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 Appellant

After a Decision by the Court of Appeal
Second Appellate District, Division Six
Case No. B252476

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

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To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Plaintiff/Respondent Estuardo Ardon ("Plaintiff") hereby respectfully submits his Answer Brief on the Merits.

I. INTRODUCTION

The Court of Appeal correctly held that the "plain language" of Government Code "section 6254.5 unambiguously expresses the Legislature's intention that everything produced in a response to a [Public Records Act] request must be accessible to everyone except in the limited circumstances stated in the statute itself," and that "disclosures pursuant to the PRA that are made inadvertently, by mistake or through excusable neglect, are not exempted from the provisions of [Government Code] section 6254.5 that waive any privilege that would otherwise attach to the production." (*Ardon v. City of Los Angeles* (2014) 232 Cal.App.4th 175, 182-183 [181 Cal.Rptr.3d 324] (*Ardon*) (the "Opinion").)

Neither the California Public Records Act, California Government Code section 6250 et seq. (the "PRA") nor the legislative history surrounding its enactment support reversal of the Second District's unanimous Opinion affirming Judge Edmon's carefully reasoned, eleven-page order denying the City's Motion to compel the return of documents and disqualify Plaintiff's counsel.[1] (*Ardon*, *supra*, 232 Cal.App.4th at p. 179.) The City conceded in its reply brief before the trial court that counsel's PRA request was a proper request for documents under the PRA. (See 2 Clerk's Tr. ("CT") 341.) Pursuant to this proper request, Plaintiff's

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[1] The Second Appellate District, Division Six (Burke, J.) (Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution, with Gilbert, P.J. and Yegan, J. concurring), affirmed the trial court's order denying the City's motion to compel Plaintiff to return privileged documents and to disqualify his counsel (the "Motion").

counsel received documents that they reasonably and validly believed need not be returned because any privilege that may have at one time been attached to them was statutorily waived under the PRA. Once the documents were disclosed, they became available to anyone as a matter of law. (2 CT 478.)

Plaintiff's counsel followed the procedural requirements of the PRA and made their admittedly proper request for public records concerning the City's telephone utility users tax ("UUT") on firm letterhead. The Court of Appeal, quoting Judge Edmon, directly rejected as baseless the City's argument that Ardon's counsel used her PRA request as "a deliberate end run around the City's assertions of privilege." (Opening Brief ("Op. Br.") at p. 43.) The Court of Appeal agreed with Judge Edmon that "'[n]othing in [Ms. Rickert's] request targeted privileged information. 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.'" (*Ardon*, *supra*, 232 Cal.App.4th at p. 183 [quoting 2 CT 482].) Moreover, the courts below found meritless the City's assertions that a PRA request on firm letterhead to the authority designated by the City for such requests constitutes "gamesmanship" and that compliance with the procedures established by the City for its processing of such requests made on the City through the Office of the City Administrator and the PRA equates to "mischief." (Op. Br. at p. 26; *Ardon*, *supra*, 232 Cal. App. 4th at p. 183.)

The Opinion is manifestly correct for many reasons. First, the PRA's express language provides that a local public agency's disclosure of documents pursuant to a PRA request results in an automatic publication of the documents and consequently waiver of any privilege pursuant to which it may have withheld production of the documents in the first instance.

(*Ardon, supra*, 232 Cal.App.4th at p. 179 [quoting Gov. Code, §§ 6254, subd. (k), 6254.5].) Authorities charged with responding to PRA requests have recognized that disclosure, even if inadvertent, equals waiver. (2 CT 369, 381.)

Government Code section 6254.5 ("Section 6254.5") contains nine exceptions to the waiver-by-disclosure rule; "inadvertent disclosure" is not one of them. Clearly, the Legislature knew how to create exceptions if it wanted to. The courts cannot read an exception into Section 6254.5 that the Legislature has not provided in the statute. (*Ardon, supra*, 232 Cal.App. 4th at p. 183 [quoting 2 CT 477].) This is particularly true here given the constitutionally embedded policies favoring disclosure and the Legislature's determination that evidentiary privileges shall exist solely as provided by statute. (See Gov. Code, § 6250 ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."]; Cal. Const., art. I, § 3, subd. (b)(2) [requiring the court to broadly construe a statute or court rule "if it furthers the people's right of access" and to narrowly construe the same "if it limits the right of access."]; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [20 Cal.Rptr.2d 330, 853 P.2d 496] ["Our deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute."].)

Furthermore, even if inadvertent disclosure were one of the exceptions to the waiver-by-disclosure rule, there was no legal "inadvertence" involved here since the City Administrator, a public officer acting for the City (not the City's attorneys), disclosed the documents to Plaintiff's counsel. (*Ardon, supra*, 232 Cal.App.4th at p. 179; 2 CT 479-480.) The law concerning "inadvertent disclosure" stems from the courts' analysis and application of Evidence Code section 912, which provides that

disclosure by *someone other than the holder of the privilege* without the consent of the holder is "inadvertent" and does not result in waiver. That is not the case here because the City, the holder of the privilege, disclosed the documents. Therefore, there was no basis for the City to seek return of any of the documents.

Moreover, even if inadvertent disclosure occurred here, the City's position is unsustainable. The PRA provides no mechanism for the return of documents once disclosed. (2 CT 478.) Rather, once disclosed the documents are available to anyone, and as Judge Edmon succinctly noted, "how can a public record, available to anyone who requests it as a matter of law, possibly be privileged?" (*Ibid.*) The City's disclosure constituted an independent waiver under Evidence Code section 912(a). (2 CT 480.)

Finally, with respect to disqualification, the parties have settled this case and the documents have not had, and will not have, any impact on this litigation. Plaintiff filed his unopposed motion for preliminary approval of the class action settlement on July 22, 2015. The City filed a Declaration in Support on that same day. The trial court's order denying the City's Motion to disqualify Plaintiff's counsel remains proper because mere exposure to an adversary's confidences is insufficient to warrant an attorney's disqualification. Indeed, the City has utterly failed to articulate how it has been or ever will be prejudiced. Plaintiff has not used the three documents at issue, even though it would not have been improper to do so for the reasons stated above, and the central merits issues in this case are issues of law confined to the application of the UUT to telephone services to which numerous federal appellate and district courts have already found it did not apply. Indeed, as Judge Mohr, the original trial judge, stated, had it not settled, this action would likely have been decided based upon stipulated facts and/or upon facts already admitted to by the City. (2 CT 284:6-7; pp. 304-307.)

There is no precedent for disqualifying counsel for receiving documents under circumstances that they reasonably and validly believed to constitute a waiver of any privilege under the PRA. The opinions of both the trial and appellate courts validate the reasonableness of counsel's belief. In the absence of violating a clear standard, counsel should not even be sanctioned, much less disqualified. Indeed, the trial court in exercising its discretion so concluded, and the Court of Appeal agreed. (2 CT 484; *Ardon, supra*, 232 Cal.App.4th at p. 184.) The City's repeatedly cited decision, *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 648 [82 Cal.Rptr.2d 799] (*State Fund*), is in accord. (See *ibid.* [Court unanimously reversed sanctions in absence of clear standard].)

There is no reason to believe that Plaintiff's counsel's exposure to the three documents at issue had any, much less would have a continuing, impact on this settled litigation. On the other hand, the prejudice that would be suffered by Plaintiff from losing his chosen counsel, who have diligently litigated this action for nearly nine years—including obtaining this Court's unanimous reversal of opinions by the trial and appellate courts—cannot be denied. (See *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 253 [128 Cal.Rptr.3d 283, 255 P.3d 958].) Disqualification motions are disfavored for just this reason.

This Court should affirm the unanimous Opinion affirming Judge Edmon's order denying the City's Motion in all respects.

