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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

AIRPORT COMMUNITIES
COALITION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

MOTION TO STRIKE
ATTORNEY-CLIENT PRIVILEGED
DOCUMENTS

I. INTRODUCTION

In its reply materials submitted in support of its motion for stay, the Airport Communities Coalition (ACC) relies in part on a document containing attorney-client privileged communications. This document was inadvertently disclosed by Ecology to the ACC pursuant to a public disclosure request. Because the attorney-client communications were disclosed inadvertently and unintentionally, ACC should be required to return the document and all references to the attorney-client privileged information should be stricken from the record.

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II. STATEMENT OF FACTS

The facts relevant to this motion are stated in the accompanying Declaration of Ray Hellwig. Briefly, Ecology periodically receives public disclosure requests from the ACC for

MOTION TO STRIKE
ATTORNEY-CLIENT PRIVILEGED
DOCUMENTS

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

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1 documents relating to the Sea-Tac International Airport (STIA) expansion project. Ecology's
2 practice is to review documents responsive to the ACC's requests for non-disclosable material
3 and withhold such material from disclosure. Dec. of Hellwig, ¶ 3. Particularly, Ecology does
4 not disclose attorney-client privileged information. *Id.*

5 In the present case, Ecology inadvertently disclosed a document containing attorney-
6 client privileged communications to the ACC. Ecology intended to redact the attorney-client
7 privileged information from the document prior to disclosure. Dec. of Hellwig ¶ 4. Ecology's
8 attorneys did in fact redact the information from one copy of the document but Ecology
9 inadvertently disclosed another copy of the document without the information redacted. Dec.
10 of Hellwig, ¶ 5. Because the attorney-client privileged information was inadvertently
11 disclosed, it should be stricken from the record and ACC should be required to return the
12 document to Ecology.

13 III. AUTHORITY AND ARGUMENT

14 In Washington, communications between attorney and client are protected by statute:

15 An attorney or counselor shall not, without the consent of his or her client,
16 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.

17 RCW 5.60.060(2).

18 The attorney-client privilege applies to communications between an assistant attorney
19 general and a state agency. *Amoss v. University of Washington*, 40 Wn. App. 666, 687, 700
20 P.2d 350 (1985); *Harris v. Pierce Cy.*, 84 Wn. App. 222, 235, 928 P.2d 1111 (1996). The
21 privilege extends to communications with all employees. *Sherman v. State*, 128 Wn.2d 164,
22 190, 905 P.2d 355 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 394-95, 101 S. Ct. 677,
23 66 L. Ed. 2d 584 (1981).

24 The doctrine of attorney-client privilege recognizes the societal importance of fostering
25 open communications between an attorney and client so that the client can provide information
26 to their attorney without fear of subsequent disclosure in litigation. *Dietz v. Doe*, 131 Wn.2d

1 835, 842, 935 P.2d 611 (1997); *Heidebrink v. Moriwaki*, 38 Wn. App. 388, 393, 685 P.2d 1109
2 (1984). This privilege extends to documents containing privileged communications as well.
3 *Deitz*, 131 Wn.2d at 842; *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990).

4 Under the Public Disclosure Act, Chapter 42.17 RCW, an agency may exempt records
5 from disclosure if those records would not be available to another party under the rules of
6 pretrial discovery for causes pending in the superior courts, including attorney-client privileged
7 communications. RCW 42.17.310(1)(j).

8 A client can voluntarily waive the attorney-client privilege by disclosure of the
9 privileged information. *Deitz*, 131 Wn.2d at 850. However, most jurisdictions¹ that provide
10 for a privilege for attorney-client communications have held that the privilege must be able to
11 withstand inadvertent disclosures. *United States v. Zolin*, 809 F.2d 1141, 1415 (9th Cir. 1987).

12 In *Zolin*, the Ninth Circuit held that the attorney-client privilege was not waived if the
13 mistaken disclosure of the privileged information was "...sufficiently involuntary and
14 inadvertent as to be inconsistent with a theory of waiver." *Zolin*, 809 F.2d 1415, 1417.
15 Indeed, a majority of state and federal courts have rejected the traditional rule that inadvertent
16 disclosure waives the attorney-client privilege.

