

TO: Honorable Members of the Open Government Commission

FROM: Bradford B. Kuhn, Nossaman LLP, on behalf of City of Alameda

DATE: October 12, 2021

RE: City's Position Statement: Open Government Commission Complaint Re: Garfinkle Public Records Request

1. INTRODUCTION

The City of Alameda ("City") acted lawfully and in accordance with the California Public Records Act and Alameda Municipal Code ("AMC") section 2-92 when it (i) promptly responded to Mr. Garfinkle's public records request, (ii) produced over 1,100 pages of responsive documents on a rolling basis over a three month period, and (iii) declined to generate a privilege log of documents withheld from production, particularly in light of the fact that the City did not withhold any documents.

2. BACKGROUND

A. The Public Records Request

On June 16, 2021, Mr. Garfinkle submitted to the City a public records request seeking communications between all representatives of the City government and the City's state and federal lobbyists covering a period of approximately nine months. (See Exhibit 1.) The City acknowledged receipt of the request on June 17, 2021 and stated that the Public Records Act did not specify a time limit to produce records, only that an estimate was required. (See Exhibit 2.) The City also stated that the request would be processed in the order it was received and consistent with the City's limited resources and current volume of requests. The City informed Mr. Garfinkle that there was currently a high volume of requests.

On June 24, 2021, the City informed Mr. Garfinkle that it would take approximately six to twelve weeks to process the request. (See Exhibit 3.) Locating responsive emails required building searches in the City's database and reviewing identified documents to determine if they were relevant and contained any privileged material. Batches of documents were produced to Mr. Garfinkle on June 22, August 18, August 19, August 23, September 15, and September 20, 2021. (See Exhibits 4-9.) *In total, 1,164 pages of documents were produced.* The City did not withhold any documents, and where redactions for privileged information¹ were made, the reason for the redaction was communicated to Mr. Garfinkle simultaneously with the production of the documents and the portions redacted were identified by the word "Redacted" in red font on the applicable document. From the initial request, the City was able to produce all

¹ No documents were withheld; however, certain information from the documents were redacted based on an attorney-client communication, attorney work product, or deliberative process.

documents within approximately three months -- the original time estimate communicated to Mr. Garfinkle.

B. The Complaint

On October 4, 2021, an Open Government Commission Complaint ("Complaint") was submitted by Mr. Garfinkle against the City. The Complaint alleges that the City's handling and production of documents in response to Mr. Garfinkle's public records request violated the Public Records Act and AMC 2-92. Specifically, the Complaint asserts that (1) a rolling production of documents across a three month period was an excessive amount of time to process the request, and (2) Mr. Garfinkle should have received an identification of all exempted documents, including an explanation of the subject of the communication and the names of the senders and recipients -- essentially a privilege log.

3. DISCUSSION

The California Public Records Act (Government Code section 6250 *et seq.*) and AMC section 2-92 require the disclosure of governmental records to the public upon request. AMC section 2-92 requires the City to respond to requests in the same time frame and manner as set forth in the Public Records Act. (AMC, § 2-92.2 (c).)

As demonstrated below, the City's rolling production of documents within three months of the request was proper, and the Public Records Act does not require the governmental agency to take on the additional task of preparing and producing a privilege log (especially here where no documents were withheld). Thus, the actions of the City were lawful and proper.

A. The City's Timing on the Production of Documents was Proper.

Government Code section 6253, subdivision (b) requires that in response to a public records request, records should be made available "promptly," but it does not provide a specific time frame in which the records must be produced. (See also 88 Ops.Cal.Atty.Gen. 153 (2005).) Once the governmental agency determines that there are indeed responsive documents, the agency is to provide an estimated date and time when the records will be made available. (Gov. Code, § 6253, subd. (c).)

In the case of *Rogers v. Superior Court of Los Angeles Cty.* (1993) 19 Cal.App.4th 469, 483 ("*Rogers*"), the court found the city timely and promptly disclosed records when the request was made at the end of March 1992, and most of the records were produced in April and May, with the remaining documents produced in July. The court concluded that the production of documents on a rolling basis as the city identified them was proper and satisfied the "promptness" requirement of the Public Records Act.

