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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

PETITION FOR REVIEW

Of a Decision of the Second Appellate District of the
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 Demon, Judge Presiding

[Related to Case Nos. BC406437; BC404694; BC363735; and BC447863]

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To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of Los Angeles respectfully petitions for review of a published opinion of the Second District Court of Appeal, Division Two, filed December 10, 2014.

QUESTIONS PRESENTED FOR REVIEW

1. Does inadvertent disclosure of privileged documents by a clerk responding to a Public Records Act, Government Code sections 6250 et seq. ("PRA") 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?

REVIEW IS APPROPRIATE TO RESOLVE WHETHER THE PUBLIC RECORDS ACT WEAKENS THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTIONS OR WHETHER IT CAN BE HARMONIZED WITH THOSE LEGAL PRINCIPLES

In a published opinion ("the Opinion"), the Court of Appeal held the Public Records Act ("PRA") 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 PRA request waives those protections, even though inadvertent disclosure by an attorney responding to an identical discovery request does not. Review is appropriate under California Rules of Court, rule 8.500, subdivision (b)(1) "to settle ... important question[s] of law."

The Court of Appeal quoted the trial court's erroneous explanation 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 [PRA] is waived as to the world ... .' " (Opinion at p. 4 [emphasis added].) However, Evidence Code section 912 provides no exception for inadvertent disclosure, there is no statute governing waiver of the work-product doctrine upon disclosure to third parties at all — let alone statutory protection for inadvertent disclosure. 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.

Yet despite this absent statutory basis, it is well established that inadvertent disclosure of documents subject to the attorney-client privilege under the Evidence Code or the work-product doctrine under the Code of Civil Procedure, and whether produced as an electronic file or in hard copy, does not result in waiver. Rather such inadvertent disclosure triggers an ethical obligation on counsel receiving such materials to refrain from examining them more than necessary to ascertain privilege. (*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656–657 ["*State Fund*"].) *State Fund* relies on ABA Formal Ethics Opinion No. 92-368 and has been cited in no fewer than 71 cases and thus represents a well-established rule of California, as well as American, law.

This rule is a common law rule and does not arise from statute. Nevertheless, this Court cited *State Fund* with approval in *Rico v. Mitsubishi Motors Corporation* (2007) 42 Cal.4th 807 ("*Rico*"), an opinion cited in no fewer than 41 others. Nor does *Rico* limit the rule to inadvertent disclosure in response to a discovery context. Indeed, *Rico* involved counsel obtaining opposing counsel's notes by unexplained means:

> Somehow, Johnson acquired Yukevich's notes. Johnson maintained that they were accidentally given to him by the court reporter. Yukevich insisted that they were

> taken from his file while only Johnson and plaintiffs' team were in the conference room.
>
> ....
>
> The [trial] court ultimately concluded that the defense had failed to establish that Johnson had taken the notes from Yukevich's file. It thus ruled that Johnson came into the document's possession through inadvertence.

(*Id.* at p. 812)

Review is also necessary to consider whether clerical employees have the authority to inadvertently waive the attorney-client privilege, held by the City Council, or work-product protections held by counsel. The Opinion's unprecedented conclusion that a public agency's privileges may be lost by a bureaucratic error is of paramount concern to all public agencies in our state from the State itself to the 7,000 units of local government that serve Californians, most with far fewer resources than Los Angeles. If the rule stands, governments must risk their privileges or treat requests for public records as defensively and with the same application of expensive legal services as they are required to do as to discovery requests. This benefits neither the transparency objective of the Public Records Act nor the public fisc. Such a rule will also discourage the creation of privileged materials in the first instance, impairing counsel's ability to defend public agencies and their ability to communicate with their clients and their clients'

abilities to know and to adhere to the requirements of 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 PRA nor open-meeting statute abrogate attorney-client privilege as applied to counsel's memo regarding land use matter to be heard at open meeting] ("*Roberts*").)

If the Opinion's profound change in the law governing public agency's privileges is to be effected, this Court should say it. Review is appropriate here.

A. THE OPINION UNDERMINES THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

The Opinion's distinction of inadvertent disclosure in discovery from that as to PRA requests is analytically unsound and undermines the attorney-client privilege and the work-product doctrine. First, as discussed above, the Opinion's claim of statutory support for the distinction in Evidence Code section 912 and Code of Civil Procedure section 2031.285 is error.

