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Inadvertent Disclosure of Documents Under the Public Records Act Does Not Waive the Attorney-Client Privilege

The California Supreme Court has resolved a significant split among California appellate courts regarding whether inadvertent disclosure of documents in response to a Public Records Act request results in waiver of the attorney-client privilege pursuant to section 6254.5 of the Act. The court held that this waiver provision applies only to intentional release of a public record, and hence that a public agency's inadvertent disclosure of a document does not waive applicable privileges. *Ardon v. City of Los Angeles*, No: S223876 (March 17, 2016) An attorney representing the plaintiff in a pending class action against the City of Los Angeles served the City with a request for documents under the Public Records Act. In response, an assistant city administrative officer provided the attorney with approximately 53 documents, among which were three memos containing attorney-client communications. After discovering this, the City notified plaintiff's counsel that the privileged documents had been produced inadvertently, and requested their return. After plaintiff's counsel refused, the City filed a motion to compel return of the documents, which was denied by the trial court. In a published decision, the Second District Court of Appeal affirmed the trial court's ruling, concluding that production of the documents had waived any privilege pursuant to Section 6254.5 of the Act. The California Supreme Court granted the City's petition for review of this decision. While review was pending, the First District Court of Appeal decided *Newark Unified School District v. Superior Court*, No. A142963 (1st Dist. Ct. App., August 1, 2015). As discussed in our report on that case ([Court Rejects "Gotcha" Theory of Waiver Under Public Records Act](#)), the First District held that inadvertent disclosure of documents containing attorney-client communications in response to a Public Records Act request does not result in a waiver of the privilege under section 6254.5. The California Supreme Court agreed with the reasoning in *Newark* and reversed the Court of Appeal. Section 6254.5 provides that "[n]otwithstanding 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 the Public Records Act. Examining this language, court found that the word "disclosure" was ambiguous as to whether inadvertent disclosures were included, and therefore turned to the legislative history for guidance. It determined that the purpose of the bill was to address *intentional* disclosures and to prohibit agencies from selectively disclosing privileged documents to particular persons or entities while withholding them from the general public. The concluded that the bill did not contemplate inadvertent disclosure, and that the central purposes of the statute -- to preclude selective disclosures -- would not be advanced by applying the waiver provisions to accidental disclosures. Quoting from the *Newark* decision, the court reasoned that when "a release is inadvertent, no 'selection' occurs because the agency has not exercised a choice in making the release Accordingly, an inadvertent release does not involve an attempt to assert the exemption as to some, but not all, members of the public, the problem section 6254.5 was intended to address." (Internal quotation marks omitted). The court also observed that construing section 6254.5 to exclude inadvertent disclosures of attorney-client or work product material was consistent with the construction of similar waiver provisions in the litigation context. Evidence Code section 912(a) provides that the attorney-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." Case law has construed Evidence Code section 912 restrictively, holding that "waiver" under that provision does not include inadvertent disclosure of privileged information as a result of human error in responding to discovery requests. The court concluded that, in light of the fact that human error is at least as likely to occur in the process of responding to a Public Records Act request as to a discovery request, there was no reason why inadvertent disclosures should be treated differently in the former situation than in the latter. The court cautioned that its determination that inadvertent release of exempt documents does not waive the exemption under the Public Records Act "must not be construed as an invitation for agencies to recast, at their option, any past disclosures as inadvertent so that a privilege can be reasserted subsequently." The court

observed that its holding applied only "to truly inadvertent disclosures and must not be abused to permit the type of selective disclosure section 6254.5 prohibits." It added that an agency's own characterization of its intent was not dispositive, and that disputes over the issue of inadvertence under the Public Records Act would be resolved by courts, just as they were under the Evidence Code.

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