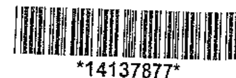
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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By ________ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Petitioner, vs. DIANE URBAN, et al, Respondents.	RG15-785743 ORDER GRANTING PETITION FOR WRIT OF MANDATE Date: March 17, 2016 Time: 1:30 pm Dept.: 14

INTRODUCTION

The petition of the National Lawyers Guild, San Francisco Bay Area Chapter ("NLG") for a writ of mandate to compel the City of Hayward ("Hayward") to refund costs charged for production of public records under the California Public Records Act ("CPRA") came on regularly for hearing on March 17, 2016, in Department 14 of this Court, Judge Evelio Grillo presiding. The Court having considered the pleadings and arguments submitted in support of and in opposition to the petition, it is hereby ORDERED: The petition of the NLG for a writ of mandate is GRANTED.

PROCEDURE

The court issued a tentative decision before the initially scheduled hearing that framed the analysis differently than the parties and invited short supplemental briefs. The

court also invited additional evidence on: (1) how many hours Hayward employee Perez spent on the third review of the videos in which he did the actual work of redacting exempt information from the videos (Perez Dec., paras 34-40; Perez depo at 34-35, 49-50), and (2) the specificity of the redactions in the redacted videos. The parties submitted additional briefs and evidence. (*Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

SUMMARY OF OPINION

This case presents issues of statutory interpretation under the California Public Records Act ("CPRA") regarding whether and, if so, under what circumstances pubic agencies can charge CPRA requestors for the costs of related to defining and focusing a request, identifying responsive public records, reviewing the public records for exempt information, redacting information from public records, and producing public records. The court holds as a matter of law that in Government Code 6253(b) and 6253.9(a)(2), the phrase "data compilation, extraction, or programming to produce the record" does not refer to making a redacted version of an existing public record. The court holds as a matter of law that under Government Code 6255, the CPRA's catch-all exemption, a public agency asserting that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record" may consider the expense and inconvenience of all aspects of responding to the CPRA request, including the cost of redacting public records.

The case factually concerns the application of Government Code 6255 to Hayward's decision to charge the NLG for some of the costs related to identifying, reviewing, redacting, and producing documents and body camera videos taken by police officers. Hayward spent over 170 hours locating, retrieving, reviewing, redacting, and producing both written and electronic public records and spent the vast majority of those hours as part of the regular expected burden of complying with a CPRA request. Hayward has not demonstrated that its CPRA compliance imposed an undue burden over and above the regular expected burden. Hayward therefore could not condition production of the redacted videos on payment of both the $1 direct cost of production and $3,246.47 in staff time related to redacting the videos. Hayward must, therefore, return the previously charged $3,246.47 to the NLG.

FACTS

The Hayward Police Department has a policy requiring police officers to wear and use body worn cameras. (Roush Dec., paras 5-8, Exh 1 and 2.). Hayward police officers assisted officers in a neighboring city regarding a public demonstration on 12/6/14 and subsequent demonstrations.

On 12/31/14, third party John Hamasaki made a CPRA request for public records relating to the actions of Hayward police officers at the various demonstrations. On 1/28/15, the NLG made a CPRA request for eleven categories of documents. There was substantial overlap between Hamasaki's 12/31/14 request and the NLG's 1/28/15 request. (Nishioka Dec., Exh 15a.) There is no indication that Hamasaki narrowed these requests or that Hayward has responded to them.

The NLG's CPRA request sought eleven categories of documents, including any and all written, audio, or video records relating to actions of Hayward police officers at the various demonstrations. Hayward located, retrieved, reviewed, redacted, and produced over 220 public records. (Perez Dec., para 7-24.) On 3/11/15, Hayward produced these records to NLG and did not charge NLG for either staff time or the direct cost of production. (Perez Dec., para 24.) On 3/17/15, Hayward produced records in response to NLG's follow-up on CPRA request and again did not charge for either staff time or the direct cost of production. (Perez Dec., para 25.)

The attention then turned to the police body worn videos. On 3/18/15, the NLG narrowed its request to (1) body camera video from 2 identified officers from 7:56-8:30 pm on 12/6/14; (2) body camera video from 5 identified officers from 9:52-10:30 pm on 12/6/14; (3) body camera video from 5 identified officers from 12:55-1:10 am on 12/7/14. (Nishioka Dec., Exh 10, Lederman email of 3/18//15 at 5:43 pm.)

Hayward had previously identified the relevant videos, which were in MP4 format for video and MP3 for audio. Hayward employee Adam Perez had previously spent 40-45 hours reviewing the videos for exempt material before the NLG narrowed its request. (Perez Supp. Depo at 7-8.) Perez then spent 5-6 hours reviewing the narrowed selection of videos for exempt material. (Perez Supp. Depo at 8.) The Hayward City Attorney also looked at the videos for exempt material. (Perez Supp. Depo at 9.)

