

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

**FILED**

LOS ANGELES SUPERIOR COURT

MAY 20 2011

JOHN A. CLARKE, CLERK

BY N. DIGIAMBATTISTA, DEPUTY

LOS ANGELES TIMES )  
COMMUNICATIONS LLC )  
Petitioner )

vs )

CITY OF BURBANK )  
Respondent )

CASE NO. BS130379

**COURT'S RULING ON PETITION FOR WRIT OF MANDATE HEARD ON  
MAY 20, 2011**

Petitioner Los Angeles Times Communications LLC, which substituted in as Petitioner in lieu of the Burbank Leader pursuant to stipulation, has filed a writ of mandate under the California Public Records Act ("PRA") to obtain information regarding the bonuses received by Burbank city employees.<sup>1</sup> The City of Burbank has declined to provide this information. Petitioner contends that this refusal is a violation of the PRA. Gov't Code section 6250 *et seq.*

The Court has considered the parties' briefs and admissible evidence, having heard argument and having taken the matter under submission, now renders the following tentative decision:<sup>2</sup>

<sup>1</sup> Although Petitioner (through its parent company) is presently in bankruptcy, it is a debtor in possession and is authorized to prosecute this matter without further reference to the Bankruptcy Court.

<sup>2</sup> The Court sustains Respondent's objections to the declarations filed by Petitioner. Specifically, the Court sustains Burbank's objections to the declaration of Thomas Peele as irrelevant and without probative value. There is no relation between the aggregate salary information he allegedly collected in San Francisco with the disaggregated information sought by Petitioner in this case. Nor is the declaration of Ron Lin admissible. Although he claims to have received information from the County of Los Angeles about "bonuses," that testimony is hearsay and inadmissible. In addition, this case is not about "bonuses," it is about the disclosure of merit awards linked to individual employee performance. Finally, the declaration of Dan Evans, the editor of the Burbank Leader, is irrelevant. His opinion of whether the merit pay program makes sense is of no probative value. The remainder of his declaration consists of speculation and argument and the objections thereto are sustained. However, the Court overrules Petitioner's objection to the declaration of Mr. Olsen – both in support of the opening brief and in reply. Counsel's testimony regarding the UC Regents disclosure of "bonus" information is competent and of probative value. Additionally, the letters and information provided by a number of other cities in response to an identical

05/23/11

### Statement of the Case

The Burbank Leader is a newspaper of general circulation published in the City of Burbank. The Burbank Leader is a division of the Los Angeles Times Community News Division. Respondent City of Burbank ("Burbank") is located in Los Angeles County and is a "local agency" as defined in Government Code § 5252. As such, Burbank is subject to PRA.

In December 2010, a reporter for the Burbank Leader made a written PRA request to Burbank, following up on a voicemail. The voicemail and written message stated that the City of Glendale had posted all bonuses for its city employees over the previous ten years. The reporter wanted Burbank to provide the same information for its employees. (Petition, Exhibit A).

Burbank promptly refused the request. In a letter from the Chief Assistant City Attorney, Burbank first distinguished itself from its sister city, Glendale.

"The City of Burbank does not provide bonuses. Rather, there is an established merit pay for performance process that was created . . . a number of years.

Burbank then explained what had been provided to the reporter.

You have been provided with the collective bargaining agreements in which the merit pay plan is provided for . . . . You have also been provided with information which indicates the aggregate amount of merit pay pools and the aggregate amount of merit pay actually awarded for 2009-2010.

Burbank then went on to explain why nothing more would be provided.

We would object to providing information pertaining to which employees received the merit pay for performance and in what amount on the grounds that California Government Code § 6254(c) provides that personnel records, the disclosure of which would constitute an unwarranted invasion of personal privacy, are exempt from disclosure. . . . Given that the merit pay awards are directly related to an employee's performance, we believe that disclosing the actual individual amounts would violate the privacy rights of individuals relating to their performance or lack thereof.

Petition, Exh. B.

---

request for "merit pay" is not hearsay as it is not being admitted for the truth of the matter, but instead to demonstrate a willingness to disclose individual merit pay under the PRA. This is relevant to the issue of the reasonable expectation of privacy by public employees in the component of their salary consisting of merit pay.

