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David H. Yamasaki

Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-09-CV-150427 Filing #G-52309

By R. Walker, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

TED SMITH, an individual,

Plaintiff,

vs.

CITY OF SAN JOSE, a municipal entity; SAN JOSE REDEVELOPMENT AGENCY, a municipal entity; HARRY MAVROGENES, in his official capacity as Executive Director of the San Jose Redevelopment Agency; MAYOR CHUCK REED, in his official capacity as Mayor of the City of San Jose; PETE CONSTANT, in his official capacity as a Councilmember for the City of San Jose; ASH KALRA, in his official capacity as a Councilmember for the City of San Jose; SAM LICCARDO, in his official capacity as a Councilmember for the City of San Jose; PIERLUIGI OLIVERO, in his official capacity as a Councilmember for the City of San Jose; MADISON NGUYEN, in her official capacity as a Councilmember for the City of San Jose; ROSE HERRERA, in her official capacity as a Councilmember for the City of San Jose; JUDY CHIRCO, in her official capacity as a Councilmember for the City of San Jose; KANSEN CHU, in his official capacity as a Councilmember for the City of San Jose; NORA CAMPOS, in her official capacity as a

Case No.: 1-09-CV-150427

**ORDER AFTER HEARING ON
MARCH 15, 2013**

[(1) Motion by Defendants CITY OF SAN JOSE; SAN JOSE REDEVELOPMENT AGENCY; HARRY MAVROGENES, MAYOR CHUCK REED, and CITY OF SAN JOSE COUNCIL MEMBERS PETE CONSTANT, ASH KALRA, SAM LICCARDO, PIERLUIGI OLIVERIO, MADISON NGUYEN, ROSE HERRERA, JUDY CHIRCO, KANSEN CHU, NORA CAMPOS and NANCY PYLE for Summary Judgment; (2) Motion by Plaintiff TED SMITH for Summary Judgment]]

Trial Date: Not set

Judge: Hon. James P. Kleinberg
Dept.: 1 (Complex Civil)

Complaint Filed: August 21, 2009

1 Councilmember for the City of San Jose;
2 NANCY PYLE, in her official capacity as a
3 Councilmember for the City of San Jose; and
DOES 1 through 20,

4 Defendants.

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9 The above-entitled matter came on regularly for hearing on Friday, March 15, 2013 at
10 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable James P. Kleinberg
11 presiding. The appearances are as stated in the record. The Court, having reviewed and
12 considered the written submission of all parties, having heard and considered the oral argument
13 of counsel, and being fully advised, orders that Exhibit A attached to and incorporated herein is
14 the Order of the Court.

15 IT IS SO ORDERED.

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17 Dated: March 18, 2013


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Honorable James P. Kleinberg
19 Judge of the Superior Court
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EXHIBIT A

Calendar line 3

Case Name: *Smith vs. City of San Jose, et al.*

Case No.: 1-09-CV-150427

This is a dispute over whether certain electronic messages sent or received by a public official via a personal digital assistant (“PDA”) that concern public business are subject to the California Public Records Act (“PRA”), Cal. Gov’t Code, § 6250 et seq. In the Complaint for declaratory and injunctive relief, plaintiff Ted Smith (“Plaintiff”) alleges that he served a written PRA request for “‘any communications, documents, correspondence, e-mails, calendar entries or meeting notes,’ created or received by the City of San Jose, the City’s Redevelopment Agency, or any City Officials including the Mayor and City Councilmembers, relating to Tom McEnery, John McEnery, San Pedro Square Properties, Urban Markets, Barry Swenson, Sarah Brouillette, and several other downtown issues.”¹³ Plaintiff also sought “all electronic information relating to public business, sent or received by Mayor Reed, Councilmember Oliverio and Councilmember Liccardo using his or her private electronic devices.”¹⁴

The Complaint alleges that on July 24, 2009 the City Attorney responded to Plaintiff’s counsel by stating that he would not produce communications created or maintained by the “Mayor, members of the City Council or their staff using any type of personal digital assistant.” The Complaint further alleges that on August 16, 2009 the San Jose Mercury News (the “Mercury”) published an article entitled “Many Records Still Secret Despite San Jose’s Promises of Openness” stating that City Attorney Rock Doyle’s position was that “unless the City Council, the Legislature or a court compels him to do otherwise, San Jose will not consider e-mails or text messages stored outside the city servers as official public records—regardless of whether the messages pertain to city business or even whether the phone or PDA used was partly paid for via city subsidy.”

