S223876

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTUARDO ARDON, on behalf of himself and all others similarly situated,
Plaintiff and Respondent,

vs.

CITY OF LOS ANGELES
Defendant and Petitioner.

After A Decision By The Court Of Appeal
Second Appellate District, Division Six
Case No. B252476

Superior Court for the County of Los Angeles
Hon. Lee Smalley Edmon, Judge
Trial Court Case No. BC363959

ANSWER TO PETITION FOR REVIEW

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The City of Los Angeles's Petition is frivolous, presenting no issue warranting the attention of this Court.

The City has not demonstrated that its Petition presents an unsettled and important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) There is no conflict among the lower courts. There is no indication that this issue is widespread. The City simply disagrees with the Appellate Court's unanimous affirmance of Judge Edmon's decision in the trial court below.

Based upon a plain reading of the Public Records Act, Government Code section 6250, et seq. (the "PRA"), the Appellate Court unanimously affirmed the exhaustive opinion of the Court below (Edmon, J.) (*see* Exhibit A hereto for Edmon, J. opinion) and held that the City's position, that waiver of the attorney client privilege cannot result from "inadvertent disclosure" of documents in response to a PRA request, has "no support in the statute or the legislative history that surrounds the enactment of the PRA." (*Ardon v. City of Los Angeles* (2014) 232 Cal.App. 4th 175, 180.)

In reaching their holdings, both the Second Appellate District and the trial court below followed the decision of the First Appellate District in *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, 455 [49 Cal.Rptr.2d 639]. Furthermore, published guidelines by local agencies charged with interpreting the PRA recognize that inadvertent disclosure in response to a PRA request constitutes a waiver of privilege. (See Exhibit B hereto.) Clearly, there is no conflict of authority on the issue sought to be reviewed.

Since the documents received by Plaintiff's counsel were not privileged, there was no basis for the City's demand that they be returned and, therefore, no obligation on Plaintiff's counsel to return them. To the extent that the City wrongfully argues that its Petition raises a question of first impression or seeks to resolve a nonexistent conflict, there is even less merit to its position on disqualification. (*State Compensation Insurance*

Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 654-656 [82 Cal.Rptr.2d 799] (rejecting even sanctions where law unsettled).) Consequently, the City's Petition is also frivolous to the extent it seeks the disqualification of Plaintiff's counsel.

Respectfully submitted,

DATED: February 4, 2015

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

The text of this Answer consists of 359 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

Respectfully submitted,

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BC363959 Ardon v. City of Los Angeles

Friday, October 25, 2013, 10:30 a.m.
Department 322, Judge Lee Smalley Edmon

MOTION OF DEFENDANT CITY OF LOS ANGELES FOR ORDER COMPELLING THE RETURN OF PRIVILEGED MATERIAL AND TO DISQUALIFY PLAINTIFFS' COUNSEL OF RECORD

COURT'S FINAL RULING: DENIED

I. Introduction:

This putative class action lawsuit involves allegations by Plaintiff Estuardo Ardon that Defendant City of Los Angeles ("the City) improperly collected a Telephone Users' Tax ("TUT"). According to Plaintiff, the City's TUT excluded from taxation all services not subject to taxation under a similar Federal Excise Tax ("FET"). In 2006, after several federal courts had held that the FET only applied to long distance service that charged according to a combination of duration of the call and the distance of the call, the IRS ceased collecting the excise tax on long distance calls billed only according to the duration of the call. Plaintiffs contend that the TUT was tied to the scope of the federal tax and that the City did not have legal authority to collect taxes on long distance telephone service charged solely by the minute in light of the scope of the FET. In 2007, the City adopted an amendment to the TUT eliminating reference in the TUT to the FET. Plaintiff contends that the 2007 amendment was illegal because it constituted an expansion of an excise tax that required approval by a majority of voters. In a February 2008 election, Los Angeles voters approved a new Communications Users' Tax ("CUT"), which encompasses, among other things, long distance telephone service billed solely according to the duration of the call.

