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JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 83-1103
of	:	JUNE 15, 1984
JOHN K. VAN DE KAMP Attorney General	:	
CLAYTON P. ROCHE Deputy Attorney General	:	

THE HONORABLE RONALD M. KURTZ, EXECUTIVE OFFICER, CALIFORNIA STATE PERSONNEL BOARD, has requested an opinion on a question we have rephrased as follows:

Does the Information Practices Act of 1977 override the attorney-client privilege where an individual seeks access to information about himself which is maintained by a state agency and which falls within the scope of that privilege?

CONCLUSION

The Information Practices Act of 1977 does not override the attorney-client privilege as to information sought by an individual about himself which is maintained by a state agency and which falls within the scope of that privilege.

ANALYSIS

The Information Practices Act of 1977 (hereinafter "Act") is contained in sections 1798 through 1798.76 of the Civil Code.[1] It was enacted to protect an individual's right of privacy guaranteed by article I, section 1, of the California Constitution and by the United States Constitution with respect to "personal" and "confidential" information (as defined by the Act) which is collected, maintained and disseminated by the state (§§ 1798.1, 1798.2). The Act is administered by the Office of Information Practices in the Executive Office of the State Personnel Board. (§§ 1798.4-1798.8.) Each state agency maintaining "personal" or "confidential" information must notify the Office of Information Practices of such records, their purposes and use, disclosure which will be made of the records, the legal authority for maintaining the records, and other matters with respect thereto. (§§ 1798.9- 1798.10.)

With respect to disclosure of records, the Act prescribes that "[n]o agency may disclose any personal or confidential information unless the disclosure of such information" is pursuant to or in accordance with one of twenty-one listed conditions. (§ 1798.24.) The first of such conditions is:

> "(a) Pursuant to an unsolicited written request, or an oral request which is accompanied by adequate indication of identity, by the individual to whom the record pertains."[2]

Article 8 of the Act (§§ 1798.30-1798.43) then provides that:

> "(a) Each agency shall permit any individual upon request and proper identification to inspect all the *personal* information in any record containing personal information and maintained by reference to an identifying particular assigned to such individual . . . ." (§ 1798.34; emphasis added.)

Article 8 however further provides that a state agency need not disclose to an individual any *confidential* information about that individual. (See § 1798.40.)

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[1] All section references are to the Civil Code unless otherwise indicated.

[2] Other examples of conditions are "[t]o a governmental entity when required by state or federal law" (subd. (f)); "[p]ursuant to the California Public Records Act" (subd. (g)); "[t]o any person pursuant to a search warrant" (subd. (l)); "[t]o a law enforcement agency when required for an investigation of unlawful activity . . . ." (subd. (o)); and "[t]o a committee of the Legislature . . . ." (subd. (s)), to name a few.

The question presented for resolution herein is whether the Information Practices Act of 1977 overrides the attorney-client privilege[3] where an individual seeks access to information about himself which is maintained by a state agency and which falls within the scope of that privilege. For example, suppose a state agency has sought the advice of house counsel or the Attorney General as to whether certain conduct by a state employee constitutes sufficient grounds for punitive action against the employee. May the state employee inspect counsel's written evaluation of such situation which is given to the appointing power by counsel? Or suppose a state agency hires a consultant and a dispute arises as to whether the consultant has properly performed under his contract. The matter is referred to house counsel or the Attorney General for advice. May the consultant inspect the advice of counsel which has been reduced to writing and transmitted to the board? Or

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[3] The attorney-client privilege is codified in sections 950-962 of the Evidence Code. The main provision is section 954 of that code, which provides:

> "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
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> "(a) The holder of the privilege;
>
> "(b) A person who is authorized to claim the privilege by the holder of the privilege; or
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> "(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.
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> "The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word 'persons' as used in this subdivision includes partnerships, corporations, associations and other groups and entities."

Evidence Code, section 952 defines "confidential communication" as follows:

> "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than 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, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Section 912 of the Evidence Code relates to waiver of the privilege by the holder thereof.

suppose the Department of Motor Vehicles seeks the advice of house counsel or the Attorney General as to whether a certain physical impairment constitutes grounds for revocation of a particular individual's driver's license. May the driver inspect counsel's reply to the department? In short, what is the impact of the Information Practices Act of 1977 upon the attorney-client privilege?

A resolution of this question requires an examination of the interrelationship of the Act with other relevant laws, including not only the attorney-client privilege, but also the California Public Records Act, Government Code, section 6250 et seq. It further requires a determination as to whether information about an individual which falls within the rubric of the attorney-client privilege is "personal" or "confidential" information *within the meaning of the Act*. This is so, since, as explained above, the individual may only see "personal information" about himself as a matter of right.