II. STATEMENT OF FACTS

A. Nature of the Action

Prior to March 2008, the City's UUT ordinance imposed a 10 percent tax on amounts paid for ***all*** telephone services used by every person located within the City. (1 CT 21, ¶ 1; p. 25, ¶ 26.) However, the plain language of ***the UUT expressly excluded from taxation all amounts paid***

for telephone services not taxable under the Federal Excise Tax (26 U.S.C. § 4251) (the "FET"). (*Id.* at p. 26, ¶ 28.)

The FET, adopted in 1965, applies to only three, narrowly defined types of telephone service: local service, teletypewriter exchange service, and long distance service where calls are charged by both time and distance. (1 CT 21, ¶ 3; p. 27, ¶ 36.) Five United States Circuit Courts of Appeal, the Court of Federal Claims, and five United States District Courts have all concluded that typical modern long distance telephone service is not subject to the FET. (*Id.* at p. 22, ¶ 5; p. 28, ¶ 42.) Following these clear holdings, in 2006 the Internal Revenue Service ("IRS") ceased collecting taxes on all telephone service except local-only telephone service and offered refunds to all taxpayers in the United States by way of their 2006 federal tax return. (*Id.* at p. 28, ¶ 44; pp. 40-53.) In stark contrast, however, the City continued to require telephone companies to collect and remit taxes from telephone users on services to which neither the FET nor, consequently, the UUT which expressly incorporated the FET applied, and has never offered its taxpayers refunds. (*Id.* at p. 26, ¶ 28.)

B. Procedural History

Plaintiff filed a class tax refund claim with the City on October 19, 2006, which the City rejected on December 7, 2006. (1 CT 31, ¶¶ 64-67; pp. 55-58; p. 60.) Plaintiff filed his class action complaint on December 27, 2006 and an amended class action complaint on March 27, 2007, after the City, on January 9, 2007, purported to amend the UUT ordinance without voter approval to eliminate the reference to the FET. (*Id.* at p. 32, ¶¶ 68-71.)

On May 2, 2007, the City filed a demurrer to Plaintiff's complaint. The trial court held that Plaintiff's class claim was not permitted, and Plaintiff appealed. The Court of Appeal affirmed the trial court's order. (*Ardon v. City of Los Angeles* (2009) 174 Cal.App.4th 369 [94 Cal.Rptr.3d

245] (lead opn. of Kitching, J.); see *id.*, at pp. 386-387 (conc. opn. of Klein, P.J. ["In view of the confusion in this area, it would be helpful for the Supreme Court to grant review in this case . . . ."]; *id.* at pp. 387-389 (dis. opn. of Croskey, J.).) On July 25, 2011, this Court unanimously reversed the trial and appellate court rulings and ruled in Plaintiff's favor. (*Ardon v. City of Los Angeles, supra,* 52 Cal.4th at p. 253.)[2]

In March and September of 2007, Plaintiff served the City with discovery and served a subpoena on the League of California Cities (the "League") for the production of business records concerning the UUT. (1 CT 158-175.) On March 28, 2008, Judge Mohr granted motions to quash filed by the League and the City, finding that emails posted by attorneys in the League's List Serve, whose members sign a confidentiality agreement as a condition precedent to joining the group, are protected by the attorney-client and attorney work product privileges. (*Id.* at pp. 177-181.)[3] Judge Mohr's Order did not address documents created by the League or any of the other documents at issue here.

On February 6, 2008, the City provided counsel for Plaintiff with a privilege log. The privilege log describes 27 documents the City claimed were privileged, including several documents authored by or sent to the

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[2] Plaintiff's counsel also shortly thereafter secured a unanimous decision from this Court in the plaintiff's favor in a similar UUT refund class action against the City of Long Beach, which is represented by the same counsel as the City here. (See *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 623 [155 Cal.Rptr.3d 817, 300 P.3d 886] (*McWilliams*).)

[3] Plaintiff did not have an opportunity to appeal that interlocutory order.

League, and a catch-all entry for "Communications by and between persons on League of Cities Attorneys' List Serve." (*Id.* at pp. 195-201.)[4]

On January 14, 2013, Ms. Rachele Rickert, on Wolf Haldenstein firm letterhead, made a PRA request to the City Administrative Officer that could be made by any member of the public. (2 CT 267 ¶ 2; p. 269.) "The request . . . broadly asked for documents relating to the IRS' 2006 interpretation of the FET, the City's preparation of the UUT, and documents from [the] City's Task Force (*not* the City Attorney) statewide coordination efforts." (2 CT 482, fn. 3; see also *id.* at p. 267, ¶ 2; p. 269.) Ms. Rickert is a partner with Wolf Haldenstein, one of the firms representing Plaintiff in this action. (*Id.* at p. 267, ¶ 1.) On January 25, 2013, Mr. Raymond Ciranna, Assistant City Administrative Officer, contacted Ms. Rickert and notified her that he had approximately 53 documents pertaining to her request. (*Id.* at p. 267, ¶ 3; p. 272.) Thereafter, on February 5, 2013, the Office of the City Administrative Officer mailed a CD containing the 355 pages of documents to Ms. Rickert. (*Id.* at p. 267, ¶ 4.) That CD remains in certain of Plaintiff's counsel's possession and is available to this Court. That CD has not been disseminated to the public and is solely in the possession of Plaintiff's counsel.

Upon reviewing the documents, Ms. Rickert noticed that two of the documents appeared to match the descriptions of documents listed on the City's privilege log (Nos. 2 and 4), while another, not specifically identified on the City's log, appeared to have been drafted in response to a document that is listed (twice) on the City's log (Nos. 3 and 21). (2 CT 264; p. 267, ¶ 5.) Specifically, the documents at issue are:

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[4] Plaintiff brought a motion to compel production of 14 of the 27 documents, and on October 31, 2013, the trial court ordered the City to produce 12 of the 14 documents.

1. an undated City Inter-Departmental Correspondence memorandum from William T. Fujioka, City Administrative Officer, to Rockard J. Delgadillo, City Attorney, with a subject of "IRS Notice Regarding Federal Excise Tax" (the "Fujioka Memo");
2. a memorandum by the Legal Department, League of California Cities to "California City Attorneys," dated June 27, 2006 with a subject line of "Federal Excise Tax Announcement and Utility Users Tax" (the "League Memo"); and
3. a City Inter-Departmental Correspondence dated September 28, 2006 from Fujioka to David Michaelson, Chief Assistant City Attorney, with a "Reference: Your Letter Dated September 18, 2006" (the "Fujioka Letter").

These are collectively referred to herein as the "Three Documents." (2 CT 264.)

Despite the City's repeated and erroneous contention to the contrary, the 355 pages of documents produced on the CD did not include a September 18, 2006 letter from Chief Assistant City Attorney, David Michaelson, to City Administrative Officer, William Fujioka, which the City calls the "Michaelson Letter" (Op. Br. at pp. 7-8), and Plaintiff's counsel does not have and never had a copy of that letter. (See 1 CT 91; 2 CT 264, ¶ 5(a)-(c); p. 267.)[5]

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[5] Plaintiff pointed out in his opposition before the trial court (2 CT 251-252, fn. 6.), in his preliminary opposition to the City's petition for writ of mandate (at p. 7), and in his answering brief in the Court of Appeal (at p. 8) that his counsel do not possess the Michaelson Letter and that the letter was not on the CD, yet the City persists in claiming that they do and that it was produced. (Op. Br. at 46.) It is unclear what the City's motive is in repeating this mistake over and over again after it has repeatedly been put on notice that Plaintiff's counsel do not have, never had and have never seen the Michaelson Letter.

Ms. Rickert immediately conducted legal research and concluded that, pursuant to express language of the PRA, the City had waived any privilege that may have attached to the Three Documents. Ms. Rickert then set the documents aside and turned to other pressing professional commitments arising from the fact that on February 6, 2013, Plaintiff's counsel received notice from this Court that oral argument had been scheduled in the related *McWilliams v. City of Long Beach* action for March 5, 2013. Subsequently, out of an abundance of caution, Ms. Rickert brought her receipt of the Three Documents to the attention of Ms. Holly Whatley, counsel for the City, in a meet-and-confer letter dated April 3, 2013, in order to give the City an opportunity, if it so desired, to make a motion asserting a privilege claim to the Three Documents. (2 CT 264-265, ¶ 6; 1 CT 78-84.)

