September 20, 2023

VIA ELECTRONIC MAIL

Shasta County Board of Supervisors
1450 Court Street
Redding, CA 96001

Email: shastacountybos@co.shasta.ca.us

Re: Ordinance No. 755

Dear Board Members:

We write as attorneys for the First Amendment Coalition, American Civil Liberties Union of Northern California, Scripps NP Operating, LLC (doing business as the Record Searchlight), and North State Community Journalism Project, Inc. (doing business as Shasta Scout) (collectively, "Organizations"). On behalf of the Organizations, we urge the Board of Supervisors to repeal Ordinance No. 755 ("Ordinance") as soon as possible.

The Organizations advocate for and depend on access to public records to fulfill their missions. In particular, the Record Searchlight and Shasta Scout have consistently fought for transparency and access to public records in Shasta County to keep the community informed. The Ordinance impairs this important work by imposing unlawful fees that can run into the hundreds or thousands of dollars for "locating, retrieving, reviewing, preparing," or "furnishing" public records.

As an initial matter, the Ordinance is invalid because it "limits the right of access" to public records without any "findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., Art. I, § 3, subd. (b)(2).) But even if it contained such findings, it would remain unlawful.

The California Supreme Court recently confirmed that the California Public Records Act ("CPRA") prohibits the kind of fees specified in the Ordinance, which impose unjustified financial barriers to exercising transparency rights guaranteed by the CPRA and California Constitution. (*National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 493-494, 507-508; *see also* Gov. Code, §§ 7922.530, 7922.575.)

As the court held, the CPRA prohibits charges for "staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information." (*National Lawyers Guild*, *supra*, 9 Cal.5th at p. 493.) An agency cannot "recover the costs of searching through a filing cabinet for paper records" or "searching for responsive

records in an e-mail inbox or a computer's documents folder," or "charge for time spent redacting a hard copy" or removing "exempt data" from electronic records. (*Id.*, at pp. 501, 506.)

As the County is aware, the Shasta County Superior Court recently cited *National Lawyers Guild* to hold that the County could not collect fees for public records in excess of direct costs of duplication. (*Scripps NP Operating LLC v. County of Shasta*, No. 22CV-0200189 (Apr. 10, 2023) Ruling on Writ of Mandate at p. 9.) Yet the County continues to assess unlawful fees under the Ordinance, including to one or more of the Organizations.

No law allows the County to impose the kind of fees specified in the Ordinance. The County is mistaken that Government Code section 54985 authorizes the Ordinance. Under section 54985, a county may only "increase or decrease" a fee "that is otherwise authorized to be levied by another provision of law." (Gov. Code, § 54985, subd. (a).) Nothing in section 54985 can "be construed as granting any additional authority to levy any fee or charge which is not otherwise authorized by another provision of law nor shall its provisions be construed as granting authority to levy a new fee or charge when other provisions of law specifically prohibit the levy of a fee or charge." (*Id.*, § 54987, subd. (a).)

Therefore, section 54985 permits the County only to increase or decrease the amount of a fee that is otherwise authorized or not prohibited, not to create a new kind of fee. (*Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 789 & fn.7 [where applicable statute created "no authority for the imposition of a processing fee to be paid in advance of administrative review," court rejected county's reliance on section 54985, which "has no application here, where the processing fee is not authorized by law"].) Because the kind of fees imposed by the Ordinance are prohibited by the CPRA and not authorized by any other law, section 54985 cannot justify the Ordinance.

Nor can section 54985 be construed to impose a "statutory fee" for copies of public records (Gov. Code, § 7922.530, subd. (a)), because section 54985 does not itself authorize the collection of any fees. (*Shippen v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 1119, 1124-1125 [holding "statutory fees" for public records are created by "[s]tatutes establishing fees in specific monetary amounts" or statutes that "although they do not contain specific dollar amounts, permit some body to assess and charge fees"].) Because section 54985 itself does not establish or permit any fees, it cannot impose a "statutory fee" under the CPRA.

