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VENTURA
SUPERIOR COURT
FILED

DEC 02 2019

MICHAEL D. PLANET
Executive Officer and Clerk
BY: _____, Deputy
JEANETTE FIMBRES

Attorney for Petitioner
Moving Oxnard Forward, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE VENTURA COUNTY — HALL OF JUSTICE

Moving Oxnard Forward, Inc.,

Petitioner,

vs.

Michelle Ascencion;
City of Oxnard; and
DOES 1 through 10, inclusive,

Respondents;

Case No.: 56-2019-00536762-CU-WM-VTA

**Verified Petition for Alternative and/or
Peremptory Writ of Mandate;
Complaint for Declaratory & Injunctive
Relief**
[Gov. Code § 6258]

BY FAX

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT:

Petitioner **Moving Oxnard Forward, Inc.** by this Verified Petition and Complaint for Declaratory and Injunctive Relief, petitions this court for a Writ of Mandate and/or requests declaratory relief and an injunction directed to Respondents and by this Petition alleges:

1. The purpose of this action is to enforce Petitioner's right to receive records from Respondents pursuant to Government Code section 6250 et seq.,¹ the California Public Records Act (PRA).

PARTIES

2. Petitioner **Moving Oxnard Forward, Inc.** is a corporation organized under the laws of

¹ All undesignated code references are to the Government Code.

1 the State of California and having its principal place of business in the City of Oxnard, County of
2 Ventura, State of California. Petitioner is beneficially interested in this action because it
3 requested public records from Respondents and Respondents have not adequately responded to
4 its request.

5 3. Respondent **Michelle Ascencion** (City Clerk) is sued in her official capacity as City Clerk
6 for the City of Oxnard. In her official capacity as City Clerk, she has a ministerial duty to comply
7 with the PRA on the City's behalf.

8 4. Respondent **City of Oxnard** (City) is a municipal corporation and local agency as defined
9 by the PRA.

10 5. The true names of Respondent DOES 1 through 10, inclusive, are unknown to Petitioner,
11 who therefore brings this action against DOES 1 through 10, inclusive, by such fictitious names
12 and will seek leave of this Petition to show their true names, identities, and capacities when they
13 have been ascertained.
14

15 JURISDICTION AND VENUE

16 6. Pursuant to section 6258, "any person may institute proceedings for injunctive or
17 declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her
18 right to inspect or to receive a copy of any public record or class of public records under [the
19 PRA]." The PRA defines "person" as including corporations. Therefore, Petitioner is a
20 "person" suing to enforce its right to receive public records.

21 7. The Ventura County Superior Court is the proper venue because (1) the acts complained
22 of, which are the subject of this Petition, have all occurred or will all occur in the County of
23 Ventura, State of California; (2) Respondent City of Oxnard is located in the County of Ventura;
24 (3) Respondent Ascencion does business and/or resides in the County of Ventura and is named in
25 her official capacity on behalf of a government entity located in Ventura County; and (4) the
26 public records that are at issue in this action are located in or within the control of parties located
27 in the County of Ventura.
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1 8. The relief sought is within the jurisdiction of this Court.

2
3 **FIRST CAUSE OF ACTION:**
4 **VIOLATION OF PUBLIC RECORDS ACT (GOV. CODE § 6250 ET SEQ.)**
5

6 **A. Petitioner’s Public Records Act Request**

7 9. On October 9, 2019, Alicia Percell, Secretary of Petitioner Moving Oxnard Forward,
8 requested public records from Respondents on Petitioner’s behalf and in her capacity as
9 Petitioner’s Secretary. She submitted five separate requests by email with the subjects “PRA
10 request 1 of 5,” “PRA request 2 of 5,” “PRA request 3 of 5,” “PRA request 4 of 5,” and “PRA
11 request 5 of 5.” She sent five separate requests, with the expectation that some requests would
12 take longer than others to process and did not want those requests to slow down the City’s
13 response to the others. Percell also separated the requests to help ensure that any exemptions the
14 City claimed as a basis for withholding records could be matched more accurately to specific
15 requests. Attached as **Exhibit A** is a true and correct copy of her five requests.

16 10. The requests related to a “Resident Satisfaction and Community Priorities Survey” the
17 City commissioned and conducted this year from August 29 to September 3 to promote a ballot
18 measure in the upcoming March 2020 Primary Election — the Oxnard Government
19 Accountability and Ethics Act — and a potential 1.5-cent sales tax increase for the November
20 2020 ballot.

