

State of California
Court of Appeal
Case No. C056889

Superior Court of California
County of San Joaquin
Case No. CV029588

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

TRACY PRESS, INC., a California Corporation,
Petitioner and Appellant,

vs.

CITY OF TRACY, CITY COUNCIL OF CITY OF TRACY,
SUZANNE TUCKER
Respondents.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court
For San Joaquin County (CV029588)
Honorable Lauren P. Thomasson, Judge

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I. INTRODUCTION.

The California Constitution provides: “The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” (Cal. Const., art. I, section 3(b)(1).) In similar language, the California Public Records Act declares, “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” In this case, a public official (a city councilwoman in Tracy) did “the people’s business” on her home computer – she communicated with federal officials, identifying herself as a councilwoman, about a major project in her home town. The trial court erroneously concluded that a public official can circumvent the California Constitutional and avoid the Public Records Act by doing the public’s business on a home computer. Its decision should be reversed.

Both the California Supreme Court and this court in recent decisions have clearly pointed the way. Our Supreme Court just a few months ago, in a landmark Public Records Act case, declared: “Openness in government is essential to the functioning of a democracy.” International Federation of Professional and Technical Engineers Local 21 v. Superior Court (Contra Costa Newspapers) (2007) 42 Cal. 4th 319, 328 [hereafter “IFPTE” or “Contra Costa Newspapers”). This Court likewise explained recently: “Californians have a constitutional right to access the records of their public agencies. They have a strong interest in knowing how government officials conduct public business, particularly when allegations of malfeasance by public officers are raised.” BRV Inc. v. Superior Court

(2006) 143 Cal. App. 4th 742, 746.

The trial court's ruling here ignores those precedents. It encourages public officials to do the public's business on home computers to avoid public access to what they are doing. It threatens the "openness in government" which our Supreme Court so recently explained is "essential to the functioning of a democracy." (Contra Costa Newspapers, *supra*, 42 Cal. 4th at 328.) It encourages serial meetings which are outlawed by the Ralph M. Brown Act. It would cut off public access to public officials' communications with other agencies, though our Supreme Court recently held, "public access makes it possible for members of the public to expose corruption, incompetence, inefficiency, prejudice and favoritism." (Contra Costa Newspapers, 42 Cal. 4th at 333, internal quotation marks and citations omitted.)

This Court should encourage accountability and check discourage the "secrecy in the political process" which our Supreme Court so recently condemned. (Contra Costa Newspapers, 42 Cal. 4th at 329.) The judgment should be reversed.

II. FACTUAL HISTORY.

The Tracy Press is a newspaper of general circulation published in Tracy, California which regularly covers City of Tracy government and officials. (Joint Appendix 85:27-28) The City of Tracy (hereafter "Respondents") is a municipal Corporation located in San Joaquin County, and is a "local agency" as that term is defined in Government Code § 6252(a) and a "public agency" as that term is defined in Government Code §6252(d). (JA 370:2-4) The City Council is the duly elected legislative body for the City and is responsible for compliance with Government Code § 6252 and the California Constitution. (JA 5:13-17.) Suzanne Tucker is an

elected member of the Council and is a public official as that term is used in the California Constitution, Article 1 § 3(b), adopted by an 83 percent vote of the people of the State of California as Proposition 59 in 2004. (JA 5:18-22)

On January 9, 2007 the Tracy Press requested, under the PRA and Article I, § 3(b) of the California Constitution described above, records of communications between any members of the City Council, including but not limited to Council Member Tucker, and Lawrence Livermore National Laboratory (hereafter “LLNL”) since January 1, 2006 regarding the proposed bio-agent laboratory as well as any test bombing the Lab will do at Site 300. (JA 5:27-6:7; 370:4-9) The PRA Request was for a very narrow time period on a very specific public issue before the Council and requested only written communications between the Council Members and LLNL on a controversial public issue. (JA 370:4-9)

On January 18, 2007 the City responded to the Request by refusing to produce any written e-mails of members of the Council not otherwise communicated to a city employee or consultant. The City’s position was that all e-mails, unless copied or sent to a City computer or e-mail address, were protected from disclosure. (JA 69-72; 89-91) The same e-mail written on a City computer or using a City e-mail address would be disclosed, but would not be disclosed if sent to, created, sent from or stored on an individual council member’s computer. (JA 69-72; 89-91)

