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Inadvertent Disclosure of Privileged Documents Under the Public Records Act Does Not Waive the Privilege for All Time

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Resolving a split of opinion in the Courts of Appeal, the California Supreme Court held today that the inadvertent disclosure of a privileged document under the California Public Records Act does not forever waive the privileged nature of the document. (*Ardon v. City of Los Angeles* (March 17, 2016) S223876.)

The underlying litigation was initiated approximately 10 years ago and involved a class-action lawsuit against the City of Los Angeles challenging the validity of a tax. In 2007 and 2008, the plaintiffs served discovery requests on the City and the League of California Cities. The City prepared a "privilege log" listing documents withheld under the attorney-client privilege and the attorney work product privilege. The court overseeing the litigation agreed that the documents were privileged and properly withheld from disclosure during discovery.

In 2013, with the litigation still pending, plaintiffs' attorney sought a variety of documents under the Public Records Act (Government Code § 6250 et seq.). The City's administrative office provided 53 documents upon payment of a copying fee of $6.95. The attorney informed the City that two of the documents matched descriptions in the privilege log of documents that had been withheld under the attorney-client privilege, and a third document appeared to disclose the contents of another record described in the privilege log. The City responded that the three documents were indeed privileged and had been produced inadvertently, and demanded their return. The plaintiffs' attorney refused to return the documents, claiming the privilege had been waived by their inadvertent disclosure under the PRA.

The City asked the court to intervene and order the return of the documents, but the trial court agreed that production under the PRA had waived any privilege. The Court of Appeal affirmed, relying on Government Code section 6254.5, which provides that when an agency discloses a record that is otherwise exempt from the PRA "to any member of the public, this disclosure shall constitute a waiver of the exemptions." The City appealed to the California Supreme Court, which characterized the issue as one of "statewide importance" not rendered moot by purported settlement discussions between the parties to the lawsuit.

While the Court's decision was pending, another Court of Appeal came to the opposite conclusion, finding section 6254.5 of the PRA does not apply to an inadvertent release of attorney-client privileged documents, and therefore an inadvertent release does not waive the privilege. (*Newark Unified School District v. Superior Court* (2015) 190 Cal.Rptr.3d 721.)

The Supreme Court found "the statutory language as a whole ambiguous in this regard," and

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resolved the ambiguity by concluding that "inadvertent disclosure does not waive the exemptions." Considering the many exemptions for confidential information specified in the PRA, the Court found it "doubtful the Legislature intended to enact a statutory scheme that would prevent government agencies from minimizing the damage caused by the inadvertent disclosure of private and confidential information." It was "much more plausible" that the Legislature intended to permit agencies to waive an exemption by making "a voluntary and knowing disclosure, while prohibiting them from selectively disclosing the records to one member of the public but not others." Neither the language of the statute nor the legislative history suggested the Legislature contemplated waiver via inadvertent disclosures as opposed to intentional ones.

The Court also discussed the important purposes served by the attorney-client and work product privileges, which apply to public agencies and private parties alike. When an attorney receives materials that obviously appear to be subject to one of these privileges and to have been provided through inadvertence, that attorney has an ethical duty to refrain from examining the materials and to immediately notify the sender so the parties can resolve the situation. (See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818.) These rules repudiate a "gotcha" theory of waiver, in which a clerical error in document production becomes the equivalent of consent to disclosure by a party or its attorney.

The Court cited an amicus brief filed by the San Francisco city attorney's office on behalf of the League of California Cities and others, noting the "thousands upon thousands of public records requests" received by agencies each year and the logistical problems in reviewing the many pages of records responsive to even a single request. In this practical context, "human errors" are bound to occur. The Court cautioned its holding does not permit agencies to recast past disclosures as "inadvertent" so the privilege can be asserted in response to later requests. Rather, the holding applies to "truly inadvertent disclosures and must not be abused."

This decision reflects a victory for public agencies struggling to meet their obligations in response to frequent and sometimes massive requests for records under the PRA. While careful review of records is still necessary prior to PRA disclosures, agencies no longer have to fear that a truly inadvertent release of a PRA-exempt record results in a waiver of the exemption as to any future requests.