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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DAVID M. MORGAN, dba COCHISE COUNTY RECORD, Plaintiff/Appellant, v. JILL ADAMS, City Clerk; THE CITY OF SIERRA VISTA, a political subdivision and public body, Defendants/Appellees.	2 CA-CV 2012-0041 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV201100878

Honorable James L. Conlogue, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 David Morgan appeals from the superior court's dismissal of his petition for special action arising from his public-records request submitted to the City of Sierra Vista. On appeal, Morgan argues the court erred by concluding that a memorandum written by the Sierra Vista City Attorney is protected by attorney-client privilege and not a public record subject to inspection. He also contends that even if the memorandum is protected by the privilege, the court erred by denying his request for other information about the memorandum, such as the date it was authored and its recipients. For the reasons that follow, we affirm in part and reverse and remand in part.

Factual and Procedural Background

¶2 On July 8, 2011, Morgan filed a public-records request with the Sierra Vista City Clerk, Jill Adams, for "[a]ll documents of all types . . . related to fines assessed, paid or unpaid, payments or agreements proffered (whether accepted or not) by or related to Rick Mueller's 2010 election campaign and/or his exploratory committee." Five days later, Adams responded by providing Morgan with photocopies of one document and one check and stating that no other documents existed except a legal memorandum, which she explained was prepared by the Sierra Vista City Attorney for the Sierra Vista City Council and therefore was protected from public disclosure by attorney-client privilege. Based on Adams's response, Morgan requested additional information, including the date of the memorandum and how it was delivered to the city council. Adams did not respond.

¶3 Morgan then sought special action relief in the superior court, alleging Adams produced "some but not all documents subject to the request." The City filed a

motion to dismiss arguing "[t]he memorandum that [Morgan] seeks is protected [by] the attorney-client privilege." After hearing oral argument on the motion, the trial court concluded the memorandum is a "public document" and ordered it submitted for an in-camera inspection to determine if it "is subject to release." The court subsequently issued its under-advisement ruling, finding "[t]he document falls within the attorney[-]client privilege and is not subject to public inspection," denying the relief requested in Morgan's complaint, and dismissing the action.

¶4 Morgan filed a motion for reconsideration requesting that the superior court release as much information surrounding the document as possible without violating the privilege. Specifically, he requested information concerning the date the memorandum was written, its title, delivery date, names of the intended recipients, delivery method, and any confirmation that it actually had been received and reviewed. The court denied Morgan's motion, finding any further disclosure would violate the privilege. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1) and Rule 8(a), Ariz. R. P. Spec. Actions.

Discussion

¶5 Arizona has a strong policy favoring disclosure and access to public records. *See Griffis v. Pinal County*, 215 Ariz. 1, ¶ 16, 156 P.3d 418, 422 (2007). "The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees." *Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, ¶ 33, 35 P.3d 105, 112 (App. 2001). Any person who has requested public records

and has been denied access to them may appeal the denial by filing a special action in the superior court. A.R.S. § 39-121.02(A). And, so long as the special action complies with the applicable procedural rules, the superior court lacks discretion to deny jurisdiction and must decide the case on the merits.[1] *Lake v. City of Phoenix*, 222 Ariz. 547, ¶ 17, 218 P.3d 1004, 1008 (2009).

¶6 "Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." *Griffis*, 215 Ariz. 1, ¶ 8, 156 P.3d at 421, *citing Carlson v. Pima County*, 141 Ariz. 487, 489-90, 687 P.2d 1242, 1244-45 (1984). "Only documents with a 'substantial nexus' to government activities qualify as public records, and the nature and purpose of the document determine whether it is a public record."[2] *Lake*, 222 Ariz. 547, ¶ 8, 218 P.3d at 1006, *quoting Griffis*, 215 Ariz. 1, ¶ 10,

[1]Morgan's argument that the superior court declined jurisdiction of the special action is without merit. After he filed the petition for special action, the City filed a "Motion to Dismiss," claiming the memorandum was "not a public record because it [wa]s attorney[-]client privileged." The City did not ask the court to decline jurisdiction, and the court did not do so. Rather, the court reached the merits of the action by ordering an in-camera review of the memorandum and concluding it was protected. *See* Ariz. R. P. Spec. Actions 6 (court may grant plaintiff relief in whole or in part or "may dismiss the action either on the merits or without prejudice").

