CYNDY DAY-WILSON, ESQ. (SBN 135045)
CITY ATTORNEY
cday-wilson@ci.eureka.ca.gov
City of Eureka
531 K Street
Eureka, CA 95501
Telephone: (707) 441-4147
Facsimile: (707) 441-4148

Attorney for CITY OF EUREKA

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF HUMBOLDT

NORTH COAST JOURNAL,

Petitioner/Plaintiff,

v.

CITY OF EUREKA,

Respondent/Defendant.

Case No. CV170486

RESPONDENT/DEFENDANT CITY OF EUREKA'S OPPOSITION TO MOTION FOR ORDER RE ACCESS TO PUBLIC RECORDS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF CYNDY DAY-WILSON IN SUPPORT THEREOF; OBJECTIONS TO DECLARATION OF PAUL BOYLAN

Date: August 7, 2017
Time: 1:45 p.m.
Dept: 4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TO PETITIONER/PLAINTIFF THE NORTH COAST JOURNAL AND ITS ATTORNEY OF RECORD:

Respondent/Defendant the City of Eureka (hereafter, the "City") hereby OPPOSES the Motion For Order Regarding Access To Public Records (hereafter, "Motion") of Petitioner/Plaintiff The North Coast Journal (hereafter, "Petitioner") as set forth below.

Dated: July 25, 2017

Cyndy Day-Wilson
CITY ATTORNEY
CITY OF EUREKA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This case involves the standard applicable to the disclosure of private emails and text messages of public officials under the California Public Records Act ("CPRA"). The California Supreme Court addressed this *exact* issue this year in *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, and held that if a city employee uses a personal account to communicate about the conduct of public business, those communications *may* be subject to disclosure under the CPRA. More specifically, and as is relevant here, the Supreme Court held that in order for such personal communications to "qualify as a public record under the CPRA, ***at a minimum, a writing must relate in some substantive way to the conduct of the public's business.***" *Id.* at 618-919. Consequently, absent that connection to the public's business, communications on personal devices do not qualify as a "public record."

Here, Petitioner issued a request under the CPRA for email and text messages sent or received by the Mayor and City Council during two specified time periods. A search of City devices and accounts revealed that no records, whatsoever, existed in response to Petitioner's request. A limited number of records did exist on personal devices and accounts, however, these records were not related in any substantive way to City business. Accordingly, the City informed Petitioner that no public records existed.

Now, in clear contradiction of the ruling in *City of San Jose,* Petitioner argues that the City is required to cite a specific statutory exception for withholding records contained on personal devices. This argument cannot be reconciled with the *City of San Jose* decision, which held that prior to a communication on a personal device being deemed a "public record" under the CPRA, there is a threshold requirement that the communication relate to the public's business. Significantly, unless that threshold is met, the communication is not a "public record" and the City is not required to cite any statutory ground for not disclosing such records. As applied here, because the records from personal devices were private in nature, and had no substantive relation to City business, the records are not disclosable.

While the moving papers argue, "Petitioner knew for a fact that records responsive to Petitioner's request existed," Petitioner has failed to introduce *any evidence* to support that assertion. Similarly, while the moving papers argue Petitioner does not "trust" the City based on the outcome of a separate lawsuit and that the City "habitually interprets law applicable to records access issues narrowly," a review of the record in this case demonstrates that it is in fact Petitioner who is completely ignoring both the law and the evidence. When analyzed in light of the *City of San Jose* decision, the evidence in this case, which includes declarations of the Mayor and every single Councilmember attesting that their private devices and accounts do not contain any public records, unequivocally demonstrates the City has strictly complied with the law.

Accordingly, because Petitioner has offered no evidence in support of this motion, and because the motion cannot be reconciled with the *City of San Jose* decision, the City requests that Petitioner's motion be denied and the Petition/Complaint be dismissed, with prejudice.

II. STATEMENT OF FACTS.

On April 14, 2017 the City of Eureka received a request for records (hereafter, "PRA request") pursuant to the California Public Records Act from North Coast Journal (hereafter, "Petitioner").[1] The PRA request asked for access to and copies of any and all emails and text messages sent or received by members of the Eureka City Council and the Mayor during two time periods that approximately correspond with Eureka City Council meetings (January 17, 2017 between 6 p.m. and 8:10 p.m. and February 7, 2017, between 6 p.m. and 8:05 p.m.).[2] Upon receiving the request, counsel for the City took immediate action to preserve any relevant documents by contacting the members of the Eureka City Council and the Mayor and instructed them to preserve all records during the subject time period of the PRA request.[3]

