

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

MINUTE ORDER

DATE: 09/27/2018

TIME: 01:30:00 PM

DEPT: C32

JUDICIAL OFFICER PRESIDING: James E. Loveder

CLERK: Julianna Barrera

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: Joseph Villegas

CASE NO: **30-2017-00934489-CU-WM-CJC** CASE INIT.DATE: 07/28/2017

CASE TITLE: **Inland Oversight Committee vs. Westminister School District**

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

EVENT ID/DOCUMENT ID: 72879697

EVENT TYPE: Petition for Writ

APPEARANCES

Anthony Kim, from Briggs Law Corporation, present for Petitioner(s).

Jacquelyn Takeda Morenz, from Atkinson, Andelson, Loya, Ruud & Romo, A Professional Corporation, present for Respondent(s).

All parties present this date having been advised by virtue of a posted notice and verbal notification of the right to have the matter heard before a judge or commissioner and no objections having been made, it is deemed that the parties have stipulated that the matter may be heard by the temporary judge, pursuant to California Rules of Court, rule 2.816(d)(1).

Stipulation for Temporary Judge signed and filed.

The Court issues tentative ruling.

The Court hears oral argument and confirms the tentative ruling. The tentative ruling becomes the final order of the Court as follows:

The Petition by Plaintiff Inland Oversight Committee for writ of mandate requiring Respondent Westminister School District ("respondent" or the "School District") to comply with its obligations under the California Public Records Act ("CPRA") is GRANTED.

"Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time." (*Govt. Code* §6258.) In a writ petition under the CPRA, "[t]he trial court's role is to review the agency's objections to the CPRA requests in light of the relevant exemptions." (*Wilder v. Sup. Ct.*, 66 Cal.App.4th 77, 84 (1998).)

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In the Complaint, petitioner alleged that the School District violated CPRA in two ways. First, there was at least one record responsive to petitioner's request that was not turned over, and second, the School District failed to respond to the requests in a timely fashion. (Compl., ¶13.) The School District responded in its answer that it did respond within 10 days of the request, and offered the responsive records in exchange for copying costs of \$5. (Ans., ¶12.)

The briefing and evidence submitted by the parties indicates the following:

On 06/28/17, petitioner submitted via facsimile to the Public Information Officer of respondent a request for copies of "public records," as that term is defined in the California Constitution and CPRA. The records requested fell into 14 categories, all of them encompassing written communications. 12 of the categories encompassed written communications – either email or otherwise – to or from Dr. Marian Kim-Phelps, the recent superintendent of respondent School District, who had departed for the Poway Unified School District. (Kim Decl., Ex. B.) The final two encompassed all written communications between Poway Unified School District and the respondent pertaining to a lawsuit filed by a San Diego watchdog group, San Diegans for Open Government, against Poway Unified. (Ibid.) The time frame for the requests was January 15, 2017 to July 5, 2017. (Ibid.)

On 07/03/17, the School District sent a letter to petitioner's counsel, stating that the request had been received, and requesting an additional 14 days to conduct its review to search for identifiable records in its possession. (Ard Decl., Ex. 2.) Petitioner contends that it did not receive this communication, but respondent has produced a facsimile report indicating that a fax was indeed sent to petitioner's counsel's office on 07/03/17. (Morenz Decl., Ex. 1.)

On 07/24/17, respondent sent another letter to petitioner's counsel, indicating that the review had been completed and that there were approximately 50 pages of responsive records. The School District offered to duplicate and forward the records at a cost of \$5. (Ard Decl., Ex. 2.) Petitioner contends again that it did not receive this letter, but respondent's facsimile report indicates that a fax was sent to petitioner's counsel's number on that date. (Morenz Decl., Ex. 1.)

The Verified Complaint in this matter was filed on 07/28/17. Thereafter, on 07/31/17, respondent's counsel e-mailed petitioner's counsel to state that the records request had been given an appropriate response. (Morenz Decl., Ex. 1.) Counsel sent petitioner's counsel copies of the letters sent by the School District, as well as the fax activity report confirming their transmission. (Ibid.)

Petitioner's counsel asked for an electronic copy of the responsive records, after which time he promised to confer with his client to determine if the lawsuit should be withdrawn. (Morenz Decl., Ex. 2.) The records were sent in PDF format on 08/07/17 after petitioner submitted a check for \$5. (Kim Decl., Ex. F.) By 08/17/17, petitioner indicated that its complaint would not be withdrawn. (Kim Decl., Ex. 8.)

