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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

2006 MAR -9 AM 9:53  
ATTORNEY GENERAL  
OF WASHINGTON

WASHINGTON STATE FARM BUREAU )  
FEDERATION, et al., )

Plaintiffs, )

v. )

CHRISTINE GREGOIRE, et al., )

Defendants. )

No. 05-2-10166-9

TRANSCRIPT OF PROCEEDINGS  
Ruling on Motion to Compel

DATE: February 28, 2006

APPEARANCES:

For the Plaintiff: RICHARD STEPHENS  
Attorney at Law

For the Defendant: JEFFREY EVEN  
Deputy Solicitor General

The Honorable James H. Allendoerfer

Department 9

William Meek, CSR  
Official Court Reporter  
CSR No. 2696  
Department No. 9  
Snohomish County Courthouse  
Everett, Wa 98201  
(425)388-3282

**COPY**

1 BE IT REMEMBERED that on the 28th day of  
2 February, 2006, the above-entitled and numbered cause  
3 came regularly on for Motion to Compel before the  
4 Honorable JAMES H. ALLENDOERFER, one of the Judges of  
5 the above-entitled Court, sitting in Department No. 9  
6 thereof, at the Snohomish County Courthouse, in the City  
7 of Everett, County of Snohomish, State of Washington.

8 The Plaintiff appeared by and through its attorney,  
9 RICHARD STEPHENS;

10 The Defendant appeared by and through its attorney,  
11 JEFFREY EVEN;

12 WHEREUPON, both sides having announced they were  
13 ready to begin, the following proceedings were had,  
14 to-wit:

1           THE COURT: All right. Let me move along, because  
2 I'm in the middle of a trial and I can't spend any  
3 additional time on this case today. If you need  
4 additional time, we'll have to reschedule it for a  
5 supplemental hearing.

6           I'm prepared to rule that the legislative privilege  
7 encompasses inter-agency as well as intra-agency  
8 communications that are within the context of  
9 legislative deliberations. To the extent that OFM or  
10 any other state employees are actively participating in  
11 the policy making and deliberative functions of the  
12 legislature, their communications are just as privileged  
13 as the intra-agency communications within the  
14 legislature itself (that is, between the legislators and  
15 their staff).

16           This is consistent with my ruling on January 13,  
17 2006, where in limitation number 3 I said as follows:  
18 "The privileged materials must be internal  
19 communications or papers stating opinions and  
20 recommendations of state employees, or information  
21 directly solicited by legislators for legislative  
22 purposes." What I meant by that was that if legislators  
23 need assistance from the Governor's office in preparing  
24 their budget, or if they want recommendations, opinions  
25 or advice, they may get that by going through OFM or

1 other knowledgeable officials in the Governor's office.  
2 That's part of the overall concept of privileged  
3 legislative deliberative communications. And, it would  
4 apply to such communications year round if they're  
5 dealing with legislative deliberations. As Mr. Even  
6 suggests, in the fall state officials may already be  
7 starting such communications regarding the next spring's  
8 legislative session.

9 However, there is a second hat that OFM wears that  
10 is unprivileged, and that's the hat where they're acting  
11 in an administrative capacity and where they're dealing  
12 with facts and not with recommendations on policy or  
13 deliberative issues. It has to do with when OFM is  
14 preparing population forecasts, expenditure forecasts,  
15 inflation forecasts, and long-term budget projections,  
16 and when it's calculating expenditure limits. Moreover,  
17 OFM operates as the key staff support for the  
18 Expenditure Limit Committee. When it's acting in that  
19 capacity it is not acting under the cloak of privilege.

20 Therefore, I find that if the communications by OFM  
21 in the fall of 2005 that are now being questioned  
22 related to preparation for the ELC meeting coming up in  
23 November, or, if they were memos to the legislature  
24 stating that somehow the 2005 budget exceeded the  
25 expenditure limit, they would not be privileged

1 documents, and they should be disclosed.

2 Mr. Stephens found a federal case arising out of  
3 Washington, which was quite helpful, Seafirst v.  
4 Jenkins. That explained that communications may be  
5 factual in nature (and therefore unprivileged) even if  
6 they're in the context of an expert interpreting the  
7 facts. I find that to be very likely what OFM does on a  
8 frequent basis. They are the experts on facts regarding  
9 population forecasts, inflation forecasts, and  
10 expenditure forecasts, and they interpret those for the  
11 legislature. When they're doing so, they are acting in  
12 their unprivileged capacity. They are passing along  
13 expert interpretations of facts. They are not acting as  
14 legislators or quasi-legislators. They are not giving  
15 recommendations or opinions that can be privileged as  
16 legislative deliberations.

17 To the extent that this ruling still leaves  
18 ambiguities, I'm prepared to go through the sealed  
19 envelope of documents in camera, and apply my criteria  
20 on a document-by-document basis. If that's what's going  
21 to happen, it needs to happen quickly because we have a  
22 summary judgment scheduled for March 17; and I will need  
23 the assistance of Mr. Even because there's many more  
24 documents in that sealed envelope than I need to bother  
25 myself with, and I would appreciate it perhaps, Mr.

1 Even, if you would open the sealed envelope and flag the  
2 ones I ought to look at, or give me an index that I can  
3 use so I don't need to read every document.