In 2008, Plaintiff served a subpoena duces tecum on the League of California Cities ("the League") requesting email records from an email listserve maintained by the League and limited in membership to City Attorneys throughout the state. Apparently some of the email correspondence generated among the various city attorneys on that listserve involved discussions about long distance telephone excise taxes and the implications of the federal interpretations of the FET. The Honorable Anthony Mohr found that communications made on the email listserve were protected by the attorney-client and work product privileges and that those privileges were not waived in light of the common interest doctrine. (See generally, Decl. of Whatley, Exh. 3 & 4.) Also in 2008, in response to a separate request for production of documents served by

Plaintiff upon the City, the City produced a privilege log of 27 documents. (Decl. of Whatley, Exh. 2 & 6.)

On January 14, 2013 Plaintiff's counsel Rachele Rickert made a request pursuant to the Public Records Act to the City, requesting documents pertaining to:

> "1. The Internal Revenue Services' announcement in 2006 to discontinue the application of the federal excise tax on time-only long distance telephone services, and documents concerning how the change would impact the City's telephone tax ordinance;
> 2. The preparation and presentation of an updated Ordinance relative to the collection of the Utility User's Tax ("UUT"); and
> 3. The work of the City's Communications Tax Equity Task Force in clarifying the statewide responses as it relates to the UUT."

(Decl. of Rickert, Exh. A.) On January 25, 2013 the Office of the City Administrator responded to Ms. Rickert's Public Records Act request, stating that the City had identified "approximately 53 documents that pertain to [her] request" and stating that the City would provide those documents at a cost of $6.95. (Decl. of Rickert, Exh. B.) Ms. Rickert paid the fee and obtained the documents from the City on February 5, 2013. (Decl. of Rickert, ¶ 4.)

In a letter dated April 3, 2013, Ms. Rickert informed the City that Ms. Rickert had obtained through her Public Records Act request copies of two documents that appeared to be listed in the 2008 privilege log. (Decl. of Whatley, Exh. 7, pp. 4-5.) Ms. Rickert further informed the City that she had obtained a third document that appeared to have been prepared in response to two other documents listed in the privilege log and which disclosed the contents of those two other documents. (Decl. of Whatley, Exh. 7, p. 4.) The City responded by asserting that the documents had been inadvertently produced in response to the Public Records Act request and demanded that Plaintiff return the documents to the City and agree not to rely upon those documents in any way. (Decl. of Whatley, Exh. 9.) Plaintiff's counsel declined to do so, contending that the City had waived any claim of privilege. (Decl. of Whatley, Exh. 10.)

The City now moves this Court for an order compelling the return of the three purportedly privileged documents produced in response to the Public Records Act request and moves to disqualify Plaintiff's counsel.

II. Analysis

Plaintiff's primary argument in opposition to the motion is grounded in Government Code section 6254.5. That portion of the Public Records Act provides that (subject to exceptions not at issue here) "whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law." Government Code section 6254, in turn, generally exempts from disclosure any documents subject to a privilege as detailed in the Evidence Code. (Gov. Code § 6254(k).) That is, section 6254.5 provides that disclosure of a privileged document pursuant to the Public Records Act constitutes a waiver of any privilege provided in the Evidence Code by converting the document from a confidential document exempt from disclosure under the Public Records Act into a public record, accessible by any member of the public. The privileges in the Evidence Code include the attorney-client privilege. (Evid. Code § 954.) The City contends that section 6254.5 does not waive privilege for inadvertently produced documents. The City asserts that Plaintiff's counsel must be disqualified for obtaining the privileged documents. In supplemental briefing, the City further asserts that Plaintiff's counsel must be disqualified for violating the Rules of Professional Conduct by contacting a represented party.

A. Inadvertent Disclosures Are not Exempted from the Public Records Act's Waiver Provisions

The City contends that the particular disclosure in this case did not constitute a waiver under section 6254.5 because disclosure of the documents was inadvertent. (Reply, p. 5-6; see also Mtn., p. 4.) Analogizing the facts of this dispute to cases where privileged material was inadvertently produced in discovery, the City contends that there is no waiver by inadvertent production in response to a Public Records Act request. (See Reply, p. 5 ["If the law will not tolerate this in the discovery context, why would it tolerate the abrogation of the attorney client privilege in the PRA context when an inadvertent disclosure has been made?"].)

