



PRA, Discovery, and Privilege Issues

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Topics

- I. Managing PDRs and Discovery
- II. Discovery in Public Records Act cases
- III. Attorney-Client Privilege and Attorney Work Product

I. Discovery and PDRs

- Navigating the minefield
 - Can be simultaneous
 - PDR as harbinger of litigation
 - Discovery during or after PDR
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- "...may seek public records ... under the pretrial rules of discovery but is not precluded from seeking those records under the Public Records Act."

O'Connor v. Washington State Dep't of Soc. & Health Servs., 143 Wn.2d 895, 907, 25 P.3d 426, 432 (2001)

Consistency

- Search parameters and capability
- Interpretation
- Redactions (protective orders)
- Custodian and records identification valuable for litigation holds and PDRs
- Delay for litigation advantage is NOT permitted

PDR before Discovery

- Know agency business
- Let attorney know about request
- Could be pre-litigation
- Gov QA reports for attorney review
- Record your steps – interpretation, search, review

Example pre-litigation PDR

Re: Public Disclosure Act Request

To Whom It May Concern:

The following is a request under the Washington State Public Records Act, RCW 42.56 *et seq.*, on behalf of my client, [REDACTED]

On or about [REDACTED] was arrested at a demonstration by Seattle Police Department (SPD) officers, including [REDACTED], which was identified as Incident No. [REDACTED] [hereinafter the “incident”]. Subsequently, the Seattle City Attorney filed charges against [REDACTED], under the caption *City of Seattle v. [REDACTED]*, in Seattle Municipal Court. The case went to trial on or about [REDACTED] after which the jury acquitted [REDACTED] of all charges.

I request the following documents that related to these events:

- **The prosecutor’s file for this matter;**
- **All written communications (including letter and email) to or from Officers [REDACTED], and [REDACTED], or other officers, regarding the aforementioned incident and prosecution of [REDACTED]**

Later-Discovered Records

- Records found in discovery after PDR closed
- **WAC 44-14-04007 - Later-discovered records:**

An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

PDR during or after Discovery

- Know current litigation
- Could refer to discovery production (beware of scope of requests and discovery rules)
- Record methodology
- CR 60 motions

Rufin v. Seattle

- Record located in discovery in PRA case
- Not produced in underlying litigation or PDR response
- Allegations of purposeful delay and withholding
- Adequate search standard (*Neighborhood Alliance*). No violation.
- Unsuccessful CR 60 motion, reconsideration, appeal

II. Discovery in PRA Cases

- Discovery served on Agency
 - Clarification of facts for liability or penalty
- Discovery served by Agency
 - Clarification of cause of action
- Relevancy limitation

Statewide Reporting

- Agency time spent on litigation
- Track hours
 - Discovery is often the bulk of hours for PDOs

Offer of Judgment

- Discovery is expensive
- If there is liability - Consider an offer of judgment before or during discovery to potentially limit attorneys fees
- Appropriate in PRA cases (*Rufin v. Seattle*)

Discovery Served on Agency

- Interrogatories and RFPs
 - Steps taken to respond to request (search, review, redaction) (GovQA)
 - Agency processes and procedures (privileged?)
 - Remember updated Model Rules
 - PDO training, experience, and supervision
 - Agency resources

Example Interrogatories

- **Interrogatory No. 1:** Identify all individuals who assisted in responding to PDR # ____.
- **Interrogatory No. 2:** For each individual identified in Your Answer to Interrogatory No. 1, state exactly what each individual did to assist in responding to the request.
- **Request for Production No. 1:** Produce all documents relating to PDR # ____.
- **Request for Production No. 2:** Produce all policies, procedures, guidelines, guides, continuing legal education materials, or similar guidance at the City related to Public Records Act requests.