Second, the Opinion's observation that "[i]n 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" (Opinion at p. 6 [internal quotations and citations omitted]) ignores that courts must also harmonize statutes rather than to allow one to defeat the other. (*Id.* at p. 373 [harmonizing PRA, open-meeting law, and Evidence Code].) The *State Fund* rule is itself a judicial gloss on the statutory privileges arising from courts' power to govern the bar. It does not allow the distinction the Opinion establishes. Rather it applies regardless of how counsel come into possession of privileged materials of their adversary. (*State Fund, supra,* 70 Cal.App.4th at p. 656.)

Finally, the policies that support the attorney-client and work product privileges do not apply uniquely in discovery, but under any circumstances where disclosure is compelled, as it was here under the PRA. By carving the PRA out of protection provided under *State Fund* — and approved by this Court in *Rico* — the Opinion dilutes privileges that are fundamental to our system of jurisprudence.

B. THE OPINION ALLOWS CLERICAL STAFF TO WAIVE PRIVILEGES HELD BY OTHERS

The Opinion gives short shrift to the argument low-level staff cannot waive the attorney-client privilege held by the City Council or the work product protection held by counsel. The point is worthy

of more serious consideration.

The attorney-client privilege of a private corporation belongs to its management and is normally exercised by its officers and directors. (*Melendrez v. Superior Court of the State of California* (2013) 215 Cal.App.4th 1343, 1353–54.) The "officers and directors" of a city is its City Council, and it is undisputed the City Council waived no privilege here. Similarly, the work product protection is held by attorneys, and it can be neither exercised nor waived by the City Council or even the Mayor, let alone clerical employees. (2 Witkin, Cal. Evid. (5th ed. 2012) Witnesses, § 146 ["Attorney is Holder of Privilege"].)

The Opinion's concern a city might seek to selectively disclose privileged materials via clerical staff must yield to the principle that only those who hold a privilege can waive it — especially here, where it cannot be argued the City had any intent to do so. Should such misconduct arise, courts will have means to police it via the existing doctrine that privileges may be waived by those with authority to do so — impliedly or expressly. (2 Witkin, Cal. Evid. (5th ed. 2012) Witnesses, § 155 ["Implied and Express Waiver"].)

FACTUAL BACKGROUND

This case, before this Court once previously (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 [Government Claims Act permits class action claims against local governments], challenges the City's pre-March 2008 telephone users tax ("TUT"). Ardon claims a 2006

Internal Revenue Service's ("IRS") decision to exclude from the Federal Excise Tax ("FET") charges for long-distance service based only on time, as opposed to time and distance, required a similar reduction of the City's TUT. (1 CT 22–23 [Corrected First Amended Class Action Complaint, ¶¶ 6–9.)

Ardon served its first document production request seeking, among other things, City documents relating to the FET, IRS Notices reflecting the IRS' changed interpretation of the FET, and communications regarding application of the TUT to long distance services charged on the basis of time alone. (1 CT 152 [Declaration of Holly O. Whatley ("Whatley Decl.") at ¶ 2]; 1 CT 161.) Ardon served a second request seeking documents concerning the TUT authored by the League of California Cities — of which the City is a member. (1 CT 153 [Whatley Decl. at ¶ 3]; 1 CT 168.)

Concurrently with the second request, Ardon served a deposition subpoena for business records on the League seeking records related to:

- the FET;
- amendment of any telephone tax to eliminate reference to the FET; IRS notices of its changed interpretation of the FET;
- applicability of any tax to long-distance service charged only on the basis of time; and,
- League communications on behalf of or at the direction

of the City as to any of these.

(1 CT 153 [Whatley Decl. at ¶ 4]; 1 CT 174–175.)

The trial court granted League and City motions to quash agreeing the materials Ardon sought were protected by the attorney-client privilege and the work-product doctrine. (1 CT 153 [Whatley Decl. at ¶ 5]; 1 CT 177.)

The City produced documents in response to both requests for production, withholding 27 described in a privilege log ("Privilege Log"). (1 CT 154 [Whatley Decl. at ¶ 7]; 1 CT 195-201.)

