COPY

SUPREME COURT
FILED

MAY 12 2015

Frank A. McGuire Clerk

Deputy

CRC 8.25(b)

S223876

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND
OTHERS SIMILARLY SITUATED
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES
Defendant and Petitioner

PETITIONER CITY OF LOS ANGELES' OPENING BRIEF

On Review of a Decision of
the Second District Court of Appeal
Case No. B252476

Affirming a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Lead Case No. BC363959
Honorable Lee Smalley Edmon, Judge Presiding

[Related to Case Nos. BC406437; BC404694; and BC363735]

Michael G. Colantuono (SBN 143551)
*Holly O. Whatley (160259)
Amy C. Sparrow (191597)
COLANTUONO, HIGHSMITH & WHATLEY, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710
hwhatley@chwlaw.us

Noreen S. Vincent (102935)
Beverly A. Cook (68312)
OFFICE OF THE CITY ATTORNEY
200 North Main Street, Suite 920
Los Angeles, California, 90012
Telephone: (213) 978-7760
Facsimile: (213) 978-7714
noreen.vincent@lacity.org

Attorneys for PETITIONER CITY OF LOS ANGELES

S223876

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTUARDO ARDON, ON BEHALF OF HIMSELF AND
OTHERS SIMILARLY SITUATED
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES
Defendant and Petitioner

PETITIONER CITY OF LOS ANGELES' OPENING BRIEF

On Review of a Decision of
the Second District Court of Appeal
Case No. B252476

Affirming a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Lead Case No. BC363959
Honorable Lee Smalley Edmon, Judge Presiding

[Related to Case Nos. BC406437; BC404694; and BC363735]

Michael G. Colantuono (SBN 143551)
*Holly O. Whatley (160259)
Amy C. Sparrow (191597)
COLANTUONO, HIGHSMITH & WHATLEY, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710
hwhatley@chwlaw.us

Noreen S. Vincent (102935)
Beverly A. Cook (68312)
OFFICE OF THE CITY ATTORNEY
200 North Main Street, Suite 920
Los Angeles, California, 90012
Telephone: (213) 978-7760
Facsimile: (213) 978-7714
noreen.vincent@lacity.org

Attorneys for PETITIONER CITY OF LOS ANGELES

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW 1
INTRODUCTION 2
STATEMENT OF THE CASE 4
A. Trial Court Proceedings 4
B. Court of Appeal Proceedings 5
STATEMENT OF FACTS 6
STANDARD OF REVIEW 10
LEGAL ARGUMENT 11
I. THE PUBLIC RECORDS ACT DOES NOT TRUMP THE ATTORNEY-CLIENT PRIVILEGE OR ATTORNEY WORK PRODUCT DOCTRINE 11
A. Government Code Section 6254.5 Does Not Abrogate the Attorney-Client Privilege Upon Inadvertent Disclosure 11
B. Section 6254.5 Is Intended to Prevent Selective Disclosure, Not to Penalize Inadvertence 18
C. Reading Government Code Section 6254.5 to Abrogate Privilege is Unsupported by Case Law 21
D. This Court Should Harmonize the Public Records Act with the Evidence Code 24
E. That Courts Oversee Public Records Act Requests Only When Suits Arise Does Not Support Abrogation of Privilege 27
F. The Lower Courts' Conclusions Here Require Attorneys to Handle All Public Records Act Requests 30
II. ONLY THE HOLDER OF A PRIVILEGE CAN WAIVE IT 31
A. There Was No Authorized Waiver of Attorney-Client Privilege Here 32
B. Nor Was There Authorized Waiver of Work Product Protections 34
III. ARDON'S COUNSEL FLOUTED ETHICAL DUTIES 39
A. *State Fund* Made Clear Counsel's Duties in 1999 39
B. *State Fund* Is Not Limited to Discovery 40
C. An Attorney Who Violates *State Fund* is Subject to Disqualification 44
D. Ardon's Counsel Violated *State Fund* and Should be Disqualified 45
IV. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Elkins v. United States (1960)
364 U.S. 206 29

In re Grand Jury Proceedings (8th Cir. 1972)
273 F.2d 540 36

Hickman v. Taylor (1947)
329 U.S. 495 37

Mapp v. Ohio (1961)
367 U.S. 643 .... 26, 28, 29

Romer v. Evans (1996)
517 U.S. 620 22

California Cases

Aetna Casualty & Surety Co. v. Superior Court (1984)
153 Cal.App.3d 467 36

Alaska Exploration, Inc. v Superior Court (1988)
199 Cal.App.3d 1240 35

Alkow v. State Bar of Cal. (1952)
38 Cal.2d 257 41

American Mut. Liab. Ins. Co. v. Superior Court (1974)
38 Cal.App.3d 579 38

Ardon v. City of Los Angeles (2011)
52 Cal.4th 241 4

Black Panther Party v. Kehoe (1974)
42 Cal.App.3d 645 .... 19, 20, 21, 22

Ex parte Brady (1924)
65 Cal.App. 345 22

Clark v. Superior Court (2011)
196 Cal.App.4th 37 .... *passim*

Coito v. Superior Court (2012)
54 Cal.4th 480 36

Costco Wholesale Corp. v. Superior Court (2009)
47 Cal.4th 725 28

County of Santa Clara v. Superior Court (2009)
170 Cal.App.4th 1301 .... 22, 23

Crawford v. State Bar of Cal. (1960)
54 Cal.2d 659 41

People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra (1999)
20 Cal.4th 1135 10

Fellows v. Superior Court (1980)
108 Cal.App.3d 55 36

Gately v. Cloverdale Unified School Dist. (2007)
156 Cal.App.4th 487 14

Haas, Cohler & Munter v. Superior Court (1985)
172 Cal.App.3d 264 .... 35, 38

Masonite Corp. v. County of Mendocino Air Quality Management Dist. (1996)
42 Cal.App.4th 436 .... 23, 24

Mitchell v. Superior Court (1984)
37 Cal.3d 591 .... 16, 28, 42

National Steel Products Co. v. Superior Court (1985)
164 Cal.App.3d 476 36

O'Mary v. Mitsubishi Electronics America, Inc. (1997)
59 Cal.App.4th 563 .... 15, 24

People v. Boehm (1969)
270 Cal.App.2d 13 36

Rico v. Mitsubishi Motors Corp. (2007)
42 Cal.4th 807 .... *passim*

Roberts v. City of Palmdale (1993)
5 Cal.4th 363 .... 3, 33

Rumac v. Bottomley (1983)
143 Cal.App.3d 810 36

San Diego County v. California Water & Tel. Co. (1947)
30 Cal.2d 817 34

Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009)
45 Cal.4th 557 21

State of California v. Superior Court (1981)
29 Cal.3d 240 34

State Compensation Ins. Fund v. WPS, Inc. (1999)
70 Cal.App.4th 644 .... *passim*

California Constitution

Cal. Const., Article I, § 7 23

California Statutes

Civ. Code
§ 3426.2 29

Code Civ. Proc.
§ 904.1, subd. (a)(6) 5
§ 2018.010 35
§ 2018.030 .... 11, 35
§ 2030.260 25
§ 2031.260 25
§ 2031.285 17
§ 2033.250 25

Evid. Code
§ 912 .... *passim*
§ 915, subd. (a) 28
§ 954 .... 11, 15

Gov. Code
§ 6250 .... 1, 31
§ 6253, subd. (c) 25
§ 6254.5 .... *passim*
§ 6258 25
§ 6259 25

ISSUES PRESENTED FOR REVIEW

The Supreme Court granted the City of Los Angeles' ("City") Petition for Review on March 11, 2015.

The Petition raised the following issues:

1. Does inadvertent disclosure of privileged documents by a clerk responding to a Public Records Act, Government Code sections 6250 et seq. ("Public Records Act"), request waive attorney-client privilege and work product protections, when the holders of the privileges (the City Council and the City's attorneys, respectively) were neither notified of the request nor had opportunity to review the documents before disclosure?

2. Does a municipal clerical employee have authority to waive the attorney-client privilege and the protection of the work product doctrine?

3. Is disqualification appropriate when counsel breaches ethical standards requiring an attorney who receives inadvertently disclosed, privileged documents to refrain from examining the materials any more than is necessary to ascertain privilege and to immediately notify the sender?

Respondent Estuardo Ardon's ("Ardon") Answer stated no other issues for consideration, and the order granting review stated no limitations on the issues presented.

INTRODUCTION

In a published opinion ("the Opinion"), the Court of Appeal held the Public Records Act limits the force of the attorney-client privilege and the work-product doctrine such that inadvertent disclosure of privileged materials by a clerical employee responding to a Public Records Act request waives those protections, even though inadvertent disclosure by an attorney responding to an identical discovery request does not. That Opinion flies in the face of decades-long authority that protects privileged material from mistaken disclosure. At its essence, the Court of Appeal decision declares that the public's right to know under the Public Records Act trumps public agencies' attorney-client and work product privileges. It does so without plain authorization by statute or case law.

This unprecedented conclusion that a public agency's privileges may be waived by a clerical error will harm both public agencies and the Californians they serve. To maintain these vital privileges under this decision, governments must treat public records requests as defensively and with the same application of expensive legal services as they do discovery requests. This will inevitably slow and complicate disclosure of public records and benefit neither the public fisc nor the transparency objective of the Public Records Act. Additionally, such a rule will discourage creation of privileged materials in the first instance, impairing

counsel's ability to communicate with and to defend public agency clients and those clients' capacity to understand and follow the law. As Justice Mosk wrote for a unanimous Court:

> A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements.

(*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380 [neither Public Records Act nor open-meeting statute abrogates attorney-client privilege applied to counsel's memo regarding land use matter to be heard at public hearing] ("*Roberts*").)

