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PEOPLES HOMELESS TASK FORCE ORANGE COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLES HOMELESS TASK FORCE ORANGE COUNTY,

Petitioner/Plaintiff,

v.

CITY OF ANAHEIM,

Respondent/Defendant.

SRB MANAGEMENT COMPANY, LLC

Real Party in Interest.

Case No. 30-2020-01135406-CU-WM-CJC Consolidated with Case No. 30-2020-01174133-CU-WM-CJC)

Assigned for all purposes to the Hon. David A. Hoffer, C42

PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR WRIT OF MANDATE AND DECLARATORY RELIEF FOR VIOLATIONS OF THE CALIFORNIA PUBLIC RECORDS ACT

Date: September 24, 2021
Time: 9:30 a.m.
Dept.: C42

Action Filed: 02/28/2020
Hearing Dates on Writ: 09/24/2021
12/10/2021

I. The City's Search Was Insufficient.

An agency must conduct a search that is "reasonably calculated to uncover all relevant documents." (*See Weisberg v. DOJ* (D.C. Cir. 1983) 705 F.2d 1344; *Campbell v. United States* (D.C. Cir. 1998) 164 F.3d 20, 27 [noting an agency must search using methods which can be reasonably expected to produce the information requested].) In order to show that its search was sufficient, the agency must demonstrate "beyond material doubt that the search was reasonable." (*Truitt v. Department of State* (D.C.Cir.1990) 897 F.2d 540, 542; *see also McGehee v. C.I.A.* (D.C. Cir. 1983) 697 F.2d 1095, 1101 ["burden of persuasion on this matter is properly imposed on the agency"].) This showing requires "affidavits attesting to the sufficiency of an agency's search [which] must be detailed and non-conclusory…" including the search methods, search terms, and files searched. (*Oglesby v. Dep't of the Army (*D.C. Cir. 1990) 920 F.2d 57, 68; *see also Weisberg v. United States Department of Justice* (D.C.Cir. 1980) 627 F.2d 365, 371 [agency affidavit must denote which files were searched and reflect a systematic approach to document location]; *Bennett v. DEA* (D.D.C. 1999) 55 F.Supp.2d 36, 40 [pointing out that affidavit must provide details of scope of search; "simply stating that 'any and all records' were searched is insufficient"].)

The City's claim that it "gathered the responsive records pursuant to its established procedures for CPRA compliance" is insufficient to meet its burden. Moreover, the declarations submitted by the City only show that the records coordinators received the request from the City Clerk's office and forwarded it to people in their respective offices. They do not rise to the level of detail required. They do not include search terms. They do not include any basis about how key players, such as the city manager, the mayor, or the city attorney, all of whom were on the negotiating team and at the center of the stadium sale, actually searched for records. For example, the City states that Maggie Solorio forwarded the request to Loretta Day and directed her to forward the request to 18 individuals, including city councilmembers. However, it lacks any details as to what those individuals did to search or whether they even identified responsive records. (Solorio Decl., ¶¶ 6-7.)

The City bemoans this obligation, offering a variety of excuses. First, it claims that "it should not be the City's burden to prove the non-existence of records" (Opp., p. 7), and then writes off the overwhelming circumstantial evidence of the insufficiency of the City's search, much of which is directly referencing the City's own statements as mere "speculation." Given that the City could easily have refuted these factual claims, the failure to do so is an adoptive admission. (Evid. Code § 1221; *see also Nungaray v. Pleasant Val. Lima Bean Growers & Warehouse Ass'n* (1956) 142 Cal.App.2d 653, 666 [failure to deny the truth of a statement may constitute an admission by silence].) For example, despite the fact that the City Attorney, a member of the negotiating team with sufficient information to address these claims, actually filed a declaration, he fails to refute the claim that additional responsive records existed, but were not turned over. There is no declaration from anyone familiar with the Stadium Sale or the negotiations leading up to the sale to confirm that no responsive records existed. As the very least, this calls into question the City's credibility. (Evid. Code § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].)

