

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(ENDORSED)
FILED
JUL 07 2023
Clerk of the Court
Superior Court of CA County of Santa Clara
BY C. Pham DEPUTY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

SAN JOSE MERCURY NEWS LLC,
Petitioner/Complainant,
vs.
CITY OF SAN JOSE,
Respondent/Defendant.

Case No. 23CV415609
**ORDER AFTER JULY 6, 2023
HEARING**
Submitted Matter

This matter came on for hearing on July 6, 2023, at 1:30 p.m. in Department 18, the Honorable Thomas E. Kuhnle presiding. Petitioner San Jose Mercury News, LLC (“Mercury News”) is represented by Duffy Carolan, Esq. Respondent City of San Jose (the “City”) is represented by Elisa T. Tolentino, Esq. Before the Court is the Mercury News’s Petition for Writ of Mandate regarding compliance with the California Public Records Act (“CPRA”) that was filed on May 4, 2023. In it, the Mercury News seeks the City’s records concerning an October 5, 2022 incident described below. It made CPRA requests for those records on November 16, 2022 and March 24, 2023 (as modified by counsel’s letter dated March 28, 2023). Having reviewed and considered the written submissions of the parties, and having listened carefully to the parties’ arguments, the Court rules as follows:

1 **I. BACKGROUND FACTS**

2 On the evening of October 5, 2022, San Jose Fire Department (“SJFD”) personnel
3 allowed unauthorized passengers to ride in Engine 4 (the “Firetruck”) from an adult
4 entertainment establishment named the Pink Poodle to another establishment named AJ’s Bar.
5 During this incident the Firetruck was not responding to any calls. The incident was, in part,
6 captured on video. The SJFD investigated and stated later that at least one SJFD employee was
7 disciplined as a result of the incident.

8 The Mercury News has repeatedly requested all public records concerning the incident,
9 including all disciplinary records. The City has turned over some of the records. It has refused,
10 however, to produce all. The City has relied on two CPRA exemptions. One pertains to
11 personnel files. The other is a “catch-all” exemption which requires the public benefits of non-
12 disclosure to “clearly outweigh” the public interest.

13 In support of its assertion that CPRA exemptions apply here, the City filed the
14 Declaration of Jennifer Schembri, who is the Director of both the City’s Human Resources
15 Department and the Office of Employee Relations (“OER”). Schembri states that on October 7,
16 2022, at the direction of Fire Chief Robert Sapien, Jr., SJFD, in coordination with OER, initiated
17 an investigation of the October 5, 2022, incident. The investigation was completed in February
18 2023. An investigation report was prepared that included the identity of employees involved,
19 statements of witnesses, the City’s factual findings, and its recommendations for disciplinary
20 action. The report also attached documents upon which the City relied in reaching its findings
21 and recommendations. Schembri states that investigation reports of this type are kept
22 confidential.

23 Schembri states that Chief Sapien prepared two memoranda about the incident, which
24 were dated March 10, 2023, and April 25, 2023. Both were provided to the City’s mayor, the
25 City council, and the public. She states that Chief Sapien’s April 25, 2023 memorandum
26 provides a complete and accurate summary of the factual findings in the confidential
27 investigation report described above. With respect to violations of City rules, the memorandum
28 states:

1 The use of a City vehicle to transport unauthorized passengers violated City and
2 Fire Department policies, including the City's Code of Ethics and Use of City and
3 Personal Vehicles policies as well as the Fire Department's Ride-Along Program.
4 Additionally, taking the fire engine outside of the area to which it is assigned
5 without being dispatched to a call for service violated City and Department
6 policies, including the Fire Department's Policies and Procedures for Leaving
7 First-In Response Area.

8 The memorandum also states that "the City has taken appropriate disciplinary action and now
9 considers this matter closed, as all required due process has been completed as no appeal of the
10 discipline has been filed."

11 Schembri notes that since at least 2008, the City has maintained and published on its
12 website annual lists of formal disciplinary actions taken by the City. As of May 17, 2023, the list
13 of disciplinary actions in 2023 was updated to include the demotion of a Fire Captain. The
14 conduct for which the discipline was imposed is described as "Employee engaged in conduct in
15 violation of the San Jose Fire Department Rules and Regulations, the City's Code of Ethics
16 Policy, and Use of City and Personal Vehicles Policy." Schembri confirms this discipline was
17 imposed as a result of the City's investigation of the October 5, 2022, incident, and that the Fire
18 Captain did not appeal the City's findings or discipline.