Three weeks later, after the City's counsel lost a second unanimous decision before this Court in the related *McWilliams* matter to Plaintiff's counsel it seeks to disqualify here,[6] the City filed the Motion. (2 CT 265.) The trial court decisively rejected the City's tactical maneuver to disqualify in an eleven-page, single-spaced opinion, after allowing the City to make its case through not only customary opening and reply briefing, but also extended supplemental and supplemental reply briefing and two oral arguments. The City then filed an appeal and a Petition for Writ of Mandate, which the Court of Appeal denied. (*City of Los Angeles v. Superior Court of Los Angeles County*, petition denied Dec. 12, 2013, B252460.) The City never sought to stay the trial court's order pending resolution of its writ petition or appeal.[7] Plaintiff thereafter filed his motion

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6 *McWilliams, supra*, 56 Cal.4th 613.

7 The trial court *sua sponte* also examined whether or not counsel for Plaintiff had violated Rule of Professional Conduct 2-100 and found it did not apply. (2 CT 481-483.) The Court of Appeal affirmed. (*Ardon, supra,*

for class certification, but before the motion was heard, the parties settled the action. Plaintiff filed his motion for preliminary approval of the class action settlement and the City filed a declaration in support on July 22, 2015, with a hearing date of August 13, 2015.

Plaintiff's counsel have never had possession of the Michaelson Letter and have not used the Three Documents in question or their contents in this litigation, nor do they intend to do so. (2 CT 265, ¶ 7.) At the end of this litigation, Plaintiff's counsel will, if requested, return or destroy the Three Documents at the City's option.

III. STANDARD OF REVIEW

Those portions of the opinions below dealing with the proper interpretation of Section 6245.5 involve questions of law subject to de novo review. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159 [84 Cal.Rptr.3d 597, 194 P.3d 330] ["As to the trial court's conclusions of law, however, review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion."].)

However, as the City concedes, a trial court's decision on a motion for disqualification is reviewed for abuse of discretion. (Op. Br. at p. 10; see also *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 685 [158 Cal.Rptr.3d 761]; *Clark v. Superior Court (VeriSign)* (2011) 196 Cal.App.4th 37, 46 [125 Cal.Rptr.3d 361] ["A trial court's ruling on a disqualification motion is reviewed under the deferential abuse of discretion standard."].) "As to disputed factual issues, a reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact." (*In re Charlisse C., supra*, 45 Cal.4th at p. 159.)

Moreover, applications for disqualification are generally disfavored. (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300-01 [254

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232 Cal.App.4th at pp. 183-184.) The City has not appealed from these holdings in that regard.

Cal.Rptr. 853] [motions to disqualify "can be misused to harass opposing counsel . . . [or] to delay the litigation"].)

In prosecuting this appeal, the City ignores well-settled rules that govern review of the trial court's decision here. First, "[t]he order is subject to reversal only when there is no reasonable basis for the trial court's decision." (*Federal Home Loan Mortg. Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860 [80 Cal.Rptr.2d 634].) Indeed, the "trial court's application of the law to the facts is reversible only if arbitrary and capricious." (*In re Charlisse C., supra*, 45 Cal.4th at p. 159.)

The City does not argue that the trial court's decision to deny the City's Motion for disqualification was arbitrary or capricious since the trial court clearly gave serious consideration to the points raised by the parties in multiple rounds of briefing and two rounds of oral argument and issued a very detailed, eleven-page, carefully reasoned opinion. (1 CT 121-140, 2 CT 338-350, p. 400 [declaration referencing supplemental brief], pp. 432-437.) In that opinion, based on the facts presented to it that, *inter alia*, Counsel's request was openly made on firm stationery, sought generic categories of public records, was not designed to elicit information subject to attorney-client privilege, was posed to the parties charged by the City with responding to it, and that the City Administrator's office and not the City's counsel disclosed the materials at issue, Judge Edmon concluded that: "It is difficult to conceive of a request more squarely within the Legislature's intent in enacting the Public Records Act." (2 CT 482.) Moreover, based on these facts, contrary to finding the "mischief" and "gamesmanship" asserted by the City, Judge Edmon concluded that "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." (2 CT 484 [quoting Gov. Code, § 6250].)

The trial court's carefully considered decision does not become arbitrary or capricious simply because the City disagrees with it.

Second, "[t]he judgment of the trial court is presumed correct; all intendments and presumptions are indulged to support the judgment; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court's resolution of any factual disputes arising from the evidence is conclusive." (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 728 [135 Cal.Rptr.2d 415] [internal quotations and citations omitted].)

Finally, if the trial court's order "is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds upon which the lower court reached its conclusion." (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610 [92 Cal.Rptr.2d 897] [affirming judgment awarding punitive damages, where trial court relied on erroneous theory of entitlement to punitive damages, but a valid theory existed].)

IV. LEGAL ARGUMENT

A. The City's Disclosure of the Three Documents Resulted in a Statutory Waiver of Any Privilege Pursuant to which the City Might have Withheld the Documents

1. Both the California Constitution and the Government Code Provide That The PRA Must Be Broadly Construed in Favor of the People's Right of Access

The PRA's purpose, as described by the Legislature, is to ensure that governmental information is widely available to the public because "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; see also 2 CT 482; *Sierra Club v. Superior Court* (2013) 57 Cal.4th

157, 164 [158 Cal.Rptr.3d 639, 302 P.3d 1026].) Moreover, the California Constitution requires courts to broadly construe a statute or court rule "if it furthers the people's right of access" and to narrowly construe the same "if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).)

2. The Plain Language of Section 6245.5 Provides that Disclosure Constitutes Waiver

The City has admitted that Plaintiff's counsel's utilization of the PRA in addition to formal discovery to gather evidence in this action was proper. (See 2 CT 341.)[8] The PRA does not require obtaining the consent of or giving notice to the City's litigation counsel prior to making a PRA request. (2 CT 483 [An exception to Rule 2-100 of the Rules of Professional Conduct "permits an attorney to communicate directly with a public official about the subject matter of the litigation without the consent of the City Attorney."].)

Furthermore, the PRA's plain language provides that a local agency's disclosure of documents pursuant to a PRA request results in an ***automatic waiver of <u>any</u> privilege that may have applied***. Section 6254.5 provides, in pertinent part:

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[8] See also *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 826 [98 Cal.Rptr.2d 564] (*Axelrad*) ["[A] plaintiff who has filed suit against a public agency may, either directly or indirectly through a representative, file a [PRA] request for the purpose of obtaining documents for use in the plaintiff's civil action[]."]; Gov. Code, § 6257.5 [The PRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested . . . "]; *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77, 82-83 [77 Cal.Rptr.2d 629] [holding that the plaintiff had the right to documents pursuant to a PRA request even though she was preparing to file a lawsuit and would have access to defendant's documents through discovery: "It is not the prerogative of the courts to insist that petitioner employ one type of remedy over another where the Legislature has expressly made both equally available."].

> ***Notwithstanding any other provisions of law***, whenever a state or local agency discloses a public record which is otherwise exempt from [the PRA], 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....

(Emphasis added.)

Section 6254, subdivision (k) expressly relates to a governmental entity's ability to withhold from its response to a PRA request: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k).) Therefore, "[S]ection 6254.5 provides that disclosure of a privileged document pursuant to the [PRA] constitutes a waiver of any privilege provided in the Evidence Code by converting the document from a confidential document exempt from disclosure under the [PRA] into a public record, accessible by any member of the public." (2 CT 476; see also *Ardon*, *supra*, 232 Cal.App.4th at p. 179.) The City admits that documents cannot be selectively disclosed. (Op. Br. at p. 5, 18.) As Judge Edmon correctly observes: "[H]ow can a public record, available to anyone who requests it as a matter of law, possibly be privileged?" (2 CT 478.)

