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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF HUMBOLDT

THE NORTH COAST JOURNAL

Petitioner,

v.

THE CITY OF EUREKA

Respondent

Case No. CV 170486

PETITIONER'S REPLY RE ACCESS TO PUBLIC RECORDS; REQUEST FOR RELIEF FROM DEFAULT RE LATE FILING OF OPENING BRIEF; DECLARATION OF PAUL NICHOLAS BOYLAN; PROOF OF SERVICE VIA EMAIL

Date: August 7, 2017
Time: 1:45 PM
Dept.: Courtroom 4

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INTRODUCTION

The City of Eureka ("Respondent" or the "City") essentially argues that both the North Coast Journal ("Petitioner") and this Court should trust the City to decide whether or not the public has a right to access records and information within the City's control.

No. There are good reasons not to trust the City's evaluation, which is why this lawsuit was filed. Petitioner seeks an order requiring production of the information at issue or, if this Court deems that the City has met its heavy burden of proof, Petitioner requests an independent, impartial judicial determination via *in camera* review.

ARGUMENT

I. THE RECORDS AT ISSUE RELATE TO THE PUBLIC'S BUSINESS.

All records access disputes are decided on their own facts. (*City of Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1416-1417.) The facts of this case are unique. The public is legitimately interested in determining how much public time City officials are spending on private business. This particular interest is satisfied through access to emails or text messages, sent or received during public meetings, even with the entire message redacted because even a redacted message demonstrates how much public time a City official is devoting to private matters. (*See* Declaration of Thad Greenson, ¶¶ 4-9, filed herewith.)

II. PUBLIC POLICY FAVORS DISCLOSURE.

Petitioner has argued – and the City does not contest – that public policy favors the disclosure of government-held records. However, the point is so important – and the City's seeming failure to understand the burdens this policy imposes on public agencies and courts alike – Petitioner feels it is necessary to expand upon the argument here.

Litigation and appellate review of decisions that affect the public right to access government-held records and information is different from other disputes centering on other rights and statutes. There is a strong presumption in favor of decisions that provide for more access coupled with a strong presumption disfavoring decisions that restrict the public's access to government held records that transcend the ordinary judicial

determination of issues and evidence.

The right to access records is a constitutional right [Cal. Const. Art. I section 3(b)(1) and (2)] fundamental to our democracy (Government Code § 6250; *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-426) that, if violated, causes irreparable injury. (*Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1465 [quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373].)

The right to access records and information is closely connected to, if not essential for, free speech. The disclosure of government-held records and information advances important first amendment interests by protecting the public's right to know about public persons. (*Providence Journal Co. v. FBI* (D.R.I. 1978) 460 F.Supp. 762, 776.) Secrecy is antithetical to our democratic system of government. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771-772.) Access to government held records and information is necessary to safeguard the accountability of government to the public. (*Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1141.)

In California, the right to access records and information is a potent right – so potent that it is the settled policy that every law, rule, regulation, and judicial decision must be interpreted to favor access, while every statutory and evidentiary ambiguity must be resolved whenever possible in favor of access and decided against arguments negatively impacting access. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617; Sander v. State Bar of California (2013) 58 Cal.4th 300, 323; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166.)

The impact of this rule – *sui generis* to records access issues – is profound: when confronted by a close question of law or fact, this Court is required to resolve such close questions and any ambiguities in favor of findings and interpretations that result in more access and not less.

This includes this Court's interpretation and application of *City of San Jose v. Superior Court* (*City of San Jose*) (2017) 2 Cal.5th 608 – the recent Supreme Court case that rejected the previously common argument that the PRA only reaches records in the

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physical possession of agencies, and does not reach records stored on private electronic devices.

This Court – and any subsequent appellate court – is required to reject the City's narrow, restrictive interpretation and, instead, expansively interpret and apply *City of San Jose* so as to allow for more, not less, public access to records and information that pertain to the public's business. It is absurd to argue that the most recent and most powerful Supreme Court decision applying the sui generis policy objectives that strengthen the public's right to know could be used to justify denying the public access to the records the City is withholding.

