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Superior Court of the State of Washington
For the County of Yakima

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SUPERIOR COURT JUDGES

Judge Kevin S. Naught
Judge Elisabeth M. Tutsch
Judge Douglas L. Federspiel
Judge Blaine G. Gibson
Judge David A. Elofson
Judge Ruth E. Reukauf
Judge Gayle M. Harthcock
Judge Richard H. Bartheld

Yakima County Courthouse
128 North Second St.
Yakima, Washington 98901

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT
COMMISSIONERS

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January 19, 2021

Timothy Hall, Attorney
Hall and Gilliland PLLC
1111 W. Yakima Avenue
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D.R. (Rob) Case, Attorney
Larson, Berg & Perkins, LLC
105 North 3rd Street
P.O. Box 550
Yakima, WA 98907

Re: Wilkinson v. City of Selah, Cause No. 20-2-02261-39

Dear Mr. Hall and Mr. Case:

This shall serve as my letter opinion following the hearing on Friday January 15, 2021 and my *in camera* review of the document produced for inspection by the City of Selah as a result of Mr. Wilkinson's Motion for Order to Show Cause filed December 23, 2020.

Factual & Procedural Statement. Mr. Hall made a public records request to the City of Selah on September 24, 2020 to the then Public Records Officer, Mary Wurtz. The request stated:

I am requesting electronic copies of any email sent by any Selah City Council Membr to any other Selah city Council member since June 1, 2020 regarding any alleged violations of the Open Public Meetings Act – including but not limited to - the use of straw polls by the Selah City Council during executive sessions. If there were any investigations/reports/discussions conducted by any agency within the City of Selah regarding any violations of the Open Public Meetings Act by any employee of the City of Selah or by any Selah City Council member since June 1, 2020 please provide those electronic records – as well as any emails detailing the same.

Having received no response, Mr. Hall filed suit on Mr. Wilkinson's behalf on December 8, 2020. On December 17, 2020 the City of Selah responded claiming that its new Public Records Officer, Treesa

Morales, that it had just become aware of the PRA request by Mr. Hall, that she had located one such document, a one page email, and that the document was exempt from production. The City claimed the following exemptions: RCW 42.56.280, RCW 42.56.510; Selah Municipal Code 1.06.060; attorney-client privilege per Hangartner v City of Seattle, RCW 42.56.070(1), RCW 5.60.060(2) and WAC 44-14-06002; and the work product privilege.

Mr. Wilkinson next filed a Motion for an Order to Show Cause under RCW 42.56.550 and an Order to Show Cause was entered ex parte setting a time for the City of Selah to appear and show cause why an order requiring the City to disclose the record denied to Mr. Wilkinson should not be entered. The City Opposed the relief via the Show Cause Process and claimed the following five exemptions: (1) RCW 42.56.280 (Intra-Agency Opinion); (2) RCW 42.56.520 (Any Other Law) and/or RCW 42.56.070(1) (Any Other Statute); (3) Selah Municipal Code section 1.06.060 and/or RCW 42.23.070(4); (4) Attorney Client Privilege and Common Interest Doctrine; and (5) Work Product Privilege.

Public Records Act -- RCW 42.56 & Open Public Meetings Act -- RCW 42.30

RCW 42.56.550 provides a process for a member of the public to seek public records that have been denied to him or her for inspection or copying by an agency. Subsection (1) provides in part that the responsible agency must:

Show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

Further, the statute allows the court to examine any record in camera and the court may conduct a hearing based solely on the affidavits. RCW 42.56.550(3). This Court has done both.

In examining the affidavits/declarations in this matter and the record in camera, together with the assorted exemption claims of the City, this Court keeps in mind RCW 42.56.030 which provides:

Construction. The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

Similar to RCW 42.56.030, RCW 46.30.010 provides:

Legislative declaration. The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.110 provides:

Executive sessions. Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:

(i) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(ii) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(iii) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

RCW 46.30.060(2) provides:

No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

Analysis of Claimed Exemptions.

First Exemption. RCW 42.56.280 (Intra-Agency Opinion). The email in question was sent by one council member to the mayor and other council members and no other person. Dec. of Case, para 8; Dec of Morales, para 5. The City claims the sender expressed an opinion in the email. Id.

This exemption fails as the City has not met its burden. After reviewing the document in camera it is obvious that it is not a pre-decisional deliberative process that is being discussed in the email. See West v. Port of Olympia (2008). rev denied 165 Wn.2d 1050 and Progressive Animal Welfare Soc v. University of Washington, 125 Wash 2d 243, 256-57 (1994). It also may very well contain the author's opinion but it is not the type of opinion that falls within the exemption. Id.

