CITY AND COUNTY OF SAN FRANCISCO

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February 18, 2015

The Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

Re: *Ardon v. City of Los Angeles*
California Supreme Court No. S223876
California Court of Appeal, Second Appellate District, Case No. B252476
Amicus Letter Brief In Support of Petition for Review (Rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

The League of California Cities ("League") and the California State Association of Counties ("CSAC") (collectively "Amici") submit this letter brief in support of the Petition for Review filed by the City of Los Angeles ("City"), seeking review of a published decision by Division Six of the Second Appellate District of the Court of Appeal. (*Ardon v. City of Los Angeles* (2014) 232 Cal.App.4th 175 ("*Ardon*").) In *Ardon*, the court interpreted the Public Records Act (Cal. Gov. Code §§ 6250 et seq.) to hold that a City employee's unauthorized and inadvertent disclosure of privileged attorney-client records and privileged attorney work product constitutes a waiver of those privileges.

I. INTRODUCTION

For many years, this court and others have repeatedly affirmed the right of California cities, counties, and other public entities subject to the Public Records Act to maintain the confidentiality of records that fall under the attorney-client or attorney work product privilege. The Court of Appeal, in this case, did not. Its decision is not only wrong as a matter of law, but is a dangerous precedent with potentially broad ramifications. If left standing, the decision will weaken these privileges for public entities. The decision will likely also undermine the confidentiality provisions in other State laws, which too will harm public entities, and others.

The Legislature could not have intended such harmful results under the Public Records Act, and the statute, properly read, does no such thing. One of its sections merely enunciates a commonsense – and, until now, uncontroversial – general principle, with which Amici agree: A public entity may not pick and chose who gets access to public records. If an agency chooses to give a public record to Requester A, it may not rely on an exemption the Act creates to deny the record to Requester B. The Court of Appeal's decision errs in treating this general principle as an absolute rule, divorced from its original purpose – to prevent public entities from playing favorites among public records requesters – and superior to other principles, deeply rooted in various bodies of California law other than the Act and serving diverse public policies, protecting the confidentiality of various types of records. The conceptual and interpretive flaws in the decision purge much of the common sense from this section of the Act.

The conceptual flaw in the Court of Appeal's view of privilege, discussed more fully in part V(A) below, is to separate the legal principles that make a record privileged from those that cause a record to lose its privileged status. The interpretive flaw in the Court of Appeal's view of the Public Records Act, discussed more fully in part V(B) below, is to discount almost entirely Section 6254(k), the Act's safe harbor provision, while giving conclusive effect to Section 6254.5, the Act's so-called waiver rule. The Legislature never intended for the latter provision to trump the former. Rather, it intended for Section 6254(k) to be a safeguard for hundreds of State laws creating legal privileges or otherwise making certain categories of records confidential.

An appellate decision this consequential, and this flawed, deserves the attention of our state's highest court.

II. INTERESTS OF AMICI

This case presents serious concerns for cities and counties. Accordingly, the League and CSAC ask this court to grant the City's Petition for Review.

The League is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

III. THE FACTS

As part of a larger response to a public records request, the City gave the requester three records the disclosure of which forms the centerpiece of this case. The three records were protected from disclosure by the attorney-client privilege and/or attorney work product privilege. Reduced to essentials, the facts are:

The City employee who disclosed the records was not the holder of either privilege.

The respective holders of the privileges had not authorized the employee to disclose the records, or delegated to the employee authority to decide whether to waive the privileges.

The disclosure of the records was an inadvertent error.

On these facts, under established principles governing waiver of the attorney-client and attorney work product privileges, discussed more fully below, disclosure of the records did not waive the privileges. Nevertheless, the Court of Appeal, ignoring well-settled precedent anchored in the statutes creating these privileges, relied on a general provision in the Public Records Act to find waiver.

IV. THE COURT OF APPEAL'S DECISION

The Court of Appeal rested its decision on Section 6254.5 of the Public Records Act. (Cal. Gov. Code § 6254.5.) That section states:

> Notwithstanding any other provision of the 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. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment.

The section then identifies nine circumstances excepted from the above quoted language.