21 11. The specific requests were for copies of any and all of the following documents:

22
23 **a. Request Number One**

- 24 • Requests for bids, proposals, or quotes related to this survey
25
26 • Bids, proposals, or quotes provided by any vendor or potential vendor in
27 response to the city’s solicitation of bids, proposals, or quotes related to
28 this survey

1 **b. Request Number 2**

- 2 • Executed agreements between the city and the selected survey vendor
3 (FM3 Research - Fairbank, Maslin, Maullin, Metz & Associates)
4 • Invoices (paid or unpaid) related to the survey
5

6 **c. Request Number 3:** Work products provided to the city by the survey vendor
7 related to the survey, including but not limited to the survey questionnaire,
8 written reports, spreadsheets, topline results, frequencies, cross tabulation tables,
9 detailed survey response data, etc.

10 **d. Request Number 4:** Written communications (i.e. correspondences, emails and
11 their attachments, text messages, memos, etc.) between the city and any vendor
12 who submitted a bid, proposal, qualifications, or quote related to this survey
13 (including the vendor who was chosen to conduct the work).

14 **e. Request Number 5:** Written communications (i.e. correspondences, emails and
15 their attachments, text messages, memos, meetings agendas, etc.) to or from city
16 staff (including elected officials) concerning the commissioning or development of
17 this public opinion survey.
18

19 12. The next day, Respondent Michelle Ascencion responded with her restatement of
20 Percell's requests, combing the five requests into one and describing each of the five requests as a
21 "part." A true and correct copy of Ascencion's October 10 email restating the requests is
22 attached as **Exhibit B**.

23 13. Ascencion accurately restated Percell's requests with one exception: She omitted the
24 words "requests for" from Percell's first request for "requests for bids, proposals, or quotes ..."
25 This omission had the effect of suggesting Percell made two requests for the bids and other
26 proposals the City received, negating the distinction between the bids themselves and the City's
27 request for bids, which was lost in Ascencion's restatement.
28

1 **B. Respondents' Response to Petitioner's Request**

2 14. On October 21, 2019, Ascencion responded in aggregate to the five requests without
3 specifically addressing any one request. She disclosed some records that day and stated that
4 additional records would be disclosed by October 28. The records provided on October 21
5 included a "Professional Services Agreement" with Lew Edwards Group and three related email
6 discussions. Attached as **Exhibit C** is a true and correct copy of Acencion's October 21 email
7 without the attached public records.

8 15. In her October 21 response, Ascencion also explained that "certain records are exempt
9 from disclosure" indicating that the records exist but would not be disclosed. Without identifying
10 any specific document or stating why any specific exemption applied, Ascencion listed several
11 PRA exemptions she asserted justified withholding records. Those exemptions are

- 12 a. Government Code section 6254(a): preliminary drafts, notes, or inter- or intra-
- 13 agency memoranda;
- 14 b. Government Code section 6254(k): attorney-client privilege, official information,
- 15 and attorney work product;
- 16 c. Government Code section 6254.7(d): trade secrets; and
- 17 d. Government Code section 6255: either as the deliberative process exemption
- 18 described in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 or the catch-
- 19 all exemption if the public interest in nondisclosure exceeds the public interest in
- 20 disclosure.
- 21

22 16. On October 28, 2019, the City disclosed additional records in response to the requests.
23 With that response, the City confirmed that it was withholding public records. It stated as reasons
24 *Alicia Percell*
Government Codes sections 6254(a) and (k) and 6254.7(d), as described above, as well as tax
25 information pursuant to Government Code section 6254(i) and Revenue and Tax Code section
26 7056. Ascencion described this communication as closing out the requests. A true and correct
27 copy of this response, without the attached public records, is attached as **Exhibit D**.
28

1 17. The October 28 document disclosure included a “Letter of Agreement” with FM3
2 Research, various communications and invoices with FM3 Research and Lew Edwards Group,
3 and city council documents, including information presented at a City Council meeting that
4 discussed the survey.

5 18. Neither the October 21 nor the October 28 responses from Ascencion related specifically
6 to any one of Percell’s PRA requests. Ascencion’s combined response listed exemptions
7 applicable to any one of the five requests without stating which request the exemptions relate to.
8 For this reason, Ascencion’s determination to each of the five requests is incomplete.

9 **C. The Parties Met and Conferred Regarding Respondents’ Response to the Request**

10 19. On November 1, 2019, Percell responded to Ascencion regarding the scope of the
11 requests to address the discrepancy between her requests and Ascencion’s restatement of those
12 requests, as described in paragraph 13 above.