Over five years later, Ardon's counsel disclosed to the City for the first time by April 3, 2013 letter, that she had obtained three of those privileged documents assertedly in response to a PRA request under Government Code, section 6254. (1 CT 154 [Whatley Decl., ¶ 8]; 1 CT 203.) These are:

- September 18, 2006 Letter from Chief Assistant City Attorney, David Michaelson, to City Administrative Officer, William Fujioka ("Michaelson Letter"). This analyzes the impact of IRS Notice 2006-50 on the TUT, the core issue in this case, and options for the City, including arguments to defend against claims identical to Ardon's. The privilege log identified this as "Letter prepared by legal counsel" at numbers 3 and 21 and designated it subject to attorney-client, attorney-work product and deliberative-process

protection. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 9]; 1 CT 206.) The letter bears a legend: "ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION." (1 CT 154–155 [Whatley Decl., ¶ 9].)

- June 27, 2006 Memorandum from the League to California City Attorneys ("League Memo"). This memorandum, enclosed with the Michaelson Letter, analyzes the possible impact on local taxes of the IRS' changed interpretation of the FET. The Privilege Log identified this as "Research memo sent to legal counsel" at number 4 and designated it as within the attorney-client, work-product and deliberative process privileges. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 10]; 1 CT 196.)
- June 1, 2006 Memorandum from City Administrative Officer, William Fujioka to City Attorney, Rockard J. Delgadillo ("Fujioka Memo"). This bears the subject line, "IRS Notice Regarding Federal Excise Tax." The Privilege Log identified it at number 2 and designated it as protected by the attorney-client, work-product and deliberative-process privileges. (1 CT 154–155 [Whatley Decl., ¶¶ 8, 11].) Plaintiff admits having 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's counsel repeatedly demanded return of these privileged documents. (1 CT 155–156 [Whatley Decl., ¶¶ 12, 14]; 1 CT 213–215; 1 CT 222-223.) Ardon's counsel refused. (1 CT 155–156 [Whatley Decl., ¶¶ 11, 13]; 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].) Nor did the Chief Administrator. (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 the work-product protection of the Michaelson Letter or the other two documents. (1 CT 151 [Vincent Decl., ¶ 6].)

PROCEDURAL HISTORY

The City filed its Motion to Compel Return of Privileged Documents and to Disqualify Counsel of Record. (1 CT 121.).

On hearing the motion, the trial court requested supplemental briefing on the legislative history of the PRA and Rules of Professional Conduct, Rule 2-100. (Reporter's Transcript, July 1, 2013 hearing at p. 17.) At the second hearing on this motion, the trial court adopted its tentative ruling denying the motion. (Reporter's Transcript, October 25, 2013 hearing at p. 14; 2 CT 474–484.)

The City appealed and the Second District affirmed in a published opinion.

LEGAL DISCUSSION

I. PUBLIC RECORDS ACT WAIVER DOES NOT APPLY

A. Inadvertent Disclosure in Response to a PRA Request Does Not Constitute Waiver.

Two PRA provisions are in issue here. 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 PRA allows public agencies to withhold from responses to requests for access to public records material subject to any statutory privilege.

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.

Legislative history indicates that "waiver" under Government Code section 6254.5 was intended to prevent selective disclosure of records — which by its very nature must be intentional. Other than the Opinion, no published authority has ever held inadvertent disclosure of materials subject to the attorney-client privilege or work product rule results in waiver — much less that waiver in litigation in which the public agency has won discovery battles to maintain privilege. Moreover, the Opinion conflicts with *State Fund, Rico* and *Clark v. Superior Court (VeriSign)* (2011) 196 Cal.App.4th 37 [affirming disqualification of counsel provided privileged records of defendant employer by plaintiff employee].

I. Section 6254.5 was intended to prevent selective disclosure, not to punish inadvertence

The PRA governs the right to inspect public records. Section 6253 provides that public records are generally open for inspection. Section 6254 sets forth exemptions to this general requirement, including that for records protected by statutory privileged stated in its subdivision (k) quoted above.

Subdivison (k)'s exemption includes documents subject to the attorney-client privilege under Evidence Code section 954, as well as those subject to the work-product protection of Code of Civil Procedure section 2018.030.

Section 6254.5's waiver rule — which the City concedes applies to intentional release of attorney-client privileged materials and work product — recognizes that all members of the public should be afforded equal access to public records and prohibits selective disclosure.

