

# CLIENT NEWS BRIEF

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

If a public agency accidentally discloses privileged attorney-client information when it responds to a Public Records Act request, does the agency waive the attorney-client privilege? The answer is no, according to a California Supreme Court ruling issued today, March 17, 2016. The decision significantly impacts how public agencies throughout the state handle Public Records Act requests. In *Ardon v. City of Los Angeles*, the California Supreme Court resolved conflicting rulings by courts of appeal on the proper interpretation of a provision of the Public Records Act, Government Code section 6254.5, which provides 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 Section 6254, 6254.7, or other similar provisions of law.

The California Supreme Court reversed a decision by the Second District Court of Appeal, which had held that the City of Los Angeles waived the attorney-client privilege as to documents the City mistakenly disclosed to a taxpayer, who was also the plaintiff in a pending lawsuit against the City. In response to a Public Records Act request made by the plaintiff, the City handed over 53 pages of documents, three of which were privileged and previously withheld when the plaintiff requested them in litigation. The City requested return of the privileged documents two months after their production when the requesting party's attorney notified the City that the documents were produced. The *Ardon* Court of Appeal concluded that because "the City has disclosed the documents to one member of the public," that it "was prohibited as a matter of law from 'selectively withholding' that document from any other member of the public." Furthermore, according to the *Ardon* Court of Appeal, the plain language of section 6254.5 dictated a waiver because the law contained nine explicit exceptions to waiver, but did not include documents handed over by mistake or inadvertence.

Rejecting the decision of the *Ardon* Court of Appeal, the California Supreme Court followed the First District Court of Appeal in *Newark Unified School District v. Superior Court (Newark)*. **Lozano Smith successfully represented Newark Unified School District in this litigation, including before the Court of Appeal** (See [Client News Brief No. 42, August 2015](#)). In contrast to the *Ardon* Court of Appeal, the *Newark* Court of Appeal held that a school district did not waive the attorney-client privilege when its employee accidentally gave privileged information to the requesting party. The California Supreme Court agreed, reasoning in *Ardon* that the Legislature could not have possibly contemplated that the mistaken release of privileged information would waive the attorney-client privileges, especially given the Public Records Act's safeguards for private, sensitive information of citizens that are in the hands of the government. Rather, the law focused on preventing intentional

March 2016  
Number 14



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and selective disclosures by a public agency. Citing to *Newark's* discussion of the law's legislative history, the California Supreme Court stated: "When a release is inadvertent, no selection occurs because the agency has not exercised choice in making the release. It was an accident. 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." Like the *Newark* Court of Appeal, the California Supreme Court further reasoned that Evidence Code section 912 and the importance of the attorney-client privileges repudiate "the 'gotcha' theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent." Indeed, one further point made by the California Supreme Court is the impracticality of such a rule: "the logistical problems public entities can face in reviewing, in some cases, even thousands of pages of records responsive to a public records request . . . is daunting. It would be foolish to believe that human errors in the processing of public records requests will cease . . . ."

It is important to emphasize that the California Supreme Court in *Ardon*, like *Newark*, presumed that a public agency's mere assertion that a mistaken release of documents could be challenged and a trial court would examine all the relevant circumstances to determine waiver. "This holding applies to truly inadvertent disclosures and must not be abused to permit the type of selective disclosure section 6254.5 prohibits," the California Supreme Court stated. Moreover, in some circumstances, it may not matter whether or not a public agency can show that it released documents by mistake. Public agencies must take note of the caveat in the *Newark* decision, that a member of the public could prove the distribution of privileged documents reached a point that would make a court order to return the documents hard to enforce. *Newark* specified that trial courts would have to make a determination on a case-by-case basis; 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 prudent step by public agencies that would seek a court order to return privileged documents disclosed by mistake.

In October 2015, the California Supreme Court granted review of the *Newark* decision, but effectively stayed its review pending the outcome of *Ardon*. Today, the California Supreme Court ordered the *Newark* decision published and noted that order in its *Ardon* decision, meaning that the case is good law to be relied upon by public agencies statewide.

The school 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 *Ardon* or *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](#).