SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

24CV081048: IN THE MATTER OF: CITY OF OAKLAND PUBLIC ETHICS COMMISSION
07/26/2024 Hearing on Motion to Compel .; filed by CITY OF OAKLAND PUBLIC ETHICS COMMISSION (Petitioner) in Department 520

Tentative Ruling - 07/24/2024 Julia Spain

The Motion to Compel NOTICE OF MOTION AND MOTION TO COMPEL OAKLAND UNITED TO RECALL SHENG THAO, FOUNDATIONAL OAKLAND UNITED, and FOUNDATIONAL OAKLAND UNITES COMPLIANCE WITH THE CITY OF OAKLAND PUBLIC ETHICS COMMISSIONS INVESTIGATIVE SUBPOENAS filed by CITY OF OAKLAND PUBLIC ETHICS COMMISSION on 06/27/2024 is Denied.

Petitioner City of Oakland Public Ethics Commission's ("Petitioner") Motion to Compel Compliance with the subpoenas served on May 21, 2024 is DENIED in its entirety.

The subpoenas as a whole are neither code-compliant nor constitutional. (2 C.C.R., § 10027 (d); N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 460–461; Britt v. Superior Court (1978) 20 Cal.3d 844, 852–853; Roberts v. United States Jaycees (1984) 468 U.S. 609, 617–618; Pacific-Union, supra, 232 Cal.App.3d 60, 70.) Moreover, though independently insignificant in light of the Court's ruling, categories 1(d) and 2(b) additionally lack parameters sufficient to make them "reasonably relevant" to Petitioner's investigation. (Kirchmeyer v. Helios Psychiatry Inc. (2023) 89 Cal.App.5th 352, 359; Brovelli v. Superior Court (1961) 56 Cal.2d 524, 529.)

BACKGROUND

On May 21, 2024, Petitioner served Respondents Oakland United to Recall Sheng Thao ("OUST"), Foundational Oakland United and Foundational Oakland Unities ("FOU") (collectively "Respondents") with investigative subpoenas requiring a return date of May 29, 2024 at 4:00 p.m. and indicating that no extensions would be granted absent good cause. (Russell Decl. ¶ 11; Exh. H.) In particular, the subpoenas at issue seek the following categories of documents from Respondents:

1. All written records concerning or referencing funds actually or potentially raised by or offered to [Respondents] that also:

a. reference or concern an actual or potential recall campaign against Oakland Mayor Sheng Thao;
b. reference or concern the actual or potential payment of expenditures for signature-gathering or petitioning services;
c. reference or concern the earmarking of contributions or payments made to Foundational Oakland United for purposes of making a contribution to a specifically identified campaign committee or ballot measure; or
d. contain any of the following keywords:

• "sheng";
• "thao" ;
• "recall";
• "mayor";
• "oust";
• "private" ;
• anonymous";
• "secret"; IX . " identity";
• "identify";
• "name"; or
• "earmark."

2. All written records concerning or referencing:

a. the making of a monetary or non-monetary contribution to Oakland United to Recall Sheng Thao; or

b. any actual or potential contract with, or payment to, any of the following entities:

• The Halftone Shop; or
• On The Ground

3. All written records: a. referencing or concerning the drafting or sending of the email message included as Attachment lb to this subpoena; or b. received by or sent from the address andrew@foundationaloaklandunites.org referencing or concerning donations as described in Attachment lb.

(Russell Decl. ¶ 11; Exh. H.)
The notice attaching the subpoenas further instructed: "you are required to search the records of your officers, directors, treasurers, employees, contractors, volunteers, or agents who might reasonably have some of the records sought." (Russell Decl. ¶ 11; Exh. H.)

Respondents responded to the subpoenas at issue on May 28, 2024, objecting that the subpoenas were not code-compliant, that the documents sought were protected by attorney-client privilege, that the document categories were overly broad, and further that the subpoenas as-drafted, infringed on the constitutional privacy rights of their members. (Russell Decl. ¶ 12; Exhs. J.)

On June 6, 2024, Petitioner sent a response letter to Respondents indicating its disagreement with Respondents' objections (Russell Decl. ¶ 13; Exh. K) and on June 13, 2024, Respondents responded to Petitioner's correspondence, reiterating the basis for its objections. (Russell Decl. ¶ 14; Exh. L.)

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LAW

A. Investigative Subpoena – Requirements & Scope

Government Code section 11181 authorizes government department heads to "[i]nspect and copy books, records, and other items" and to "[i]ssue subpoenas for . . . the production of papers, books, accounts, documents, any writing as defined by Section 250 of the Evidence Code, tangible things, and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state." (Gov. Code, § 11181, subds. (a); (e).) "During the course of an investigation, the department may issue and serve upon a person, corporation, partnership, association, public entity, or other organization a subpoena, on a form prescribed by the department, to require the attendance and testimony of a witness by deposition or other investigative proceeding or means including, without limitation, an investigative interview." (2 C.C.R., § 10027, subd. (a).)