Plaintiff also alleges that on August 17, 2009, Mayor Chuck Reed issued a memorandum of recommendations for the “Sunshine Reform Task Force,” including a recommendation that “[r]ecords of city businesses created with personal equipment, such as personal email, text messages, cell phones, social networking websites, and other new technologies should be covered by the [PRA].”¹⁵

The Complaint asserts one cause of action for declaratory relief against defendants City of San Jose, San Jose Redevelopment Agency, Harry Mavrogenes, Mayor Chuck Reed, and City of San Jose Council members Pete Constant, Ash Kalra, Sam Liccardo, Pierluigi Oliverio, Madison Nguyen, Rose Herrera, Judy Chirco, Kansen Chu, Nora Campos, and Nancy Pyle (“Defendants”). Plaintiff alleges that there is an actual controversy between the parties “related to their respective rights and duties. Plaintiff contends, and defendants deny, that the City must produce the records sought by plaintiff in his CPRR including e-mails, text messages, and other electronic information relating to public business, regardless of whether they were created or received on the City owned computers and servers or the City Officials’

¹³ Compl. ¶ 4. A copy of Plaintiffs’ full written PRA request is attached to his Complaint as Exhibit A.

¹⁴ Compl. ¶ 5.

¹⁵ A copy of this Memo is attached to the Complaint as Exhibit B.

personal electronic devices.”¹⁶ “Plaintiff desires a judicial determination and declaration that defendants are required to produce all records pertaining to the public’s business, created or received by City Officials, regardless of what electronic device was used.”¹⁷

Plaintiff and Defendants now bring cross-motions for summary judgment.¹⁸

Judicial Notice

In opposition to Defendants’ motion and in support of his motion, Plaintiff requests judicial notice of: (1) August 16, 2009 San Jose Mercury News article (Exh. A); (2) Minutes of the February 24, 2009 San Jose City Council meeting (Exh. B); (3) Memorandum by Mayor Chuck Reed to the San Jose City Council, dated August 17, 2009 (Exh. C); (4) Minutes of the August 18, 2009 San Jose City Council meeting (Exh. D); (5) Minutes of the March 2, 2010 San Jose City Council meeting (Exh. E); (6) Resolution No. 75293, passed by the San Jose City Council on March 2, 2010 (Exh. F); (7) Charter of the City of San Jose (Exh. G); (8) Minutes of the January 24, 2012 San Jose City Council meeting (Exh. H).

The request is **GRANTED** as to Exhibits B-H, as they constitute legislative enactments of a public entity in the United States. (See Evid. Code, § 452, subs. (b); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 9, fn. 5 [judicial notice of city council meeting minutes].) As for the August 16, 2009 Mercury article, the existence of the article is not reasonably subject to dispute, so the request is **GRANTED** as to the existence of the article for purposes of context, but not for the truth of anything stated in it. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 900, fn. 3.) Defendants challenge the relevance of these matters, but the Court feels they are sufficiently relevant to Plaintiff’s interpretation of the PRA and the records subject to it.¹⁹

Parties’ Arguments

Defendants argue they are entitled to summary judgment and Plaintiff is not because Plaintiff seeks communications by Mayor Reed and Council members and their staff stored solely in private, non-City accounts inaccessible to the City through City servers. Defendants argue these are not records “prepared, owned, used, or retained” by a public agency for purposes of the definition of “public record” under the PRA because the records must be within the public entity’s custody or control, and must be “prepared, owned, used or retained” by the public agency. (Gov. Code, § 6252, subd. (e).) Defendants cite analogous case law from a Michigan court interpreting the federal Freedom of Information Act (“FOIA”) finding the FOIA did not render the individual plaintiffs’ personal emails public records solely because they were captured in the public body’s email system’s digital memory. Defendants submit that since at least 2002, communications using private electronic devices of the Mayor, Council members and their staff to and from their private accounts have not been stored by the City on any City equipment and are not accessible to the City. (Defs’ Sep. St. of Material Facts [“MF”] 4.) The

¹⁶ Compl. ¶ 38.