Applying the text of Section 6254.5 in the most literal way, the Court of Appeal determined that the "local agency" – the City, acting through an employee – had disclosed the three privileged records to a "member of the public" (who happened to be counsel adverse to the City in litigation that was the impetus for the public records request). And the court found that none of the nine exceptions to Section 6254.5's waiver rule applied. The court concluded that the disclosure constituted a waiver, with the records losing their privileged status.

V. ARGUMENT

A. The Court of Appeal's Decision Erodes the Attorney-Client and Attorney Work Product Privileges for Public Entities

The Court of Appeal's decision fails to recognize that the privileges in issue here have two interdependent parts: the legal principles that determine when a record obtains, and when it loses, its privileged status. The second set of principles – how a privilege is lost – is just as important as how it is gained. Courts apply these two sets of principles to determine whether a record is privileged, ever mindful of the legislative policies underlying the privileges.

Simple examples illustrate the folly of divorcing the substance of a privilege from the manner of its waiver. When an individual consults a lawyer for legal advice, communications between them (written or oral) are privileged as confidential attorney-client communications; but the privilege would lose much of its value if the lawyer, or the lawyer's secretary, or the individual's secretary – i.e., anyone other than the individual who consulted the lawyer – could nullify the privilege by disclosing the communication. Similarly, when an attorney prepares an internal memorandum that falls under the attorney work product privilege, the privilege would lose much of its value if someone other than the attorney could nullify it by disclosing the memorandum.

The Court of Appeal's decision rejects this unitary concept of the law of privilege, treating waiver as a procedural formality rather than an essential part of the attorney-client and attorney work product privileges. This conceptual failing has adverse consequences for public agencies. The court's decision weakens these privileges afforded public entities – and thereby undermines the legislative policies behind the privileges. Specifically:

Holder of the privilege; authority to waive. Only the holder of a privilege may waive it. (Cal. Evid. Code § 912(a).) For the attorney-client privilege, where a public entity is the client, the law rejects the view that any employee may waive the privilege. Rather, the holder is an official or body with sovereign authority at the top of the governmental structure. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373; Cal. R. Prof. Conduct 3-600.) For the attorney work product privilege, the attorney who created or is responsible for the record is the holder. (*Lasky, Haas, Cohler & Munter* (1985) 172 Cal.App.3d 264, 271-72, 278.)

In this case, the City employee who disclosed the privileged records is not the holder of either privilege, and was not authorized by the holder of either privilege to waive the privilege or disclose the records. Nevertheless, the Court of Appeal held that so long as "the agency" has

disclosed a privileged record, there is a waiver under Section 6254.5. The court's decision indicates that anyone employed by the public entity – at least anyone involved in responding to a public records request – may waive the attorney-client privilege on behalf of the entity and the attorney work product privilege on behalf of the attorney who holds that privilege. This is a radical departure from established rules governing the law of privilege.

Inadvertent disclosure; what constitutes a waiver. Accidental or inadvertent disclosure of privileged attorney-client materials does not constitute a waiver of the privilege. (*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654.) As one court put it, "an underling's slip-up" does not constitute a waiver. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577.) The same principle holds for inadvertent disclosure of records that are privileged attorney work product. (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 679 (attorney work product privilege subject to same waiver principles as attorney-client privilege).) An inadvertent disclosure is, by definition, a nonconsensual waiver, and hence no waiver at all. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577.)

As to the issue of inadvertent disclosure, the Court of Appeal's decision, again, radically rewrites the law of privilege. In the face of inevitable human errors that result in inadvertent disclosure of privileged records such as those in issue here, State law maintains the records' privileged status to serve important legislative policies. But the Court of Appeal's decision evinces a different sensibility. It amounts to sanctioning a "'gotcha' theory of waiver" that disregards the legislative policies underlying a privilege and that is as misguided in a public records context as in a discovery context. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 577 (commenting in discovery context).)