"A subpoena for an investigative interview or deposition, or other investigative proceeding, also may require the production of books, records, documents, and physical materials in the possession of, or under the control of, the person or organization named on the subpoena." (2 C.C.R., § 10027, subd. (c).)

"Service of a subpoena for an investigative interview or deposition, or other investigative proceeding, shall be made in compliance with section 12963.1(b) of the Government Code in such manner as to allow the person or organization named on the subpoena reasonable time for compliance. In no event shall an investigative subpoena indicate a date for appearance or compliance that is less than fifteen (15) days after the date service of the subpoena is completed." (2 C.C.R., § 10027, subd. (d).)
An investigative subpoena must be issued in a manner consistent with the state and federal Constitutions, and is valid if it:

1) inquiries into matters the agency is authorized to investigate;
2) is "not too indefinite," and
3) seeks information that is "reasonably relevant" to the investigation.

(Kirchmeyer, supra, 89 Cal.App.5th at p. 359; Brovelli, supra, 56 Cal.2d at p. 529.)

The agency issuing the investigative subpoena has authority to subpoena records regarding whether the entity under investigation is subject to the agency's jurisdiction and whether there have been violations of provisions under the agency's jurisdiction. (State Water Resources Control Board v. Baldwin & Sons, Inc. (2020) 45 Cal.App.5th 40, 56 citing to Brovelli, supra, 56 Cal.2d at p. 529.)

B. Constitutional Right to Privacy (Balancing of Interests)

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Where an investigative subpoena implicates the constitutional right to privacy, the court must balance the privacy rights at issue against the countervailing interests raised by the party issuing the subpoena. (Grafilo v. Wolfsohn (2019) 33 Cal.App.5th 1024, 1035.) In this context, "good cause" is shown by "competent evidence" that the records sought are relevant. (Ibid.)

In Hill v. National Collegiate Athletic Association (1994) 7 Cal.4th 1, the California Supreme Court "established a framework for analyzing constitutional invasion of privacy claims". Under this framework, the Court evaluates whether the information sought implicates a legally protected privacy interest, an objectively reasonable expectation of privacy, and a threatened intrusion that is serious. (Hill, supra, 7 Cal.4th at pp. 35-37.)

The party seeking the information may then raise any legitimate, countervailing interests that disclosure serves, while the party seeking protection may identify feasible alternatives would diminish the loss of privacy. (Grafilo v. Cohanshohet (2019) 32 Cal.App.5th 428, 437; Hill, supra 7 Cal.4th at pp. 37-40.) If a claimant meets all three criteria stated in Hill, supra, 7 Cal.4th 1, the court must then balance the privacy interest at stake against other countervailing interests. (Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360, 371.)

ANALYSIS

A. The Subpoenas Are Not Code-Compliant (2 C.C.R., § 10027 (d))

As a preliminary matter, the subpoenas at issue are not code-compliant because they failed to provide Respondents with adequate time to respond. (2 C.C.R., § 10027, subd. (d).) The California Code of Regulations requires that the subpoena allow the person or organization responding to a subpoena a "reasonable time for compliance" which shall "[i]n no event" indicate a date for compliance that is "less than fifteen (15) days after the date service of the subpoena is completed." (2 C.C.R., § 10027, subd. (d).)

Here, the subpoenas were served on May 21, 2024 (Russell Decl. ¶ 11; Exh. I) and demanded compliance by May 29, 2024. (Russell Decl. ¶ 11; Exh. H.) They further specified that no extensions would be granted absent good cause. (Ibid.)

Although Petitioners have since conceded that their subpoenas failed to allow sufficient time to respond and therefore were not code-compliant, their agreement to continue the date of the hearing does not cure this defect or otherwise or invalidate Respondents' objections to the subpoena on this basis.

B. The Subpoenas Are Unconstitutional

Apart from failing to comply with minimum statutory requirements, the subpoenas at issue are

unconstitutional because they seek (absent due process) documents outside of Respondents' possession, custody and control and purport to extend into to the private records of unnotified individuals – some of whom are at best peripherally associated with Respondents.

An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated to apprise interested parties of their obligations and afford them an opportunity to present their objections. (Edward W. v. Lamkins (2002) 99 Cal.App.4th 516, 529.) Here, while the Notice of Subpoenas ("Notices") at issue were served on Respondents, they purported to search the private records of entire categories of individuals associated with Respondents without providing notice to those individuals who remained only generally referenced and unidentified.

For example, the Notice served on Foundational Oakland Unities states the following:

"you are required to search the records of your officers, treasurers, employees, contractors, volunteers, or agents who might reasonably have some of the records sought, including the following individuals specified on the subpoena:

• Stacy Owens;
• Peter Sullivan;
• Tanya Boyce;
• Andrew Hock; and
• Seneca Scott"

(Russell Decl. at Exh. H: Notice of Subpoena # 240008-03.)