Perez then spent 3-4 hours reviewing the videos closely to determine exactly when the exempt material started and stopped and whether it was in the audio or the video portion. (Perez Supp. Depo at 12.) Perez then spent 8-9 hours listening to the audio portion and deleting the portions that were exempt. (Perez Supp. Depo at 12.)

Perez then spent 23 hours using Windows Movie Maker software to redact the exempt portions of the video from the public records. (Perez Dec., para 34-40; Perez depo at 34-35, 49-50; Perez Supp. Depo at 12-13).)

Hayward employee Perez spent a total of 170 hours on the project as a whole, including time spent locating, retrieving, reviewing, and redacting, and producing the public records, as well as time Perez spent learning to use video editing software. (Perez Dec., para 42.) The NLG's 1/28/15 request was Hayward's first experience with a CPRA request for video that required redacting, and Perez's first use of the video editing software. (Perez depo at 51-52.)

On 5/14/15, counsel for Hayward discussed a rolling production and suggested that Hayward would charge $103 per disk as suggested on its standard fee schedule. (Nishioka Dec., Exh 10, Nishioka email of 5/14/15 at 10:55 am.) (See also Nishioka Dec., Exh 11 [Hayward fee schedule stating $103 per "communication tape"].) This prompted the NLG to assert on 5/14/15 that under the CPRA a public agency can charge only for the direct cost of production. On 5/14/15, counsel for Hayward stated that the videos were available for production at a cost of $2,938.58, which was $1 for the cost of the DVD and $2,937.58 for the staff time. (Nishioka Dec., Exh 10, Nishioka email of 5/15/15 at 5:20 pm.) Before the exchange on 5/14/15, there had been no discussion of the cost of locating, retrieving, reviewing, redacting, and producing the public records. On 5/18/15, Hayward sent an invoice for $2,938.58 for the first set of videos totaling 232 minutes.

On 8/26/15, the NLG, made a CPRA request specifically seeking police body camera video. The NLG requested (1) video from the cameras of 24 identified officers

from 7:56-8:30 pm on 12/6/14; (2) video from the cameras of 24 identified officers from 9:52-10:30 pm on 12/6/14; (1) video from the cameras of 24 identified officers from 12:55-1:10 am on 12/7/14. (Nishioka Dec., Exh 13.) This request amounted to 2088 minutes, or almost 35 hours, of police body worn video

On 10/2/15, Hayward sent a second invoice to the NLG for $308.89 for a second set of videos totaling 65 minutes. (Nishioka Dec., Exh D [Perez Depo Exh 4].)

For each CPRA request, Hayward permitted NLG to view the redacted videos to see the content. Hayward required the NLG to pay the invoices as a condition of producing copies of the redacted videos or permitting NLG to make copies of the redacted videos. (Lederman Dec,. para 2 and 4.)

Hayward charged the NLG for 35.3 hours of Perez's time, which Hayward valued at $72.50 per hour, and 4.9 hours of Mr. Roush's time, which Hayward valued at $77.21 per hour. (Perez Depo Exh 2.) Hayward later trained a records clerk in video editing and her hourly rate is $30.41. (Perez Dec., para 47.) Hayward did not charge for any time spent related to collection, downloading, indexing, or storage of the police camera videos. (Roush Dec., para 9.)

Hayward presented evidence that a commercial video editing service estimated editing 6 hours of video with 2-3 edits every 30 seconds of video would take a roughly 160 hours at a rate of $65 per hours, for a total estimated cost of $10,400. (Hayward Supp Oppo, Exh 3.)

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ANALYSIS

The NLG filed this petition under Code of Civil Procedure section 1085. The court may issue a writ under Code of Civil Procedure section 1085 directing a public agency to perform its functions in conformity with the law. In this case, the issue is whether Hayward charged the NLG costs under the CPRA in conformity with the law.

On issues of statutory interpretation and construction, the court applies its independent judgment. On the factual issues under Government Code 6255, Hayward has the burden of proof and must "demonstrate a clear overbalance on the side of confidentiality." (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 228.) Hayward must demonstrate the clear overbalance by a preponderance of the evidence. (Evidence Code 115. (See also *Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1015-1018 [distinguishing between burden of proof in trial court and standard of review in Court of Appeal].)

A. CHARGING FOR DIRECT COST OF PRODUCING PUBLIC RECORDS - STATUTORY INTERPRETATION OF GOVERNMENT CODE. 6253(b) AND 6253.9(a)(2).

Government Code 6253(b) and 6253.9(a)(2), state that a public agency may charge for the "direct costs of duplication" of public records without regard to whether they are maintained in paper or electronic format. "'Direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." (*North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 147-148.) This law is settled.

After the hearing, the Court of Appeal issued *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432 ("*Stanisalus*"). In *Stanislaus*, the Court considered the limiting prepositional phrases and held that the phrase "direct costs of duplication" under Government Code 6253(b) was narrower than the "direct ... costs of providing the product or service" under Government Code 27366. (*Stanislaus*, 246 Cal.App.4th at 1454.) *Stanislaus* did not question the reasoning or conclusion of *North County Parents Organization.*

B. CHARGING FOR COSTS OF "DATA COMPILATION, EXTRACTION, OR PROGRAMMING" - STATUTORY INTERPRETATION OF GOVERNMENT CODE. 6253.9(b).