The decision rests on the theory that the rules governing public records requests are separate and distinct from the rules governing discovery. True enough – but only so far as that principle goes. And it does not go so far as the court's decision, which crosses a line never before crossed. Until now, it has been understood that legal privileges do not change on the basis of which disclosure regime is engaged. Courts have never recognized a "privilege" regime for litigation and a "privilege lite" regime for public records requests. But that is just what the Court of Appeal did in this case. Its two-track privilege system puts public entities in uncharted and dangerous waters. In our judgment, there is no way to hermetically seal the two tracks from one another, and this system will operate to degrade the attorney-client and attorney work product privileges on both tracks, unfairly harming public entities in the process.

With nearly 500 cities and 58 counties in California – not to mention other types of public entities – the impact of the Court of Appeal's decision, if allowed to stand, will be great. Though precise quantitative figures are unavailable, Amici can in good faith represent that each year public entities in this state collectively receive thousands upon thousands of public records requests. And the number of requests seems to be increasing each year, perhaps due to the ease with which requests can be made electronically (including, with a requester's push of the "send" button, to multiple addressees). Further, the volume of records covered by even one public records request can be staggering, as evidenced by a recent case in which an attorney representing a potential litigant sought to use the Public Records Act rather than discovery tools to gather evidence for his case. Initially, the attorney indicated 87 engineering department files for review. In the end, the attorney spent 20 days over the course of three months reviewing 65,000 pages of documents from 400 files before designating 16,000 pages for scanning at his expense. (*Bertoli v. City of Sebastopol* (Ct. App. 2015) 182 Cal. Rptr. 3d 308, 312 (as modified January 30, 2015).)

Public entities recognize that they must function under these pressures, and they can always strive to do better – albeit with finite resources – in avoiding erroneous disclosures of privileged records. But the logistical problems public entities can face in reviewing, in some cases, even thousands of pages of records responsive to a public records request – and sometimes conducting the review while simultaneously defending or preparing to defend against a lawsuit brought by the requester – is daunting. It would be foolish to believe that human errors in the processing of public records requests will cease, and it is at best speculative to conclude that erroneous disclosure of privileged records will measurably decline in the foreseeable future. If the Court of Appeal's decision stands, it will therefore undoubtedly harm public entities by weakening the attorney-client and attorney work product privileges.

B. The Court of Appeal's Decision Jeopardizes Other Privileges and Many State Confidentiality Laws

This case directly involves the attorney-client and attorney work product privileges, but over the near and long term it will involve much more if the Court of Appeal's decision stands. The decision shortchanges Section 6254(k) of the Public Records Act, which protects from disclosure records covered by legal privileges and many other State confidentiality laws. At the same time, the decision overstates the scope and import of Section 6254.5's waiver rule. This double error of statutory construction – giving too little emphasis to Section 6254(k) and too much to Section 6254.5 – places many State laws in jeopardy.

Section 6254(k)'s safe harbor. Section 6254(k) states that the Act does not override – and in fact preserves – any exemption from disclosure, be it a legal privilege or any other federal or State confidentiality law:

> [N]othing in this chapter shall be construed to require disclosure of records that are any of the following: .... (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.

(Cal. Gov. Code § 6254(k).) This safe harbor from disclosure extends to the attorney-client privilege and the attorney work product privilege, both of which safeguard information that "is exempted or prohibited pursuant to ... state law." (Cal. Evid. Code §§ 950 et seq.; Cal. Code Civ. Pro. §§ 2018.010 et seq.) Of particular import in this case, Section 6254(k) expresses a special solicitude for protecting legal privileges: The only laws it specifically references are "provisions of the Evidence Code relating to privilege." Even so, Section 6254(k)'s safe harbor is not so limited in scope. It covers all records the disclosure of which is exempted or prohibited under State (or federal) law.

The introductory wording of this safe harbor is telling: "Nothing *in this chapter* shall *be construed* to require disclosure...." (Emphasis added.) Section 6254(k) and Section 6254.5 are in the same chapter in the Government Code: Title 1, Division 7, Chapter 3.5, "Inspection of Public Records." Hence, the Court of Appeal's decision conflicts with Section 6254(k)'s mandate. The decision construes one provision in Chapter 3.5 – Section 6254.5 – to require disclosure of records that Section 6254(k) protects from disclosure; precisely what Section 6254(k) prohibits a court from doing.