The Ordinance itself cannot impose a "statutory fee," because the Ordinance is not a "statute." By California law, a "statute" means "an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act." (Gov. Code, § 811.8.) This definition "excludes local charters and ordinances." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 620.)

To the extent that the County might also attempt to justify the Ordinance's unlawful fees by relying on an outdated Attorney General opinion regarding section 54985 and public records, that reliance would be misplaced. (Cal. A.G. Op. No. 01-605, 85 Ops.Cal.Atty.Gen. 225 (2002).) The opinion carries little or no weight because it predates the 2004 adoption of Proposition 59, which amended the California Constitution to mandate that any "statute, court rule, or other authority" must be "narrowly construed if it limits the right of access" to public records. (Cal. Const., Art. I, § 3, subd. (b)(2).)

This "interpretive rule" requires that section 54985 must be narrowly construed to exclude any potential implication that it might allow charges for public records not clearly authorized by other

law. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 175.) Whatever the merits of the opinion when issued, "the constitutional canon" now requires courts to interpret section 54985 "in a way that maximizes the public's access to information unless the Legislature has *expressly* provided to the contrary," which it has not done with respect to the kind of charges imposed by the Ordinance. (*Ibid.* [citation omitted].)

As the California Supreme Court has emphasized, the kind of fees imposed by the Ordinance "may be prohibitive," and "Article I, section 3 of the state Constitution favors an interpretation that avoids erecting such substantial financial barriers to access." (*National Lawyers Guild, supra,* 9 Cal.5th at p. 507.) Because it could not and did not consider the impact of Proposition 59, the Attorney General opinion is obsolete and retains little or no persuasive value. (*See Almond Alliance of California v. Fish & Game Commission* (2022) 79 Cal.App.5th 337, 358 [declining to follow Attorney General opinion that had not considered relevant law].).

Even assuming otherwise, the opinion cannot justify the Ordinance. It confirms that "Section 54985 does not grant independent authority to charge a fee in the first instance but only authorizes a county board of supervisors to increase (or decrease) a fee that is statutorily authorized elsewhere," and it acknowledges that the relevant part of the CPRA only allows charges for "duplication." (85 Ops.Cal.Atty.Gen. at p. 228 & fn. 4.) Thus, especially when narrowly construed under Proposition 59, at most the opinion addresses only charges for duplicating records. It cannot authorize the kind of charges specified in the Ordinance for locating, retrieving, reviewing, or redacting records, which are not part of "duplication."

"Duplicate" means "to make a copy," and therefore the cost of making "copies is the cost of copying them," not locating, retrieving, reviewing, preparing, or redacting records. (*North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 147; *cf. Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 483 [holding statutory charges for "actual costs of copying do not encompass costs related to examining, redacting, and preparing documents" because "'[c]opying' is simply not a synonym for locating, examining, redacting, or producing" and for "documents examined but not produced, there can be no cost of 'copying'"].) Therefore, any charges the opinion might potentially allow for duplication cannot include the different kind of fees imposed by the Ordinance.

For all these reasons, the Ordinance imposes unlawful fees to locate, retrieve, review, prepare, furnish, or redact public records. If the Ordinance is not repealed at the earliest possible opportunity, we are prepared to file a lawsuit to enjoin its enforcement. Time is of the essence because every day that the Ordinance remains in effect, the public is subject to a financial barrier depriving them of their transparency rights under the CPRA and California Constitution.

The County should also refund any fees assessed under the Ordinance against the Organizations or others. To the extent the County has assessed fees under the Ordinance for any CPRA requests that remain outstanding, the County should withdraw any such assessments and process those requests immediately.

We are glad to discuss this matter with County Counsel or otherwise, but if the County has not repealed the Ordinance by close of business on October 18, 2023, we intend to file suit as soon as possible after that time.

This letter may not present all applicable arguments; all rights are reserved. Thank you for your attention to this matter. Please let us know if you have any questions.

Sincerely,

s/David Loy

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