17 The hard-line attitude toward inadvertent disclosure has been questioned by
18 many decisions in recent years. Rather than taking a "strict liability"
19 approach, the courts have increasingly looked at the client's 'culpability,'
both in allowing the breach of confidentiality and in continuing to assert
the privilege after the breach.

20 Epstein Edna, *The Attorney-Client Privilege and the Work-Product Doctrine*, p. 65 (2d ed.
21 1989). The Courts have supported the assertion that a disclosure must be voluntary in order to
22 waive the attorney-client privilege, and because an inadvertent disclosure cannot be voluntary,
23 the privilege is not waived. See *Georgetown Manor v. Ethan Allan*, 753 F. Supp. 936 (S.D.
24 Fla. 1991).

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26 ¹ The Washington courts have not addressed the question of whether the attorney-client privilege is
waived by an inadvertent disclosure of the privileged information. 5A *Wash. Pract.* § 501.22 (1999) at 142; 2
Wash. Civ. Pro. Deskbook §26.6 (2)(a)(I)(B) (1997) at SU-26-9

1 In evaluating the circumstances surrounding an inadvertent disclosure, the Courts have
2 taken a “reasonableness” approach by weighing several factors on a case-by-case basis to
3 determine if the attorney-client privilege has been waived. *Lois Sportswear v. Levi Strauss*,
4 104 F.R.D. 103, 105 (S.D.N.Y. 1988). Specifically, in cases where there are large numbers of
5 documents, where the party making the inadvertent disclosure has procedures in place to
6 prevent such disclosures, and where the party takes immediate steps to rectify the error, the
7 courts have held that the inadvertent disclosure was not voluntary, and therefore does not
8 constitute a waiver of the attorney-client privilege. *Lois Sportswear*, 104 F.R.D. at 105;
9 *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D 323 (N.D. Cal. 1985); *U.S. v. Pepper’s Steel and*
10 *Alloys, Inc.*, 742 F. Supp. 641, 643 (S.D. Fla. 1990).

11 Here, Ecology had procedures in place to prevent the disclosure of attorney-client
12 privileged information. The Declaration of Ray Hellwig indicates that his practice was to
13 review documents responsive to ACC’s public disclosure requests prior to disclosing them. If
14 the documents contained attorney-client privileged information, or were otherwise non-
15 disclosable, he indicated in a log that the document should be withheld from disclosure. The
16 document at issue in this particular case was identified on such a log by Mr. Hellwig. Dec. of
17 Hellwig, Ex. 1. Further, the document was sent to Ecology’s attorneys and redacted before
18 being disclosed to the ACC. Dec. of Hellwig, Ex. 2. However, another copy of the document
19 was inadvertently included in a stack of materials provided by Ecology to the ACC pursuant to
20 a later public disclosure request. Dec. of Hellwig, ¶ 5.

21 Ecology’s disclosure of this document in an un-redacted form was inadvertent. There
22 is no question that the information contained in the document is subject to attorney-client
23 privilege and should not have been disclosed. Ecology’s intent was to disclose only a redacted
24 copy of the document as the exhibits to Mr. Hellwig’s declaration show. Since Ecology had
25 procedures in place to prevent disclosure, and the disclosure was inadvertent, the documents
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1 should be returned to Ecology and all references to the attorney-client privileged information
2 should be stricken from the record.

3 **IV. CONCLUSION**

4 For the reasons stated above, Ecology's Motion to Strike should be granted and the
5 ACC should be ordered to return the attorney-client privileged document to Ecology.

6 DATED this 9th day of October, 2001.

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8 CHRISTINE O. GREGOIRE
Attorney General

9
10 
THOMAS J. YOUNG, WSBA # 17366
Assistant Attorney General

11
12 
JOAN M. MARCHIORO, WSBA # 19250
Assistant Attorney General

13
14 Attorneys for Respondent
15 State of Washington
16 Department of Ecology
17 (360) 586-6770

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