Were there any doubt as to that intent, legislative history resolves it. When the statute was added to the Public Records Act in 1981, its sponsor, Senator Barry Keene, issued four press releases trumpeting its prohibition of selective disclosure. (2 CT 401 [Declaration of Holly O. Whatley in Support of City's Supplemental Brief ("Supplemental Whatley Decl."), ¶¶ 2, 3]; 2 CT 402–403 [March 24, 1981 press release]; 2 CT 404–405 [April 28, 1981 press release]; 2 CT 401 [Supplemental Whatley Decl., ¶¶ 4, 5]; 2 CT 406–408 [July 6, 1981 press release]; 2 CT 409–411 [September 9, 1981 press release].)

Selective disclosure was also discussed in three legislative staff reports. (2 CT 401 [Supplemental Whatley Decl., ¶ 6]; 2 CT 412–414 [August 11, 1981]; 2 CT 401 [Supplemental Whatley Decl., ¶ 7]; 2 CT 415–417 [April 28, 1981]; 2 CT 401 [Supplemental Whatley Decl., ¶ 8]; 2 CT 418 [August 11, 1981].)

Moreover, the Legislature enacted Government Code section 6254.5 by Stats.1981, c. 968, p. 3680, § 3, and is presumed to have been aware of *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645 (*"Black Panther Party"*). Plaintiffs there demanded to inspect complaints of abusive practices by collection agencies, and the

Bureau of Collection and Investigative Services acknowledged it routinely disclosed those complaints to collection agencies for response. (*Id.* at p. 655.) Although the court concluded the complaints fell within an exemption under Government Code section 6254 (*Id.* at p. 654), it rejected the Bureau's contention it could share these complaints with collection agencies but deny access to others. Government Code section 6254.5 codified this holding, and government officials cannot rely upon the exemptions of section 6254 to justify selective disclosure.

However, the Opinion's observation that the relief sought by the City would allow selective disclosure "to Ms. Rickert but not to others" (Opinion at p. 6) ignores that selective disclosure requires intention. The Opinion rests upon an absurd premise that a public agency might wish to selectively disclose privileged materials to its adversaries in high-stakes litigation, while denying access to the public at large.

2. The Opinion would require attorneys to staff PRA response desks.

The City receives hundreds of PRA requests annually; State agencies receive thousands. The Opinion leaves them with unacceptable options: forego statutory privileges — including in class action disputes like that at bar involving perhaps tens of millions of dollars— or assign attorneys to respond to PRA requests, undoubtedly making disclosure slower and much, much more costly. Nothing in *Black Panther Party* or the legislative history of

Government Code section 6254.5 evidences intent to impose that choice, and the Opinion's failure to harmonize the provisions of the PRA internally and with the Evidence Code and Code of Civil Procedure ought not evade this Court's review.

Moreover, the trial court's view that "Ms. Rickert used the Public Records Act for exactly the purpose it was intended" (2 CT 482) invites litigants to ignore standards of professional courtesy — and the trial court order barring discovery — by failing to inform counsel for the City of their requests and instead press for an advantage under the PRA. Neither professionalism nor respect for the courts allows such a sneak attack.

B. Clerical Employees Cannot Waive Privilege

The City Council and City Attorney hold the privileges in issue here, not clerks who handle PRA requests. Only they can waive privilege and they did not. (1 CT 150–151 [Vincent Decl., ¶¶ 4—6].)

1. No one with authority waived the attorney-client privilege

Though the clerk who processed Ms. Rickert's PRA request worked in the City Administrator's office, the City Administrator — much less the City Council — made no knowing and voluntary decision to disclose the privileged materials disputed here. Nor did he sign the response to the PRA request (2 CT 272–273). Indeed, he declared he never waived the privilege here, nor authorized anyone to do so and the documentary evidence supports his declaration. (1 CT 147–148.) Thus, even assuming the City Administrator could

waive the privilege (which the City does not concede, as the City Council holds the privilege), he did not.

It would be impossible, of course, for the City Administrator to personally vet hundreds of PRA responses per year. Nor is there any evidence here the disclosures at issue here were made by an employee with authority to waive privilege. Moreover, that neither the City Attorney nor outside counsel was copied on Ardon's PRA request gave the responding employee no reason to believe oversight by management was needed. That this low-level staff overlooked the confidentiality stamp which appeared on one of the three documents is regrettable, but the law must account for human fallibility and preserve the goals of the PRA, the Evidence Code and the Code of Civil Procedure nevertheless.

