

CLIENT NEWS BRIEF

California Court of Appeal Holds Attorney-Client Privilege Not Waived by Public Agency's Accidental Disclosure of Privileged Communications in Response to a Public Records Act Request

In a decision impacting public agencies across the state, the California Court of Appeal held that a school district did not waive its attorney-client privilege when it accidentally revealed attorney-client communications in response to a request under the Public Records Act. In *Newark Unified School District v. Superior Court* (July 31, 2015) 2015 Cal.App.Lexis 671 (*Newark*), the Court of Appeal reversed the trial court, which previously ruled that the school district waived the privilege even upon a mistaken release of documents. Lozano Smith's litigation team represented the school district in the case before the trial court and on appeal.

The controversy centered on a Public Records Act statute, Government Code section 6254.5, which states "whenever a state or local agency discloses a public record which is otherwise exempt . . . to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in" Government Code section 6254. Among the exemptions under Government Code section 6254 are "(r)ecords, 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." (Gov. Code, § 6254, subd. (k).) The *Newark* court held that regardless of Government Code section 6254.5, when a public entity mistakenly turns over attorney-client communications in response to a Public Records Act request, that is not a "disclosure" of attorney-client communications resulting in the waiver of the attorney-client privilege.

In *Newark*, Just hours after the release of over 1,500 documents in response to a Public Records Act request, the district realized that the disclosed documents included over 100 pages of privileged communications between the district and its lawyers, and requested their return or destruction. The requesting party refused, prompting the district to seek a restraining order in superior court on the basis that the attorney-client privilege is not waived under the Public Records Act when such privileged communications are inadvertent or unintentional. The requesting party argued that any disclosure, accidental or not, resulted in a waiver of the attorney-client privilege. The trial court ruled against the district, but issued a restraining order against the requesting party and others prohibiting the review and dissemination of the privileged documents until any further ruling on appeal.

In reversing the trial court, the appellate court found the statutory language susceptible to the interpretations encouraged by each of the parties and, therefore, analyzed the legislative history of Government Code section 6254.5 to determine its meaning and intent. Based upon the legislative history, the court concluded that the Legislature did not intend Government Code section 6254.5 to undermine the attorney-client privilege, but rather "to prevent government officials from manipulating the (Public Record Act) exemptions by asserting them against some members of the public while waiving them as to others." Section 6254.5 thus does not address a public agency's employee's accidental release of information protected by the attorney-client privilege. Furthermore, the proper interpretation of section 6254.5 required the court to reconcile it with Evidence Code section 912, which defines how the attorney-client privilege can be waived. Because inadvertent disclosures do not waive the attorney-client

August 2015
Number 42



Sloan R. Simmons
Partner and Litigation
Practice Group Co-Chair
Sacramento Office
ssimmons@lozanosmith.com



Steve Ngo
Senior Counsel
Walnut Creek Office
sngo@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

August 2015
Number 42

privilege under Evidence Code section 912, and Government Code section 6254.5 could be interpreted to avoid such a conflict with the evidence code, *Newark* concluded the school district did not waive the attorney-client privilege when it responded to the request under the Public Records Act.

The court did caution, however, that a member of the public could prove the distribution of privileged documents was so widespread that a court order to return the documents would be hard to enforce. The court specified that trial courts would have to make a determination on a case-by-case basis, but that under the facts in *Newark*, there was no evidence of such a wide and irretrievable distribution and the school district employee quickly put the requesting party on notice of the accidental disclosure of privileged documents and demanded their return. This “*Newark* notice” appears a necessary step by public agencies seeking a court order to return privileged documents disclosed by mistake.

The issuance of *Newark* by the Court of Appeal’s First Appellate District comes as the California Supreme Court takes up *Ardon v. Los Angeles*, an earlier opinion by the Second Appellate District, which held that the city had surrendered its attorney-client privilege when it inadvertently disclosed attorney-client information under the Public Records Act. *Ardon* was de-published pending a decision by the California Supreme Court. Notably, in *Ardon*, the party requesting documents under the Public Records Act put the public agency on notice of the apparent disclosure of attorney-client communications and the public agency did not request the communications’ return or destruction until several months after the documents had been disclosed. Because of the Supreme Court’s consideration of *Ardon*, Supreme Court review may also be sought by the losing party in *Newark*.

The district’s litigation team in *Newark* included Lozano Smith Partners [Jerome Behrens](#) and [Sloan Simmons](#), Senior Counsel [Steve Ngo](#) and [Matthew Hicks](#), and Associate [Frances Valdez](#).

If your public agency has any questions regarding the *Newark* opinion or the Public Records Act in general, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).