

Chairman

Sam Abed
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City of Escondido

February 6, 2017

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Vice Chairwoman

Jo MacKenzie
Vista Irrigation District

TO: Local Agency Formation Commission

FROM: Executive Officer

Members

Bill Horn
County Board of
Supervisors

SUBJECT: Correspondence from LAFCO Legal Counsel Regarding
2017 Gift Limit Changes and Supreme Court Decision
Affecting Attorney-Client Privilege

Dianne Jacob
County Board of
Supervisors

Andrew Vanderlaan
Public Member

Attached is correspondence from LAFCO Legal Counsel Michael Colantuono regarding important changes that increase gift limit provisions for 2017 under the Political Reform Act and a recent Supreme Court decision affecting the scope of attorney-client privileges. This correspondence is for the Commission's information and no action is recommended.

Lorie Zapf
Councilmember
City of San Diego

Vacant
City Member

Respectfully Submitted,

Ed Sprague
Olivenhain Municipal
Water District



Alternate Members

MICHAEL D. OTT
Executive Officer

Greg Cox
County Board of
Supervisors

MDO:ra

Chris Cate
Councilmember
City of San Diego

Attachments: (1) Fair Political Practices Commission 2017 Gift Limit Increase
(2) Supreme Court Decision Affecting Scope of Attorney-Client Privilege

Racquel Vasquez
Mayor
City of Lemon Grove

Harry Mathis
Public Member

Judy Hanson
Leucadia Wastewater
District

Executive Officer

Michael D. Ott

Legal Counsel

Michael G. Colantuono

TO: Michael D. Ott, Executive Director

FROM: Douglas M. Johnson, Assistant General Counsel

CC: Michael G. Colantuono, General Counsel

DATE: December 30, 2016

SUBJECT: Fair Political Practices Commission 2017 Gift Limit Increase

As you may know, the Fair Political Practices Commission (FPPC) increases the annual gift limit every two years under the Political Reform Act to reflect changes in the Consumer Price Index.¹ For calendar years 2017 and 2018, a local official and designated employees may not accept a gift or gifts from a single source totaling more than \$470 in a calendar year.² Gifts from a single source with a combined value of \$50 or more must still be reported on the appropriate Form 700.

A "gift" includes any payment or other benefit for which the local official or designated employee does not provide payment (i.e., money, property, services) of equal or greater value.³ However, there are exceptions to what constitutes a gift and different reporting requirements sometimes apply. We are available to answer specific questions regarding the gift rules and reporting requirements.

If you have any questions, please contact Michael Colantuono at (530) 432-7359 or MColantuono@chwlaw.us, or Douglas Johnson at (530) 208-5367 or DJohnson@chwlaw.us.

¹ Gov. Code, § 89503, subd. (f).

² Cal. Code Regs., tit 2, § 18940.2.

³ Gov. Code, § 82028, subd. (a); see Cal. Code Regs., tit. 2, § 18940.1 [definitions for "gifts"].

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HIGHSMITH

WHATLEY, PC

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MEMORANDUM

TO: Mike Ott, Executive Officer
 San Diego LAFCO

FILE NO: 49021.0001

FROM: Michael G. Colantuono, General
 Counsel

DATE: December 29, 2016

CC: Holly O. Whatley, Esq.
 David M. Ruderman, Esq.

RE: New Supreme Court Decision Affecting Scope of Attorney-Client
 Privilege as to Bills for Legal Services

INTRODUCTION AND SUMMARY. The California Supreme Court today decided *Los Angeles County Board of Supervisors v. Superior Court (ACLU of Southern California)*, Case No. S226645, concluding the ACLU is not entitled to copies of bills from lawyers defending civil rights cases arising in the LA County Jail system while cases are pending, but might be allowed those copies when litigation concludes. The case thus grants greater protection to public agency legal bills while litigation is pending than we have previously advised was available under earlier law. I therefore write to summarize it for you and to identify your options to withhold legal bills from those who may request them.