[2]Our supreme court has described a "public record" as: (1) a record made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference; (2) a record required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said, or done; or (3) a written record of transactions of a public officer in his or her office, which is a convenient and appropriate method of discharging his duties, and is kept as such, whether required by law or not. *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538-39, 815 P.2d 900, 907-08 (1991), *citing Mathews v. Pyle*, 75 Ariz. 76, 78-79, 251 P.2d 893, 895 (1952).

156 P.3d at 421. Whether or not a document is a public record is a question of law we review de novo. *Lake*, 222 Ariz. 547, ¶ 7, 218 P.3d at 1006.

¶7 Here, the superior court concluded the memorandum is a public record, and neither party challenges that determination on appeal. We agree with the court's determination. At a minimum, the memorandum is a "written record of [a] transaction[] of a public officer in his office," *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538-39, 815 P.2d 900, 907-08 (1991), having a "substantial nexus" to government activities, *Lake*, 222 Ariz. 547, ¶ 8, 218 P.3d at 1006. But "[e]ven if a document qualifies as a public record, it is not subject to disclosure if privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure." *Id*. Moreover, access to public records may be restricted if they are protected by the attorney-client privilege. *See Primary Consultants, L.L.C. v. Maricopa Cnty. Recorder*, 210 Ariz. 393, ¶ 9, 111 P.3d 435, 438 (App. 2005) (public record need not be disclosed when statute restricts access); A.R.S. § 12-2234 (attorney-client privilege); *cf. Ariz. Dep't of Econ. Sec. v. O'Neil*, 183 Ariz. 196, 197, 901 P.2d 1226, 1227 (App. 1995). We therefore turn to Morgan's argument that the court erred in concluding the memorandum is protected from disclosure by the attorney-client privilege.

¶8 Morgan contends an attorney's communication to his client is only protected to the extent it reveals details of a prior client-to-attorney communication. To support this argument, he quotes a law review article for the proposition that courts have narrowly construed the privilege as affording only "*derivative protection* that is dependent upon the continued privileged character of the previously revealed

communications." *See* Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 Am. U. L. Rev. 967, 972 (1999). And, he contends the City failed to meet its burden of establishing the privilege because "[it] produced no evidence of a confidential communication *from the client* from which protection might be derived for a purported communication *from the attorney*." The City counters that "Arizona's [attorney-client privilege] statute, [§ 12-2234], does not limit Arizona's privilege to this exceedingly narrow interpretation." Morgan claims for the first time in his reply brief that the plain language of § 12-2234 also supports his argument. The existence of an attorney-client privilege is largely a question of law we review de novo.[3] *Salvation Army v. Bryson*, 229 Ariz. 204, ¶ 8, 273 P.3d 656, 659 (App. 2012).

¶9 Section 12-2234 provides in pertinent part:

> A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. . . .
>
> B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or

[3]Rule 501, Ariz. R. Evid., states that "[t]he common law—as interpreted by Arizona courts in the light of reason and experience—governs a claim of privilege unless" an applicable statute provides otherwise. *See also Salvation Army v. Bryson*, 229 Ariz. 204, ¶ 14, 273 P.3d 656, 660 (App. 2012) (privilege governed by common law "except when statute dictates otherwise"); *State ex rel. Thomas v. Schneider*, 212 Ariz. 292, ¶ 19, 130 P.3d 991, 995 (App. 2006) (same).

> omissions of or information obtained from the employee, agent or member if the communication is either:
>
> 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
>
> 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.
>
> C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Roman Catholic Diocese of Phx. v. Superior Court*, 204 Ariz. 225, ¶ 5, 62 P.3d 970, 973 (App. 2003) (purpose of privilege is to encourage client to be truthful so attorney can provide adequate advice).

¶10 In *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993), our supreme court described the privilege in this way: "Under the attorney-client privilege, unless a client consents, a lawyer may not be required to disclose communications made by the client to the lawyer or advice given to the client in the course of professional employment."[4] And this court has stated that under § 12-2234,

[4]"Under *Samaritan Foundation*, the privilege would apply only to employee-initiated communications intended to seek legal advice or to communications concerning the employee's own conduct for the purpose of assessing legal consequences for the corporation." *Roman Catholic Diocese of Phx.*, 204 Ariz. 225, ¶ 6, 62 P.3d at 973. In response to *Samaritan Foundation*, our legislature amended § 12-2234 by broadening the

"*any* communications between an attorney and an employee or agent of the [organizational client], made for the purpose of providing legal advice or obtaining information to provide legal advice, are protected." *Roman Catholic Diocese of Phx.*, 204 Ariz. 225, ¶ 6, 62 P.3d at 973.