Second Exemption. RCW 42.56.150 (Any Other Law) and/or RCW 42.56.070(1) (Any Other Statute). The City relies on Hangartner v City of Seattle, 151 Wn2d 439, 450-454 (2004) which holds that the attorney-client privilege can make documents exempt even if not otherwise listed as a specific exemption. This exemption was briefed with the attorney client and work product exemptions.

Third Exemption. Selah Municipal Code section 1.06.060 and/or RCW 42.23.070(4). The cited Code requires City Council members, mayor and staff to hold in confidence anything that transpired in executive session unless given approval by the council to discuss them outside of executive session. RCW 42.23.070(4) prohibits disclosure of a municipal officer to disclose confidential information gained by reason of his or her position. The City provided declarations which indicates that the executive session discussions are supposed to be confidential and that the City Council has not granted approval for any attendee(s) to disclose what occurred during its executive session of July 14th. Dec. of Case, paras 9-10; Dec of Morales paras 6-7.

This exemption fails as the City has not met its burden. After reviewing the document in camera it is obvious that an action occurred that is not authorized to take place in an executive session therefore the action itself is not protected. See e.g., Miller v. City of Tacoma, 138 Wash.2d 318 (1999); RCW 46.30.060(2). Any discussion of the action likewise should not be afforded the protection of the PRA in light of the policy to narrowly construe exemptions. As noted by Mr. Wilkinson, citing Attorney General Opinion AGO 2017 No. 5 August 3, 2017, "a participant who discloses conversations not legally within the scope of an executive session would not transgress the public purpose for which executive sessions are authorized in the first place." Citing In Re Recall of Lakewood City Council Members, 144 Wn.2d at 586. The reasons for and permissible scope of executive sessions are construed narrowly as I have done here.

Fourth Exemption. The Attorney-Client Privilege and Common Interest Doctrine. The City declares that the July 14th, 2020 executive session was convened for the purpose of enabling confidential discussions between the City Council, Mayor, City Administrator and Mr. Case (the City's attorney) regarding actual or threatened litigation. That the meeting was convened so that the other attendees could obtain legal input and advice. Dec. of Case, para 11, Dec. of Morales, para 8. Further that all of those in attendance shared a common legal interest as to the litigation that was discussed during the July 14 executive session. Dec. of Case para 12. The City relies on Hangartner v. City of Seattle 151 Wn.2d 439, 450-454 (2004); RCW 42.56.070(1); RCW 5.60.060(2) and WAC 44.14.06002. In Hangartner, the court determined that the attorney-client privilege was one of the "other statutes" that that qualified as an exemption, citing RCW 5.60.060; Hangartner, 151 Wn.2d 450-454. Even so, the appellate court remanded the case to the trial court to determine if the withheld documents were actually covered by the privilege.

This exemption fails as the City has not met its burden. Even though an executive session can be had in order for the attendees to discuss with legal counsel representing the agency matters relating to pending or threatened litigation (See RCW 42.30.110 cited above), the document at issue is an email generated after

the fact about an action that occurred at the executive meeting in question. It does not discuss legal advice sought or given. It is not a document between a client and an attorney. It is not a document generated by a request for legal advice. It does not appear to this Court to be a document created by a client with the intention of communicating with their attorney. As to the common interest doctrine, that cannot apply due to the content of the email in light of the action described which is not authorized to take place within executive session. Certain conversations within the July 14 executive session may very well be privileged, but the actual action taken is not in this case.

Fifth Exemption. The Work Product Privilege. Work product obviously applies to communications which take place in anticipation of litigation.

This exemption fails as the City has not met its burden. The same analysis applies as set forth above. The City cannot claim this exemption as explained under the analysis of the Third and Fourth Exemption.

Conclusion.

I have conducted an in camera review of the sole document in dispute. I have reviewed the declarations and the law. I have heard arguments of counsel. I conclude that the City has not met its burden to show that the document falls within an exemption to the PRA. As a result, I will prepare a separate generic order (a copy of which is enclosed). Said generic order will require that the City of Selah release a full unredacted copy of the email to the Plaintiff, Trent Wilkinson by delivering same to Mr. Wilkinson's attorney, Timothy Hall no later than 4 p.m. January 29, 2021.

Sincerely,



Gayle M. Harthcock,
Yakima County Superior Court Judge

Encl.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Trent Wilkinson

NO. 20-2-02261-39

VS.

City of Selah

ORDER re: Production
of Documents

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The City of Selah shall produce an
unredacted copy of the email
document that was the subject of
The January 15, 2021 Show Cause
hearing to Mr. Wilkinson's attorney,
Timothy Hall no later than
January 29, 2021 @ 4:00 p.m.

DONE IN OPEN COURT this 19th day of January, 2021.

[Signature]
JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

Approved as to form:
(Copy received)

Attorney for _____

Attorney for _____