PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: November 18, 2021
Resolution No.: L-612

R E S O L U T I O N

RESOLUTION DENYING BRANDON RITTIMAN'S APPEAL OF THE COMMISSION'S DETERMINATION THAT RECORDS SOUGHT UNDER CALIFORNIA PUBLIC RECORD ACT REQUESTS 20-597, 20-598, 20-599, AND 20-600 ARE EXEMPT FROM DISCLOSURE

SUMMARY

The California Public Records Act enshrines the public's right to access information concerning the conduct of the people's business, while also establishing numerous categories of documents that are exempt from disclosure, including correspondence to and from the Governor's office. On November 19, 2020, Brandon Rittiman requested such records from the California Public Utilities Commission ("Commission") pursuant to the California Public Records Act ("CPRA"). On November 30, 2020, staff for the Legal Division of the Commission informed Mr. Rittiman of its determination that the requested records were exempt from disclosure pursuant to California Government Code section 6254(l).

This resolution denies Mr. Rittiman's subsequent appeal for a reconsideration of the Commission Staff determination that the records sought are exempt from disclosure. Having reviewed the requests, it is clear that they seek documents exempt from disclosure pursuant to the Correspondence Exemption embodied in California Government Code section 6254(l) and are in fact broad enough in nature to implicate additional categories of privilege that would likewise preclude their disclosure.

BACKGROUND

The Commission has exercised its discretion under Public Utilities Code section 583, and implemented its responsibility under Government Code section 6253.4(a), by adopting the guidelines for public access to Commission records embodied in General Order ("G.O.") 66-D. (See Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act (R.14-11-001), last amended by Decision 20-08-031).

When the Commission receives a CPRA request, the Commission's Legal Division determines if the information should be released or withheld pursuant to statutory exemptions or other applicable privileges. If documents are withheld, the Legal Division will inform the CPRA requestor and not release the information. (See G.O. 66-D, § 5.5(d).) The requestor may seek reconsideration of the matter by the full Commission by submitting a "Public Information Appeal Form" within ten days of receiving notice that the request has been denied. (See id.). The Commission will then reexamine the request and issue a Resolution on the matter.

On November 19, 2020, Brandon Rittiman made four CPRA requests to the Commission at issue in this Resolution, and they were subsequently identified as PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600. Specifically, the requests sought the following records:

- From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Ana Matasantos. This request includes all documents, emails, or texts whether made on state-issued or personal devices. [PRA 20-597].
- From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Alice Reynolds. This request includes all documents, emails, or texts whether made on state-issued or personal devices. [PRA 20-598].
- From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Ann Patterson. This request includes all documents, emails, or texts whether made on state-issued or personal devices. [PRA 20-599].
- From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Rachel Wagoner. This request includes all documents, emails, or texts whether made on state-issued or personal devices. [PRA 20-600].

Marybel Batjer is the President of the Commission and was sworn into office on August 16, 2019. All four of the other individuals from whom communications were sought in the CPRA requests are or at all relevant times were employees of the Governor's office.

On November 30, 2020, via a letter sent by electronic mail, Commission legal staff informed Mr. Rittiman of its determination that the communications sought were exempt from disclosure pursuant to California Government Code section 6254(l), which

explicitly exempts from public disclosure "[c]orrespondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter." (the "Correspondence Exemption").

On December 4, 2020, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600 were exempt from disclosure.[1] Mr. Rittiman argued that the Commission should interpret the term "correspondence" as used in Government Code section 6254(l) narrowly, that the term applies only to communications by (presumably physical) letter, citing *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 1337 (1991), and that the Commission should still produce any responsive text messages, emails, and calendar entries. The Commission acknowledged Mr. Rittiman's appeal the same day.[2] In subsequent correspondence, counsel for Mr. Rittiman has argued that the Correspondence Exemption contained in Government Code section 6254(l) should apply only to correspondence "sent from individuals, companies, and/or groups who are outside of the government," citing *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 168 (3d Dist. 1998).[3]

DISCUSSION

The California Constitution and the CPRA confer a public right to access a substantial amount of government information. The preamble to the CPRA declares "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250. However, "[t]he right of access to public records under the CPRA is not absolute." *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1282 (2006). There are numerous statutory exemptions for documents that the California Legislature has deemed inappropriate for general public disclosure.