¹⁷ Compl. ¶ 40.

¹⁸ Because the papers submitted in these cross-motions closely mirror one another, the Court will discuss the issues jointly, but will distinguish each motion when necessary.

¹⁹ However, the Court agrees with Defendants that evidence of non-retroactive policies established ten months after Plaintiff’s PRA request cannot be construed as admissions by the City as to its interpretation of the scope of the PRA.

supporting evidence includes the Declarations of Lisa Herrick, Senior Deputy City Attorney and Vijay Sammeta, Acting Director of the City of San Jose Information Technology Department.

In opposition to Defendants' motion and in support of his own motion, Plaintiff argues that communications sent to or from City employees regarding public business are public records, regardless of their format or storage location. Plaintiff submits that an August 16, 2009 article in the Mercury reported that a former labor leader sent a text message to City Council Member Sam Liccardo by accident. She was sending text messages to other City Council members during a meeting about a proposal to give millions of city redevelopment dollars to former Mayor Tom McEnery. (Pltf's Additional Undisputed Material Fact ["AMF"] 8.) The first text message, dated February 24, 2009 and sent at 8:18 p.m. states, "Ok as long as inclusion on motion for ba protection."²⁰ The second message, sent shortly thereafter at 8:31 p.m. states, "Accidentally texted you. Sorry[.]" Plaintiff argues that based on the text messages' time stamps and City Council Meeting Minutes, the texts were sent to Council Member Liccardo during or shortly after the February 24, 2009 City Council and Redevelopment Agency Board hearing on the "Approval of a Building Rehabilitation and Loan Agreement with Urban Markets, LLC, for improvements related to the San Pedro Square Urban Market." (Pltf's AMF 8, 9.) Council Member Liccardo produced the two text messages to the Mercury in 2009 in response to a PRA request. (Pltf's AMF 8-10.) However, the City did not produce the text messages to Plaintiff until June 29, 2011, even though they would have been responsive to categories 27 and 29 of his June 1, 2009 PRA request. (Pltf's AMF 9, 11.)

Plaintiff further submits that in response to the Mercury article, Mayor Reed issued a memorandum including recommendations for the "Sunshine Reform Task Force," which was approved by the City Council on August 18, 2009. (Pltf's AMF 14-15.) The City Council referred to the Rules and Open Government Committee "the question of how communications about City business made with personal email, text messages, cell phones, social networking websites and other new technologies should be dealt with as public records." (Pltf's AMF 15.) On March 2, 2010, the City Council unanimously passed Resolution No. 75293, which revised City Council Policy 0-32, entitled "Disclosure and Sharing of Material Facts," and City Council Policy 0-33, entitled "Public Records Policy and Protocol." (Pltf's AMF 16.) Revised City Council Policy 0-32 requires "every member of the City Council to publicly disclose (1) material facts; and (2) communications received during Council meetings that are relevant to a matter under consideration by the City Council which have been received from a source outside of the public decision-making process."²¹ Revised City Council Policy 0-33 states:

Records available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics, and, in addition, any recorded and retained communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network. The records do not have to be written but may be in another

²⁰ Decl. Marwa Elzankaly In Opp. to Defs' MSJ ¶ 3, Exh. B; Decl. Christine Peek In Opp. to Defs' MSJ ¶ 13, Exh. L.

²¹ RJN Exh. F at p. 2.

format that contains information such as computer tape or disc or video or audio recording.²²

Plaintiff argues the PDA communications in question, including voicemails, are “writings” under the PRA’s definition (Gov. Code, § 6252, subd. (g)); the PDA communications relate to the “conduct of the public’s business” for purposes of section 6252 subdivision (e) because the City Council and Redevelopment Agency Board approved the McEnery family and Urban Market LLC’s plans for the San Pedro Square in San Jose, and the public has a legitimate interest in how the City approves the expenditure of public funds; and under a plain meaning interpretation of the PRA, the PDA communications were “prepared, owned, used, or retained” by the City because they were composed and sent by City officials, the officials continue to own and retain those messages still on their private PDAs, and the communications were “used” because they served their intended purpose of communicating a message about City business.