19 **II. THE CALIFORNIA PUBLIC RECORDS ACT**

20 The Constitution of the State of California, and the CPRA, require production of public
21 records. The California Constitution states, "The people have the right of access to information
22 concerning the conduct of the people's business, and therefore the writings of public officials
23 and agencies shall be open to public scrutiny. . . . In order to ensure public access to the
24 writings of public officials and agencies . . . each local agency is hereby required to comply
25 with the California Public Records Act." (Cal. Const, Art. I, § 3(b)(1), (7).) The Constitution
26 also states that any "statute, court rule, or other authority shall be broadly construed if it furthers
27 the people's right of access, and narrowly construed if it limits the right of access." (Cal.
28 Const., Art. I, § 3(b)(2).)

A public record is "any writing containing information relating to the conduct of the
public's business prepared, owned, used, or retained by any state or local agency regardless of
physical form or characteristics." (Gov't Code § 7920.530, subd. (a).) The requirement that a

1 record relate to the conduct of the public’s business is broadly construed and rarely contested.
2 (See, e.g., *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 824-25; *San*
3 *Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774 [“This definition is intended
4 to cover every conceivable kind of record that is involved in the governmental process.”
5 (citations omitted)].) Indeed, “Generally, any ‘record . . . kept by an officer because it is
6 necessary or convenient to the discharge of his official duty . . . is a public record.’ ” (*City of San*
7 *Jose v. Superior Court* (2017) 2 Cal.5th 608, 618 (*City of San Jose*).

8 The CPRA requires agencies to disclose public records upon request except to the
9 extent records or portions thereof are expressly exempt from disclosure. (Gov’t Code
10 §§ 7922.000, 7922.525, 7922.530, subd. (a); *City of San Jose, supra*, 2 Cal.5th at p. 616.)
11 “Any reasonably segregable portion of a record shall be available for inspection by any person
12 requesting the record after deletion of the portions that are exempted by law.” (Gov’t Code
13 § 7922.525, subd. (b).)

14 Here, the City relies on two exemptions to withhold records. First, Government Code
15 section 7927.700 exempts “personnel, medical, or similar files, the disclosure of which would
16 constitute an unwarranted invasion of personal privacy.” Second, Government Code section
17 7922.000 exempts records for which “on the facts of the particular case the public interest served
18 not by disclosing the record clearly outweighs the public interest served by the disclosure of the
19 record.”¹

20 The City “bears the burden of proving that an exemption applies.” (*American Civil*
21 *Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 67
22 (*ACLU*)). The “[s]tatutory exemptions from compelled disclosure are narrowly construed” and,
23 to justify secrecy, the City has the burden of proof to demonstrate a “clear overbalance on the
24 side of confidentiality.” (*California State University, Fresno Association v. Superior Court*
25 (2001) 90 Cal.App.4th 810, 831; see also *Bakersfield City School District v. Superior Court*
26 (2004) 118 Cal.App.4th 1041, 1045.) Conclusory or boilerplate assertions that merely recite

27
28 ¹ The City states that the legal standard for this exemption is “essential the same” as the weighing of privacy interests against the public interest in disclosure under Government Code section 7927.700. (Opp. Brief at p. 9.)

1 statutory standards are not sufficient.” (*ACLU, supra*, 202 Cal.App.4th at p. 83.) [internal
2 quotations and citations omitted].)

3 **III. DISCUSSION**

4 The City has the burden of proving (1) the requested records may be withheld under the
5 exemption for personnel records (Gov’t Code § 7927.700), or (2) the public interest served by
6 not disclosing the record *clearly outweighs* the public interest served by disclosure (Gov’t Code
7 § 7922.000, emphasis added.) Both statutes must be narrowly construed.

8 **A. Records Concerning the Fire Captain**

9 While public employees have a significant privacy interest in their personnel files, the
10 law is equally clear that once an agency imposes discipline, or finds a charge to be true, “the
11 strong public policy against disclosure vanishes; this is true even where the sanction is a private
12 reproof. In such cases a member of the public is entitled to information about the complaint, the
13 discipline, and the ‘information upon which it was based.’ ” (*American Federation of State,
14 County and Municipal Employees v. The Regents of University of California* (1978) 80
15 Cal.App.3d 913, 918, quoting *Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548,
16 575; see also *Marken v. Santa Monica-Malibu United School District* (2012) 202 Cal.App.4th
17 1250, 1273-1277 (*Marken*).) Therefore, with respect to the Fire Captain, the City must produce
18 records containing information about the complaint and the discipline imposed, including the
19 SJFD’s investigation report referenced in Chief Sapien’s April 25, 2023 memorandum.

20 **B. Records of Other SJFD Employees Involved in the Incident**

21 The law regarding the release of records for employees who are not disciplined is
22 different. Disclosure of records is not automatic. Nevertheless, “if the information in the
23 agency’s files is reliable and, based on that information, the court can determine the complaint is
24 well founded and substantial, it must be disclosed.” (*Marken, supra*, 202 Cal.App.4th at pp.
25 1275; see also *Bakersfield School District v. Superior Court* (2004) 118 Cal. App. 4th 1041,
26 1045.)

