

FILED

SUPERIOR COURT OF CALIFORNIA

SEP 14 2018

COUNTY OF MONTEREY

CLERK OF THE SUPERIOR COURT
Alina Oliver

Alina Oliver

Case No.: 18CV002532

Intended Decision

Royal Calkins,

Petitioner,

vs.

City of Carmel-by-the-Sea,

Respondent.

This matter came on for court trial on September 7, 2018. All sides were represented through their respective attorneys. The matter was argued and taken under submission.

This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein. (Cal. Rules of Court, rule 3.1590(c)(1).)

Background

This case concerns a public records request for documents substantiating the qualifications of City Attorney Glen R. Mozingo. In 2017, Respondent Carmel-by-the-Sea (the City) hired Mr. Mozingo based in part upon his response to a request for qualifications (RFQ) put out by the City. Petitioner Royal Calkins (Petitioner) and others suspected that Mr. Mozingo had misrepresented some of his qualifications. In response to these suspicions, the City conducted a closed session review of Mr. Mozingo's qualifications based upon documents Mr. Mozingo presented that purportedly corroborated those qualifications (the Documents). Following that review, the City Council publicly affirmed that Mr. Mozingo's qualifications were authentic. Petitioner filed a public records request, demanding that the City release the Documents. The City refused on numerous grounds. This action followed.

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Discussion

The City claims that the Documents are exempt from disclosure under the California Public Records Act (CPRA, Government Code, ¹ § 6250, et seq.) on various grounds, including that disclosure would violate a related law, the Ralph M. Brown Act (Brown Act, § 54950, et seq.)

The California Public Records Act requires state and local government agencies to make their records available to the public for inspection and copying upon request. “The people have the right of access to information concerning the conduct of the people’s business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., art. I, § 3, subd. (b)(1). The California Supreme Court has explained the purpose of the PRA as follows:

“Openness in government is essential to the functioning of a democracy. ‘Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.’ [Citation.] In adopting the Act, the Legislature declared that ‘access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.’” (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328–329.)”

Section 6253, subdivision (b), generally requires that public records be produced upon request unless the records sought are made “exempt from disclosure by express provisions of law.” (§ 6253(b).) This includes Section 6254 which expressly lists several categories of records exempt from disclosure requirements and Section 6255, subdivision (a), often referred to as the “catch all exemption.” That exemption requires the City to show 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.”

¹ Unless otherwise stated, all references in this decision are to the Government Code.

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Analysis

Whether the Documents are Subject to the CPRA

Section 6252, subdivision (e), defines “public records” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” Section 6252, subdivision (g), defines a “writing” as “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

The Documents in question, which purportedly substantiate Mr. Mozingo’s qualifications, are indisputably writings. Further, the City Council *used* the Documents to verify Mr. Mozingo’s qualifications. Those qualifications constitute “a matter relating to the conduct of the people’s business.” Mr. Mozingo represents the City in legal matters and is compensated for that work from public funds. The mere fact that the Documents may be in the possession of Mr. Mozingo, rather than the City, is irrelevant; the Documents are in the City’s *constructive* possession. (See *City of San Jose v. Superior Court (Ted Smith)* (2017) 2 Cal.5th 608, 623.)

The court therefore finds that the Documents are “public records” within the meaning of the CPRA. Because the Documents are public records, disclosure is required unless the City can show the Documents qualify for an express statutory exemption. (See § 6253, subd. (b).) The City argues that several such exceptions apply.

Closed Session Materials

The City first contends that the Documents are exempt from disclosure because they

1 were produced in a lawfully held closed session under the Brown Act. The Brown Act regulates
2 the conduct of the legislative bodies of local agencies. In general, “[a]ll meetings of the
3 legislative body of a local agency shall be open and public, and all persons shall be permitted to
4 attend any meeting of the legislative body of a local agency, except as otherwise provided in this
5 chapter.” (§ 54953.) However, the Brown Act authorizes local legislative bodies to hold sessions
6 closed to the public for limited, statutorily defined purposes only. (§ 54962 [“[e]xcept as
7 expressly authorized . . . no closed session may be held by any legislative body of any local
8 agency.”] Courts have construed these exceptions narrowly to promote the Brown Act’s liberal
9 policy in favor of government transparency. (*San Diego Union v. City Council* (1983) 146
10 Cal.App.3d 947.)

11
12 The City claims that the closed session at which review of Mr. Mozingo’s documents
13 occurred, was authorized by the “personnel exception” and the “pending litigation exception.”
14 The City also claims that disclosure of the Documents would violate the Brown Act’s prohibition
15 of the disclosure of confidential information.

16 Personnel Exception

17 The “personnel exception” authorizes the City to conduct a closed session to consider the
18 appointment, employment, evaluation of performance, discipline, or dismissal of a public
19 employee, or to hear complaints or charges against that employee. (§ 54957, subd. (b)(1).) It is
20 not clear whether the exception applies here. It is true that, in addition to the review of Mr.
21 Mozingo’s qualifications, a performance review occurred. But Mr. Mozingo’s performance is not
22 at issue. Moreover, although Petitioner’s accusations could be characterized as a “complaint or
23 charge,” they are unrelated to the performance of Mr. Mozingo’s job duties.