In this case, the City informed Mr. Garfinkle that it currently had a high volume of requests and it estimated six to twelve weeks to process the request. The records were subsequently produced on a rolling basis as they became available -- in five batches. Mr. Garfinkle received all of the requested documents within approximately three months of his request and some even quicker due to the rolling production. This rolling production and timeline is nearly identical to that which was determined to be lawful and acceptable in the *Rogers* case, especially here where the search involved a request for records spanning a nine-month period and involved the City's undertaking a complex search and review of over 1,150

emails for privileged materials. Therefore, the City produced the documents promptly and complied with the requirements of the Public Records Act.

B. The Law Does Not Require a Privilege Log to Be Created.

The Public Records Act does not impose a duty on governmental agencies to spend the time and resources creating a privilege log when responding to a public records request. The agency need only produce documents, not create them. (*Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 665-666 [affirming that under California law, "while the CPRA requires public agencies to provide access to their existing records, it does not require them to create new records to satisfy a request"].)

In the case of *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, the California Supreme Court held there is "nothing in the act itself that mandates any action other than opening for inspecting the records identified ... or providing copies.... Preparing an inventory of potentially responsive records is **not mandated** by the CPRA." (*Haynie, supra*, 26 Cal.4th at p. 1074, emphasis added; see also *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1193 ["The Public Records Act does not...require the maintenance of an index of records available for public inspection."].) If such a requirement existed, it "has the potential for imposing significant costs on the agency" and "would be burdensome and of scant public benefit." (*Haynie, supra*, 26 Cal.4th at 1074.)

Just as there is no requirement to make an index, there is no requirement that an agency prepare a privilege log. "Although the [California Public Records Act] describes its procedures and exceptions 'in exceptionally careful detail,' it **contains no equivalent provision describing an agency's duty to create a log of documents exempt from disclosure.**" (*Ibid*, emphasis added.) Further, case law "has never approved or even mentioned a public agency's obligation to create a list and description of documents withheld at the pre-petition stage." (*Ibid*.) Therefore, the California Supreme Court confirmed that an agency need only produce documents, not take on the burden of creating them.

As stated in the Complaint, Mr. Garfinkle expected exempted documents "to be specifically identified along with an explanation of the subject of the communication and the names of the senders and recipients." This request is equivalent to a privilege log or an index of the public records at issue in this case, which is not a mandated aspect of the Public Records Act. (*Haynie, supra*, 26 Cal.4th at 1074.) The City's actions in not creating and producing a privilege log is within the expectations and reasoning of both the Public Records Act and the California Supreme Court case of *Haynie*.

Beyond the law not mandating a privilege log, the City could not have identified exempt documents even if it wanted to, **because there were no exempted documents to identify.** The City did not withhold any relevant documents and where redactions for privileged material were needed, the reason for the redaction was communicated to Mr. Garfinkle via email simultaneously with the production of the documents. Thus, both the law and the facts support the finding that the City did not violate the Public Records Act or AMC 2-92.

4. RECOMMENDATION

Bradford B. Kuhn, of Nossaman LLP, on behalf of the City, recommends that the OGC find the complaint to be unfounded on the following grounds: the City's actions in producing 1,164 responsive documents on a rolling basis within three months of the request, and declining to create a privilege log (especially where no documents were withheld), complied with the Public Records Act and AMC 2-92.

Exhibits:

1. June 16, 2021 Public Records Request
2. June 17, 2021 City Confirmation of Receipt of Request
3. June 24, 2021 City's Estimation of Time to Complete Request
4. June 22, 2021 Production Email from Sarah Henry
5. August 18, 2021 Production Email
6. August 19, 2021 Production Email
7. August 23, 2021 Production Email
8. September 15, 2021 Production Email
9. September 20, 2021 Production Email

Exhibit 1

From: Jay [<mailto:garsurg@comcast.net>]

Sent: Wednesday, June 16, 2021 3:44 PM

To: Lara Weisiger <lweisiger@alamedaca.gov>

Subject: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists
June 16, 2021

Good afternoon, Ms. Weisiger.