13 20. Ultimately, the distinction between bids and requests for bids did not make a difference
14 because the City claimed it did not have any additional responsive records even though the City’s
15 Municipal Code requires a bidding process for all contracts exceeding \$5,000 and the public
16 opinion survey in question cost more than \$5,000. Respondents’ made the claim that it had no
17 responsive records in a November 4 email to Percell, a true and correct copy of which is attached
18 as **Exhibit E**.

19 21. On November 6, 2019, Percell identified several documents she believed were missing
20 from the response. A true and correct copy of this email is attached as **Exhibit F**. Percell
21 specifically identified several email attachments which were referenced in emails but not included
22 in the City’s response. (Exh. A, p. 7.) These missing attachments included:

- 23
- 24 a. An invoice from Lew Edwards Group;
 - 25 b. Two documents attached to a July 11 email from
26 catherine@lewedwardsgroup.com to City Manager, Alex Nguyen;
 - 27 c. A document attached to a September 9 email from Katie Casey to two people at
28 Lew Edwards Group; and

1 d. Any other attachment, which can generally be identified by searching the
2 responsive documents for the word “attach” to identify those emails with
3 attachments.

4 22. Percell also requested that the City provide a list of the withheld documents and specific
5 reasons why they were excluded from disclosure. This request was made in a November 6 email
6 from Percell to Ascencion, a true and correct of which is attached as **Exhibit G**. Respondents
7 never responded to this request.

8 23. On November 18, Respondents provided the missing Lew Edwards Group invoice. A true
9 and correct copy of this response (without the invoice) is attached as **Exhibit H**. On November
10 22, they provided the attachments to the July 11 email from catherine@lewedwardsgroup.com. A
11 true and correct copy of this response (without the attachments) is attached as **Exhibit I**. As of
12 the filing of this Petition, the City has not provided any of the other attachments and described
13 the requests as “closed.” (Exh. I.)

14 **D. Outstanding Public Records**

15 24. Excluded from the City’s responses to Petitioner’s requests were records responsive to
16 Request Number Three, “work products provided to the city by the survey vendor related to the
17 survey, including but not limited to the survey questionnaire, written reports, spreadsheets,
18 topline results, frequencies, cross tabulation tables, detailed survey response data, etc.” For
19 example, the City has not provided the questionnaire, top line results, frequencies, cross
20 tabulation tables, and other raw data from the survey.

21 25. Petitioner is further informed and believes that Respondents have withheld other
22 communication and records related to the survey from its responses to each of the five requests
23 based on any one of the exemptions they have claimed.

24 **E. The Records Petitioner Requested are not Exempt from Disclosure Under the PRA.**

25 26. The exemptions stated in Respondents’ responses do not apply to Petitioner’s requests.

27 a. Government Code section 6254(a) does not apply to the requests because, *inter*
28 *alia*, the exemption applies only to records that are not retained by the agency. If

1 the records have been withheld from Respondents' disclosure, then they must
2 possess the records. Therefore, those records were retained and this exemption
3 does not apply. Moreover, with respect to request number three, the survey
4 results are not the type of drafts that the subdivision (a) exemption applies to.
5 Besides documents at issue in request number three, Petitioner is informed and
6 believes that Respondents have improperly withheld additional records based on
7 this exemption.

8 b. Many omitted records cannot be protected by the attorney-client privilege because
9 they necessarily involve communications with the public and/or an opinion
10 research firm, which would waive any possible privilege claim. The records are
11 not attorney work product because they are the opinion research firm's work
12 product. Moreover, the opinion research firms' work product cannot reasonably
13 be construed as official information. Besides documents at issue in request
14 number three, Petitioner is informed and believes that Respondents have
15 improperly withheld additional records based on this exemption.

16 c. The public opinion research into the thoughts and opinions of Oxnard residents is
17 not any firm's "trade secret," so section 6254.7(d) cannot apply either. To this
18 end, the records are not "any formula, plan, pattern, process, tool, mechanism,
19 compound, procedure, production data, or compilation of information which is
20 not patented" that section 6254.7(d) applies to. Moreover, at least with respect to
21 the questionnaire, any claim of "trade secret" would have been waived when the
22 questionnaire was read to at least 600 Oxnard voters. Besides documents at issue
23 in request number three, Petitioner is informed and believes that Respondents
24 have improperly withheld additional records based on this exemption.

25 d. Section 6255 does not apply because there is little to no public interest in
26 withholding these records while the public interest in disclosing them is great. The
27 information is generally information about the thoughts and desires of Oxnard
28

1 voters, paid for with taxpayer funds, to be used by the City in support of a political
2 campaign to pass City Council-sponsored ballot measures at the March and
3 November 2020 elections. Besides documents at issue in request number three,
4 Petitioner is informed and believes that Respondents have improperly withheld
5 additional records based on this exemption.