Government Code 6253.9(b) is an exception to the general rule that a public entity may charge only for the direct cost of production. Government Code 6253.9(a) and (b) state:

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.
>
> (b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to

construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) The request would require data compilation, extraction, or programming to produce the record.

Hayward argues that under Government Code 6253.9(b) a public agency may charge a CPRA requestor for the cost of redacting public records to "extract" exempt information from the public records. This is not a reasonable interpretation of the California statute. (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 396-397.)[1]

Starting with the words of the CPRA, under the CPRA a public agency must make public records promptly available unless the records are "exempt from disclosure by express provisions of law." (Government Code 6253(b).) The CPRA section at issue here, Government Code 6253.9, is expressly limited to "an identifiable public record not exempt from disclosure pursuant to this chapter." Therefore, Government Code 6253.9(a) and (b) concern the production of non-exempt public records, which means complete public records with no redactions of exempt information. There is no indication in Government Code 6253.9(a) or (b) that the cost provisions concern time spent redacting exempt information from existing public records.

[1] The federal statute is different. The federal FIOA has a provision that permits a federal agency to charge for the cost or redacting public records. (5 USC 552(a)(2).)

The text of Government Code 6253.9(b)(2) strongly suggests that this exception applies only when a CPRA request requires a public agency to produce a record that does not exist without compiling data, extracting data or information from and existing record, or programing a computer or other electronic devise to retrieve the data. The court reads section 6253.9(b) and 6263.9(b)(2) together. Government Code 6253.9(b) states that if public records are in electronic format, and if the request would require "data compilation, extraction, or programming to produce the record" (Government Code 6263.9(b)(2)), then a public agency can charge for "the cost of producing a copy of the record, including the cost to *construct* a record, and the cost of programming and computer services necessary to produce a copy of the record" (Government Code 6263.9(b)(emphasis supplied). Reading section 6253.9(b) and 6263.9(b)(2) together strongly suggests that a public agency may require cost reimbursement where the "data compilation, extraction, or programming" is necessary to "to construct a record," but it does not suggest that when a request is made under the CPRA for an *existing* public record, that the agency may charge for information or data removed from that record. It does not appear that the Legislature intended to use the words "data compilation," "extraction," or "programming" in a technical sense. That being so, in the context of the CPRA, the court must "first examine the statutory language giving it a plain and commonsense meaning. . . (*Regents of University of California, supra,* at 397.) The court must "examine that language [not] in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts. . .If the statutory language is clear, courts must generally follow its plain

meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Id.*)

The "plain and commonsense" meaning of "compilation" is something compiled, *i.e.*, "1: to compose out of materials from other documents 2: to collect and edit into a volume . . . ." (Merriam-Webster's Collegiate Dictionary (10th Edition 1998, p.235.) Compilation is "something compiled." (*Id.*) Stated another way it is the process of *assembling* information collected from other sources. Similarly, the plain and commonsense meanings of "extraction" include "to extract something," as in "1: a selection from a writing or or discourse: Excerpt" and "1 a: to draw forth (as by research) <~data> . . . ." (*Id.*) The production or construction of a public record that did not exist previously by compiling from disparate sources or by extracting data from a source clearly would satisfy the criteria for cost recovery under section 6253.9. Conversely, the agency's redaction and retention of exempt material from an existing public record, and subsequent production of that existing record without the exempt material included, would involve neither the "compilation" of information or the "extraction" of information that was subsequently produced pursuant to the CPRA.

Second, in section 6253.9(b)(2) the phrase "data compilation, extraction, or programming to produce the record" suggests that the three actions apply in similar ways to public records. As a matter of statutory construction, when a group of actions are listed together they are presumed to have a similar effect. A public agency could, for example, compile data from disparate sources, or could extract data from a single large document and produce the data pursuant to a CPRA request, or it could program a computer to obtain data that did not otherwise exist in a readily retrievable form. In all

three cases, the public agency would be manipulating public records of existing data to create a new document that could be produced in response to a CPRA request, subject to any review for exempt material.

Third, section 6253.9 as a whole appears to use the phrases "public record" and "record" interchangeably. There is no indication that the statute was intended to apply to the redaction of public records. The phrase "data compilation, extraction, or programming to produce the record" therefore logically refers to the construction or production of data to be produced to the recipient, and not to the creation of a redacted version of a previously existing public record.

The texts of other CPRA sections are informative. The court considers section 6253.9 in the context of section 6253(a), which states that a public agency must produce the non-exempt information in public records if it can be reasonably segregated from the exempt information in the public records. (*See, e.g., Regents, supra*, at 397 ("portions of a statute [must be considered] in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every work, phrase, sentence and part. . . .") (Government Code 6253(a) states:

> Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

Section 6253(a) suggests that if a public agency is removing or redacting exempt information then it is simply segregating exempt information. This in turn suggests that the "extraction … to produce the record" in section 6253.9(b)(2) means the compiling information for production to the CPRA requestor, and not the segregation of exempt information from a public record. Where the legislature uses two clearly different words

in the same statutory scheme, the court presumes that the legislature meant two different things.

