

Law Office Of Roy S. Gordet
Attn: Gordet, Roy S.
235 Westlake Center
#452
Daly City, CA 94015

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

<p>Muchnick Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> <p>University Of California, Board Of Regents Defendant/Respondent(s) (Abbreviated Title)</p>	<p>No. <u>RG17857115</u></p> <p>Order</p> <p>Motion</p> <p>Denied</p>
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The Motion filed for Irvin Muchnick was set for hearing on 12/20/2019 at 10:00 AM in Department 22 before the Honorable Jeffrey Brand. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The motion of Muchnick regarding the privilege of the Fulp email chain was set for hearing on 12/20/19 in Department 22 of this Court, the Honorable Jeffrey Brand presiding. After consideration of the points and authorities and the evidence **IT IS ORDERED:** The motion of Muchnick regarding the privilege of the Fulp email chain is **DENIED**.

PUBLIC RECORDS ACT - LEGAL FRAMEWORK.

The California Public Records Act states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code 6250.) This principle is also stated in the state Constitution as follows: "The people have the right of access to information concerning the conduct of the people's business, and, therefore ... the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const, Art I, Sec. 3(b)(1).)

The public is entitled to inspect public records unless one of the exceptions stated in the Act applies. (Gov. Code 6253 (a) & (b)). A public entity can assert that responsive public records are exempt from production under the CPRA one of the Govt Code 6254 specific exemptions or the Govt Code 6255, the catch-all exception. As a matter of statutory interpretation, the court reads the exemptions narrowly. (Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 305; County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57, 60.) As a matter of evidence, the public entity has the burden of proving that an exemption applies. (Gov. Code 6255.) The Regents asserts the CPRA exemption in Gov. Code 6254(k) applies to the extent that it incorporates the attorney client privilege in Evidence Code 950 et seq. (Sanchez v. County of San Bernardino (2009) 176 Cal.App.4th 516, 527 [CPRA "does not require the disclosure of a document that is subject to the attorney-client privilege"].)

As a matter of law, a public entity can waive the CPRA exemption by disclosing the information. (Gov. Code 6254.5; Ardon v City of Los Angeles (2016) 62 Cal.4th 1176; Newark Unified School District v Superior Court (2015) 245 Cal.App.4th 887.)

As a matter of evidence, CPRA requestor has the burden of proving waiver. The court has found no case law clarifying which party has the burden of proof to establish waiver or non-waiver under Gov. Code 6254.5. Looking to the law of waiver in non-CPRA contexts, the general rule is that the party asserting the privilege has the burden of showing the preliminary facts necessary to support the

privilege, but after this burden is met "the burden shifts to the party opposing the privilege to show either the claimed privilege does not apply, an exception exists, or there has been an express or implied waiver." (Venture Law Group v. Superior Court (2004) 118 Cal.App.4th 96, 102.) (See also Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal.App.4th 417, 442.) The burden is on the party claiming waiver to prove waiver because that is consistent with the general law on waiver and also avoids requiring government agencies to prove a negative. The burden is only by a preponderance of the evidence because the use of "whenever" and "shall" in the statute and the direction in California Constitution, Article I, section 3(b), suggest that the burden on the person seeking public documents be construed to further the people's right of access. This is not a situation where "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 375.)

FACTS

This motion concerns whether all or part of an email string is covered by the attorney-client privilege and, if so, whether the Regents waived the privilege. The document is Plaintiff's Exh A. Breaking it down, it is a series of emails:

