

Memorandum

TO: BOARD OF FAIR CAMPAIGN
AND POLITICAL PRACTICES

FROM: Kevin Fisher
Assistant City Attorney

SUBJECT: *GIWARGIS APPEAL*

DATE: October 6, 2021

This memorandum provides an overview of the attorney-client privilege and the statutory requirements that affect Ramona Giwargis' appeal of the City's decision to withhold documents requested under the Public Records Act.¹

As discussed below, we recommend that the Board of Fair Campaign and Political Practices deny the appeal or refer the matter to the City Council for final determination.

1. Facts.

On May 9, 2021, through the City's online Public Records Act request form, Ramona Giwargis requested:

A copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months.

On May 18, 2021, the City, through the Records Coordinator in the Mayor's Office, notified Ms. Giwargis of its decision to withhold documents. The responsive documents were emails seeking and providing legal advice between staff in Mayor's Office and the City Attorney's Office, and were identified as confidential, privileged attorney-client communications exempt from production under California Government Code section 6254(k).²

On June 3, 2021, Ms. Giwargis appealed the City's decision to the Rules and Open Government Committee ("Rules Committee"), stating that documents were improperly withheld because it was not possible for all communications related to Solutions San Jose to meet the requirements to be exempt under the attorney-client privilege.³

¹ Gov. Code §6250 *et seq.*

² Government Code section 6254(k) states: "Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of ... [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."

³ A copy of the appeal to Rules is attached as Attachment A.

The Rules Committee heard the appeal on June 23, 2021 and directed City staff to conduct another search of emails within the scope of the request, including the Mayor's personal accounts and devices, and to produce a privilege log disclosing information about the documents such as the email addresses used, the sender, the receiver, and the time and date of the withheld communication. A "privilege log" is used in legal discovery, and its purpose is to provide a description of withheld documents to aid in substantiating a claim of attorney-client privilege.⁴ Such a log is not required to be prepared or produced in response to Public Records Act requests, but City staff indicated that a log could be prepared.

City staff performed another search and did not find additional documents. City staff also provided a privilege log to Ms. Giwargis.⁵ Following the production of the privilege log, Ms. Giwargis lodged an appeal with the Board of Fair Campaign and Political Practices ("the BFCPP") asking to reevaluate the withholding of these records.⁶

The City Attorney's Office informed Ms. Giwargis that only the City Council can waive the attorney-client privilege and produce these records.⁷ The City Attorney's Office asked Ms. Giwargis if she wanted to direct her appeal to the City Council, but Ms. Giwargis declined.

2. The Process for Appealing Records Requests under the San José Municipal Code.

The City's "Open Government Ordinance," under San José Municipal Code (SJMC) section 12.21.430, has a process for a records requestor to appeal a withholding of records under the Public Records Act. This administrative process serves as an alternative means for a requestor to seek withheld documents instead of or before suing under the Public Records Act. Requestors are not required to follow these administrative procedures before suing under the Public Records Act, and the City's failure to follow them will not invalidate any action taken by the City.⁸

Under this process, a requestor dissatisfied with the City's response to a records request may appeal to the Open Government Manager.⁹ The Open Government Manager is designated by the City Manager as the person responsible for coordinating interdepartmental records responses with the City's various Records Coordinators and assisting on complex requests.¹⁰ A Records Coordinator is the person in every office or department designated as "knowledgeable about the affairs of the department who has

⁴ *Hernandez v. Superior Court* (2003) 112 Cal. App. 4th 285, 292, See also Code of Civ. Pro §2031.240.

⁵ A copy of the privilege log is attached as Attachment B.

⁶ A copy of the appeal to the BFCPP is attached as Attachment C.

⁷ A copy of the City Attorney's letter is attached as Attachment D.

⁸ SJMC §§12.21.430.E, G.

⁹ §12.21.430.B

¹⁰ SJMC §12.21.270, City Administrative Policy Manual 6.1.1.

custody of records and Public Information relating to the responsibilities and work performed by the office or department.”¹¹

The requestor may also appeal to the Rules Committee, either before or after the appeal to the Open Government Manager.¹² If the requestor is dissatisfied with the response from the Rules Committee, the requestor may submit a complaint to the BFCPP or directly to the City Council.¹³ If the response of the BFCPP is unacceptable to any party, the party may appeal to the City Council.¹⁴

3. The Attorney-Client Privilege.

The Public Records Act, under Government Code section 6254(k), does not require the production of documents that are protected by the attorney-client privilege. There are many exemptions under the Public Records Act that allow for public agencies to withhold documents, but the attorney-client privilege is one where the law strictly regulates how privileged communications are handled.

