

## Memorandum

**TO:** Board of Fair Campaign and Political Practices

**FROM:** Steven Miller and Jessilyn Ho

**DATE:** December 3, 2021

**RE:** Viewing Attorney-Client Privileged Documents in Response to PRA Request

---

You have asked us to consider whether the Board of Fair Campaign and Political Practices ("Board") may review certain responsive records exempted from disclosure in response to Ms. Ramona Giwargis' May 9, 2021 Public Records Act ("PRA") request because they are subject to the attorney-client privilege. Under section 12.21.430(c) of the San Jose Municipal Code, the Board is charged with reviewing the City's response to the Giwargis PRA request. But the City Attorney has advised the Board that it may not view the exempted records as it is not the holder of the privilege.<sup>1</sup>

In addition, you have asked us if there might be a way to amend Title 12 of the Municipal Code to clarify the Board's authority to review privileged records under circumstances like those present here.

As discussed in more detail below, we find no reason to question the City Attorney's conclusions on this issue. While one could imagine an amendment to Title 12 that could attempt to clarify the Board's role in a manner that could allow it to review privileged records, it is impossible to predict whether such an amendment would actually have the desired effect.

### **1. The Evidence Code Does Not Provide the Board Authority to Review Privileged Documents.**

The attorney-client privilege rests with the client. As the City Attorney has advised, the City is the client under these circumstances, and the City Council is the holder of the privilege.<sup>2</sup> Consequently, the City Council is the only body authorized to disclose privileged documents to those not within the scope of the privilege. This raises the question of whether the Board might fall within the scope of the privilege, and/or may fall within the categories of those who may view privileged records without City Council authorization and without waiving the privilege.

The Evidence Code lists numerous categories of individuals who may claim the privilege or who may view privileged records without waiving the privilege (e.g., the physician-patient privilege (section 994), the clergy privilege (section 1034), and privileged relationships are all codified in specific Evidence Code provisions.) Evidence Code section 915 provides that judges have the

---

<sup>1</sup> October 6, 2021 Memorandum from Kevin Fisher, Assistant City Attorney, to the Board.

<sup>2</sup> *Id.* at page 4.

authority to review attorney-client privileged information without waiving the privilege. However, the Evidence Code does not extend this same authority to arbitrators.<sup>3</sup> The Board does not fall into any of the specific Evidence Code categories of privilege holders. But a question is whether the Board's role in the PRA appeal process as set forth in section 12.21.430 of the Municipal Code means that it is acting like a judge—with the resulting ability to review privileged records without waiving the privilege.

We think it would be unlikely that a court would find that the Board is acting in a quasi-judicial manner when it fulfills its role under section 12.21.430. A quasi-judicial hearing (also referred to as an administrative hearing) is a hearing in which there is a property interest at stake, and the decision-making body (i.e., a non-judicial board or officer) is charged with exercising its discretion when applying legal standards to a specific factual situation.<sup>4</sup> Examples of quasi-judicial hearings ordinarily include issuing discretionary land use permits or business licenses or ruling on an appeal from a planning commission decision. We do not think there is a property interest here that would transform the Board into a quasi-judicial body such that it should be treated like a judge for purposes of the privilege. This conclusion is underscored by the fact that the Evidence Code does not even allow arbitrators to review privileged records without waiving the privilege.

Even if the Board were acting in a quasi-judicial manner when it conducts a PRA request appeal, the Evidence Code, which is the source of the attorney-client privilege, does not authorize the Board to view the privileged documents in that context. Absent an amendment to the Evidence Code, we think the Board does not have explicit statutory authority to review privileged documents without requiring the City Council to waive the privilege.

## **2. Extending the Attorney-Client Privilege to Third Parties.**

Even without express statutory authority, courts will extend the attorney-client privilege to third parties if (1) the third party is essential and necessary for the purpose of seeking legal advice, or (2) if the third party is so thoroughly integrated into the entity that s/he should be treated as functionally equivalent to an employee.<sup>5</sup> The concept of extending the privilege is often applied in the context of a consultant working for an entity that is subject to the privilege. Courts have extended the privilege, for example, when a consultant "acted as the public face of the company

---

<sup>3</sup> Evidence Code section 915(a) provides that a presiding officer may not require the disclosure of privileged information. "Presiding officer," defined in Evidence Code section 905, means "the person authorized to rule on a claim of privilege in the proceeding in which the claim is made," which includes an arbitrator or legislative body (see Evid. Code § 901). However, section 915(b) specifically authorizes the court—and only the court (ie not an arbitrator)—to conduct an *in camera* review of the privileged documents. See also *Moeller v. Superior Ct.* (1997) 16 Cal.4th 1124, 1135; *Cornish v. Superior Ct.* (1989) 209 Cal.App.3d 467, 480.

<sup>4</sup> *Mountain Defense League v. Bd. of Supervisors of San Diego County* (1977) 65 Cal.App.3d 723, 729; *Ocean Park Assocs. v. Santa Monica Rent Control Bd.* (2004) 114 Cal. App. 4th 1050, 1061.

<sup>5</sup> Evid. Code §§ 912, 952; *Citizens for Ceres v. Superior Ct.* (2013) 217 Cal.App.4th 889, 915-916; *Behunin v. Superior Ct.* (2017) 9 Cal.App.5th 833, 845-846.

and provided information to [company's] legal staff that was useful and necessary to evaluate legal strategy . . . [and] acted as [the company's] functional employee for the purposes of the attorney-client privilege."<sup>6</sup> Courts will not extend the privilege to a consultant if the consultant's involvement is not necessary or essential to obtaining legal advice from the employer's attorney.<sup>7</sup>

We have not found any authority for treating the Board like a consultant for purposes of expanding the privilege. Nor have we found any reason why the Board might not be within the scope of the privilege if, like a consultant, its involvement were necessary and essential to obtaining legal advice from the City Attorney. The City might therefore consider amending section 12.21.430 to clarify the Board's role in reviewing appeals of PRA requests and to assert that the Board's authority includes reviewing privileged records without waiving the privilege.<sup>8</sup>

However, we do not think a court would find the Board's involvement necessary or essential *for purposes of the privilege* just because the Municipal Code said so. Rather, we think a court would conduct a fact-specific inquiry into the specific circumstances of a particular situation. Therefore, it is impossible to predict whether a Municipal Code amendment would have the desired effect.

We hope this analysis is helpful. We look forward to discussing further with the Board.

---

<sup>6</sup> *Schaeffer v. Gregory Vill. Partners, L.P.* (N.D. Cal. 2015) 78 F.Supp.3d 1198, 1204.

<sup>7</sup> *Behunin*, 9 Cal.App.5th 833.

<sup>8</sup> Even if the Board could view privileged documents without waiving the attorney-client privilege, there may be Brown Act issues regarding viewing privileged documents during a closed session that are beyond the scope of this Memorandum.