Although both lower courts declined to harmonize the Public Records Act with statutes and case law establishing privilege, this Court need not. Rather, this Court should take this opportunity to clarify that public agencies' privileges are no less than those of private parties and that agencies are not held to a standard of perfection the law recognizes private parties cannot attain. Human error is inevitable, permitting the public to capitalize and leverage such error to the detriment of public agencies is not. The City respectfully requests this Court reverse and order the privileged material at issue returned to the City, prohibit plaintiff's counsel from distributing it or using it in any way and disqualify them from this action.

STATEMENT OF THE CASE

A. Trial Court Proceedings

This Court has seen this case once before. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 [Government Claims Act permits class action claims against local governments]. It challenges the City's telephone users tax ("TUT") in effect before March 2008. This appeal, however, involves only whether Ardon's counsel may flout the City's attorney-client, attorney work product and deliberative process privileges by using the City's defense counsel's own written analysis of this very case to the City's disadvantage.

When the City learned its privileged materials had been inadvertently disclosed to opposing counsel, it sought their return. (1 CT 155, 213-215 [Whatley Decl., ¶ 12 and Exh. 9 thereto].) When opposing counsel refused, the City filed its Motion to Compel Return of Privileged Material and to Disqualify Counsel of Record ("Motion to Compel"). (1 CT 121.) [1] The Motion to Compel seeks to require the return of privileged materials and to disqualify Ardon's counsel to ensure the City is not disadvantaged by opposing counsel's familiarity with the City's counsel's own strategic evaluation of the case.

On hearing on the Motion to Compel, the trial court requested supplemental briefing on the legislative history of the Public

---

[1] "CT" refers to the Clerk's Transcript.

Records Act and the application of Professional Rules of Conduct, Rule 2-100 ["Communications With a Represented Party"]. (July 1, 2013 Reporter's Transcript at p. 17.) At a second hearing, the trial court adopted as its final order a tentative ruling denying the Motion to Compel. (October 25, 2013 Reporter's Transcript at p. 14; 2 CT 474–484.)

The City timely appealed pursuant to Code of Civil Procedure section 904.1, subdivision (a)(6), allowing immediate appeal of an order denying a motion to disqualify counsel.

B. Court of Appeal Proceedings

The Second District affirmed in a published opinion ("Opinion"). [2] In so doing, the Court of Appeal held that a provision of the Public Records Act preventing selective disclosure of public records to favored persons trumps public agencies' privileges. The Court of Appeal adopted the trial court's conclusion that:

> [u]nlike 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 ....**

(Opinion at p. 4 [emphasis added].)

---

[2] The Court of Appeal's opinion is attached as Exhibit 1 pursuant to California Rule of Court 8.520(h).

The City timely petitioned for review, which this Court granted.

STATEMENT OF FACTS

Ardon claims an Internal Revenue Service's ("IRS") 2006 decision set forth in Notice 2006-50 to exclude charges for long distance service based only on time — as opposed to time and distance — from the Federal Excise Tax ("FET") base required a similar reduction in the base of telephony subject to the City's TUT. (1 CT 22–23 [Corrected First Amended Class Action Complaint, ¶¶ 6–9.) The City, of course, disagrees.

Ardon served a first request for production of documents. (1 CT 152 [Declaration of Holly O. Whatley ("Whatley Decl.") at ¶ 2].) He sought, among other things, a variety of City documents relating to the FET, the IRS Notices reflecting that agency's changed interpretation of the FET, and communications regarding the application of the TUT to long distance telephone service charged only by duration of the call. (1 CT 161.)

Ardon served a second request for production of documents, seeking documents in the City's possession concerning the TUT authored by the League of California Cities ("League") – of which the City is a member. (1 CT 153 [Whatley Decl. at ¶ 3]; 1 CT 168.) Ardon simultaneously served on the League of California Cities a deposition subpoena for production of business records seeking

records related to the FET; the amendment of any tax on telephone service to eliminate any reference to the Internal Revenue Code, including the FET; the IRS' notices that announced its changed interpretation of the FET; the application of any tax to long distance telephone service charged only on the basis of the duration of calls; and League communications on behalf of or at the direction of the City relating to any of these. (1 CT 153 [Whatley Decl. at ¶ 4]; 1 CT 174–175.)

Judge Anthony J. Mohr granted the League's and the City's motions to quash. (1 CT 153 [Whatley Decl. at ¶ 5]; 1 CT 177.) He concluded the material Ardon sought was protected by the attorney-client privilege and the work-product doctrine. (*Id.*)

The City produced documents in response to Ardon's two requests for production of documents, but withheld 27 documents described in a privilege log provided to Ardon's counsel ("Privilege Log"). (1 CT 154 [Whatley Decl. at ¶ 7]; 1 CT 195–201.)

More than five years after the City claimed the privilege as detailed in that Privilege Log, Ardon's counsel first disclosed to the City that she had obtained a number of those very attorney-client privileged documents in response to a Public Records Act request. (1 CT 154 [Whatley Decl., ¶ 8]; 1 CT 203.) In her letter, Ardon's counsel claims to possess three documents the City withheld as privileged:

1. September 18, 2006 Letter from Chief Assistant City Attorney, David Michaelson, to City Administrative Officer, William

Fujioka ("Michaelson Letter"). This letter analyzes the Impact of IRS Notice 2006-50 on the City's TUT — the core issue in this case — and City options, including defense arguments to claims identical to Ardon's. The Privilege Log identified this as "Letter prepared by legal counsel" at numbers 3 and 21, and the City designated it as protected by the attorney-client, attorney work product and deliberative process privileges. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 9]; 1 CT 206.) The letter itself bears the legend atop page one "ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION." (1 CT 154–155 [Whatley Decl., ¶ 9].)

2. June 27, 2006 Memorandum from the League to California City Attorneys ("League Memo"). This memorandum, an attachment to the Michaelson Letter, analyzes the possible impact on local utility user taxes of the IRS Notice 2006-50. The Privilege Log identified this as "Research memo sent to legal counsel" at number 4, and the City designated it as protected by the attorney-client, attorney work product and deliberative process privileges. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 10]; 1 CT 196.)

3. June 1, 2006 Memorandum from City Administrative Officer, William Fujioka to City Attorney, Rockard J. Delgadillo ("Fujioka Memo"). This memorandum to the City Attorney bore the subject line, "IRS Notice Regarding Federal Excise

Tax." The Privilege Log identified this document at number 2, and the City designated it as protected by the attorney-client, attorney work product and deliberative process privileges. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 11].) Ardon's counsel admits she has an undated copy of this document (identifiable by its file number, WTF:JSS:16060007C). (1 CT 155 [Whatley Decl., ¶ 11]; 1 CT 211.)

The City repeatedly demanded Ardon's counsel return these privileged documents. (1 CT 155–156 [Whatley Decl., ¶¶ 12, 14]; 1 CT 213–215; 1 CT 222–223.) She refused, disclaiming any legal or ethical duty to do so despite the authorities cited in the City's demands. (1 CT 155–156; 1 CT 213-215 [Whatley Decl., ¶¶ 11, 13 and Exh. 9 thereto]; 1 CT 211; 1 CT 218–220.)

The City Council never waived the attorney-client privilege as to these documents. (1 CT 150–151 [Declaration of Noreen Vincent ("Vincent Decl."), ¶¶ 4, 5].) The City's Chief Administrator never waived privilege as to these documents. (1 CT 147–148 [Declaration of Miguel Santana ["Santana Decl."], ¶¶ 3–5].) Nor did he authorize anyone else to do so. (*Id.*) Finally, the City Attorney's office never waived its work product rights in the Michaelson Letter or the other two documents. (1 CT 151 [Vincent Decl., ¶ 6].)

STANDARD OF REVIEW

> Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. However, ... where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion.

(*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra,* (1999) 20 Cal.4th 1135, 1143–1144 [internal citations omitted].)

No facts are disputed here. Accordingly, this Court's review is de novo.

LEGAL ARGUMENT

I. THE PUBLIC RECORDS ACT DOES NOT TRUMP THE ATTORNEY-CLIENT PRIVILEGE OR ATTORNEY WORK PRODUCT DOCTRINE

A. Government Code Section 6254.5 Does Not Abrogate the Attorney-Client Privilege Upon Inadvertent Disclosure

Two provisions of the Public Records Act are in issue. Government Code, section 6254, subdivision (k) states:

> Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:
>
> ....
>
> (k) 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.

Thus, the Public Records Act expressly allows public agencies to bar access to public records subject to any statutory privilege. This includes the attorney-client privilege under Evidence Code section 954, as well as the work-product protection of Code of Civil Procedure section 2018.030.

Government Code section 6254.5 states, in relevant part:

> Notwithstanding any other provisions of law, 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.

Rather than harmonize these provisions with the Evidence Code sections they reference, the lower courts here determined unintentional disclosure of privileged material in response to a Public Records Act request waives the privilege. No prior authority has ever so held.

Indeed, California courts have ruled time and again that inadvertent disclosure of privileged information does not result in waiver under the Evidence Code, but instead places an ethical obligation on counsel to refrain from exploiting an adversary's inadvertence. (E.g., *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654 [hereinafter, "*State Fund*"].)

In *State Fund*, the plaintiff sent defendant's counsel several documents identical to those provided in discovery. However, the plaintiff also inadvertently sent 200 pages of forms entitled, "Civil Litigation Claims Summary," marked "attorney-client communication / attorney work product." (*State Fund, supra,* at p. 648.) The word "confidential" was printed around the perimeter of the first page of each form. (*Ibid.*) When plaintiff's counsel

discovered his error and demanded return of the documents, as here, opposing counsel refused, claiming waiver.