Considering the CPRA as a whole, permitting a public agency to charge a CPRA requestor for the costs related to the agency's "extraction" of exempt information under section 6253.9(b) would be contrary to the legislature's decision to limit charges to a public agency's "direct costs of duplication." The court will read the word "extracting" consistent with the broader legislative scheme. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.)

The apparent legislative intent of section 6253.9 was to address issues particular to information in electronic format "relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency." (Government Code 6252(e).) There is, however, no indication that the legislature intended to permit a public agency to characterize its redactions of electronic documents as "extractions" and thereby recover its costs of redacting exempt information, but not to permit the public agency to recover its costs of redacting exempt information from paper public records if the agency performs the redaction with a black felt marker.

CPRA case law suggests that the court should not read section 6253.9 to permit an agency to charge for the costs of extracting exempt information from existing public records. *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 147-148, states that "Direct cost" does not include "ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." Agency review of a public record before producing the document to determine what is "reasonably segregable" and the redaction of any exempt

information from the document is an ancillary task, and not a direct cost of producing the document.

Analogous provisions of other statutes and the case law suggest that it is unlikely that the Legislature intended to allow an agency to charge for the costs of reviewing public records for exempt information, and then charge additional fees for redacting the exempt information from those records. Under CEQA a petitioner may elect to prepare an administrative record and the public agency can, and should, review it for completeness. In *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1059, the court held that a public agency cannot charge the petitioner for the time spent checking for completeness. *Coalition,* 229 Cal.App.4th at 1059, states "This sort of review is a chore public agencies face in every case in which the petitioner elects to prepare the record under subdivision (b)(2), and if an agency could always claim a sizeable amount for review "for completeness" or "certification," that would defeat the Legislature's aim of providing for lower-cost record preparation alternatives." Similarly, reviewing public records for exempt information and redacting that information is "a chore public agencies face in [CPRA request] and if an agency could always claim a sizeable amount for review [for identifying exempt information], that would defeat the Legislature's aim of providing for [pubic access to public records]."

Under Penal Code 1054.9, a person sentenced to death or to life without the possibility of parole can obtain discovery materials from the prosecution and from law enforcement but must pay the "actual costs of examination or copying." In *Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, the court held "examination" referred to the

defendants' cost of examining physical evidence. The court then examined "the actual costs of ... copying" and stated:

> [T]he actual costs of copying do not encompass costs related to examining, redacting, and preparing documents for production in response to a section 1054.9 request. However, "actual costs" does include the labor cost of the employee who actually copies items or transfers them to electronic media, as well as a proportional share of equipment costs and the cost of the "product" itself—for example, the ink, paper, or compact disc.

(*Rubio*, 244 Cal.App.4th at 483.) The Court's analysis included the observation that the "Legislature's intent was to enable defendants to efficiently reconstruct defense attorneys' trial files" and that "imposing a large bill on defendants would tend to stifle post conviction requests." (*Rubio*, 244 Cal.App.4th at 484.) Just as under Penal Code 1054.9 the "actual costs of copying do not encompass costs related to examining, redacting, and preparing documents for production," it is unlikely that the legislature intended that under section 6253.9(b) a public agency could for electronic records recover the "costs related to examining, redacting, and preparing documents for production."

The court takes judicial notice that public agencies regularly undertake the expense of reviewing the public records and redacting exempt information before releasing records in response to a CPRA request. In *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, the California Supreme Court recently held that a public agency's inadvertent disclosure of documents in response to a CPRA request does not waive attorney-client and work product privileges. In reaching that decision, the Court noted that public agencies must respond to CPRA requests promptly, that pubic agencies have limited resources, and that public entities face "logistical problems ... in reviewing, in

some cases, even thousands of pages of records responsive to a public records request." That noted, if public agencies could routinely charge CPRA requestors for the costs related to the review and redaction of any electronic public records, then the cost of electronic records exception would swallow the general rule that public agencies can charge only for the for the direct cost of producing public records.

Based on the above, the court concludes that under Government Code 6253.9(b) the "extraction" of electronic information from existing public records does not include the review and redaction of exempt or privileged material from such records, where the information extracted is retained by the public agency.

C. CHARGING FOR UNDUE BURDEN OF PRODUCING PUBLIC RECORDS - STATUTORY INTERPRETATION OF GOVERNMENT CODE. 6255.

Under the CPRAs' catch-all exemption, Government Code 6255, a public agency may refuse to produce public records based on an undue burden or it may condition production on the CPRA requestor paying some of the cost related to the identification, collection, review, redaction, and production of the public records at issue. Government Code 6255 states:

> 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.