Time	From	To	Subject	Content	Bates No.				
Mon 4/21/14 at 9:47 AM				Marc DeCoulode, Lt, UCBPD	N/A	N/A	Redacted		UC 461
Mon 4/21/14 at 9:50 AM				Christopher Patti, Chief Campus Counsel			N/A	N/A	
				Redacted					UC 460
Mon 4/21/14 at 9:52 AM				Herb Benenson, Asst Athletic Director			Christopher Patti		Ted
				Agu-Cause of Death	Redacted				UC 460
Mon 4/21/14 at 10:07 M				Marc DeCoulode Lt, UCBPD			Herb Beneneson et al		Ted Agu-
				Cause of Death	Redacted				UC 460
Mon 4/21/14 at 10:09 AM				Phil Esten, Deputy Dir of Athletics, External Relations					Marc
				DeCoulode et al Ted Agu-Cause of Death	Redacted				UC 459
Mon 4/21/14 at 12:12 PM				Marc DeCoulode Lt, UCBPD	N/A	N/A	Redacted		UC 458
Mon 4/21/14 at 2:02 PM				Brad Buchman, Medical Director			N/A	N/A	Redacted
				UC 458					
Mon 4/21/14 at 4:15 PM				Wesley Mallette, Associate Athletic Director, Strategic Communications	N/A		N/A	Redacted	UC 456
Mon 4/21/14 at 4:47 PM				Christopher Patti, Chief Campus Counsel			N/A	N/A	
				Redacted					UC 455
Tues 4/22/14 at 10:25 AM				Herb Benenson, Asst Athletic Director			N/A	N/A	Redacted
				UC 455					
Tues 4/22/14 at 10:37 AM				Brad Buchman, Medical Director			N/A	N/A	Redacted
				UC 455					
Tues 4/22/14 at 10:58 AM				Casey Batten, Head Team Physician			Brad Buchman et al		
				Fwd: Ted Agu-Cause of Death (Statement, Talking Points and Q&A)			Redacted		UC 454
Tues 4/22/14 at 11:02 AM				Phillip Esten, Deputy Director of Athletics			N/A	N/A	
				Redacted					UC 453
Tues 4/22/14 at 11:25 AM				Athletic Director			Phillip Esten		Fwd: Ted Agu-Cause of
				Death (Statement, Talking Points and Q&A)	Redacted				UC 453
Tues 4/22/14 at 11:35 am				Phillip Esten, Deputy Director of Athletics			N/A	N/A	
				Redacted					UC 452
Tues 4/22/14 at 12:33 PM				Brad Buchman, Medical Director			Phillip Esten		Fwd: Ted
				Agu-Cause of Death (Statement, Talking Points and Q&A)			Redacted		UC 452
Tues 4/22/14 at 1:12 PM				Phillip Esten, Deputy Director of Athletics			N/A	N/A	
				Redacted					UC 451
Tues 4/22/14 at 1:37 PM				Kyle McRae	N/A	N/A	Redacted		UC 451
Wed 4/23/19 at 9:02:22 AM PDT				Herb Benenson, Asst Athletic Director			Kyle McRae et al		
				(Solly Fulp)			Fwd: Ted Agu-Cause of Death (Statement, Talking Points and Q&A)		Redacted
				UC 450					
Wed 4/23/14 at 9:57 am				Solly Fulp	Dad		Fwd: Ted Agu-Cause of Death (Statement, Talking Points and Q&A)		
				"See below"	UC 450				

Christopher Patti, Chief Campus Counsel, remained on the email string from the beginning until the

final email from Fulp to "Dad."

The final email is the most significant for this motion. The email is from Solly Fulp, Deputy Director of Athletics and Chief Operating Officer, to "dad." The court considers the text of the email, the deposition testimony, and the declarations. The court weighs the evidence, and gives the most weight to the email itself and the reasonable inferences that can be drawn from the email.

Fulp sent the email final to a specific person. The email was not the result of an errant keystroke in a list of recipients. Fulp sent the email with the statement "See below." This means that Fulp took the time to direct "dad" to the content below. It is highly unlikely that Fulp mistakenly both forwarded the email string to his father and also wrote "See below." The court makes a factual finding that Fulp purposefully and intentionally forwarded the email string to his father.

The court finds that Fulp forwarded the email to his father intending it to be a confidential intra-family communication in the nature of "Dad, this why I've been so busy at work."

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ATTORNEY-CLIENT PRIVILGE.

The Regents has the burden of proving that an exemption applies. The court considers the email string as a series of discrete communications, each incorporating the prior communications.

