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A DIVIDED CALIFORNIA SUPREME COURT BALANCES GOVERNMENT TRANSPARENCY WITH THE ATTORNEY-CLIENT PRIVILEGE

In a significant decision involving the scope of the attorney-client privilege applicable to public agencies, the California Supreme Court offered a nuanced approach to determine when local agencies must disclose lawyers' invoices when requested under the California Public Records Act (PRA). In *Los Angeles County Board of Supervisors v. Superior Court*, No. S226645 (December 29, 2016), a majority of the Court rejected a brightline rule that such invoices are categorically protected by the attorney-client privilege. Rather, the Court held that lawyers' invoices are privileged—and so need not be disclosed under the PRA—when a legal matter remains open and pending. After the matter has concluded, the contents of legal invoices should be disclosed under the PRA unless the contents were conveyed "for the purpose of legal consultation or risk exposing information that was communicated for such a purpose."

BACKGROUND

In 2013, after several investigations into the Los Angeles County jail system, the ACLU of Southern California and a private party (collectively, ACLU) filed a PRA request directed to the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel (County) seeking counsels' invoices in connection with nine lawsuits alleging excessive force against inmates in the County jail system. Specifically, the ACLU's PRA request sought invoices specifying the amounts outside law firms had billed the County for defending the lawsuits in an effort to expose that the County's outside counsel may have engaged in "scorched-earth litigation tactics," rather than settling these costly suits.

In response, the County redacted contents from invoices for three cases that were no longer pending, based on the attorney-client privilege and the work-product privilege. The County produced documents that still revealed billing rates, hours billed, and billing totals. The County, however, refused to provide invoices for the six cases that remained pending, claiming the attorney-client privilege.

The ACLU filed a petition seeking to compel the County to comply with the PRA and disclose the requested records for all nine lawsuits. The superior court decided in favor of the ACLU. The Court of Appeal disagreed and granted a counter-petition by the County to stop disclosure of invoices for the six pending cases. The Court of Appeal held that the invoices were privileged by focusing on the attorney-client relationship and whether the communication was confidentially transmitted, on the theory that the privilege protects any confidential matters transmitted from lawyer to client, regardless of the content of the communication.

THE CALIFORNIA SUPREME COURT'S HOLDING

Reversing and remanding the Court of Appeal's decision, the California Supreme Court rejected the idea that *any* confidential transmission of information in an attorney-client relationship is privileged. The Court concluded that the existence of the attorney-client privilege turns on the content and purpose of the communication, not the form of information transmitted. The Court explained that the "heartland of privilege" only protects

communications that "bear some relationship to the attorney's provisions of legal consultation."

Applying these standards to law firm invoices, the Court reasoned that the information in counsel's invoices may or may not relate to legal consultation, and further, that the content of the invoices takes on a different significance over time. The Court held that when a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees, because even the aggregate amount could convey the nature or amount of work occurring, and disclosure might reveal investigative efforts or trial strategy. However, cumulative fee totals for legal matters that have concluded "long ago" may communicate little or nothing about the substance of legal consultation, and so may warrant disclosure if requested under the PRA.

Notably, three dissenting justices supported the rule adopted by the Court of Appeal, which would have protected from disclosure in response to a PRA request *all* lawyer bills, regardless of whether the underlying matter was active and ongoing or had concluded.

FUTURE IMPLICATIONS

While the Court provided a clear rule to maintain the confidentiality of attorney invoices related to pending or active legal matters, the contents of other attorney invoices may not be afforded the same protection.

Thus, public agencies asked to disclose attorneys' bills for matters that concluded long ago should carefully scrutinize the content of the invoices to discern whether each component (the date and description of services rendered, the amount of time expended, and the aggregate billing amount) either communicates information for the purpose of legal consultation or reveals information that was communicated for legal consultation. If so, those communications should be redacted or withheld.

The *Los Angeles County Board of Supervisors* case involves the production of invoices from outside counsel received by a public agency subject to the PRA. The Court's reasoning, however, could possibly apply to billing records maintained by city attorneys and county counsels.

In sum, the Supreme Court has held that the attorney-client privilege does not automatically shield an attorney's bills from production in response to a PRA request. Rather, public agencies should only invoke the privilege after reasoned analysis supports a conclusion that specific elements of a lawyer's invoice relate to the provision of legal consultation.

For more information on this case or any of the issues discussed above, please contact Barbara E. Kautz, Dolores Bastian Dalton, Justin D. Bigelow, Nahal Hamidi Adler, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

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