In addition, the City Attorney requested that all documents on City equipment and accounts that were sent or received during the two time periods of the PRA request be provided. This search by the Mayor and Councilmembers determined that no records existed on City equipment or

1 Day-Wilson, Decl., ¶ 2.
2 Day-Wilson, Decl., ¶ 2.
3 Day-Wilson, Decl., ¶ 3.

accounts.[4]

Separately, counsel for the City directed the members of the City Council and the Mayor to conduct a search for any records on their private devices and email accounts during the time periods of the PRA request.[5] Each Councilmember and the Mayor conducted a search of their personal emails and text messages and provided any existing records to counsel for the City.[6] Counsel for the City reviewed the records provided to determine whether any of the records related to City business consistent with the *City of San Jose* standard. The records were not related to the City's business in any substantive way and were instead personal and private in nature. The Mayor and City Councilmembers executed declarations, under penalty of perjury, attesting that no public records existed on their private devices and accounts in response to the PRA request.

On April 24, 2017, the City notified Mr. Greenson that no public records existed in response to his PRA request.[7] On May 1, 2017 Mr. Greenson sent an email that stated, in relevant part, "Records responsive to the Journal's request clearly exist, but the City has determined that all of them are exempt per the Public Records Act."[8] Mr. Greenson then demanded that the City state what exception it was relying on in support of withholding records. On May 2, 2017 the City sent a letter in response, which stated, in relevant part, "The City did not cite a specific exception allowing it to withhold public records in its previous email because the documents were not public records. The requested communications do not qualify as public records because their content does not relate to the public's business. *See City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 618-19."[9]

On June 5, 2017 Petitioner filed the instant Verified Petition For Alternate And Preemptory Writ Of Mandate and Complaint For Declaratory And Injunctive Relief Re Access. In a final attempt to avoid the unnecessary expense of this action, on June 28, 2017 the City sent another

4 Day-Wilson, Decl., ¶ 5.
5 Day-Wilson, Decl., ¶ 6.
6 Day-Wilson, Decl., ¶ 7.
7 *See Petitioner's Opening Brief,* Exhibit 1, page 1-2 ; Day-Wilson, Decl., ¶ 7.
8 *See Petitioner's Opening Brief,* Exhibit 1, page 4 ; Day-Wilson, Decl., ¶ 10.
9 *See Petitioner's Opening Brief,* Exhibit 1, page 5-6 ; Day-Wilson, Decl., ¶ 11.

letter to Petitioner's counsel stating that the requested writings were not public records and were personal in nature.[10] The City filed an Answer on July 5, 2017 along with declarations from each member of the City Council and the Mayor indicating they had no public records. On July 17, 2017, Petitioner untimely served the subject motion.[11]

III. ARGUMENT.

A. Petitioner's Motion Should Be Denied Because It Was Served Untimely

On July 6, 2017, the Court set a hearing date in this case for August 7, 2017. Based upon that hearing date, Petitioner was required to serve its moving papers by personal service no later than July 14, 2017.[12] Petitioner did not serve its moving papers until three days later on July 17, 2017.[13] As a result, Petitioner's motion is procedurally defective because its moving papers were served less than 16 court days prior to the hearing. The City therefore requests that Petitioner's motion be overruled on this ground.

B. Petitioner's Motion Is In Direct Conflict With The California Supreme Court's Decision In *City of San Jose v. Superior Court*

It is significant to note from the outset that Petitioner's boilerplate motion omits any reference to the *City of San Jose* decision. This is significant because the City specifically referred Petitioner to the *City of San Jose* decision when it informed Petitioner of its response to the PRA request, and because Petitioner's arguments are in clear contradiction with the express ruling in *City of San Jose*.[14] Rather than address that ruling, the moving papers relying upon an argument that is in direct conflict with the *City of San Jose* decision. Specifically, Petitioner argues the City violated the law because it did not cite a statutory exemption that would allow it to withhold public records. Significantly, and as detailed in the *City of San Jose* decision, the moving papers make an

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10 *See* Respondent's Answer, Exhibit A.

11 Day-Wilson, Decl., ¶ 12. Paul Boylan realized this deficiency, and offered a compromise of allowing the City one extra day to draft its opposition. This offer was rejected because of an uncertainty regarding the validity of a stipulation between the parties that is contrary to a statute and entered into without express court approval. Day-Wilson, Decl., ¶ 15.

12 *See* Cal. Code Civ. Proc. § 1005.