1 The City acknowledges the complaint was well founded, and presumably the information
2 in the City's files is reliable. The City argues, however, that the incident was not substantial. On
3 page 1 of its Opposition brief, it states:

4 What Petitioner ignores is that the entire incident – from the fire engine's
5 departure from the station to its return – spanned a total of only 20 minutes. The
6 unauthorized ride-along lasted only four minutes. Petitioner also ignores that the
7 bases for discipline implicated no sexually inappropriate conduct or threat to
8 public safety. The City received no complaints whatsoever about this incident.
9 There has been no allegation of any untoward behavior occurring over the
10 duration of the 20-minute incident.

11 The reaction by then-Mayor Samuel Liccardo, however, makes clear the City believed the
12 incident was substantial. On October 7, 2022 he stated, "If the investigation concludes that this
13 video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue
14 apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work
15 of the rest of our SJFD team." (Pet. Opening brief, at p. 8.) Chief Sapien's March 10, 2023
16 memorandum also recognizes the incident was substantial. It states that the actions were
17 "*seriously misaligned* with the Department's mission and values and here *highly detrimental* to
18 the confidence and trust of our community and our workforce." (emphasis added.)

19 Chief Sapien's April 25, 2023 memorandum expressly references "the crew assigned to a
20 Fire engine company" who were present on October 5, 2022. The memorandum states, "The
21 crew first declined to provide the female with a ride-along; however, she persisted and was
22 driven partially around the block and returned to The Pink Poodle at approximately 9:10 p.m." It
23 was "[t]he use of a City vehicle to transport unauthorized passengers [that] violated City and Fire
24 Department policies." There is no evidence of mitigating circumstances; there is nothing to
25 suggest the Fire Captain coerced the crew to participate in the incident or that the crew voiced
26 objections. Moreover, the April 25, 2023 memorandum and the City's website identify
27 misconduct and policy violations, but nowhere is there an explanation of why members of the
28 crew were not disciplined in the same way as the Fire Captain. Under similar circumstances,
records have been ordered produced. (See *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th
742, 755 (*BRV*) ["The report exonerated Morris of all serious allegations of misconduct except
those relating to outbursts of anger. In this circumstance, the public's interest in understanding

1 why Morris was exonerated and how the District treated the accusations outweighs Morris's
2 interest in keeping the allegations confidential.”].)

3 The Court concludes that the information in the agency’s files is reliable and the
4 complaint is well founded and substantial, and therefore the complete investigatory report and
5 disciplinary records related to this incident, including those concerning the “crew,” must be
6 produced. This is true under Government Code sections 7927.700 and 7922.000. (*BRV, supra*,
7 143 Cal.App.4th at p. 755 [“the tests under the two statutes, however, are essentially the
8 same.”].) Like the classroom teacher in *Marken*, the Fire Captain and crew occupy a position of
9 “trust and responsibility” and thus the public has a legitimate interest in knowing whether and
10 how SJFD enforces its policies. (*Marken, supra*, 202 Cal.App.4th at p. 1276.)

11 **IV. ATTORNEYS’ FEES AND COSTS**

12 Petitioner seeks an award of attorneys’ fees and costs under Government Code section
13 7923.115, subdivision (a) [“If the requester prevails in litigation filed pursuant to this chapter,
14 the court shall award court costs and reasonable attorney’s fees to the requester. The costs and
15 fees shall be paid by the public agency and shall not become a personal liability of the public
16 official involved.”].) They also seek an award of attorneys’ fees and costs Code of Civil
17 Procedure section 1021.5 [“a court may award attorneys’ fees to a successful party against one or
18 more opposing parties in any action which has resulted in the enforcement of an important right
19 affecting the public interest.”].) The Court will address attorneys’ fees and costs if a timely
20 motion is filed in advance of the next hearing.

21 **V. DISPOSITION**

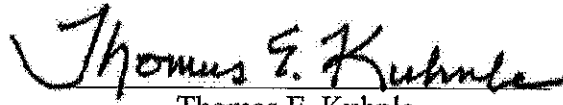
22 The Court **ORDERS** the City of San Jose to produce to the Mercury News, within 30
23 days after service of this Order, the complete investigatory report and disciplinary records
24 concerning the October 5, 2022 incident, and any records upon which the City relied in reaching
25 its findings and recommendations.² Before providing the records to the Mercury News, the City
26
27

28 ² The CPRA permits *in camera* inspections by courts, but caselaw advises such inspections take place sparingly, since it hinders appellate review. Here, the Court did not find an *in camera* inspection was necessary.

1 is ordered to redact identifying information of third parties, including but not limited to their
2 names, addresses, and telephone numbers.

3 A further case management conference, and any motion for attorneys' fees and costs, is
4 now set on **September 21, 2023, at 1:30 p.m. in Department 18.**

5
6 Dated: July 7, 2023



7 Thomas E. Kuhnle
8 Judge of the Superior Court
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