The Court of Appeal disagreed, citing Evidence Code section 912, which provides:

> Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) ... is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.

State Fund held: "Based on the language of Evidence Code section 912, we hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." (*Id.* at p. 654.)

Later decisions extend *State Fund* to inadvertent disclosure outside formal discovery. This Court addressed the issue in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 ["*Rico*"]. There, the trial court determined the privileged notes at issue—an attorney's notes of his discussion with an expert — had been disclosed "through inadvertence" of a court reporter at a deposition. (*Id.* at p. 812.) Still, the court found no waiver.

Similarly, in *Clark v. Superior Court* (*VeriSign*) (2011) 196 Cal.App.4th 37 ["*Clark*"] the client took privileged materials from his employer even before he retained counsel, and no one ever accused

his subsequent counsel of obtaining those materials inappropriately or in discovery. (*Id.* at 42–44, 49.) Again, the court found no waiver. (*Id.* at pp. 54–56.)

The lower courts' conclusions here directly conflict with all these authorities — as well with as the Public Records Act's incorporation of Evidence Code privileges. Quoting the trial court, the Court of Appeal stated here that "disclosure of documents under the [Public Records Act] is not the same as disclosure in the course of litigation discovery." (Opinion, p. 4.) However, as discussed above, the *State Fund* rule is not limited to the discovery context.

Moreover, the lower courts' reasoning here ignores that subdivision (k) of Government Code section 6254 references Evidence Code privileges, indicating intent that courts harmonize the Public Records Act with the Evidence Code, which courts read to maintain privilege despite inadvertent disclosure. (*Gately v. Cloverdale Unified School Dist.* (2007) 156 Cal.App.4th 487, 494 ["Statutory provisions that are in pari materia, i.e., related to the same subject, should be construed together as one statute and harmonized if possible."].) Disclosure of non-privileged material is compulsory under the Discovery Act and the Public Records Act alike, and both except materials privileged under the Evidence Code.

As the Fourth Appellate District noted:

> [D]iscovery is coercion. The force of law is being brought upon a person to turn over certain documents. Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. [Plaintiff] invites us to adopt a "gotcha" theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.

(*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 ["*O'Mary*"].)

Nothing in the Public Records Act evidences intent to displace the attorney-client privilege or work product doctrine. Indeed, the statute is expressly to the contrary. Government Code section 6254, subdivision (k) incorporates Evidence Code privileges, including the attorney-client privilege defined by its section 954. Cases interpreting waiver of that privilege have **never** found inadvertent disclosure to constitute waiver. Protection of attorney-client privilege — which the California Supreme Court has held as critical

to our system of jurisprudence for public and private parties alike — requires that rule.

> [T]he fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] In other words, the public policy fostered by the privilege seeks to insure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Baird v. Koerner, supra,* 279 F.2d at p. 629.) Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. As this court has stated: "The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence." [Citation.]

(*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599–600.)

This reasoning applies here. Protection of the privilege from inadvertent disclosure should be no less in the context of Public Records Act requests than elsewhere. The different rationale the lower courts adopted here would mean the public has more right to access governmental records than a court's power to demand relevant evidence. That unprecedented rule is unlikely to be the Legislature's intent. The Legislature and the courts have already weighed the costs of maintaining the privilege — even in instances of inadvertent disclosure — and decided its benefits outweigh its costs.

The lower courts here rely on Evidence Code section 912's claimed express protection of privilege from waiver via inadvertent disclosure and the perceived silence of the Public Records Act on the point. (Opinion at p. 4 [Exh. 1 hereto]). However, Evidence Code section 912 provides no exception for inadvertent disclosure; no statute governs waiver of the work-product doctrine upon disclosure to third parties. Moreover, Code of Civil Procedure section 2031.285 is limited to the production of electronically stored information and does not depend upon whether disclosure was inadvertent or deliberate. As detailed above, the protection of privileged material from waiver by inadvertent disclosure arises from case law construing Evidence Code provisions cross-referenced in the Public Records Act.

These flaws justify reversal.

B. Section 6254.5 Is Intended to Prevent Selective Disclosure, Not to Penalize Inadvertence

By expressly incorporating Evidence Code privileges, the Public Records Act is unambiguous as to the protection of the attorney-client privilege. Evidence Code provisions regarding waiver control over the lower courts' more general waiver analysis here. However, even if the Court concludes the Public Records Act is ambiguous, its legislative history demonstrates the City's interpretation is correct.

When the statute was added to the Public Records Act in 1981, its sponsor, Senator Barry Keene, issued no fewer than four press releases trumpeting its prohibition of selective disclosure. Two stated SB 879 would:

> [p]rohibit selective withholding of government documents. Once officials showed documents to any members of the public, they would become public records available to everyone.

(2 CT 401 [Declaration of Holly O. Whatley in Support of City's Supplemental Brief ("Supplemental Whatley Decl."), ¶¶ 2, 3]; 2 CT 402–403 [Mar. 24, 1981 press release]; 2 CT 404–405 [Apr. 28, 1981 press release].) The other two press releases stated the bill would:

> strengthen ... the Public Records Act by ... [b]anning the selective withholding of government documents.

(2 CT 401 [Supplemental Whatley Decl., ¶¶ 4, 5]; 2 CT 406–408 [July

6, 1981 press release]; 2 CT 409–411 [Sept. 9, 1981 press release].)

Three staff reports also demonstrate this was the concern of what is now Government Code section 6254.5. An Assembly Committee on Governmental Organization staff report states a principal feature of the bill is a "ban on selective withholding of government documents." (2 CT 401 [Supplemental Whatley Decl., ¶ 6]; 2 CT 412–414 [Aug. 11, 1981 staff report].) A Senate Committee on Governmental Organization staff report reiterates that:

> [t]he measure prohibits selective withholding of government documents, by requiring that once an official has shown a specific document to any person, it must become publically available.

(2 CT 401 [Supplemental Whatley Decl., ¶ 7]; 2 CT 415–417 [Apr. 28, 1981 staff report.) A third report repeats this language verbatim. (2 CT 401 [Whatley Decl., ¶ 8]; 2 CT 418 [Aug. 11, 1981 staff report].) The Legislature's concern with "selective" disclosure necessarily presumes the initial disclosure was deliberate. An official with authority to do so must knowingly and intentionally show a document to a member of the public before waiver can applies under Government Code section 6254. 5. Inadvertent disclosure, by its very nature, is neither deliberate nor selective.

Moreover, when the Legislature enacted Government Code section 6254. 5 (adopted by Stats. 1981, c. 968, p. 3680, § 3), it was presumed to know of *Black Panther Party v. Kehoe* (1974) 42

Cal.App.3d 645. The plaintiffs there demanded inspection of complaints involving abusive practices by licensed collection agencies, and the Bureau of Collection and Investigative Services acknowledged it routinely disclosed those complaints to the collection agencies to permit their responses. (*Id.* at p. 655.) Although the court concluded the complaints fell within an exemption to the duty to disclose under the Public Records Act stated in Government Code section 6254 (*id.* at p. 654), it rejected the Bureau's contention it could share these complaints with collection agencies while denying access to plaintiffs:

> **The Public Records Act denies public officials any power to pick and choose the recipients of disclosure.** When defendants elect to supply copies of complaints to collection agencies the complaints become public records available for public inspection.

(*Id.* at pp. 656–657 [emphasis added, fn. omitted].) As by legislative history discussed above indicates, Government Code section 6254.5 codified this holding, and government officials cannot rely upon the exemptions provided by section 6254 to support a selective disclosure of public records.

The lower courts here mistakenly reasoned that, if the City could reclaim privileges for the inadvertently disclosed documents, it could achieve the selective disclosure Government Code section 6254.5 prohibits. However, this, too, is error. In *Black Panther* the

Bureau of Collection and Investigative Services **deliberately** disclosed exempt material to collection agencies. It purposely waived protection from disclosure. In inadvertent disclosure cases like this, however, no deliberate disclosure occurs. Los Angeles never selectively disclosed privileged material to one while denying access to another. Rather, the City consistently intended to maintain the privilege. The three documents were released inadvertently to precisely the person the City would never have favored — its adversary in high-stakes litigation.

Nor is there evidence the Legislature adopted Government Code section 6254.5 to penalize inadvertence and to abrogate privilege. Given that the attorney-client privilege is fundamental to our legal system, a court should demand very compelling evidence that the Legislature intended to reduce its scope. (E.g., *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573 [presumption against implied repeal].) Such evidence is absent here, and the available legislative history reveals section Government Code 6254.5 was adopted to address a very different issue — government favoritism via selective disclosure of public records.

C. Reading Government Code Section 6254.5 to Abrogate Privilege is Unsupported by Case Law

As discussed above, Government Code section 6254.5 codified *Black Panther Party v. Kehoe, supra,* 42 Cal. App. 3d 645, which states "[t]he Public Records Act denies public officials any power to **pick**

and choose the recipients of disclosure." (*Id.* at p. 656 [emphasis added].) The case was plainly concerned with government favoritism.

Similarly, in *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301 ("*Santa Clara*"), the trial court found the County had sold graphic information system data to at least three private purchasers. (*Id.* at 1329.) When a non-profit group sought the same information via a public records request, the county asserted an exemption to the Public Records Act's usual rule of disclosure. The Court of Appeal affirmed the trial court's conclusion that the County could not withhold the data. It observed:

> [d]isclosure to one member of the public would constitute a waiver of the exemption requiring disclosure to any other person who requests a copy.