Petitioner obtained e-mails from LLNL pursuant to a public records request to LLNL, and from Tracy produced in response to a separate public records request by a local citizen. At least 18 of the e-mails produced by LLNL were e-mails from or to Tucker on the subject of the bio-lab which was then pending before the council. (JA 99-149; Summarized JA 61-66)

These e-mails show that Tucker frequently identified herself as “Suzanne Tucker, Tracy City Council” while attempting to manipulate the hearing process and assist LLNL. (JA 101, 102, 123, 132, 134, 136, 138, 141) These e-mails were not produced in response to the Tracy Press’s PRA request but they demonstrate the type of e-mails that are known to exist, and which the City and Tucker have refused to produce.

They establish that Tucker was not acting as a private citizen, but was using her public position on the City Council to secretly manipulate the hearing process to assist LLNL. They also indicate that Tucker may have used her home computer to avoid public disclosure, saying on one occasion, “the Tracy Press is still after my e-mail.” (JA 101, 104.) She forwarded newspaper articles and discussed tactics and strategy with the public relations department of LLNL. It is this activity that the trial court found was somehow protected from disclosure.

The Records produced by Respondent in response to the Public Records Request by another citizen contain at least 13 e-mails to a Council-appointed committee known as the Tracy Tomorrow and Beyond Committee (hereafter “TT&B”) during the same time period as the above e-mails between Tucker and LLNL on the same bio-lab issue. (JA 158-159, 160-162, 163-164, 165-166, 167-168, 175-176, 185-187, 194, 195, 197, 204, 209-218, 223)

These e-mails from LLNL and Tracy show a council member working hard to manipulate the outcome of a Council Subcommittee on behalf of LLNL while attempting to pretend public neutrality and give the pretense of an open mind.

On March 22, 2007, in response to the Appellant’s PRA request, the City responded that “e-mails sent in a Council Member’s individual

capacity, that are not sent or received to or from a City employee or committee and that do not use City resources, are not public records subject to the Public Records Act.” (JA 70)

III. PROCEDURAL HISTORY

On April 4, 2007, the Appellant filed a “Petition for Writ of Mandate to Compel Release of Public Records.” (JA 3-10)

A hearing on the Petition was set for May 24, 2007. (JA 254-255)

Respondents filed a Demurrer with a hearing on the Demurrer set for May 23, 2007. (JA 273-274).

Briefs were filed by Appellants opposing the City’s demurrer and supporting the Petition. (JA 39, 275) The City filed a brief supporting its demurrer, but filed no opposition to the Petition on the merits. (JA 260-272, 296.) The California First Amendment Coalition filed an Amicus Brief supporting Appellant’s position. (JA 290-295)

The trial court’s tentative ruling was “Demurrer sustained, ten days to amend. The Court has tentatively sustained the demurrer. However, if the Court’s Tentative decision denying the Petition for Writ of Mandate becomes the Order of the court, the Court intends to overrule the demurrer as being moot.” As to the Petition, the tentative ruling was “Motion Denied”. (JA 324)

On May 23, 2007, the matter was extensively argued by both sides. (JA 325-365) During the course of the hearing, the City admitted that its position was that the writings of a public official were only subject to disclosure if the writings were created at a meeting or stored on the City’s computer system (JA 352:13-355:5.)

On August 23, 2007, 92 days after the matter was submitted, the trial court issued a “Statement of Decision and Order After hearing Re Defendant City of Tracy’s Demurrer Opposing Petition for Writ of Mandate to Compel Release of Public Records”. (JA 369-372; 386-387) Respondents’ Demurrer to the Petition for Writ of Mandate to Compel Release of Pubic Records was “**SUSTAINED without leave to amend.**” (JA 371:18-19, Emphasis in original) Petitioner’s Petition for a Writ of Mandamus was “**DENIED**”. (JA 371:20-23)

The denial of the Petition for Writ of Mandate is the subject of a Writ Petition under Government Code § 6259(c) filed on September 14, 2007, in this court.¹ (Case No. C056812.) This court issued an Order To Show Cause in that Writ case on October 18, 2007.