Further efforts to resolve this dispute were unavailing. On December 16, 2010, another written PRA request was sent to Burbank's Chief Assistant City Attorney. Burbank noted that it did not object to providing the names and salaries of all of its employees, and reiterated it has already released gross compensation amounts for each employee (which includes merit pay), the aggregate amounts of merit pay by employee unit and the total number of employees eligible for merit pay and how many employees actually received it. (Respondent's Opposition Motion at 4, Exh. A). Petitioner, however, wanted the total compensation information broken down (e.g., base, overtime, loans, and merit/bonus pay, etc.) for all city employees given bonuses/merit pay for 2007-08, 2008-09, 2009-2010, and for the current fiscal year 2010-2011. (Petition, Exh. C).

On January 7, 2011, Burbank reiterated its previous position and refused to disclose the specific amount of "merit pay" awarded individual employees. (Petition, Exh. D).

Petitioner filed a Petition for Writ of Mandate under the California Public Records Act (Gov't Code section 6259) on January 28, 2011.

### **Standard of Review**

A writ of traditional mandate will lie only "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station." Wasko v. Department of Corrections, 221 Cal. App. 3d 996, 1000 (1989).

Two basic requirements are essential to the issuance of the writ: (1) a clear and present ministerial duty on the part of the Respondent; and (2) a clear, present and beneficial right in the Petitioner to the performance of that duty. Wasko, supra, 221 Cal. App. 3d at 1000.

### **Analysis**

The PRA was adopted in 1968, replacing "a hodgepodge of statutes and court decisions, relating to disclosure of public records." Times Mirror Co. v. Superior Court, 53 Cal. 3d 1325, 1338 (1991). The PRA generally requires public agencies to disclose public records, subject to exemptions. International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal. 4th 319, 328-29 (2007).

Implicit in the democratic process is a 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." Id.

In explaining the PRA and its considerations, a recent decision looked back over 25 years to an early decision construing this statute. In Sacramento County Employees' Retirement Association v. Superior Court, \_\_\_ Cal. 4th \_\_\_, 2011 Cal. App. LEXIS 569 (May 11, 2011), the Court of Appeals quoted liberally from Justice Friedman's earlier decision:

“Governmental files hold massive collections which are roughly divisible into public business and private revelations. Statutory and decisional law on public record disclosure reveals two fundamental if somewhat competing societal concerns – prevention of secrecy in government and protection of individual privacy. ‘The People’s right to know’ is a rubric which often accompanies disclosure claims. The ‘right to know’ demands public exposure of recorded official action. A narrower but important issue is the privacy of individuals whose personal affairs are recorded in government files. Societal concern for privacy focuses on minimum exposure of personal information collected for governmental purposes. The California courts have equated the right of privacy with the right ‘to be let alone,’ which must be balanced against public interest in the dissemination of information demanded by democratic processes.”

Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 651-52 (1974).

Also noted was Justice Friedman’s observation that “Although personal information which private persons supply to government may not itself reveal official action, it may have sharp relevance to inquiries into official conduct.” Id. at 652. “The objectives of the Public Records Act thus include preservation of islands of privacy upon the broad seas of enforced disclosure.” Id. at 653.

It is this balancing that, once again, is at issue here.

1. The PRA Authorizes the Disclosure of Salary Information, Including Merit or Bonus Pay.

Under the PRA, all public records are subject to disclosure unless the Legislature has expressly provided to the contrary. Versaci v. Superior Court, 127 Cal. App. 4th 805 (2005). Accordingly, the burden is on the agency seeking to withhold records by demonstrating that this information is subject to an express exemption, or (under the catchall exemption) that, on the facts of this particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. Gov. Code § 6255; Gilbert v. City of San Jose, 114 Cal. App. 4th 606 (2003).

The statutory exemption upon which Burbank relies is set forth in Gov’t Code § 6254(c), which exempts from public disclosure “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” As with all the enumerated exceptions, this exemption is to be narrowly construed. California State University v. Superior Court, 90 Cal. App. 4th 810 (2001). And, possible opprobrium or embarrassment is insufficient to prevent disclosure of records under the PRA. New York Times Co. v. Superior Court, 52 Cal. App. 4th 97 (1997).