(*Id.* at 1321–1322, quoting 86 Ops. Cal. Atty. Gen 132, 137 (2003) internal citation omitted.) Thus, the case applies when government intentionally discloses records to some, but not all, which the Public Records Act forbids. This result reflects the broadly shared social value that government plays a neutral role in society and does not favor some over others. (E.g., *Romer v. Evans* (1996) 517 U.S. 620, 633 ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."); *Ex parte Brady* (1924) 65 Cal.App. 345, 347 (statute regarding

operation of courts in counties of the "first class" improperly granted privileges to citizens of such counties that were denied citizens of others); Cal. Const., art. I, § 7 ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.").) But nothing in *Santa Clara* addresses inadvertent disclosure of privileged documents in response to a Public Records Act request, nor holds such inadvertent disclosure waives privilege.

The lower courts here nevertheless rely on *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 ("*Masonite*"), in which the plaintiff failed to designate certain trade secrets when it provided documents to the defendant District. (2 CT 478–479.) However, that case applies trade secret law, which does not exempt inadvertently disclosed materials, but instead focuses on whether trade secrets have been so designated when they are turned over to government agency. There, the plaintiff's failure to designate its trade secrets was dispositive, and the District was not permitted to withhold undesignated documents in response to a Public Records Act request.

However, the holding there was entirely dependent upon trade secret law and has no bearing on the Legislature's intent under Government Code sections 6254.5 [barring selective disclosure] and 6254, subdivision (k) [incorporating Evidence Code privilege into the Public Records Act]. To the contrary, just as *Masonite* recognizes

that the Uniform Trade Secrets Act is "persuasive" in interpreting trade secret disclosures under the Public Records Act (*id.* at p. 451), this Court should recognize that Evidence Code privileges — including their protection against inadvertent waiver developed by case law — are "persuasive" in construing Government Code section 6254.5. (*State Fund, supra,* 70 Cal.App.4th 644, 654 ["Based on the language of Evidence Code section 912, we hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney"].) Therefore, to the extent *Masonite* applies here, it stands for the proposition that the Public Records Act should be harmonized with privilege law — here, the Evidence Code, which does not recognize waiver under these circumstances.

D. This Court Should Harmonize the Public Records Act with the Evidence Code

As noted above, section 912 of the Evidence Code does not recognize waiver by inadvertent disclosure that occurs under compulsion. (*State Fund, supra,* 70 Cal. App. 4th 644, 654 [no waiver by inadvertent disclosure]; *O'Mary, supra,* 59 Cal. App. 4th at p. 577 [rejecting "gotcha" theory of waiver on inadvertent disclosure under compulsion].) The lower courts' failure here to harmonize the Public Records Act with the Evidence Code creates needless inconsistency between the two.

The compulsion to respond to Public Records Act requests is no less than in discovery. Indeed, the Public Records Act requires

agencies to respond to such requests in just 10 days (Govt. Code, § 6253, subd. (c)) compared to the 30 days typical for written discovery and document requests. (Code Civ. Proc., §§ 2030.260, 2031.260 and 2033.250.) Moreover, the importance of prompt disclosure under the Public Records Act — and the attendant risk of inadvertent disclosure — would seem to argue more persuasively for a rule against waiver by inadvertent disclosure here than in discovery. Failure to timely satisfy request under the Public Records Act risks suit and attorneys' fees awards. (Gov. Code, §§ 6258–6259.) Thus, there would seem to be more compulsion under that statute than in the context of ordinary discovery.

Allowing the Public Records Act's ban on selective disclosure to elevate inadvertent disclosure to intentional waiver of privilege — as the lower courts did here — produces anomalous situations. For example, under Evidence Code section 912, privilege withstands inadvertent disclosure, and counsel are ethically obliged to refrain from exploiting privileged information. If the privilege has been waived under the Public Records Act, however, documents available to the public under the Public Records Act remain privileged under the Evidence Code and Rules of Professional Conduct. Protection for the privilege that this Court has described as fundamental to our justice system cannot tolerate such inconsistency.

Courts have refused such double standards for core rights. For example, the United States Supreme Court interpreted the exclusionary rule for illegally seized evidence uniformly between the federal government and state government. (*Mapp v. Ohio* (1961) 367 U.S. 643, 657 [eliminating rule allowing state officers to present "on a silver platter" illicitly obtained evidence for use in federal court.) The Supreme Court of the United States noted that, the absence of a uniform standard obliging both state and federal officers to protect citizens' right against unlawful search and seizure would "encourage disobedience to the Federal Constitution", rendering the right illusory. (*Ibid.)* Here too, different rules for waiver of privilege in discovery and as to Public Records Act requests would encourage gamesmanship as occurred here.

Additionally, low-level municipal clerks will be held to a standard of perfection — a standard to which courts do not hold lawyers. Although governments could use more highly trained (and therefore expensive) staff to hand records requests, they are so many that doing so would require a dedication of resources beyond the means of many agencies. The Public Records Act applies equally to the smallest water district in Modoc County as well as to Los Angeles County. It must be construed so as to realistic apply to the very different resources available to each.

Were the result reached by the lower courts here to stand, a loophole in privilege law would invite precisely the mischief that

occurred here — the City's own defense analysis of this very case is silently obtained by Ardon's counsel, who reads and relies on it for months before disclosing to defense counsel that she has it. The fruit of the City's lawyers' labor is silently, secretly, used to its own detriment. This ought not to be the law.

E. That Courts Oversee Public Records Act Requests Only When Suits Arise Does Not Support Abrogation of Privilege

The lower courts here express concern that courts "lack of control" over inadvertent disclosure outside litigation justifies less protection for privilege in the context of requests under the Public Records Act than in litigation. This concern, however, is overstated.

First, on the facts of this case, the trial court **did** have control because the parties were in litigation. The City's motion to compel Ardon's counsel to return the privileged documents and to disqualify his counsel proves the point.

Second, courts protect privilege from inadvertent disclosure in settings that involve neither discovery nor requests under the Public Records Act. In *Rico,* the privileged notes at issue were obtained "through inadvertence" of a court reporter at a deposition. (*Rico, supra,* 42 Cal. 4th at p. 812.) This Court nevertheless protected the privilege. Similarly, in *Clark,* the privileged material was taken by the plaintiff even before he retained counsel or filed suit. (*Clark, supra,* 196 Cal.App.4th at 42–44, 49.) Again, the court had little

problem protecting the privilege. (*Id.* at pp. 54–56.)

Third, that protecting privileges may result in "inconveniences" and may be more difficult when litigation is not already pending are insufficient to construe section 6254.5 to allow inadvertence to defeat privilege. Again, this Court recognized in *Mitchell* that protecting privilege can conceal relevant information, but nevertheless determined that the attorney-client and other privileges merit protection because they are so fundamental to our system of justice. The Legislature reasoned similarly when it adopted Evidence Code section 915, subdivision (a), to prohibit judges from demanding to inspect attorney-client privileged material *in camera.* (See also, *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 ("[A] court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege . . . .").) Similar balancing is required in Fourth Amendment review of searches and seizures. Courts recognize that excluding evidence obtained in illegal searches means the trier of fact will never hear relevant evidence, but our Constitution demands no less. As the U.S. Supreme Court wrote in *Mapp:*

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' *People v. Defore,* 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will

> undoubtedly be the result. But, as was said in *Elkins [v. United States* (1960) 364 U.S. 206*]*, 'there is another consideration—the imperative of judicial integrity. 364 U.S. at page 222, 80 S.Ct. at page 1447.

(*Mapp, supra,* 367 U.S. at p. 659.)

Finally, to the extent that inadvertent disclosure of privileged material in response to a Public Records Act request may occur outside the context of pending litigation, public agencies have methods to protect the material from further and repeated disclosure just as, for example, do owners of trade secrets that have been stolen (Civ. Code, § 3426.2) or persons whose private information has been obtained without consent. For example, the public agency could file suit seeking injunctive relief to recover the privileged material and to prevent its disclosure. That this option entails initiating a suit, as opposed to seeking relief in an already pending suit, does not support ignoring the protection in the Public Records Act context. Rather, the public agency should be able to determine for itself whether the material at issue warrants the filing of a suit to maintain its protection. And, importantly, this option is available no matter if the person that obtained the inadvertently disclosed material was a lawyer or not.

Most fundamentally, that courts protect privilege on inadvertent disclosure in litigation which they supervise would seem to argue for more protection of privilege in non-litigation

settings, rather than less. The social value of privilege warrants those protections necessary to maintain it. If immediate judicial supervision cannot do so without the benefit of the *State Fund* rule, then such a rule is even more necessary in other settings further from the bench.

F. The Lower Courts' Conclusions Here Require Attorneys to Handle All Public Records Act Requests

Like many larger local governments, the City receives hundreds of Public Records Act requests annually. If the lower courts' rule prevails, Los Angeles will have two options to comply with the Public Records Act: do without attorney-client and work product privileges in litigation — including class action disputes that involve potentially tens of millions of dollars, such as the case at bar — or task attorneys to respond to Public Records Act requests. That attorneys are as prone to human error as others means this will reduce the risk to City privileges, but will not eliminate it.

The trial court was of the view that "Ms. Rickert used the Public Records Act **for exactly the purpose it was intended.**" (2 CT 482 [emphasis added].) If so, the law invites litigants to ignore standards of professional courtesy and instead to press for advantage under the Public Records Act. Indeed, such request might become the standard of care, compelling all who litigate with public agencies to see what inadvertence might benefit their clients.

Sensible agencies will apply what resources they can to staff

records request with lawyers, inevitably raising the cost and slowing the flow of information from government to the governed. This is plainly not the goal of the Public Records Act. (Gov. Code, § 6250 ["access to information concerning the conduct of the people's business is a fundamental and necessary right"].) Harmonizing the Public Records Act and the Evidence Code as the City urges strikes a better balance of competing public goals than the lower courts reached here.

