

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Voice of Orange County.Org vs. County of Orange**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC
SERVICE****CASE NUMBER:**
30-2016-00841766-CU-WM-CJC

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**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 05/09/2017

TIME: 10:02:00 AM

DEPT: C19

JUDICIAL OFFICER PRESIDING: Walter Schwarm

CLERK: Kimberley Gray

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2016-00841766-CU-WM-CJC** CASE INIT.DATE: 03/18/2016

CASE TITLE: **Voice of Orange County.Org vs. County of Orange**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72585743

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

Stipulation and Order Re: Retention of Sealed Records is read and considered.

Stipulation and Order Re: Retention of Sealed Records signed and filed.

The Court, having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

See Memorandum of Intended Decision attached.

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAY 09 2017

DAVID H. YAMASAKI, Clerk of the Court

BY: _____, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

VOICE OF ORANGE
COUNTY.ORG
Petitioner/Plaintiff,
v.
COUNTY OF ORANGE,
Respondent/Defendant.

30-2016-00841766
MEMORANDUM OF INTENDED
DECISION
Hon. WALTER P. SCHWARM
Dept. C19

In this document, the Court announces its Memorandum of Intended Decision. The Memorandum of Intended Decision will be the Statement of Decision unless within ten (10) days either party files and serves a document that specifies controverted issues or makes proposals not covered in the Memorandum of Intended Decision as provided by California Rules of Court, Rule 3.1590(c)(4). This Memorandum of Intended Decision will address the principal controverted issues presented during the hearings regarding the Petition for Writ of Mandate (Code Civ. Proc., § 632.)

“A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citation.]” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) Further, “ [I]n rendering a statement of decision under Code of Civil Procedure

1 section 632, a trial court is required only to state ultimate rather than evidentiary facts; only
2 when it fails to make findings on a material issue which would fairly disclose the trial court's
3 determination would reversible error result.' ” (*Sperber v. Robinson* (1994) 26 Cal.App.4th
4 736, 745.)

5 **STATEMENT OF CASE**

6 On May 27, 2016, Petitioner filed a Verified First Amended Supplemental Petition for
7 Writ of Mandate and Declaratory Relief for Violations of the California Public Records Act.
8 (Supp. Pet.) This Petition sought a judgment “that the records requested by the Petitioner are
9 disclosable public record [sic] and the County violated the California Public Records Act by
10 refusing to produce the records. (Supp. Pet., p. 9:18-20.) According to the Supp. Pet.,
11 Petitioner, sought (1) “Emails between Jean Pasco and Supervisor Spitzer regarding Spitzer’s
12 citizen arrest of a man at Wahoo’s Fish Tacos;” and (2) “Emails among county supervisors
13 and their staffs regarding the county’s Boys Town contract, including request to delay, pull or
14 continue the contract at a later date, and any other emails related to that request.” (Exhibit C
15 attached to the Supp. Pet.) Respondent further clarified the request as to the Boys Town
16 contract by requesting records between April 1, 2015 and December 31, 2015. (Exhibit E
17 attached to Supp. Pet.) On June 13, 2016, Respondent filed its Answer to the Verified First
18 Amended and Supplemental Petition for Writ of Mandate and Declaratory Relief. (Answer.)

19 Specifically, Petitioner seeks disclosure of the records identified in Respondent’s
20 Privilege Log. This Privilege Log is attached to Petitioner’s Notice of Motion and Motion for
21 Writ of Mandate and Declaratory Relief as Exhibit J. The disputed records consist of 26
22 pages marked as OC 1 through OC 26. At Respondent’s request, and pursuant to
23 Government Code section 6259, subdivision (a), and *State Bd. of Equalization v. Superior*
24 *Court* (1992) 10 Cal.App.4th 1177, 1183, fn. 5, the court conducted an in camera review of
25 OC 1 through OC 26 on April 18, 2017 and April 25, 2017. Respondent requested a
26 Statement of Decision.
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LEGAL BACKGROUND

Government Code section 6250 states, “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and 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.” “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).)