13 Day-Wilson, Decl., ¶ 12.

14 An attorney has a duty not to mislead the court in presenting law or fact. *See* Bus. & Prof. Code, § 6068; California Rules of Professional Conduct 5-200(A).

unsupported leap in logic because Petitioner fails to establish how the private communications qualify as "public records" under the CPRA. As set forth herein, Petitioner's argument must be rejected based upon the standard enunciated by the California Supreme Court in *City of San Jose.*

1. Applicable Standard Set Forth in *City of San Jose.*

In *City of San Jose*, the California Supreme Court applied the CPRA to a request for all messages sent or received on personal electronic devices owned by a mayor and two city council members.[15] The Court held, "when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act."[16] The Court held that communications that were not substantively related to the public's business are not public records.[17] The Court defined a public record to require four elements: "Under this definition, a public record has four aspects. It is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, *or* (4) owned, used, or retained by any state or local agency.[18] The Court reasoned the CPRA was not intended to cover every communication to or from a government actor.[19] The Court listed four factors that can be considered in assessing whether a writing is a public record: (1) the content itself; (2) the context in, or purpose for which, it was written; (3) the audience to whom it was directed; and (4) whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.[20]

Importantly, with regard to records on personal devices, the Court held that such writings must *at a minimum* have *a substantive connection* to the public's business to be public record:

> We clarify, however, that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business,

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15 *Id.* at 615.
16 *Id.* at 608. (Emphasis added.)
17 *Id.* at 618-19.
18 *Id.* at 617. (Emphasis added.)
19 *Id.* at 618.
20 *Id.* at 618.

generally will not constitute public records.[21]

The Court explained that the test that is applicable to records contained on personal devices "departs" from the traditional test under the CPRA.[22] To qualify as "primarily personal" under this standard, and thus beyond the scope of the CPRA, a record need not be "purely personal," that is "totally void of reference to governmental activities."[23] Classifying records as outside of the CPRA only if they were "purely personal" would "sweep too broadly [...] particularly when applied to electronic communications sent through personal accounts."[24]

Finally, the Court discussed the process for responding to requests for public records stored upon personal or private accounts. The government should notify individuals of the request for records and its scope and then is entitled to rely upon individuals to search their own private devices for potentially responsive material.[25] The Court analogized this to cases permitting employees to search their own private accounts under the Freedom of Information Act.[26]

As applied here, the City of Eureka responded in strict compliance with the ruling in *City of San Jose* by asking members of the City Council to search their personal accounts and retain all possibly relevant communications.[27] The Mayor and members of the City Council have done so, and each produced a declaration stating that they have no responsive public records.[28] The City is entitled to rely on these individuals[29] to search their own private accounts for emails or messages related to the government's business. Additionally, while some emails or texts occurred during the requested period, none of these communications related in substance to City business.[30] While

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21 *Id.* at 618-19 *citing* Gov. Code § 6252, subd. (e). (Emphasis added.)
22 *Id.* at fn 4.
23 *Id.* at 619 fn.4.
24 *Id.* (Emphasis added.)
25 *Id.* at 628. ("As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material.") (Emphasis in original.)
26 *Id.* at 628.
27 Day-Wilson, Decl., ¶ 3, 6.
28 *See* Respondent's Answer, Exhibit A.
29 *See San Jose,* at 628.
30 Day-Wilson, Decl., ¶ 8.

the City anticipates Petitioner will argue that such messages are per se "public records" because they were sent or received during a Eureka City Council meeting, such argument is contrary to the *City of San Jose* decision which required "at a minimum" that a writing be substantively related to the government's business to be classified as a public record.[31]

Finally, Petitioner failed to submit any evidence in the record that would provide any basis to doubt the declarants' truthfulness or thoroughness.[32] Based upon the declarations of the persons whose personal records were requested, any electronic messages sent or received during the time period of Petitioner's PRA request were personal, not substantively related to public business, and therefore not subject to the CPRA.

2. Government Workers Are Entitled to Privacy.

The reasoning in the *City of San Jose* decision rests on the well-established principle that elected officials and government workers do not forfeit all personal privacy by entering public office. Applying the CPRA to writings that relate "in a substantive way to the conduct of the public's business"[33] but not private writings, serves an important policy goal. Public officials, no less than the average citizens, [34] are entitled to engage in private written communications with their family, friends, and acquaintances without fear that these communications will be shown to strangers or appear in the news. Here, by Petitioner's analysis, any and all communications sent or received by public official are automatically public records, that may only be withheld upon a showing that some statutory exception applies. This analysis runs completely afoul of the statutory scheme of the CPRA, as well as the constitutional guarantees of privacy that all citizens, regardless of their position, enjoy.