II. ONLY THE HOLDER OF A PRIVILEGE CAN WAIVE IT

The lower courts here refused to apply another long-standing rule — that only the holder of a privilege may waive it. (See Opinion at p. 7.) Rather, the Court of Appeal feared a rule against waiver by inadvertence would swallow the rule against selective disclosure. (*Ibid.*) This ignores the fundamental capacity of our legal system to distinguish inadvertence from intentional acts. As Oliver Wendell Holmes put it a century ago, "Even a dog knows the difference between being kicked and being stumbled over."[3] Courts can and should distinguish inadvertence from intentional acts under the Public Records Act as they do in so many other areas of law.

---

[3] "Early Forms of Liability," Lecture I from The Common Law. (1909) <http://en.wikiquote.org/wiki/Oliver_Wendell_Holmes,_Jr.? (as of May 10, 2015).)

A. There Was No Authorized Waiver of Attorney-Client Privilege Here

The trial court erroneously concluded the City's disclosure here was intentional because the client rather than an attorney released the documents. (2 CT 480 ["Under the plain language of Section 912, consent is irrelevant to a disclosure made by the actual holder of the privilege. ... Here, the documents were disclosed by the City itself (through the City Administrator), not the City Attorney"].) The City Council holds the City's privileges. The trial court's tentative ruling goes on to discuss that the City Administrator is a public officer, who acts with the authority of the City Council, and therefore has authority to waive privilege. (*Id.*, at fn. 1.) This treats a clerk in the City Administrator's office as the holder of the privilege. That, of course, is not the law. The City challenged this error on appeal, but the Court of Appeal did not address it.

The undisputed evidence demonstrates no one with authority to do so waived the attorney-client privilege here. Though the employee who processed Ardon's Public Records Act request worked in the office of the City Administrator, the City Administrator made no knowing and voluntary decision to disclose these materials. The City Administrator did not sign the letter responding to Ardon's Public Records Act request. (2 CT 272–273.) Moreover, he declared he never waived the privilege in issue and that he did not authorize anyone else to do so. These declarations

are consistent with the documentary evidence. (1 CT 147–148 [Decl. of Santana, ¶¶ 3-5].) Thus, even assuming the City Administrator could waive the privilege — which the City does not concede — the evidence establishes he did not.

The City receives hundreds of Public Records Act requests yearly, and it would be impossible for the City Administrator to personally review responses to all of them. Nor should the law require him to. Moreover, no evidence in this record suggests one with authority to do so knowingly waived privilege. That Ardon's counsel did not copy the City Attorney or its outside counsel on her Public Records Act request suggests the employee who responded to the request had no reason to seek oversight by management.

Most troubling about the lower courts' analysis is the error as to who may waive a public agency's privileges. The client here, of course, is the City itself. Only the City Council, its governing body, may waive the privilege. (See, *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 ["We conclude that a local governing body is the holder of the attorney-client privilege with respect to written legal opinions by the governing body's attorney … ."].) The undisputed evidence shows the Los Angeles City Council never authorized waiver of the privileges in issue here. (1 CT 150–151.) The lower courts' contrary conclusion here is error.

Allowing low-level City employees to waive City privileges would make a dramatic and anomalous change in public

management. It would be strange indeed if an elected council member lacks power to waive City privilege, but a low-level clerk can. Such a rule allows unaccountable employees to force the hands of elected officials. Moreover, if mistakes of low-level staff can bind governments in matters of import, some will be tempted to purchase such "mistakes" and undermine the integrity of public service. Courts have repeatedly refused to allow employees to tie the hands of a public agency itself when to do so would undermine the integrity of the agency or its processes. (Cf., *State of California v. Superior Court* (1981) 29 Cal.3d 240, 244 *("Fogerty")* ("Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public."); *San Diego County v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, 824 (local officials could not bind agency to abandon roads other than by following required procedures; no estoppel based on such actions).)

Finally, the City's attorneys specifically asserted the privilege as to the documents at issue and listed them on a detailed privilege log. (1 CT 195-201 [privilege log].) This is hardly intentional waiver of privilege. In short, no one with authority to do so waived attorney-client privilege here.

B. Nor Was There Authorized Waiver of Work Product Protections

All three privileged documents Ardon's counsel has admitted to obtaining in response to a Public Records Act request (and

perhaps others she has yet to disclose) are subject to work product protection. The City's attorneys — not the City Administrator, the City Council, or even the Mayor, much less an employee tasked with Public Records Act responses — hold that privilege. Thus, the clerk who processed Ardon's records request could not have waived the work product doctrine.

The work-product doctrine protects an attorney's impressions, conclusions, opinions, legal research or theories from exploitation by others. While the attorney-client privilege exists to protect the attorney-client relationship by assuring a client that any statements made in seeking legal advice will be kept strictly confidential, the work product privilege promotes the adversary system by safeguarding the fruits of an attorney's trial preparations from discovery by an opponent. (See, e.g., *Alaska Exploration, Inc. v Superior Court* (1988) 199 Cal.App.3d 1240, 1256; Lasky, *Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264 (*"Lasky, Haas"*.)

As this Court recently explained:

> In California, an attorney's work product is protected by statute. (Code Civ. Proc., § 2018.010 et seq.; ... .) Absolute protection is afforded to writings that reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a).) All other work product receives qualified protection; such material "is not discoverable unless the court

> determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (§ 2018.030, subd. (b).)

(*Coito v. Superior Court* (2012) 54 Cal.4th 480, 485 ("*Coito*").)

The work product privilege has the same common law origin as the attorney-client privilege (*In re Grand Jury Proceedings* (8th Cir. 1972) 273 F.2d 540, 844–845) and has been applied to public lawyers just as to private lawyers. (See, *People v. Boehm* (1969) 270 Cal.App.2d 13, 21 [DA's notes in criminal case]; 70 Ops. Atty. Gen. Cal. 28 (1987) [city attorney's work product need not be disclosed to civil grand jury].) The doctrine affords attorneys a zone of privacy within which to investigate, analyze and prepare how best to represent clients (*National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476), and is not limited to materials prepared in anticipation of litigation, but also to those prepared in advisory roles. (*Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 Cal.App.3d 467, 478–479; *Rumac v. Bottomley* (1983) 143 Cal.App.3d 810, 815–816.)

Fellows v. Superior Court (1980) 108 Cal.App.3d 55,[4] held after a thorough analysis of prior cases on the issue, both within and without California, that:

---

[4] This Court disapproved *Fellows* on other grounds in *Coito, supra,* 54 Cal.4th at p. 499.

- the privilege is held exclusively by the attorney who creates the work;
- it survives termination of litigation in which it is developed; and,
- an attorney's transmittal of a case file containing work product is not waiver, because the disclosure is not to disinterested parties or third parties but, rather, to the client "whose interest in nondisclosure is supported by policy reasons which underlie the creation of the privilege ...." (*Id.* at p. 66.)

Hickman v. Taylor (1947) 329 U.S. 495, 510–511 explains the doctrine as follows:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, **it is essential that a lawyer work with a degree of privacy,** free from unnecessary intrusion by opposing parties and their counsel. **Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.** That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote

justice and to protect their clients' interests. **This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed ... the 'work product of the lawyer.'** Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (Original emphasis.)

Once information is divulged, the harm occasioned by its release cannot be undone. (*American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579.)

And *Lasky, Haas, supra,* (1985) 172 Cal.App.3d at p. 278 recognized: "the attorney is the sole holder of the work product privilege and may effectively assert it even as against a client." Accordingly, work product may only be disclosed by or with the consent of the attorney who holds the privilege. Here, Ardon's counsel refrained from notifying the City's counsel of her Public

Records Act request. As they did not know of the request for their work, they could not have consented to its release.

The trial court did not address the attorney work product doctrine but found waiver of all privileges categorically. (2 CT 481.) The Court of Appeal did likewise. (Opinion, pp. 4-7 [Exh. 1 hereto].) This, despite uncontroverted evidence that no one in the City Attorneys' office waived the privilege. (1 CT 150-151 [Vincent Decl., ¶¶ 6-7].) Both courts erred, both to conclude a clerk could waive attorney-client privilege and that he or she might waive an attorney's right to protect his work product.

III. ARDON'S COUNSEL FLOUTED ETHICAL DUTIES

A. *State Fund* Made Clear Counsel's Duties in 1999

Counsel's ethical duties on receipt of privileged materials have been plainly stated since at least the 1999 decision in *State Fund*:

> When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are

> privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

(*State Fund, supra,* 70 Cal.App.4th at pp. 656–657.)

In *State Fund,* the trial court sanctioned defendant's counsel for retaining inadvertently disclosed, privileged material, citing an American Bar Association ethics opinion. (*Id.* at pp. 655–656.) The Court of Appeal reversed the sanction, finding that defendant's counsel's conduct, while condemned by the ABA, had not yet been clearly proscribed by California law. (*Id.* at p. 656.) It noted its decision changed that fact, stating its holding as establishing the "standard for future application to instances similar to that presented here." (*Ibid.*)

B. *State Fund* Is Not Limited to Discovery

An attorney's ethical duties do not turn on the how he or she comes to possess privileged material. Though a plumber (to use Ardon's example)[5] who receives privileged information in response to a Public Records Act request is not bound by the ethical duties articulated by *State Fund,* an attorney is. "Attorneys must conform to

---

[5] 2 CT 253.

professional standards in whatever capacity they are acting in a particular matter." (*Crawford v. State Bar of Cal.* (1960) 54 Cal.2d 659, 669; *Alkow v. State Bar of Cal.* (1952) 38 Cal.2d 257, 263.) Simply put, the law does not allow attorneys to pick and choose when to be bound by the professional rules of ethics.