“Despite the strong legislative policy favoring access, the the public’s right to disclosure of public records is not absolute. In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254; and (2) the catchall exception of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. But unless exempted, all public records may be examined by any member of the public, often the press, but conceivably any person with not greater interest than idle curiosity.” (*American Civil Liberties Union of Northern Cal. v. Superior Court (ACLU)* (2011) 202 Cal.App.4th 55, 67; internal citations and internal quotation marks omitted.)

Government Code section 6255, subdivision (a), provides, “The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or 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.” In *Humane Society of U.S. v. Superior Court (Humane Society)* (2013) 214 Cal.App.4th 1233, 1263, fn. 27, the court explained, “California courts recognize a ‘deliberative process privilege’ under section 6255’s catchall exemption”

Regents of University of California v. Superior Court (1999) 20 Cal.4th 509, 540 states, “Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations,

1 discussion, debates, deliberations and like materials reflecting advice,
2 opinions, and recommendations by which government policy is processed
and formulated.”

3 *ACLU, supra*, at pp. 75-76, provides,

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5 “In applying the privilege, [t]he key question in every case is whether the
6 disclosure of materials would expose an agency’s decisionmaking process
7 in such a way as to discourage candid discussion within the agency and
8 thereby undermine the agency’s ability to perform its functions. [Citation.]
9 Even if the content of a document is purely factual, it is nonetheless
10 exempt from public scrutiny if it is actually . . . related to the process by
which policies are formulated [citation] or inextricably intertwined with
policy-making processes. [Citation.] (Internal citations and internal
quotation marks omitted.)

11 *City of San Jose v. Superior Court, 2 (City of San Jose) (2017) 2 Cal.5th 608, 618-*
12 *619* explains,

13 We clarify, however, that to qualify as a public record under CPRA, at a
14 minimum, a writing must relate in some substantive way to the conduct of
15 the public’s business. This standard, though broad, is not so elastic as to
16 include every piece of information the public may find interesting.
17 Communications that are primarily personal, containing no more than
incidental mentions of agency business, generally will not constitute
public records.”

18 Government Code section 6253, subdivision (a), provides, “Public records are open to
19 inspection at all times during the office hours of the state or local agency and every person
20 has a right to inspect any public record, except as hereafter provided. Any reasonably
21 segregable portion of a record shall be available for inspection by any person requesting the
22 record after deletion of the portions that are exempted by law.” (See also, *Humane Society of*
23 *the United States v. Superior Court (Humane Society) (2013) 214 Cal.App.4th 1233, 1274.*)

24 “As the court in *City of San Jose* noted, ‘ . . . California courts apply the section 6255
25 balancing test for the catchall exception on a case-by-case basis. Where the public interest in
26 disclosure of the records is not outweighed by the public interest in nondisclosure, courts will
27 direct the government to disclose the requested information.’ [Citations.]” (*Id.*, at p. 1255.)
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ANALYSIS

As to OC 1-4, OC 7, OC 9-11, OC 13, Respondent asserts that the following exemptions from disclosure apply: The deliberative process privilege, Government Code section 6255, subdivision (a), and Government Code section 6254, subdivision (a). As to the remaining documents, Respondent contends that the following exemptions apply: The deliberative process privilege, and Government Code section 6255, subdivision (a).

A. OC 1 through OC 4

OC 1 and OC 2 pertain to emails between Supervisor Todd Spitzer and Jean Pasco who was the County Information Manager. (Declaration of Supervisor Todd Spitzer (hereafter “Declaration”), ¶ 38.) OC 3 and OC 4 are a draft statement.