We recognize that Section 6254.5 has similar language ("Notwithstanding any other provision of the law"), but, while we do not contend that this language has no force or effect, a court should reject its application in this case and in any other case involving a privilege or other confidentiality provision that statutes other than the Public Records Act create. As the text of Section 6254(k) makes apparent, the Legislature intended that section to protect laws exempting

or prohibiting disclosure of certain types of information. The Court of Appeal's decision converts that section from a safe harbor into a trap that targets legal privileges and other confidentiality laws as inferior or subservient to what the court sees – mistakenly – as an all-encompassing waiver rule in Section 6254.5.

And consider the breadth of that trap. Hundreds of State laws – at least – exempt or prohibit from disclosure various categories of information and thus fit within Section 6254(k)'s safe harbor. For the public's convenience, the Public Records Act at its end contains a list, albeit incomplete, of such laws. (Cal. Gov. Code §§ 6276 et seq.) Over 500 are listed. Many of them implicate personal privacy or business interests. Many serve important public or governmental policies. In every case, the Legislature has made a specific judgment that the exemption or prohibition is in the public interest. And in determining whether an unauthorized disclosure of a particular record that is privileged or otherwise confidential waives the privilege or negates the confidentiality of the record, a court should examine the policies the Legislature sought to serve in creating the privilege or other confidentiality provision. It is unlikely that, in enacting Section 6254.5, the Legislature intended, in blanket fashion, to transform into empty vessels a multitude of State laws protecting information from disclosure, whenever a public employee lacking authority to disclose confidential information inadvertently does so.

Yet that is the logical implication of the Court of Appeal's decision. The decision does not suggest that its analysis of Section 6254.5's waiver rule applies uniquely to the attorney-client and attorney work product privileges nor is there a logical basis for such a conclusion. The decision does not distinguish – either expressly or by implication – the laws creating those privileges from the more than 500 other State laws encompassed within Section 6254(k)'s safe harbor. If the decision remains in place, what would happen if a mid-level public employee mistakenly discloses to one member of the public a record that is part of a sensitive open investigation and that is protected from disclosure by the official information privilege (Cal. Evid. Code § 1040)? Would that record then have to be disclosed to the world, or to any requester, on a waiver theory, due to the employee's mistake? What would happen if the employee inadvertently discloses to one member of the public a record revealing the identity of a confidential informant or whistleblower who at great personal risk has reported illegal conduct to a public entity? Would that record then lose the protection of the identity of informer privilege (Cal. Evid. Code § 1041), and have to be more broadly disclosed? It takes little imagination to think of other serious problems this decision, if left standing, will cause public entities – and the people and communities they serve.

The Court of Appeal's approach in this case ignores a basic principle of statutory construction that is apposite. "[W]here the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears." (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588.) Section 6254(k) encompasses, and seeks to preserve, a large number of specific statutory schemes the Legislature has created, including those governing the attorney-client and attorney work product privileges. It must be presumed that the Legislature did not intend to disrupt all of these specific statutory schemes by imposing on them a general, one-size-fits-all waiver provision in the Public Records Act – "unless an intent to the contrary clearly appears." And there is no such contrary intent here, much less one that "clearly appears" from the legislative history of Section 6254.5. That section of the Act should not be interpreted to effect a waiver of privileges or negation of other confidentiality provisions whose existence and reach find their genesis in entirely different bodies of law that serve many different and diverse public policies.

Section 6254.5's limited reach. The methodological flaws in the Court of Appeal's decision go deeper than its inadequate analysis of Section 6254(k). The decision also likely

misconstrues the text of Section 6254.5, which states that "disclosure shall constitute a waiver of the *exemptions specified* in Sections 6254, 6254.7, or other similar provisions of law." (Emphasis added.) Without explanation, the decision states that "Section 6254, subdivision (k) is such an exemption." (*Ardon, supra*, 232 Cal.App.4th, at 179.) But that is hardly self-evident. Neither the attorney-client privilege nor the attorney work product privilege, nor the myriad other provisions of State law protecting the confidentiality of different types of records, is "specified" in Section 6254(k), in any real sense of the word (although that section has a general reference to privileges in the Evidence Code). Section 6254(k) does not describe or specifically identify the more than 500 State laws encompassed within its safe harbor. They are specified elsewhere in State law.