Most troubling is the Opinion's erroneous conclusion that the PRA empowers **anyone** to waive privileges simply by inadvertence in responding to a PRA request but in no other manner. The City is, of course, the client here and only its City Council has authority to waive privilege. (See, *Roberts, supra,* 5 Cal.4th at p. 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. ..."].) Again, undisputed evidence shows the City Council never authorized waiver here. (1 CT 150–151.)

Thus, the conclusion a clerk unauthorized by the City Council can inadvertently waive attorney-client privilege is unsupported in

law or fact. While the Opinion's observation that "such an exception" to the rule privilege can be waived only by the holder "would put it within the power of the public entity to make selective disclosures through 'low level employees,'" (Opinion at p. 7) might raise concerns under other circumstances, the law recognizes many circumstances under which one interest (such an interest in avoiding selective disclosure) may be outweighed by another (such as an interest in allowing the holder of a privilege to control waiver). It also ignores that the holder of a privilege may be found to have implied waiver and a court would, no doubt, be able to use that rule to prevent the selective disclosure with which both Government Code, section 6254.5 and the Opinion are concerned. Moreover, the City's interest in preventing inadvertent waiver here is especially compelling given that Ardon's counsel flouted a trial court discovery order and impaired the City's counsels' ability to defend this case by exploiting the error of a low-level employee.

Nor does the Opinion consider yet another consequence of its rule — if the mistakes of low-level employees may have profound consequence, there will be incentive to purchase such mistakes when the stakes are high. The law ought not create such temptations for those whose low wages and low visibility makes them especially vulnerable to temptation and exploitation. Authority is better vested where the public can see it — in the hands of elected officials and those they closely manage.

2. Nor did the City Attorney waive work product protection

All three of the privileged documents opposing counsel admittedly obtained (and perhaps others as well) are work product, and the City's attorneys — not clerical employees, the City Administrator, the City Council, or even the Mayor — hold that privilege. Thus, none but they may waive it.

The attorney work product privilege protects an attorney's impressions, conclusions, opinions, legal research or theories. (Code Civ. Proc., § 2018.030.) It exists to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery by opposing counsel. (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.)

California Code of Civil Procedure, section 2018.020 declares the policy of this State to "preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to ... prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases," and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." Section 2018.030 makes this privilege absolute as to "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories ... ." Work product "is not discoverable under any circumstances." (Code Civ. Proc., § 2018.030.) The statute also recognizes a qualified privilege as to written materials and oral

information that do not reflect an attorney's legal thoughts. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 68 ("*Fellows*").)

Fellows thoroughly analyzes precedent from California and elsewhere and concludes the protection is held exclusively by the attorney who creates work product. Accordingly, communications subject to the work product rule may only be disclosed by or with the consent of the attorney. Here, Ardon's counsel refrained from notifying the City's counsel of her PRA request. Thus, the attorneys whose work product was in issue had no opportunity to waive it and cannot have done so.

II. OPPOSING COUNSEL FLOUTED THEIR ETHICAL DUTIES

A. *State Fund* Prescribes Counsel's Duties.

Counsel's ethical duties are clear:

> 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 p. 656–657.)

The plaintiff in *State Fund* sent defendant's counsel documents intended to be identical to those provided in discovery, except that the new set of documents was Bates-stamped for trial. Inadvertently, plaintiff also sent 200 pages of forms entitled, "Civil Litigation Claims Summary," marked "attorney-client communication / attorney work product." (*Id.* at p. 648.) "Confidential" was printed around the perimeter of the first page of each form. (*Ibid.*) When plaintiff's counsel discovered his mistake and demanded return of the documents, as here, opposing counsel refused. The trial court sanctioned him, relying on an American Bar Association opinion. (*Id.* at pp. 655–656.) The Court of Appeal reversed this award only because that counsel's conduct had not yet been clearly proscribed by California law. (*Id.* at p. 656.) However, the Court specifically made the holding quoted above as a "**standard for future application to instances similar to that presented here.**" (*Ibid.*, emphasis added.) Thus, the lawyer who appealed sanctions in State Farm is the last who may benefit from the prior silence of California law; opposing counsel here may not.

