

# LAW OFFICES OF KELLY A. AVILES

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October 2, 2015

Maria Huizar  
City Clerk  
City of Santa Ana  
20 Civic Center Plaza  
Santa Ana, CA 92701

(via email and U.S. mail)

**Re: CPRA Requests by Voice of OC**

Dear Ms. Huizar:

I represent the Voice of OC regarding the recent CPRA requests submitted by Adam Elmahrek.

On September 14, 2015, Mr. Elmahrek requested copies of records pertaining to a City Council meeting where the Council would be discussing City Manager David Cavazos. On September 22<sup>nd</sup>, you responded, withholding one responsive document pursuant to Government Code § 6254(c), pertaining to personnel or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

In this case, the requested record is not exempt pursuant to Government Code § 6254(c). We are informed and believe that the document withheld is a letter from City Manager David Cavazos to the City Council, responding to concerns and allegations about a relationship between Mr. Cavazos and a subordinate city employee. We are also informed and believe that the employee in question is or was a member of a union bargaining team responsible for negotiating with Mr. Cavazos.

Under those circumstances, the disclosure of the document would not constitute an unwarranted invasion of privacy and, therefore, must be disclosed.

“Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity.” *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347. The California Supreme Court has held that “a diminished expectation of privacy is outweighed by legitimate regulatory objectives. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 9.

“[T]he right of privacy protects the individual's *reasonable* expectation of privacy against a *serious* invasion.” [Citation.] As we recently summarized Hill's holding, “The party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.” [Citation.] “A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.” [Citation.]

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*Sheehan v. San Francisco 49ers* (2009) 45 Cal.4th 992, 998.

On balance, Courts have consistently found that the public's interest in disclosure trumps any diminished right of privacy a public employee may have once a recorded complaint is of a substantial nature and there is reasonable cause to believe the complaint is well founded. *BRV, Inc. v. Superior Court*, 143 Cal.App.4th 742, 759; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045; *Register Division of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909; *American Federation of State, County and Municipal Employees (AFSCME), Local 1650 v. The Regents of the University of California* (1978) 80 Cal.App.3d 913, 918.

In *BRV, supra*, 143 Cal.App.4th at 759-60, the Court specifically addressed the interplay between Government Code § 6254(c) and claims of privacy by high ranking employees and officials:

The higher the position of the employee, the further the right of privacy is diminished...The potential injury here is to his reputation, but as a public official, he knew his performance could be the subject of public, "vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." (Sullivan, *supra*, 376 U.S. at p. 270.) The constitutional protections of free speech, press, and, in this state, access to public agency records to observe the conduct of public business are not forfeited by the risk of injury to official reputation. (*Id.* at pp. 272-273.)

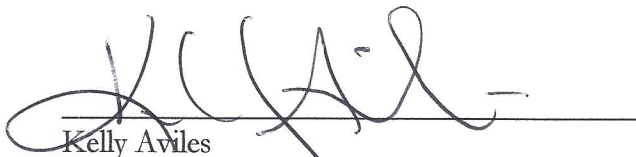
The public also has an overriding interest in seeing how the government deals with improper conduct of public employees. *BRV, Inc., supra*, 143 Cal.App.4th at 759; *Bakersfield City School District, supra*, 118 Cal.App.4th at 1045. Here, the public's interest is greater because of the potential conflicts of interest when two parties on either side of the City's union negotiations are having a personal relationship.

Additionally, on September 30<sup>th</sup>, Mr. Elmahrek submitted a second CPRA request for the letter sent to the City Council outlining grievances with City Manager David Cavazos. This record is disclosable for the same reasons outlined above.

Please confirm that the City will immediately release the record it previously withheld in response to the September 14 CPRA request, and will also be releasing the letter requested in the September 30 CPRA Request.

Please do not hesitate to contact me if you have any questions regarding this matter.

For the Firm,

  
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Kelly Aviles

cc: Sonia Carvalho, City Attorney