24
25 But whether or not it was a lawfully held session involving personnel review does not, by
itself, preclude the validity of this Petition, which arises under the Public Records Act. The

1 question is whether or not the Petition seeks confidentially protected material. This Petition,
2 seeks only the bare documents that confirm the existence of material contained in Mr. Mozingo's
3 resume.

4 **Pending Litigation Exception**

5 Closed session is authorized to discuss "pending litigation." (§ 54956.9, subd. (a).)
6 Litigation is considered "pending" when, inter alia, a point has been reached where "based on
7 existing facts and circumstances, there is a significant exposure to litigation against the local
8 agency." (*Id.*, subd. (d)(2).) Those "facts and circumstances" are expressly limited by statute.
9 (*Ibid.*) The only relevant ground is "a statement threatening litigation made by a person outside
10 an open and public meeting on a specific matter within the responsibility of the legislative body .
11 . . ." (*Id.*, (e)(5).)

12
13 Petitioner threatened the City with litigation in an April 2, 2018 email, but this demand
14 related to a prior public records request seeking Mr. Mozingo's billing records. (Rose Dec., Ex.
15 3.) Petitioner subsequently stated that he was "preparing to go to court over the resume issues."
16 (Rose Dec., Ex. 3.) However, this statement came on June 18, 2018, weeks after the relevant
17 public meeting of June 4, 2018. (Rose Dec., ¶ 9.) That threat then, could not have justified
18 invocation of the litigation exception as to a past closed session. Accordingly, the exception
19 does not apply.²

20 **Confidentiality**

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22 "A person may not disclose confidential information that has been acquired by being
23 present in a[n] [authorized] closed session . . ." (Gov. Code, § 54963(a).) The term

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25 ² Even if either exception applied, this would not end the inquiry. The issue is not whether a closed session was authorized, but whether an exception to the CPRA applies. No statute categorically prohibits closed session materials from being disclosed to the extent they qualify as "public records" under the CPRA and no exception to their release applies.

1 "confidential information" means "a communication made in a closed session that is specifically
2 related to the basis for the legislative body of a local agency to meet lawfully in closed session .
3 . ." (*Id.*, § 54963(b).) The Documents were not "communications made in a closed session."

4 Rather, they were "diplomas, degrees, licenses, membership verifications and National
5 Republican Congressional Committee awards, letters of verification and substantiation,
6 scholastic awards, a letter confirming his appointment to the London Court of Arbitration, and
7 letters of commendation from the Secretary of the Treasury and then-sitting Supreme Court
8 Justice William O. Douglas." (Giffen Dec., ¶ 8.)

10 **Exceptions to the CPRA**

11 The City maintains that three exceptions to the Public Records Act support their refusal
12 of Petitioner's records request. Statutory exemptions under the Public Records Act are narrowly
13 construed. (Cal. Const., art. I, § 3, subd. (b)(2); *City of Hemet v. Superior Court* (1995) 37
14 Cal.App.4th 1411, 1425.) The burden of proving a statutory exemption applies is on the
15 proponent of nondisclosure. (§ 6255, subd. (a).)

16 **Deliberative Process Privilege**

17 The City claims that production of the Documents would violate the "deliberative process
18 privilege." That privilege protects "not only the mental processes by which a given decision was
19 reached, but the substance of conversations, discussions, debates, deliberations and like materials
20 reflecting advice, opinions, and recommendations by which government policy is processed and
21 formulated." (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540.)

22 Because the privilege is not expressly stated in the Public Records Act, it applies only if
23 it can satisfy section 6255's "catch all" exception. Section 6255, subdivision (a), provides that an
24 otherwise nonexempt record may be withheld only if the City can show that "the public interest
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1 served by not disclosing the record *clearly outweighs* the public interest served by disclosure of
2 the record.” (Emphasis added.)

3 Preliminarily, the court notes that it is highly doubtful whether the Documents would
4 reveal either the deliberations or the mental processes of the City Council. The Documents
5 address a specific, binary question: whether Mr. Mozingo’s qualifications as stated in his
6 response to the City’s RFQ were accurate.

7
8 Regardless, the City is concerned that disclosure would threaten future applicants with
9 the risk of their private information being revealed. The City speculates that disclosure “may
10 threaten to expose the City’s decision-making process, discourage candid discussion at the City
11 Council, and undermine the City’s ability to function.” In support of this statement, a City
12 Attorney declares, “[h]olding the review in Closed Session permitted free and candid discussion
13 about Mr. Mozingo among the Council Members and their counsel.” (Giffen Dec., ¶ 10.)