As to OC 1 through OC 4, Respondent contends that they are subject to exemption under Government Code section 6254, subdivision (a), Government Code section 6255, subdivision (a), and the deliberative process privilege. Respondent appears to concede that the draft press release is a preliminary draft that falls within Government Code section 6254, subdivision (a). Respondent argues that this exemption applies because it is “not a record retained by the public agency in the ordinary course of business.” (Gov. Code, § 6254, subd. (a).) *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 714, states, “If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed. [Citation.]” Additionally, Respondent did not carry its burden of proof of showing a County policy regarding the retention of preliminary materials. Although the Declaration indicates that Supervisor Spitzer’s practice was not to keep preliminary drafts (Declaration, ¶, 39), the evidence was insufficient to show the County’s policy as to retention of preliminary materials. Thus, OC 1 through OC are subject to disclosure because the County did not discard OC 1 through OC 4.

1 ***1. Balancing the Interests under Government Code sections 6254, subdivision (a),***
2 ***and 6255, subdivision (a).***

3 Government Code section 6254, subdivision (a), does not require disclosure if “the
4 public interest in withholding those records clearly outweighs the public interest in
5 disclosure.” Government Code section 6255 justifies nondisclosure if “on the facts of the
6 particular case the public interest served by not disclosing the record clearly outweighs the
7 public interest served by disclosure of the record.” Both sections require the court to balance
8 the public interest in withholding the records, or the public interest served by nondisclosure,
9 against the public’s interest in disclosure. *Humane Society, supra*, at p. 1255, states, “The
10 burden of proof as to the application of an exemption is on the proponent of nondisclosure,
11 who must demonstrate ‘that on the facts of the particular case the public interest served by not
12 disclosing the record *clearly outweighs* the public interest served by disclosure of the record.’
13 [Citation.] In other words, the proponent of nondisclosure must establish a ‘clear
14 overbalance’ on the side of nondisclosure. [Citations; Italics in original.]”

15 As to both sections, Respondent asserts the deliberative process privilege as the public
16 interest justifying nondisclosure. The County submitted OC 1 through OC 4 as responsive to
17 the Petitioner’s request for “Emails between Jean Pasco and Supervisor Spitzer regarding
18 Spitzer’s citizen arrest of a man at Wahoo’s Fish Tacos.” Respondent does not dispute that
19 OC 1 through OC 4 pertain to the conduct of the people’s business. (Gov. Code, §§ 6250 and
20 6252, subd. (e).)

21 The court finds that Respondent has not carried its burden of showing that the public
22 interest in nondisclosure clearly outweighs the public’s interest in disclosure as required by
23 Government Code sections 6254, subdivision (a), and 6255, subdivision (a). The court finds
24 that the deliberative process privilege does not apply in these circumstances. The deliberative
25 process privilege applies to the mental processes by which a government employee reached a
26 decision connected to the processing or formulation of government policy. *ACLU*, at p. 76,
27 explained,

28 “Neither the record nor CDCR’s briefs explain how revelation of the
names of the pharmaceutical companies and others from whom CDCR

1 sought to acquire sodium thiopental would disclose the mental processes
2 of any government employee or the substance of deliberations relating to
3 the formulation of any government policy, or undermine CDCR's ability
4 to perform its functions. . . . The explanation in CDCR's trial brief, which
5 satisfied the trial court, is the following: 'CDCR has withheld or redacted
6 approximately fifteen documents based on the deliberative process.
7 Because these documents reflect the government's decisionmaking
8 process, they are exempt from disclosure.' This pronouncement is
9 manifestly inadequate. The deliberative process privilege does not justify
10 nondisclosure of a document merely because it was the product of an
11 agency's decisionmaking process; if that were the case, the PRA would
12 not require much of government agencies. The privilege does not come
13 into play in this case because CDCR has failed to show that its attempts
14 to purchase sodium thiopental involved the formulation of policy, or how
15 disclosure of the names of those contacted during this enterprise could
16 compromise the ability of a CDCR decision maker ' "to test ideas and
17 debate policy and personalities uninhibited by the danger that his tentative
18 but rejected thoughts will become subjects of public discussion." ' [citation],
19 or discourage internal policy debate, or otherwise undermine
20 CDCR's ability to perform its functions."