Article 12 of the Act is captioned "Construction With Other Laws." Of particular significance are sections 1798.70 and 1798.71. Section 1798.70 provides:

> "*This chapter shall be construed to supersede any other provision of state law*, including Section 6253.5 of the Government Code, or any exemption in Section 6254 or 6255 of the Government Code, *which authorizes any agency to withhold from an individual any record containing personal information* which is otherwise accessible under the provisions of this chapter." (Emphasis added; see also § 1798.75.)

Thus, by the literal terms of section 1798.70, the Act supersedes and overrides the confidentiality which attaches to records in the custody of a state agency by virtue of the attorney-client privilege if (1) the *individual* who is the subject of the records seeks access to them and (2) such records contain only "*personal*" information as defined in the Act, subject to the caveat contained in section 1798.71.[4] That section contains an exception in the context of litigation. It provides:

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[4] Although privileges such as the attorney-client privilege constitute barriers to testimonial compulsion, when such information is received by a public agency, it must also be considered to be "confidential" in the hands of the agency to protect the privilege. (See *Sacramento Newspaper Guild* v. *Sacramento Bd. of Suprs.* (1968) 263 Cal.App.2d 41, attorney-client privileged matters impliedly excepted from the open meeting requirements of the Ralph M. Brown Act. *Cf. Richards* v. *Superior Court* (1968) 258 Cal.App.2d 635, State's I.M.E. records both privileged and confidential.)

Insofar as the Public Records Act is concerned, section 6254 of the Government Code exempts from disclosure some seventeen categories of records. As pertinent herein, subdivision (k) exempts from disclosure:

"This chapter shall not be deemed to abridge or limit the rights of litigants, including parties to administrative proceedings, under the laws, or case law, of discovery of this state."

Accordingly, if the individual is a *party* to litigation between himself and the state, section 2016 of the Code of Civil Procedure would prevent access to the records, since the "individual" could discover only matters not privileged" pursuant to the discovery statutes. Thus, the question presented herein is relevant only in a nonlitigation setting.

The Act defines information to be "confidential information," "personal information" or "nonpersonal information."[5] "Personal Information" is defined in subdivision (b) of section 1798.3, and is residual in nature. Thus, subdivision (b) states: "(b) The term 'personal information' means any information in any record about an individual that is maintained by an agency, including, but not limited to, his or her education, financial transactions, medical or employment history. *It does not mean information found to be confidential or nonpersonal under subdivision (a) or (c) of section 1798.3*." (Emphasis added.)

The term "confidential information" for purposes of the Act is defined in subdivision (a) of section 1798.3. It reads in full:

"As used in this chapter:

"(a) The term 'confidential information' means any of the following:

"(1) Any information in any record maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including efforts of the Department of Justice to prevent, control, or reduce crime or to apprehend criminals if the information is (i) compiled for the purpose of identifying individual criminal offenders and alleged offenders and consists only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; or (ii) compiled for the purpose of a criminal investigation of suspected criminal activities, including reports of informants and

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"(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, *provisions of the Evidence Code relating to privilege*." (Emphasis added.)

[5] We need not concern ourselves with "nonpersonal information" herein. It is, however, defined in section 1798.3, subdivision (c).

investigators, and associated with an identifiable individual; or (iii) contained in any record which could identify an individual and which is compiled at any stage of the process of enforcement of the criminal laws, from the arrest or indictment stage through release from supervision and including the process of extradition or the exercise of executive clemency.

"(2) Information consisting solely of written testing or examination material, or scoring keys used solely to determine individual qualifications for appointment or promotion in public service, or used to administer a licensing examination, or academic examination, the disclosure of which would compromise the objectivity of fairness of the testing or examination process.

"(3) Information containing medical, psych- iatric or psychological material, if the holder of the record determines that disclosure of the information would be medically or psychologically detrimental to the individual. Such information shall, upon written authorization, be disclosed to a physician, psychiatrist or other licensed medical or psychological personnel designated by the data subject.

"(4) Information, other than that referred to in paragraph (1) of subdivision (a), consisting solely of investigative materials maintained by an agency for the purpose of investigating a specific grievance, complaint, or violation of state law, but only so long as an investigation is in progress and such investigative information has not been maintained for a period longer than is necessary to complete a criminal, civil, or administrative prosecution or initiate other remedial action. An agency may keep the source or sources of information used for an investigation under this section confidential so long as it determines that confidentiality is necessary to protect its law enforcement activities.

"(5) Records consisting of information used solely for the purpose of verifying and paying government health care service claims made pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code.