14 Assertions of dire consequences from disclosure require evidentiary support, not mere
15 speculation. (See, e.g., *Commission on Peace Officer Standards & Training v. Superior Court*
16 *(Los Angeles Times Communications LLC)* (2007) 42 Cal.4th 278, 302.) Further, the City may
17 not simply invoke general policies favoring nondisclosure. The City must explain the public’s
18 *specific interest* in nondisclosure of the documents in a *specific case*. (*Citizens for Open*
19 *Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307.) The City has not done so.

20
21 On the other side, the interests favoring disclosure are substantial. The public has a
22 general interest in the “prevention of secrecy in government.” (*Gilbert v. City of San Jose* (2003)
23 114 Cal.App.4th 606, 610.) Disclosure is in the public interest when, among other things, it
24 would “shed[] light on an agency’s performance of its statutory duties. [Citation.]” (*City of San*
25 *Jose v. Superior Ct. (San Jose Mercury News, Inc.)* (1999) 74 Cal.App.4th 1008, 1019, internal

1 quotation marks omitted.)

2 Here, these interests are implicated. The City has expended (and will expend) significant
3 public funds to employ a City Attorney whose qualifications have come into question. The
4 public has a strong interest in 1) ensuring public funds are properly spent; 2) verifying that public
5 officials have adequately reviewed Mr. Mazingo's supporting materials; and 3) ensuring that the
6 City Council is fulfilling its statutory duties. The City asks the public to trust them, but the law
7 requires the City to substantiate that trust. "Open access to government records is essential
8 to *verify* that government officials are acting responsibly and held accountable to the public they
9 serve. 'Such access permits checks against the arbitrary exercise of official power and secrecy in
10 the political process.' The whole purpose of [the Act] is to ensure transparency in government
11 activities." (*City of San Jose v. Superior Ct. (Ted Smith)* (2018) 2 Cal.5th 608, 625, italics in
12 original, internal citations omitted.) In short, the public interest favors disclosure.

14 Attorney-Client Privilege

15 The City argues that disclosure would violate attorney-client privilege. Documents
16 subject to the attorney-client privilege are exempted from disclosure under the Public Records
17 Act. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 [attorney-client privilege is
18 "applicable to public records"].) However, the privilege only applies when "the dominant
19 purpose of the relationship is 'one of attorney-client' [Citation.]" (*League of California*
20 *Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 989.) The privilege does not apply when
21 the attorney is acting in a non-attorney capacity. (*Montebello Rose Co. v. Agricultural Lab. Rel.*
22 *Bd.* (1981) 119 Cal.App.3d 1, 32.) Here, although Mr. Mazingo was a City Attorney, his status in
23 the closed session was as a subject undergoing personnel review, not an attorney. Further, the
24 attorney-client privilege protects "confidential communications." (Evid. Code, § 954.)
25

1 As discussed above, Respondent has failed to show how the Documents themselves can
2 fairly be characterized as "communications."

3 **Right to Privacy**

4 Finally, the City claims that it has a strong interest in maintaining Mr. Mozingo's
5 privacy. The right to personal privacy is guaranteed by the California Constitution. (Cal. Const.
6 Art. I, § 1.) The Legislature enacted the Public Records Act "mindful of the right of individuals
7 to privacy." (Gov. Code, § 6250.) Records containing information implicating personal privacy
8 are therefore exempted from disclosure by several of the Act's provisions, both expressly and by
9 incorporation through section 6254, subdivision (k).

10 The City has not shown that the right to privacy applies. The City describes the requested
11 documents as "diplomas, degrees, licenses, membership verifications . . . , scholastic awards . . . ,
12 [and] letters of commendation" (Giffen Dec., ¶ 8.) Such documents do not generally contain
13 sensitive personal information. These documents are not automatically immunized from
14 disclosure simply because, as the City suggests, Mr. Mozingo considers them private. Moreover,
15 Mr. Mozingo waived any privacy interest he may have had in these documents when he
16 voluntarily submitted his qualifications to the City when applying for a public position, and those
17 qualifications were made public. (See *San Gabriel Tribune v. Superior Court* (1983) 143
18 Cal.App.3d 762, 780-781.)

19 Disclosable public records do not automatically gain confidential status, and thus
20 immunity from disclosure, simply because they were brought to a closed session.
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22 **Disposition**

23 Petitioner's petition for writ of mandate is granted. The City must expeditiously disclose
24 the requested Documents.

25 The court directs Petitioners' counsel to prepare appropriate judgments and writs

1 consistent with this decision, present them to opposing counsel for approval as to form, and
2 return them to this court for signature.

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4 Dated: *Sept. 14, 2018*


Robert A. O'Farrell

Judge of the Superior Court

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CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the Intended Decision for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection 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 Services in Monterey, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Neil L. Shapiro
Law Offices of Neil L. Shapiro
PO Box 4086
Carmel CA 93921

Jon R. Giffen
Kennedy, Archer & Giffen
24591 Silver Cloud Court, Ste 200
Monterey CA 93940

Date: 09-14-18

Chris Ruhl, Clerk of the Superior Court,


Deputy Clerk
Alina Oliver

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