B. *State Fund's* Rule Is Not Limited to Discovery

An attorney's ethical duties do not turn on how he or she comes to possess privileged material. Though a plumber (to use Ardon's example) who receives privileged information in response to a PRA request is not bound by the ethical duties stated in *State Fund,* every attorney who practices before California courts is. It is long settled that "[a]ttorneys must conform to professional standards in whatever capacity they are acting in a particular matter." (*Crawford v. State Bar of Cal.* (1960) 54 Cal.2d 659, 669 [lawyer acting as tax consultant]; *Alkow v. State Bar of Cal.* (1952) 38 Cal.2d 257, 263 [attorney acting as collection agent].) The Opinion erred to allow opposing counsel to shed her obligation to the Rules of Professional Conduct, the trial court and this Court when reviewing a production pursuant to a PRA Request. Those duties remain hers so long as she is licensed to practice law.

The Opinion cites the fact the PRA does not expressly state the *State Fund* rule, thus reading it to repeal it in the context of public records requests and stating that that rule arises by statute in the context of discovery. Yet the Opinion overlooks that the *State Fund* rule is itself judge-made — the Evidence Code contains no statutory exception to its rule that disclosure results in waiver, and Evidence Code section 912 is silent on the issue of inadvertence. The Opinion overlooks, as well, that the Code of Civil Procedure includes no general protection against inadvertent disclosure.

The Code of Civil Procedure does expressly protect electronically stored information ("ESI") produced in discovery when the sending party notifies the recipient of a claim of privilege, but this protection neither requires a showing of inadvertence nor obligates the recipient to refrain from inspection:

> (a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim.
>
> (b) After being notified of a claim of privilege or of protection under subdivision (a), a party that received the information shall immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for a determination of the claim.
>
> (c)(1) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved.
>
> (2) A party who received and disclosed the information before being notified of a claim of privilege or of protection under subdivision (a) shall, after that

notification, immediately take reasonable steps to retrieve the information.

(d)(1) If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal.

(2) Until the legitimacy of the claim of privilege or protection is resolved, the receiving party shall preserve the information and keep it confidential and shall be precluded from using the information in any manner.

(Code Civ. Proc., § 2031.285.) Given how ESI is gathered, reviewed and stored, disclosure of privileged information is likely, and indeed common. Thus, the Legislature expressly provides additional protection of privilege in this context. However, this additional protection does not relegate the *State Fund* rule to circumstances under which ESI is produced in discovery, but instead operates independently.

The Opinion simply fails to recognize that the *State Fund* ethical obligations are of common law rather than statutory and makes law of the trial court's erroneous 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 [PRA] is waived as to the world ... ." (Opinion at p. 4 [emphasis added; internal quotations omitted].)

However, no statute makes exception to the *State Fund* rule in the context of inadvertent disclosure, whether in discovery or otherwise. Two cases beyond *State Fund* are sufficient to make the point.

In *Rico,* though one party claimed the privileged notes at issue were stolen, the trial court determined they had been obtained "through inadvertence." (*Rico, supra,* 42 Cal.4th at 812.) This inadvertence was not in a document production, but perhaps by a court reporter mishandling attorney notes at a deposition. (*Ibid.*) The court nevertheless found opposing counsel bound by *State Fund* to immediately notify the author of the notes; that the disclosure was not at the hands of the authoring counsel in the context of written discovery gave him no freedom to exploit the error — whoever's it might have been.

Similarly, in *Clark,* the plaintiff employee took privileged materials from his employer before he retained counsel, and no one accused that counsel of obtaining those materials through inappropriate means. (*Clark v. Superior Court* (*VeriSign*), *supra,* 196 Cal.App.4th at 42–44, 49.) That he obtained them from his client did not relieve him of his ethical duty to immediately notify opposing counsel and to return the material. (*Id.* at pp. 54–56.) Again, the court

enforced the *State Fund* rule without regard to how the attorney obtained the privileged material.

Although the Opinion concludes otherwise, the ethical obligation attaches regardless of how an attorney obtains privileged material. *State Fund* describes this as the "obligation of an attorney receiving privileged documents due to the inadvertence of another," without specifying who that "other" might be and without limiting the rule to inadvertence in civil discovery. (*State Fund, supra,* 70 Cal.App.4th at p. 656–657.) Were the rule otherwise, attorneys would be encouraged to devise ways to "stumble across" privileged material outside discovery. Under Ardon's theory, if his counsel had found a privileged document of the City's misplaced in her conference room following a meeting, she could exploit it, because it had not been inadvertently disclosed by opposing counsel in discovery. The ethical requirements of a fair adversary system are not so easily evaded.