Discovery Served on Agency

- Depositions
 - Fact Witness – usually PDO or records custodian
 - 30(b)(6) witness – testifies on behalf of agency. Required to educate self on topics listed.
 - Used to establish liability and *Yousoufian* factors

Agency Response to Discovery

- Need contemporaneous recording of process
- Keep correspondence
- Keep records produced
- Retention - two years after closure of request

Discovery Served by Agency

- Vague complaints
 - Contention interrogatories
 - Identify specific records or claims
 - Depositions of requestor
- Example Interrogatories:
 - Do you contend the City improperly redacted records in response to your request?
 - If you contend that the City improperly redacted records, please state the basis of your contention.
 - Please identify the specific records you allege contain “facially inappropriate redactions” or “excessive redactions.”

Discovery Served by Agency

- Could require requestor to address *Yousoufian* factors:
 - Economic loss to requestor
 - Failure to clarify
 - Response to communications
 - Failure to pay for installment
- Example Interrogatories:
 - Please identify the specific economic losses you attribute to the alleged PRA violations.
 - Please identify the specific communications in which you clarified the public disclosure request.
 - Please specify on what dates you paid the invoice for the second installment of records.

III. ACP and AWP

- Definitions
 - Application
 - Waiver
 - Tips
-
- Same standard as discovery. Different consequences.

Definition of Attorney-Client Privilege

- “Other” statute incorporated into PRA
 - *Hangartner v. Seattle*
- RCW 5.60.060(2)(a):
 - An attorney or counselor shall not, without the consent of his or her client, 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.

Scope

AGO Guidance:

- Communication
- Made between privileged persons
- In confidence
- For the purpose of obtaining or providing legal assistance to the client.

Advice?

- Scheduling
- Ministerial
- Known information
- Business/policy advice
- Investigation (*Allstate*)
- Marked as:
 - confidential/attorney-client/privileged/for legal advice
- Can include attachments

Examples

- Email - To Client, From Attorney, RE: - PRA Question: *What time are you available to meet on Tuesday?*
 - No
- Email - To Attorney, From Client, RE: - Question: *Should the City do X?*
 - Maybe – This could be a request for legal advice, or it could be requesting policy advice. You may need to ask the attorney or client involved.
- Email - To Client, From Attorney, RE: – PRA Litigation: *The PRA case settled for \$13,000.*
 - No - This is a known fact.
- Email - From Client, To Attorney, RE: – Legal matter – Attorney Client/Confidential: *Want to grab lunch?*
 - No
- Email - From Attorney, To Paralegal, RE: – PRA litigation: *Please print out the complaint and bring it to today's meeting.*
 - No

Client

Government entity

- Duly authorized constituents - RPC 1.13

Contractors/Consultants

- Functional equivalent (*Telford factors*)

NOT:

- Former Employees after employment (*Highland School Dist.*)
- Outside of “need to know”

Attorney

- Agency Attorneys
- Outside Counsel
- NOT
 - Employees or consultants with law degrees

Communication

- Between attorneys discussing advice
- Between clients seeking advice
- Between clients sharing advice given
- *Fossos v. Matheson*, 149 Wn. App. 1062, No. 61637-4-I, 2009 WL 1110889 (2009) (upholding as privileged communications between several deputy Attorney Generals, two legislative offices, and three members of different executive offices). *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1078 (N.D. Cal. 2002) (“Materials, transmitted between nonlawyers, that reflect matters about which the client intends to seek legal advice are comparable to notes a client would make to prepare for a meeting with her lawyer—notes which could serve as an agenda or set of reminders about things to ask or tell counsel. It would undermine the purpose of the attorney-client privilege not to extend protection to such notes. Therefore, internal communications that reflect matters about which the client intends to seek legal advice are protected.”);

Examples

- From Client, To Client, RE: – Parks Issue: *I asked Attorney if the City should do X, and she told me X would incur a certain amount of risk, but Y is fine.*
- From Client, To Client, RE: – Permit Issue: *Can you please gather the Smith permit applications, I'd like to run them by Attorney to see if they comply with the code.*
- From Client, To Client, RE: - Jones Case: *Attorney asked me to collect all of the related documents so that she can produce Discovery in this matter, can you search your files for them?*

Non-Waiver

- Common-interest agreement
 - *Kittitas County v. Allphin*
- Translator/Interpreter
 - *US v. Kovel* (accountant)
 - *State v. Aquino-Cervantes* (foreign language)

Waiver - Voluntary

- Disclosure to unauthorized parties

Client owns privilege and can waive it.

