



## *Memorandum*

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Attorney-Client Privilege

**DATE:** October 20, 2005

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### **Background**

Item 3.4 on the City Council Agenda for October 25, 2005 is entitled "Waiver of Attorney/Client Privilege and Release of All Documents Withheld from the Public in Response to the Grand Jury Report on the Norcal Contract." Pursuant to a request of the Rules Committee, this memorandum provides background information concerning the attorney-client privilege including a discussion of its purpose, application, and waiver.

### **Purpose of the Attorney-Client Privilege**

As a general rule, the client of an attorney may refuse to disclose, and may prevent another from disclosing, a confidential communication between the client and the attorney. In the case of a public entity such as the City of San Jose, the Council, as representatives of the citizens of San Jose, is the client although attorney-client communications necessarily must be through individuals acting for the entity. Communications between a public entity's officers or employees and its attorneys are privileged to the extent the communications are intended to be confidential and within the scope of the officer's or employee's responsibility, even though the individual is not the "client". Accordingly, while attorney-staff communications may be subject to the privilege, it is the Council that is the holder of the privilege.

The purpose of the attorney-client privilege is to encourage a client to communicate completely and fully with his or her attorney, without fear of having the confidential communication disclosed, to ensure appropriate and reasoned legal advice and counsel. The privilege has been recognized for over 400 years, and is the oldest recognized confidential communication privilege.

The California Supreme Court has stated that without the ability to make a full disclosure of the facts to an attorney, a client risks inadequate representation. Thus, the protection of confidences involved in the attorney-client relationship is not merely a rule of professional conduct, but involves public policies of

paramount importance that are reflected in numerous statutes. The attorney-client privilege is regarded as fundamental to the proper functioning of the judicial system, and, except in rare circumstances, the attorney *must* assert the privilege on behalf of the client and refuse to disclose the substance of the privileged communication absent a waiver of the privilege by the client.

### **Application of the Privilege**

The privilege applies to all *confidential communications* between an attorney and client *unless* the communication falls within a statutory exception or is not made in the course of the professional relationship between attorney and client. Generally, the confidential communications subject to the privilege include communications between City staff and elected officials, and attorneys in the City Attorney's Office, if the communications are intended to be confidential and relate to the municipal business of the City. The privilege may be raised in any proceeding, whether judicial, administrative, or otherwise, including investigations and inquiries. The privilege applies even when litigation is not pending or threatened.

The privileged communications include an attorney's legal opinion and advice given in confidence. The privilege embraces not only verbal communications, but letters, papers delivered to the attorney, and records or entries made by the attorney in his or her professional capacity. It may also embrace acts, signs or other means of communicating information, videotapes, photographs, communication transmitted by facsimile, e-mail, cellular telephone, or other electronic means between the client, or someone acting on behalf of the client, and its lawyer.

The privilege is absolute. Evidence protected by the privilege may not be ordered disclosed regardless of relevance, necessity, or any particular circumstances peculiar to the case or matter.

Despite its broad policy of transparency to ensure that local governing bodies deliberate in public, the Brown Act recognizes the need to preserve the attorney-client privilege for confidential legal advice and confidential communications with the attorney for the public entity. Similarly, the Public Records Act protects attorney-client documents from disclosure.

### **“Holder” of the Privilege – Who May Assert the Privilege**

With regard to the Norcal documents, the City Council is the client, and the holder of the privilege. The City Attorney is duty bound to respect the privilege.

As an example, a court has held in a case brought by a developer seeking to have a City Council disclose a letter from its City Attorney advising the Council of its legal position with respect to a parcel map application approved by the Planning Commission. The developer had appealed the proposed map to the City Council. After receiving the confidential opinion letter on the matter from the City Attorney, the City Council held a public meeting to discuss the issues raised in the letter. Several days later, the developer demanded a copy of the letter, and the City Council refused to provide it. The California Supreme Court concluded, among other things, that the City Council is the holder of the attorney-client privilege with respect to such written legal opinions by the public entity's attorney.

### **Waiver of the Privilege**

Generally, a waiver of the privilege can only occur by *consent* of the client, or by *disclosure of a significant part* of the confidential communication by the client. In the case of a municipal client, the attorney-client privilege may be waived only by the City Council.

Authorized disclosure of a significant part of a privileged communication waives the privilege only with respect to that communication. Other privileged communications in the same relationship are unaffected even if they relate to the same subject matter.

### **Norcal Documents**

In connection with the Norcal contract amendment, the City has identified 1288 documents that are public and 69 documents that are privileged. All of the public and privileged documents have been provided to the Council appointed independent investigator, without a waiver of the privilege. The San Jose Mercury News has requested some of the privileged documents that have been provided to the independent investigator, and that request has been denied pursuant to the attorney-client privilege. Councilmember Reed is now seeking to have the Council waive the privilege.

### **Conclusion**

As noted in the above discussion, the purpose of the attorney-client privilege is to encourage a client to fully and completely communicate with an attorney without fear of the information being revealed to others. It is designed to allow a client to get the full benefit of an attorney's advice.

The request to waive the attorney-client privilege as to these documents is unique. Other than the District Attorney's investigation of the converged network matter, the City Council has never been asked to waive the attorney-client privilege. Given the potential precedent of this decision which may impact future Council-Attorney discussions, the Council should carefully consider whether to waive the privilege at this time. It is anticipated that if the substance of any of the confidential information in the privileged documents is used by the investigator in his report, the City Council may be asked to waive the privilege and release those documents, or the substance of those documents, to the public. An option to waiving your privilege now, is to wait until the independent investigator completes his report before deciding which, if any, of the privileged documents should be considered for public release.

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cc: Del Borgsdorf