Nos. 407471

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

METHOW VALLEY CITIZENS COUNCIL,

Appellant,

v.

OKANOGAN COUNTY,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND WASHINGTON STATE ASSOICATION OF COUNTIES

FOSTER GARVEY PC

Andrea L. Bradford, WSBA #45748
1111 Third Avenue, Suite 3000
Seattle, Washington 98101

INSLEE BEST DOEZIE & RYDER, PS

Charlotte Archer, WSBA #43062
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004

Attorneys for Washington State Association of Municipal Attorneys and Washington State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) and the Washington State Association of Counties (WSAC) file this brief in support of Okanogan County (County) to urge the court to reject the arguments of Methow Valley Citizens Council (MVCC).

The Public Records Act, Chapter 42.56 RCW (the "PRA"), serves an important public interest: providing the public with access to public records in furtherance of government transparency and accountability. But that transparency is not absolute, and in adopting the PRA, the legislature struck a balance between transparency and the needs of Washington's public agencies to engage with and rely on confidential legal advice. As a result, the PRA does not permit the public to access records protected by the attorney-client privilege.

Washington's public entities are permitted to consult with attorneys and obtain legal advice to best serve the public by understanding and evaluating the legal risks associated with their

policies and decisions and to preserve that advice from disclosure under the PRA. Based on the plain language of the PRA as interpreted and applied by the courts, legal advice given to public entities is not subject to the watered-down protections urged by MVCC. Instead, the PRA confirms that a confidential attorney-client relationship is fundamental to the efficient and effective function of government and the same protections afforded to advice given an individual or business.

II. IDENTITY AND INTEREST OF AMICUS

WSAMA is a nonprofit organization comprised of attorneys representing cities and towns throughout Washington State. WSAMA's primary purpose is to educate its members on all municipal law issues.

WSAC was formed in 1906 in order to serve the counties of Washington State. WSAC's members include elected county commissioners, councilmembers, and executives from all of Washington's 39 counties. WSAC's mission is to be a voice for

all Washington counties through advocacy, education, programs, services, and collaboration.

WSAMA and WSAC have an interest in the consistent application of both the attorney-client privilege and the Public Records Act. Washington's counties and cities will be directly impacted by this Court's ruling on the scope of the attorney-client privilege exemption to the Public Records Act.

III. STATEMENT OF THE CASE

Amici adopt the County's Statement of the Case.

As noted by the County, the Appellants failed to assign error to any of the trial court's factual findings, including the results of the trial court's *in camera* review of the records at issue in this case.

IV. ARGUMENT

MVCC advances unsupported theories on the applicability of the attorney-client privilege under the Public Records Act. These theories would undercut the ability of public entities to seek candid and confidential legal advice, muddle the distinct

protections of the work product doctrine, and encourage public agencies to withhold documents in their entirety rather than redact documents where possible. Further, the notion that an agency employee's use of her attorney's confidential legal advice could subject that legal advice to disclosure would perversely incentivize ignoring attorney advice, or not seeking advice at all. WSAMA and WSAC respectfully request this Court apply well-established law and affirm the trial court's ruling that the Memorandum is exempt from disclosure under the PRA as a "classic example" of attorney-client privilege. CP 326.

A. The Public Records Act Does Not Require Disclosure of Attorney-Client Privileged Communications

The County's Memorandum is plainly an attorney-client privileged document. While the PRA is liberally construed, it does not require agencies to disclose attorney-client communications. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004). Such a requirement would be contrary to public policy. The attorney-client privilege protects communications between an attorney and a client for the purpose

of legal advice. RCW 5.60.060(2)(a) (attorney may not be "examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment"); *West v. Washington State Dep't of Nat. Res.*, 163 Wn. App. 235, 247, 258 P.3d 78 (2011).