But disclosure of documents under the Public Records Act is not the same as disclosure in the course of litigation discovery. While litigants are free to obtain evidence through the mechanisms set up by the Public Records Act, (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 826), the Public Records Act was not enacted to supplement the Civil Discovery Act and its broad provisions are not limited to litigants or attorneys. Rather, the Act itself sets forth its purpose: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 6250.)

As Plaintiff rightly notes (Opp., p. 8), section 6254.5 expressly exempts from its waiver provisions documents produced in the context of "legal proceedings or as otherwise provided by law ... ." (Gov. Code § 6254.5(b).) Disclosure of a privileged

document by way of the Public Records Act waives that privilege as to the world and demands production to any member of the public seeking access to it. (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321-22 ["Disclosure to one member of the public would constitute a waiver of the exemption, requiring disclosure to any other person who requests a copy"].) But under the provisions of section 6254.5(b) disclosure of a privileged document in civil discovery to a litigant would not render that document a "public record" obtainable by any member of the public.

At the initial July 1, 2013 hearing on this matter, the Court requested supplemental briefing on the question of whether anything in the legislative history of section 6254.5 indicates that disclosure of the document did not waive a claim of privilege. In its supplemental briefing, the City argues that the legislative history of section 6254.5 weighs against any finding of waiver. The City suggests that section 6254.5 is merely designed to prohibit "selective disclosure" of public records. (City Supp. Brf., p. 2.) The City cites to statements made by the bill's sponsor in the Senate and a Senate Committee that section 6254.5 would prohibit "selective withholding" of government documents under the Public Records Act. (City Supp. Brf., p. 3.) The City concludes that "[t]he focus on 'selective' necessarily presumes that the disclosure was deliberate in the first instance." (City Supp. Brf., pp. 3-4.) In order for the City to waive its privilege as to the world, it contends, it must have deliberately disclosed the documents to Ms. Rickert.

But as Plaintiff correctly observes (Pltf. Supp. Reply, p. 3), section 6254.5 contains several exceptions to the general waiver provisions, including the exception noted above for documents produced in discovery. The City would have the Court read an exception into section 6254.5 for inadvertent disclosures that does not appear in the statute. The City would do so based on a narrow reading of the ambiguous term "selective," which also does not appear in the text of the statute, but only in the statements of a single legislator and a committee staff report. "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ...." (*Manufacturers Life Ins. Company v. Superior Court* (1995) 10 Cal.4th 257, 274.) In cases such as this where a party claims an exclusion from a statute not found in the statute itself, Courts "must assume that the Legislature knew how to create an exception if it wished to do so ... ." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.) Indeed, the legislature clearly knew how to create an exception to the otherwise absolute waiver provision in section 6254.5: it created nine of them. (See Gov. Code § 6254.5(a)-(i).) None of those nine exceptions to the absolute waiver provided in section 6254.5 exempts an "inadvertent disclosure."

Unlike litigation discovery, where inadvertent disclosure is expressly protected from waiver by statute (see Evid. Code § 912; Code Civ. Proc. § 2031.285), any privileged document disclosed pursuant to the Public Records Act is waived as to the world "[n]otwithstanding any other provisions of the law... ." (Gov. Code § 6254.5.) This

distinction between disclosure through the Public Records Act and through civil discovery makes sense. Civil discovery is often governed by a protective order precluding disclosure of sensitive documents to third parties. Moreover, unlike documents produced in response to a Public Records Act request, civil discovery is subject to the supervision of the Court. A party who inadvertently produces a privileged document in discovery often has a statutory right to have the privileged document returned and may invoke the process of the Court to invoke that right. (See, e.g., Code Civ. Proc. § 2031.285.) And even when there is not direct statutory provision for the return of a privileged document, a party who inadvertently produced a privileged document in the course of litigation has a clear mechanism for redress - litigation always involves a judge with the power to order the document's return.