III. THE CITY BEARS THE BURDEN OF PROOF AND PERSUASION.

A local agency withholding public records cannot merely assert that a document or information within a document is exempt from the reach of the California Public Records Act (PRA). The agency faces a heavy burden of proof and persuasion requiring a "clear overbalance" of proof in favor of nondisclosure. (Gov't Code § 6255; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 67; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282; *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 908, 906*; Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 712; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 299, 302; Gov't Code § 6255.)

These burdens are made heavier by special rules of evidence and procedure – discussed above - that require all courts to interpret all law and all ambiguities and resolve all close evidentiary questions in favor of findings that allow disclosure. (Cal. Const., art. I, § 3 (b) (2); *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166-167, 175) *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 756. [1]

[1] In the context of this case's facts – elected officials using their cell phones

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IV. THE CITY FAILS TO MEET ITS BURDEN OF PROOF.

The City is arguing that the records at issue are private communications, and therefore not public record. However, the City does not meet its burden of proving that the records at issue are private.

The PRA allows documents and information to be withheld on the grounds of *personal* privacy (Gov't Code § 6243(c)). Because privacy is a purely personal right, it cannot be asserted by anyone other than the person whose privacy is threatened with invasion. (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1131; *Hendrickson v. California Newspapers, Inc*. (1975) 48 Cal.App. 3d 59, 61).

To support a privacy claim, Respondent bears the burden of proving (1) the existence of a legally protected individual privacy interest; and (2) the individual's reasonable expectation of privacy under the circumstances. (*Hill v. National Collegiate Athletic Assn* (*Hill*). (1994) 7 Cal.4th 1, 39.) Even if a privacy interest is substantial and release of information would invade those interests, there is no actionable privacy interest unless the invasion is "clearly unwarranted." *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818. Speculative assertions supporting these elements are not enough; a privacy interest must be established with documentary or testimonial evidence. (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 73-74.)

Respondent presents no documentary or testimonial evidence demonstrating that anyone has a reasonable expectation of privacy in any of the information withheld or that the release of information would constitute an invasion of privacy that is clearly unwarranted under the circumstances. This failure is especially important in light of the unusually heavy burden of proof California law imposes upon any public agency attempting to prevent the disclosure of records. The City provides no evidence showing its interest in shielding information from disclosure outweighs the public's presumed right

during public meetings – the burden is nearly impossible to meet because public officials lose their privacy expectations connected to things they do in public. (*Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal.App.2d 733, 746-747.)

PAUL NICHOLAS BOYLAN, ESQ.
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to know. Thus, this Court is left to speculate, and, this Court is required to resolve such speculation in Petitioner's favor so as to allow disclosure.

In specific reference to the text messages and emails at issue, even if Respondent is able to prove all of the elements needed to support a viable privacy claim, Respondent must prove these elements are satisfies as to *all* of the information within any given communication. And even if any part of any of the communications at issue is proven private, Respondent must still comply with Gov't Code § 6253(a), redact the proven private information, leaving all other information vailable for public access – *as San Jose* instructs. (*City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 626 [stating "Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review. (*See* § 6253, subd. (a)"].)

V. REAL-WORLD CONSEQUENCES SHOULD BE CONSIDERED.

The City is essentially arguing that it can unilaterally decide – based on an extremely narrow interpretation of law - to withhold from public scrutiny communications public officials conducted in public during the time they are serving in their official capacity. If this Court endorses the City's viewpoint, it will encourage Respondent and other public agencies to never allow the public to determine whether or not a public official is using public time to conduct private business – a legitimate matter of public interest and public concern – resulting in less scrutiny and greater secrecy.

The California Supreme Court recently approved of reviewing courts deciding records access disputes with the policy goal of avoiding public agency game-playing that could result in less access to public records. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625.) [2] This Court should share the Supreme Court's concerns. If this Court

[2] Courts should always consider the impact of their rulings on public policy and the consequences that will flow from their decisions. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) Reviewing courts must select legal constructions that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of a statute. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Practical

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does not expressly repudiate the City's interpretations of law and fact, then the City and its officials will be encouraged to mix public with private business and prevent the public from either identifying the misuse of public time and resources or confirm that public time and resources are being spent wisely and properly.