FACTS OF THE CASE. LA County is frequently sued for alleged civil rights violations occurring in its County jails and uses outside counsel to defend those suits. The ACLU made a request under the Public Records Act (PRA) for copies of all invoices in a number of suits, in an effort to show the County used "scorched earth" litigation

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tactics, raising the cost to litigate such cases, and wasting county resources. The County withheld the invoices as subject to the attorney-client privilege. The trial court ordered all the bills released, after they were redacted to conceal substantive legal advice and attorney work product (i.e., “an attorney’s mental impressions or theories of the case”). The Court of Appeal reversed, concluding the bills were categorically — and permanently — protected from disclosure. The Supreme Court granted review and, in this morning’s decision, upheld the County’s decision to withhold invoices for pending cases, but not its decision to withhold invoices for resolved cases.

THE DECISION. The Court split 4-3. Writing for four justices, Justice Cuéllar concluded:

What we hold is that the attorney-client privilege does not categorically shield everything in a billing invoice from PRA disclosure. But invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the heartland of the privilege. The privilege therefore protects the confidentiality of invoices for work in pending and active legal matters.

(Slip Op. at pp. 1-2.) Justice Werdegar dissented for three justices, concluding that legal invoices are entirely privileged and that privilege continues when litigation ends.

The Court noted the general duty to redact documents to protect privileged information, without withholding the entire document: “The fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document.” (Slip Op. at p. 6, internal quotation omitted.) The PRA, the Court concluded, “requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions” and disclose the non-privileged material. (*Id.* at p. 7, internal quotation omitted.) However,

public agencies are not required to attempt selective disclosure of records that are not “reasonably segregable.” To the extent this

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standard is ambiguous, the PRA must be construed in whichever way will further the people's right of access.

(*Ibid.*, internal quotation omitted.)

The heart of the majority's opinion are its conclusions the attorney-client privilege attaches only to confidential communications between lawyers and clients "for the purpose of legal consultation" and that:

Invoices for legal services are generally not communicated for the purpose of legal consultation. Rather they are communicated for the purpose of billing the client and, to the extent they have no other purpose or effect, they fall outside the scope of an attorney's professional representation. ... While invoices may convey some very general information about the process through which a client obtains legal advice, their purpose is to ensure proper payment for services rendered, not to seek or to deliver the attorney's legal advice or representation.

(Slip Op. at p. 11.)

The Court nevertheless concluded that invoices are entirely protected from disclosure while litigation is pending, and may be at least partly exempt from disclosure thereafter:

But while billing invoices are generally not "made for the purpose of legal representation," the information contained within certain invoices may be within the scope of the privilege. To the extent that billing information is conveyed 'for the purpose of legal representation' — perhaps to inform the client of the nature of amount of work occurring in connection with a pending legal issue — such information lies in the heartland of the attorney-client privilege. And even if the information is more general, such as aggregate figures describing the total amount

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spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged. **When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees.** This is because, even though the amount of money paid for legal services is generally not privileged, an invoice that shows a sudden uptick in spending might very well reveal much of a government agency's investigative efforts and trial strategy. Midlitigation swings in spending for example could reveal an impending filing or outsized concern about a recent event.

The same may not be true for fee totals in legal matters that have concluded long ago.

(Slip Op. at pp. 14–15, emphases added.)

To date our advice has been to release the amounts charged for our services on a month-by-month basis. This new decision allows LAFCO to withhold even the amount spent until litigation ends.

Justice Werdegar's dissent, which is not the law, does provide this characterization of the majority opinion that may influence how lower courts apply it:

Following today's decision, attorneys in this state must counsel their clients that confidential communications between lawyer and client, previously protected by the attorney-client privileged, may be forced into the open by interested parties once the subject matter has concluded.

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(Dissent at p. 8.) This is true, but does not mean that entire invoices must be released when litigation ends. The amount paid will likely be disclosable, but the work done, advice given, and attorney impressions reflected in invoices will remain subject to privilege, allowing redactions of invoices before they are released.

CONCLUSION AND OPTIONS. Thus, the net effect of the decision is to allow more protection for legal bills that we have advised to date under earlier law. LAFCO now has these options with respect to PRA request for copies of legal bills:

1. Release redacted invoices to show amounts billed even as to pending litigation. This is more than the law requires, but can demonstrate a commitment to public access.
2. Withhold invoices until litigation ends and then release redacted invoices to show amounts billed.

If we can provide more advice on this subject, please let me know.

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