



**Contra
Costa
County**

To: Board of Supervisors
From: Mary Ann Mason, County Counsel
Date: September 13, 2022

Subject: Amendment of County Ordinance Code to restore exemption from disclosure of certain attorney client privileged records

RECOMMENDATION(S):

1. INTRODUCE Ordinance No. 2022-32, amending the County's Better Government Ordinance to remove subdivision (e) of Section 25-4.404 regarding attorney-client communications;
2. As set forth below, FIND that (a) restoring the full privilege for records of attorney-client communications by deleting Section 25-4.404, subdivision (e) serves the public interest by allowing the County and its officials to receive unfettered legal advice on a variety of matters to aid decision-making and reduce legal exposure and to assert the full scope of the privilege afforded by State law to aid the County's defense of litigation; and (b) pursuant to Article 1, Section 3(b)(2) of the California Constitution, there is a need to protect the attorney-client privilege by amending the Better Government Ordinance to remove the waiver of the exemption for records of certain attorney-client communications in subdivision (e) of Section 25-4.404 of the County Ordinance Code;
3. WAIVE reading, and FIX September 20, 2022 for adoption.

FISCAL IMPACT:

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY
ADMINISTRATOR

☐ RECOMMENDATION OF BOARD
COMMITTEE

Action of Board On: **09/13/2022** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

VOTE OF SUPERVISORS

AYE: Candace Andersen, District II
Supervisor
Diane Burgis, District III Supervisor
Karen Mitchoff, District IV Supervisor
Federal D. Glover, District V Supervisor

NO: John Gioia, District I Supervisor

Contact: Mary Ann McNett Mason,
County Counsel, (925) 655-2200

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: September 13, 2022

Monica Nino, County Administrator and Clerk of the Board of Supervisors

By: June McHuen, Deputy

Fiscal impacts are unknown.

BACKGROUND:

The California Public Records Act and the Better Government Ordinance

The California Public Records Act (“PRA”), codified in Government Code section 6250 et seq., was enacted in 1968 to give the public a tool to monitor government operations. In this regard, the PRA gives the public the right to obtain copies of non-exempt public records. Nearly three decades ago, in 1995, the County enacted the Better Government Ordinance (“BGO”) (Division 25 of the County Ordinance Code) to provide additional public access to certain records.

Pursuant to Evidence Code section 954, attorney-client communications are privileged and confidential. Under the PRA, attorney-client privileged communications are exempt from disclosure in response to a record request pursuant to Government Code section 6254(k), which exempts “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.”

However, the BGO removed this protection for certain attorney-client records, thus permitting the disclosure of records of certain communications between the County’s legal advisor and County officers, departments, and policy bodies. (County Ord. Code, § 25-4.404(e).) These include records of those attorney-client communications that: (1) concern an actual or potential conflict of interest; (2) analyze a proposed legislative action or position of the county; (3) analyze or interpret the Ralph M. Brown Act, the PRA, or the BGO; and (4) constitute reports to the Board of Supervisors on the progress of negotiation of a matter after the negotiation is completed. (*Id.*) With this waiver, members of the public can obtain such records (to the extent they are not exempt from disclosure pursuant to a different exemption) under the BGO.

The Attorney-Client Privilege

Under State law, the attorney-client privilege is regarded as sacred. (*People v. Flores* (1977) 71 Cal.App.3d 559, 565.) The privilege is absolute and disclosure may not be ordered, regardless of the circumstances. (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) Courts recognize that “effective aid is impossible” without the ability to provide confidential legal advice. (*Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 54.) Courts also recognize the strong public interest in ensuring that communications between public agencies and their attorneys remain confidential. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 381-82 (“The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public.”); *St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434, 443 (“...the privilege’s protection of the confidentiality of written

attorney-client communications is fundamental to the attorney-client relationship, in the public sector as well as in the private sector, and is vital to the effective administration of justice.”.) The privilege is so critical that attorneys are required to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code, § 6068(e)(1).)

Section 25-4.404(e) is inconsistent with these deep-seated protections for attorney-client communications in State law. In fact, Contra Costa County is an outlier as to this issue, as most counties do not waive the attorney-client privilege in this manner.

The Impacts of the Waiver of the Attorney-Client Privilege

The County values transparency and the full and prompt production of disclosable records in response to public records requests. The County has a detailed Administrative Bulletin (No. 120.6), which provides guidance to County departments and employees regarding legal obligations under the PRA, as well as the proper and efficient handling of records requests. The County also provides training to officials, bodies, and employees regarding the PRA.

However, the lack of protection under the BGO for records of certain attorney-client communications has negatively impacted the County and worked against the public’s interest in efficient and effective government operations. For example, this provision has interfered with the ability of County legal advisors, who have ethical duties to their clients, to communicate fully with and provide written advice to department representatives, elected officials, and policy bodies regarding conflict-of-interest issues, proposed legislative actions or positions, open meeting and public records issues, and certain negotiations. This provision impedes the advisors’ ability to convey unfettered advice to clients and can have detrimental effects on the County’s position in litigation and other legal matters, as adversaries and others may become aware of the substance of this advice. In addition, this waiver results in an unlevel playing field for the County, as private parties are not required to release their communications in the same manner.

In recent years, and particularly during the Covid pandemic, the County has received more public record requests than in the past. This increase in the volume of public records requests necessarily increases the risk of litigation. In fact, the County faced six writ petitions in recent years, alleging violations of the PRA. The County’s position in such litigation could be undermined if the County were required to release attorney-client communications regarding matters that are the subject of the court proceeding.

Impact of Ordinance 2022-32

This proposed amendment will update the BGO to eliminate the waiver of the attorney-client privilege for the types of records described above, aligning the County’s ordinance code with State law protections for these attorney-client records and with the practice of most other counties. This action recognizes the strong public policies upon

which the attorney-client privilege is based, as well as the significant public interest in efficient government operations. Protecting the attorney-client privilege furthers the compelling public interest in ensuring that the County has effective legal representation and that the County's legal interests are not adversely impacted by the non-discretionary disclosure of records that under State law would remain confidential.

This ordinance would not otherwise modify the provisions of the BGO. Section 25-4.404 would continue to include all other existing provisions regarding access to records, including access to records of prelitigation claims, settlement communications, and settlement agreements.

CONSEQUENCE OF NEGATIVE ACTION:

If the BGO is not amended, records of certain attorney-client privileged communications will remain subject to potential public disclosure. The County's relationship with its legal advisors will continue to be negatively impacted and the ability of County departments, officers, and bodies to receive thorough and effective legal assistance and the best possible defense to litigation will continue to be jeopardized.

ATTACHMENTS

Ordinance No. 2022-32

Redline of Ordinance Code section 25-4.404