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[1] Mr. Rittiman did not use the "Public Information Appeal Form," as required by G.O. 66-D, and instead informally emailed Legal Division staff of his appeal. Although the Commission has undertaken review of his appeal, this Resolution does not constitute precedent that the Commission will waive the procedural requirements of G.O. 66-D in future situations.

[2] The Commission acknowledges that its processing of the appeal and preparation of this Resolution has taken longer than usual. The Commission also acknowledges that, while the CPRA confers substantial public benefits, responding to such requests consumes substantial Commission resources. The Commission received 594 subpoena and CPRA requests in 2017, 653 in 2018, 702 in 2019, 699 in 2020, and is on pace to receive more than that in 2021.

[3] Mr. Rittiman's CPRA request and appeal were both made on his behalf only ("I ask to obtain records," "I write to appeal.") Since then, an attorney purporting to represent both Mr. Rittiman and KXTV-TV (ABC10) has advocated for the release of the subject records. The Commission's determination would be the same regardless of the requestor(s).

THE CORRESPONDENCE EXEMPTION

Each of the four CPRA requests made by Mr. Rittiman on their face seeks "all communications" between President Batjer or her executive staff and employees of the Governor's office. Any such communications or correspondence are facially exempt from disclosure under the clear terms of Government Code section 6254(l), which exempts from public disclosure "[c]orrespondence of and to the Governor or employees of the Governor's office. . . ."

Mr. Rittiman argues, however, that the term "correspondence" should be interpreted narrowly and "must be confined to communications by letter," citing *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1337 (1991). Thus, Mr. Rittiman urges the Commission to produce all otherwise responsive "text messages, emails, and calendar entries." We believe Mr. Rittiman's interpretation of *Times Mirror* is itself too narrow.

In *Times Mirror*, a newspaper sought the "appointment schedules, calendars, notebooks and any other documents that would list [the Governor's] daily activities as governor from [his] inauguration in 1983 to the present." *Id*. at 1329. In determining whether such a request implicated the Correspondence Exemption in Government Code section 6254(l), the California Supreme Court relied on Webster's definition of "correspondence" as "communication by letters." *Id*. at 1337. Because all that was sought by the newspaper were internally generated appointment schedules, calendars, and notebooks, the Court did not consider these to meet the definition of "correspondence" under Government Code section 6254(l). *Id*.

By contrast, Mr. Rittiman is asking for "all communications" between President Batjer and her executive staff and employees of the Governor's office, a much broader request that squarely implicates Government Code section 6254(l). To the extent that Mr. Rittiman argues that the term "correspondence" should be limited to communications by (paper or physical) letter, pursuant to the Court's reliance on Webster's definition of "correspondence" in *Times Mirror*, that argument is unavailing. *Times Mirror* was published in 1991 and involved a request for records created between 1983 and 1988, largely before the advent of electronic communication. Webster's current definition of correspondence, for example, is "communication by letters *or email*" (emphasis added).[4] There is no logical distinction to be made between an email and a text message and an electronically communicated calendar entry, which often contains messaging elements. The statutory prohibition on disclosure of "[c]orrespondence of and to the Governor or employees of the Governor's office" should not hinge on what type of computer or phone application a correspondent uses. Mr. Rittiman's CPRA requests seeking "all communications" ask for records that, by definition, are exempt from disclosure pursuant to California Government Code section 6254(l).

[4] See https://www.merriam-webster.com/dictionary/correspondence.

Mr. Rittiman also seizes on a piece of dicta in *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159 (3d Dist. 1998) to argue that the Correspondence Exemption contained in Government Code section 6254(l) applies only to communications coming "to" the Governor's Office from "outside of government." This argument ignores the statute and misreads the case.

In *California First Amendment Coalition*, the Court of Appeal was deciding whether or not application materials sent to the Governor's office for appointment to an open county supervisor position were "correspondence" and thus exempt from disclosure under Government Code section 6254(l). In its discussion, the Court of Appeal examined the *Times Mirror* case for precedent, noting that, "[i]n *Times Mirror*, the Supreme Court feared that treating internally generated documents as correspondence would create an exemption so broad that all records in the custody of the Governor or employees of the Governor's would be exempt from disclosure." *California First Amendment Coalition*, 67 Cal. App. 4th at 168.