The sustaining of the Demurrer without leave to amend is appealable pursuant to Code of Civil Procedure Section 472c(a). A Notice of Appeal was filed on September 18, 2007. (JA 380-381)

The parties stipulated to the filing of a Joint Appendix. (JA 388-390). The Joint Appendix is filed concurrently with this Opening Brief.

Although the substantive issues in this Appeal are identical to the issues in case #C056812 also currently before this court, Appellant has proceeded by way of both Writ and Appeal as the trial court both denied the Petition for Writ on the merits and sustained the demurrer without leave to amend.

If this Court grants the relief requested in Writ Petition case #C056812, then this matter will be moot as relief sought by this appeal is

¹ Decisions refusing disclosure of public records under Government Code section 6259 are not appealable, but are reviewable by writ petition under section 6259(c).

identical to the relief sought in case #C056812.

IV. STANDARD OF REVIEW

The City demurred to the Petition and the trial court sustained that demurrer without leave to amend. The Petition here sought relief – disclosure of records – under both the Public Records Act and article I, section 3(b)(1) of the California Constitution.

The trial court was required to give the Petition a reasonable interpretation, reading it as a whole and its parts in their context. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318 ;216 Cal.Rptr. 718) The trial court must examine the factual allegations of the Petition to determine whether they state a cause of action under any available legal theory. (Ellenberger v. Espinosa (1994) 30 Cal.App.4th 943, 947; 36 Cal.Rptr.2d 360; Kamen vs. Lindly (2001) 94 Cal.App.4th 197, 210; 114 Cal.Rptr.2d 127; Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 879-880; 6 Cal.Rptr.2d 151].) “A demurrer should not be sustained without leave to amend **if the complaint, liberally construed, can state a cause of action under any theory** or if there is a reasonable possibility the defect can be cured by amendment.” Kong v. City of Hawaiian Gardens (2002) 108 Cal. App. 4th 1028, 1037. If the Petition stated a claim under either one – and it stated a claim under both – the trial court should not have sustained the demurrer.

“A demurrer tests the pleading alone, and not the evidence or the facts alleged.” (City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 459, 80 Cal.Rptr.2d 329.)

Likewise, this court must “assume the truth of the complaint’s properly pleaded or implied factual allegations.” (Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081; 6 Cal.Rptr.3d 457) Because a trial court’s determination is made as a matter of law, this court will review the

ruling de novo.” (Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, 1423; 131 Cal.Rptr.2d 684; E-Fab, Inc. vs. Accountants, Inc. Services (2007) 153 Cal.App.4th 1308, 1315; Consumer Cause, Inc. vs. Arkopharma, Inc. (2003) 106 Cal.App.4th 824, 827; 131 Cal. Rptr. 342; Kong, supra, 108 Cal. App. 4th at 1038.)

Not only is the review de novo, but this Court “must conduct an independent review” of a trial court’s statutory construction under the Public Records Act. (CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 651) The trial court made no factual findings which would be entitled to deference.

A Plaintiff or Petitioner need not request leave to amend in order to preserve on appeal the issue of whether the court abused its discretion in sustaining a demurrer without leave to amend. (Code Civ. Proc., § 472c; Palm Springs Tennis Club v. Rangel (1999) 73 Cal.App.4th 1, 7; 86 Cal.Rptr.2d 73; Hugh McAllister vs. County of Monterey (2007) 147 Cal.App.4th 253, 297; 54 Cal.Rptr.3d 116.)

V. SUSTAINING OF A DEMURRER WITHOUT LEAVE TO AMEND IS AN APPEALABLE ORDER.

Respondent will argue that this appeal is not proper but the trial court’s ruling must be challenged by Writ. If the trial court had only denied the Petition on the merits, that argument would be correct. However the trial court in its “Statement of Decision and Order After hearing Re Defendant City of Tracy’s Demurrer Opposing Petition for Writ of Mandate to Compel Release of Public Records” sustained the demurrer without leave to amend AND denied the Petition for Writ of Mandamus. (JA 371:18-23) The Order was not in the alternative as the tentative ruling appeared to have been phrased. (JA 324.) The trial court’s final Order sustained the demurrer without leave to amend.