Moreover, an agency's search has been held insufficient where they should have known or could have determined that additional records existed. (See, e.g., *Republic Nat'l Comm. v. Dep't of State* (D.D.C. 2016) 235 F.Supp.3d 235 , 241-242 [search inadequate by failing to fairly interpret the broader aim of the request and to search for additionally responsive materials despite being aware of them]; *Whitaker v. Cent. Intel. Agency* (D.D.C. 2014) 31 F.Sup.3d 23, 28 [agency must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry]; *Iturralde v. Comptroller of Currency* (D.C. Cir. 2003) 315 F.3d 311, 315 [agency declarations could be overcome by showing that it ignored indications that further responsive documents existed *and* failed or refused to interview officials that might have been helpful in finding the missing documents]; *Valencia-Lucena v. U.S. Coast Guard* (D.C. Cir. 1999) 180 F.3d 321, 328 ["When all other sources fail to provide leads to the

missing record, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record"].)

The City says it should not be held to this standard because it has been over eighteen months since the search. But this lawsuit was filed while the search was still being completed. The last production was made after this lawsuit was filed. The Petition clearly indicates that responsive records are missing from the production, calling into question the sufficiency City's search. It makes no sense that the City would be unable to provide sufficient information about how the search was conducted or what responsive records existed.

The City also argues that Petitioners request was "neither focused nor specific" and seems to infer that should be held to a lower standard because of the nature of the CPRA Request. (Opp., p. 2.) However, the City cites no real authority for this argument. *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, is attorney fee case that had nothing to do with an agency's search obligations. Similarly, *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, which related to whether phone records of all calls sent and received by public officials are exempt from disclosure, had nothing to do with the nature of the search required by a public agency. The City also cites *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, where the court found that the request was overbroad. However, the request was much different in that case, consisting of 62 separate requests which were "in some cases, unlimited in time," "not reasonably limited to a certain file or project" and required "numerous City departments to search their entire catalog of records." *ACLU v. Deukmejian* (1982) 32 Cal.3d 440, is also distinguishable, as it related to the burden of segregating exempt material, not about the search.

Instead, Courts have recognized that "a requester, having no access to agency files, may be unable to precisely identify the documents sought. Thus, writings may be described by their content.... An agency is thus obligated to search for records based on criteria set forth in the search request." (*Cal. First Amendt. Coal. v. Sup. Ct.* (1998) 67 Cal.App.4th 159, 165–66 ["Courts...should construe the request reasonably, in light of its

clear purposes: 'Feigned confusion based on a literal interpretation of the request is not grounds for denial'"] *see also Cmty. Youth Athletic Ctr. v. City of Nat'l City* (2013) 220 Cal.App.4th 1385, 1425 [focus should be on the criteria in the request and the description of the information, as reasonably construed, and the search should be broad enough to account for the problem that the requester may not know what documents or information of interest an agency possesses]; *State Bd. of Equalization v. Sup. Ct.* (1992) 10 Cal.App.4th 1177, 1186 ["size of the request is not the measure . . . but whether the records can be located with reasonable effort"].) "[G]overnment agencies—particularly those with an incentive not to assist in the dissemination of their files . . . may demand an unreasonable level of specificity." (*ACLU v. Sup. Ct.* (2011) 202 Cal.App.4th 55, 85 ("*ACLU*").)

The City also argues that it is entitled to a presumption that the search was reasonable. Not so. As the Supreme Court recently stated in response to a similar contention, "It is no answer to say . . . that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is for the public to make that determination, based on information to which it is entitled under the law." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625.)