VI. AN *IN CAMERA* REVIEW IS REQUIRED.

If this Court does not order the City to provide Petitioner with access to the records at issue because the City failed to meet its burden of proving the information at issue is private, then - as Petitioner argued, and, again, the City does not dispute - the proper mechanism for resolving a PRA dispute is through an *in camera* review of the records being withheld to determine if any of the records, or parts of those records, should be disclosed to the public. (Gov. Code §§ 6253 (a) and 6259 (a) and (b).) [3] Moreover, Petitioner – and this Court – have good reasons to distrust the City's evaluation of the facts and the law. (*See* Declaration of Thad Greenson, ¶¶ 10-13, filed herewith.) An independent judicial review is necessary to determine what, if anything, the public is entitled to access in records the City is withholding from public review.

CONCLUSION

For these reasons, Petitioner North Coast Journal respectfully requests that this Court either order the City of Eureka to provide access to the emails and text messages at issue or conduct an *in camera* review and, after that review, order the City to produce copes of all records responsive to Petitioner's request, but with the private information this Court identifies redacted.

Dated: July 31, 2017

PAUL NICHOLAS BOYLAN, ESQ.

PAUL NICHOLAS BOYLAN, attorney for
THE NORTH COAST JOURNAL

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constructions are preferred. (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1540.)

[3] Government Code § 6253 subd. (a) states in pertinent part "[t]he court *shall* decide the case after examining the record *in camera*." (Emphasis added.)

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REQUEST FOR RELIEF FROM DEFAULT

I. INTRODUCTION:

On Thursday, July 13, 2017 - one day earlier than specified in Code of Civil Procedure § 1005 - Petitioner North Coast Journal's attorney, Paul Nicholas Boylan, sent Petitioner's opening brief to the fax/filing service he uses with instructions to both file and serve Petitioner's opening brief that same day (with assurances that it would be faxed and served on July 13, 2017). (*See* Declaration of Paul Nicholas Boylan, below ("Boylan Decl."), ¶ 2.) On Monday, July 17, 2017, Mr. Boylan learned that, despite his instructions, Petitioner's opening brief had been filed but not served. (Boylan Decl., ¶ 2.)

Mr. Boylan immediately contacted Respondent's legal counsel, Cyndy Day-Wilson and informed her of the mistake and offered to email a copy to her. (Boylan Decl., ¶ 2.) Mr. Boylan also offered to stipulate to allowing Ms. Day-Wilson an extra day to compensate for the day she lost, with the day being taken from Mr. Boylan's time to file a reply brief. Ms. Day declined both offers. (Boylan Decl., ¶ 2.) Mr. Boylan then made arrangements for physical service that same day – resulting in service being one day later than specified in Code of Civil Procedure § 1005. (Boylan Decl., ¶ 2.)

In opposition to Petitioner's opening brief, Respondent argues that Mr. Boylan defaulted and that Petitioner's opening brief should be denied for that reason.

Mr. Boylan asks the Court to relieve him of the default on the grounds that any default due to one-day late service resulted of excusable neglect and that granting relief will not prejudice Respondent in any way.

II. THE COURT SHOULD GRANT RELIEF FROM DEFAULT.

A. Relief From Default is Favored.

Code of Civil Procedure § 473 provides relief from defaults taken as the result of mistake, surprise and excusable neglect. Relief from default pursuant to Code of Civil Procedure § 473 is liberally granted in order to allow cases to be heard on their merits. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 696.) Because the law favors disposing of cases on their merits, any doubts in applying Code of Civil Procedure § 473

must be resolved in favor of the party seeking relief from default. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

B. Mr. Boylan's Default Was The Result of Mistake, Surprise And/or Excusable Neglect.

As shown below in the Declaration of Paul Nicholas Boylan, the failure to file Petitioner's opening brief was the result of a his reasonable error. (Boylan Decl., ¶¶ 2 and 3.) For this reason, this Court should exercise its discretion to relieve Petitioner from the default caused by Mr. Boylan's mistake, surprise and excusable neglect.

C. Respondent Will Not Suffer Any Prejudice if Relief is Granted.

A Party should not be divested of valuable rights by way of default unless it is clearly made to appear that other party has suffered or will suffer serious detriment or damage by reason of the default, or that default was intentional or willful. (*Atkins v. Anderson* (1956) 139 Cal. App 2d 918, 920.) Respondent City alleges no prejudice from service that was one day late. Moreover, any prejudice, even if alleged or argued, was self-inflicted and avoidable because Respondent declined Mr. Boylan's offer to stipulate to allow Respondent an extra day to compensate for the day lost due to late service. Lack of Respondent prejudice weighs in favor of granting Petitioner's request for relief from default.