The Public Records Act, on the other hand, is not limited to the context of litigation. Unlike litigation discovery, once a document is disclosed under the Public Records Act, the Public Records Act does not provide for its return. This fact is highlighted by Plaintiff's observation that any individual "whether that person is a plumber, a doctor, or an attorney" could have made an identical request, received identical documents, and been under no obligation to notify the City or return the documents. (See Opp., pp. 8-9.) Suppose, for example, that Ms. Rickert was not counsel in this case, but general counsel for an anti-tax public interest organization. Nothing in the Public Records Act would have prevented her from immediately sending all three documents to the Los Angeles Times or publishing them to the internet, nor would the City have had any remedy under the Act to prevent her from doing so. And as noted, because the documents have been disclosed to Ms. Rickert, the City is precluded by operation of law from refusing to disclose the documents to any other member of the public.

The City concedes in its supplemental brief that "waiver could theoretically be at issue only if the City were to assert [its right to withhold privileged documents under] the section 6254, subdivision (k) exemption in response to a separate PRA request involving the same subject matter as Plaintiff's PRA request." (City Supp. Brf., p. 2.) But, the City contends, "the court need not address this hypothetical here ... ." (City Supp. Brf., p. 2.) Quite the contrary. The City's hypothetical is crucially important because it illustrates exactly why an "inadvertent disclosure" exemption cannot be read into the statute. As discussed above (and even suggested by the City's cited legislative history), now that the City has disclosed the documents to one member of the public, it is prohibited as a matter of law from "selectively withholding" that document from any other member of the public. But how can a public record, available to anyone who requests it as a matter of law, possibly be privileged?

In this context, the case of *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 is instructive. In that case, Masonite sought to enjoin the Air Quality Management District from disclosing certain documents to a third party under the Public Records Act because Masonite contended that the

documents were trade secrets not subject to disclosure. (*Id.* at 440-41.) Pursuant to Health and Safety Code section 44346, Masonite was permitted to designate certain documents that it was legally required to provide to the District as trade secrets. If a member of the public made a Public Records Act request for documents designated as trade secrets, the District was required to notify Masonite and give Masonite an opportunity to enjoin production. However, some of the documents that Masonite delivered to the District were not properly designated as trade secrets, even though portions of the documents indicated that the documents were trade secrets. (*Id.* at 453-54.) While the Court held that documents properly identified as trade secrets were not subject to disclosure, it held that Masonite's *inadvertent* failure to label some of the documents as trade secrets waived any trade secret privilege that would have prevented disclosure under the Public Record Act. (*Id.* at 454-55.)

In that case, Masonite argued, as the City does here, that the possibility of waiver by way of "[i]nadvertent or mistaken disclosure" would constitute "an excessively punitive and 'rigid rule'" that would lead to "absurd results." (*Id.* at 455.) The Court of Appeal disagreed, noting that Masonite was "afforded the opportunity to properly claim a trade secret, and by doing so prevent[] disclosure of confidential information." (*Id.*) Masonite's failure to properly designate the document as a trade secret, however, transformed the privileged document into an unprivileged public record because "[v]oluntary disclosure of information as a public record, even if mistaken, constitutes a valid waiver of trade secret protection." (*Id.*)

It is of course true that in *Masonite*, the party seeking to protect the documents was not the party to disclose them. That distinction is of little import, however, because in this case the party seeking to invoke the privilege is *also* the public agency subject to the Public Records Act. If anything, the case for waiver is only stronger in this case. Masonite's error was to inadvertently disclose the document to a regulator without the proper designation. To the extent that the City's disclosure can be construed as "inadvertent," its inadvertent error was to disclose the documents to a member of the public with no legal restrictions on the manner in which the documents could be used. That disclosure, even if inadvertent, permanently destroyed any semblance of confidentiality by converting those documents into public records subject to disclosure to any member of the public at any time for any reason. Based on the plain language of the statute, any attorney-client or work product privilege that may have once existed was waived at the time of disclosure under the Public Records Act.