The purpose of the attorney-client privilege is "to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship." *Kittitas Cnty. v. Allphin*, 190 Wn.2d 691, 709, 416 P.3d 1232 (2018) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (1980)). Courts have long been mindful of balancing government transparency and the important purposes underlying the attorney-client privilege. *See In re Recall of Lakewood City Council*, 144 Wn.2d 583, 586, 30 P.3d 474 (2001) (addressing argument regarding the Open Public Meetings Act, Chapter 42.30 RCW, and noting, "The Legislature sought to balance the public policy

against secrecy and governmental affairs and the attorney/client privilege."). "The attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery. The privilege encourages free and open communication by assuring that communications will not later be revealed directly or indirectly." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) (internal citation omitted).

Public agencies—no less than private entities—are entitled to confidential legal advice: "It is essential that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion, in order to assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare legal theories, and plan strategy without undue interference." *Soter*, 162 Wn.2d at 748–49; *see also* Restatement of the Law 3d, Law Governing Lawyers § 74, cmt. B (2000) ("The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture. Communications from such persons

should be correspondingly privileged."). Federal courts have noted that the rationale for the privilege is particularly important for government entities, as protecting their attorney-client privileged communications ultimately benefits the public:

> [*T]he traditional rationale for the [attorney-client] privilege applies with special force in the government context*. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. *Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest*.

In re Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007) (emphasis added); *see also Guidiville Rancheria of California v. United States*, No. 12-CV-1326 YGR, 2013 WL 6571945, at *2 (N.D. Cal. Dec. 13, 2013) (noting "policies underlying the privilege particularly favor encouraging government officials formulating policies in the public's interest to consult with counsel in conducting that public business"); *In re Grand Jury Subpoena*

Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1036–37 (2d Cir. 1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, *but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law*." (emphasis added)).

Here, the trial court found, following *in camera* review, that the County properly redacted confidential legal advice while disclosing the actual "checklist" sought by MVCC. CP 326–27. The Memorandum is plainly an attorney-client communication for the purpose of legal advice and is therefore exempt from disclosure. To avoid this straightforward conclusion, MVCC advances multiple arguments which unnecessarily curtail the scope of the attorney-client privilege, all of which this Court should reject.

1. Attorney-Client Communications Relating to An Agency's "Regular Administrative Functions" Are Protected From Disclosure

MVCC argues that documents prepared for a public entity's "regular administrative purposes" are not protected by the attorney-client privilege. Appellant's Br. at 22. MVCC rests its argument on the rule that the attorney-client privilege "does not protect documents that are prepared for some other purpose than communicating with an attorney." *Hangartner*, 151 Wn.2d at 452. That rule is inapplicable here because the trial court found that the County's document *was* created for the purpose of communicating with an attorney. CP 319. Nonetheless, MVCC's contention that attorney communications relating to a public agency's "administrative functions" are not protected is wholly unsupported by authority.

Public sector clients have just as much need of attorney advice as private sector clients. *See Soter*, 162 Wn. 2d at 748–49 (rejecting arguments that work product and attorney-client privilege did not apply to records of school district's attorneys

and explaining need for public sector attorneys to protect against legal risk). And in holding that attorney-client privileged records are exempt from disclosure under the PRA, the state supreme court did not limit the subject matter of protected attorney-client communications. *Hangartner*, 151 Wn.2d at 453. Providing second-tier protection to the privileged communications of government agencies is contrary to public policy, and MVCC's position would render a broad swath of public sector legal advice unprotected.

The determinative inquiry is not whether the records relate to some government administrative function; instead, the application of the attorney-client privilege involves straightforward, blackletter principles. If a communication is between privileged persons and is made for the purpose of obtaining legal advice, the communication is privileged and exempt from disclosure. *West*, 163 Wn. App. at 247. MVCC provides no legal basis to hold otherwise.

2. The Work Product Exemption to the PRA Is A Separate and Distinct Exemption

The work product doctrine is not at issue here, as the County does not contend on appeal that the Memorandum is exempt under the work product doctrine. Respondent's Br. at 12 n.5. Nonetheless, MVCC's arguments repeatedly conflate the work product exemption to the PRA and the attorney-client privilege exemption, which are separate and distinct bases for exemption. This Court's ruling should differentiate between these two exemptions and ensure public agencies can continue to protect *both* confidential legal advice *and* work product generated in anticipation of litigation.

