

Kittitas County v. Allphin: Emails Shared Between Two Washington Agencies Protected Under Work Product Doctrine

Legal Alert
May 22, 2018

Contact

Andrea L. Bradford

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In a [five to four decision](#), the Washington Supreme Court concluded that emails exchanged between two separate public agencies – Kittitas County and the Washington State Department of Ecology – were protected under the work product doctrine and therefore exempt from disclosure under the Washington Public Records Act, Chapter 42.56 RCW.

Kittitas County and the Department of Ecology both investigated a company, Chem-Safe, for violations of waste-handling requirements. During litigation regarding the Notice of Violation the County issued to Chem-Safe, emails were exchanged between the County and Ecology. The County later withheld these emails from production under the Public Records Act, claiming work product protection.

A five-justice majority opinion of the Washington Supreme Court, authored by Justice Wiggins, concluded the emails were protected by the work product doctrine and then adopted a new rule to determine whether the protection was waived: “a party waives its work product protection when it discloses work product to a third party in a manner creating a significant likelihood that an adversary will obtain that information.” Applying this rule, the Court concluded that Kittitas County did not waive work product protection by exchanging emails with employees of the Department of Ecology because the disclosure was to a party aligned on a matter of common interest and the disclosure “never created a circumstance in which it was significantly likely that Chem-Safe would be able to obtain the work product.”

Justice Yu dissented, joined by two other justices. While agreeing with the rule adopted by the majority regarding waiver, Justice Yu would have held that because both the County and

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Ecology are public entities subject to the PRA, “the circumstances under which the County voluntarily disclosed the disputed e-mails to Ecology in this case *did* create a significant likelihood that an adversary would obtain them and, therefore, that the County presumptively waived the protections of the work product doctrine.” Justice Madsen separately dissented, contending that government parties should be treated the same as private parties, but that parties must have a “mutual understanding that the parties will maintain confidentiality” to avoid waiver of work product protection.

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