The Court of Appeal then distinguished the internally generated "Governor's calendar and schedule" at issue in *Times Mirror* and determined that the application materials for the county supervisor seat were "correspondence" within the meaning of, and thus exempt from disclosure by, Government Code section 6254(l). In doing so, the Court of Appeal supported the distinction from *Times Mirror* by stating, "[i]n our view, the correspondence exemption was intended to protect communications to the Governor and members of the Governor's staff from correspondents outside of government." *Id*.

However, the issue of inter-governmental correspondence was not before the Court of Appeal in *California First Amendment Coalition*, it did not purport to consider the issue, nor do we think the Court was articulating a broader reading of the statute than necessary to reach its holding. "It is, of course, 'axiomatic that a decision does not stand for a proposition not considered by the court.'" *Wishnev v. The Northwestern Mutual Life Ins. Co.*, 8 Cal. 5th 199, 217 (2019) (quoting *People v. Barker*, 34 Cal. 4th 345, 354 (2004)). Because the Court of Appeal was not actually deciding the issue of whether correspondence by a separate and unique governmental agency, like the Commission, to and from the Governor's office would be exempt under section 6254(l), the Court's statement is dicta and cannot be relied upon.

That the Court of Appeal was only distinguishing the facts of *Times Mirror* and not deciding a question that was not before it is further evidenced by the language the Court used seeming to limit the exemption to communications directed "to the Governor and members of the Governor's staff." *California First Amendment Coalition*, 67 Cal. App. 4th at 168. The plain text of Government Code section 6254(l) exempts from production "[c]orrespondence **of and to** the Governor or employees of the Governor's office . . . " (emphasis added), which would obviously include correspondence **from** and **to** the

Governor's office. A court's "primary task in construing a statute is to determine the Legislature's intent. Where possible, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law. . . .'" *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 731 (2003). It seems clear that the Court of Appeal was merely contrasting the type of document it was ruling on (correspondence submitted by private individuals to the Governor's Office) with that which was before the Court in *Times Mirror* (internally created calendars and schedules, which were not correspondence).

Finally, the CPRA was modeled on the federal Freedom of Information Act ("FOIA," 5 U.S.C. § 552), and "[t]he legislative history and judicial construction of the FOIA thus 'serve to illuminate the interpretation of its California counterpart.'" *Times Mirror*, 53 Cal. 3d at 1338; *see also California First Amendment Coalition*, 67 Cal. App. 4th at 169, n.8 ("Because the Public Records Act is modeled after the federal Freedom of Information Act and serves the same purpose, federal decisions under the FOIA are often relied on to construe California's Act.").[5] Under federal law, members of the public are not entitled to a President's records while that President is in office. FOIA does not apply to offices within the Executive Office of the President whose function is to advise and assist the President.[6] *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (noting that the term "agency" does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President."). However, the Presidential Records Act (22 U.S.C. §§ 2201-09) makes many such records available five years after a president leaves office. To the extent the CPRA is based on FOIA, that would militate in favor of applying the Correspondence Exemption to the correspondence Mr. Rittiman has requested.

The overwhelming weight of authority and the plain language of the Correspondence Exemption codified in Government Code section 6254(l) require that the correspondence sought by Mr. Rittiman be exempt from disclosure.

THE DELIBERATIVE PROCESS PRIVILEGE

Government Code section 6254(k) exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Government Code section 6255, in addition, provides that documents need not be disclosed where "on the

[5] The CPRA was amended in 1975 to limit the exemption in section 6254(l) from all records maintained by the Governor to "correspondence of or to the Governor and his staff." *Times Mirror*, 53 Cal. 3d at 1337.

[6] Title 5 United States Code section 552(b)(5) provides that agencies need not disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

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."

The deliberative process and mental process privileges provide for confidential treatment of deliberative advice given to agency decision-makers, and confidential information used to develop such advice. There is a need for preserving the confidentiality of deliberative communications since disclosure would discourage candid and thorough discussions between Commissioners, their advisors, and members of the Governor's office. In *Times Mirror*, the California Supreme Court recognized that "[d]isclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." *Times Mirror*, 53 Cal. 3d at 1343. "Even routine meetings between the Governor and other lawmakers, lobbyists or citizens' groups might be inhibited if the meetings were regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press." *Id*. at 1344.