Appellant therefore had to proceed by Writ to this court to challenge the denial of the Petition pursuant to Government Code § 6259(c), and by this appeal to challenge the sustaining of the demurrer without leave to amend. (CCP 472c, CCP 904.1(a)(1))

VI. THE MANDATE OF OPENNESS; BURDEN ON AGENCY.

As recently as August 27, 2007 the Supreme Court stated in a landmark Public Records Act opinion: “Openness in government is essential to the functioning of a democracy.” IFPTE/Contra Costa Newspapers, *supra*, 42 Cal. 4th at 328. This Court likewise took note of the constitutional right of access to the writings of public officials in BRV v. Superior Court (2006) 143 Cal. App. 4th 742, 746, declaring: “Californians have a constitutional right to access the records of their public agencies. They have a strong interest in knowing how government officials conduct public business, particularly when allegations of malfeasance by public officers are raised.”

The PRA could not be clearer: “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state”. (Government Code § 6250.) The PRA was enacted in 1968 “to safeguard the accountability of government to the public, for secrecy is antithetical to a democratic system of government of the people, by the people (and) for the people.” (San Gabriel Tribune vs. Superior Court (1983) 143 Cal.App.3d 762, 772.) The PRA was enacted against a “background of legislative impatience (sic) with secrecy in government...” The Legislature had long been attempting to “formulate a workable means of minimizing secrecy in government.” (*Ibid*, see CBS, Inc. vs. Block (1986) 42 Cal.3d 646, 651.)

The burden is on the public agency to justify non-disclosure. Contra

Costa Newspapers, 42 Cal. 4th at 329. Laws furthering the right of public access must be broadly construed, while laws limiting access must be narrowly construed. (Cal. Const., art. I, § 3(b)(2).)

The principles of openness mandated by the PRA were broadened by the amendment of the California Constitution by Proposition 59. Article 1, Section 3(b) of the California Constitution was placed in the Constitution when voters passed Proposition 59 with an 83 percent majority vote in 2004. (Declaration of Karl Olson 1:27-2:8, Tab 7.) Article I, § 3(b)(1) provides: “The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies **and the writings of public officials and agencies shall be open to public scrutiny.**”

The California Supreme Court explained in its recent Contra Costa Newspapers decision, 42 Cal. 4th at 328-29, quoting CBS, supra, 42 Cal.3d at 651: ““Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.””

No better example of “secrecy in the political process” can be found than Tucker’s secret manipulation of the TT&B process on behalf of LLNL while putting on the front of neutrality to the public. A public record’s status as a public record under the PRA or Constitution is not lost because it is stored on a personal computer, e-mailed from a personal computer, or created when the public official is not actually sitting in a duly noticed public meeting. The key is whether a public official is conducting public business and acting as a public official. Tucker was. Indeed, a public

official with something to hide may be more likely to use a home computer, as Tucker did here. Indeed, Tucker was acutely aware that the Tracy Press was requesting her e-mails: she forwarded the Press' Public Records Act request (JA 104), and a few weeks later she said, "the Tracy Press is still after my e-mail." (JA 101.)

VII. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT INDIVIDUAL MEMBERS OF A LOCAL AGENCY ARE NOT SUBJECT TO THE PUBLIC RECORDS ACT OR STATE CONSTITUTION.

The trial court, in flat contravention of article I, section 3(b)(2) of the California Constitution, narrowly defined every statute and definition to restrict public access. This was compounded by the misapplication of a non-PRA Government Code section on governmental organization to narrowly restrict the application of the PRA. The trial court ruled that a public official is only a part of a local agency for those brief moments when he or she is meeting with the other members and they are eligible to exercise their vested powers. (JA 370:26-28.) Under the trial court's unduly narrow definition of public records, even the employees of a local agency would not be subject to the Public Records Act. Moreover, the trial court flatly ignored the clear language of article I, section 3(b)(1) of the California Constitution, which provides in unmistakably clear language, "the writings of public officials and agencies shall be open to public scrutiny." The Petition, which was brought under both the PRA and the California Constitution, alleged (JA 3-4, especially 4:23-26), and the record shows, that Tucker identified herself as and acted as a "public official" – a member of the Tracy City Council – in her extensive correspondence with Lawrence Livermore Lab officials on the Bio-Lab project. (JA 101-149.)

