

## Court Rejects “Gotcha” Theory of Waiver Under Public Records Act

**Update:** After granting review and holding the *Newark* case (below) pending its decision in [Ardon v. City of Los Angeles](#), No: S223876 (March 17, 2016), the California Supreme Court agreed with the reasoning in *Newark*, discussed below, and rejected the conflicting reasoning of the Second District Court of Appeal in the case before it. Our report on the *Ardon* case (*Inadvertent Disclosure of Documents Under the Public Records Act Does Not Waive the Attorney-Client Privilege*) is available [here](#). ----- A California

appellate court has ruled 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. [Newark Unified School District v. Superior Court](#), No. A142963 (1st Dist. Ct. App., August 1, 2015 -- Ordered Published by Cal. Supr. Ct., March 17, 2016). A contrary interpretation, the court concluded, would not advance the purposes of the statute and would create an irreconcilable conflict with Evidence Code section 912, under which accidental disclosure of attorney-client information does not constitute a "disclosure" triggering its waiver provisions.

**Background.** Two community organizations requested documents from a school district under the Public Records Act. Within hours of releasing the documents, the district realized it had inadvertently included documents containing attorney-client communications. It immediately contacted the recipients, informing them of the inadvertent inclusion and seeking return of the privileged documents. The two organizations refused, contending that disclosure of the documents waived any privileges by operation of section 6254.5 of the Act, which states that disclosure of a public record to any member of the public waives otherwise applicable exemptions. The Public Records Act broadly grants access by members of the public to all records relating to the public's business. The Act contains a number of exemptions, including the exemption for records subject to privileges in the Evidence Code, such as the privilege that extends to records containing attorney-client communications. Section 6254.5 of the Act, however, provides that "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 the Act. **What Constitutes "Disclosure?"** The principal issue before the court was whether the inadvertent inclusion of attorney-client documents in a Public Records Act production constitutes "disclosure" of those documents for purposes of section 6254.5. On this point, the two organizations contended that providing a document to a member of the public constitutes "disclosure" of that document under the plain meaning of the statute regardless of whether the release was intentional or inadvertent. The district, on the other hand, argued the term "disclosure" requires an intentional release of the document, and that inadvertent releases are not within the scope of the waiver provision. The court concluded that the statutory language was reasonably susceptible to either interpretation, and therefore turned to legislative history for guidance. It found that the principal purpose of section 6254.5 was to prevent government officials from selectively withholding documents by asserting exemptions against some members of the public, while waiving them as to others. This purpose, according to the court, supported the district's interpretation of the statute: when a release is inadvertent, no "selection" occurs because the agency has not exercised choice in making the release. An inadvertent release thus cannot 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. **Avoiding Statutory Conflicts.** This interpretation was also necessary, in the court's view, to avoid a direct conflict between section 6254.5 and analogous provisions in the Evidence Code. Section 912(a) of the Evidence Code states that waiver of the attorney-client privilege occurs "if any holder of the privilege, without coercion, has *disclosed* a significant part of the communication . . . ." This statute is not limited to judicial proceedings but applies to any ostensible waiver of these privileges, and hence overlaps section 6254.5's provisions. As with section 6254.5, nothing in Evidence Code section 912 expressly restricts its application to

intentional disclosures -- both simply provide that disclosing a document results in waiver. However, courts have consistently interpreted Evidence Code section 912 to mean that the inadvertent disclosure of privileged documents does *not* effect a waiver. Indeed, the California Supreme Court has held that an attorney who receives inadvertently produced documents has an ethical duty to refrain from reviewing them, and must notify opposing counsel and return the documents on request. Because both statutes apply in the context of disclosures under the Public Records Act, interpreting section 6254.5 to result in a waiver, the court said, "would dictate diametrically and irreconcilably opposed results" whenever the inadvertently disclosed documents contained attorney-client information. The court added that "while we adopt this interpretation of section 6254.5 in the interests of statutory harmony, solid policy grounds support it: Protection of the attorney-client privilege is regarded as fundamental to the administration of justice, and its waiver is disfavored."

\* \* \*

The court's well-reasoned decision should result in a collective sigh of relief from public agencies. Section 6254.5 is not limited to disclosures in response to formal Public Records Act requests; it applies to *any* disclosure of "a public record that is otherwise exempt from this chapter, to any member of the public . . . ." The statutory interpretation urged by the two organizations would have applied, for example, to agency documents accidentally mailed to the wrong address or attached to a misdirected email. In effect, it would create a public agency carve-out to the protections under the Evidence Code for inadvertently disclosed information. The court's decision harmonizes the provisions of the Public Records Act with those of the Evidence Code and comports with longstanding principles in the case law relating to inadvertent waivers.

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