In denying plaintiffs access to the Governor's appointment schedules, calendars, and notebooks, the Court in *Times Mirror* concluded, "The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it." *Id*. at 1345. *See also California First Amendment Coalition*, 67 Cal. App. 4th at 169-174 (finding applications made to Governor for open county supervisor seat protected by the deliberative process privilege).

These privileges protect the public's interest in allowing its policy makers to have "frank discussion of legal or policy matters," an interest that would be "inhibited if 'subjected to public scrutiny"' and "greatly hampered if, with respect to such matters, government agencies were 'forced to operate in a fishbowl."' *Times Mirror*, 53 Cal. 3d at 1340.

Mr. Rittiman's CPRA requests seek precisely the type of information normally deemed subject to the deliberative process privilege, which forms an additional reason the correspondence he seeks should not be produced.

OTHER APPLICABLE PRIVILEGES

In *Times Mirror*, the Supreme Court also noted that the Governor's appointment schedules, calendars, and notebooks were arguably subject to the "official information privilege" contained in Government Code section 6254(k). *Times Mirror*, 53 Cal. 3d at 1339, n.9. As described above, Section 6254(k) exempts records "the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Section 1040(a)

of the Evidence Code establishes a privilege for "official information," defined as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." The correspondence requested by Mr. Rittiman is further subject to the statutory "official information privilege" contained in Government Code section 6254(k).

Finally, the requests by Mr. Rittiman, seeking "all communications" from President Batjer or her principal executive staff and employees of the Governor's office over a period of more than a year are broad enough to implicate additional privileges, such as the attorney-client privilege and attorney work product doctrine, and the Commission reserves those and any additional privileges over the requested communications as well.

NOTICE AND COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was emailed to Mr. Rittiman and his counsel on October 12, 2021, in accordance with Cal. Pub. Util. Code § 311(g). Comments were received on November 12, 2021 by counsel for Mr. Rittiman and his employer, TEGNA Inc., which owns the subsidiary operating KXTV-TV/ABC10 in Sacramento. The comments largely reiterate arguments made by Mr. Rittiman already addressed above. Mr. Rittiman misconstrues the Resolution's reference to Public Utilities Code section 583, which only indicates the dual purpose that GO 96-D serves. Mr. Rittiman argues that this Resolution is moot because the California Supreme Court granted his petition for review and has transferred the matter to the Court of Appeal with instructions to vacate its order and remand the matter to a respondent superior court. However, Mr. Rittiman supplies no legal precedent for his argument, and the Commission is aware of no legal reason why it should not comply with GO 66-D and issue this Resolution.

Mr. Rittiman continues to argue that the Governor's Correspondence exception expressed in Government Code section 6254(l) should be construed not to apply to any communication between the Governor's Office and any governmental agency. But, as discussed at length above, the statutory language gives no indication at all that its plain terms should be disregarded. Government Code section 6254(l) exempts from disclosure, "Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary." It is one thing to narrowly construe an exception to a statute, but it is another to create an entirely new exception to that exception to the statute itself. As discussed, the Court of Appeal in *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 164 (3d Dist. 1998) recognized that "[t]he narrow issue before [the court was] whether the California Public Records Act (§ 6250 et seq.) compels the Governor to disclose the names and qualifications of applicants for a temporary appointment to a local Board of Supervisors . . . ." To contextualize its holding, the Court of Appeal referenced applying the exception to "correspondents outside of government," but the issue of correspondence from a separate arm of government was not before the Court of Appeal, the issue had not

been briefed to the Court of Appeal, and nowhere did the Court of Appeal purport to deviate from the clear text of the statute.

