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**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

ENERGY POLICYADVOCATES,
a Washington nonprofit corporation

Plaintiff,

v.

ATTORNEY GENERAL’S OFFICE,
an agency of Washington State,

Defendant.

NO. 20-2-00570-34

DEFENDANT’S MOTION TO SEAL
DECLARATION OF WILLIAM
SHERMAN

I. INTRODUCTION

The central issue in this case is whether the redacted material in the Attorney General’s Office’s (AGO) records provided in response to a Public Records Act (PRA) request is attorney work product. The Thurston County Superior Court has generally disfavored in camera review of disputed records in a Public Records Act case. For that reason, the AGO’s briefing and declarations explained in detail the nature of specific records and how the work product privilege applies, but without revealing the work product information. At the Hearing on Affidavits, this Court determined that it would review certain records in camera and ordered that those records be filed under seal. To assist this Court in its in camera review, the AGO has submitted a Declaration of Chief of the Environmental Protection Division William Sherman to provide additional and more specific background on the potential litigation to which the withheld documents relate. This Declaration details the nature of the potential litigation. and necessarily reveals strategy and other

1 mental impressions related to the potential litigation that are protected from public disclosure by the
2 PRA and Civil Rule 26(b)(4).

3 The mental impressions discussed in Mr. Sherman's Declaration are classic work product.
4 Indeed, they include some of the very work product at issue in this suit, including the subject, of the
5 potential litigation, the identities of the potential targets, the nature of the potential litigation, and
6 the parties plans in that potential litigation. For the same reasons that the court ordered the sealing
7 of the records being reviewed in camera, Mr. Sherman's Declaration should be sealed. To preserve
8 the confidentiality of its work product, the AGO seeks leave to file Mr. Sherman's Declaration
9 under seal for in camera review.¹

10 II. BACKGROUND

11 The background of this case is set out in full in Defendant's Memorandum In Support Of
12 Hearing On Affidavits (RCW 42.56.550). To reiterate briefly, Plaintiff Environmental Policy
13 Advocates (EPA) seeks attorney work product related to potential litigation the State of Washington
14 is contemplating. The AGO redacted portions of records on the ground that they are exempt from
15 disclosure under the controversy exception of the PRA, RCW 42.56.290. Plaintiff disagrees. To
16 resolve this dispute this Court must to determine whether the redacted information constitutes work
17 product.

18 Mr. Sherman's Declaration sets out in detail the nature of the AGO's interest and
19 involvement in the potential litigation against certain named and general targets. The information
20 includes how long the AGO has been interested in such litigation, the steps the AGO has taken and
21 is taking regarding pursuing such litigation, and the ongoing nature of the potential litigation.

22 To preserve the confidentiality of discrete portions of Mr. Sherman's Declaration, the AGO
23 respectfully requests leave to file Mr. Sherman's Declaration under seal.

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26 ¹ Along with this Motion and the accompanying In Camera Declaration, the AGO has publicly filed a
lightly redacted version of Mr. Sherman's Declaration.

1 **III. ARGUMENT**

2 Washington’s Constitution mandates that “[j]ustice in all cases shall be administered
3 openly[.]” Const. art. I § 10. But court records may be and often are sealed to protect “significant
4 and fundamental rights.” *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004). In determining
5 whether dispositive pleadings should be sealed from public disclosure, five factors balance the
6 litigant’s private interest against the ordinary presumption of transparency:

- 7 1. The proponent of closure and/or sealing must make some showing of the need
8 therefor. . . .
9 2. Anyone present when the closure and/or sealing motion is made must be given an
10 opportunity to object to the suggested restriction. . . .
11 3. The court, the proponents and the objectors should carefully analyze whether the
12 requested method for curtailing access would be both the least restrictive means
13 available and effective in protecting the interests threatened. . . .
14 4. The court must weigh the competing interests of the parties and the public, and
15 consider the alternative methods suggested. Its consideration of these issues should be
16 articulated in its findings and conclusions, which should be as specific as possible
17 rather than conclusory. . . .
18 5. The order must be no broader in its application or duration than necessary to serve
19 its purpose.