The trial court's narrow reading of access rights is contrary to

existing presumptions. The Attorney General has defined “public record” broadly as intending “to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. **Only purely personal information unrelated to ‘the conduct of the public’s business’ is exempt from the definition of “public record,” such as “the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities.”**” (San Gabriel, *supra*, 143 Cal.App.3d at 774.) The focus of the Attorney General was on content and purpose, not procedure and location.

At the urging of the City and Tucker, the trial court focused on and based its decision on the term “local agency” as defined by Government Code Section 6252(a). But Tucker does not cease to be an elected member of the Council – a “public official” under article I, section 3(b)(1) -- even when at home. Tucker and the Council argued that because the PRA does not specifically say it applied to individual members of a local agency, the PRA’s provisions only applied to local agencies when actually meeting together at duly noticed public meetings. The City and Tucker misdirected the trial court to Government Code Section 36501 which vests power in a general law city in a city council of 5 members. (Points & Authorities Supporting Demurrer JA 265:23-266:2, footnote 6) This Government Code Section is unrelated to the PRA or California Constitution but instead relates to Governmental organization and how power is vested in certain agencies. It was never intended to determine applicability of the PRA to individual members of any agency.

A. Government Code Section 36501 is not applicable to Proposition 59 or the PRA.

Government Code Section 36501 deals with the organization of City Government. It merely states the groups and persons in whom the power of a City Government is vested:

“The government of a general law city is vested in:

- (a) A city council of at least five members.
- (b) A city clerk.
- (c) A city treasurer.
- (d) A chief of police.
- (e) A fire chief.
- (f) Any subordinate officers or employees provided by law.”

This section provides no guidance in making a determination as to whether individual members of a City Council, which is a local agency, must comply with the PRA. No case or any authority supports the proposition that members of a city council are exempt from the Public Records Act. The trial court’s logic that the PRA requires disclosure of documents of a local agency, but not of the individual members of that agency, cannot be supported without reliance on this inapplicable section. Moreover, and more fundamentally, the trial court’s ruling ignores the independent force of article I, section 3(b)(1) of the California Constitution.

If the trial court’s ruling stands, then Section 36501 is the litmus test to determine the applicability of the Public Records Act, and even a City Manager and other employees of the city would be exempt from the PRA. Section 36501 was not intended or written to apply that way.

B. Trial Court’s Ruling Would Allow Forbidden “Serial Meetings.”

The Brown Act’s (Govt. Code § 54950 et seq.) prohibition of serial meetings is instructive. (Stockton Newspapers vs. Redevelopment Agency (1985) 171 Cal. App. 3rd 95, 104-05.) The Brown Act prohibits elected officials from engaging in “a series of telephone conversations” to arrive at

a consensus outside the public meeting. (Id. at 104.) E-mail has made this illegal practice more convenient. If an elected official is not an elected official, but a private citizen, when using her own computer or e-mail account or address to conduct agency business, then as private citizens council members can conduct serial meetings, violate the Brown Act, and avoid detection. Elected officials should not be allowed to circumvent Article I, Section 3(b) of the Constitution, the PRA and the Brown Act so easily. It is the subject matter, not the venue, mode of communication or ownership of the computer that matters.

C. The Trial Court Should Have Relied On Proposition 59's Requirement That The PRA Be Interpreted Broadly To Require Disclosure.

Instead of turning to an unrelated Government Code Section dealing with persons and groups vested to act on behalf of a local agency, the trial court should have followed the mandate of the State Constitution. Article I, section 3(b)(1) states that the writings of public officials shall be open to public scrutiny. Article I, § 3(b)(2) of the California Constitution requires that a statute or other authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” The correct analysis would have been to determine that, consistent with Article I, Section 3(b)(2), a member of the City Council is subject to the PRA when corresponding on public business. Instead, the trial court relied on an unrelated section determining how the power of a general law city is vested to determine that individual members of the Council need not comply with state law. This is a narrow construction limiting the right of access, the exact opposite of the mandate of the PRA and Article I, Section 3(b)(2) of the Constitution.

The trial court attempts to characterize its decision as a refusal to

expand the existing definitions of “public record” and “local agency” to cover the writings sought in this action. (Statement of Decision JA 371:11-14.) What the trial court has really done, however, is rewrite the legislation to make Section 36501 part of the PRA to determine to whom and when the PRA and the State Constitution will apply. It has said that “public officials” are not subject to the PRA or Article I, Section 3(b)(1) of the State Constitution because they are only individuals. The trial court has effectively written the term “public official” out of Proposition 59 and Article I, Section 3(b)(1) of the State Constitution.