B. Even Assuming an Implicit "Inadvertent Disclosure" Exception to the Waiver Provisions in Section 6254.5, the Instant Disclosure Was not "Inadvertent"

Even if the Court were to essentially read a non-statutory policy exception to section 6254.5's waiver provision for inadvertent disclosure of privileged information, the instant disclosure was not "inadvertent" and constituted a waiver of the attorney-client privilege under the terms of Evidence Code section 912. To this point, the Court

of Appeal's discussion in *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, relied upon heavily by the City in support of disqualification, is highly instructive. That case suggests that the rule of inadvertent disclosure as a defense to waiver is limited to inadvertent disclosure by *attorneys*. (See *Id.* at 654 ["we hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information *by the attorney*"] [emphasis added].) The Court of Appeal observed that, pursuant to Evidence Code section 912, it only is the client, as holder of the privilege, who may waive it. (*Id.* at 652.) Waiver by an attorney, therefore, must be authorized by the client. (*Id.*) That is, a holder of the privilege may waive it "*either* by disclosing a significant part of the communication *or* by manifesting through words or conduct consent that the communication may be disclosed by another." (*Id.* [emphasis added]; see also Evid. Code § 912(a).) Inadvertent disclosure by an attorney does not waive the privilege because it does not manifest the *client's* consent to waive the privilege.

But as the Court of Appeal acknowledged, wavier by an attorney (which requires consent) is distinct from waiver by the actual holder of the privilege. (See *Id.* ["In this case, it is clear that State Fund did not itself disclose to appellants the claim summaries, but rather its counsel effected the inadvertent disclosure]."") Under the plain language of section 912, consent is irrelevant to a disclosure made by the actual holder of the privilege. The privilege-holder's consent is only relevant when the disclosure is made by another. Here, the documents were disclosed by the City itself (through the City Administrator), not by the City's attorney.[1] The plain language of section 912(a) and the City's preferred case *State Compensation Ins. Fund* clearly provide that the issue of inadvertent disclosure is irrelevant in this case. There is no question of whether the City consented to an attorney disclose of privileged documents. The City Administrator made the disclosure, not the City Attorney.

For this reason, the City's request for disqualification is unavailing. Even assuming that the City's citation to *State Compensation Ins. Fund v. WPS, Inc.* 70 Cal.App.4th 644 would mandate disqualification if, as in that case, the documents had been inadvertently produced by the City's counsel in the context of discovery, the instant case is not analogous. *State Compensation Ins. Fund* involved an attorney's receipt of documents in discovery that were subject to an attorney-client privilege that

[1] In its supplemental reply, the City suggests that that only the City Council had the authority of the client (the sovereign City of Los Angeles) to waive a privilege. (See Supp. Reply, p. 2.) Not so. It is beyond question that the City Administrator is a public officer. (See L.A. City Charter, Vol. I, Art. II §§ 200, 201 [defining the "chief administrative officer of each department and office" as a "City Officer" and designating the Office of Administrative and Research Services as a City office].) As a public officer, the City Administrator acts with the authority of the sovereign as to all duties entrusted to him by the City Council, including the disclosure of documents under the Public Records Act. (See L.A. Admin. Code § 12.10 [delegating authority to implement Public Records Act to heads of City departments].) "The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is *an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting.*" (*Coulter v. Pool* (1921) 187 Cal. 181, 187.)

had not been waived. (*Id.* at 654.) Here by contrast, disclosure under the Public Records Act constituted an act of waiver, and the documents were no longer subject to privilege at the time. And in any event, the City's disclosure of the documents also constituted a waiver of the privilege under the terms of Evidence Code section 912(a).

The disqualification rule in *State Compensation Ins. Fund* concerned an attorney's ethical duties upon receipt of documents that "clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence... ." (*Id.* at 656.) Here, the documents could not have "clearly appeared" to be privileged because the manner of their production (directly from the City through a Public Records Act request) unequivocally indicated that any privilege was waived. The ethical duties discussed in *State Compensation Ins. Fund* had no bearing on Ms. Rickert's receipt of documents, and there is no basis for disqualification.

C. Ms. Rickert Did not Violate Rule of Professional Conduct 2-100

The City conceded on page one of its initial reply brief that Ms. Ricker's Public Records Act request was proper. However, after the Court posed a question at the July 1, 2013 hearing regarding the applicability of Rule of Professional Conduct 2-100 (prohibiting contact with a represented party), the City reversed course and argued that Ms. Ricker's Public Records Act request constituted a violation of Rule 2-100 and independently demands disqualification.

