SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

THE NORTH COAST JOURNAL,

Petitioner,

v.

THE CITY OF EUREKA,

Respondent.
_____/

CASE NO. CV170486

RULING AND ORDER REGARDING MOTION FOR ORDER RE ACCESS TO PUBLIC RECORDS

Presently before the Court is Petitioner The North Coast Journal's ("Petitioner") Motion for Order re Access to Public Records ("Motion for Public Records"), filed July 13, 2017. Respondent The City of Eureka ("Respondent") opposes the Motion for Public Records.

The Court rules as follows after considering all the papers filed in this matter and the arguments of the parties at the hearing on August 7, 2017. The Court takes judicial notice of all pleadings and documents in the Court's file. Evidence Code §§452, 453.

Request for Statement of Decision.

At the hearing, Petitioner requested a statement of decision and argued that the

law requires the Court to issue a statement of decision, citing cases including *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 79-80 (statement of decision not required after ruling on motion, with certain judicially created exceptions including "where issue has been deemed important").

The Court has reviewed the cited cases and applicable practice guides. A hearing on a petition for writ of administrative mandamus may be a "trial of question of fact" for purposes of a statement of decision under CCP §632. However, generally a statement of decision is neither required nor available upon decision of a motion or where the issue tendered to the trial court is only one of law, with some exceptions noted where the motion significantly affects the rights of the parties. *See* CALIFORNIA PRACTICE GUIDE, CIVIL TRIALS AND EVIDENCE (RUTTER 2016) §§16:108.5-16:111.1, §§16:114-16:125.

The Court believes that this motion matter is not a trial of question of fact and is generally a matter of law. Nonetheless the Court acknowledges the importance of the subject matter and the likelihood of appellate review. For this reason, the Court states that this ruling and order is the Court's proposed statement of decision, subject to objection. CRC 3.1590(c)(1).

Objections.

At the hearing, Respondent requested that the Court rule on each of its evidentiary objections prior to ruling on the Motion for Public Records.

Declaration of Paul Boylan.

The Court has considered the following objections and rules as follows:

Paragraphs 3, 4, 5, and 6. Respondent objects that Declarant's background and work history are irrelevant under Evidence Code §350. The objections are OVERRULED. The background is potentially relevant to Declarant's proffered opinions.

Paragraph 8, 7:12-16. Respondent objects under Evidence Code §352 that reference to the prior lawsuit between the parties is an improper attempt to prejudice the Court and that the matter is irrelevant under Evidence Code §350. The objections are OVERRULED. The Court may assign proper weight to any such reference.

Paragraph 8, 7:16-20. Respondent objects under Evidence Code §403 that Declarant's opinion lacks foundation or preliminary evidence and that Declarant's attack on the credibility of one party based on differing legal opinions is prejudicial under Evidence Code §352. Respondent also objects that a declaration setting forth only conclusions, opinions, or ultimate facts is insufficient. The objections are OVERRULED. The Court may assign proper weight to any such reference.

Paragraph 8, 7:19-20. Respondent objects that the statement is irrelevant under Evidence Code §350 and prejudicial under Evidence Code §352. Respondent also objects that a declaration setting forth only conclusions, opinions, or ultimate facts is insufficient. The objections are OVERRULED. The Court may assign proper weight to any such reference.

Declaration of Thadeus Greenson.

The Court notes the objection but considers the late-filed declaration and rules as follows:

Paragraph 4, 1:23-26. Respondent objects to the statements as irrelevant under Evidence Code §350. The objection is OVERRULED. Respondent also objects to a portion of the statement – "other members of the public have reported witnessing the same" -- as hearsay under Evidence Code §1200. The objection to this portion of the statement on hearsay grounds is SUSTAINED. Respondent also objects that the statement -- "In my experience, it seems to be a common and growing practice" – is inadmissible opinion not supported by factual evidence. This objection is

OVERRULED. Respondent further objects that the referenced lines are speculative. This objection is also OVERRULED.