Plaintiff argues the City and its agents are considered one and the same for purposes of the PRA, since City officials, acting in their official capacity, represent the City, and a City can only prepare, own, use or retain records through the acts of its officials and employees. Plaintiff argues the City’s interpretation of the PRA would lead to absurd consequences in which the “public” nature of a record is completely determined by its storage location rather than its content. Plaintiff argues his interpretation of the PRA is consistent with the Brown Act, Gov. Code, § 54950 et seq., which proclaims that deliberations of public councils be conducted openly and prohibits the legislative bodies of local agencies from conducting nonpublic meetings. (Gov. Code, § 54952.2.)

Finally, Plaintiff argues the City has waived all PRA exemptions because it failed to invoke any exemptions justifying nondisclosure.

Discussion

Plaintiff’s objections to evidence submitted by Defendants in support of their motion and in opposition to Plaintiff’s motion are **OVERRULED**. Defendants’ objections to the Elzankaly declaration submitted in support of Plaintiff’s motion and in opposition to Defendants’ motion are **OVERRULED**. Defendants’ objections to the Peek declaration submitted in support of Plaintiff’s motion and in opposition to Defendants’ motion are **SUSTAINED** as to paragraph 13 (hearsay), but otherwise **OVERRULED**.

Government Code section 6253 establishes the right of “every person” to “inspect any public record” except as provided in the PRA. (Gov. Code, § 6252, subd. (a).) Upon a request, the agency “shall, within 10 days from receipt of the request, 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” (*id.*, subd. (c)), but this deadline may be extended in “unusual circumstances.” (*Ibid.*)

“Public records” is defined 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. ‘Public records’ in the custody of, or maintained by, the

²² RJN Exh. F at p. 4.

Governor's office means any writing prepared on or after January 6, 1975." (Gov. Code, § 6252, subd. (e).) "'Writing' means 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." (*Id.*, subd. (g).) The PRA's definition of public record "'is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition" (Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9.)" (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 288, fn. 3 [*"CPOST"*].)

Exemptions to the PRA are set forth in Government Code section 6254, and include, among other types of records, preliminary drafts, notes or inter-/intra-agency memoranda not retained by the public agency in the ordinary course of business, (§ 6254, subd. (a)); records pertaining to pending litigation to which the public agency is a party (subd. (b)); and personnel, medical or similar private files (subd. (c)). "Section 6254's 'exemptions are to be narrowly construed [citation], and the government agency opposing disclosure bears the burden of proving that one or more apply in a particular case.' [Citation.] The federal Freedom of Information Act (5 U.S.C. § 552 et seq.) (FOIA), upon which the PRA was modeled, has similarly been interpreted as creating a liberal disclosure requirement, limited only by specific exemptions, which are also to be narrowly construed. [Citation.]" (*Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, 896.)

Here, the dispute involves Plaintiff's PRA requests nos. 27-30, which asked for copies of "[a]ny and all voicemails, emails or text messages sent or received on private electronic devices used by" Mayor Reed, Council members Pierluigi Oliverio, Sam Liccardo, and their staff, and the other members of the City Council and their staff "regarding any matters concerning the City of San Jose." Defendants disclosed all non-exempt records sent from or received on private electronic devices using City accounts (City's MF 2), but did not disclose any records sent from or received by those persons on private electronic devices using their private accounts. (City's MF 3.)

There is no dispute that the City is subject to the PRA. "The City is a local agency by definition under section 6252, subdivision (b) and therefore has a statutory duty to provide access to public records." (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774.) Furthermore, there appears to be no dispute that records sent from or received by City officials on private electronic devices using private accounts would constitute "writings" within the PRA's broad definition. Nor is there a dispute that Plaintiff's PRA requests sought communications "relating to the conduct of the public's business." In particular, the requests sought records concerning certain individuals and entities involved in a city redevelopment project.