- 6 e. The public interests in this information include, but are not limited to, City
7 residents' need *and right* to oversee City expenditures and conduct to, *inter alia*,
8 (a) confirm whether the City Council is acting in accordance with their wishes and
9 (b) whether the public opinion survey was a necessary and efficient use of public
10 funds. Further, given the intended use of the publicly-funded information, the
11 survey data and other related records should be provided to the public so that City
12 residents may fully evaluate the City-sponsored ballot measures and have all
13 information available to them in order to make an informed decision at ballot box.

14 27. Even if an exemption applies, Respondents are still required to disclose segregable
15 portions of the records Petitioner requested. Petitioner is informed and believes that nonexempt
16 portions of the records could and should have been disclosed and requests that the Court review
17 those records *in camera* to make that determination, if necessary.

18 **F. Remedies**

19 28. “Whenever it is made to appear by verified petition to the superior court of the county
20 where the records or some part thereof are situated that certain public records are being
21 improperly withheld from a member of the public, the court shall order the officer or person
22 charged with withholding the records to disclose the public record or show cause why he or she
23 should not do so.” (§ 6259, subd. (a).)

24 29. The PRA specially allows “injunctive or declarative relief or writ of mandate” to enforce
25 this right. (§ 6258.)
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1 **Writ of Mandate**

2 30. As a local agency, the City is required to comply with the PRA. Respondents have a
3 ministerial duty to comply with the PRA on the City’s behalf.

4 31. A writ of mandate may issue “to any inferior tribunal, corporation, board, or person, to
5 compel the performance of an act which the law specially enjoins, as a duty resulting from an
6 office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right
7 or office to which the party is entitled, and from which the party is unlawfully precluded by that
8 inferior tribunal, corporation, board, or person.” (Code Civ. Proc. § 1085.) As to this court, the
9 City is an inferior board and the individually named respondents are inferior persons. The PRA
10 specially enjoins Respondents disclosure of the public records Petitioner requested as a duty
11 resulting from “an office, trust, or station.”
12

13 32. As described above, Petitioner requested public records from Respondents and
14 Respondent failed to provide all of the responsive records that Petitioner is entitled to receive.
15 Petitioner has no other plain, speedy, or adequate remedy in the ordinary course of law. Indeed,
16 writ of mandate is specifically authorized as a remedy for PRA violations. (Gov. Code § 6258.)

17 33. Petitioner is beneficially interested in this action because it concerns public records
18 Percell requested on its behalf.

19 **Declaratory Relief**

20 34. There is an actual controversy between the parties as to whether Respondents satisfied all
21 their obligations under the PRA.
22

23 35. Declaratory relief is specifically authorized as a remedy for PRA violations.

24 36. Petitioner alleges the following PRA violations:

- 25 a. Failure to disclose nonexempt public records, either in their entirety or segregable
26 portions of public records containing exempt information;
27 b. Inadequate justification for withholding public records; and
28

1 c. Inadequate determination in response to Petitioner's five separate PRA requests.

2 37. Declaratory relief is necessary to resolve this controversy and determine whether
3 Respondents violated the PRA.

4 **Injunctive Relief**

5
6 38. Respondents have unlawfully withheld the public records that Petitioner requested. Their
7 continued denial of Petitioner's right to obtain the records it requested is an irreparable injury for
8 which there is no adequate remedy in the ordinary course of law. There is no pecuniary relief
9 appropriate or sufficient to substitute for Respondents' failure to disclose the public records
10 Petitioner requested.

11 39. Injunctive relief is specifically authorized as a remedy for violation of the PRA.

12 40. In the alternative to a writ of mandate, Petitioner requests a mandatory injunction
13 ordering that Respondents disclose the public records Petitioner requested.

14 **PRAYER FOR RELIEF**

15
16 Wherefore, Petitioner prays that the Court:

17 1. Issue appropriate peremptory and/or alternative writ as necessary to compel
18 disclosure of the public records Petitioner requested;

19 2. Enter declaratory judgment that Respondents violated the PRA as set forth
20 herein;

21 3. Issue a preliminary, temporary, and/or permanent injunction to compel all of the
22 relief Petitioner seeks in the first cause of action;

23 4. Award Petitioner its attorneys' fees and costs reasonably incurred herein; and

24 5. For such other and further relief as the Court deems proper.

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DATE: November 27, 2019

Respectfully Submitted,
LAW OFFICE OF CHAD D. MORGAN

By: 

Chad D. Morgan Esq.
Attorney for Petitioner
Moving Oxnard Forward