Morodomi, Mark

From: Morodomi, Mark
Sent: Thursday, May 28, 2009 4:26 PM
To: 'Marleen Sacks'
Cc: David@donahue.com
Subject: RE: Measure Y Public Records Request/PRR-090059

Marleen,

Based upon our conversation of May 14, 2009, and your May 20, 2009, email, I have reexamined the three emails that were provided to you that had limited redactions. As you point out, I did express the attorney-client privilege on May 14, 2009.

Upon reconsideration, I will provide you with an unredacted copy of the February 18, 2009 8:53 a.m. email from Cheryl Taylor to Gilbert Garcia.

Both the March 19, 2009, 1:39 p.m. email from Ms. Taylor to Mr. Garcia and the March 19, 2009, 2:24 p.m. email have cc: to deputy city attorneys Kevin Siegel and myself. Both emails ask for a legal opinion from the City Attorney's office on a specifically stated topic relating to the Police Department's budget.

The cc: is the equivalent of having both attorneys in the same room when Ms. Taylor and Mr. Garcia asked for the legal opinion. Had both individuals been in the same room as the deputy city attorneys, the communication would be privileged. All parties involvement were in fact under Zurich, necessary "to further the interest of the client [the City of Oakland] in the consultation" and "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." All parties needed the legal advice. Mr. Garcia is OPD's budget person, and the City Attorney's Office client representative for OPD budget matters. Ms. Taylor is the City's Budget Director and the City Attorney's Office client representative for City's Budget Office. Ms. Silva works in the Budget Office. Howard Jordan is the Chief of Police. David Kozicki is the Deputy Chief of Police, Bureau of Field Operations. (STI Outdoor v. Superior Court 91 Cal.App.4th 334, 341 (2001).)

Examining your quote from Evidence Code section 912, it would be nonsensical for one client representative to "claim the privilege in any proceeding" when communicating with his counterpart in the City central budget office. Again this was not required because each party was necessary to further the City's interest.

It would not make sense that the March 31 legal opinion constituted a waiver of an attorney's preparatory material for the opinion. Otherwise the release of any public opinion by an attorney would allow for waiver of all the attorney work product leading up to the opinion. That is not the law.

Finally, a late raising of an exemption does not constitute a waiver of the exemption. (Michaelis, Montanari & Johnson v. Superior Court, 38 Cal.4th 1065, 1072 (2006).)

Ms. Abney will provide the February 18, 2009 8:53 a.m. email.

Mark Morodomi

Office of the City Attorney
1 Ogawa Plaza, 6th Fl.
Oakland, CA 94612
510-238-6101

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Attachment 4E

f: 510-238-6500

From: Marleen Sacks [mailto:[redacted]
Sent: Wednesday, May 20, 2009 8:53 PM
To: Morodomi, Mark
Cc: Russo, John; David@donahue.com
Subject: Re: Measure Y Public Records Request/PRR-090059

Mark:

As you will recall, on March 31 and April 1, 2009 I submitted a request for records pursuant to the Public Records Act, Government Code Section 6250 et seq. I received responsive documents on May 6, 2009. That same day, I wrote to you and Ms. Abney requesting unredacted versions of e-mails that had been blacked out, without explanation. I did not hear back from you.

On May 14, 2009 I spoke to you about the matter and you indicated that the materials had been redacted pursuant to the attorney-client privilege. Later that day I sent you an e-mail asking for a formal response from the City on why it was taking the position that portions of the documents were protected by the attorney-client privilege, with legal citations included. To date, I have received no response from you. For the reasons outlined below, I believe that the City has violated the Sunshine Ordinance and has waived any attorney-client privilege that may have applied to the redacted portions of the documents, by virtue of the fact that the privilege was expressly waived by public release of the City's March 31, 2009 legal opinion, and by virtue of the fact that the attorney-client privilege was not timely asserted.

Oakland's Sunshine Ordinance, Section 2.20.240 provides: "No record shall be withheld from disclosure in its entirety unless all information contained in it is exempt from disclosure by law. Any redacted, deleted or segregated information **shall be keyed by footnote or other clear reference to the appropriate justification for withholding.** Such redaction, deletion or segregation shall be done personally by the attorney or other staff member conducting the exemption review."

Section 2.20.250 provides:

"Any withholding of information shall be justified, in writing, as follows:

(A) A withholding under a permissive exemption of the California Public Records Act or this ordinance **shall cite the legal authority…."**

Attachment 4E

Notably, the City has failed to comply with the above provisions of the Sunshine Ordinance. The redacted materials were not "keyed by footnote" and no legal justification, and no legal citations were provided to justify the redaction. Indeed, even after I asked for such justification in writing, it was not provided.

My position is that, even had the City complied with the ordinance, the attorney-client privilege is not applicable in this situation, and even if it were, it was waived. While Section 6254(k) creates an exemption for documents protected by the attorney-client privilege, the privilege does not apply to all communications between a corporate or government agency and officials within the organization. Specifically, as noted in Zurich American Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485, 1503, in order for the privilege to apply, the communications must be considered confidential, and must be shared only with "those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. ...The key concept here is need to know... involvement of an unnecessary third person in attorney-client communications destroys confidentiality...." Id.

The Zurich court also noted that "otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is "copied in" on correspondence or memoranda. Id. At 1504. In addition, the privilege may be waived as outlined in section 912 of the Evidence Code: (1) when the holder of the privilege, without coercion, and in a nonconfidential context, discloses a significant part of the communication or consents to such disclosure by anyone, and (2) when there is a failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to do so.

As applied here, there is no indication that the parties to the relevant e-mails intended for their communications to be confidential, nor is there any other indication that the privilege would apply. In addition, the City released a formal legal opinion on March 31, 2009 regarding the use of Measure Y funds for 14 PSOs previously funded out of the general fund. The e-mails that have been redacted related to the March 31 legal opinion. Any privilege that would have applied was waived by release of the legal opinion. Moreover, no assertion of the attorney-client privilege was made when I requested the documents. Based on the legal authority cited above, I am again requesting unredacted copies of the requested documents.

I look forward to hearing from you soon.

Marleen

Attachment 4E