Paragraph 5, 1-2:27-28, 1-2. Respondent objects to the statement as irrelevant under Evidence Code §350, as hearsay under Evidence Code §1200, and as speculative under Evidence Code §702. The objections are OVERRULED.

Paragraph 6, 2:3-12. Respondent objects to the statement as speculative, irrelevant, lacking foundation and conclusory. The objections are OVERRULED.

Paragraph 7, 2:13-16. Respondent objects to this statement as irrelevant and speculative. The objections are OVERRULED.

Paragraph 8, 2:17-21. Respondent objects to the statement as irrelevant, lacking foundation, and hearsay. The objections are OVERRULED.

Paragraph 9, 2-3:22-28, 1-2. Respondent objects to the statement as misstating the evidence. The objection is noted but OVERRULED. The Court will evaluate the evidence in front of it. The Respondent also objects to the statement as irrelevant and conclusory. The objections are also OVERRULED.

Paragraph 10, 3:3-18. Respondent objects that the lengthy statement is irrelevant, not the best evidence, prejudicial, conclusory and hearsay. The objections are OVERRULED. The Court may assign proper weight to any such reference.

Paragraph 11, 3:19-25. Respondent objects that the statement is irrelevant, prejudicial, conclusory and speculative. The objections are OVERRULED. The Court may assign proper weight to any such reference.

Paragraph 12, 3-4:26-28, 1-6. Respondent objects that the statement is irrelevant, not the best evidence, prejudicial, conclusory and hearsay. The objections are OVERRULED. The Court may assign proper weight to any such reference.

///

Paragraph 13, 4:7-10. Respondent objects to the statement as irrelevant and lacking foundation. The objections are OVERRULED. The Court may assign proper weight to any such reference.

DISCUSSION

Petitioner requested from the City of Eureka copies of emails and text messages sent or received by members of the Eureka City Council and the mayor on two dates in 2017 and during the time period of approximately 6 p.m. to 8 p.m., the time of two regular city council meetings.

Petitioner makes two main arguments in support of its request for an *in camera* review of the documents pursuant to Government Code §6253(a) and §6259(a) and (b). First, Petitioner argues that due to its distrust of the City of Eureka and its belief that public records exist, the City did not meet its burden to establish that the records are private and the Court must conduct an *in camera* review to determine if the records at issue are indeed public records, whether any exemption exists, and to determine what information within the documents must be disclosed (or what private information should be redacted from the communications at issue). Petitioner also asserts that all records from the time period in question, even if private business and entirely redacted, are public records because "even a redacted message demonstrates how much public time a City official is devoting to private matters" and is of interest to the public. Petitioner states: "The public is presumptively interested in knowing what elected officials and public employees are doing – and not doing – when they are "on the clock" conducting the public's business while serving in their capacities as elected officials and public employees."

Respondent opposes the Motion for Public Records by arguing that the private emails and text messages of public officials are only subject to disclosure under the

Public Records Act ("PRA") if the writings "relate in some substantive way to the conduct of the public's business" under *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619. Respondent argues that it determined that no responsive public records exist. First, it determined that no responsive records existed on City equipment or accounts. Then: "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. 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."

The City's process for determining whether records contained on private devices or accounts were public records appears in accord with *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608. Specifically, the *City of San Jose* court stated that private accounts may contain public records that are subject to the Public Records Act. To qualify as a public record, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. Communications that are primarily personal, containing no more than incidental mentions of agency business generally will not constitute public records. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in or purpose for which it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act in the scope of his or her employment. *City of San Jose*, 2 Cal.5th at 618.

The *City of San Jose* court discussed but did not sanction a particular process for determining responsive material on personal accounts or devices. When a public agency receives a Public Records Act request it must communicate the request to the employees in question when held in a nongovernmental account and then the agency may reasonably rely on these employees to search their own personal files, accounts and devices for responsive material. *City of San Jose*, 2 Cal.5th at 628.

Respondent states that each councilmember and the mayor conducted a search of their personal emails and text messages and provided any existing records to counsel for the Respondent and counsel for Respondent then reviewed the records to determine whether the records related to city business. According to the declaration of counsel for Respondent: "I personally reviewed all of the written communications to determine whether any of the communications from personal devices or accounts were related to the City's business. Instead, all of the written communications were personal and private in nature." Therefore, communications on private devices or accounts were apparently not withheld from the public agency but provided to counsel for the City for review.