In contrast to the attorney-client privilege, "[t]he work product doctrine is designed to protect the efforts of an attorney and those who assist attorneys from disclosure to a litigation adversary." *Kittitas Cnty.*, 190 Wn.2d at 709; *see also Limstrom v. Ladenburg*, 136 Wn.2d 595, 607–08, 963 P.2d 869 (1998) ("The work product exemption not only protects the interests of individuals but also promotes and protects the effectiveness of

our adversarial judicial system."). The work product or "controversy" exemption to the PRA protects records to the extent they would be unavailable under the rules for pretrial discovery. RCW 42.56.290; *Limstrom*, 136 Wn.2d at 607–08. In order to be protected as work product under the PRA, the record must be "relevant to a controversy" which the court has defined as "completed, existing, or reasonably anticipated litigation." *Hangartner*, 151 Wn.2d at 449. The exemption protects "factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions." *West v. Thurston Cnty.*, 144 Wn. App. 573, 582–83, 183 P.3d 346 (2008).

The standards governing the scope of the attorney-client privilege exemption and the work product exemption, as well as the underlying policy goals, are distinct. *See Kittitas Cnty.*, 190 Wn.2d at 710 (policies underlying and standards for waiver of attorney-client privilege and work product are distinct). Yet, MVCC's opening brief discusses the work product exemption

and attorney-client privilege exemption in the same breath, confusing the standards. Appellant's Br. at 20–21, 25–27.

For example, in MVCC's discussion of *Overlake I* and *Overlake II*, MVCC points to the fact that the case involved "an actual dispute between the permit applicant and permitting entity," and "actual or anticipated litigation." Appellant's Br. at 25–27. This analysis is only relevant to application of the work product doctrine. It is irrelevant to an analysis of the attorney-client privilege exemption: the attorney-client privilege "appl[ies] to all communications and advice between an attorney and client, including from the attorney to the client. *And this privilege applies whether or not the communication is relevant to a controversy*." *Zink v. City of Mesa*, 162 Wn. App. 688, 724, 256 P.3d 384 (2011) (internal citation omitted, emphasis added).

In addition, MVCC's brief cites *Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), to claim that "documents created by lawyers and used by a public entity in the regular course of its governmental activities to ensure

compliance with legal requirements are not privileged" (Appellant's Br. at 30), and "documents containing factual findings for the purpose of complying with law or policy are not privileged attorney-client communications" (Appellant's Br. at 31). *Morgan* involved a city's investigation into allegations that a municipal judge had harassed a municipal court employee. Pursuant to city policy, the city conducted a factual investigation into the complaint, hiring outside counsel to do so. *Id*. at 752. The Court held that the ultimate report of the attorney's factual investigation was not protected as work product, because it was prepared pursuant to city policy in the ordinary course of business: no one had threatened litigation, and none was reasonably anticipated. *Id.* at 754. The Court also held that the report was not protected by the attorney-client privilege because the report was limited to a factual investigation, contained "no legal analysis and no recommendations," and was written "not to provide legal advice, but to comply with the City's antidiscrimination policy." *Id.* at 747.

Morgan reflects blackletter principles of attorney-client privilege and work product: litigation must be reasonably anticipated to claim work product protection, and communications must be made for the purpose of legal advice to be protected by the attorney-client privilege. Nothing in *Morgan* creates a requirement that documents be related to a controversy to be protected by the attorney-client privilege, or that actual legal advice and recommendations lose their protection because they are part of the "regular course of . . . governmental activities."

The Court should reject MVCC's attempt to muddy the distinct protections of the attorney-client privilege and the work product doctrine. While a record may be protected by both exemptions if a controversy exists, there is no requirement that a controversy exist for the attorney-client privilege to apply in its own right. *See* RCW 5.60.060(2)(a); *Zink*, 162 Wn. App. at 724.