Ardon mistakenly argues the rule applies only if the privileged material is disclosed by litigation counsel or stolen. First, in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, though one party claimed the privileged notes at issue were stolen, the trial court determined they were obtained "through inadvertence." (*Id.* at p. 812.) That inadvertence was not of litigation counsel, but by a court reporter during a deposition. (*Ibid.*) Therefore, *Rico* involved neither theft nor disclosure by litigation counsel. This Court nevertheless found the receiving attorney bound by *State Fund* to immediately notify opposing counsel.

Similarly, in *Clark v. Superior Court (VeriSign)* (2011) 196 Cal.App.4th 37, a client took privileged materials from his employer before retaining counsel or suing, and no one accused his subsequently retained counsel of obtaining those materials inappropriately. (*Id.* at 42–44, 49.) However, even though counsel obtained privileged documents from his client — not by theft or inadvertence by counsel in discovery — he still bore the ethical duty to immediately notify opposing counsel he had obtained them. (*Id.* at pp. 54–56.) Again, the court imposed the ethical duty on the

attorney without regard to how he obtained privileged documents.

Thus, the ethical obligation attaches regardless of how an attorney obtains privileged material. *State Fund* an "obligation of an attorney receiving privileged documents due to the inadvertence of another," and did not limit its rule either to theft or the discovery context. (*State Fund, supra,* 70 Cal.App.4th at 656–657.) A different rule would incentivize lawyers to devise ways to "stumble across" privileged material outside discovery as Ardon's counsel did here.

Under Ardon's theory, if his counsel found a privileged City document in a coffee shop near City Hall, she could secretly use it to her client's advantage (as she did here), because opposing counsel did not inadvertently disclose it and she did not steal it. Such a duty is so narrow as to be meaningless. The Penal Code is sufficient to address theft. Case law had never limited *State Fund* to discovery. The rule Ardon's counsel seeks has no basis in authority. It is not, and cannot be, the law.

Rather, the focus is properly on the fact that opposing counsel has received privileged materials, not how he or she does so. This ethical obligation is an aspect of the attorney-client privilege, a central tenet of our justice system. As this Court declared in *Mitchell, supra,* 37 Cal.3d at 599–600, the strong public policy to protect attorney-client privilege refutes Ardon's argument his counsel may circumvent their duty to honor opposing party's privilege. Indeed, public policy demands the opposite.

That conclusion is particularly compelling here, given that Ardon's counsel used a Public Records Act request that she could easily have copied to counsel for the City but did not. This was a deliberate end run around the City's assertions of privilege in discovery that procured the City's defense analysis of this very case — documents Judge Mohr easily recognized as privileged when he granted the City's and the League's motions to quash.[6] (1 CT 153 [Whatley Decl., ¶ 5]; 1 CT 177 [Order Granting Motion to Quash].)

---

[6] In support of its motion to quash, the League submitted the Declaration of Patrick Whitnell, its general counsel. (2 CT 320 [2007 Declaration of Patrick Whitnell ("2007 Whitnell Decl.")].) He notes that the responsive League documents included "a legal analysis," created by League counsel, "on utility user tax issues that is shared on a limited basis only with attorneys representing potentially affected cities through the Listserve." (2 CT 321 [2007 Whitnell Decl., ¶ 3].) These documents were before Judge Mohr when he issued his March 28, 2008 order granting the League's and the City's motions to quash. Moreover, Ardon's counsel admits she has the document identified as Document No. 4 on the City's Privilege Log and described there as a "Research memo sent to legal counsel." (2 CT 251.) **This is the very document that Mr. Whitnell referenced in his 2007 declaration.** (2 CT 313–314 [Declaration of Patrick Whitnell ("2013 Whitnell Decl."), ¶¶ 3–5]; 2 CT 333 [Declaration of Tiana J. Murillo, ¶ 3].)

C. An Attorney Who Violates *State Fund* is Subject to Disqualification

An attorney who obtains attorney-client privileged material and fails to comply with the rule *State Fund* is appropriately disqualified. (E.g., *Clark, supra,* 196 Cal.App.4th 37.) There Clark sued his former employer, VeriSign, and produced several privileged VeriSign documents in discovery. (*Id.* at p. 43.) Many were prominently marked "Attorney–Client Privileged," "Prepared at Request of Counsel," and/or "Highly Confidential." VeriSign's counsel demanded Clark's counsel return the privileged documents. While Clark's counsel initially agreed to return certain documents, like Ardon's counsel here he ultimately neither returned nor destroyed them. (*Id.* at p. 43–44.)

The Court of Appeal ruled Clark's counsel was obligated not to review the privileged documents more than necessary to determine they were privileged and to immediately notify VeriSign's counsel he had them.

> [O]nce the examination showed a document had been transmitted between an attorney representing VeriSign and either an officer or employee of VeriSign, that examination would suffice to ascertain the materials [were] privileged, and any further examination would exceed permissible limits.

(*Id.* at p. 53.) The Court of Appeal affirmed the trial court's

conclusion Clark's counsel exceeded those limits, in part, because he examined each document in sufficient detail to categorize them by subject matter. (*Id.*) Accordingly, the Court found disqualification of Clark's counsel was not an abuse of discretion. (*Clark, supra,* 196 Cal.App.4th at p. 55.)

State Fund also applies when an attorney obtains work product. (*Rico, supra,* 42 Cal.4th 807.) Rico's counsel Johnson obtained defense counsel Yukevitch's strategy notes under unconfirmed circumstances. (*Id.* at p. 812.) A week later, Johnson used those notes during deposition of a defense expert. When Yukevitch realized Johnson had used the only copy of those notes at the deposition, he demanded their return and moved to disqualify plaintiffs' legal team and their experts because they had access to and had used his work product. (*Id.* at p. 812–813.) The trial court disqualified Rico's counsel and this Court affirmed. This Court endorsed *State Fund* and confirmed that it applies to work product, grounding the rule in an attorney's obligation to "respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."(*Id.* at p. 818 [citation and internal quotation omitted].)

D. Ardon's Counsel Violated *State Fund* and Should be Disqualified

Disqualification is mandated here. These facts do not create simply an appearance of impropriety or accidental review of

inconsequential information. Ardon's counsel made a Public Records Act request undisclosed to City's counsel, obtained thereby defense counsel's written strategy for defending this very case and then persistently refused to return it even when the City's counsel informed her of the controlling law. *State Fund's* rule is objective. Courts consider what would have been apparent to reasonably competent counsel in the position of the attorney to be disqualified. (*Rico*, 42 Cal.4th at pp. 818–819.) No reasonable attorney in Ardon's counsel's position could conclude the City Council and City Attorney knowingly and intentionally disclosed to her, on a Public Records Act request she did not disclose to them, privileged analysis of the legal issues which animate this case. It was a windfall too good to be true and obviously inappropriate to retain.

First, Ardon's counsel obtained confidential analysis of the legal issues in this very suit. The Michaelson Letter — prepared by one of the most senior lawyers in the City Attorney's office — analyzes the impact of IRS Notice 2006-50 on the City's TUT and the litigation the City anticipated it would provoke. On the City Attorney's letterhead, it bears prominent notations reading "ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION." (1 CT 154–155 [Whatley Decl., ¶¶ 8, 9].)

Second, counsel indisputably reviewed the confidential documents beyond what was minimally necessary to determine their privileged nature; their review was sufficient to correlate the

documents to those listed in the City's privilege log. (See 1 CT 154–155 [Whatley Decl., ¶¶ 8, 11]; 1 CT 206; 1 CT 211.) This conduct disqualified counsel in *Rico* and *Clark*. (*Rico, supra,* 42 Cal.4th at p. 819; *Clark, supra,* 196 Cal.App.4th at p. 53 ["[counsel]...examined the content of each document in sufficient detail to allow [him] to 'determine their subject matter for categorization']). Plainly Ardon's counsel violated their ethical duties under *State Fund* and *Rico* and the lower courts erred to allow them to try this case.

Third, even a cursory examination would reveal these documents had been sent between an attorney and client. The Michaelson Letter enclosed the League Memo analyzing the possible impact of the FET issue on local utility user taxes. Moreover, the Fujioka Memo was addressed to the City Attorney. (1 CT 155 [Whatley Decl., ¶¶ 10, 11].)

Fourth, it is equally apparent that the privileged documents were provided inadvertently. In addition to being labelled as confidential, privileged or attorney work product, the City designated them as such on a privilege log and withheld them from production during discovery. (1 CT 154 [Whatley Decl., ¶ 7]; 1 CT 194 [Privilege Log].) Indeed, it was Ardon's counsel who first identified the documents in her possession as those listed on the privilege log. (1 CT 206-207.) Plaintiff's counsel — having litigated this case since 2006 — is also aware of the City's position regarding the League-generated documents and, indeed, the City successfully

quashed Ardon's subpoena served on the League. (1 CT 153 [Whatley Decl., ¶ 5]; 1 CT 177 [Order Granting Motion to Quash].)

Accordingly, Ardon's counsel well knew they had privileged material and of the City's intent to protect that privilege. They cannot credibly claim they thought production in response to a Public Records Act request of which they gave the City's attorneys no notice was a deliberate waiver of privilege the City had strenuously defended. Instead, counsel play "gotcha" and refuse to surrender their windfall, arguing not only that they may use the documents, but use them as a basis to strip privilege from related materials. They are willfully blind to their ethical obligations and evidence no respect for the legitimate rights of other parties to this case which invoke the power of courts in a democratic society to seek not advantage, but justice. Disqualification is appropriate here.

Furthermore, no showing of injury need support a ruling of disqualification. Disqualification is "proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed." (*Clark, supra,* 196 Cal.App.4th at p. 55.) Indeed, a showing of injury would require the injured party to revealing precisely how inadvertently disclosed, privileged information had prejudiced its case — drawing a road map for further harm.