The weighing analysis is flexible and fact specific. It can concern whether documents are exempt due to their content, whether a CPRA request is unduly burdensome due to its

volume, or (as in this case) whether a CPRA request is unduly burdensome due to the cost of segregating and/or redacting exempt information.

The CPRA expressly permits a public agency to segregate exempt information in public records from information that must be disclosed to the public. Government Code 6253(a) states:

> Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

As a general principle, " 'where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the [CPRA] to make public records available for public inspection and copying unless a particular statute makes them exempt.'" (*Humane Society of the United States v. Superior Court of Yolo County* (2013) 214 Cal.App.4th 1233, 1274.) (See also *Pasadena Police Officers Association v. Superior Court* (2015) 240 Cal.App.4th 268, 291.)

The CPRA does not have a provision that permits a public agency to charge a CPRA requestor for the costs associated with the segregation of exempt portions of public records from the portions that must be disclosed. In addition, the structure of section 6253 suggests that as a general principle a public agency cannot charge for the cost of segregating exempt from non-exempt portions. Section 6253(a) concerns segregation and section 6253(b) concerns the charging of costs, but 6253(b) does not state that a public agency can charge the costs of segregating exempt from non-exempt portions.

In *Northern Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 124, the court considered the cost of redacting documents and stated:

> [T]he PRA has been judicially interpreted to require segregation of exempt from nonexempt materials contained in a single document ... . We conclude that where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the PRA to make public records available for public inspection and copying unless a particular statute makes them exempt. ... Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the PRA favoring disclosure is to be implemented faithfully. If the burden becomes too onerous, relief must be sought from the Legislature.

That noted, "[t]he burden of segregating exempt from nonexempt materials [is] one of the considerations which the court can take into account in determining whether the public interest favors disclosure under section 6255." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453 fn 13.)

All of the above suggests that if a public agency determines that the cost of reviewing and redacting a public record "clearly outweighs the public interest served by disclosure of the record," then the public agency can require the CPRA requestor to make a financial contribution that will reduce the financial burden on the public agency to a level that reduces the burden to a point where it no longer "clearly outweighs the public interest served by disclosure of the record." Public agencies must bear the reasonable costs of complying with the CPRA. (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 237 ["There is nothing in the [CPRA] to suggest that a records request

must impose *no* burden on the government agency']; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 615-616 ["an agency may be forced to bear a tangible burden in complying with the Act absent legislative direction to the contrary"].) Public agencies are not, however, required to bear an undue burden. (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452-453 ["We reject the suggestion that in undertaking this task the courts should ignore any expense and inconvenience involved in segregating nonexempt from exempt information"]; *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1425 ["An agency may legitimately raise an objection that a request is overbroad or unduly burdensome"].)

The standard of when the cost "clearly outweighs the public interest served by disclosure of the record" is specific to the CPRA. The CPRA and the related provisions in the California Constitution demonstrate a strong policy that the public should have prompt and low cost access to public records. Under Government Code 6255, a public agency must demonstrate that the burden of locating, retrieving, reviewing, redacting, and producing public records "clearly outweighs" the public interest served by disclosure of the record. The burden a public agency must bear as part of permitting public oversight of public institutions on matters of public importance is therefore greater than the undue burden standard used in civil discovery which is to facilitate the resolution of private disputes between private parties.

CPRA requestors and public agencies can, and should, discuss the burden of redacting exempt information as part of the focusing efforts under Government Code 6253.1. This balancing approach under section 6255 is consistent with the instructions in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 238, that on remand "the trial

court [is] to allow such further procedures as will identify the disclosable records within the balancing standards of section 6255, ... The trial court should reconsider Fredericks's request and the scope of any required disclosures as they are affected by the costs of compliance, based on all the relevant CPRA public interest balancing and policy factors."

D. FACTS OF THIS CASE - COSTS ASSOCIATED WITH ASSISTING CPRA REQUESTORS MAKE FOCUSED AND EFFECTIVE REQUESTS.

The NLG initially made a broad request for public records that included both written records and police body camera videos. Hayward produced the written public records. The NLG thereafter narrowed its request for videos.

The record reflects that Hayward met its obligation to assist a CPRA requestor make a focused and effective request. (Government Code 6253.1(a).) This includes "[p]rovid[ing] suggestions for overcoming any practical basis for denying access to the records or information sought." (Government Code 6253.1(a)(3).) One such practical basis for denying access would be the costs related to production, so a public agency's assistance should include a discussion of the potential costs associated with the production of different public records. Hayward did not confer about the cost of redaction early in the Government Code 6253.1(a) process. Hayward did, however, permit the NLG to view the redacted video before the NLG made its decision whether to pay to obtain a copy of the video.

Hayward does not seek to recover the costs it incurred in assisting the NLG make a focused and effective request. That said, the court can consider those costs when determining whether in the course of responding to the CPRA request Hayward was

required to assume a burden that "clearly outweighs the public interest served by disclosure of the record."