3. Public Agencies Do Not Waive Privilege By Following Attorney Advice

MVCC also argues that documents "used by a public entity in the regular course of its governmental activities to ensure compliance with legal requirements" are not privileged. Appellant's Br. at 30. While MVCC's brief acknowledges that "somehow embracing" advice within a memorandum does not waive the privilege (Appellant's Br. at 33), its argument about how much "use" to which an agency may put its attorney's advice without a waiver is unclear. This lack of clarity in the rule proposed by MVCC is alarming and would have serious, detrimental consequences. Clarity over what communications are protected encourages public agencies to obtain written legal advice to comply with their obligations, which is for the public's benefit. Lack of clarity not only discourages obtaining written legal advice in the first instance, it generates risks under the PRA because public agencies need to be able to reasonably determine what is protected from disclosure and what is not.

Moreover, public sector clients do not waive the protections of attorney-client privilege merely by following confidential legal advice. Generally, disclosure of attorney-client protected communications to a third party waives the attorney-client privilege, unless that third person is necessary for the communication. *Kittitas Cnty.*, 195 Wn. App. at 367. But a client who consults with an attorney and then follows that attorney's advice does not waive privilege. *CP Salmon Corp. v. Pritzker*, 238 F. Supp. 3d 1165, 1172 (D. Alaska 2017) (criticizing argument that would require disclosure of "adhered-to legal advice," stating "[s]uch a situation would clearly frustrate the 'safe harbor that [the attorney-client privilege] provides to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" (quoting *Gomez v. Vernon*, 255 F.3d 1118, 1132 (9th Cir. 2001))); *Yellowstone Women's First Step House, Inc. v. City of Costa Mesa*, 2018 WL 6164305, at *5 (C.D. Cal. May 9, 2018)

(rejecting argument that "mere reliance on legal advice constitutes a waiver").

This case does not involve a policy initially drafted by an attorney and later adopted as an official agency regulation or policy. As a factual matter, the trial court found after *in camera* review that at no point did the County "refer to, adopt, announce, assert, or otherwise rely on any portion of the Memorandum to set forth a policy or a position on anything." CP 325. Accordingly, the authority relied upon by MVCC is inapposite. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2d Cir. 2005) (addressing DOJ Office of Legal Counsel memorandum which was repeatedly publicly cited by Attorney General and incorporated into policy on state and local law enforcement authority, stating "attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy").

Further, attorney communications regarding proposed legislation or policies may be protected as privileged, so long as

they are sought for the purpose of legal advice. *See Yellowstone Women's First Step House, Inc.*, 2018 WL 6164305, at *3 ("The Court is not persuaded that all communications related to the implementation of the ordinances at issue constitute 'policy-making' and therefore, are not privileged. In determining whether the attorney-client privilege applies, the proper analysis is to examine the 'primary purpose' of the communication."); *In re Cnty. of Erie*, 473 F.3d at 422 ("When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice.").

Attorneys working on behalf of Washington's cities and counties routinely draft confidential legal memoranda protected by the attorney-client privilege to help agencies comply with the law on innumerable subjects, and they routinely draft ordinances and resolutions to help agencies comply with the law. While

some of these records may also be protected by the work product doctrine, some are not.

For example, counties and cities may seek advice regarding bond financing for new public facilities; procurement processes and prevailing wages for public works projects like roads and parks; employment and labor concerns; reviewing environmental impacts of proposed developments; evaluating strategies for addressing homelessness for compliance with case law; or helping public agencies comply with Washington's open government laws.

These issues frequently arise without any anticipated litigation. Nonetheless, legal advice on these issues remains protected. Public agencies should feel just as free to consult an attorney for guidance as any private entity. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) ("The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.").

B. MVCC's Claim That Providing a Redacted Document Waives Privilege Undermines the Purpose and Structure of the PRA

MVCC asks this Court to create a new, deceptive hazard for state and local governments as they navigate their obligations under the PRA. As Appellant notes, "the County, at first, withheld the Checklists in their entirety" and "later voluntarily disclosed the documents, partially redacted." Appellant's Br. at 38. MVCC asks this Court to penalize the County by finding that redacting privileged content, rather than withholding the entire document, constitutes a waiver of applicable privileges, and perhaps the entire subject matter discussed with the attorney. MVCC's theory is contrary to the PRA's mandates and has been rejected by the Washington Supreme Court.