The City's argument that it was under no duty to ask third parties to turn over responsive records is also erroneous. (*City of San Jose,* at 627-629; *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1428.) While the City is not required to seek out records it does not own or control, certainly the City has not demonstrated that is the case here. For example, its attorneys' files would be under City control pursuant to the California Rules of Profession Conduct. (See Rule 1.16 ["lawyer promptly shall release to the client, at the request of the client, all client materials and property"].) Similarly, the City's agreement with its contractors specifically confirms the City's control over work product.[1]

[1] See Icon Agreement, ¶ 15.2; Kosmont Agreement, ¶ 15.2, both available at https://www.anaheim.net/DocumentCenter/View/27565/Barrett-Kosmont-agreements

II. The City Completely Fails To Meet the High Burden To Demonstrate That The Records It Is Withholding Are Exempt.

The City's response fails to meet its high burden to demonstrate that the responsive records, which are presumptively disclosable, should be withheld from the public. Generally, the City has done nothing more than recite the statutory standards, devoid from any analysis of how the specific records it is withholding actually meet the elements of the exemptions the City invokes. Moreover, for the drafts exemption, the deliberative process claim, and its invocation of the Section 6255 balancing test, the City does not even address how the public interest served by withholding these records could *clearly outweigh* the substantial public interest in disclosure, given the serious concerns raised by the stadium sale and the secrecy with which the transaction was conducted. The mere "pronouncement" of an exemption, along with the rote resuscitation of its language, falls far from meeting the heavy burden to justify nondisclosure and overcome the presumption of openness. (*ACLU*, 202 Cal.App.4th at 76 [if it were otherwise, "the PRA would not require much of government agencies"].)

As to the City's request for in camera review, while permissible[2], it is a last resort and not a substitute for the agency's responsibility to meet its high burden of proof. (*Id*. at 86–87.) "*In camera*, ex parte review, though permitted…and sometimes necessary, is generally disfavored—it 'is not a substitute' for the government's obligation to justify its withholding in publicly available and debatable documents, and it should be invoked only when the issue at hand '"could not be otherwise resolved."' (*Id*. at 88.)[3]

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[2] It is not mandatory, however, despite the language in the statute. (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893 ["under § 6259 *in camera* inspection of the record in question is not required as a matter of law, but is trusted to the sound discretion of the trial court"].)

[3] Federal courts also disfavor *in camera* review in FOIA cases, even though it is expressly permitted by 5 U.S.C.A § 522(a)(4)(B). (See, e.g., *NLRB v. Robbins Tire & Rubber Co.* (1978) 437 U.S. 214, 224 [*in camera* review is discretionary and "designed to be invoked when the issue…could not otherwise be resolved"]; *Ctr. for Biological Diversity v. Office of the United States Trade Representative* (9th Cir. 2011) 450 F.App'x 605, 608, quoting *Weiner v. FBI* (9th Cir. 1991) 943 F.2d 972, 979 ["'resort to *in camera* review is appropriate only after the government has submitted as detailed public affidavits and testimony as possible"]; *Missouri Coalition for Environment Foundation v. U.S. Army Corps of Engineers* (8th Cir. 2008) 542 F.3d 1204, 1210 [stating that "*in camera*

The City has not met that burden here. For example, it notes that it "withheld approximately five documents [under the section 6255 balancing test], each of which was a draft containing information for which confidentiality is in the public interest given the context of Stadium Site financial negotiations." This does not address why there was ever a need for confidentiality, or why it continues, especially after the negotiations have been completed. (*See, e.g., Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065 [California Supreme Court finding under § 6255 balancing test that disclosure of proposals submitted to agency as part of negotiating a public contract, lease, or other project properly may await conclusion of the agency's negotiation process, but must be disclosed before the agency's recommendation is finally approved].)

Nor does the City balance the intense public interest in the sale of the City's largest asset against the alleged public interest in nondisclosure. This same problem plagues the City's withholding of documents it claims are "drafts" under section 6254(a) and its invocation of the deliberative process (which is merely an interest balanced under section 6255.)

The City's reliance on the draft exemption and its claim of deliberative process both suffer from an additional issue. The City fails to address key elements of the exemption. As noted in the opening brief, but ignored by the City, section 6254(a), which "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure," ***is not applicable where the documents have actually been retained.*** (*Citizens for A Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 714.) This conclusively precludes the City from relying on Section 6254(a) to withhold responsive records here.