Furthermore, Section 6254.5 defines "agency" to include "a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment." Here, the disclosure was made by an employee in the City Administrator's office, and there is no dispute that the employee was acting within the scope of his employment.[9]

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[9] *State of California v. Superior Court* (1981) 29 Cal.3d 240, 244 [172 Cal.Rptr.713, 625 P.2d 256] and *County of San Diego v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, 824 [186 P.2d 124] cited by the City, are inapposite. Those cases concerned principles of estoppel, which are not

3. The Legislature Does Not Recognize Inadvertent Disclosure as an Exception to the Automatic Waiver Rule

The City requests this Court to read an exception for "inadvertent disclosure" into section 6245.5 that does not exist in the statute. Section 6254.5 enumerates in unambiguous language nine specific exceptions to the waiver-by-disclosure rule, but that enumeration does not include "inadvertent disclosure." (See Gov. Code, § 6254.5, subds. (a)-(i).)[10] A basic principle of statutory construction, *expressio unius est exclusio alterius* ("the expression of certain things in a statute necessarily involves exclusion of other things not expressed") mandates that an "inadvertent disclosure" exception may not be read into a statute in which the Legislature declined to insert it.

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present here. In any event, as noted by the Court of Appeal for the Ninth Circuit, while "[e]arlier cases frequently declared that estoppel against the government is rare and should be invoked only in extraordinary circumstances [citing *San Diego v. California Water and Telephone Co.*], [t]he modern rule is more flexible, and generally permits the application of estoppel against the government when the traditional elements of estoppel are present. (*Sawyer v. County of Sonoma* (9th Cir. 1983) 719 F.2d 1001, 1006 & fn. 12 [citing California cases].) Moreover, those cases did not concern the PRA, which specifically authorizes employees of an agency responding to a PRA request to waive privilege by disclosing the documents. (Gov. Code, § 6254.5.)

[10] Whether a waiver occurred here does not turn on whether the member of the public who requested the records is an attorney. (Op. Br. at pp. 40-41.) It is well established that "[t]he [PRA] does not differentiate among those who seek access to public information. It 'imposes no limits upon who may seek information or what he may do with it.'" (*State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190-91 [13 Cal.Rptr.2d 342] [citation omitted]. See also Gov. Code, § 6252, subds. (b), (c).) As Judge Edmon held: Ms. Rickert's Public Records Act request was not only "well within her 'fundamental and necessary rights' as a citizen," but also "her ethical duties as a lawyer under the Rules of Professional Conduct." (2 CT 484; see also *Ardon, supra*, 232 Cal.App.4th at p. 184.)

> disclosure be "intentional," notwithstanding the failure of section 912 to distinguish between intentional and inadvertent disclosures.

(*Newark Unified*, *supra*, 2015 Cal.App.LEXIS 671 at p. *16.)

The *Newark Unified* court erred when it failed to recognize that *State Fund* concerned disclosure by an attorney and not disclosure by the holder of the privilege. The requirement in Evidence Code section 912 that disclosure occur without "coercion" applies to a disclosure by the holder of the privilege whereas a disclosure made by "anyone" else requires "consent" by the holder of the privilege. Therefore, the *Newark Unified* court took the holding in *State Fund*, which concludes that waiver does not include inadvertent disclosure "by the attorney," and applied it to the facts before it, which, as in this case, concerned disclosure by the ***holder*** of the privilege itself. The *Newark Unified* court's analysis is wrong because, as Judge Edmon correctly observed, "[t]he plain language of section 912(a) and the City's preferred case [*State 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 disclos[ure] of privileged documents. The City Administrator made the disclosure, not the City Attorney." (2 CT 480.)[13]

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[13] See *Underwater Storage, Inc. v. United States Rubber Co.* (D.D.C. 1970) 314 F.Supp. 546, 548-49 [where plaintiff turned over document to his attorney for production to the defendant and later claimed the production was inadvertent, the court held his position to be "untenable."] "The plaintiff turned over to his attorney the documents to be produced. This letter was among them. The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege . . . . Any privilege that may have attached to the document was destroyed by the

b. The PRA Draws A Clear Distinction Between Documents Produced Pursuant to the PRA and Documents Produced in other Legal Proceedings

One of the fundamental errors underlying the *Newark Unified* decision is its mistaken holding that: "Evidence Code section 912 and Government Code section 6254.5 are equally applicable to govern the waiver of privilege in these circumstances." (*Newark Unified, supra*, 2015 Cal.App.LEXIS 671 at p. *33.) To the contrary, the Legislature in the PRA draws a clear distinction between the treatment accorded to documents produced in response to a PRA request and documents produced through other legal proceedings such as in formal discovery:

> "[The automatic waiver] shall not apply to disclosures . . . [m]ade through other legal proceedings or as otherwise required by law . . . ."

(Gov. Code, § 6254.5, subd. (b). See also *Ardon, supra*, 232 Cal.App.4th at p. 181 ["section 6254.5, subdivision (b), explicitly states that a privilege is not waived if disclosure is compelled by legal process or proceedings"]; *Axelrad, supra,* 82 Cal.App.4th at p. 829, fn. 9 [recognizing the contrast between civil discovery rules and right of access to information under the PRA].)[14]

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voluntary act of disclosure." (*Id.* at p. 549 [citing *D'Ippolito v. Cities Service Co.* (S.D.N.Y. 1965) 39 F.R.D. 610].)

[14] The City's citations to *State Fund, supra*, 70 Cal.App.4th at p. 648, *Clark, supra,* 196 Cal.App.4th 37 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758, 171 P.3d 1092] (*Rico*) are inapposite because of this distinction and the underlying fact that the purportedly privileged documents were not released, as here, by the privilege holder pursuant to a proper request made pursuant to the PRA. They were decided under Evidence Code section 912 and involved inadvertent disclosure by the privilege holder's attorney during formal discovery in litigation (*State Fund* and *Rico*) or theft of the documents (*Clark*).

Therefore, while inadvertent disclosure by an attorney, as opposed to a party, that occurs in the context of formal litigation discovery may create a duty for an attorney to notify opposing counsel of the apparent inadvertent disclosure, in the context of a party's response to a PRA request, an automatic waiver occurs and the member of the public to whom the disclosure was made has no duty to notify the agency who disclosed the materials about any aspect of the disclosure. (See *Ardon*, *supra*, 232 Cal.App.4th at p. 180 ["'disclosure of documents under the [PRA] is not the same as disclosure in the course of litigation discovery.'"] [quoting 2 CT 476].) Pertinently, the PRA does not provide any mechanism for the "clawback" of any documents disclosed pursuant to a PRA request, in contrast to the "clawback" statute applicable to discovery, Code of Civil Procedure section 2031.285. (*Ardon*, *supra*, 232 Cal.App.4th at pp. 180-181; 2 CT 478.) To the contrary, the PRA provides, as the City admits, that any document disclosed must be available to any other member of the public. (*Ardon*, *supra*, 232 Cal.App.4th at pp. 180-81; 2 CT 478; Op. Br. at pp. 5, 18.)