Rule of Professional Conduct 2-100 provides:

> "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

(Cal. Rules Prof. Conduct, Rule 2-100(a).) However, the rule also exempts from its application, *inter alia*, any "[c]ommunications with a public officer, board, committee, or body." (Cal. Rules Prof. Conduct, Rule 2-100(c)(1).) The Court agrees with the City's original conclusion that Ms. Ricker's request was proper.

The City asserts that the exception for communications with public officers serves only to "preserve the inviolate right of all citizens to petition their government as protected by the First Amendment to the United States Constitution." (City Supp. Reply, p. 4 [citing State Bar Formal Op. No. 1984-82]; see also *United States v. Sierra Pacific*

Industries (E.D. Cal. 2011) 759 F.Supp.2d 1215, 1216-18.)[2] True enough, but the Public Records Act is expressly intended to protect just such rights:

> "In enacting [the Public Records Act], the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a *fundamental and necessary right of every person in this state.*"

(Gov. Code § 6250 [emphasis added].)

Here, Ms. Rickert used the Public Records Act for exactly the purpose the Legislature intended. Nothing in Ms. Rickert's request targeted privileged information.[3] It merely requested generic categories of public records relating to the adoption of a citywide tax ordinance that Ms. Rickert believed to be unlawful. It is difficult to conceive of a request more squarely within the Legislature's intent in enacting the Public Records Act.

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[2] The City's reliance on *United States v. Sierra Pacific Industries* to assert that Ms. Ricker's conduct violated Rule 2-100 is unpersuasive. To begin with, that decision of a federal district court interpreting a California Rule of Professional conduct is not binding on this Court. To the extent it demands a different result than the formal opinions of the State Bar, the State Bar's interpretation of the Rule (as the administrative agency responsible for regulating the conduct of attorneys) is entitled to "considerable weight" and the Court should not depart from that interpretation "unless it is clearly erroneous or unauthorized." (Sara M. v. Superior Court (2005) 36 Cal.4th 998, 1012.) But *Sierra Pacific* does not suggest a different result here in any event. In *Sierra Pacific* an attorney suing the U.S. Forest Service attended a public tour in the Plumas National Forest. (*United States v. Sierra Pacific Industries, supra* 759 F.Supp.2d at 1215-16.) During the course of the tour, the attorney surreptitiously questioned several Forest Service employees. (*Id.*) A magistrate judge found, and the District Court affirmed, that the attorney was not exercising his right to petition the government by secretly questioning Forest Service employees and that such low-level employees were not "public officers" within the meaning of Rule 2-100. (*Id.* at 1217-18.) Here, Ms. Rickert was exercising a statutorily guaranteed right to petition the government, and she did so through the same formal channels that are required of any citizen when exercising that right. She did not secretly contact any City employee to ask a special favor or make any misrepresentations on her request. Moreover, the District Court's determination that contact with low-level employees who were not "public officers" constituted a violation of Rule 2-100 is in tension with State Bar Formal Op. 1977-43 which provides that an attorney may contact either a high-level "public official" or a low-level "government employee." "If the staff members are public officials, the attorney is free to contact them because rule 7-103 of the Rules of Professional Conduct [the predecessor to Rule 2-100] does not apply. If they are not public officials, contact would still be authorized as they are not parties to the litigation." (State Bar Formal Op., No. 1977-43.)

[3] The request did not specifically ask for communications from the California League of Cities, for example, which Judge Mohr had already found were privileged. It did not request communications between City staff and the City Attorney. Nor did it seek categories of documents inherently likely to skew toward such documents. Rather, it broadly asked for documents relating to the IRS' 2006 interpretation of the FET, the City's preparation of the UUT, and documents from City's Task Force (*not* the City Attorney) statewide coordination efforts.