Codified under Evidence Code section 954, the attorney-client privilege is “a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.” Confidential communication between client and lawyer refers to “information transmitted between a client and a lawyer in the course of that relationship and in confidence...,” and “includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”¹⁵ The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”¹⁶

The “client” is the holder of the attorney-client privilege, and the client may claim it to prevent disclosure of privileged communications or waive it.¹⁷ An attorney may also claim the privilege for a client, and the attorney has an affirmative duty to do so whenever privileged documents are sought to be disclosed.¹⁸ However, an attorney may not waive the attorney-client privilege for their client, and the attorney may only disclose privileged communications without a client’s consent if necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or substantial bodily harm to another.¹⁹

¹¹ Consolidated Open Government and Ethics Provisions, Reso No. 77135 (“Sunshine Resolution) §1.3.1.

¹² SJMC §12.21.430.B.

¹³ §12.21.430.C.

¹⁴ §12.21.430.D

¹⁵ Evid. Code §952.

¹⁶ *Upjohn Co. v. United States* (1981) 449 US 383, 389.

¹⁷ Evid. Code §953.

¹⁸ §955, See also Bus. And Prof. Code §6068(e)(1)

¹⁹ §956.5, See also Bus. And Prof. Code §6068(e)(2).

The attorney-client privilege also applies to organizations like corporations and public entities,²⁰ and for lawyers advising in an organizational setting the “client” is the organization itself.²¹ But since an organization cannot communicate *per se*, attorney-client communications must necessarily be through individuals acting for the organization either through its governing body, which the law designates as the holder of the privilege for the organization,²² or through employees or agents “who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.”²³ In other words, in an organizational setting, confidentiality in attorney-client communications is retained if the communication is among or disclosed only to those who “need to know” in order to act on behalf of the organization in the particular legal matter.²⁴ Involvement of unnecessary third persons, even if within the same organization, could break the privilege.²⁵

Here, the City and, by extension, the City Council is the “client.” The City Attorney is required under the City Charter to provide advice to the City Council and its officers in “all matters of law pertaining to their offices or their powers and duties.”²⁶ It is common and, as noted, required under the Charter for the City Attorney’s Office to provide legal advice to individual Councilmembers as it relates to their roles in City business and the appropriate use of City resources. Such communications further the City’s interests in complying with the law and fall within the attorney-client relationship and attorney-client privilege, thereby triggering the legal obligations discussed above.

4. Only the City Council can Waive the Attorney-Client Privilege.

As the City’s governing body, the City Council is the holder of the attorney-client privilege for the City and may release withheld documents that are identified as privileged. The City Council is the only body authorized to make this decision, and the City Council did not delegate this authority to any other person or body when it adopted the administrative appeal process in the Municipal Code. As previously mentioned, there are many exemptions under the Public Records Act, but few are as strictly regulated or carry the same obligations as the attorney-client privilege. Had the Council intended to delegate the ability to waive the attorney-client privilege, this delegation would have needed to be explicit to abrogate the authority vested in the Council under State law.

Similarly, the BFCPP may not view the privileged documents. Under City policy, any documents that the Open Government Manager and/or Records Coordinator believe

²⁰ *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373.

²¹ *Id.* at 370, fn. 3.

²² Evid. Code §954, see also *Roberts v. City of Palmdale, supra*, at 370, fn. 3.

²³ §952.

²⁴ *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1503.

²⁵ *Id.*

²⁶ City Charter §803(c).

may be withheld are sent to the City Attorney's Office for review, and any decisions to withhold records are made in consultation with the City Attorney's Office.²⁷ The City Attorney's Office plays a central role in identifying when documents are privileged, but this determination requires individuals who receive requests and compile records, per City policy, to transmit documents to the City Attorney so this determination can be made. These individuals are recognized under the law as persons "reasonably necessary for the transmission of the information" to the City Attorney and are acting under its direction. Therefore, they are within the scope of the attorney-client relationship, and the attorney-client privilege is not broken through this process.²⁸

However, disclosure to any other persons deemed unnecessary to the attorney-client relationship, even if employed with or serving as officers for the City, could break the privilege and breach the City Attorney's duty under the law to maintain confidentiality in these records. In this instance, the BFCPP is not within the scope of the attorney-client relationship between the City and the City Attorney's Office. The BFCPP did not request or receive the legal advice, is not reasonably necessary for the transmission of the information, nor was it part of the purpose for which the City Attorney was consulted. Notably, the Rules Committee, which previously heard this matter, likewise was not provided the withheld documents to review for the same reasons.

5. Conclusion.

Considering the statutory requirements associated with preserving and waiving the attorney-client privilege, the BFCPP is not authorized in this instance to view the withheld documents or waive the attorney-client privilege.

²⁷ City Administrative Policy Manual §6.1.1, p. 6, see also Sunshine Resolution §4.3.1.4.

²⁸ Evid. Code §952.