Consequently, the City's citation to law pertaining to formal civil discovery is misplaced and certainly provides no basis for the extreme sanction of disqualification. Indeed, the Court of Appeal found that the City's position that "PRA requests are akin to discovery requests in litigated disputes" and that "'inadvertent production' of privileged material should be treated similarly in both forums . . . ***finds no support in the statute or the legislative history that surrounds the enactment of the PRA***." (*Ardon*, *supra*, 232 Cal.App.4th at p. 180 [emphasis added].) Therefore, the City's heavy reliance on *State Fund*, where the Court refused to sanction much less disqualify counsel in the absence of an established standard and where the inadvertent disclosure by an attorney (not the actual privilege-holder as here) in civil discovery did not constitute waiver, is

misplaced since the very manner of the documents' disclosure here "unequivocally indicated that any privilege was waived." (2 CT 481.)[15]

c. Case Law Supports Plaintiff's Position

Directly rejecting the City's position, California courts have emphasized in similar contexts that voluntary disclosure, even if inadvertent, constitutes waiver pursuant to Section 6254.5. (See *Masonite Corp. v. County of Mendocino Air Quality Management District* (1996) 42 Cal.App.4th 436, 455 [49 Cal.Rptr.2d 639] (*Masonite*) ["Voluntary disclosure of information as a public record, even if mistaken, constitutes a valid waiver of trade secret protection."]; *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 787 [152 Cal.Rptr. 846] ["If no claim of confidentiality or exemption from disclosure was then and there asserted it is deemed waived."]; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 [117 Cal.Rptr. 106] ["When a record loses its exempt status and becomes available for public inspection, section 6253, subdivision (a), endows *every citizen* with a right to inspect it."] [emphasis in original]; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321-22 [89 Cal.Rptr.3d 374] ["Disclosure to one member of the public would constitute a waiver of the exemption, requiring disclosure to any other person who requests a copy."] [citations omitted]; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018 [88 Cal.Rptr.2d 552] ["[O]nce a public record is disclosed to the requesting party, it must be made available for inspection by the public in general."].)

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[15] Plaintiff's counsel's obtainment of the documents in response to an admittedly proper PRA request is in no way similar to the plaintiff's conduct in *Clark, supra,* 196 Cal.App.4th 37. There the plaintiff removed privileged documents when he left the company and attempted to use them later in litigation against his former employer.

In *Masonite, supra*, 42 Cal.App.4th 436, Masonite sought to enjoin the Air Quality Management District (the "District") from disclosing certain documents to a third party under the PRA because Masonite contended the documents were trade secrets not subject to disclosure. (*Id.* at pp. 440-441.) In the pertinent part of *Masonite*, documents that Masonite delivered to the District were not properly designated by Masonite as trade secrets ("category 2 information"). (*Id.* at pp. 453-454.) The Court of Appeal held that Masonite's inadvertent failure to label its documents as trade secrets waived any trade secret privilege that would have prevented disclosure under the PRA. (*Id.* at pp. 454-455.) As the Court held: Masonite was "afforded the opportunity to properly claim a trade secret, and by doing so prevent[] disclosure of confidential information." (*Id.* at p. 455.) Masonite's failure to properly designate its category 2 information as trade secrets, however, transformed the privileged documents into unprivileged public records because "[v]oluntary disclosure of information as a public record, even if mistaken, constitutes a valid waiver of trade secret protection." (*Ibid.*) "[T]he release by the District [of the category 2 information] was within the proper scope of authority to disclose public records" under Section 6254.5. (*Id.* at p. 454.)[16]

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[16] Some of the documents that Masonite delivered to the District were *properly designated* as trade secrets by Masonite (the "category 3 information"). The District subsequently sent the category 3 information to another agency which, not realizing the reports contained "'information for which a claim of trade secret protection had been made,' by Masonite" released the material to a member of the public. (*Masonite, supra*, 42 Cal. App. 4th at p. 450.) The Court of Appeal held that the category 3 information did not become public records because "[t]he mistaken and inadvertent release of the Category 3 information by the [agency] was, according to the undisputed evidence presented by Masonite, outside the proper scope of the employee's duties." (*Id.* at p. 452.) That portion of *Masonite* is inapplicable here, where the holder of the privilege, the City itself, disclosed its own documents and not those of a third party.

The *Newark Unified* court missed the point of this pertinent holding in *Masonite*. The *Newark Unified* court's interpretation of *Masonite* as assuming an "intentional rather than inadvertent release of [category 2] documents by the public agency" and therefore having "no bearing on, and plainly did not purport to address, the consequences of inadvertent release," (*Newark Unified*, *supra*, 2015 Cal.App.LEXIS 671 at p. *40) is contrary to the following language in *Masonite*: "Once the category 2 information was submitted in the reports without trade secret designation, ***whether deliberately or inadvertently***, it was a public record which the District, and others, could disclose without restriction to the public generally." (*Masonite*, *supra*, 42 Cal.App.4th at p. 455 [emphasis added].) The focus in *Masonite* as to the release of category 2 information, as it should have been in *Newark Unified* and as it should be here also, is on whether the *holder of the privilege* knowingly disclosed the information. As the *Masonite* court correctly held, "[v]oluntary disclosure of information as a public record, even if mistaken, constitutes a valid waiver" of privilege. (*Ibid.*) "'Generally, "waiver" denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right.'" (*Ibid.* [quoting *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 [24 Cal.Rptr.2d 597, 862 P.2d 158]; *Berkeley Unified School District v. State of California* (1995) 33 Cal.App.4th 350, 362 [39 Cal.Rptr.2d 326]].)[17]

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[17] "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." (8 Wigmore, Evidence § 2327 (McNaughton rev. 1961.) See also McCormick, Evidence § 93 (Cleary ed. 1972)

Here, the City was also "afforded the opportunity to properly claim" privilege of its documents and "by doing so prevent disclosure of confidential information." (*Masonite*, *supra*, 42 Cal.App.4th at p. 455.) Instead, the City gave the documents to a member of the public, waiving any claim of privilege that may have previously attached. (See 2 CT 479.) As Judge Edmon noted while referring to the *Masonite* facts, "'If anything, the case for waiver is only stronger . . . . 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 [PRA].'" (*Ardon*, *supra*, 232 Cal.App.4th at p. 182 [quoting 2 CT 479].)

The City attempts to distinguish *Masonite* on the basis that the opinion applies trade secret law, which the City argues without citation to any authority "does not exempt inadvertently disclosed materials." (Op. Br. at p. 23.) The trade secret privilege, like the attorney-client privilege, is one of the many privileges enumerated in Division 8 of the Evidence Code. The trade secret privilege, like the attorney-client privilege, is also subject to waiver. (See *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1141 [84 Cal.Rptr.2d 350, 356] [defendant gas company, "as a matter of law, waived its right to assert the trade secret privilege" by failing to timely object to requests for production of documents on that basis].) The trade secret privilege, like the attorney-client privilege, is also exempted from disclosure by Government Code section 6254, subdivision (k) which references "the Evidence Code relating to privilege." Moreover, the City's statement that trade secret law "does not exempt inadvertently disclosed materials" ignores one of the holdings in *Masonite* itself—that "[t]he

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["[w]aiver includes . . . not merely words or conduct expressing an intention to relinquish a known right, but conduct, such as a partial disclosure, which would make it unfair for the client to insist on the privilege thereafter."].)

Furthermore, both the trial court and Court of Appeal correctly recognized that not only must a court generally "assume that the Legislature knew how to create an exception if it wished to do so," but also that, specifically here, the Legislature "clearly knew how to create an exception to the otherwise absolute waiver provision in section 6254.5: it created nine of them," and none provide an exception for inadvertent disclosure. (*Ardon*, *supra*, 232 Cal.App.4th at p. 183 [internal quotations and citation omitted] [quoting 2 CT 477].)

Where, as here, the Legislature has enumerated nine specific exceptions, courts cannot imply others. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 [150 Cal.Rptr.3d 111; 289 P.3d 884]; see also *City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902 [16 Cal.Rptr.2d 232] [same].) As this Court has recognized in a case relied on by the City, "deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid. Code, § 911.)" (*Roberts v. City of Palmdale*, *supra*, 5 Cal.4th at p. 373.)