"(6) Any information which is required by statute to be withheld from the individual to whom it pertains."

It is thus seen that the definition of "confidential information" for purposes of the Act is silent as to privileged material generally, and material which would fall within

the attorney-client privilege specifically. In some situations such material could conceivably fall within the scope of subdivisions (a)(1) through (a)(5).[6] However, in order to ensure that our analysis herein covers *all* possible attorney-client information in the hands of a state agency which an individual might seek, we will assume that the information sought cannot fall within any of the first five subsections of subdivision (a). This leaves for resolution the question whether attorney-client privileged information may be said to fall within subdivision (a)(6) as "[a]ny information which is required by statute to be withheld from the individual to whom it pertains."

It could be argued that subdivision (a)(6) requires that a statute *specifically* state that the individual to whom it pertains may not see a particular record before the subdivision is operative. However, considering the all-encompassing nature of the Information Practices Act of 1977, we do not believe that the subdivision need be nor should be given such a narrow construction. The Legislature, in enacting such far-reaching legislation as the Act, certainly could not have envisioned every specific situation which might arise nor necessarily have intended to *specifically* cover such situations.

The primary goal in interpreting a statute is to attempt to ascertain legislative intent. (*Valley Circle Estates* v. *VTN Consolidated, Inc.* (1983) 33 Cal.3d 604, 609.) In ascertaining this intent we believe that the circumstances attendant herein give rise to the following rules of construction set forth in *Fuentes* v. *Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7, as follows:

> ". . . Repeals by implication are not favored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. (*In re White* (1969) 1 Cal.3d 207, 212 [81 Cal.Rptr. 780, 460 P.2d 980].) Furthermore, we must assume when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules. (*Estate of Simpson* (1954) 43 Cal.2d 594, 600 [275 P.2d 467, 47 A.L.R.2d 991]; *American Friends Service Committee* v. *Procunier* (1973) 33

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[6] For example, under subdivision (a)(1)(iii) the Governor could have received confidential advice from this office concerning an extradition matter. And confidential advice from either house counsel or this office as to whether sufficient grounds exists for punitive action against a state employee arguably might fall within subdivision (4).

Also, the definitions include material which could fall within privileges other than the attorney-client privilege. For example, subdivision (a)(1)(iii) could encompass material within the "official information" privilege received from an informant within section 1040(b)(2) of the Evidence Code. And subdivision (a)(3) could encompass material falling within the physician-patient or psychotherapist-patient privileges. (See Evid. Code, § 990 et seq.; § 1010 et seq.)

> Cal.App.3d 252 [109 Cal.Rptr. 22], hg. den.) In *Theodor* v. *Superior Court* (1972) 8 Cal.3d 77, 92 [104 Cal.Rptr. 226, 501 P.2d 234], we spoke '. . . of the policy that it should not be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'"

(See also *Sacramento Newspaper Guild* v. *Sacramento Bd. of Suprs.*, *supra*, 263 Cal.App.2d at pp. 54-58.) Were we to construe the Act to permit an individual to examine records which fall within the attorney-client privilege, each of the foregoing rules of construction would be violated. The attorney-client privilege dates back to at least 1654. (See *Hazard, An Historical Perspective on the Attorney-Client Privilege* (1978) 66 Cal.L.Rev. 1061, 1070.) We believe that if the Legislature had intended to work a repeal thereof, either totally or partially, it would have done so *in unmistakable language*.

Furthermore, we believe that to construe section 1798.3, subdivision (a)(6), to encompass the attorney-client privilege,[7] *is* in accordance with the general intent of the Legislature expressed in section 1798.71 of the Act itself. As will be recalled, that section states that the Act is not intended to modify the rights of litigants with respect to discovery matters. Such a declaration evinces an overall legislative purpose to preserve the attorney-client privilege even in the wake of the enactment of the Information Practices Act of 1977.

Accordingly, we conclude that records which fall within the scope of the attorney-client privilege are "confidential information" within the meaning of the Act. Thus, in a nonlitigation setting, where the rules of discovery are not available to protect the privilege, the Information Practices Act of 1977 does not override the attorney-client privilege where an individual seeks information about himself which falls within the scope of that privilege. Such information need not be disclosed.

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[7] As noted, in the hands of the government, a statute prescribing a privilege requires that the information falling within the scope thereof be considered to be "confidential" and not open to the public. (See n. 4, *supra*.) Additionally, an attorney must "maintain inviolate the confidence, and at every peril to himself . . . preserve the secrets, of his client." (Bus. & Prof. Code, § 6068, subd. (e).) Both statutes would prohibit disclosure of attorney-client privileged material to the individual concerned.