Similarly-worded Notices were served on OUST and Foundational Oakland United, requiring them to search the records of their "officers, treasurers, employees, contractors, volunteers, [and] agents" for responsive documents as well. (Russell Decl. at Exh. H: Notice of Subpoena # 240008-04; Notice of Subpoena # 240008-07.)

While it may be appropriate to have Respondents search records in their possession, custody or control, the notices here purport to reach beyond the scope of the subpoenaed party's records and into the private records of Respondents' "officers, treasurers, employees, contractors, volunteers, or agents" without first serving those individuals with notice that their private documents are to be searched.
First, absent a separate subpoena (or notice at the very least) to the unidentified individuals (described as Respondents' "officers, treasurers, employees, contractors, volunteers, or agents") whose personal records are sought, Petitioner has not provided these individuals with due process because the notice served on Respondents does not inform these individuals that documents in their possession, custody or control are being searched as part of an investigation.

Second, the scope and nature of the subpoenas at issue violate these individuals' constitutional privacy rights and also appears to offend the prohibition against unreasonable searches and seizures guaranteed to them by the federal Constitution. (Pacific-Union Club v. Superior Court (1991) 232 Cal.App.3d 60, 70 ("Pacific-Union").)

Third, extending the subpoena beyond the scope of documents in the possession, custody or control of the named parties and into the private records of individuals associated with them infringes on the associated individuals' freedom of intimate association and expressive association. (N.A.A.C.P., supra, 357 U.S. at pp. 460–461; Britt, supra, 20 Cal.3d at pp. 852–853; Roberts, supra, 468 U.S. at pp. 617–618.)

"The supremacy of the federal Constitution is especially clear when . . . authorities demand or subpoena information: a court 'has jurisdiction to determine whether the [authority's] inquiry offends the prohibition against unreasonable searches and seizures or violates the right of privacy or the privilege against self-incrimination.' [Citation.]" (Pacific-Union, supra, 232 Cal.App.3d 60, 70.)

While these issues were inadequately briefed by the parties, the Court remains unconvinced that a subpoena seeking access to records in the possession, custody or control of individuals can be valid or constitutional absent notice to that individual that their records are being searched as part of an investigation and adequately apprising that individual of what the investigation at issue is about.

The privacy of personal association is protected by the First and Fourteenth Amendments of the United States Constitution. (N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 460–461; Britt v. Superior Court (1978) 20 Cal.3d 844, 852–853.) The freedom to associate with the persons of one's choice, without unwarranted governmental intervention or interference, is divided into two components: the freedom of intimate association and the freedom of expressive association. (Roberts v. United States Jaycees (1984) 468 U.S. 609, 617–618.) Intimate association stands constitutionally protected because "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." (Ibid.) Thus, "freedom of [intimate] association receives protection as a fundamental element of personal liberty." (Id. at p. 618.)

Freedom of expressive association stands protected as an "indispensable means of preserving" the liberty to "associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." (Roberts, supra, 468 U.S. at p. 618.) The freedom of expressive association enjoys a "close nexus" with the freedom of speech (N.A.A.C.P., supra, 357 U.S. at p. 460) and embodies a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (Roberts, supra, 468 U.S. at p. 622.)

The notices here demand that the subpoenaed party search the records of their "officers, treasurers, employees, contractors, volunteers, or agents." While extending any subpoena beyond the scope of records in the possession, custody or control of the party named in the subpoena appears on its face unconstitutional, the validity of a subpoena requiring that a search to extend into the private records of the subpoenaed party's "volunteers" and "agents" appears especially questionable given the undefined nature of the term "agent" and the tenuous connection that these individuals might have with Respondents' organization in the event that they once volunteered to perform any task for the organization at all.

Absent sufficient justification, the Court in good conscience cannot issue an order compelling compliance with Petitioner's subpoenas where they blatantly violate due process, infringe on the privacy rights of unnamed individuals, require an unreasonable search of the private records and implicate the constitutional freedom of association of entire categories of individuals who were not provided notice of the subpoena at issue and were not informed that Petitioners sought access to their private records.

C. Categories 1(d) and 2(b) Are Not "Reasonably Relevant" to the Investigation at Issue

While the Court denies Petitioner's motion in its entirety on the basis that the subpoenas are neither code-compliant nor constitutional (2 C.C.R., § 10027 (d); N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 460–461; Britt v. Superior Court (1978) 20 Cal.3d 844, 852–853; Roberts v. United States Jaycees (1984) 468 U.S. 609, 617–618; Pacific-Union, supra, 232 Cal.App.3d 60, 70), the Court additionally notes the subpoenas include two document categories (Categories 1(d) and 2(b)) that lack sufficient parameters to make them "reasonably relevant" to Petitioner's investigation. (Kirchmeyer, supra, 89 Cal.App.5th at p. 359; Brovelli, supra, 56 Cal.2d at p. 529.)