Local agencies charged with implementing the PRA, such as Ventura and San Diego Counties, for example, recognize that inadvertent disclosure constitutes a waiver. (2 CT 369 [County of Ventura recognizes in its 2008 *Guide To The California Public Records Act* that if a document that "would otherwise be exempt [] is disclosed to any member of the public, any applicable exemption *is waived* and may not later be asserted . . . even if the disclosure was inadvertent." (citing Gov. Code, § 6254.5) (emphasis in original)]; 2 CT 381 [San Diego County PowerPoint presentation downloaded from its web site on July 9, 2013, demonstrating it agrees].) Whether this will require agencies to "staff records request[s] with lawyers" as the City predicts (Op. Br. at pp. 30-31) is an issue the City

should raise with the California Legislature, not this Court.[11]

4. There is no Conflict Between Section 6254.5 and Evidence Code Section 912

The court in *Newark Unified School District* recently mistakenly concluded that it was "compelled to interpret section 6254.5 to exclude inadvertent disclosures in order to avoid a conflict with Evidence Code section 912." (*Newark Unified School District v. Superior Court* (July 31, 2015, No. A142963) 2015 Cal.App.LEXIS 671 at p. *24 (*Newark Unified*).) However, nowhere in the opinion does that court consider that the Legislature has already avoided the very conflict the *Newark Unified* court felt it was compelled to avoid. Section 6254.5 provides that "***[n]otwithstanding any other provisions of law***, whenever a state or local agency discloses a public record ... this disclosure shall constitute a waiver of the exemptions specified in Section[] 6254 . . . " (Gov. Code, § 6254.5.) Section 6254 subdivision (k) specifically relates to privileges under the Evidence Code. Therefore, section 6245.5 expressly provides that disclosure constitutes a waiver of those privileges.[12]

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[11] Publicly available practices and procedures for the cities of Fresno and San Jose and the counties of Santa Clara and San Diego require review by the city attorney or county counsel when there is a question whether a responsive document is exempt. (See, e.g., 2 CT 455-456.) The City appears to already follow a similar policy. (2 CT 458-460.)

[12] *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal. 4th 557, 573 [87 Cal.Rptr.3d 700, 198 P.3d 1109] cited by the City, is distinguishable. *Schatz* concerned the presumption against implied preemption or repeal because the Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6200 et seq.) at issue in that case does not expressly state that the arbitration it creates is to the exclusion of any other arbitration, such as pursuant to the California Arbitration Act (Code Civ. Proc., § 1280 et seq.). Here, in contrast, the Legislature expressly stated in the PRA that its waiver-by-disclosure provision applies to the privileges specified in Section 6254, subdivision(k) "[n]otwithstanding any other provisions of the law."

The *Newark Unified* court quotes this language from section 6245.5, but then fails to consider it as part of its analysis of the statute. Section 6254.5 and Evidence Code section 912 are not "equally applicable to govern the waiver of privilege" in these circumstances (*Newark Unified, supra,* 2015 Cal.App.LEXIS 671 at p. *33) because the Legislature made clear that Section 6254.5 applies to responses to PRA requests *to the exclusion of all other provisions of law.* (Gov. Code § 6254.5.) The Legislature also made clear that the Section 6254.5 waiver-by-disclosure rule "shall not apply to disclosures . . . [m]ade through other legal proceedings . . . ." (*Ibid.*) Therefore, interpreting section 912 as equally applicable to PRA requests would not only render superfluous the "[n]otwithstanding any other provisions of law" language, but would also render meaningless the Legislature's clear distinction drawn between disclosures made pursuant to a PRA request and disclosures made in other legal proceedings, including discovery in litigation, which is contrary to the rules of statutory interpretation. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 [279 Cal.Rptr. 834, 807 P.2d 1063] ["Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary."].)

a. "Inadvertent Disclosure" Law Applies to Disclosures Made by Someone Other Than the Holder of the Privilege

In analyzing the language of Evidence Code section 912 and *State Fund*'s interpretation of it, the *Newark Unified* court erroneously stated:

> Under subdivision (a) of section 912, the right to claim the specified privileges "is waived . . . if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Despite the statute's declaration that any uncoerced "disclosure" creates a waiver, courts have consistently held that inadvertent disclosures do not. In the leading case, [*State Fund*], the court read into the statute the requirement that a

mistaken and inadvertent release of the Category 3 information" by the public agency did not constitute waiver because, in effect, the agency did not have consent from the holder of the privilege (Masonite) to disclose the information. (*Masonite*, *supra*, 42 Cal.App.4th at p. 452.) As discussed in section IV.A.4.a. *supra*, "inadvertent disclosure" law is based upon considerations of waiver. As Judge Edmon observed, "waiver by an attorney (which requires consent) is distinct from waiver by the actual holder of the privilege." (2 CT 480, citing *State Fund*, 70 Cal.App.4th at p. 652.) Therefore, the City's attempt to distinguish *Masonite* fails.

5. The League Memo was Never Privileged

The City misstates the record in making the argument that the Three Documents consist of protected work product. (Op. Br. at p. 35.)[18] None of the Three Documents was authored by an attorney in the City Attorney's Office, as the City claims. Ardon's counsel does not possess the Michaelson Letter, and the Fujioka Letter and the Fujioka Memo, written by the CAO, are not protected by the attorney work product doctrine.

Moreover, the League Memo was never protected by the attorney work product or attorney-client privileges. It does not contain, discuss or reflect communications between the City and its attorneys. The League of California Cities is not an attorney and certainly not counsel to the City. Even if the League Memo was authored by attorneys, ***the City lacks standing to assert the privilege***, and the League attorney(s) waived any

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[18] The City implies that it does not have a record of the documents it gave to Ms. Rickert pursuant to her PRA request. (See Op. Br. at pp. 34-35 ["(and perhaps others she has yet to disclose)"].) The City's failure to keep track of its own documents does not require disqualification of Plaintiff's counsel. Moreover, the CD, which is available, is the best evidence of what documents were produced. At no time has the City requested a copy of the CD, apparently preferring to cast baseless allegations instead of gathering probative evidence.

work product protection when they disseminated the memo to third parties, such as the Los Angeles Chief Assistant City Attorney. (See *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 679 [81 Cal.Rptr.3d 186] ["[D]isclosure to a third party will waive the work product privilege . . . ."].) Finally, Judge Mohr's March 28, 2008 Order did not address documents created by the League; it merely held that the email communications between its member attorneys posted on the League's List Serve were protected from disclosure, but did not address the League Memo or any other document authored by the League. (1 CT 177-181.)

6. The City's Disclosure Was Not "Inadvertent" and Constituted a Waiver Under Both Section 6245.5 and Evidence Code Section 912

As the trial court correctly held, even if inadvertent disclosure were exempted from the automatic waiver provision of Section 6254.5 (and it is not), the City's disclosure was not "inadvertent" and constituted "an independent waiver under Evidence Code section 912, notwithstanding Government Code section 6254.5." (2 CT 479, 483.) "[T]he rule of inadvertent disclosure as a defense to waiver is limited to inadvertent disclosure by *attorneys*." (2 CT 480 [citing *State Fund*, *supra*, 70 Cal.App.4th at p. 654].) The holder of the attorney-client privilege, here the City, may waive the privilege "'*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.'" (2 CT 480 [quoting *State Fund*, *supra*, 70 Cal.App.4th at p. 652].) "Under the plain language of section 912, consent is irrelevant to a disclosure made by the actual holder of the privilege." (2 CT 480.)[19] Therefore, "[t]he plain language of

[19] The City is incorrect that "Evidence Code section 912 provides no exception for inadvertent disclosure." (Op. Br. at p. 17.) Section 912 explicitly requires the privilege holder's consent before waiver by another

[Evidence Code] section 912(a) and the City's preferred case [*State Fund*] clearly provide that the issue of inadvertent disclosure is irrelevant in this case." (2 CT 480.) There is no question whether the City consented to an attorney disclosure of privileged documents given that "[t]he City Administrator made the disclosure, not the City Attorney." (*Ibid.*; see also *Ardon*, *supra*, 232 Cal.App.4th at p. 179 ["The Office of the City Administrator responded to the request . . . ."].)[20]

7. Legislative History Should Not Be Considered But, In Any Event, Supports The Trial and Appellate Courts' Holdings

Given the PRA's clear language that disclosure equals waiver notwithstanding any other provision of law, and that inadvertent disclosure is not one of the nine exceptions specified by the Legislature to that principle, there is no basis for resorting to consideration of legislative history. Arguments similar to those made by the City's counsel here were

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can occur. When documents are disclosed inadvertently by another, such as a lawyer, there is no waiver because there is no consent by the holder. (Evid. Code, § 912.) "Inadvertent disclosure by an attorney does not waive the privilege because it does not manifest the *client's* consent to waive the privilege." (2 CT 480.) Section 6254.5 has no similar consent language because under the PRA disclosure is by the privilege holder.