While Section 6254(k) is sometimes informally referred to as an "exemption" and is situated, in a purely locational sense, in Section 6254, it ought not be considered an exemption within the meaning of Section 6254.5. Section 6254(k) itself exempts nothing from disclosure. Rather, it is nothing more than a drafting shortcut, taking the reader to other places in State law where an exemption or prohibition is found. It is the functional equivalent of the nearly impossible task of combing through more than 500 provisions throughout State law that subsection (k) encompasses, including obscure or overlooked provisions not listed at the end of the Public Records Act, and then inserting in each of them subsection (k)'s language to clarify that each of the laws that safeguard specific types of information from disclosure retain their protective force notwithstanding the Act's disclosure regime.

The one thing we know for sure about the laws encompassed within the safe harbor of Section 6254(k) is that they are different from – not similar to – the exemptions in Sections 6254 and 6254.7. This court has noted the difference: Section 6254(k) "is not an independent exemption. It merely incorporates other prohibitions established by law." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656 (citations omitted); *accord, Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283.) Those prohibitions are extrinsic to the Act; they are created, defined, and described elsewhere in State (or federal) law. The Act merely cross-references them, and only to clarify that it does not supersede them. In sharp contrast, all other exemptions in the Act are what this court calls "independent exemption[s]" – specific exemptions in the Act, of which there are many, and the "catch-all" balancing exemption that allows a public agency to deny access to a record where "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Cal. Gov. Code § 6255(a).) These exemptions are intrinsic to the Act; they are created, defined, and described, at least in part, in the Act itself.

Thus, when Section 6254.5 references "waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law," it is likely referencing the "independent exemption[s]" created in Section 6254 and other sections of the Act. This construction of Section 6254.5's waiver language best comports with the legislative intent behind Section 6254(k). It fully honors the laws governing the attorney-client and attorney work product privileges, and all other privileges and confidentiality laws within Section 6254(k)'s safe harbor. The Court of Appeal's reading of Section 6254.5 does not.

This does not mean that records protected from disclosure by one of the many privileges or confidentiality laws extrinsic to the Act, and disclosed inadvertently or without authorization, would in all cases continue to receive protection from disclosure. Rather, in such cases, a court would examine the relevant statutory scheme to determine whether waiver has occurred or the confidentiality provision has been nullified. In the present case, the rules governing waiver of the attorney-client and attorney work product privileges clearly establish that there has been no waiver. In other cases, involving other State laws, the answer to that inquiry could be different.

C. Other Important Considerations

This letter brief does not cover all relevant issues, but rather highlights the decision's broad and harmful ramifications – for cities, counties, and other public entities; for the law of privilege; and for any State law whose protections may be jeopardized by a public employee's unauthorized or inadvertent disclosure of a privileged or confidential record.

Our focus on laws encompassed within Section 6254(k)'s safe harbor should not be understood as an implied acknowledgment that waiver of exemptions intrinsic to the Public Records Act should be determined in accordance with the Court of Appeal's expansively literal interpretation of Section 6254.5. Section 6254.5's waiver rule must be read in conjunction with the terms of each intrinsic exemption. But, in addition, we agree with the City that Section 6254.5 should be applied in a manner that is consistent with its purpose. The animating purpose of Section 6254.5 is to prevent public entities from selectively disclosing public records – deliberately favoring one requester over another, or one category of requesters over another, by giving records to one but not the other. That section underscores that all requesters have equal status under the Public Records Act; that public entities cannot pick and choose to whom they disclose public records. This principle complements the Act's directive that a public entity cannot consider the requester's purpose in determining its response to a public records request. (Cal. Gov. Code § 6257.5.)

VI. CONCLUSION

For the reasons stated herein, Amici request that the City's Petition for Review be granted. Our state's highest court should give due consideration to what is a most troubling appellate decision.

Respectfully submitted,

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On February 18, 2015, I served the attached:

LETTER BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REVIEW

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and served the named document in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 18, 2015, at San Francisco, California.

Pamela Cheeseborough