14 Here, OC 1 through OC 4 pertain to the incident at the restaurant. Respondent has not
15 sufficiently shown how the incident at the restaurant involved the processing or formulation of
16 policy pertaining to the County. Also, Respondent has not sufficiently demonstrated how
17 disclosure of OC 1 through OC 4 would compromise the ability of a County decision maker to
18 debate policy. Respondent has not shown how the decisionmaking with respect to OC 1 through
19 OC 4 related to the processing or formulation of a County policy or County decision.
20 Specifically, Respondent has not carried its burden to show a connection between OC 1 through
21 OC 4 and a County policy, function, or decision. For example, Respondent did not demonstrate
22 that OC 1 through OC 4 were relevant to an item on an agenda for a meeting of the Board of
23 Supervisors, or to any other County function. The court does not intend to suggest that the
24 deliberative process privilege could never apply to predecisional communications with a
25 government employee in a position similar to the County Information Manager. For the
26 deliberative process privilege to apply, however, such communications must relate to the
27 processing or formulation of government policy.
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1 The court finds that the Respondent has not shown that there is a public interest in
2 nondisclosure because the deliberative process privilege does not apply in these circumstances.
3 Thus, the Respondent has not carried its burden of showing that the public interest in
4 nondisclosure clearly outweighs the public interest in disclosure. The court grants the Writ of
5 Mandate as to OC 1 through OC 4 with the following qualification. The court orders the
6 Respondent to redact the first paragraph of an email from Ms. Pasco on September 4, 2015 at
7 9:30 a.m. The court finds that redaction is appropriate because this paragraph does not qualify
8 as a public record within the meaning of *City of San Jose, supra*, as discussed above.

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10 ***B. OC 5 and OC 15***

11 As to OC 5 through OC 15, the court finds that Respondent has shown that the public
12 interest in nondisclosure clearly outweighs the public interest in disclosure based on the
13 deliberative process privilege. These documents pertain to emails between Supervisor
14 Spitzer's staff and Boys Town. (Declaration, ¶ 40.)

15 Respondent's position is that the deliberative process privilege applies to these
16 documents because they tend to show "the substance of [Supervisor] Spitzer's judgment and
17 mental processes, and 'such information would indicate which interests or individuals he
18 deemed to be of significance with respect to critical issues of the moment.'" (Opposition of
19 Respondent County of Orange, p. 11:24-27.) The County showed that Supervisor Spitzer's
20 elected office requires him "to meet with people who have diverse views on a variety of
21 different and sensitive subjects." (Declaration, ¶ 45.) He "consider[s] the identity of those
22 with whom [he] meet[s] and the meetings themselves to be fundamentally confidential so that
23 those constituents [he] meet[s] with are free to express their views and opinions with candor,
24 and so that [he] may be reasonably assured of their candor." (Declaration, ¶ 45.)

25 Similar to *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1344, the court
26 finds that OC 5 through OC 15 are exempt from disclosure based on the deliberative process
27 privilege as applied through Government Code section 6255, subdivision (a). OC 5 through
28 OC 15 would intrude on Supervisor Spitzer's decision making regarding "interests or

1 individuals he deemed to be of significance with respect to critical issues of the moment.”
2 (*Id.*, at p. 1343.) Respondent has shown that the decision making related to the County’s
3 relationship with Boys Town. Respondent provided evidence that Boys Town was the
4 subject of County decision making. An item pertaining to Boys Town appeared on the
5 agenda for the April 14, 2015 Board of Supervisors meeting. (Declaration, ¶ 31 and Exhibit
6 5.) The Board of Supervisors approved an item related to Boys Town on May 5, 2015.
7 (Declaration, ¶ 32 and Exhibit 6.) Thus, OC 5 through OC 15 relate to the decision making
8 pertaining to the processing and formulation of government policy as to Boys Town. OC 5
9 through OC 15 could tend to reveal Supervisor’s Spitzer’s mental processes as to his decision
10 making related to Boys Town.