As the City concedes, Rule 2-100(c) expressly permits an attorney to contact a represented public official about the subject matter of the official's representation in order to preserve the attorney's right to petition the government. Interpreting a nearly identically worded exception to the predecessor rule to Rule 2-100, the State Bar agreed. The State Bar considered a scenario where:

> "An attorney representing a party bringing an action against a city... approaches the city manager or other member of the administrative staff and privately discusses the subject matter of the action between the city and his client without permission from the city attorney."

(State Bar Formal Op. No. 1977-43.) The State Bar concluded that it makes no difference whether the attorney contacts the official publicly or privately, nor does it matter what the subject matter of the communication is (even if, as the opinion discussed, the attorney is *directly attempting to influence the city's substantive response to the litigation*). The State Bar determined that under any scenario "an attorney representing a client who is suing the city may communicate with any public official or the city council about a subject of the litigation without the consent of the city attorney." (State Bar Formal Op. No. 1977-43.)

Attorney or not, Ms. Rickert had a "fundamental and necessary" right to petition her government under the Public Records Act. This right is expressly recognized in the exception to rule 2-100 for communications with public officials, which permits an attorney to communicate directly with a public official about the subject matter of the litigation without the consent of the City Attorney. Ms. Rickert's exercise of her statutory and constitutional rights to petition her government regarding a matter of public importance was entirely within the scope of permitted professional conduct, and there is no basis to disqualify her or her or any members of her law firm under Rule of Professional Conduct 2-100.

III. Conclusion

Because the three documents at issue were produced by the City in response to a request under the Public Records Act, any privilege that may have previously attached was waived by operation of law when the City produced them under the Public Records Act. The fact that the documents may have been provided by inadvertence or mistake is of no consequence because "[v]oluntary disclosure of information as a public record, even if mistaken, constitutes a valid waiver" of a privilege. (*Masonite Corp. v. County of Mendocino Air Quality Management Dist., supra*, 42 Cal.App.4th at 455.) Moreover, the fact that the document was produced by the City itself, rather than through counsel, constituted an independent waiver under Evidence Code section 912, notwithstanding Government Code section 6254.5.

Of course, this is not to say that some or all of the documents in question were not privileged at one time. The City may have been well within its rights under Government Code section 6254(k) to withhold them from disclosure. But the City did not withhold them, it disclosed them to a member of the public under a statute that provided no recourse for their return and no consequence for their immediate and universal distribution. In doing so, the City waived any claim to privilege. Because privilege was waived, Plaintiff's counsel had no ethical duty to return a public record or to refrain from using it, and there is no basis to disqualify Ms. Rickert or any other attorney associated with Plaintiff. Likewise, Ms. Rickert's Public Records Act request was well within her "fundamental and necessary rights" as a citizen and her ethical duties as a lawyer under the Rules of Professional Conduct. Accordingly, the City's motion to compel return of the three purportedly privileged documents and to disqualify Plaintiff's counsel is DENIED.

COUNTY OF VENTURA

GUIDE TO THE

CALIFORNIA PUBLIC RECORDS ACT

2008

Office of the County Counsel

000364

B. Exemptions to Disclosure Are Specifically Limited by the CPRA

The CPRA states a general policy in favor of disclosure, so that support for refusal to disclose information must be found among specified exceptions to that general policy. (*Johnson v. Winter* (1982) 127 Cal.App.3d 435.) Please find more on exemptions from disclosure in section IX, below.

C. Segregating Exempt Materials

Where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required so that the nonexempt materials may be disclosed. (Gov. Code, § 6253, subd. (a); *Northern Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116.) If the exempt information can be removed or redacted, then you should do so and disclose the nonexempt portions of the record.

IV. CPRA DISCLOSURE EXEMPTIONS ARE PERMISSIVE BUT, IN GENERAL, SHOULD BE ASSERTED

The CPRA provisions authorizing nondisclosure of certain records do not prevent a local agency from opening those records to public inspection, unless disclosure is otherwise prohibited by law. (Gov. Code, § 6254.) However, in general, applicable exemptions should be asserted in order to protect privacy and to prevent waiver of confidentiality. Specific statutory exemptions from disclosure are discussed in section IX, below.