E. FACTS OF THIS CASE - COSTS ASSOCIATED WITH IDENTIFYING, RETRIEVING, AND REVIEWING PUBLIC RECORDS.

The evidence in this case demonstrates that Hayward employee Perez spent a total of approximately 130 hours identifying, retrieving, and reviewing the public records at issue. Much of this time was, however, spent because Perez was new to audio and video editing.

Hayward does not seek to recover the costs it incurred identifying, retrieving, and reviewing the public records. That said, the court can consider those costs when determining whether in the course of responding to the CPRA request Hayward was required to assume a burden that "clearly outweighs the public interest served by disclosure of the record."

F. FACTS OF THIS CASE - COSTS ASSOCIATED WITH THE SEGREGATION OR REDACTION OF PUBLIC RECORDS.

Hayward seeks to charge the NLG for the costs of segregating exempt information from non-exempt information and then redacting the exempt information from the public documents.

Hayward argues that the segregation of exempt portions of public records from the non-exempt portions is "extraction" under Government Code 6253.9(b). As discussed above, the statutory language does not support this construction. The "extraction" in the statute refers to extracting information from various sources for

production to the individual or entity making the CPRA request, and not to extracting exempt information from an existing public record.

The evidence in this case demonstrates that section 6253.9(b) does not apply. Hayward was in possession of the body camera videos, those videos were in an accessible MP4 format, and the videos were public records. Hayward could have produced copies of the videos in the electronic format in which Hayward holds the information in the ordinary course of the business, which is in MP4 format. (Government Code 6253.9(a)(1).) (Perez depo at 54:18-57:16.) Hayward did not need to produce a new record that would not have existed without the "data compilation, extraction, or programming." The Government Code 6253.9(b) exception for costs does not apply on the facts of this case.

Hayward argues in the alternative that segregating and redacting the exempt portions of the public records was an undue burden under Government Code 6255 and that it can charge $3,247.47 for its redacting costs. Case law supports this construction. The balancing analysis under Government Code 6255 is by definition a multifactor and fact specific analysis. On the facts of this case, the court considers (1) the subject matter of the public records; (2) the other costs incurred in responding to the CPRA request; (3) the format of the public records as it relates to the value of the public disclosures; (4) the format of the public records as it relates to the cost of redaction; (5) the specificity of the redaction, and (6) whether NLG has an alternative, less intrusive means of obtaining the information.

The subject matter of the public records is relevant because "The *weight* of [the public] interest is proportionate to the gravity of governmental tasks sought to be

illuminated and the directness with which the disclosure will serve to illuminate.' " (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1324.) Although there is a public interest in all public records, there is a greater public interest in governmental tasks of greater gravity. In addition, exactly what is the public interest "is subject to change over time." (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 240.) Attention to what is the public interest at a point in time is consistent with the CPRA's short time frames and recognition that a delay of public information can have the effect of a denial of public information. Accordingly, under the CPRA the greater the gravity of the governmental task to be illuminated and the greater the general and the immediate public interest, the greater the burden the public agency should be expected to bear to ensure transparency.

In this case, the public records at issue concern law enforcement activity. There is an ongoing strong public interest in transparency in, and public disclosure of, law enforcement activity. (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 74-75.) In addition, the court takes judicial notice that in the past few years there have been several highly publicized incidents that have focused public attention on the use of force by law enforcement officers. The subject matter of the public records suggests that Hayward must assume a significant burden in providing transparency.

The totality of the cost that a public agency incurs in responding to a CPRA request is relevant. The section 6255 catch-all exception permits the court to look at many variables. A public agency incurs costs related to locating, retrieving, reviewing, redacting, and producing the requested public records. The undue burden analysis is

related to the total cost of providing the documents to the public, not just to the portion of that cost that a public agency has decided to bill to the CPRA requestor.

In this case, Hayward incurred costs related to locating, retrieving, reviewing, redacting, and producing the requested public records but only billed for the cost related to redacting the public records. Hayward located, retrieved, reviewed, redacted, and produced over 220 written documents and over 280 minutes (4.6 hours) of police body camera video. Hayward assumed the bulk of the cost of this work and seeks to recover $3,247.47. The totality of the cost suggests that Hayward is seeking to recover only a small fraction of its CPRA related expenses. Hayward did not, however, provide any evidence on the dollar cost in staff time or expenses related to locating, retrieving, reviewing, redacting, and producing the requested public records.

The format of the public records relates to the value of the public disclosures because some formats of public records illuminate more than other formats of public records. There is, for example a difference between a transcript showing a city councilperson's indignation, a photograph of the city councilperson in their moment of indignation, and a video of the moment. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 863 ["It has been said that a picture is worth a thousand words"]; *People v. Webb* (1999) 74 Cal.App.4th 688, 690 ["If a picture is worth a 1000 words, a moving picture is worth a million."].)