In any event, the City has been damaged. No "brain eraser" can allow Ardon's counsel to un-learn the City's defense analysis of

this case. If they are permitted to maintain this action, they could not help but use that information to inform litigation strategy and to advance Ardon's case. Their illicit knowledge will aid them in selecting and presenting arguments, particularly in their forthcoming motion to certify a plaintiff class here. They have advantage in selecting issues to try, settle and appeal. In short, counsel's wrongful study of the City's privileged analysis will undermine the integrity of the judicial system if they are allowed to try this case. Nothing short of disqualification can ensure the City's wrongfully acquired privileged materials are not used against it. The City respectfully urges this Court to reverse and to order the trial court to grant the disqualification order it refused.

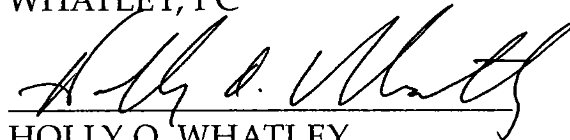
IV. CONCLUSION

Accordingly, the City respectfully requests that this Court to reverse and order the trial court to vacate its order and to grant the City's motion for an order compelling the return of privileged material and to disqualify Ardon's counsel.

DATED: May 11, 2015

Respectfully submitted,

COLANTUONO, HIGHSMITH & WHATLEY, PC



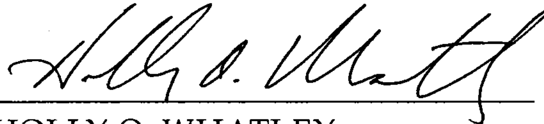
HOLLY O. WHATLEY
Attorneys for Appellant and Defendant City of Los Angeles

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8. 204(c)(1) of the California Rules of Court, the enclosed brief of Appellant and Defendant City of Los Angeles is produced using 13-point Palatino Linotype including footnotes and contains approximately 11,354 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: May 11, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



HOLLY O. WHATLEY
Attorneys for Appellant and
Defendant City of Los Angeles

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ESTUARDO ARDON, Plaintiff and Respondent, v. CITY OF LOS ANGELES, Defendant and Appellant.	2d Civil No. B252476 (Super. Ct. No. BC363959) (Los Angeles County)

The City of Los Angeles (City) appeals the trial court's order denying its motion to compel Estuardo Ardon to return privileged documents it turned over to his counsel pursuant to a Public Records Act (PRA) request and to disqualify his counsel. Ardon contends that by producing the documents, the City waived statutory privileges that would have permitted it to refuse the request. He also contends that refusing to accede to the City's demands is not a basis for disqualification. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

Judge Edmon's ruling denying the City's motions includes the following summary of the nature of this class action: "Ardon [claims] that [the] City of Los Angeles improperly collected a Telephone Users Tax ('TUT'). According to [Ardon,] 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 [charges for] long distance service [that were based upon both the]

duration . . . and the distance of the call, the IRS ceased collecting the excise tax on long distance calls [that were] billed only [on] the duration of the call. [Ardon] contend[s] 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 2007, the City [amended] the TUT eliminating [the ties] in the TUT to the FET. Ardon contends that the 2007 amendment was illegal because it [expanded] an excise tax that required approval by a majority of voters."

The dispute that produced this appeal arises from a PRA request by Ardon's counsel in January 2013 for documents pertaining to the subject matter of the complaint. The Office of the City Administrator responded to the request, stating that the City had identified "approximately 53 documents that pertained to the request" and said the City would provide those documents at a cost of $6.95. Ardon's counsel paid the fee and received the documents from the City in February 2013.

Judge Edmon's ruling notes that "In a letter dated April 3, 2013, [Ardon's counsel] informed the City that [she] had obtained through her [PRA] request copies of two documents that appeared to be listed in [a] 2008 privilege log. [Ardon's counsel] 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. The City responded by asserting that the documents had been inadvertently produced in response to the [PRA] request and demanded that [Ardon's] counsel return the documents to the City and agree not to rely upon those documents in any way. [Ardon's] counsel declined to do so, contending that the City had waived any claim of privilege."

The City moved to compel the return of the three documents claimed to be privileged and to disqualify Ardon's counsel. Following supplemental briefing and a hearing, the trial court denied the City's motion concluding that the City's production of the documents in response to Ardon's counsel's PRA request waived any privilege that previously attached to the records whether or not the document production was the product of mistake, inadvertence or excusable neglect.

DISCUSSION

Government Code section 6254.5[1] provides that "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 [s]ections 6254, 6254.7, or other similar provisions of law." Section 6254, subdivision (k) is such an exemption. It provides that records need not be disclosed if they are the subject of a privilege created by the Evidence Code. Thus, unless some other provision of law saves it, the act of publically disclosing a document subject to a statutory privilege waives the privilege and makes the document a public record accessible to anyone.

The City contends that exceptions not found in the PRA must be judicially attached to section 6254.5; viz., 1) that statutory privileges are not waived if a protected document is "inadvertently disclosed;" and 2) that it must appear the clerk who produces the document was specifically authorized by the holder of the privilege to waive it. We disagree.

Standard of Review

The proper interpretation of section 6254.5 is a question of law, which we conduct de novo. (*Stone v. Davis* (2007) 148 Cal.App.4th 595, 600; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.).) "'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] 'We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent.' [Citations.] The plain meaning controls if there is no ambiguity in the statutory language. [Citation.] If, however, 'the statutory language may reasonably be given more than one interpretation, ""courts may consider various extrinsic aids,

[1] All statutory references are to the Government Code unless stated otherwise.

including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.""' [Citation.]" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.)

Inadvertent Disclosure

The City contends PRA requests are akin to discovery requests in litigated disputes. It argues that an "inadvertent production" of privileged material should be treated similarly in both forums. The City claims that if documents or things can be recalled by the party producing them in a litigated dispute, then a governmental agency must be permitted to erase the statutory waiver of the privilege found in section 6254.5 and claw back documents passed along "inadvertently."

The City's position finds no support in the statute or the legislative history that surrounds the enactment of the PRA. As Judge Edmon accurately observed, "disclosure of documents under the [PRA] 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 [PRA], (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 826), the [PRA] 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.)"

Judge Edmon explained, "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 [PRA] is waived as to the world '[n]otwithstanding any other provisions of the law[.]' (Gov. Code, § 6254.5.)" Nothing in the PRA gives the entity producing it either the right to recover it or a mechanism to seek its return. And as noted, because the documents were disclosed to Ms. Rickert, the City is precluded from denying disclosure to anyone who asks.

In distinguishing civil litigation discovery from PRA disclosures, Judge

Edmond stated, "[C]ivil discovery is subject to the supervision of the Court. A party who inadvertently produces a privileged document in discovery may have 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 no[] 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." That is obviously not the case with PRA requests and responses and it is notable that section 6254.5, subdivision (b), explicitly states that a privilege is not waived if disclosure is compelled by legal process or proceedings.

Judge Edmon noted that the City agreed that the statutory waiver in section 6254.5 might be a problem if, *after* making a PRA disclosure of the documents to counsel Rickert, it asserted its right to withhold privileged documents to another person not involved in Ardon's case who makes the same request. Although the City said the trial court "need not address this hypothetical," Judge Edmon disagreed. She stated, "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. [H]ow can a public record, available to anyone who requests it as a matter of law, possibly be privileged?"

Judge Edmon relied upon *Masonite Corporation v. County of Mendocino Air Quality Management District* (1996) 42 Cal.App.4th 436 as authority for its ruling. There, Masonite sought to enjoin the district from disclosing certain documents to a third party under the PRA because documents it was required to disclose to the district were trade secrets. Although Health and Safety Code section 44346 permits Masonite to protect its trade secrets, it claimed it had *inadvertently* failed to do so and deserved relief from the waiver. The *Masonite* court agreed with the trial court that "[v]oluntary

disclosure of information as a public record, even if mistaken, constitutes a valid waiver of trade secret protection." (*Masonite*, *supra*, at p. 455.)

Judge Edmon acknowledged that in *Masonite*, the party seeking to protect the documents was not the party that disclosed them. She stated, "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 [PRA]. If anything, the case for waiver is only stronger[.] 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 [PRA]." We agree.

Moreover, the relief sought by the City is inconsistent with the legislative history of section 6254.5. The City pointed out that statements by legislators and in a legislative staff report declare the purpose of the waiver was to avoid "selective disclosure." The exception sought by the City would accomplish exactly that; viz., selective disclosure of the allegedly privileged documents to Ms. Rickert but not to others.

As Judge Edmon said, "'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, subds. (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 [citation], any privileged document disclosed pursuant to the [PRA] is waived as to the world '[n]otwithstanding any other provisions of the law[.]' (§ 6254.5.)"

We conclude that section 6254.5 unambiguously expresses the Legislature's intention that everything produced in a response to a PRA request must be accessible to everyone except in the limited circumstances stated in the statute itself. We hold that disclosures pursuant to the PRA that are made inadvertently, by mistake or through excusable neglect are not exempted from the provisions of section 6254.5 that waive any privilege that would otherwise attach to the production.

Disclosures by Clerical Employees of the City Administrators Office

The City also contends another implied exception should be attached to section 6254; namely, a waiver of statutory privileges only applies if it is shown the "low level employee" producing the document was explicitly authorized by the city council or the city attorney to waive it. We disagree. First, it is not our function to rewrite legislation. Second, such an exception 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's Counsel Did Not Violate the Rules of Professional Ethics by Making a PRA Request

Judge Edmon concluded that "Ms. Rickert used the [PRA] for exactly the purpose the Legislature intended. Nothing in [her] 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 [PRA]." We agree.