Similarly, although a key element of the deliberative process is that the communications must related to the process by which "government policy is processed and formulated," the City never even alleges any "policy" it was in the process of being

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inspection should be limited as it is contrary to the traditional role of deciding issues in an adversarial context upon evidence produced in court"].)

formulating. It is clear from the subject matter of the request, the sale of the stadium, that the documents at issue here relate to a transaction, not formulation of agency policy. Therefore, invocation of the deliberative process is unwarranted.

The City focuses its argument on the claim that factual information can be deliberative, citing *Times Mirror Co. v. Sup. Ct.* (1991) 53 Cal.3d 1325; *Wilson v. Sup. Ct.* (1996) 51 Cal.App.4th 1136; and *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469. In those cases, courts found that disclosure of factual information, like all of the Governors' appointment schedules and calendar entries in *Times Mirror* or all phone numbers called by every councilmember in *Rogers*, would be the functional equivalent of revealing the the deliberative process.

The City's reliance on those cases here suffers from at least two problems. First, the City has failed to show how *these* records would be the functional equivalent of revealing the deliberative process, which still requires a showing of the formulation of agency policy that the City cannot meet on these facts. *ACLU*, 202 Cal.App.4th at 76 is instructive. The agency claimed documents were exempt under Section 6255 "[b]ecause these documents reflect the government's decision-making process, they are exempt from disclosure." However, the court found that the "pronouncement was manifestly inadequate" and held that the deliberative process privilege does not justify nondisclosure of a document merely because it was the product of an agency's decisionmaking process; if that were the case, the PRA would not require much of government agencies." (*Id.*) "Conclusory or boilerplate assertions that merely recite statutory standards are not sufficient." (*Id.* at 83.)

Second, the cases on which the City relies predate the Proposition 59, which created a California Constitutional amendment elevating the right of access to constitutional stature and required all statutes, court rules, or other authority, including those in effect as of the date of its enactment, be read broadly in favor of public access and narrowly construed where they would limit public access. (Cal. Const., Art. I § 3.) This provision makes the broad construction of any asserted interest in disclosure, including the deliberative process, impermissible under the limited construction mandated post-

Proposition 59. Moreover, even these cases, which purport to limit public access, must themselves be narrowly construed under the constitutionally required construction.

The City's claim of privilege and work product suffer from the same problem. The City merely recites the language of the privilege, without explaining how it applies to these particular records. Moreover, it appears from the City Attorney's declaration, that the City is taking the position that everything the City Attorney does is privileged. However, as Chief Justice George warned, the analysis is not that simple when the attorney preforms functions other than pure legal advice, like being a part of the negotiating team. "[C]ommunications between persons who stand in an attorney-client relationship are not privileged in every instance, because it sometimes occurs that an attorney-client relationship exists, but that the attorney also acts in another capacity for the client, as, for example, the client's agent in a business transaction." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 744, Chief Justice George concurring.) When an in-house attorney is representing a public agency, attorney/client privilege simply cannot function in the same way as private corporations or with outside counsel specifically retained to give legal advice on a specific issue (as was the case in *Costco*.) For example, the City Attorney states that he prepares ordinances and resolutions for the City. Those are not confidential simply because an attorney has drafted them.

While it is not Respondent's position that nothing the City Attorney does can be privileged, and the bulk of his work is likely to provide legal advice, the claim of privilege here warrants additional scrutiny and requires explanation of how these documents related to "legal advice" as opposed to mere negotiations. (*See Los Angeles Cty. Bd. of Supervisors v. Sup. Ct.* (2016) 2 Cal.5th 282, 289 [documents that do not "reveal the substance of legal consultation" are not privileged].)