The format of the public records relates to the cost of redaction because some redaction tools are more time consuming and expensive than other redaction tools. It might be easier to redact exempt information from hard copy paper records with a black felt tip marker than it is to redact pdfs or other electronic documents with computer

software, which in turn might be easier than redacting audio and video tracks in videos. When Hayward produced written documents to the NLG in response to a CPRA request, Hayward spent a few hours on the review and redaction process but decided not to charge NLG anything for that expenditure of staff time. (Perez depo at 65:2-18.)

In this case, the public records are police body worn video. These videos provide high-value public disclosures because they show the actual actions of law enforcement personnel and the actual actions of citizens before, during, and after law enforcement activity. Hayward must demonstrate that it will assume a significant burden in connection with complying with the NLG request, given that these records provide transparency, public disclosure, and have a high value to the public.

The specificity of the redaction also relates to the cost of redaction. If the identities of a specific fox and a specific dog were exempt from disclosure, then a public agency could redact the sentence "The quick brown fox jumped over the lazy dog" in several ways:

The quick brown ███ jumped over the lazy ███, or

The █████ █████ fox jumped over the ███ dog, or

The ██████████ fox jumped over the ███ dog, or

The █████ █████ ███ jumped over the ███ ███, or

The █████████████ jumped over the ██████, or

██████████████████████████████████████

The different levels of specificity in the redactions would correlate with the quality of the public disclosures and the cost of redaction. The public interest in maximum disclosure would favor close review and then redaction on a word by word basis, but the public

interest in economical redaction would favor a more cursory review and block redaction. The parties could negotiate these matters in the Government Code 6253.1 discussions. At one extreme, highly specific redactions might require a potentially time consuming and expensing redaction process the costs of which in time and money could impede public access, while at the other extreme highly general redactions would be faster and less expensive but provide less public access to the content of public records.

In this case, the specificity of Hayward's redactions varied with the nature of the exempt material. Hayward was specific in redacting police activity and was more general in redacting medical information of members of the public. In addition, Hayward on occasion redacted only police audio that disclosed police tactics while producing the video to the public. (Perez Supp. Depo at 15, 33-34.) Hayward's specificity in its redactions is consistent with the strong public interest in the oversight of law enforcement activities and lesser interest in the medial information of persons caught in the public eye. Hayward's decision to err on the side of specific redactions to maximize disclosure of law enforcement action was appropriate and supports Hayward's request for the extra time and money spent making specific redactions.

The court can consider whether a CPRA requestor has an alternative, less intrusive, means of obtaining the information. (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 242.)

In this case, there is no evidence that the NLG had an alternative, less intrusive means of obtaining audio and video of the law enforcement actions. For example, there was no evidence that videos of the events at issue were available on the local news or had

been recorded on cellphone cameras and uploaded to the internet. Therefore, the public interest in the public records is of great weight.

The court can consider whether a CPRA requestor is seeking cumulative information that will not materially increase public knowledge of the governmental activity. If, for example, a CPRA requestor makes a broad request, the requestor identifies what issue or decision the requestor is seeking to illuminate, and the public agency locates, retrieves, reviews, redacts, and produces public records that illuminate that issue, then the the public agency might legitimately legitimately argue that the disclosure of additional public records regarding governmental actions before, or after, or surrounding the primary issue or decision would impose an undue burden. This consideration gives effect to Government Code 6253.1(a) and the discussions that a CPRA requestor and a public agency are supposed to have regarding the focusing of CPRA requests.

In this case, the NLG is not seeking cumulative information. Hayward argues that a third party has made requests for police police body worn video. The requests by the third party are not before the court. The court notes, by way of dicta, that if the requests overlap with NLG's requests, then Hayward could potentially make a copy of the NLG production and give it to the third party. If the third party requests concern the same issues as the NLG's requests, then Hayward could also assert that the requests are seeking cumulative information and that further production is unduly burdensome. Those issues are not, however, before the court.

In *Stanislaus,* 246 Cal.App.4th 1432, the court considered the ability of Recorders to charge for "the direct and indirect costs of providing the product or service" of making

copies of documents for the public under Government Code 27366. In *Stanislaus,* 246 Cal.App.4th at 1451-1452, the court considered how to interpret the cost recovery provision in light of California Constitution, Art. I, § 3, subd. (b)(2), which states that statutes are to be narrowly construed if they limit the right of access. The petitioner argued that "higher fees limit access and lower fees improve access." The court stated:

> The evidence presented in this case shows that (1) "access" has a monetary component, an elapsed time component and a convenience component and (2) there are tensions or tradeoffs among these components. For instance, charging low fees might improve access by reducing financial barriers, but also could adversely affect the ease and speed of access. For instance, low fees could lead to a reduction in the number of hours the clerk-recorder's office takes requests for copies and an increase in the time that elapses between the submission of the request and the delivery of the copy to the customer. Therefore, reducing the fees charged ultimately could make obtaining copies a more time consuming, less convenient process for the customer. The tension between the different factors relevant to access lead us to conclude that the constitutional provision designed to further the people's right to access should be interpreted in a way that balances the different components and does not overemphasize cost.