Government Code section 6254 sets forth certain categories of documents that are exempt from disclosure and also exceptions to the exemptions. Thus, section 6254 requires careful reading. However, it is clear that the exemptions from disclosure in Government Code section 6254 are *permissive, not mandatory,* i.e., they *permit* nondisclosure but do not *require* nondisclosure. (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905.)

V. WAIVER OF DISCLOSURE EXEMPTIONS: NO TURNING BACK

With very limited exceptions, if a document that would otherwise be exempt from disclosure is disclosed to any member of the public, any applicable exemption *is waived* and may not later be asserted. Waiver of the exemption occurs even if the disclosure was inadvertent.

Government Code section 6254.5 provides, in part, as follows:

> "Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from

Printer Friendly

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Redistricting 2011

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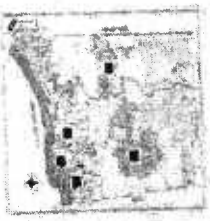
Resources



Reference Materials:

- 2001 Districts with 2010 Census Data
- California Statewide Database
- County of San Diego Charter
- County of San Diego Redistricting General Information Flyer
- National Conference of State Legislatures (NCSL) Redistricting Conference Meeting Materials
- State of CA Redistricting Assistance Site Flyer
- Strength in Numbers -Article
- U.S. Census Bureau
- US Department of Justice -Demographic Data Guidance
- US Office of Management and Budget - Bulletin 00-02: Guidance for agencies that collect or use aggregate data on race

Redistricting Advisory Committee (RAC) Notebook*(Delivered to RAC on 2/11/2011)*:

Meeting Information

- RAC Meetings

Redistricting Advisory Committee

- Welcome Letter
- Resolution to form the RAC
- Robert's Rules of Order

Board of Supervisors Actions

- **April 5, 2011**
  - BOS Appointment to RAC -Board Letter
  - BOS Appointment to RAC -Application
  - Minute Order
- **March 15, 2011**
  - Accept Redistricting Advisory Committee By-Laws
  - 2011 Redistricting Advisory Committee By-Laws
  - Minute Order
- **February 9, 2011**
  - BOS appointments to RAC
  - BOS appointments to RAC -Supporting Docs
  - Minute Order
- **January 25, 2011**
  - Redistricting San Diego County Supervisorial Districts
  - Resolution to Establish a Redistricting Advisory Committee
  - Attachment A - 2011 Redistricting Criteria and Guidelines
  - Attachment B - 2011 Redistricting Timeline
  - Minute Order
- **December 7, 2010**
  - Redistricting Board Letter
  - Minute Order

Redistricting Criteria

- Criteria

Existing Supervisorial District Maps

- District 1
- District 2
- District 3

- District 4
- District 5
- All Districts

Legal Sources

- Legal Overview
- California elections code 21500-21505
- County of San Diego Charter 400.1
- Federal Voting Rights Act Sec 2 [42 United States Code 1973, 1973b(f)(2)]
- The Ralph M. Brown Act
  - PowerPoint Presentation
  - Government Code 54950 et seq.
- California Public Records Act
  - PowerPoint Presentation
- Board of Supervisor Policy A-74

Waiver of exemptions

With very limited exceptions, if a document that is otherwise exempt is disclosed, *even by mistake*, any applicable exemption is waived and may not later be asserted

Gov't Code 6254.5

CERTIFICATE OF SERVICE

I, LaDonna Cothran, hereby certify that I am a citizen of the United States and a resident of the State of California, over the age of eighteen, and not a party to the within action.

On this 4th day of February 2015, I filed the original and 8 paper copies of the Plaintiff/Respondent's ANSWER TO PETITION FOR REVIEW in *Ardon v. City of Los Angeles*, No. S223876 (the "Brief"), with the Clerk of the Supreme Court of California via Federal Express Overnight Delivery and one electronic copy via online submission, served one copy of the Brief via Federal Express Overnight Delivery on the Clerk of the Court of Appeal of California, served one copy on the Honorable Amy D. Hogue, the trial court judge in the Los Angeles Superior Court via Federal Express Overnight Delivery, and served one copy of the Brief via U.S. Mail on all parties on the attached service list.

DATED: February 4, 2015

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

By LaDonna Cothran
LaDonna Cothran

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