Category 1(d) requests in relevant part:

All written records concerning or referencing funds actually or potentially raised by or offered to [Respondents] that also contain any of the following keywords:

• Private
• Secret
• Identity
• Identify
• Anonymous and
• Name

(Russell Decl. ¶ 11, Exh. H: Category 1 (d).)

Category 2 (b) requests:

All written records concerning or referencing "any actual or potential contract with, or payment to, any of the following entities: i. The Halftone Shop; or ii. On The Ground." (Russell Decl. ¶ 11, Exh. H.)

Neither of these categories are "reasonably relevant" to Petitioner's investigation of the campaign to recall Mayor Sheng Thao, Respondents' suspected earmarking of funds for that purpose or of Respondents' failure to report contributions exceeding a certain base amount. In particular, these categories lack any relevant parameters that identify the purpose for which the payments at issue were made and therefore are not "reasonably relevant" to the present investigation which itself is limited to the investigation of contributions made for a particular purpose. (Kirchmeyer, supra, 89 Cal.App.5th at p. 359; Brovelli, supra, 56 Cal.2d at p. 529.) Therefore, although the Court denies Petitioner's motion on other grounds, Petitioner should strongly consider revising categories 1(d) and 2(b) in the event that they anticipate reissuing these subpoenas in the future.

D. Documents Protected by Attorney Client Privilege

Finally, addressing the parties' arguments regarding Petitioner's subpoena of communication documents from Respondents' counsel, the Court agrees that the language of the subpoena and the document requests in particular did not make it abundantly clear that only non-privileged documents were being demanded.

On Reply, Petitioner contends that "the Subpoenas, on their face, explicitly exclude "information legally privileged under the California Evidence Code." (Reply p. 5:25-26, citing to Russell Decl. at Exh. H, Attach. 1a.) However, this statement is misleading.

In full context, Attachment 1a (cited by Petitioner's Reply) provides in relevant part:

"For purposes of this subpoena, the use of the term "complete" in relation to a written record means that the version of the record produced under this subpoena shall not be redacted or abridged or in any way, other than information legally privileged under the California Evidence Code. Any redaction or withheld record must be accounted for on an accompanying privilege log with sufficient detail to identify the particular record being redacted or withheld, the sender(s) and recipient(s) of that record, and the basis for invoking a privilege as to that redaction or withheld record."

(Russell Decl. at Exh. H, Attach. 1a.)

This excerpt expressly concedes that the subpoenas seek privileged documents and therefore purports to allow for their redaction in a sentence hidden under the definition of the term "complete." (Russell Decl. at Exh. H, Attach. 1a.)

While this issue does not affect the court's adjudication of the present motion, Petitioner is advised for future subpoenas to make it abundantly clear either that only non-privileged documents are sought or that privileged documents may be withheld subject to a privilege log. This detail should not be hidden in the text of a definition, but explicitly called out in the document request itself – especially in connection with document categories seeking communications to or from Respondents' counsel.

CONCLUSION

For the foregoing reasons, Petitioner's motion to compel compliance with its investigative subpoenas is denied in its entirety. (2 C.C.R., § 10027 (d); N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 460–461; Britt v. Superior Court (1978) 20 Cal.3d 844, 852–853; Roberts v. United States Jaycees (1984) 468 U.S. 609, 617–618; Pacific-Union, supra, 232 Cal.App.3d 60, 70.)

NOTICE: This tentative ruling will automatically become the court's final order on Friday July 26, 2024 unless, by no later than 4:00 p.m. on Thursday July 25, 2024, a party to the action notifies BOTH: 1) the court by emailing Dept520@alameda.courts.ca.gov; AND 2) all opposing counsel or self- represented parties (by telephone or email) that the party is contesting this tentative ruling.

The subject line (RE:) of the email must state: "Request for CONTESTED HEARING: [the case name], [number]." When a party emails to contest a tentative ruling, the party must identify the specific holding(s) within the ruling they wish to contest via oral argument.

The court does not provide court reporters for hearings in civil departments. A party who wants a record of the proceedings must engage a private court reporter. (Local Rule 3.95.) Any privately retained court reporter must also participate via video conference. His/Her email must be provided to the court at the time the Notice of Contest is emailed.

ALL CONTESTED LAW AND MOTION HEARINGS ARE CONDUCTED VIA REMOTE VIDEO unless an in person appearance is required by the court. Invitations to participate in the video proceeding will be sent by the court upon receipt of timely notice of contest. A party may give email notice he/she will appear in court in person for the hearing, however all other counsel/parties and the JUDGE MAY APPEAR REMOTELY.