Proposition 59 mentions “public officials” and “agencies” separately, contradicting the trial court’s conclusion that only the writings of local agencies, but not public officials, are subject to disclosure. Article I, Section 3(b)(1) of the California Constitution provides: “The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of **public officials** and **agencies** shall be open to public scrutiny.” To arrive at the conclusion that only an “agency” must comply with a PRA request, the trial court has effectively written the term “public officials” out of the State Constitution.

Proposition 59, as now embodied in the California Constitution, provides access to two distinct categories of items: (1) the meetings of public bodies and (2) the writings of public officials. If, as the City of Tracy urges, the voters had intended ONLY to mandate disclosure as to public officials when meeting as a public body, then the second category of “writings of public officials” would not even have been necessary. The phrase “writings of public officials” is not limited to when they are meeting as a public body. Respondents would limit the right of access to writings of

public officials to those made only when they meet as a public agency or body, which is a restriction on this constitutional right not contained in the constitution and contrary to the broad construction required by Article I, Section 3(b)(2).

If the trial court was faced with some ambiguity in trying to determine the applicability of the PRA and Proposition 59, it should have ruled in a manner to broaden their scope. An example of this type of ruling is the case of Recorder v. Commission on Judicial Performance (1999) 72 Cal.App.4th 258, 269. In Recorder, the court construed Proposition 190 from the 1994 ballot, which enacted Article VI, § 18(j) of the California Constitution for the purpose of providing greater openness in the proceedings of the California Commission on Judicial Performance. The Court observed:

“Where a provision in the Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted.” (Citations.) “The argument submitted to the electors in support of a proposed Constitutional amendment is not controlling but may be resorted to as an aid in determining the intention of the framers and the electorate. New provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for.”

The trial court was urged to take judicial notice of Proposition 59 ballot arguments and analysis, in which its proponents called Proposition 59 the “Sunshine Amendment,” in construing Proposition 59. It was exactly the type of backroom secret lobbying on behalf of the public relations arm of another agency alleged here that the voters wanted disclosed when Proposition 59 was enacted. Indeed, the ballot argument in favor of Proposition 59 said the measure would allow members of the public to get answers to questions like, “Who did the City Council talk to

before awarding a no-bid contract?” (JA 82.) The ballot argument said Proposition 59 “will create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how.” The voters’ intent was clearly to provide access to the sort of e-mails sent and received by Councilwoman Tucker to Lawrence Livermore Lab on public business.

D. The Trial Court was required to overrule the demurrer

The trial court was required to examine the factual allegations of the Petition to determine whether they state a cause of action under any available legal theory. (Ellenberger v. Espinosa (1994) 30 Cal. App. 4th 943, 947; 36 Cal.Rptr.2d 360; Kamen vs. Lindly (2001) 94 Cal.App.4th 197, 210; 114 Cal.Rptr.2d 127; Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 879-880; 6 Cal.Rptr.2d 151].) The trial court was required to overrule the demurrer **if the petition, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility that any defect can be cured by amendment.** Kong v. City of Hawaiian Gardens (2002) 108 Cal. App. 4th 1028, 1037. Instead, the trial court narrowly interpreted both the PRA and state constitution in the most narrow fashion possible to sustain the demurrer. There are, therefore, two grounds requiring a liberal interpretation of the PRA and state constitution: the language of the PRA itself requiring a liberal reading, and the general rules of liberal interpretation applying to demurrers. The sustaining of the demurrer in this case violated both principles.

E. The Trial Court Misapplied The PRA And Proposition 59 Exemption Provisions.

The trial court limited the application of the PRA and Proposition 59 by determining that Proposition 59 did not “supersede or modify existing privacy rights guaranteed under the State’s Constitution nor repeal or

modify existing or implied constitutional exceptions to the right of access to public records.” (Statement of Decision JA 371:3-5) The trial court’s errors were that no PRA exemptions were involved in this case, and no constitutional rights to privacy were involved that outweighed the public’s right to these documents.