Thus the *State Fund* rule applied to inadvertence in discovery (*State Fund*'s facts), by a court reporter (*Rico*) and theft by the plaintiff client (*Clark*). The who and the how mattered not. What mattered what that a licensed attorney had privileged material without entitlement and was ethically obligated to return it without using it to advance his or her client's cause. Ardon's effort to limit *State Fund* to its facts to excuse the misconduct here runs afoul of Justice Gilbert's wise admonition:

> In an attempt to extract legal principles from an opinion that supports a particular point of view, we must not seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations.

(*Harris v. Superior Court* (1992) 3 Cal. App. 4th 661, 666.)

This uncompromising ethical obligation arises from the requisites of an adversarial system and the policy of the attorney-client privilege. As this Justice Broussard wrote for a unanimous court:

> [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 strong public policy refutes Ardon's claim his counsel may circumvent her duty to honor opposing party's privilege. Indeed, public policy demands counsel fulfill their ethical obligations under *State Fund,* regardless from whom or by what means privileged materials are obtained without an authorized waiver by the holder of the privilege.

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

When an attorney obtains inadvertently disclosed, privileged material and fails to comply with *State Fund,* disqualification is appropriate. In *Clark,* the plaintiff sued VeriSign, his former employer, and provided his counsel several of VeriSign's privileged documents; plaintiff's counsel then produced them in response to the employer's discovery demands. (*Clark v. Superior Court* (*VeriSign*), *supra,* 196 Cal.App.4th at pp. 41–43.) Many were prominently marked "Attorney–Client Privileged," "Prepared at Request of

Counsel," and/or "Highly Confidential." VeriSign's counsel demanded their return. While Clark's counsel initially agreed to return some documents, he ultimately neither returned nor destroyed them. (*Id.* at 43–44.)

The Court of Appeal ruled that Clark's counsel, upon coming into possession of privileged documents, was bound by the *State Fund* rule:

> Once 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.

(*Clark v. Superior Court* (*VeriSign*), *supra*, 196 Cal.App.4th at 53.) The court upheld the lower court's finding Clark's counsel exceeded those limits, in part, because he examined the documents sufficiently to determine theirs subject matter. (*Ibid*) Accordingly, the court found no abuse of discretion in the trial court's disqualification of Clark's counsel. (*Id.* at p. 55.)

Similarly, *State Fund* applies when an attorney obtains work product. In *Rico*, plaintiff's counsel (Johnson) obtained a printed copy of defendant's counsel's (Yukevitch) strategy notes under disputed circumstances. (*Rico, supra*, 42 Cal.4th at 812.) A week after acquiring them, Johnson used those notes to depose a defense

expert. When Yukevich realized that Johnson possessed and had used his notes, he demanded return of the notes and moved to disqualify plaintiffs' legal team and their experts. (*Id.* at pp. 812–813.) The trial court granted the motion and this Court affirmed, applying *State Fund* to work product, and holding that the rule grounded 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. Plaintiff's Counsel Violated State Fund and Must Be Disqualified to Allow a Fair Trial of this Dispute

Disqualification is mandated here. These facts create more than the appearance of impropriety or accidental review of peripheral information. Ardon's counsel's admits possession of the City's defense strategy for this very case and cases like it and has plainly studied those materials at length. How can the city receive a fair trial if its opponent is privy to its defense strategy and the considered advice of its counsel?

State Fund's rule is objective; courts consider what would be apparent to reasonably competent counsel in the position of he or she who comes into possession of an adversary's secrets. (*Rico, supra,* 42 Cal.4th at 818–819.) No reasonable attorney in the position of Ardon's counsel could have concluded that the City knowingly and intentionally disclosed to opposing counsel, in an unvetted PRA response, documents with confidential communications about the subject matter of pending litigation, one of which was plainly

marked to indicate its privilege. Plainly a PRA clerk erred and the beneficiary of that windfall had an ethical obligation to forego the ill-gotten gain.

Ardon's counsel obtained confidential documents analyzing the central legal issues in this case. The Michaelson Letter — prepared by one of the most senior lawyers in the City Attorney's office — directly analyzes the impact of the IRS's FET ruling on the City's phone tax and on litigation the City expected to result. It appeared on the City Attorney's letterhead and was prominently labeled "ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION." (1 CT 154-155 [Whatley Decl., ¶¶ 8, 9].)