[20] The City makes much of the fact that the PRA request at issue here was filled by a Chief Administrator clerk who it argues couldn't have waived the privilege without City Council approval. (Op. Br. at pp. 33.) As the trial court pointed out however, this is "[n]ot so" because under the City's own charter and Administrative Code, the City Administrator has the authority to disclose documents under the PRA. (2 CT 480, fn. 1 [citing L.A. City Charter, vol. I, art. II §§ 200, 201; L.A. Admin. Code, § 12.10].) Furthermore, as the Court of Appeal aptly discerned, an implied exception for low-level employees producing documents "would put it within the power of the public entity to make selective disclosures through 'low level employees' and thereby extinguish the provision in the PRA intended to make such disclosures available to everyone." (*Ardon*, *supra*, 232 Cal.App.4th at p. 183.)

made by these same counsel in a related case and unanimously rejected by this Court, because "[t]he absence of ambiguity in the statutory language dispenses with the need to review the legislative history." (*McWilliams*, *supra,* 56 Cal.4th at p. 623 [citation omitted].)[21]

The *Newark Unified* court strained to find ambiguity in the word "disclosure" when in fact there is none. (*Newark Unified*, *supra*, 2015 Cal. App. LEXIS 671, at p. *12-14.) At the outset, it must be noted that the common dictionary definition of the word "disclose" is to "make known." (*disclose, 1.* Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/american_english/disclose.> [as of Aug. 5, 2015].) Contrary to the *Newark Unified* court's speculation, neither the dictionary definition nor the PRA attach any subjective intent requirement to the act of disclosure. Even if they did, the *Newark Unified* court has mixed up two types of intent: one – to make public or in its words to "expose," "lay open," etc., which is what is intentionally done in reply to a PRA request; the other – to publish or expose privileged material. The former is what the term "disclosure" is referring to, not the latter. No one ever intends to reveal that which is secret. The question is whether the intention was to reveal the information—period. [22] Clearly the administrator who replied to the PRA request knew he was disclosing the material to the public and he intended

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[21] In any case involving statutory interpretation, the court's "fundamental task" is to "determine the Legislature's intent so as to effectuate the law's purpose." (*In re C.H.* (2011) 53 Cal.4th 94, 100 [133 Cal.Rptr.3d 573] [internal quotations and citation omitted].) Indeed, here, given that "the statute's text evinces an unmistakable plain meaning, [the court] need go no further.'" (*Ibid.* [citation omitted].)

[22] There is "no requirement that the waiver of the attorney-client privilege be intentional and knowing. Rather, the fact of waiver may follow from inadvertent disclosures or from any conduct by the client that would make it unfair for him thereafter to assert the privilege." (Epstein, The Attorney-Client Privilege and the Work-Product Doctrine [5th ed. 2007], § 1.IV.)§

to do so. Subjective intent to waive the privilege is not required. Therefore, there is no ambiguity.

Moreover, keeping in mind the Legislature's ability to specify nine unambiguous exceptions to the waiver by disclosure rule, nothing in the legislative "history" of Section 6254.5 presented by the City suggests intent by the Legislature to create an additional, unspecified exception for "inadvertent disclosure." (2 CT 384-85.) First, the press releases and Assembly and Senate committee reports submitted by the City discussing selective disclosure do not constitute legislative history. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 742 [248 Cal.Rptr.115; 755 P.2d 299] [the "opinions of individual legislators," including the "author" of the bill, and statements contained in staff reports are not legislative history]; *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 492, fn. 11 [30 Cal.Rptr.3d 823; 115 P.3d 98] ["'[T]he statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation.'"] [citation omitted].)

However, even if the material referenced by the City were relevant to legislative intent, an intent that disclosure would equal waiver, regardless of inadvertence, is consistent with and not in conflict with preventing selective disclosure, as even the *Newark Unified* decision recognized. (2 CT 479; *Newark Unified, supra*, 2015 Cal.App.LEXIS 671 at *23.) Indeed, as the Court of Appeal and Judge Edmon both correctly observed, the City's "legislative history" actually supports Plaintiff's position, because "'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. ... [H]ow can a public record, available to anyone who requests it as a matter of law, possibly be

privileged?'" (*Ardon, supra,* 232 Cal.App.4th at pp. 181-82 [quoting 2 CT 478].)

B. Denial of the City's Motion to Disqualify Was Proper

Disqualification motions are "strongly disfavored" and, therefore, "should be subjected to particularly strict judicial scrutiny." (*Visa U.S.A., Inc. v. First Data Corp.* (2003) 241 F.Supp.2d 1100, 1104 [applying California state law] [internal quotations and citation omitted].)

> "[M]otions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citations.] Such motions can be misused to ***harass*** opposing counsel [citations], [or] ***to delay*** the litigation [citation]. . . . In short, it is widely understood by judges that attorneys now commonly use disqualification motions for purely strategic purposes . . . ."

(*Gregori v. Bank of America, supra,* 207 Cal.App.3d at 300-01 [emphasis added] [internal quotations omitted].) The City's Motion to disqualify Plaintiff's counsel and the appeals were simply strategic moves to further delay this litigation from proceeding to resolution on the merits and harass Plaintiff's counsel who have diligently and successfully prosecuted this action throughout its nearly nine year history.

1. Mere Exposure to Purportedly Confidential Information is Insufficient to Warrant Disqualification

Even if the City had not waived any privilege associated with the Three Documents, Plaintiff's counsel relied upon a good faith and reasonable interpretation of the plain language of Section 6254.5 in concluding that an automatic waiver had occurred. The reasonableness and validity of this interpretation has been confirmed in the opinions of the appellate and trial courts below.

Plaintiff's counsel's reliance on its valid, good faith interpretation stands in stark contrast to the findings of bad faith underlying the cases cited by the City to support its argument that Plaintiff's counsel should be disqualified here. The Three Documents were not stolen, as were the documents in *Clark, supra,* 196 Cal.App.4th 37, and as they may also have been in *Rico, supra,* 42 Cal.4th 807. Nor were these documents inadvertently produced by an attorney in formal discovery, as they were in *State Fund, supra,* 70 Cal.App.4th 644.[23] Rather, as Judge Edmon held, the documents were lawfully obtained from the City pursuant to a generalized PRA request regarding the City's UUT that could have been made by any citizen and that the City admitted in its Reply brief below to be "proper."

Furthermore, "disqualification is inappropriate for mere exposure of confidential information to an attorney." (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 845 [123 Cal.Rptr.2d 202].) The City has failed to articulate how it has or will be prejudiced by the documents' disclosure.[24] The Three Documents do not implicate Defendant's trial strategy or analyze the potential testimony of any witness, nor will Plaintiff's counsel's review of the Three Documents affect the outcome of these proceedings.[25]

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[23] The City's argument that an attorney's ethical duties do not turn on how he or she comes to possess privileged material misses the point. (Op. Br. at pp. 40-41.) The attorneys in *State Fund*, *Rico* and *Clark* did not receive the documents at issue in response to a proper request pursuant to the PRA, which contains a waiver-by-disclosure provision. For the same reason, the City's coffee shop hypothetical (*id.* at p. 42) is inapposite.