¶11 We therefore agree with the superior court's conclusion that the memorandum is protected by the attorney-client privilege because it is a communication between the city attorney and the city's elected officials and employees for the purpose of providing legal advice. *See id.* Contrary to the narrow "derivative protection" approach advanced by Morgan, the courts of this state have broadly interpreted the language in § 12-2234 to apply the privilege not only to communications from the client to his attorney, but also to the attorney's advice to the client. *See Roman Catholic Diocese of Phx.*, 204 Ariz. 225, ¶ 6, 62 P.3d at 973 (any communication from attorney to client for purposes of providing legal advice is protected); *Granger v. Wisner*, 134 Ariz. 377, 379-80, 656 P.2d 1238, 1240-41 (1982) (legal advice to client protected by the privilege); *see also Salvation Army*, 229 Ariz. 204, ¶ 21, 273 P.3d at 662 (rejecting narrow interpretation of § 12-2234 because statute broad in scope).

¶12 Citing *Upjohn Co.*, 449 U.S. at 395-96, Morgan argues that even if the memorandum is protected, "the attorney-client privilege does not protect the underlying facts in protected communications." Similarly, in *Granger*, our supreme court said that

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scope of the attorney-client privilege applicable to communications between an attorney and the employees or agents of an organizational client, such as a corporation or governmental entity. *See Salvation Army*, 229 Ariz. 204, ¶ 19, 273 P.3d at 661; *see also* § 12-2234(B).

§ 12-2234 protects "'communication[s]' from the client and 'advice' to the client," but the privilege "does not extend to facts which are not part of the communication between lawyer and client." 134 Ariz. at 379-80, 656 P.2d at 1240-41; *see also* § 12-2234(C). By way of example, the court explained "the fact that a client has consulted an attorney, the identity of the client, and the dates and number of visits to the attorney are normally outside the scope and purpose of the privilege." *Id.* at 380, 656 P.2d at 1241.

¶13 Here, after Adams informed Morgan that she would not release the memorandum because it was privileged, he requested additional information, including "the date and title of the legal memorandum" and the method of delivery to the councilpersons who received it. And after the superior court determined the memorandum was privileged, Morgan asked the court to reconsider and/or clarify its ruling by making the "maximum information" available consistent with its previous ruling. Specifically, Morgan requested:

> a) the preparation date of the document, and
>
> b) the title of the document, and
>
> c) the delivery date of the document, and
>
> d) the names of each intended recipient and delivery method(s) for each recipient, and
>
> e) any indication of which persons, including but not limited to the Mayor and City Council members, actually received the document and any indication of whether or not it was reviewed by such person(s)[.]

In denying Morgan's motion, the court reasoned that "[a]ny further disclosure would violate the attorney[-]client privilege." But to the extent the court's ruling included "facts

which are not part of the communication between lawyer and client," it was in error. *Granger*, 134 Ariz. at 379-80, 656 P.2d at 1240-41. For example, the date of the memorandum and the identity of its recipients clearly are not protected by the privilege.[5] However, some of the additional information requested—the date the memorandum was delivered to each recipient, method of delivery, whether it actually was received, and whether it was reviewed by the recipients—may not exist in public records at all. If the additional information is not contained in the memorandum or other existing public records, the city need not create new records for the purpose of providing the information requested, unless it had a duty to keep such records but did not. *See Salt River Pima-Maricopa Indian Cmty.*, 168 Ariz. at 538-39, 815 P.2d at 907-08. A public-records request must be based on a record actually created, or required to be created, by law. *Id.* We therefore remand this case to the superior court with direction to redact the privileged information from the memorandum and to release the remaining portion to Morgan.

[5]Although the superior court's initial under-advisement ruling provided some of the additional information by indicating "[t]he document in question is a communication from the City Attorney to the Mayor and City Council," our own review suggests at least a few additional unprivileged details were not revealed. *See O'Neil*, 183 Ariz. at 198, 901 P.2d at 1228 (trial court ordered to redact privileged details covered by attorney-client privilege and to furnish remaining details pursuant to records request); *KPNX-TV v. Superior Court*, 183 Ariz. 589, 594, 905 P.2d 598, 603 (App. 1995) ("Good reason to deny access to part of a record is not necessarily good reason to deny access to all of it. Assuming that the record can be redacted, the custodian should consider disclosing what it can.").

Disposition

¶14 The superior court's order is affirmed in part and reversed in part, and the case is remanded for the purpose described in this decision. Morgan has requested attorney fees and costs on appeal. In our discretion, the request is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge