The Public Disclosure Act: New Restrictions on Access to Public Records

By Sonja D. Fritts and Jeff James

The Washington State Supreme Court recently issued a decision that restricts access to public records under the Public Disclosure Act ("PDA") in two significant ways. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004). For public employers, the *Hangartner* case appears to provide more guidance in responding to overly broad requests, and more protection when a request encompasses records arguably unavailable under the attorney-client privilege, but that are not necessarily related to a "controversy." For private employers involved in controversies with public agencies, the *Hangartner* case may make it harder to gain access to public records.

Background. Under the PDA, state or local governmental agencies are required to provide access to all public records within their control upon request, unless the records are specifically exempt from disclosure. The PDA sets out approximately 70 such exemptions. Under one exemption, an agency is not required to produce records "relevant to a controversy to which the agency is a party, but which records would not be available to another party." In other words, if the documents would be protected from discovery by the attorney-client privilege or work product doctrine, they do not have to be produced in response to a public records request. The PDA also provides that an agency is not required to produce records that fall within specific exemptions of statutes *other than* the PDA, such as the Uniform Trade Secrets Act.

***Hangartner* v. City of Seattle.** *Hangartner* actually involved two consolidated cases. In the first case, Mr. Hangartner requested information from the City of Seattle concerning the monorail project. At the time the request was made, there was "a considerable amount of public debate over the development of the light rail line," but there was no litigation pending. In a separate request, Mr. Hangartner asked for documents related to the City's designation of an alcohol impact area in the Pioneer Square neighborhood. The City provided all but six documents under the attorney-client privilege.

Mr. Hangartner argued that the attorney-client privilege only provided an exemption for documents relating to a "controversy" and because there was no "controversy" involving the monorail project or alcohol impact designation, the attorney-client privilege could not apply. In rejecting his argument, the court noted that the "attorney-client privilege protects documents and records that fall within the privilege regardless of whether they are 'relevant to a controversy.'" In so ruling, the court expanded the scope of the PDA's exemption for documents that reflected attorney-client communications. The court cautioned, however, that should an agency incorrectly claim that a document is protected under the attorney-client privilege, it could be fined between $5 and $100 for each day that it wrongfully refused to permit the requester access to the record.

In the second case, a citizens group requested "*all* books, records, documents of every kind and the physical properties of" the Seattle monorail agency. The court held that the group's request was overly broad under the PDA, noting that "a proper request...must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents."

This ruling should provide relief to beleaguered public agencies struggling with vague document requests on the one hand, and the threat of fines for failing to provide documents, on the other.

Requests for Public Records. Understandably, there has been tremendous public interest in the outcome of this case. While *Hangartner* helps to clarify the scope of the PDA, public employers will need to continue to be vigilant in responding to public records requests. Public employers should review, and if necessary update, their procedures for responding to public records requests to ensure that they address the following:

- ✓ Promptly review the request and consult with legal counsel as to whether one of the 70 exemptions might apply.
- ✓ Request clarification if requests for records and overly broad.
- ✓ Identify the types of records the agency possesses for the requester.
- ✓ Engage in an interactive "discussion" with the requester regarding the identity of the documents requested and the documents the agency possesses.
- ✓ When a request for public records is made, a response must be provided within five days. The response may be to: (1) provide the requested records; (2) provide a reasonable estimate of time in which the requested records will be provided; or (3) deny the request.
- ✓ The actual per page cost of providing copies of public records may be charged to the requester, excluding staff salaries, benefits or other general administrative or overhead charges, unless they are directly related to the actual cost or copying the public records.
- ✓ An agency need not calculate the actual per page costs or other costs for providing photocopies if to do so would be unduly burdensome, but in that event, an agency cannot charge more than fifteen cents per page for photocopies or for the use of agency equipment to photocopy, and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.
- ✓ Remember: improperly withholding public records will result in fines between $5-$100 for each day the documents are withheld.

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