Attorney can waive the privilege only if authorized (discovery)

- Voluntary Disclosure

- Subject matter waiver (*Von Bulow*)
- *Intentional*
- *Same subject*
- *Considered together*

ER 502

Waiver - Inadvertent

- Inadvertent disclosure
 - No subject matter waiver (ER 502)
 - Inadvertent
 - Reasonable steps taken to prevent
 - Reasonable steps taken to rectify
- Claw back
 - CR 26 (b) (6)
 - Notify
 - Return sequester or destroy
 - Retrieve if disclosed

Example

Dear [Requestor],

We have identified [##] pages from records released in response to Public Records Act Request (No. ####) that contain information exempt from disclosure under the attorney-client privilege. That information is located on the following pages: [####]. The City's inadvertent failure to redact that information does not constitute a subject matter waiver or otherwise waive the City's position regarding any other document or exemption that it may claim.

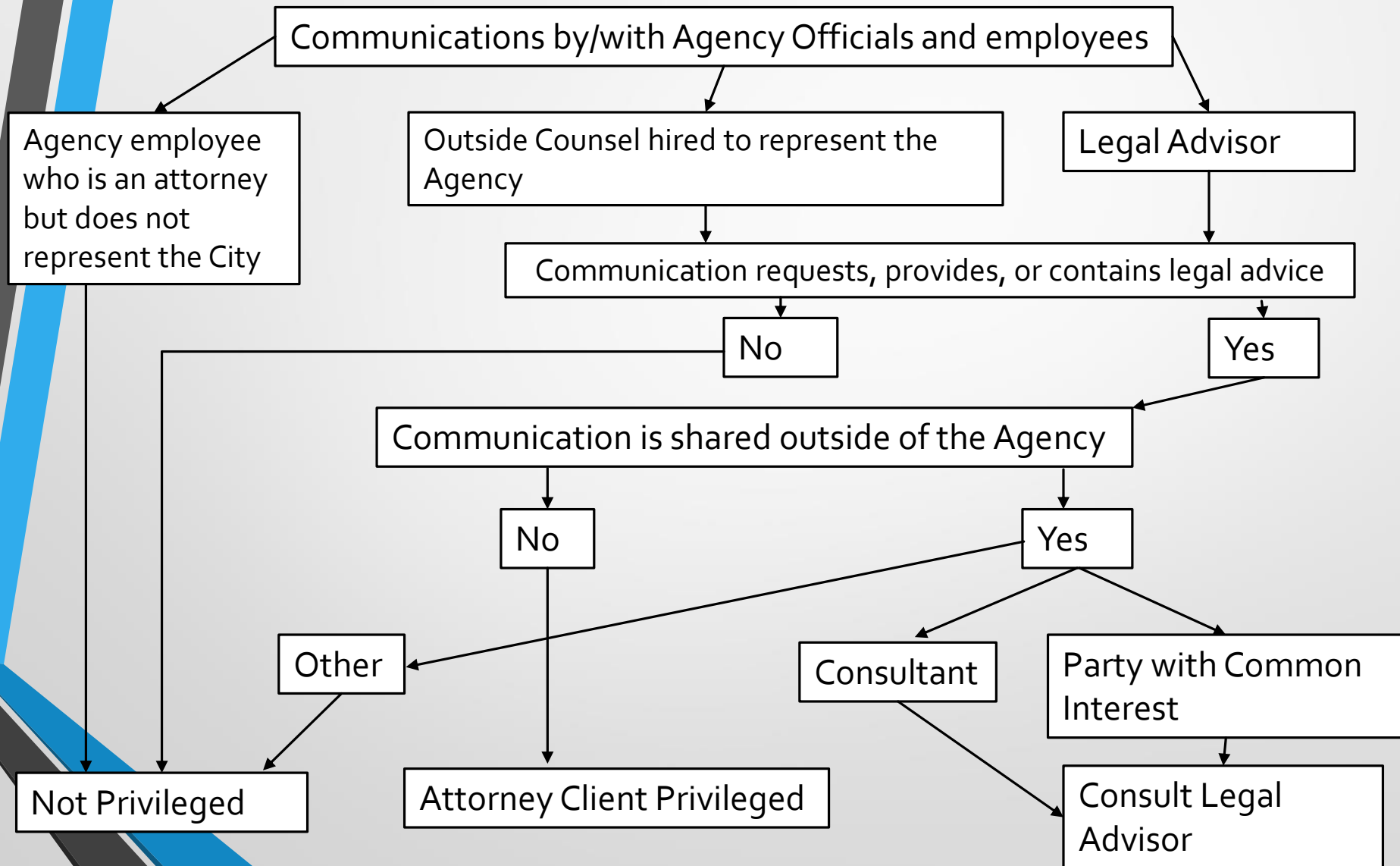
Please destroy the initially produced version of those records and accept this redacted version along with the accompanying exemption log.