Burbank argues that its merit pay system derives and is inextricably intertwined with its performance evaluation system. Thus, if the City were compelled to disclose the amounts that it paid individual employees as a “merit pay” component of their salary, it

05/23/11

would necessarily be required to disclose the respective performances of the individual employee.

Burbank further asserts that individual merit pay information goes well beyond the information that the taxpaying public would need to ensure that the public fisc is being responsibly and properly handled. Thus, there is no public interest served by disclosing "merit pay" information on an individual employee basis. Burbank argues that they have provided the public with more than enough information to enable them to examine the issue of how much the City pays its employees under its merit pay system and how that merit pay is disbursed. Burbank disclosed how much money in the aggregate has been expended on merit pay. Additionally, that gross figure was further allocated to the individual work units – thereby letting the public examine the distribution of merit pay among employee groups. Were someone to argue that these merit rewards are being unfairly allocated among different segments of City employees, this information would allow that fact to be disclosed. And, Burbank provided the total number of employees who have received merit pay over – thereby allowing a mean "merit pay" to be calculated in order to assess whether merit pay was, on average, excessive.

What Burbank has declined to release, however, is the name and actual amount paid to these identified employees as a "merit" bonus over and above published base salaries.

As noted by petitioner, it is possible that a particular employee (or small number of employees) has (have) received a significant bonus under the City's merit pay program. Based only on what the Burbank has disclosed, the public would not be able to detect that occurrence. There is a legitimate and important need on the part of the public, therefore, to know this information. At issue, therefore, is whether the disclosure of an individual employee's merit pay constitutes an unwarranted invasion of personal privacy as required under Government Code § 6254, subd. (c). The Court finds that it does not.

As observed by the Supreme Court, "[t]o the extent that some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one, and is, accordingly, entitled to diminished weight in the balancing test we apply . . . .<sup>3</sup> *Id.* at 331. There is no greater expectation in the individual components of one's salary (gross versus base + overtime + merit bonus) that there is in one's combined salary. *See, e.g., Records for Performance Awards*, 68 Ops. Cal. Atty. Gen. 73 (1985)[records and amounts and reasons for performance awards granted to executive managers of a city are subject to disclosure under the Act.]. Consistent with this expectation is the fact that merit pay information is routinely disclosed by public agencies. *See, e.g., International Federation, supra*, 42 Cal. 4th at 332 (citing *inter alia* 5 C.F.R. § 293.,311 (2001)(requiring special performance awards of federal employees be made public);

<sup>3</sup> Similarly, the declarations provided by Burbank's public employee union leaders which state that their members do not want their merit pay amounts disclosed do not control. Despite "discomfort or embarrassment . . . the strong public policy supporting transparency in government" outweighs the diminished expectation of privacy in public employee salary information. *International Federation, supra*, 42 Cal. 4th at 325-26.

Olson Decl. at ¶¶ 3 and Exhibits A – D. Salary information – of the kind sought here – therefore is outside of the zone of financial privacy for purposes of the PRA.<sup>4</sup> See International Federation, *supra*, 42 Cal. 4th at 328-29.

Merit pay, as a discretionary component of public employee's salary, is of substantial significance and importance and supports the need for complete transparency. Balanced against this significant need for full and complete disclosure, is the absence of any reasonable expectation of privacy.

### **Conclusion**

For the reasons stated above, the Petition for Writ of Mandamus is Granted. Counsel for Petitioner is to submit to this Department a proposed order and a proposed writ within 10 days with a proof of service showing that copies were served on Respondents by hand delivery or fax.

The Court will hold these documents for objections for ten days before signing and filing the Order.

The Court's Ruling, signed and filed this date, shall be deemed to be the Court's Statement of Decision.

DATED: May 20, 2011



\_\_\_\_\_  
ANN I. JONES, JUDGE OF THE SUPERIOR COURT

<sup>4</sup> Burbank's attempt to distinguish this holding by noting that the issue here is a merit component of pay, not an employee's entire salary is unavailing. The cases cited by Burbank do not limit or call into question the holding of *International Federation* that public employee salaries must be disclosed under the PRA.