Moreover, Ardon's counsel indisputably reviewed the confidential documents sufficiently to correlate them to the City's 2008 privilege log. (See 1 CT 154–155 [Whatley Decl., ¶¶ 8, 11]; 1 CT 206; 1 CT 211.) This very conduct disqualified counsel in *Rico* and *Clark*. (*Rico, supra,* 42 Cal.4th at 819; *Clark, supra,* 196 Cal.App.4th at 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 her ethical duties under *State Fund* and *Rico* and her violation should not be insulated by the trial court's misconstruction of the PRA.

Further, even for documents not expressly labeled "confidential", it was abundantly clear from even cursory

examination that each was a communication between lawyer and client. The Michaelson Letter attached the League Memo analyzing the impact of the IRS's construction of the FET issue on local taxes. The Fujioka Memo was addressed to the City's elected City Attorney. (1 CT 155 [Whatley Decl., ¶¶ 10, 11].)

Still further, it is equally apparent that the privileged documents were released inadvertently. Apart from being expressly identified as confidential, privileged or attorney work product, they were specifically designated by the City as such on the Privilege Log provided directly to Plaintiff's counsel, and were withheld during discovery pursuant to the trial court's protective order. (1 CT 154 [Whatley Decl., ¶ 7]; 1 CT 194 [Privilege Log].) (1 CT 153 [Whatley Decl., ¶ 5]; 1 CT 177 [Order Granting Motion to Quash].) Obtaining the very documents the trial ordered protected can hardly be understood as anything but willful and approaches contempt.

Accordingly, Plaintiff's counsel well knew the privileged nature of what she had and that the City's counsel and Council could not have intentionally waived the privileges they fought to defend. She cannot credibly maintain she thought production of such material in response to a PRA request — of which by her own actions the City's attorneys had no notice — was a deliberate waiver. Nor can she credibly claim her ethical duties are those of layperson unfamiliar with this case. Instead, she maintains she can exploit a clerical error, refuse to surrender privileged material and, moreover,

claim the right to use the information and, indeed, seek even more privileged material. This Court should not countenance such behavior. Our justice system requires good faith to function effectively; conduct such as this cannot be countenanced lest the courts be inundated with disputes upon every clerical failure in 7,000 local governments and hundreds of State agencies.

Furthermore, a showing of present injury is not required to support 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, requiring a showing of actual injury could further prejudice the party seeking disqualification because it would necessarily entail revealing the precise manner that inadvertently disclosed, privileged information harmed its case.

In any event, the City has plainly been damaged. Much as we might like, Ardon's counsel cannot be expected to forget the City's defense strategy now that she has it. If she is permitted to continue here, she cannot but use that information to assert a case in which millions of dollars are at stake for both the client class and its contingency counsel. Her knowledge of the City's defense strategies will inform her work, most particularly on the crucial, forthcoming certification motion. The City's secrets may also affect her selection of issues to pursue, whether and on what terms to settle, and

prospects for appeal. In short, counsel's wrongful examination of privileged documents will permeate nearly every aspect of this litigation. There is no effective alternative to disqualification to ensure a fair trial to the City and the millions who depend on the services it funds with the proceeds of the telephone tax in issue.

III. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court grant the City's Petition for Review.

DATED: January 16, 2015

Respectfully submitted,

COLANTUONO, HIGHSMITH & WHATLEY, PC

MICHAEL G. COLANTUONO
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Attorneys for Petitioner and
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CERTIFICATION OF COMPLIANCE

WITH CAL. R. CT. 8.504(d)

Pursuant to California Rules of Court, Rule 8.504(d), the foregoing **Petition for Review** contains 8,132 words (including footnotes, but excluding the tables and this Certificate) and is within the 8,400 word limit set by Rule 8.504, subd. (d), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on January 16, 2015 at Los Angeles, California.

COLANTUONO, HIGHSMITH & WHATLEY, PC

Holly O. Whatley

CERTIFICATE OF SERVICE

I, Pamela Jaramillo, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on January 16, 2015, declarant served the **PETITION FOR REVIEW** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of January, 2015, at Los Angeles, California.

COLANTUONO, HIGHSMITH & WHATLEY, PC

By: Pamela Jaramillo
Pamela Jaramillo

SERVICE LIST

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

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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	

EXHIBIT 1

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

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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.