At this point, it should be noted that the evidence indicates that the School District did make a timely response to the CPRA request. (See *Govt. Code* §6253 (c).) The School District's ultimate determination regarding the request was promised by 07/21/17, but was not actually provided until 07/24/17. (Ard Decl., Exs. 2 & 3.) Nevertheless, the determination was provided, and the School District did not purport to withhold any responsive records. (Ard Decl., Ex. 2.)

The ultimate question for the court to resolve is whether the School District adequately responded to the CPRA request. To start, it does not appear to the court to have been improper for the School District to

charge \$5 for the cost of producing the records, given that the records were gathered from numerous public and private sources, some in electronic format and others in hard copy format. See *Govt. Code* §6253.9(b) (2); see also *Morenz Decl.*, Ex. 6 at 14:14-15:19. Furthermore, it is conceivable that some of the discrepancies encountered here could be chalked up to the fact that petitioner issued three different sets of requests to three different parties – (1) the School District in the CPRA request, (2) Dr. Kim-Phelps, and (3) the School District’s person most knowledgeable, Sam Plambeck.

Nevertheless, the court does have some concerns that the School District did not undertake an appropriate search in response to the CPRA request. The request asked for all emails and written communications to and from Dr. Kim-Phelps on various topics. Yet, respondent avers that its searches of Dr. Kim-Phelps’ email records returned very few emails. (*Pogue Decl.*, ¶7.) Given that Dr. Kim-Phelps was the previous superintendent – a very high position - the lack of emails in her account should have prompted respondent to search other email accounts, or to search across the School District’s email servers for any communications to or from Dr. Kim-Phelps during the requested time frame. If such a search had been conducted, perhaps the “farewell letter” sent by Dr. Kim-Phelps to School District staff would have been discovered, as it eventually was by Mr. Plambeck. (*Kim Decl.*, Ex. L.)

Petitioner later came to know that 13 documents that it viewed as responsive to its CPRA request had not in fact been produced. One was the aforementioned farewell letter. The others are as follows:

- two entries in Dr. Kim-Phelps’ calendar that pertained to Poway (*Kim Decl.*, Exs. J & K)
- nine email communications produced by Dr. Kim-Phelps in the related *San Diegans for Open Government* lawsuit (*Kim Decl.*, Ex. N)
- one voicemail message that was attached to an email sent 02/16/17 from Priscilla Ard to Christine Paik. (*Kim Decl.*, Ex. F, p. 4)

The court does not agree that Dr. Kim-Phelps’ calendar entries were encompassed within the scope of petitioner’s CPRA request. The CPRA request was limited to communications. The term “communications” has no specific definition under the CPRA. In common parlance, however, the term “communication” implies an exchange or transmission of information between individuals. Unless Dr. Kim-Phelps transmitted her calendar entries to other individuals, it was reasonable for the School District to execute searches that did not include Dr. Kim-Phelps’ calendar. Should petitioner desire these documents, it should issue a revised CPRA request.

It also appears that the majority of the email communications produced by Dr. Kim-Phelps in the related lawsuit were to or from representatives or associates of the Poway Unified School District. (See *Kim Decl.*, Ex. N.) Thus, if, as respondent contends, Dr. Kim-Phelps had already deleted the majority of emails from her account by the time respondent undertook its search, it seems unlikely that these emails would be found on respondent’s server. They were neither sent to nor received by respondent’s employees.

As for the voicemail attached to the Ard email, it was encompassed within the CPRA request. Under *Government Code* §6252 (g), “[w]riting” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” A voicemail would be such a recording, and it would have been responsive to petitioner’s Request No. 6b (“every communication in WRITING...to Dr....Kim-Phelps...that mentions or otherwise pertains in any way to the Poway Unified School District.”). The produced email states that the voicemail was from a member of the press “regarding

speaking to Marian about her new role at the Poway USD.” (Kim Decl., Ex. F, p. 4.) It was therefore a communication from a member of the press to Dr. Kim-Phelps about Poway USD.

Given that it appears that additional documents were in fact discovered by Mr. Plambeck using wider search parameters, the court is inclined to order the School District to undertake a second search to determine whether any additional responsive documents exist in its possession.

Respondent is order to comply promptly and fully with the California Public Records Act (“CPRA”). A writ of mandate shall issue for Respondent to respond fully to the IOC Request. Pursuant to Gov. Code, § 6259 (d), the court awards court costs and reasonable attorney fees to the plaintiff, who prevail in the litigation.

Plaintiff shall give notice of this ruling.