1. Redacting Exempt Content, Rather Than Withholding a Record, Is Mandated Where Feasible

MVCC's waiver argument flatly contradicts the PRA's directive that agencies redact exempt content, rather than

withhold, where a document contains both exempt and non-exempt material.

"In general, the [PRA] does not allow withholding of records in their entirety where a redaction can be done." *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 100, 514 P.3d 661, 684 (2022) (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 261, 884 P.2d 592 (1994)) (insertion in original, internal quotation omitted). Even a record created by an attorney may contain non-privileged content; in that situation, the exempt content can be redacted, while the rest must be produced. *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 434, 327 P.3d 600 (2013), *as amended on denial of reh'g* (Jan. 10, 2014) ("[a]n otherwise exempt record can be transformed by redaction into a record that must be disclosed."); *see also Sanders v. State*, 169 Wn.2d 827, 858, 240 P.3d 120 (2010) (holding that only the portions of the records conveying the "attorney thought process about pending litigation" should be redacted).

MVCC is unable to cite any relevant legal authority supporting its view that a partial disclosure due to redaction constitutes a waiver of privilege. The PRA requires agencies to enact rules and regulations that "provide for the fullest assistance to inquirers," and to construe exemptions narrowly. RCW 42.56.100 (requiring fullest assistance); RCW 42.56.030 (requiring that exemptions be narrowly construed). The requirement to apply exemptions narrowly means agencies are directed to redact records when feasible, instead of withholding them entirely. RCW 42.56.210(1) (exempt information should be redacted when possible).

Consistent with this directive, the County redacted only the portions of the records containing an attorney's advice. The trial court's (unchallenged) findings confirm the County correctly limited its redactions to only the exempt content of these documents:

> The redacted portions of the checklists and footnotes contain the attorney's assessment and conclusions as to whether/when the November 5

> Order applies, opinions as to potentially applicable regulations, summaries of potentially applicable legal standards, advice on information the County may wish to consider as part of its determination, legal advice on what steps to take (including what language to use and when to seek further legal advice), opinions about potential risks to the county, and general analysis and application of the law.

CP 320.

MVCC asks this Court to upend the PRA's clear directive to redact exempt records where feasible. MVCC cites no cases decided under the PRA supporting its position, nor can it. In case after case, Washington's courts have reenforced the directive to redact, rather than withhold, to meet the PRA's "goal of transparent government." *Cantu,* 23 Wn. App. 2d at 78 (citing RCW 42.56.100); *see also Sanders*, 169 Wn.2d at 858 (only "the redactable material" conveying "attorney thought process about pending litigation" should be redacted).

While MVCC invites this Court to engage in a semantics debate over a document being a "checklist" rather than a legal

memorandum,[1] the case law is clear: agencies must produce redacted versions of exempt documents if redaction would render them disclosable. *See Block v. City of Gold Bar*, 189 Wn. App. 262, 279, 355 P.3d 266 (2015) (citing *City of Lakewood v. Koenig*, 182 Wn.2d 87, 94, 343 P.3d 335 (2014)).

Redacting is not gamesmanship, as MVCC argues. It is the process mandated by the PRA and our courts. Attorneys representing public agencies provide advice in myriad ways to meet the operational needs of their client agencies—in email strings, instant messages, and redlines of operational documents. If redaction, rather than withholding, waives the attorney-client privilege as to the subject matter discussed in the redacted portions, agencies would be incentivized to instead withhold these records entirely. MVCC's approach undermines the PRA's primary goal of promoting transparency.

[1] This argument is simply the converse of asserting a document is privileged merely because it is marked "privileged." Ultimately, the substance prevails, not the label given to a document.

2. Voluntary Cooperation Does Not Waive Privilege Under the PRA

MVCC encourages this Court to penalize the County for its good-faith efforts to cooperate by reevaluating disputed documents and limiting its redactions to only portions of the record after initially deeming the records fully exempt. However, the Washington Supreme Court is steadfast in its mandate that agencies cooperate with PRA litigants through ongoing dialogue and has affirmatively declined to penalize agencies "by construing [such] cooperation as a waiver." *Sanders,* 169 Wn.2d at 849.