Moreover, the City has produced absolutely no communications from the City Attorney or his office – not related to scheduling meetings of the negotiating team or even with the Angels. Is one to believe that a member of the negotiating team never communicated with the Angels over the entire year they were in negotiations? Those types of communications would not be privileged, as they would have been made with

someone other than the client. The same is true for outside counsel's communications with the Angels, that the City has yet to turn over.

While Petitioner does not argue that this Court can force an *in camera* review, "Evidence Code section 915 ... does not prevent a court from reviewing the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, or whether the communication emanated from the client. [Citation] Accordingly, while the prohibition of Evidence Code section 915 is not absolute in the sense that a litigant may still have to reveal *some* information to permit the court to evaluate the basis for the claim of privilege. [Citation.]" (*Costco,* 47 Cal.4th at 737.)

III. <u>The City's Refusal To Provide Information About Withheld Records Violates the CPRA</u>.

There can be no dispute that the actual language of the CPRA requires the City to "determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor." (§ 6253(b)-(c).) When the City withholds any record, Section 6255 requires it to "justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." This response must be in writing. (*Id.*) The purpose of this requirement is to ensure the requester has sufficient information to challenge the request, if necessary.

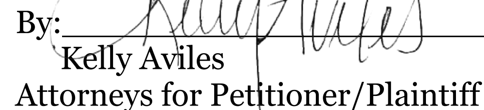
Here, a review of the City's response does nothing to address what *actual* documents being withheld, which exemptions are being invoked, any demonstration of how an exemption applies, or how the public interest in withholding is clearly outweighed by the public interested in nondisclosure. The response merely says: "certain records, or portions thereof, that ***might*** otherwise [be] responsive to your request ***may*** be withheld from production or redacted ***if*** the information they contain falls within exemptions to the

Public Records Act" and that subject to that limitation, "the City has identified responsive documents that fall within the scope of your request." (Ex. P to Petition.)

Given that the City responds to over 900 CPRA requests a year (Opp., p. 1), it is important that this Court address this issue to ensure that the City's future behavior is in line with the legal requirements. Additionally, given Petitioner's interests in City government, it is also extremely likely that Petitioner will file future CPRA requests. While the City did ultimately produce a privilege log once litigation was filed, production does not moot this question. (*See*, *e.g.*, *Bagdasaryan v. City of Los Angeles* (C.D. Cal. Oct. 22, 2018, No. 2:15-cv-01008-JLS (KES)) 2018 U.S.Dist.LEXIS 224542, at *102) [rejecting defendant's assertion that the CPRA "claim is moot because Defendant has already produced the requested documents"]; *Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063, 1087 [finding that claim that the City was invoking a procedure which did not comply with the CPRA, lawsuit was proper to ensure agency followed the law] *Orange County Employees Association, Inc. v. Superior Court of Orange County* (2004) 120 Cal.App.4th 287, 294 [dispute about whether charges for costs of production were legal was not moot because "the resolution of this issue affects not only OCEA, but also future petitioners … "]; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1419 [production of documents in dispute did not moot question of whether the city properly complied with the statute].)

DATED: September 17, 2021

Respectfully submitted,
LAW OFFICES OF KELLY AVILES



By:___________________________
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PROOF OF SERVICE

I reside or work within in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1502 Foothill Blvd., Suite 103-140, La Verne, CA 91750.

On **September 17, 2021**, I served the foregoing documents described as **PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR WRIT OF MANDATE AND DECLARATORY RELIEF FOR VIOLATIONS OF THE CALIFORNIA PUBLIC RECORDS ACT** on the parties in this action as listed in the attached service list by the following means:

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In accordance with Code of Civil Procedure sections 1010.6 and 1013, California Rules of Court, Rule 2.251, an order of the court, and/or an agreement of the parties, I caused the documents to be sent to the person at the email address listed below via email or via an electronic filing provider. After transmission, I did not receive, within a reasonable period of time, any electronic message or other indication that the transmission was unsuccessful.

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

Date: September 17, 2021

/s/*Albert D. Aviles*
Albert D. Aviles