Thank you,

Consequences

- Waiver
- PRA penalties
- In camera review
- Litigation impacts

Attorney-Client Privilege



Definition of Attorney Work Product

- RCW 42.56.290
- Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

Controversy

- Completed, existing, or reasonably anticipated litigation
 - *Dawson v. Daly*
- Attorney determination

Scope

- Mental impressions (always)
- Notes or memos from oral communications (unless impressions at issue)
- Facts and tangible items gathered (substantial need)
 - *Limstrom v. Ladenberg*
- Does not expire

Excludes

- Records created in the regular course of business
- Records created before litigation anticipated
- Investigative records if not for litigation
 - *Morgan v. Federal Way*

Example

- Survey of agency compliance with policy
- “As an agency HR investigator, I was asked to investigate violations of workplace expectations”

Who Can Assert Privilege?

- Attorneys and Paralegals (could be another agency)
- Outside Counsel
- Contractors/Employees/Investigators working at the direction of Attorneys
- Common Interest agreement participants

Consequences

- Waiver – ER 502
 - Usually not subject matter waiver
- Litigation disadvantage
- PRA penalties

Work Product

Is there existing litigation?, Has litigation been completed?, Has a claim been filed?, Is litigation specifically threatened?, Does this event trigger significant liability?

Yes

No

Is there concern that litigation may result?

Yes

No

Material reflects attorney's mental impressions, conclusions, or theories in generated connection with anticipated litigation?

No

Material reflects directions from attorney to client/expert re: anticipated litigation?

No

Material gathered by or at direction of attorney in connection with anticipated litigation?

Yes

Yes

Yes

No

Was the material shared outside of the agency?

No

Yes

Consultant

Party with common interest

Other

Was the material created in the normal course of business?

No

Yes

Attorney Work-Product

Contact legal advisor

Not Attorney Work-Product

PDR Response Procedure

- Encourage Labeling
- Know Attorneys names
- Time estimate
 - If records include potentially privileged materials, allow extra time for response (two weeks)

Installments

- Set aside all records that are potentially privileged or exempt
 - Records marked “Confidential”, “Privileged”, “A/C”, “WP”, etc.
 - Communications that include an attorney (except for scheduling issues)
 - Drafts of documents reviewed by attorneys
 - Middle of email string

Consider packaging as last installment

Attorney Review

- Contact Legal Advisor
 - Contact the attorney included in the communications/record
- Provide copies of records with proposed redactions for attorney review
 - It may be more efficient to set a meeting for review

Finalize

- Apply redactions, create exemption log and send installment
- Save a copy of redacted and unredacted materials in clearly marked folders
- Retention – 2 years



Thank You

Questions?