The reliance by the trial court on some general undisclosed privacy rights of a public official to conduct public business by personal e-mail are not described in the decision. The trial court implies that the right of the public to the writings of public officials about the public’s business is somehow out-weighted by the right of the public official to conduct the public’s business in secret. Government Code § 6255(a) states: “The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Invocation of Section 6255 is not favored. (See, e.g., CBS, *supra*, 42 Cal.3d at 652-55; BRV, *supra*, 143 Cal. App. 4th at 755-56; *California State University Fresno v. Superior Court (2001) 90 Cal.App.4th 810, 833*. As the Court said in NBC Subsidiary v. Superior Court (1990) 20 Cal. 4th 1178, 1208 fn. 25, quoting a prior case on the subject of access to court records, “[i]n either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.”)

Likewise, the Supreme Court explained in CBS, *supra*, 42 Cal.3d at 656, that without releasing the names of concealed weapons licensees, “there will be no method by which the public can ascertain whether the law is being properly applied or carried out in an evenhanded manner.” The

Supreme Court just a few months ago again emphasized that the right of public access to records “makes it possible for members of the public to expose corruption, incompetence, inefficiency, prejudice and favoritism.” (Contra Costa Newspapers, 42 Cal. 4th at 333, internal quotations and citations omitted.)

An elected public official has a “significantly reduced expectation of privacy in the matters of [his] public employment.” (BRV vs. Superior Court (2006) 143 Cal. App. 4th 742,758.) “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 vs. City of Taft (1984) 154 Cal.App.3d 332, 347.) The LLNL e-mails prove Tucker was engaged in the public’s business while describing herself as a member of the city council. (JA 101-132.) She is not entitled to privacy protection while coordinating the manipulation of a public hearing with public relations employees of another governmental agency.

As with its reference to a vague privacy right to send e-mails in an attempt to manipulate a City process, the trial court alluded to possible “constitutional exceptions to the right of access to public records”. (Statement of Decision JA 371:3-5.) At no time, either in a brief or at the hearing, has any specific constitutional exception or statutory exemption been identified as applicable to this case. Exemptions from disclosure “are construed narrowly to ensure maximum disclosure of the conduct of governmental operations.” (New York Times, supra, 218 Cal.App.3d at 1585; San Gabriel Tribune, supra, 143 Cal.App.3d at 772-73.) There was no exception or exemption applicable to this case.

VIII. SINCE RESPONDENTS FILED NO OPPOSITION TO THE WRIT BUT ONLY A DEMURRER, THE MATTER SHOULD BE REMANDED WITH DIRECTION FOR THE WRIT TO ISSUE WITHOUT FURTHER HEARING.

Respondents made the strategic decision only to file a demurrer. They filed no opposition on the merits. However there are no issues that would be raised on remand that have not already been raised in this appeal and the related writ proceeding, C056812. There is no reason, therefore, to allow the Respondents to answer on remand:

The record demonstrates that the trial court conducted a hearing with counsel for both sides present and participating, on issues specifically addressed in the pleadings and points and authorities filed by the Department and Florence. We are not advised by the Department in its briefing on appeal what issues it would have addressed had it been given leave to file the answer and how those issues may have changed the outcome of the hearing. Thus, the Department has failed to carry its burden on appeal. (People v. Stanley (1995) 10 Cal.4th 764, 793 [42 Cal.Rptr.2d 543]; Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295 [240 Cal.Rptr. 872]; Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 217 [188 Cal.Rptr. 115].)

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Respondents made the strategic decision not to file an answer to the Petition, because they raised in the Demurrer their only defenses. The matter should be reversed and remanded without an opportunity for Respondents to file an answer, and the Petition for Writ of Mandate should be granted.

IX. CONCLUSION

Our Supreme Court recently reaffirmed the need for access to information to combat “secrecy in the political process.” Contra Costa Newspapers, 42 Cal. 4th at 329. This Court likewise recently recognized the public’s “significant interest” in knowing how governing boards and public officials conduct their business. BRV, supra 143 Cal. App. 4th at 757. The trial court’s ruling exalts secrecy and undermines access. It should be reversed. The matter should be remanded to the trial court with instructions to grant the Petition without further hearing.

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

Pursuant to Rule 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the foregoing Appellant's Opening Brief 5,880 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

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