I would appreciate it if you could pass this request for production of copies of communications to the custodian(s) of the following documents: emails and other written communications sent from or received by Alameda City officials, including Staff, the Mayor, and other members of the City Council related to existing law, pending legislation, and/or contemplated future legislation. This request is for such documents which have been sent to and/or received from persons who, in an official capacity, represent the City's position(s) on legislative issues to members of the Legislature, other elected officials of the State of California, and employees/officers of any/all California Agencies and/or departments. This request also covers such relevant documents that may have been sent to or received from elected and/or employed officials of Alameda County and/or the government of the United States.

I am requesting copies of such documents sent and/or received between January 1, 2021 and the date on which the records will be made available to the undersigned.

Thank you for your attention to this Public Records Act request. Please contact me by email should any of the custodians require clarification of the details of this request.

Jay Garfinkle

Exhibit 2

From: Lisa Cooper <lcooper@alamedacityattorney.org>
Sent: Thursday, June 17, 2021 5:04 PM
To: 'Jay'
Cc: Lara Weisiger
Subject: FW: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists

Mr. Garfinkle,

On behalf of the City Clerk and pursuant to Alameda Municipal Code Section 2-92.2(d), this email acknowledges receipt of your June 16, 2021 California Public Records Act request, below, which you emailed to the City Clerk.

The Public Records Act and related Sunshine Ordinance provisions ("PRA") provide timeframes to determine whether a request seeks disclosable records. (Gov. Code, § 6253(c).)

The PRA contains no specific time limits for producing disclosable records. Instead, it requires agencies to provide an estimate of the date the records will be made available. (*Id.*) This is because the PRA recognizes that governmental operations should not come to halt in order for the public agency to respond to PRA requests, particularly requests for voluminous document sets. (See, e.g., *Rogers v. Superior Court*, 19 Cal.App.4th 469, 483 (1993) [finding that request for production of records of 1990 convention in April and May of 1992 was timely].)

This request will be handled in the order in which it is received by an attorney, and consistent with our limited resources and the current volume of requests (which at this moment is very high).

Regards, Lisa

Lisa K. Cooper

Paralegal

City of Alameda

2263 Santa Clara Avenue, Room #280

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(510) 747-4764

lcooper@alamedacityattorney.org

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Exhibit 3

From: Lisa Cooper <lcooper@alamedacityattorney.org>
Sent: Thursday, June 24, 2021 10:26 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists

Mr. Garfinkle,

We have determined that there are records responsive to your request and estimate that the records will be made available to you in 6 to 12 weeks. This notification is sent to you pursuant to the City's Sunshine Ordinance and Section 6253 of the Government Code.

Please note that some of the records responsive to your request may be subject to exemptions pursuant to applicable law. Those exemptions may include but are not limited to those found in Sections 6254(k) and 6255 of the Government Code and/or Sections 952, 954 and 1040 of the Evidence Code and records implicating privacy interests protected by the California constitution. Records that are subject to an exemption will not be included in the documents that are made available to you or will be redacted.

Regards, Lisa

Lisa K. Cooper

Paralegal

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Exhibit 4

From: Sarah Henry
Sent: Thursday, June 24, 2021 12:27 PM
To: Lara Weisiger; Lisa Cooper
Subject: FW: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists
Attachments: [EXTERNAL] RE: AB 1322; [EXTERNAL] AB 1322 Position; [EXTERNAL] RE: State legislation to review; RE: Bonta/Skinner Bills

From: Sarah Henry
Sent: Tuesday, June 22, 2021 5:07 PM
To: 'JayG'
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists

Afternoon! To the best of my knowledge the City Manager and I are the only people in the organization who communicate with our State lobbyist regarding legislation, but I know that a full email search of the system is being conducted.