The initial communication on Mon 4/21/14 at 9:47 AM, was from Marc DeCoulode, Lt. UCBDP, and was sent to Christopher Patti, Chief Campus Counsel. We know this because Patti forwarded it a few minutes later. At that time the subject line appears to be "Ted Agu-Cause of Death." The court finds that the communications from Mon 4/21/14 at 9:47 AM through Mon 4/21/14 at 2:02 PM are privileged attorney-client communications. They include counsel and are presumptively attorney-client communications regarding legal matters.

After a few forwards, on Mon 4/21/14 at 4:15 PM, it was sent from Wesley Mallette, Associate Athletic Director, Strategic Communications, to unidentified persons and the subject line changed to "Ted Agu-Cause of Death (Statement, Talking Points and Q&A)." The new subject line does not appear on the document until the email of Tues 4/22/14 at 10:58 AM, but circumstances suggest that the "Director, Strategic Communications" would have been the person to change the topic and to attach the document captioned "Talking Points and Q&A - Ted Agu - Coroners Report CMP Comments." (UC 465.)

The change in subject line and the change in the persons on the email string suggests that the topic changed to public relations. Counsel was still on the string, but the purpose of the conversation changed from confidential legal advice to public relations. The change in the topic is not material because the attorney-client relationship is determined by the nature of the relationship and not by the particulars of the specific conversation. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740.) The communications from Mon 4/21/14 at 4:15 PM through the end of the email string (excluding the final email) are presumptively privileged attorney-client communications.

WAIVER - AUTHORITY TO WAIVE AND ACTION ON BEHALF OF REGENTS

Petitioner argues that the Regents waived any attorney-client privilege when Fulp forwarded the email chain to his father. The parties address the issue of waiver in the context of Evidence Code 912, which addresses the waiver of the attorney-client privilege. The court also considers the more specific issue of waiver in the context of Govt Code 6254.5, which addresses whether for purposes of the CPRA a public disclosure has waived any exemption to the CPRA. In *Newark Unified School District v Superior Court* (2015) 245 Cal.App.4th 887, 903-908, the Court of Appeal stated that the court should try to harmonize the statutes.

Evidence Code 912 states; "[T]he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) ... is waived with respect to a communication protected by the privilege if any holder of the privilege ... has consented to disclosure made by anyone." "The attorney-client privilege may be waived, but only by the holder of the privilege." (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1101.) Where the holder of the privilege is a public agency, the agency can waive the privilege through an act of a person authorized to action on behalf of the public agency. (*DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 668 ["The privilege is not waived when the client's agent discloses a privileged communication without the client's authorization"].)

Govt Code 6254.5, states:

Notwithstanding any other law, if a state or local agency discloses a public record that is otherwise exempt from this chapter, to a member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section 6264 or 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 plain language of Govt Code 6254.5 is that an "agency" can waive a CPRA exemption only through a public disclosure by a person "acting within the scope of his or her membership, agency, office, or employment." (See also *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, 452 ["The mistaken and inadvertent release of the Category 3 information by the OEHHA was, according to the undisputed evidence presented by Masonite, outside the proper scope of the employee's duties".].)

The court compares Evidence Code 912 and Govt Code 6254.5. Evidence Code 912 focuses on whether the person was generally authorized to waive the privilege and does not address the situation where they were acting outside the course and scope of their employment. Govt Code 6254.5 presumes "a member, agent, officer, or employee of the agency" is generally authorized and focuses on whether for the particular disclosure they were "acting within the scope of his or her membership, agency, office, or employment." Following the direction of Newark to harmonize the statutes, the court holds that in the CPRA context that a person can waive the attorney client privilege only if the person is both (1) generally authorized to act on behalf of the agency and (2) was specifically "acting within the scope of his or her membership, agency, office, or employment."