4 Now moving on to the second part of today's motion,  
5 and that has to do with the third cause of action.

6 The question raised by that cause of action is what  
7 is the effect of the triangulation of funds on the  
8 State's expenditure limit?

9 I conclude that I will be in a position to decide  
10 that issue as a matter of law without intrusion into the  
11 legislators' deliberations or their subjective motives  
12 or intent. Therefore, I'm not prepared to use the third  
13 cause of action as a justification for any additional  
14 discovery.

15 If there is any question as to either side's  
16 position on whether the \$250 million that's involved in  
17 the triangulation issue was or was not considered as  
18 part of the expenditure limit for 2005, then I would  
19 insist that the State answer that question before March  
20 17, because I don't want that to be an unknown factor.  
21 That seems like absolutely vital discovery. But I asked  
22 each attorney that question this afternoon, and you both  
23 seem to say that's a settled issue, so I think we can  
24 move past that at this time.

25 In conclusion, I am granting plaintiff's motion

1 number 1, in part, and I am denying plaintiff's motion  
2 number 2.

3 MR. STEPHENS: Thank you.

4 THE COURT: Mr. Even, how do you want to progress  
5 on this task?

6 MR. EVEN: Well, I think there's a choice here. As  
7 Mr. Stephens indicated in his supplemental motion, I  
8 believe it is footnote -- it's footnote 2 on page 8,  
9 there's a list of what Mr. Stephens identified going  
10 through the privilege logs from the House, the Senate,  
11 and then the Office of Financial Management.

12 Perhaps it would help to explain. All of the  
13 documents have page numbers, and the page numbers begin  
14 with an abbreviation depending on where they  
15 originated. If the page number begins R-E-P, it came  
16 from the House of Representatives. If it begins S-E-N,  
17 it came from the Senate. If it begins OFM, it came from  
18 OFM. And there were other agencies that aren't at issue  
19 here.

20 So, one way of doing this would be Mr. Stephens has  
21 listed all of the materials that he's calling into  
22 question from the House and the Senate. He's listed  
23 those by page numbers in that footnote, and then said  
24 everything that's on the Office of Financial Management  
25 privilege log, which would be everything that has an OFM

1 page number in that packet, and they're broken down that  
2 way, they're -- all the R-E-Ps are together, the S-E-Ns  
3 are together, the OFMs are together. So one way of  
4 doing this would simply be to take Mr. Stephens'  
5 footnote.

6 THE COURT: That's good for the House and the  
7 Senate. That doesn't help on the OFM.

8 MR. EVEN: And that maybe gets me to the second  
9 possibility. One possibility would be to look at all  
10 the OFMs. The other would be if the Court's thinking  
11 here is that you would rather that I went through those  
12 and said here's the close calls, is that the kind of  
13 thing the Court is --

14 THE COURT: That would help me, and at least steer  
15 me away from those documents you've already provided to  
16 Mr. Stephens, because those are also in that sealed  
17 packet.

18 MR. EVEN: They are in there.

19 THE COURT: I don't want to read those.

20 MR. EVEN: That's right. Yeah, there are a small  
21 number of pages that are in there that have subsequently  
22 been produced, that's true.

23 THE COURT: All right. Would you do that for me?

24 MR. EVEN: Yes.

25 THE COURT: So I'll read all of Mr. Stephens'

1 Senate privilege log reference on page 8, all of his  
2 House of Representatives privilege log reference on page  
3 8, and all of the OFM privilege log, except those which  
4 Mr. Even says are already produced or which are  
5 no-brainers and would never be produced.

6 MR. EVEN: For example, I think we agree, if I  
7 understood the discussion today, that the material  
8 that's strictly internal to OFM, Governor, here's our  
9 analysis of this bill, that kind of thing, that those  
10 things that were claimed as executive privilege are not  
11 at issue?

12 MR. STEPHENS: Our position is that if it's  
13 Governor veto or signed, that those are the -- that's  
14 under your previous ruling.

15 THE COURT: Yes, that would be under my no-brainer  
16 category.

17 MR. EVEN: So I could eliminate those, and I think  
18 some of the materials that were produced subsequent to  
19 the January hearing were from the House, and I think  
20 most of them were from the House and the Senate.

21 THE COURT: All right. Do you agree with this  
22 process that we've just outlined?

23 MR. STEPHENS: Yes, yes, Your Honor.

24 THE COURT: All right. Would you give the packet  
25 to Mr. Even then, and if you could help me by flagging

1           them or something before you leave today?

2           MR. EVEN:    Sure.

3           THE COURT:  All right.  And since I'm in the middle  
4 of a trial, you'll need to do that in a conference room  
5 out in the hallway, and my law clerk, Ben, will be in  
6 contact with you as soon as you're finished.

7           MR. EVEN:    Okay.

8           THE COURT:  All right.

9           MR. EVEN:    Thank you, Your Honor.

10          MR. STEPHENS:  Thank you.

11          THE COURT:  Thank you.

12          MR. EVEN:    Your Honor, as far as an order, I think  
13 we may be best advised to proceed the same way we did  
14 before, order a transcript of the Court's ruling and  
15 then turn that into an order.

16          THE COURT:  That's fine.  We just need to make sure  
17 it's turned around before March 17.  We're still on for  
18 that date, I presume?

19          MR. STEPHENS:  Yes.

20          MR. EVEN:    Yes.

21          THE COURT:  All right.  Court's in recess.

22                       (The proceedings were concluded.)

23

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