Each public official subsequently executed a declaration certifying: "I do not have custody of any public records regarding City business that are disclosable under the PRA that are responsive to the City's request for disclosure." The Court notes that the Public Records Act Compliance Declarations from the mayor and city council members were executed in June 2017, subsequent to the City's initial responses to Petitioner in April and May of 2017 and the filing of the Petition. Preferably, such declarations would be part of the initial response and search process. *See City of San Jose*, 2 Cal.5th at 628 (the court agreed with the approach of the Washington Supreme Court that employees who withhold personal records from their employer must submit an affidavit

with facts sufficient to show the information is not a public record under the PRA – so long as the affidavits give the requester and the trial court a sufficient factual basis to determine the withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA). Any declaration withholding communications must at least contain facts sufficient to show the information is not a public record under the PRA, as the affidavits must give the requester and the trial court a sufficient factual basis to determine the withheld material is indeed nonresponsive. Had records been withheld from the public agency, the conclusory declaration from the public officials may not have been sufficient under *City of San Jose.* In this case, however, according to the declaration of counsel for the City, the records were also personally reviewed by that counsel.

Under the guidance of *City of San Jose*, based on the process taken by the City to identify, preserve, and review the communications, including the declarations submitted by the mayor and each council member, as well as the declaration of counsel by the City, the Court determines that it does not appear that public records are being improperly withheld under Government Code §6259 and does not order *in camera* review of the communications. Apparently, an *in camera* review is not required as a matter of law but is left to the sound discretion of the trial court. *See* 55 CAL.JUR. 3D (2017) RECORDS AND RECORDING LAWS §35; *Coronado Police Officers Association v. Carroll* (2003) 106 Cal.App.4th 1001, 1013; *Yarish v. Nelson* (1972) 27 Cal.App.3d 893, 903-904 (*in camera* inspection not required but within discretion of trial court, statute only applies if prima facie showing made that the records are public and being improperly withheld).

The Court also does not see that *City of San Jose* or any other authority under the Public Records Act supports Petitioner's argument that the Public Records Act

mandates disclosure as public records all emails and text messages contained on private devices or accounts, even if fully redacted, that exist from a time frame that includes public meetings or public time. As law to support this proposition, Petitioner has cited the well accepted view that the Public Records Act must be interpreted in favor of access and all ambiguities must be resolved in favor of access. *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617. Petitioner argues that the "public is legitimately interested in determining how much public time City officials are spending on private business." However, the *City of San Jose* court enunciated a standard for public records on private accounts or devices as writings that relate "in a substantive way to the conduct of the public's business." The Court does not find here that any private, personal, or non-public message sent on a private account or private device during potentially "public time" meets that standard.

The Court acknowledges the difficult line to be drawn under the *City of San Jose* decision as to public records on personal devices or accounts. The Court also acknowledges the lack of specific guidance as to a required response from the public agency or public official for requests pertaining to potentially public records on personal devices. Further, it is unclear under the facts and circumstances presented here, whether Government Code §6253 and §6259 mandate an *in camera* review or release of fully redacted records. The Court follows what it perceives to be the guidance of *City of San Jose* regarding a search and review of personal accounts for relevant communications subject to the Public Records Act.

///

///

///

///

ORDER

1. The Motion for Public Records is DENIED for the reasons stated herein.

Dated: October 13, 2017

Timothy P. Cissna, Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, 825 5th St., Eureka, California, 95501; that I served a true copy of the attached RULING AND ORDER REGARDING MOTION FOR ORDER RE ACCESS TO PUBLIC RECORDS by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Paul Boylan, PO Box 719, Davis, CA 95617

Cyndy Day-Wilson, Eureka City Attorney, Court Operations Box #63

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 18 day of October, 2017, at the City of Eureka, California.

Kim M. Bartleson, Clerk of the Court

By _____
Deputy Clerk