



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Sarah Zárate

SUBJECT: PUBLIC RECORDS APPEAL -
RAMONA GIWARGIS

DATE: June 18, 2021

Approved

Date

06/18/21

RECOMMENDATION

Deny the appeal from Ramona Giwargis regarding the City's response to her Public Records Act request.

BACKGROUND

On May 9, 2021 through the City's online Public Records Act request form, Ramona Giwargis requested a copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months.

On May 18, 2021 the City notified Ms. Giwargis of its decision to withhold responsive documents under the Attorney-Client Privilege pursuant to California Government Code §6254(k). The withheld documents were confidential correspondences seeking and providing legal advice between the Mayor's Office Staff and the City Attorney's Office and are therefore exempt from production under the California Public Records Act. On June 3, 2021 Ms. Giwargis formally appealed the City's decision to withhold the records stating that it is her belief that these records do not qualify under California Government Code §6254(k), and believes nonprivileged responsive records were improperly withheld. Ms. Giwargis' appeal is included as Attachment A.

On June 3, 2021, Ms. Giwargis submitted a second request similar to the one currently on appeal. The second Public Records Act Request asked for email, text and Slack (or other messaging system) communications between Mayor Sam Liccardo/Chief of Staff Jim Reed, Mayor's staff members and any entity or person not affiliated with the City (not City staff) that uses the phrase "Solutions San Jose" over the past six months. Staff reached out to Ms. Giwargis asking if she would be willing to wait until staff filled the second request before pursuing the appeal. Ms.

Giwargis informed staff that, although she had placed a second request, she wanted the appeal to proceed. On June 14, 2021, Mayor’s Office staff responded that there were no responsive records to Ms. Giwargis’ second request.

ANALYSIS

Ms. Giwargis is appealing the City’s response to her May 9th Public Records Act request. The City located documents and determined that the located documents needed to be withheld pursuant to the Attorney-Client Privilege under Government Code Section 6254(k). These documents are confidential correspondences between the Mayor’s Office Staff and the City Attorney’s Office and are therefore exempt from production.

Ms. Giwargis contends that because the request relates to communications with Solutions San Jose, a non-City entity, it is not possible that all correspondences qualify under the attorney-client privilege.

In an effort to respond expeditiously, the City read Ms. Giwargis’ May 9th request broadly, and determined that emails between the Mayor’s Office staff and the City Attorney’s Office mentioning Solutions San Jose were responsive. On May 18, 2021, the City notified Ms. Giwargis of its decision to withhold responsive documents under the Attorney-Client Privilege pursuant to California Government Code §6254(k). In hindsight, these emails were not responsive to Ms. Giwargis’ request because they were not between the Mayor’s Office staff and Solutions San Jose.

There are no records “between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months”.

The withheld documents are communications that fall within the Attorney-Client Privilege. The Public Records Act exempts from disclosure confidential communications between attorney and client under both California Government Code Section 6254(k) and California Evidence Code Section 954. This exemption allows staff to have frank and candid conversations with their attorney; disclosure would have a chilling effect on this ability. For a correspondence to qualify under statutory law, “there must be a (1) communication, (2) intended to be confidential, and (3) made in the course of the lawyer-client relationship”¹. The existing documents meet each of these three requirements.

In addition, California Evidence Code Section 954 states that this privilege can only be waived by the holder of the privilege. The City Council holds the authority to waive said privilege and can direct City staff to disclose the protected records.

¹ City & County of S.F. v. Superior Court (1951) [37 Cal. 2d 227](#), 234-235 [231 P.2d 26, 25 A.L.R.2d 1418].)

CONCLUSION

Ms. Giwargis' request for a copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months involves records that are exempt from disclosure based on the attorney-client privilege.. Staff recommends that the Rules and Open Government Committee deny the appeal from Ms. Giwargis.

COORDINATION

This memorandum was coordinated with the City Attorney's Office.

/s/
SARAH ZARATE
Director of the Office of Administration, Policy and
Intergovernmental Relations

For questions please contact Jessica Lowry, Open Government Manager, at publicrecordsrequest@sanjoseca.gov.

Attachment A: Correspondence with Ramona Giwargis



June 3, 2021

To: Jessica Lowry, San Jose open government manager
cc: San Jose Rules & Open Government Committee
Re: Appeal of denial of PRA request

This letter is to inform you of San José Spotlight's request to appeal the city's denial of a recent public records request.

Under the California Public Records Act, San José Spotlight on May 9, 2021 requested the following: *A copy of all email, text and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months. Please include emails/texts sent and received from personal devices and accounts as it relates to public business.*

On May 18, 2021, Henry Smith, an agenda services manager and strategic initiatives associate with the office of Mayor Sam Liccardo, denied the request in its entirety. He cited just one statute for the denial decision: *Attorney-Client Privilege [California Government Code § 6254(k)]*

This is an improper denial of San José Spotlight's public records request, for the following reasons:

- Our request asked for all communications between Liccardo and other city staffers or consultants, associates, etc. The city has asserted one exemption, 6254(k), which allows the city to invoke attorney-client privilege as a basis to withhold. However, that privilege has well-defined limits.
 - It applies only to (1) communications between a lawyer and her client, (2) regarding legal advice, (3) that is not disclosed to third parties. See California Evidence Code section 952.
- It is simply not possible that all communications relating to Solutions San Jose meet all three of the privilege's requirements.
- First, Solutions San Jose is not a city entity. So, to the extent there are legitimately privileged communications between the city attorney and Liccardo regarding legal advice, the privilege would be destroyed if those communications were shared with anyone outside the attorney-client relationship (i.e., anyone other than city staff, including anyone associated with Solutions San Jose who is not also on city staff).
- Second, it is not possible that all internal city communications -- i.e., those as to which the privilege was not destroyed -- regarding Solutions San Jose are actually subject to the privilege, for two basic reasons:
 - For a communication between an attorney and client to be privileged, it has to relate to legal advice. Simply copying a lawyer does not render the communication privileged. It is very difficult to imagine that all communications between city officials relating to Solutions San Jose related to legal advice.



- In particular, it's difficult to imagine that all such communications were related to legal advice about Solutions San Jose. Why would the city attorney be advising city staff about legal issues surrounding a non-city entity like Solutions San Jose?

For the reasons cited above, we are appealing to the city's open government manager and its Rules & Open Government Committee to reevaluate this improper denial of public records and immediately release records pursuant to our request.

California law requires public agencies to separate exempt and non-exempt records. With this blanket denial, it appears the city did not attempt to provide any documents that might be disclosable, even with redaction. A more careful search is warranted.

Please advise us of next steps, including when the committee will consider our appeal during its regularly scheduled meeting. If you have any questions regarding this appeal, please do not hesitate to contact Ramona Giwargis at [REDACTED] or [REDACTED].

We look forward to hearing from you.

Sincerely,

[REDACTED]

Ramona Giwargis
Co-founder and editor
San José Spotlight