
Why the Attorney-Client Exemption to the Public Disclosure Act Serves the Public Interest

by Ramsey Ramerman & Hugh Spitzer | Litigation Group & Municipal & Public Finance Group

In May 2004, the Supreme Court recognized what most municipalities and state agencies had long presumed: there is an attorney-client exemption to the Public Disclosure Act ("PDA"). See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P3d 26 (2004). But some sectors — most notably the media — have raised the question of why the public should not have access to what they argue is the advice of attorneys serving the public. While this assertion has some superficial appeal, it is easy to see why public entities, like private entities, need the attorney-client privilege to perform their mandated function — serving the public.

The *Hangartner* case arose out of a request to the City of Seattle for documents relating to Sound Transit construction. The PDA contains a general exemption clause that incorporates any other exemption allowed by rule or statute. The attorney-client privilege is a statutory privilege, so the City naturally asserted that privilege as an exemption under the PDA. The requestor sued, and the matter reached the Supreme Court. The Court agreed with the City that attorney-client communications were exempt from disclosure.

The Court made the right decision in *Hangartner*. Attorney-client communications are privileged because unless a client can be assured the advice they receive will remain private, they will not seek that advice. If attorneys know that their advice will be made public, they will not give candid advice. Thus, society has decided that these twin benefits outweigh the cost of keeping these communications confidential.

These justifications are just as applicable in the public sector as they are in the private sector. Public officials need the ability to consult with attorneys to ensure they are complying with the law. If there were no attorney-client privilege, then public officials would not seek legal advice for fear that they might not be following the law. And of course if they didn't seek the advice from an attorney, the net result would be that the reticent public officials would continue to unwittingly violate the law. This would be a net harm to everyone. For government to work efficiently, public employees need to be able to seek legal advice without fear that seeking legal advice will cause more harm than help.

The purposes served by the attorney-client privilege — promoting efficient government — are similar to the purposes other exemptions in the PDA serve. For example, documents that show a public entity's "deliberative processes" are exempt because public entities must be allowed to formulate ideas and brainstorm without concern that unformed ideas that are not acted on will be made public. The same exemption protects documents that reflect ongoing negotiations. Other exemptions protect valuable research data and formulas and appraisals. These promote efficiencies by not giving unfair advantage to potential competitors and adversaries.

Thus, the Supreme Court struck the right balance in *Hangartner*, a balance embodied throughout the PDA that helps public entities serve the public.

For questions regarding this article, please contact Ramsey Ramerman at ramer@foster.com or Hugh Spitzer at spith@foster.com.