Washington's public agencies rely on court decisions like *Sanders* to navigate the legal risks inherent in meeting the PRA's obligations. "The PRA is a complex and often confusing statutory framework that is the result of numerous legislative enactments and now contains over 140 varied exemptions." *Resident Action Council*, 177 Wn.2d at 435–36. Accordingly, counties, cities, and towns look to the courts to understand the operational *dos* and *don'ts* for compliance. Getting it wrong on

the PRA is costly, with potentially substantial penalties and the requirement to pay a requester's attorney fees and costs. RCW 42.56.550(4); *see Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus*., 185 Wn.2d 270, 277–80, 372 P.3d 97 (2016) (affirming a $502,827 penalty for non-production). Because of this risk, Washington's public agencies "err on the side of disclosure." *Twin Harbors Fish & Wildlife Advocacy v. Wash. Dep't of Fish & Wildlife*, 21 Wn. App. 2d 1003, 2022 WL 538366 at *4 (2022) (unpublished, cited pursuant to GR 14.1) (referring, in a PRA dispute, to the agency's policy to "err on the side of disclosure" when fulfilling requests).

The County initially identified the checklist as exempt, but later determined that, by redacting the specific legal advice as exempt, the document could be provided under the PRA. Consistent with *Sanders*, the County should not be penalized for voluntarily producing in redacted form a record it once treated as fully exempt.

3. MVCC Relies on Cases That Do Not Pertain to an Agency's Obligations Under the PRA

None of the cases cited by MVCC in support of its waiver theory involve the Public Records Act. Instead, its cited cases involve discovery disputes under Washington's Civil Rule 26 and its federal counterpart, which prohibit parties in litigation from asserting privilege "to gain a tactical advantage" over their opponent by producing only documents that support a winning contention, while withholding others that hurt their case.[2] These rules prohibit "selective disclosure" and consider the gains and losses that withholding the information causes each side; if the balance is one-sided in favor of the withholding party, the Court mandates disclosure. *See Sitterson v. Evergreen Sch. Dist.*

[2] Washington Practice cautions practitioners on the distinction between the PRA and CR 26. Civil Rule 26 guidance confirms that the Public Records Act is a distinct process from discovery in litigation, subject to specialized issues and standards. A section titled "[u]sing the public records act in lieu of discovery" directs that "specialized issues can arise if a public records request is outside the context of pending litigation. The subject is beyond the scope of this work but is discussed in *Sanders v. State*, 169 Wn. 2d 827, 240 P.3d 120 (2010)." CR 26, *General Provisions Governing Discovery*, 3A Wash. Prac., Rules Practice CR 26 (7th ed.).

No. 114, 147 Wn. App. 576, 589, 196 P.3d 735 (2008) (evaluating the scope of the privilege in a discovery dispute requires consideration of whether a party is "unfairly prejudiced" in the litigation by the withholding).

Injecting this rule into Washington's PRA is contrary to the PRA's purpose. The Washington Supreme Court has rejected MVCC's interpretation of waiver and encourages public agencies to cooperate. *Sanders*, 169 Wn.2d at 854, 858. In the PRA context, instead of focusing on evidentiary gamesmanship, "the appropriate inquiry is whether the records are exempt from disclosure." *Id*. at 849. Ensuring the PRA's goal of free and open examination of public records is accomplished through the narrow application of exemptions, regardless of whether the production of records "'may cause inconvenience or embarrassment to public officials or others.'"[3] *Gaston v. State*

[3] Nor is a requester required to prove they will be prejudiced to compel production or seek penalties under the PRA; indeed, the requester's motivations are immaterial to the adjudication of a request, except in very limited circumstances. *See Hood v. Columbia Cnty.*, 21 Wn. App. 2d 245,

Dep't of Corr., 4 Wn. App. 2d 1057, 2018 WL 3548392 (2018) (unpublished, cited pursuant to GR 14.1) (quoting RCW 42.56.550(3)). Here, the trial court's *in camera* review of the redacted records confirmed there is no gamesmanship at play: the redacted content consisted only of attorney-client privileged communications. CP 326. That finding is unchallenged on appeal.