[24] The City cites *Clark, supra,* 196 Cal.App.4th at p. 55, to support its argument that no showing of injury is required for disqualification. However, even *Clark* requires a likelihood of "future prejudice to the opposing party from information the attorney should not have possessed." (*Ibid.*) As discussed below, the City has not demonstrated future prejudice.

[25] The City repeatedly inappropriately and incorrectly asserts that the Three Documents contain "the City's defense analysis of ***this very case***." (Op. Br. at 43 [emphasis added]; see also *id.* at pp. 4, 27, 46.) First, the

The City has not been and will not be injured because Plaintiff's counsel has made no use of the documents in this litigation and, as Judge Mohr, the original trial court judge observed in 2007 after ruling on the City's demurrer, the issues in dispute are almost entirely legal ones pertaining to the City's application of the UUT to telephone services expressly excluded from the UUT. (2 CT 284:6-7.)[26] As the City has admitted, "Plaintiff's refund claim is based on the City's telephone users tax ordinance as it existed on the date he made his administrative claim in October 2006." (2 CT 289:5-6.) It is also based upon the City's unlawful amendment of the UUT ordinance without obtaining voter approval as required by article XIIIC of the California Constitution. (1 CT 24, 32, 34-35.) Plaintiff need only prove that the City collected UUT on services that were not taxable under the FET or the UUT ordinance, and that the City then attempted to amend the UUT ordinance without obtaining voter approval, in violation of article XIIIC of the California Constitution. The City admitted these facts in response to Plaintiff's First Request for Admissions, and, had the case not settled, Plaintiff would have requested summary adjudication based almost entirely upon these admissions. (2 CT 304-307 [City's Responses to Pl.'s Requests for Admission dated Nov. 26, 2007].) Therefore, the City's claim that it has or will be harmed by Plaintiff's counsel's learning the City's "litigation strategy" is baseless. (Op. Br. at 49.)

City is testifying in a brief to matters not in the record, namely that the Three Documents analyze "this very case." Second, it is a factual impossibility that the Three Documents (or the Michaelson Letter, which Plaintiff's counsel does not possess and never has) analyze "this very case" since they were created before Mr. Ardon even submitted his government claim, let alone filed this lawsuit.

[26] Judge Mohr commented that this is the type of case that would likely be decided upon stipulated or undisputed facts. (*Ibid.*)

Finally, although the City repeatedly asserts Plaintiff's ability to use the information to the "detriment" of the City, including in Plaintiff's motion for class certification (Op. Br. at pp. 27, 49), Plaintiff has already filed that motion without citation or reference to any of the Three Documents. Moreover, the case has settled. Plaintiff filed his motion for preliminary approval of the class action settlement on July 22, 2015. The City filed its Declaration in Support of the Motion for Preliminary Approval that same day. The hearing is set for August 13, 2015. Therefore, the City's arguments that the Three Documents will be used against them in the litigation ring hollow and, at the end of the litigation the Three Documents will, if the City so requests, be returned to the City or destroyed at its option.

2. Questions of First Impression Cannot Serve as a Basis for Disqualification

Disqualification is clearly inappropriate in the absence of violation of any clear standard. *State Fund, supra,* 70 Cal.App.4th at p. 648, the opinion most heavily relied on by the City, is in accord. There plaintiff's counsel sent defendant's counsel copies of the plaintiff's internal documents containing privileged attorney-client communications.[27] Although the lower court sanctioned counsel, the Court of Appeal reversed the award of sanctions, finding that the attorney "should not have been sanctioned for engaging in conduct . . . which has not been condemned by

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[27] The City incorrectly states in its Opening Brief that "[i]n *State Fund,* ***the plaintiff*** sent defendant's counsel" the documents at issue when, in fact, it was the ***plaintiff's counsel*** that sent the documents to defendant's counsel. (Op. Br. at p. 12 [emphasis added]; see also *ibid.* ["***plaintiff*** also inadvertently sent over 200 pages . . . ." (emphasis added)].) This distinction is important because, as discussed *supra* and as the trial court correctly held, *State Fund* "suggests that the rule of inadvertent disclosure as a defense to waiver is limited to inadvertent disclosure by *attorneys*." (2 CT 480 [citing *State Fund, supra,* 70 Cal.App.4th at p. 654].)

any decision, statute or Rule of Professional Conduct applicable in this state." (*State Fund, supra*, 70 Cal.App.4th at p. 656.)

The disclosure was made by the City itself in response to what the City has conceded was a proper PRA request. Furthermore, Judge Edmon expressly held that Ms. Rickert's PRA request was proper and was well within her "'*fundamental and necessary right*'" as a citizen and her ethical duties as a lawyer to provide zealous representation under the Rules of Professional Conduct. (2 CT 482 [quoting Gov. Code, § 6250, emphasis added by trial court].) "[A] rule whose violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer's duty of zealous representation." (*Cont'l Ins. Co. v. Superior Court* (1995), 32 Cal.App.4th 94, 119, [37 Cal.Rptr.2d 843, 858].)

Therefore, even if the Court were to find that the trial court erred in concluding that a waiver of privilege had occurred, disqualification of Plaintiff's counsel would still not be appropriate because, other than the absolute waiver-by-disclosure provision contained in Section 6254.5, there is no established California law governing the obligation of a lawyer upon receiving documents directly from a governmental entity in response to a PRA request "unequivocally indicat[ing] that any privilege was waived."[28]

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[28] Although it is clear there is no basis for disqualification of any firm, there is even less for disqualifying all of the firms representing Plaintiff. For the completeness of the record, Wolf Haldenstein made the PRA request on its own initiative. (2 CT 269.) After the City produced the CD of documents in response, Wolf Haldenstein mailed a copy of the request and the CD to the Chimicles firm. (2 CT 356, ¶ 3.) The Cuneo and Tostrud firms were not given copies of the PRA documents. The Chimicles, Cuneo and Tostrud firms were not copied on correspondence stating that certain of the documents had been listed on the City's privilege log. (1 CT 203-209, 213-215, 218-220, 222-223.) Ms. Whatley's letter of April 30, 2013 first notified them of the City's claims of privilege. (2 CT 356, ¶ 4.) Co-counsel cannot be disqualified based on vicarious liability or imputed

(2 CT 481.)

The trial court did not abuse its discretion in denying the City's Motion to disqualify Plaintiff's counsel.[29]

V. CONCLUSION

For all the reasons stated above, Plaintiff requests this Court affirm the Opinion of the Court of Appeal in its entirety and award Plaintiff his costs on this appeal. (Cal. Rules of Court, rule 8.544.)

Respectfully submitted,

DATED: August 7, 2015

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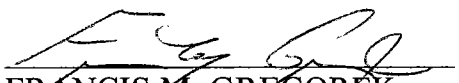
By: 
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knowledge. (See e.g., *In re Airport Car Rental Antitrust Litig.* (N.D. Cal. 1979) 470 F.Supp. 495, 507.)

[29] The City's argument that "public policy to protect attorney-client privilege refutes Ardon's argument that his counsel may circumvent their duty to honor opposing party's privilege" (Op. Br. at 42) ignores two facts. First, Plaintiff Ardon has never argued that his counsel may circumvent their ethical duties. Second, the argument presumes that no waiver occurred when the Three Documents were disclosed to Ardon's counsel. As discussed above, that is not the case.

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

The text of this brief consists of 11,852 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

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CERTIFICATE OF SERVICE

I, Kathryn Cabrera, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. That on August 7, 2015, declarant served the original and 8 paper copies of Plaintiff/Respondent's ANSWER BRIEF ON THE MERITS 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, and served one copy of the Brief on the Honorable Amy D. Hogue, the trial court judge in the Los Angeles Superior Court via Federal Express Overnight Delivery. Declarant electronically transmitted a copy of the within document in a pdf or word processing format to those persons noted at their respective electronic mailbox addresses provided to Lexis File & ServeXpress pursuant to California Rules of Court, rule 2.251, subd. (g) on the date set forth above.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of August, 2015 at San Diego, California.

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