Mr. Rittiman is also critical of the Resolution because it does not address *American Civil Liberties Union of Northern California v. Superior Court*, 202 Cal. App. 4th 55 (1st Dist. 2011) ("*ACLU*"), but that case does not change the calculus. In *ACLU*, the plaintiffs sought records from the California Department of Corrections and Rehabilitation ("CDCR"), and the Court of Appeal noted that the trial court's underlying "order did not allow CDCR to withhold internal governmental communications" under the Governor's Correspondence exception to disclosure, citing *California First Amendment Coalition*. *ACLU*, 202 Cal. App. 4th at 65. But that part of the trial court's order was not on appeal, and the Court of Appeal was simply noting the trial court's ruling. Nevertheless, the trial court's ruling is not remarkable, as *internal* CDCR communications would not normally be subject to the Governor's Correspondence exception expressed in Government Code section 6254(l). Those communications are very different in kind than the communications being sought by Mr. Rittiman. Mr. Rittiman is not seeking internal CPUC communications; nor is he requesting of the Governor's Office its internal communications; he is seeking "correspondence of and to the Governor or employees of the Governor's office," which requests fall squarely under the plain wording of the exception.

The Commission is a unique state agency of California constitutional origin "with far-reaching duties, functions, and powers." *Consumers' Lobby Against Monopolies v. Public Utils. Comm'n*, 25 Cal. 3d 891, 905 (1979) ("*CLAM*"); Cal. Const., art. XII, §§ 1-9. It is within the Commission's exclusive state jurisdiction to regulate public utilities, and to, among other things, set rates, establish rules, hold hearings, award reparations, and establish its own procedures. Cal. Const., art XII, §§ 2, 4 & 6; *CLAM*, 25 Cal. 3d at 905-906. The Commission is a legally distinct entity from other arms of California government, and we think the policies behind the Governor's Correspondence exception discussed at length with approval in *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991) support application to the records requested by Mr. Rittiman.

FINDINGS OF FACT

1. On November 19, 2020, Brandon Rittiman made request PRA 20-597 to the Commission for "From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Ana Matasantos. This request includes all documents, emails, or texts whether made on state-issued or personal devices."

2. On November 19, 2020, Brandon Rittiman made request PRA 20-598 to the Commission for "From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Alice

Reynolds. This request includes all documents, emails, or texts whether made on state-issued or personal devices."

3. On November 19, 2020, Brandon Rittiman made request PRA 20-599 to the Commission for "From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Ann Patterson. This request includes all documents, emails, or texts whether made on state-issued or personal devices.".

4. On November 19, 2020, Brandon Rittiman made request PRA 20-600 to the Commission for "From the period of Marybel Batjer's appointment to date, all communications between Ms. Batjer or her principal executive staff and Rachel Wagoner. This request includes all documents, emails, or texts whether made on state-issued or personal devices."

5. Marybel Batjer is the President of the Commission and was sworn into office on August 16, 2019.

6. All four of the other individuals from whom communications were sought in the CPRA requests are or at all relevant times were employees of the Governor's office.

7. On November 30, 2020, via a letter sent by electronic mail, Commission legal staff informed Mr. Rittiman of its determination that the communications sought were exempt from disclosure pursuant to California Government Code section 6254(l), which explicitly exempts from public disclosure "[c]orrespondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter."

8. On December 4, 2020, Mr. Rittiman emailed Commission legal staff to appeal the determination that the communications sought in PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600 were exempt from disclosure.

9. Mr. Rittiman did not use the "Public Information Appeal Form," as required by G.O. 66-D, and instead informally emailed Legal Division staff of his appeal.

CONCLUSIONS OF LAW

1. The communications sought by Mr. Rittiman in his PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600 requests are exempt from disclosure pursuant to California Government Code section 6254(l).

2. The communications sought by Mr. Rittiman in his PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600 requests are exempt from disclosure pursuant to California Government Code sections 6254(k) and 6255.

3. The requests by Mr. Rittiman, seeking "all communications" from President Batjer or her principal executive staff and employees of the Governor's office over a period of more than a year are broad enough to implicate additional privileges, such as the attorney-client privilege and attorney work product doctrine.

4. Although the Commission has undertaken review of Mr. Rittiman's appeal, this Resolution does not constitute precedent that the Commission will waive the procedural requirements of G.O. 66-D in future situations.

ORDER

1. Mr. Rittiman's appeal of the Commission's determination that records sought under California Public Record Act requests PRA 20-597, PRA 20-598, PRA 20-599, and PRA 20-600 is hereby denied.

2. The effective date of this order is today.

I certify that the foregoing Resolution was adopted by the California Public Utilities Commission of the State of California at its regular meeting of November 18, 2021, and the following Commissioners approved favorably thereon:

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RACHEL PETERSON
Executive Director