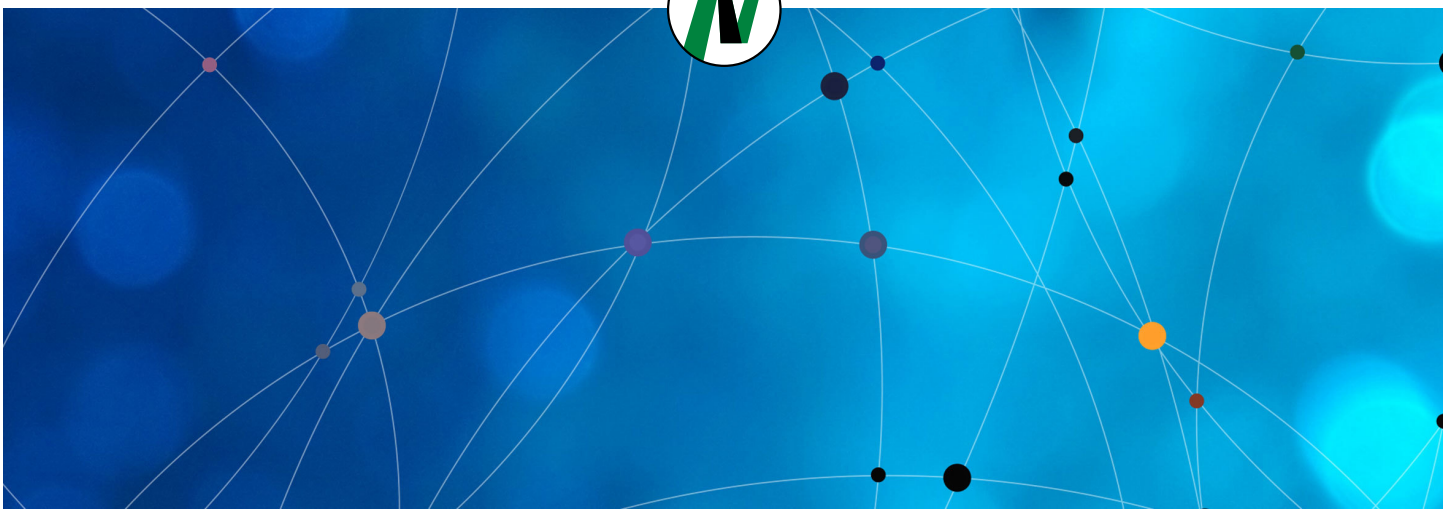

California Supreme Court Holds that Inadvertent Disclosure in Response to a Public Records Act Request Does Not Waive the Exemption for Withholding Privileged Documents

03.29.2016 | By Ashley K. Dunning, John T. Kennedy

In a unanimous opinion addressing a legal issue of statewide importance, the California Supreme Court resolved a split of authority and held that a governmental entity's inadvertent release of privileged documents under the Public Records Act does not waive the privilege.

In *Ardon v. City of Los Angeles*, 2016 Cal. LEXIS 1572, Case No. S223876 (Mar. 17, 2016), the plaintiff in litigation against the City of Los Angeles sought documents from the City pursuant to the Public Records Act. In response, the City inadvertently provided some documents that were privileged under the attorney-client privilege or the privilege for attorney work product. The City demanded that plaintiff return the documents, but plaintiff refused – asserting that by producing the documents pursuant to the Public Records Act request, the City waived any exemption from disclosure under the Public Records Act. Plaintiff argued that any disclosure, including an inadvertent disclosure of privileged documents, waived the exemption from disclosing privileged documents. The Court reviewed the statutory language of Government Code section 6254.5 in light of the Public Records Act as a whole, and concluded that the statutory language as a whole was ambiguous, and resolved the ambiguity by concluding that inadvertent disclosure does not waive the exemption from disclosure of privileged documents.

In reaching its decision, the Court determined that the Legislature intended to permit state agencies to waive exemptions from disclosure by making a voluntary and knowing disclosure, while prohibiting the

agencies from selectively disclosing the records to one member of the public but not others; however, the same waiver does not apply to inadvertent disclosures. The Court also recognized that the legislative history confirms that section 6254.5 does not contemplate inadvertent disclosures.

The Court also decided that there was no reason to construe California Government Code section 6254.5 differently than California Evidence Code section 912 with respect to inadvertent disclosures. Evidence Code section 912 applies to discovery disputes in litigation, and 'waiver' under Evidence Code section 912 does not include accidental, inadvertent disclosure of privileged information by an attorney.

Notably, the Court cited *Roberts v. City of Palmdale*, 5 Cal. 4th 363 (1993) with approval for the principle that the attorney-client and work product privileges apply to governmental entities, just as they do to private parties, even though closed session meetings between the governing boards of governmental entities and their legal counsel are limited by open meeting laws.

The *Ardon* decision provides a measure of breathing room to public agencies responding to Public Records Act requests, as it squarely rejects the gotcha theory of waiver, in which accidental disclosure of privileged documents becomes the equivalent of voluntary and knowing disclosure of privileged information. However, the Court was also clear in noting that a public agency's own characterization of its intent is not dispositive. Thus, the Supreme Court has now confirmed that if a public agency establishes that a privileged document was *inadvertently* provided in response to a Public Records Act request, it has not waived the attorney-client privilege. The Court was not, however, presented with another practical challenge for public entities, which is the voluntary disclosure of attorney-client privilege documents by a board or staff member that was not authorized by the majority of the public entity's governing board or the staff member to whom that authority has been delegated.

On the heels of *Ardon* are two other Public Records Act cases before the California Supreme Court that are being watched closely by California public agencies, *City of San Jose v. Superior Court of Santa Clara County* (Cal. Supreme Court Case No. S218066) and *County of Los Angeles Board of Supervisors v. S.C. (ACLU of Southern California)* (Cal. Supreme Court Case No. S226645).

In *City of San Jose*, the Court will determine whether written communications pertaining to City business, including e-mails and text messages, which (a) are sent or received by public officials and employees on their private electronic devices using their private accounts, (b) are not stored on City servers and (c) are not directly accessible by the City, are public records within the meaning of the California Public Records Act.

In *County of Los Angeles Board of Supervisors*, the Court will determine whether invoices for legal services sent to a public entity by outside counsel fall within the scope of the attorney-client privilege and are exempt from disclosure under the California Public Records Act, even with all references to attorney opinions, advice and similar information redacted.

Stay tuned....