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February 1, 2013

KEVIN CLUNE
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VIA EMAIL AND U.S. MAIL

Jolie Houston
City Attorney, City of Los Altos
Berliner Cohen
10 Almaden Boulevard
Eleventh Floor
San Jose, CA 95113-2233

**Re: *Palo Alto Daily Post - Public Records Act Request Regarding
August 20, 2012 Automotive Accident***

Dear Ms. Houston:

Our firm has been retained to represent the Palo Alto Daily Post (“Daily Post”) in its efforts to obtain certain public records from the City of Los Altos. This letter arises from our client’s prior request to you pursuant to the California Public Records Act (“CPRA”) seeking access to documents regarding an accident that occurred on August 20, 2012 involving a police officer at the intersection of Foothill Expressway and Arboretum Drive.

In a letter dated October 26, 2012, you responded on behalf of the City, asserting that the vast majority of the requested documents were exempt from disclosure under the CPRA. As will be explained below, the proffered exemptions do not apply, and we ask that the City reconsider its position. If the City refuses to produce the requested documents promptly, the Daily Post will be compelled to seek production via court action.

As you know, the structure of the CPRA is such that records are presumptively available to the public “unless one of the exceptions stated in the act applies.” Comm’n on Peace Officer Standards and Training v. Superior Court, 42 Cal. 4th 278, 288 (2007) (citing Cal. Gov’t Code § 6253). “The burden of proof is on the proponent of nondisclosure, who must demonstrate a ‘clear overbalance’ on the side of confidentiality.” California State Univ. v. Superior Court, 90 Cal. App. 4th 810, 831 (2001) (citation omitted). “Statutory exemptions from compelled disclosure are narrowly construed.” Id. (citation omitted).

The Daily Post requested the following categories of public records: “[a]ny documents that concern the accident, including any police reports, insurance filings, damage reports, legal claims and police officer rosters identifying all officers who were working the day of the accident.” Each of these specific types of documents is subject to disclosure here, as discussed below.

Police Reports

The City first refused to disclose any police reports regarding the accident, claiming that they are categorically exempt from disclosure under the Vehicle Code. The City’s contention is incorrect as a matter of law.

First, the mere fact that some police reports related to vehicle accidents may be “confidential” for purposes of the Vehicle Code does not change the fact that they are public records subject to presumptive disclosure under the CPRA. Vallejos v. California Highway Patrol, 89 Cal. App. 3d 781, 785 (1979) (specifically discussing traffic accident reports in the context of a public records request). Thus, any exemption from disclosure must be found under the CPRA itself—not the Vehicle Code. The City has proffered no such section of the CPRA itself which would warrant nondisclosure here. As such, the police reports must be disclosed.

Second, the relevant Vehicle Code sections do not justify wholesale withholding of even “required” accident reports. Vehicle Code Section 20008 states that a driver of a vehicle involved in an accident resulting in injury or death is required to make a written report of the accident to the California Highway Patrol (“CHP”). Vehicle Code Section 20012 makes these “required” reports “for the confidential use” of the CHP and the California Department of Motor Vehicles (“DMV”).¹ It does so in order to “encourage those persons who are required to make [such reports] to give a full and accurate account” of the accident. Davies v. Superior Court, 36 Cal. 3d 291, 299 (1984). “The Legislature did not intend to preserve the confidentiality of any information about the accident other than the identity of the reporting person.” State of California ex rel. Dep’t of Transp. v. Superior Court, 37 Cal. 3d 847, 853 (1985). Specifically, Section 20012 is not intended to “keep confidential either the fact of the accident or information about its nature and causation.” Davies, 36 Cal. 3d at 299.

Thus, even these “required” reports are public records subject to public disclosure, provided that they have been redacted to remove the reporting parties’ identifying information. See State of California ex rel. Dep’t of Transp., 37 Cal. 3d at 857; Cal. Gov’t Code § 6253 (“Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.”). Thus, the City here must provide redacted versions of such “required” reports even if it is correct in its assertion that certain portions of those reports are exempt from disclosure.

¹ Certain persons who were involved in the accident, or who may incur liability arising out of the accident, are also entitled to full access to the reports. See Cal. Vehicle Code § 20012.

Third, nothing in the Vehicle Code justifies the City's refusal to turn over police investigative reports, as opposed to the "required" reports discussed above. "Case law has long held that only required reports, not police reports, are confidential." State of California ex rel. Dept. of Transp., 37 Cal. 3d at 857. Indeed, the City's further contention that language in "Vehicle Code section 20014 specifically makes *all* reports sent to the CHP confidential" (see City's Letter 2 (emphasis added)), has been squarely rejected by the California Supreme Court. Id. (holding that "there is no indication of a legislative intent to provide a greater degree of confidentiality through section 20014 than through section 20012" and that "[t]herefore, the Department's contention that section 20014 bars disclosure of investigative reports even to persons with a proper interest must be rejected."). Presumably, there has been some sort of investigation that occurred here over and above the mere collecting of "required" Vehicle Code reports regarding this August 20, 2012 accident involving an on-duty police officer. The City is required to turn over any such reports under the CPRA.

Fourth, the public interest clearly favors disclosure here. As stated above, when analyzing a claim by a governmental entity that it is exempt from producing documents because the public interest favors nondisclosure, courts conduct a balancing test under which the *governmental entity* bears the burden of demonstrating a "clear overbalance" on the side of confidentiality. "[I]n determining whether disclosure of the reports is against public interest, the interest of the public entity as a party in the outcome may not be considered." Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 906 (1984). "A particular agency's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the agency's that is weighed." California Attorney General's Office, Summary of the California Public Records Act 11 (Aug. 2004) (emphasis in original). Specifically, "[t]he public's interest in the . . . conduct of peace officers is substantial . . ." Comm'n on Peace Officer Standards and Training, 42 Cal. 4th at 299-300. Peace officers "hold one of the most powerful positions in our society; our dependence on them is high and the potential for abuse of power is far from insignificant." Id. (citation omitted).