Solly Fulp had the general authority to waive the privilege on behalf of the Regents. Solly Fulp's title on 4/23/19 was Deputy Director of Athletics and Chief Operating Officer of that unit. (Fulp Depo at 32.) Fulp's title suggests he had authority. Fulp's participation on the email string suggest he had authority - the emails were circulating among Christopher Patti, Chief Campus Counsel, Herb Benenson, Asst Athletic Director, Phil Esten, Deputy Dir of Athletics, External Relations, and Brad Buchman, Medical Director. Solly Fulp was in the company of senior personnel at the Regents. The court finds that Fulp was an agent of the Regents and was generally authorized to act on behalf of the Regents regarding a waiver of the privilege.

When Solly Fulp specifically sent the email to "dad," he was acting in his personal capacity and was not acting on behalf of the Regents. The CPRA Govt Code 6254.5 waiver applies only to actions by "a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment." There is no indication that Fulp's email to "dad" was related to his employment.

The motion is DENIED because the Regents has demonstrated that the Fulp email contained attorney-client information and petitioner has not demonstrated that Fulp was acting within the scope of his membership, agency, office, or employment when he disclosed the email to his father.

WAIVER - INTENT TO WAIVE

Having found that Fulp was not acting within the scope of his membership, agency, office, or employment when he disclosed the email to his father, the court does not need to reach the issue of whether Fulp's disclosure was inadvertent. (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183, holds that "inadvertent disclosure does not waive the exemptions.") The court sets out its analysis so that if the case reaches the Court of Appeal then the Court of Appeal can address all of the issues presented in a single decision.

Fulp's forwarding of the email was intentional and purposeful in that Fulp knew he was forwarding the email. Fulp's declaration states he does not recall sending the email. The court weight the evidence and finds that the contemporaneous written document is are more persuasive than Fulp's recollection.

Fulp intended his forwarding of the email string to be a confidential intra-family communication in the nature of "Dad, this why I've been so busy at work." There is, however, no parent-child privilege. (In re Terry W. (1976) 59 Cal.App.3d 745.) (See also *De Los Santos v. Superior Court* (1980) 27 Cal.3d 677, 683 [minor and his mother "concede for purposes of this proceeding that there is no parent-child privilege in this state"].) If the law does not protect the confidentiality of a communication between a juvenile and his mother, then the law similarly does not protect the confidentiality of a communication between a high level employee and his father.

It would be immaterial that Fulp might have subjectively thought that the email to his father was confidential. An intentional disclosure can be inadvertent if the law is unclear, which suggest that the actor's mistaken understanding of the law is immaterial if the law is clear. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211 [An honest mistake of law, where the law is unsettled and debatable, ... militates against a finding of waiver"]; *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1252 ["BP AE's concession appears to have been the result of an erroneous legal conclusion under which both parties and the court labored rather than an intentional and knowing relinquishment"].) (See also *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 84, 87-88 [interpreting the word "inadvertent" in the context of Labor Code 226.3 and holding that "willfulness generally requires "only that the illegal act or omission occur 'intentionally,' without regard to motive or ignorance of the act's prohibited character."])

The law was clear at the time that there was no "parent-child" privilege. If Fulp had been acting within the scope of his membership, agency, office, or employment, then his failure to anticipate the legal consequences of his actions would not make his disclosure of the email any less of a waiver.

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CONCLUSION

The motion of petitioner Muchnick to require the Regents to disclose the Fulp email is DENIED. Petitioner has demonstrated that Fulp was a high level employee of the Regents and that Fulp intentionally and purposefully forwarded the email to his father. Petitioner has not, however, demonstrated that Fulp was acting within the scope of his membership, agency, office or employment when he disclosed the email to his father.

The court directs the parties to meet and confer regarding what issues remain in this case. If issues remain, then the court cannot enter judgment. (*Lauderdale v. U & I Equipment Co.* (1969) 271 Cal.App.2d 140, 142 ["A trial court has no authority to enter multiple final judgments determining multiple issues between the same parties to an action"].) If no further issues remain, then the Regents is to prepare, circulate, and submit a proposed judgment. (CRC 3.1312.)

The motion is denied.

Dated: 01/29/2020



facsimile

Judge Jeffrey Brand