In sum, the City did not produce private records because the records consisted of private communications that did not relate to City business. The City did not cite a statutory exemption in support of such non-disclosure because the communications did not qualify as public records. The

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31 *Id.* at 618-19. (Emphasis added.)

32 Petitioner seems to indicate he distrusts counsel for the City, not the City Council or Mayor. *See Decl. of Paul Boylan In Support of Petitioner's Opening Brief,* ¶ 8.

33 *Id.* at 618.

34 *See Id.* at 626 *citing Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 951.

City's decision is supported by the purpose of the CPRA,[35] the reasoning of *City of San Jose,* and the privacy rights of public employees.

3. The Public Records Act's Purpose of Government Oversight Is Consistent with Limiting Its Reach.

The distinction between private writings and public records is also consistent with the purpose of the CPRA. The CPRA is intended to safeguard the accountability of government to the public.[36] The CPRA accomplishes this by making available government communications and documents so the people can detect arbitrary abuses of power and prevent secrecy in politics.[37] Certainly if a public employee or official is conducting government business via text on their phone, or on their personal email account, such writings are public records, even if located on a private account. However, it would be nonsensical to say that everything from a grocery list to a post card becomes a public record simply because it is a writing to or from a public employee.

C. If the Court Believes In Camera Review Is Appropriate The City Should Not Be Required To Provide An Exception To The Public Records Act.

Petitioner argues that under Gov. Code §§ 6253(a) and 6259(a) and (b) an in camera review is necessary per the standard procedure for a CPRA dispute.[38] While the court may, in its discretion, elect to proceed according to these sections, these statutes are only partly applicable to the present controversy and should not be applied mechanically.

Both sections assume that the writing at issue is a public record, and the dispute is about redacting or withholding specific information from that public record. As addressed herein, the private writings at issue in this case are *not* public records in the first instance. Thus, the CPRA does not apply, and it is inappropriate to apply various procedures related to the CPRA, particularly Gov. Code § 6259(b), requiring the City to provide justification under Gov. Code § 6254 or § 6255, (listing exceptions allowing the government to withhold public records). It is also

35 *See Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1141

36 *See Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, *as modified* (Jan. 21, 1997) ("The Act was intended to safeguard the accountability of government to the public,") ;

37 *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.

38 *See Petitioner's Opening Brief,* page 3.

inappropriate to require redaction under Gov. Code § 6253 of certain portions when no portion of the writings is a public record.

Petitioner has not presented *any evidence* to support this motion, or the argument that the City is wrongfully withholding records in violation of the CPRA. Instead, Petitioner filed a self-serving and legally objectionable declaration that concludes Petitioner and its counsel distrust counsel for the City based on a completely separate legal action.[39] Under Petitioner's logic a public employee or official must be ready at all times to submit all of their personal written communications to an in camera review by a judge, or even to the public at large, based upon no more than "distrust" for the government attorney. This argument in untenable and has absolutely no legal or evidentiary support. The City, on the other hand, filed declarations of the City Council and the Mayor stating that they have no public records responsive to the PRA request.[40] Accordingly, because Petitioner has not presented any evidence in support of its motion, there is no legal basis for subjecting the City Council and the Major's private communications to an in camera review.

IV. CONCLUSION.

The CPRA applies to a wide array of public records maintained by government offices and discussing the public's business. The accessibility of these records is important because they relate to the people's business. As such, it follows that in order to withhold such records, the government must provide justification, i.e., cite an applicable statutory basis, when it does so. However, as expressly held by the California Supreme Court in the *City of San Jose* decision, that same analysis does not apply when addressing records that are maintained on personal devices/accounts. In that event, the Supreme Court held that "to qualify as a public record under the CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the people's business."[41]

Here, the City conducted a search and determined that no records existed on City devices or accounts in response to Petitioner's PRA request. Further, with regard to the Mayor and City

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39 Decl. of Paul Boylan In Support of Petitioner's Opening Brief, ¶ 8.
40 *See* Respondent's Answer, Exhibit A.
41 *Id.* at 618-19.

Councilmembers' private devices and email accounts, the City has filed concurrently herewith declarations under penalty of perjury attesting that no public records exist.

In conclusion, because the City has presented undisputed evidence showing that it complied with the CPRA, Petitioner's motion should be denied and the Verified Petition should be dismissed, with prejudice.

Dated: July 25, 2017

Cyndy Day-Wilson
CITY ATTORNEY
CITY OF EUREKA