

Anonymous

Supervisor of Records Dennis Herrera
San Francisco, CA
via email
Final

May 7, 2021

RE: DPH Requests 21-80 and 20-2942 – REVISION 2 – May 7, 2021

Supervisor of Records Dennis Herrera:

This is a petition under Admin Code §67.21(d) to determine in writing that records or parts thereof are public, regarding what DPH has labeled requests 21-80 and 20-2942. This is a corrected, 2nd revision, which replaces the earlier petition received on May 7, 2021 from this email address. Specifically, we challenge:

1. All withholding of attachments in the messages.

Because audio, video, and image records have not been provided and clearly exist in the screenshots of these messages, the records have been effectively withheld in their entirety and the request has not been complied with (see *Community Youth Athletic Center v. City of National City* (2013)¹ and *Sukumar v. City of San Diego* (2017)²). It is unknown whether the messages are on City-owned or personal devices, however, even if the devices are personal, attachments stored on them about the conduct of public business would be considered in the constructive possession of the City, and must be provided (*City of San Jose v. Superior Court* (2017)).

2. All redactions based on recommendation of the author. The City continues to misunderstand Admin Code 67.24(a)(1).

¹"The effect of the City's inability or unwillingness to locate the records had the same effect as withholding requested information from the public." (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1425)

²"The City correctly states there is no evidence it intentionally withheld known responsive documents. At the hearing on the fee motion, even Sukumar's attorney admitted there was no evidence City representatives acted in bad faith. However, bad faith is not the test. The effect of the City's inability or unwillingness to locate and produce these documents until court-ordered discovery ensued after March 8, 2016, is tantamount to withholding requested information from a PRA request." (*Sukumar v. City of San Diego* (2017), 14 Cal.App.5th 451, 466; internal citations omitted)

All recommendations of authors are not exempt – that would merely be using the deliberative process privilege under a different name as it is prohibited by Admin Code 67.24(h). Only a *draft* recommendation of the author is exempt, not all recommendations. And any factual content must be released as well within those messages.

For example, if Colfax hypothetically initially recommends shutting down restaurants and bars because of 17 positive COVID tests, and then finally recommends shutting down only bars then only the first recommendation is exempt as a *draft* and the phrase "17 positive COVID tests" must be unredacted as factual information.

Also, if the recommendations made by Colfax are not drafts at all and are his only (and thus final) recommendations they need to be disclosed. Furthermore, Elsbernd's responses to Colfax's exempt draft recommendations of the author are not necessarily draft recommendations themselves (or vice-versa). No where is the discussion by another party of the first party's draft recommendation exempted – in fact the exemption specifically states it must be the recommendation *of the author*.

3. All redactions based on official information privilege. The City continues to misunderstand Evidence Code 1040.

DPH merely cites Evid Code 1040(a) – simply defining official information; it does not exempt it. Only *some* not all official information is exempt – those exemptions are defined in Evid Code 1040(b)(1) and (b)(2) and DPH must cite which of the two exemptions they are using. The first exempts information whose disclosure is prohibited by state or federal law (if you are using (b)(1) please state that other law prohibiting disclosure). The second is a balancing test in the interest of justice (if you are using (b)(2) please explain in detail how disclosing each of those messages would harm the interest of justice).

4. All redactions under the attorney-client privilege on communications where no attorney for the City is part of the communication.

Evid Code 954 protects "a confidential communication between client and lawyer" – but these are not communications between the City and its lawyers. Communications between two non-DCA employees are not protected under Evid Code 954. Even if Sean Elsbernd is a lawyer, he does not and cannot act as a lawyer for the City (his law license is inactive in California).

DPH bears the burden of proof in showing how these exemptions apply to each redacted message.

It appears DPH is just using the above citations to hide the sensitive information in policy discussion.

Please order disclosed all public records not yet provided.

Sincerely,

Anonymous