Judge Edmon added, "As the City concedes, Rule 2-lOO(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[.] (State Bar Formal Op. No. 1977-43.) ... [¶] Attorney or not, Ms. Rickert had a 'fundamental and necessary' right to petition her government under the [PRA.] 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 any members of her law firm under Rule of Professional Conduct 2-100."

DISPOSITION

We affirm the trial court's judgment. Costs on appeal are awarded to Ardon.

CERTIFIED FOR PUBLICATION.

BURKE, J.*

We concur:

GILBERT, P. J.

YEGAN, J.

---

*(Judge of the Superior Court of San Luis Obispo County, assigned by the Chief Justice pursuant to art. 6, § 6 of the Cal. Const.)

Lee Smalley Edmon, Judge

Superior Court County of Los Angeles

Colantuono, Highsmith & Whatley, Holly O. Whatley, Amy C. Sparrow, Tiana J. Murillo; Office of the City Attorney, Noreen S. Vincent, Beverly A. Cook for Defendant and Appellant.

Dennis J. Herrera, San Francisco City Attorney, Christine Van Aken, Chief of Appellate Litigation and Warren Metlitzky, Deputy City Attorney for Amicus Curiae The League of California Cities and the California State Association of Counties on behalf of Defendant and Appellant.

Wolf Haldenstein Adler Freeman & Herz, Francis M. Gregorek, Rachele R. Rickert, Marisa C. Livesay; Chimicles & Tikellis, Timothy N. Mathews; Cuneo Gilbert & Laduca, Sandra W. Cuneo; Tostrud Law Group, Jon A. Tostrud for Plaintiff and Respondent.

PROOF OF SERVICE
Ardon v. City of Los Angeles, et al.
LASC Case No. BC 363959, and related cases
Court of Appeal Case No. B252476
Supreme Court Case No. S223876

I, Bernadette Morgan, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071-3137. On May 11, 2014, served the document(s) described as: **PETITIONER CITY OF LOS ANGELES' OPENING BRIEF** by electronic transmission at the electronic service addresses identified below on all interested parties to said action at the following addresses:

SEE ATTACHED SERVICE LIST

☒ **VIA ELECTRONIC MAIL:** I electronically transmitted a copy of the within document in a pdf or word processing format to those persons noted on the attached list at their respective electronic mailbox addresses using Lexis File & ServeXpress in accordance with the Cal. Rules of Court rule 2.251(g) on the date set forth above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 11, 2015, at Los Angeles, California.

BERNADETTE MORGAN

Colantuono & Levin, PC
300 S. GRAND AVENUE, SUITE 2700
LOS ANGELES, CA 90071-3137

SERVICE LIST

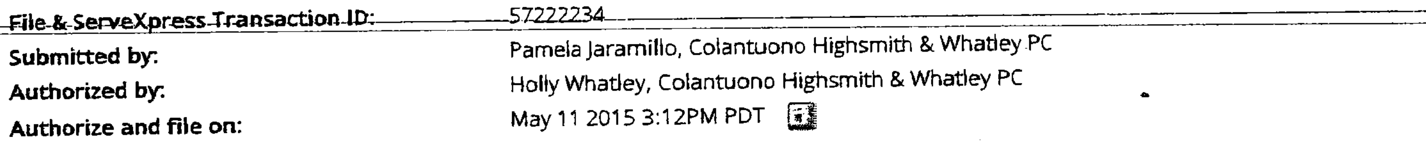
California Supreme Court Case No. S223876

Court of Appeal Case No. B252476, Trial Court Lead Case No. BC363959
[Related to Case Nos. BC406437; BC404694; BC363735; and BC447863]

Attorneys for Estuardo Ardon, BC363959	
Francis M. Gregorek Rachele R. Rickert Marissa C. Livesay Wolf Haldenstein Adler Freeman & Herz LLP 750 B Street, Suite 2770 San Diego, CA 92101 619 239-4599 619 234-4599 fax	Daniel W. Krasner Wolf Haldenstein Adler Freeman & Herz LLP 270 Madison Avenue New York, NY 10016 212 545-4600 212 545-4653 fax
Nicholas E. Chimicles Timothy N. Mathews Benjamin F. Johns Chimicles & Tikellis LLP One Haverford Centre 361 W. Lancaster Avenue Haverford, PA 19041 610 642-8500 610 649-3633 fax	Jonathan W. Cuneo William Anderson Cuneo Gilbert & Laduca, LLP 507 C Street, NE Washington, DC 20002 202 789-3960 202 789-1813 fax
Sandra W. Cuneo Cuneo Gilbert & Laduca LLP 330 S. Barrington, #109 Los Angeles, CA 90049 424 832-3450 424 832-3452 fax	Jon A. Tostrud Tostrud Law Group, P.C. 1925 Century Park East, Suite 2125 Los Angeles, CA 90067 310 278-2600 310 278-2640 fax
Attorneys for J2 Global Communications, Inc., BC 404694	
Robert J. Yorio James W. Lucey Carr & Ferrell LLP 120 Constitution Dr. Menlo Park, CA 94025 650 812-3400 650 812-3444 fax	

Attorneys forTracfone Wireless, BC 363735	
Amy L. Silverstein Edwin Antolin **12 Gough Street, 2nd Floor** **San Francisco, CA 94103** **phone: (415) 593-3502** **fax: (415) 593-3501** asilverstein@sptaxlaw.com eantolin@sptaxlaw.com 415 593-3500 415 593-3501 fax	
Attorneys for City of Los Angeles	
Carmen Trutanich Noreen S. Vincent Michael Nagle Office of the City Attorney 200 North Main Street, Suite 920 Los Angeles, CA 90012 213 978-7726 213 978-7711 fax	By U.S. Mail
Second Appellate District of the Court of Appeal, Case No. B252476	
Clerk of the Court of Appeal Second District Appellate Court 300 S. Spring Street, Fl. 2, N. Tower Los Angeles, CA 90013-1213	By U.S. Mail
Superior Court Judge Presiding in Lead Case BC363959	
The Honorable Amy Hogue Los Angeles Superior Court Central Civil West Court House 600 S. Commonwealth Ave., Dept. 305 Los Angeles, CA 90005 (213) 351-8595	By U.S. Mail

File & ServeXpress Transaction Receipt



File & ServeXpress Transaction ID:	57222234
Submitted by:	Pamela Jaramillo, Colantuono Highsmith & Whatley PC
Authorized by:	Holly Whatley, Colantuono Highsmith & Whatley PC
Authorize and file on:	May 11 2015 3:12PM PDT

Court:	CA Superior Court County of Los Angeles
Division/Courtroom:	N/A
Case Class:	Civil-Ardon vs City Of Los Angeles & Related Cases (BC363959)
Case Type:	Complex Litigation
Case Number:	BC363959
Case Name:	Ardon, Estuardo et al vs City Of Los Angeles & Related Cases et al

Transaction Option:	Serve Only - Public
Billing Reference:	42007-0005 - Ardon v. City of Los Angeles Case No. BC363959
Read Status for e-service:	Not Purchased

Documents List

1 Document(s)

Attached Document, 69 Pages **Document ID: 61901494**

Document Type:	**Access:**	**Statutory Fee:**	**Linked:**
Writ	Secure Public	$0.00	

Document title:
Petitioner City of Los Angeles' Opening Brief

Expand All

⊟ **Sending Parties (1)**

Party	Party Type	Attorney	Firm	Attorney Type
City of Los Angeles	Defendant	Whatley, Holly	Colantuono Highsmith & Whatley PC	Attorney in Charge

⊟ **Recipients (11)**

⊟ Service List (11)

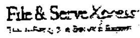
Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
Service	Ardon, Estuardo	Plaintiff	Gregorek, Francis M	Wolf Haldenstein Adler Freeman & Herz	Attorney in Charge	E-Service
Service	Ardon, Estuardo	Plaintiff	Rickert, Rachele R	Wolf Haldenstein Adler Freeman & Herz	Attorney in Charge	E-Service
Service	Ardon, Estuardo	Plaintiff	Livesay, Marisa C	Wolf Haldenstein Adler Freeman & Herz	Attorney in Charge	E-Service
Service	Ardon, Estuardo	Plaintiff	Tostrud, Jon A	Tostrud Law Group PC	Attorney in Charge	E-Service
Service	Ardon, Estuardo	Plaintiff	Cuneo, Sandra W	Cuneo Gilbert & LaDuca LLP	Attorney in Charge	E-Service
Service	Ardon, Estuardo	Plaintiff	Mathews, Timothy	Chimicles & Tikellis LLP-Haverford	Attorney in Charge	E-Service
Service	California Superior Court County of Los Angeles	Interested Party	Hogue-JU, Amy D	California Superior Court-Los Angeles County-CCW Courthouse-Hogue (307)	Attorney in Charge	E-Service
Service	J 2 Global	Plaintiff	Lucey, James W	Carr & Ferrell LLP	Attorney in Charge	E-Service
Service	J 2 Global	Plaintiff	Yorio,	Carr & Ferrell LLP	Attorney in	E-

			Robert		Charge	Service
Service	Tracefone Wireless Inc	Plaintiff	Antolin, Edwin	Silverstein & Pomerantz LLP-CA	Attorney in Charge	E-Service
Service	Tracfone Wireless Inc	Plaintiff	Antolin, Edwin	Silverstein & Pomerantz LLP-CA	Attorney	E-Service

⊟ Additional Recipients (0)

⊞ **Case Parties**

Close



About File & ServeXpress | **Resource Center** | **FAQs** | **Terms & Conditions** | **Privacy**

© 2015 File & ServeXpress, LLC. All rights reserved.

Client Support

1-888-529-7587

support@fileandservexpress.com

Chat Online