Thus, the records requested by the Daily Post here, which pertain to an accident that occurred on public streets involving such a peace officer and resulting in potential injury to civilians and their property, are of tremendous public concern. The public has a right to know the circumstances under which such an accident occurred and whether any impropriety was involved. In such a circumstance, the City cannot meet its burden of demonstrating the requisite "clear overbalance on the side of confidentiality" required to justify nondisclosure of these public records.

As such, the City is required to turn over both required and investigative police reports here, but may redact identifying information of the reporting parties.

Insurance Filings

The City is likewise required to produce for public inspection insurance-related filings concerning the August 20, 2012 accident. The City's argument that such

documents are exempt from the CPRA's general rule of disclosure based on the "pending litigation" exemption is meritless.

The pending litigation exemption is a very narrow one. "The public interest in the activities of a public agency is quite likely to be highest when the agency is being sued" because "[t]hat is exactly the time when members of the public become aware of possible misdeeds or undesirable practices on the part of the agency, and have the strongest incentive to examine records which shed light on the operations of their government." City of Hemet v. Superior Court, 37 Cal. App. 4th 1411, 1420 (1995). As such, California courts "adopt[] a limited construction of the 'pending litigation' exemption" under which "a document is protected from disclosure only if it was specifically prepared for use in litigation." Id. at 1419. "[I]f a report is prepared in the usual course of business for a purpose independent of possible legal consultation, no privilege is created even if the document is later sent to counsel." Id. at 1418. "A document or report prepared for a dual purpose is privileged, or not privileged, depending on the 'dominant purpose' behind its preparation." Id. at 1419.

Thus, for example an internal investigation into potential police misconduct, although clearly relevant to possible litigation, did not fall under the "pending litigation exemption" under the CPRA because its primary purpose was to conduct a "self-critical analysis" aimed at improving the department's training, management, and overall performance. Id. Similarly, even attorney billing records concerning ongoing litigation were not protected by the pending litigation exemption because the dominant purpose for which they were created "was not for use in litigation but as part of normal record keeping and to facilitate the payment of attorney fees on a regular basis." County of Los Angeles v. Superior Court, 211 Cal. App. 4th 57, 67 (2012). That was true even though the attorney billing records "may have an ancillary use in litigation—for example, in connection with a request for attorney fees." Id.; cf Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 904 (1984) (noting that factual investigations for insurance purposes are distinct from investigations conducted primarily for law enforcement purposes). So too here, the dominant purpose behind the creation of the City's insurance-related filings and other documents is to engage in factual analysis for risk management—not specifically for use in litigation. As with the cases described above, even though these documents may be *relevant* to possible litigation, the City would have generated such insurance-related documents irrespective of whether any lawsuit was eventually filed. As such, the City must disclose these documents as well.

Further, the public interest in disclosure of these documents does not "clearly outweigh" the public's right to this information, as explained above in the discussion concerning police records.

Damage Reports and Legal Claims

The City is likewise incorrect that it need not disclose any legal claims under the "pending litigation" exemption codified in Government Code Section 6254(b). California courts have explicitly so held. Poway Unified Sch. Dist. v. Superior Court, 62

Cal. App. 4th 1496, 1505 (1998) (“[A] Claims Act form itself does not fall within the exemption of section 6254, subdivision (b).”). As such, there is no basis to withhold such legal claims.

It is our understanding that the City has already produced one such claim form to the Daily Post. To the extent there are any other legal claims or other claims for damages, the City is obligated under the CPRA to produce them as well.

In addition, it appears that the City omitted certain pages of the one claim form that it did produce. Specifically, Exhibits A through D appear to have been withheld for unknown reasons. We request that you provide a full version of that claim form, with all corresponding attachments, as is required by the CPRA.

Rosters Identifying All Officers Who Were Working On The Day Of The Accident

It is our understanding that the City is not claiming an exemption under the CPRA regarding the “Calls for Service” log from the Los Altos Police Department on August 20, 2012. The City stated in its October 26, 2012 letter that this document will provide the requested roster of officers who were working on the day of the accident.

However, the City has suggested that the Daily Post may merely “review” the log and the City has not explicitly agreed to provide a copy of it. The CPRA clearly requires that the City must provide “an exact copy” of the log to the Daily Post, unless it is impracticable to do so for some reason. Cal. Gov’t Code § 6253(b). Please confirm that the City will provide such an exact copy of this roster. The Daily Post will, of course, pay for any costs associated with the duplication of the relevant sections of the log as required by law.

Other Documents Concerning The Accident

In addition to the specific categories of documents identified above, the Daily Post also asserted a general request for any other documents that “concern the accident.” The City’s response did not indicate whether any such additional documents regarding the accident exist and, if so, whether they are being withheld for any reason. Please produce any such documents or confirm that they do not exist.

Conclusion

In light of the discussion above, we respectfully ask that the City reevaluate its position and produce all requested documents no later than February 11, 2013. Should the City not be willing to produce the relevant documents, the Daily Post will have no choice but to seek to enforce its rights under the CPRA via civil litigation. Please note that the Daily Post would seek reimbursement of its attorneys’ fees pursuant to Government Code Section 6259(d) should it be required to file such a lawsuit.

February 1, 2013

Page 6

Please do not hesitate to call me at (415) 371-8500 should you have any questions or concerns regarding this matter, and thank you in advance for your assistance.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'K B Clune', with a long horizontal line extending to the right.

KEVIN B. CLUNE

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