D. Relief From Default is Mandatory.

Ordinarily, the judicial power to grant a relief from default is discretionary. However, whenever an application for relief from default is accompanied by an attorney's sworn affidavit of fault, relief is mandatory. (Code of Civil Procedure § 473(b).) When an attorney affidavit of fault is filed, the reviewing court is not concerned with the reasons for the attorney's mistake. (*Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 256.) Relief must be granted even where the default resulted from inexcusable neglect by the defendant's attorney. (*In re Marriage of Hock & Gordon-Hoc* (2000) 80 Cal. App. 4th 1438, 1442; *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660; *Beeman v.*

PAUL NICHOLAS BOYLAN, ESQ.
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DAVIS, CALIFORNIA 95617

Burling (1990) 216 Cal.App.3rd 1586, 1604.)

Mr. Boylan admits that his client's default – if any – was caused solely by his mistake, surprise, inadvertence and/or neglect, and Mr. Boylan states that he has taken steps to prevent the same mistakes from happening again. (Boylan Decl., ¶ 3.) Under these circumstances, relief from default is mandatory.

Date: July 31, 2017

PAUL NICHOLAS BOYLAN, ESQ.

Attorney for Petitioner NORTH COAST JOURNAL

DECLARATION OF ATTORNEY FAULT

I, Paul Nicholas Boylan, declare:

1. I am the attorney of record for Petitioner North Coast Journal. I am licensed and am in good standing to appear before all Californian courts. I make this declaration from my own knowledge. I could and would competently testify as to the matters contained in this declaration if called upon to do so.

2. On Thursday, July 13, 2017, I sent Petitioner's opening brief to the fax/filing service I use with instructions to both file and serve Petitioner's opening brief that same day. I received assurances that the brief and accompanying declaration would be both filed and served on July 13, 2017. On Monday, July 17, 2017, when I emailed my fax/filing service to remind them to send me a copy of the proof of service, I learned that, despite my instructions, Petitioner's opening brief had been filed but not served. I immediately contacted Respondent's legal counsel, Cyndy Day-Wilson and informed her of the mistake and offered to email a copy to her. I also offered to stipulate to allowing Ms. Day-Wilson an extra day to compensate for the day she lost, with the day being taken from my time to file a reply brief. Ms. Day declined both offers. I then made arrangements for physical service that same day and received confirmation of service.

3. My failure to actually file Petitioner's motion on June 2nd was absolutely the result of my mistake, inadvertence, surprise and my excusable neglect. I should have

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checked to make sure service occurred on the day I instructed, but I have a long and successful business relationship with the fax/filing service I use and have always relied on assurances of service and filing. That will never happen again: I will always seek confirmation rather than rely on a past history of successful filing and service. I am confident this mistake will not happen again.

4. Respondent will suffer no prejudice if the relief from default is granted; whereas Petitioner will be suffer extreme prejudice in being denied his right to seek fees and costs as the prevailing party in a public records action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 31, 2017, in Davis, California.

PAUL NICHOLAS BOYLAN

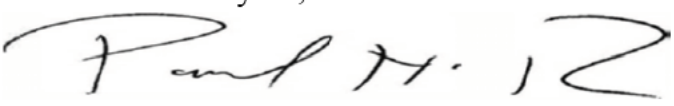
PROOF OF SERVICE VIA EMAIL

I, Paul Nicholas Boylan, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is POB 719, Davis CA 95617. On July 31, 2017, I served a document entitled "**PETITIONER'S REPLY RE ACCESS TO PUBLIC RECORDS; REQUEST FOR RELIEF FROM DEFAULT RE LATE FILING OF OPENING BRIEF; DECLARATION OF PAUL NICHOLAS BOYLAN; PROOF OF SERVICE VIA EMAIL**" via email per stipulation between the parties on the following persons at the following email addresses:

Cyndy Day-Wilson cday-wilson@ci.eureka.ca.gov	Attorney for Defendant/Respondent City of Eureka

I declare under penalty of perjury under the laws of the State of California that this proof of service was executed in Davis, California on July 31, 2017.



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