Indeed, the operational realities facing public agencies necessitate this approach. An agency may discover part way through a multi-installment request that an exemption no longer applies to part of a previously withheld record. Per *Sanders*, the agency could release the non-exempt portion of the record, while redacting any remaining exempt portions, without waiver as a potential penalty. This approach ensures agencies are compelled to cooperate throughout the life of a request and provide the fullest assistance, as mandated by RCW 42.56.100.

255, 505 P.3d 554 (2022) (holding PRA requester's motivation in submitting a request is not relevant to PRA dispute).

There is no public records case in Washington where applying redactions has been equated to "selective disclosure" as that term is used in the discovery context. The County has complied with both the spirit and letter of the PRA. MVCC's unsupported waiver theory would punish public agencies for attempting in good faith to provide "the fullest assistance" to requesters, placing agencies in a position where they would be better served by withholding records in their entirety.

V. CONCLUSION

The County's redactions to the Memorandum for attorney-client privilege are fully consistent with the PRA's directives and policies. By contrast, MVCC's arguments ignore the PRA and the law governing attorney-client privilege. Accepting MVCC's theories would erode public agencies' ability to obtain protected legal advice, to the public's detriment. This Court should affirm.

RESPECTFULLY SUBMITTED this 7th day of November 2024.

I certify that this brief contains 4,769 words, excluding the parts of the document exempted from the word count by RAP 18.17, in compliance with RAP 18.17.

FOSTER GARVEY PC

By _____
Andrea L. Bradford, WSBA #45748
1111 Third Avenue, Suite 3000
Seattle, Washington 98101
(206) 447-4400
andrea.bradford@foster.com

INSLEE BEST DOEZIE & RYDER, PS

By _____
Charlotte Archer, WSBA #43062
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004
carcher@insleebest.com

Attorneys for Washington State Association of Municipal Attorneys

CERTIFICATE OF SERVICE

On November 7, 2024, I caused a true and correct copy of the foregoing document to be served by filing it through the Supreme Court E-filing Portal, and thus a copy will be delivered electronically to all parties.

Executed at Kirkland, Washington, on November 7, 2024.

Christine Harlan

Christine Harlan

FG: 103058103.11

Worthen, Tristen

From: Christine Harlan <Christine.Harlan@Foster.com>
Sent: Thursday, November 7, 2024 3:37 PM
To: DIV3 COURT EMAIL
Cc: Andrea Bradford; William Kenick; Charlotte A. Archer; shweta.jayawardhan@pacificalawgroup.com; ckoski@vnf.com; samberson@vnf.com; paul.lawrence@pacificalawgroup.com; jrm@vnf.com; tak@vnf.com
Subject: Methow Valley Citizens Council v. Okanogan County, Case No. 407471
Attachments: MVCC Okanogan - Motion for Leave to File.pdf; MVCC Okanogan - Amicus Brief.pdf

Clerk,

Attached please find the following documents to be filed in the above-referenced matter on behalf of Washington State Association of Municipal Attorneys and Washington State Association of Counties:

1. Motion for Leave to File Brief of Amicus Curiae
2. Brief of Amicus Curiae

These documents are being sent to the court via email per the court's instruction, due to the current efiling outage. As instructed, all known counsel are also copied on this message.

If the court could please confirm receipt of this email, it would be greatly appreciated.

If the court, or counsel, have any questions or concerns, please do not hesitate to contact our office.
Thank you

Christine Harlan
Legal Practice Assistant/Paralegal
Pronouns: she/her

Tel: (206) 447-2721 ▪ *Fax:* (206) 447-9700
christine.harlan@foster.com

Foster Garvey PC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
foster.com

SEATTLE ▪ PORTLAND ▪ NEW YORK ▪ WASHINGTON, D.C. ▪ SPOKANE