I regularly review bills to see if there are any that are consistent with the City's adopted legislative agenda that the City should consider weighing in on. If there is legislation that is supported in the legislative agenda, we will draft a letter. If the legislation is in the legislative agenda but I'm not sure if we should support, I'll send the legislation to relevant staff to ask for their thoughts. If they recommend supporting the bill, we will draft a letter. Rosanna, our lobbyist, then sends the draft letters to me and the City Manager, I review and edit the letters and send them to the Mayor, who reviews and edits before signing. I'll then send the signed letters to Rosanna to distribute.

I searched my email communications with our lobbyist and found the attached four emails re: AB 1322, one of which also references a few of the other bills you noted. The first, subject Bonta/Skinner bills, shows an email I sent to Rosanna saying that I sent AB 1322 to Andrew Thomas and Lisa Maxwell to get their feedback. The second, subject State legislation to review, shows the email thread where I sent a few bills (including AB 1322, SB 8, SB 9, SB 290, and SB 15) to Andrew and Lisa asking for their feedback, and Andrew's reply. The third, subject AB 1322 Position, is an email from Rosanna where she talks about a call she and Eric Levitt had about the bill, and she noted that Eric intended to take the bill to Council to ask if they wanted to support it, but once Bonta left the Assembly we did not take the bill to Council and have not taken a position. The last, subject Re: AB 1322, is an email I sent Rosanna asking for the status and what cities would be affected by AB 1322 and her reply.

I think this answers your questions but I am also happy to talk by phone if you'd like to hear more about the process or the actions I have taken.

Many thanks,
Sarah

Exhibit 5

From: Lisa Cooper
Sent: Wednesday, August 18, 2021 9:51 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists - batches 1 & 2
Attachments: Batch 01.pdf; Batch 02.pdf

Mr. Garfinkle,
Attached please find the first two batches of emails with the City's State lobbyist responsive to your PRA below. Please note there were no exemptions in batches 1 & 2.

Regards, Lisa

Lisa K. Cooper

Paralegal

City of Alameda

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Exhibit 6

From: Lisa Cooper
Sent: Thursday, August 19, 2021 9:42 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists - batch 3
Attachments: State Batch 03_Redacted.pdf

Mr. Garfinkle,
Attached please find batch 3 of emails between the City and the City's State lobbyist responsive to your PRA below. Redactions were made pursuant to Attorney-Client communications, Government Code section 6254(k) "[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." We will continue to produce records on a rolling basis.

Regards, Lisa

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Exhibit 7

From: Lisa Cooper
Sent: Monday, August 23, 2021 10:04 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists - batch 4
Attachments: State Batch 04_Redacted.pdf

Mr. Garfinkle,
Attached please find batch 4 of emails between the City and the City's State lobbyist responsive to your PRA below. Redactions were made pursuant to Attorney-Client communications, Government Code section 6254(k) "[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." We will continue to produce records on a rolling basis.

Regards, Lisa

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Exhibit 8

From: Lisa Cooper
Sent: Wednesday, September 15, 2021 9:32 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Sacramento lobbyists - batches 5 & 6
Attachments: State Batch 05_Redacted.pdf; State Batch 06_Redacted.pdf

Mr. Garfinkle,
Attached please find batches 5 & 6 of emails between the City and the City's State lobbyist responsive to your PRA below. Redactions were made pursuant to Attorney-Client communications, Government Code section 6254(k) "[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" and Government Code, section 6255 (deliberative process privilege), as disclosure in those instances would inhibit free and candid communication between staff and their agents on matters within their purview.
We will continue to produce records on a rolling basis.

Regards, Lisa
Lisa K. Cooper
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Exhibit 9

From: Lisa Cooper
Sent: Monday, September 20, 2021 9:19 AM
To: 'Jay'
Cc: Lara Weisiger
Subject: RE: [EXTERNAL] PRA re communications with Alameda's Federal lobbyist
Attachments: Federal Lobbyist.pdf

Mr. Garfinkle,
Attached please find emails between the City and the City's Federal lobbyist responsive to your PRA below.

This completes the City's response to your PRA.

Regards, Lisa

Lisa K. Cooper

Paralegal

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