11 The court recognizes that Petitioner’s request is narrower than the request in *Times*
12 *Mirror*. The limited scope of the Petitioner’s request, as compared to the request in *Times*
13 *Mirror*, does not automatically require disclosure. Although the Petitioner’s request is more
14 limited than the request in *Times Mirror*, Respondent has shown that there is a public interest
15 in nondisclosure that clearly outweighs the public interest in disclosure based on the
16 deliberative process privilege especially in light of the County’s relationship with Boys
17 Town.

18 The court finds that the Respondent has shown that the public interest in nondisclosure
19 clearly outweighs the public’s interest in disclosure based on the deliberative process
20 privilege. Therefore, the court finds that OC 5 through OC 15 are exempt from disclosure
21 under Government Code section 6255, subdivision (a). The court denies the Writ of Mandate
22 as to OC 5 through OC 15.

23 ***C. OC 16 through OC 26***

24 The last set of documents are OC 16 through OC 26. These documents represent
25 “predecisional staff analysis, along with the staff analysis that was sent as an attachment,
26 made at [Supervisor Spitzer’s] request to inform [his] decision-making at the April 14, 2015
27 Meeting. (Declaration, ¶ 41.) At the hearing on April, 25, 2017, the parties agreed that the
28 court only had to review OC 16, OC 23, OC 25, and OC 26. Again, Respondent asserts the

1 deliberative process privilege through Government Code section 6255, subdivision (a), to
2 justify nondisclosure as to these documents. To support the application of the deliberative
3 process privilege, Respondent relies upon paragraph 41 of the Declaration. (Opposition of
4 Respondent County of Orange, p. 13:1-2.)

5 Paragraph 43 of the Declaration states, "As an elected public official, I rely upon my
6 staff to provide me with candid analyses and opinions in their work product to assist me in
7 making decisions. I consider these communications and drafts to be protected from
8 disclosure as these documents are part of my deliberative process. If this court were to order
9 these predecisional communications and drafts to be disclosed to the public, I am reasonably
10 certain, based on my years of experience holding public office, that the disclosure would have
11 a chilling effect on my ability to have open and honest predecisional discussions of high-
12 profile, sensitive issues with my staff."

13 Based on the court's in camera review, OC 16 through OC 26 pertain to staff analyses
14 pertaining to the April 14, 2015 Board of Supervisors meeting. The court finds that the
15 deliberative process privilege applies to these documents because they relate to the process
16 and formulation of government policy. For example, the Petitioner requests "Emails among
17 county supervisors and their staffs regarding the county's Boys Town contract, including
18 request to delay, pull or continue the contract at a later date, and any other emails related to
19 that request." The agenda for the Board of Supervisors meeting on April 14, 2015 reflects
20 that the Board of Supervisors considered an item relating to Boys Town. (Declaration, ¶ 31
21 and Exhibit 5.) Thus, OC 16 through OC 26 are predecisional documents reflecting
22 Supervisor Spitzer's mental processes in deciding to approve or not approve an item relating
23 to Boys Town. Further, disclosure of OC 16 through OC 26 could have the effect of
24 undermining the Board of Supervisors ability to perform its functions by discouraging the
25 flow of information to an elected official necessary to make an informed decision.

26 The court finds that Respondent has shown that the public interest in nondisclosure
27 based on the deliberative process privilege clearly outweighs the public interest in disclosure.
28 Therefore, the court finds OC 16 through OC 26 are exempt from disclosure under

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Government Code section 6255, subdivision (a). The court denies the Writ of Mandate as to OC 16 through OC 26.

CONCLUSION

The court grants the Writ of Mandate, in part, and denies the Writ of Mandate, in part, as described above.

Dated: May 9, 2017

Walter P. Schwarm
Judge of the Superior Court