20 *Id.* at 913–14 (quoting *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37–39, 640 P.2d 716
21 (1982)) (emphasis, citations, and punctuation omitted). These factors are satisfied here.

22 The work-product doctrine provides ample ground for redacting Mr. Sherman’s
23 Declaration. The “doctrine allows attorneys to have *complete privacy* to assess the strengths and
24 weaknesses of a case , . . . to plan litigation strategy and [to] share impressions[.]” *Richardson v.*
25 *Gov’t Employees Ins. Co.*, 200 Wn. App. 705, 716, 403 P.3d 115 (2017), *review denied*, 190 Wn.2d
26 1008, 414 P.3d 575 (2018) (emphasis added). As the Supreme Court has explained, the work-
product doctrine is “essential” to “the advancement of justice” and an attorney’s role in “faithfully
protecting the rightful interests of his clients”:

[I]t is essential that a lawyer work with a certain degree of privacy, free from
unnecessary intrusion by opposing parties and their counsel. Proper preparation of a
client’s case demands that he assemble information, sift what he considers to be the
relevant from the irrelevant facts, prepare his legal theories and plan his strategy
without undue and needless interference. . . . This work is reflected, of course, in

1 interviews, statements, memoranda, correspondence, briefs, mental impressions,
2 personal beliefs, and countless other tangible and intangible ways . . . Were such
3 materials open to opposing counsel on mere demand, much of what is now put down
4 in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would
5 not be his own. Inefficiency, unfairness and sharp practices would inevitably develop
6 in the giving of legal advice and in the preparation of cases for trial. The effect on the
7 legal profession would be demoralizing. And the interests of the clients and the cause
8 of justice would be poorly served.

9 *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). As such, courts routinely review claims of
10 privilege in camera. *See, e.g., Snedigar v. Hoddersen*, 114 Wn.2d 153, 167, 786 P.2d 781 (1990)
11 (“Generally, Washington courts have . . . upheld in camera review as a generally acknowledged
12 device for determining whether a privilege is to be honored.”) (internal quotation omitted).

13 The other *Dreiling* factors likewise favor the AGO’s limited request for sealing. The AGO
14 has carefully restricted the scope of its redactions to include only information which discloses
15 litigation strategy related to potential, as-yet-unfiled litigation. As discussed above, the public
16 interest strongly weighs in favor of preserving inviolate attorneys’ mental impressions. By contrast,
17 there is no recognized public interest in obtaining the AGO’s protected work product. Indeed, the
18 PRA explicitly exempts work product from discovery under RCW 42.56.290. As such, sealing
19 portions of Mr. Sherman’s Declaration is entirely appropriate here.

20 IV. CONCLUSION

21 For the foregoing reasons, the AGO respectfully requests that this Court seal and review in
22 camera the unredacted version of the In Camera Declaration of William Sherman. In the event the
23 Court denies this motion in any respect, the AGO requests leave to withdraw Mr. Sherman’s
24 declaration and refile a version that excludes protected work product.
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1 DATED this 8th day of July, 2020, at Seattle, Washington.

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3 ROBERT W. FERGUSON
4 Attorney General

5 s/ Jennifer S. Steele
6 JENNIFER S. STEELE, WSBA # 36751
7 Attorneys for Defendant State of Washington
8 Office of the Attorney General
9 800 Fifth Avenue, Suite 2000
10 Seattle, WA 98104
11 Email: Jennifer.Steele@atg.wa.gov
12 (206) 389-2106
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1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of record
3 on the date below as follows:

4 First Class Mail, Postage Prepaid

5 Matthew D. Hardin
6 324 Logtrac Road
7 Stanardsville, VA 22973

8 ABC/Legal Messenger

9 Email per Electronic Service Agreement to:

- 10 1. MatthewDHardin@protonmail.com
11 2. MatthewDHardin@gmail.com

12 I certify under penalty of perjury under the laws of the state of Washington that the
13 foregoing is true and correct.

14 DATED this 8th day of July, 2020, at Seattle, Washington.

15
16 s/ Angelina Boiko
17 ANGELINA BOIKO
18 Legal Assistant
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