Similarly, in the Government Code 6253.1 discussion about the timing, content, volume, specificity of redaction, and cost of the of the production and whether there is an undue burden on the public agency under Government Code 6255, a CPRA requestor and the public agency should consider the "the multifaceted nature of access." (*Stanislaus*, 246 Cal.App.4th at 1452.)

In *Stanislaus,* 246 Cal.App.4th at 1454-1458, the court also considered the definition of "indirect costs." The court concluded:

> "[T]he term "indirect costs" is reasonably susceptible to more than one interpretation. We … conclude that the ambiguity in the term "indirect costs" is resolved by requiring such costs be reasonably attributed to (i.e., reasonably related to) the service of providing copies and by excluding costs not reasonably attributed to the service of providing copies.

(*Stanislaus,* 246 Cal.App.4th at 1458.) In any Government Code 6253.1 discussion about the cost of the of a CPRA production, a public agency most likely could not reasonably assert that a cost was attributable to the cost of complying with the CPRA unless it at a minimum fell within that definition of "indirect cost."

G. FACTS OF THIS CASE - COSTS ASSOCIATED WITH PRODUCTION OF EXEMPT PUBLIC RECORDS.

A public agency can charge for the "direct costs of duplication" of public records without regard to whether they are maintained in paper or electronic format and, further, that a public agency may charge for any "data compilation, extraction, or programming to produce" a new public record, or data produced to the requestor. (Government Code 6253(b) and 6253.9(a)(2) and (b).) Under the CPRA's cost provisions there is no distinction between the "direct cost" of producing public records that the public agency chooses to disclose in full and the "direct cost" of producing public records that the public agency has redacted to segregate exempt information.

The evidence in this case demonstrates that Hayward charged the NLG for the direct cost of the DVDs that contained copies of the public records ($1 per DVD). The evidence strongly suggests that Hayward also charged the NLG for the time that Perez or some other Hayward employee spent copying the public records to the DVDs.

H. FACTS OF THIS CASE - CONCLUSION

Considering all of the above, the court finds that Hayward did not demonstrate by a preponderance of the evidence that the total costs in staff time and expenses related to producing redacted copies of the police body worn videos "clearly outweighs the public interest served by disclosure of the record." The court has considered the significant ongoing, and immediate, public interest in law enforcement activities and the valuable information regarding the actions of law enforcement contained in these videos. The court has also considered that Hayward produced over 220 written documents and that the cost in staff time to review and redact public records is is significantly greater for videos than for written records. That noted, Hayward focused on Government Code 6253.9 and the definition of "extraction" and did not present evidence of the total dollar cost of complying with the CPRA request. The court is troubled that Hayward did not raise the cost of CPRA compliance in the Government Code 6253.1(a) discussions, and it appears that Hayward's decision to charge for the staff time spent redacting the videos was made on 5/14 and 5/15/15 when the NLG balked at paying the standard $103 per disk charge under Hayward's fee schedule.

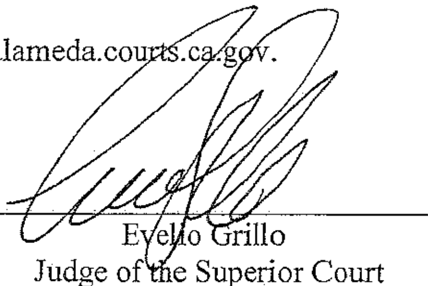
The court stresses that although the court's interpretation of the pertinent statues are matters of law, the court's application of that law to the facts of this case is fact specific. In other factual situations, it might be appropriate or inappropriate for a public agency to condition the production of written or electronic public records on reimbursement for some portion of the public agency's cost of complying with the CPRA.

CONCLUSION.

The petition of the NLG for a writ of mandate is GRANTED. The court directs the clerk of the court to issue a writ to Hayward directing Hayward to refund to the NLG all costs charged for the production of public records under the CPRA except for the $1 charged for the DVD that contained the public records.

The Court ORDERS the NLG to prepare and serve a proposed judgment and a proposed writ within ten (10) days of service of this order. Hayward may file objections to the proposed judgment and writ (5) days after service of that proposed judgment and writ. (CRC 3.1312.) The court asks the parties to both file their documents and to send MS Word versions to the court at Dept14.alameda.courts.ca.gov.

DATED: June 24, 2015



Evelio Grillo
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number : RG15785743
Case name: National Lawyers Guild, San Francisco Bay Area Chapter v Urban

ORDER GRANTING PETITION FOR WRIT OF MANDATE FILED ON JUNE 24, 2016

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document, **ORDER GRANTING PETITION FOR WRIT OF MANDATE FILED ON JUNE 24, 2016** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 24, 2016.

Executive Officer/Clerk of the Superior Court
By Monica Martin, Deputy Clerk

Amitai Schwartz, Esq.
Law Offices of Amital Schwartz
Watergate Towers
2000 Powell Street, Suite 1286
Emeryville, CA 94609

Justin Nishioka, Esq.
Deputy City Attorney CITY OF HAYWARD
777 B Street, 4th Floor
Hayward, CA 945415007