Defendants' position is that even if a record falls within the PRA's definition of "writing" and is related to public business, it is not a "public record" under the PRA when the record is not in the agency's possession, as this would not constitute a record that is "prepared, owned, used, or retained" by the agency. Defendants argue that individual City officers are not included in the

PRA's definition of "public agency," and the PRA as a whole indicates legislative intent to exclude individual officials from that definition. The Court disagrees. There is nothing in the PRA that explicitly excludes individual officials from the definition of "public agency." A "body politic" such as a city "can only act through its officers and employees." (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 174.) The City "is an artificial person created and recognized by the law, invested with important corporate powers, public, and in a sense official, in their nature, and charged with public duties which it executes by and through its officers and agents." (*Regents of the Univ. of Cal. v. Superior Court* (1970) 3 Cal.3d 529, 540.) Defendants point to other portions of the PRA that reference individuals or elected officials. (See Gov. Code, §§ 6252.6, 6254.21.) However, none of these provisions clearly evidence any legislative intent to exempt agencies' members or officers from the reach of the PRA's disclosure requirements.

Moreover, Defendants' interpretation improperly focuses on where the records are stored. "[It is] unlikely the Legislature intended to render documents confidential based on their location, rather than their content." (*CPOST, supra*, 42 Cal.4th at pp. 290-291.) Defendants would have records that otherwise fall within the PRA's definition of "public record" to be shielded from disclosure by their location in private accounts of City officials. As Plaintiff argues, under Defendants' interpretation of the PRA, a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own.

Regarding the phrase "prepared, owned, used, or retained," the only term that is generally synonymous with the notion of the public agency's "possession" is "retained." However, as discussed above, the City executes its public duties by and through its officers and agents, and "[a]ny record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." [Citation.] (*San Gabriel Tribune, supra*, 143 Cal.App.3d at p. 774.) Thus, a communication relating to the conduct of the public's business that is maintained on the private accounts of City officers reasonably falls within the definition of a record "retained" by the City. Furthermore, the phrase "prepared, owned, used, or retained" is written in the disjunctive. Thus, regardless of where a record is retained, if it is drafted by a public official, it reasonably falls within the plain meaning of the term "prepared" and by itself constitutes a "public record" for purposes of the PRA. Likewise, any record that is "used" by a public agency falls within the scope of the PRA, even if it is not prepared, owned, or retained by the agency.²³ Such a broad interpretation of "public record" comports with the discussion above that a public agency executes its public duties through its officers and agents, since the City, acting through its officials, could easily "use" records despite their storage on the officials' private accounts.

Defendants suggest that such a broad reading would be inconsistent with the PRA's concern for the privacy of individuals in terms of personnel, medical or residential information contained in public records. However, it is doubtful that City officials and agents can claim a reasonable expectation of privacy over their communications concerning the public benefit, particularly on topics currently on the City public agenda, and any personal information that

²³ What exactly constitutes "use" by a public agency is not discussed at length in the briefs or case authorities reviewed by this Court, although the Supreme Court in *CPOST* broadly articulates the scope of "public records" as those "involved in the governmental process" and related to "the conduct of the public's business." (See *CPOST, supra*, 42 Cal.4th at p. 288, fn. 3.)

falls within an exemption to the PRA can be withheld, with segregable portions produced. (See Gov. Code, § 6523, subd. (a).)

Defendants further argue that Plaintiff's interpretation of the PRA would burden public entities with the task of expanding the scope of their searches for public records into the homes and personal devices of their employees and officials. However, public entities could, as the City demonstrated with its 2010 resolutions, require City Council members and their staff to disclose such communications. Moreover, "[t]he burden of showing a request is too onerous lies with" the City. (*State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1188, citing Gov. Code, § 6255.) Here, Defendants have made no showing regarding the burden of collecting records from the private accounts of the individuals listed in Plaintiff's request. "The Public Records Act contemplates there will be some burden in complying with a records request, the only question being (in the case of nonexempt material) whether the burden is so onerous as to clearly outweigh the public interest in disclosure." (*State Board of Equalization, supra*, 10 Cal.App.4th at p. 1190, fn. 14.)

For all of these reasons, Defendants' motion for summary judgment is **DENIED**, and Plaintiff's motion for summary judgment is **GRANTED**.

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