SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF YOLO

ROSE CONROY, Plaintiff, vs. CITY OF DAVIS and DOES 1 - 10, Defendants.	Case No. CV 13 807 ORDER AFTER HEARING (MOTION FOR ATTORNEY'S FEES)

A hearing was held on October 4, 2013 to consider intervenor's motion for attorneys' fees under Code of Civil Procedure Section 1021.5. A tentative ruling was issued the day before the hearing, and at the conclusion of the hearing the Court took the matter under submission. The Court now **adopts** the tentative ruling attached hereto, for the reasons provided in the tentative ruling, and for the reasons set forth below. The purpose of this document is not to supplant the tentative ruling, but to supplement it, by explaining the Court's ruling on certain disputed points in more detail.

///

///

///

///

1. **Background**

This case concerns the public release of a report, known as the Aaronson Report, concerning the Fire Department for the City of Davis. The case was filed by Rose Conroy, who is the former Chief of the City's Fire Department. The City is the defendant.

In response to a California Public Records Act (CPRA) request from the Woodland Record, the City decided to release an unredacted copy of the Aaronson Report. Previously, the City had only released the Report in redacted form. Having learned of the planned release, the plaintiff filed the present action on May 21, 2013.

According to the complaint, the individuals who provided information for the Aaronson Report, including Chief Conroy, were promised that the information they provided would remain confidential. The complaint alleges that public release of the unredacted Report would break that promise, and violate their privacy rights.

The complaint contains two causes of action. The first is titled "Breach of Promise of Confidentiality (Government Code 6254(k) and Evidence Code section 1040)," and the second is titled "Breach of Personal Privacy (Public Record Act Section 6254(c))."

While both causes of action reference exemptions in the CPRA[1], the gravamen of the complaint is that disclosure would violate rights independent of the Act, namely the privacy rights of

---

[1] Government Code section 6254, subdivision (k) provides an exemption for records protected from disclosure by other legal doctrines, such as the official information privilege of Evidence Code section 1040. Government Code section 6254, subdivision (c) exempts from disclosure certain personnel and medical records.

plaintiff Conroy and other firefighters. (See *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250.) In other words, while the complaint *relates* to the CPRA, it is not brought *under*[2] the CPRA, which only creates a cause of action to enforce the "right to inspect or to receive a copy of any public record." (Gov. Code, 6258.) Instead, the present action is a reverse-CPRA lawsuit.

When the complaint was filed, plaintiff also filed an application for a temporary restraining order (TRO), seeking to prevent disclosure of the unredacted Aaronson Report until a preliminary injunction hearing could be held. The TRO hearing was held on May 22, 2013, and plaintiff appeared, as did future[3] intervenor Woodland Record, but the City of Davis did not appear. The Court granted the request for a TRO to preserve the *status quo* until the request for a preliminary injunction could be heard.

The preliminary injunction hearing was scheduled for June 20, 2013, but the day before the hearing the plaintiff dismissed her request for a preliminary injunction, so the Court never issued a ruling[4] on that motion. The City did not participate in the preliminary injunction proceedings, and indeed had not even made a formal[5] appearance in the case at the time of the preliminary

---

[2] (See *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1267 ["although the CPRA provides a specific statutory procedure for the resolution of disputes between the party seeking disclosure and the public agency, no comparable procedure exists for an interested third party to obtain a judicial ruling precluding a public agency from improperly disclosing confidential documents . . . [a] petition for writ of mandate is the appropriate procedure to present this issue to the court"].)

[3] On May 29, 2013, the Court granted the Woodland Record's application to intervene.

[4] Unaware that the plaintiff had dismissed her request for a preliminary injunction earlier that day, on June 19th the Court issued a tentative ruling denying the motion. That ruling never became effective because of plaintiff's earlier dismissal of the claim.

[5] The City did sign a *Stipulation re Electronic Service of Documents*, filed on June 4, 2013.

injunction hearing.[6] The intervenor did file papers opposing the issuance of a preliminary injunction, and appeared at the scheduled hearing on June 20th.

With no preliminary injunction in effect, the Court understands that the City has released the unredacted Aaronson Report.

On August 16, 2013, the intervenor filed the present motion for attorney's fees. The matter was set for hearing on September 12, 2013, but the Court asked for briefing on the question of whether attorneys' fee could be awarded while the case was still pending, and the matter was continued until October 4, 2013. The plaintiff then dismissed her complaint on September 25, 2013, thereby mooting the question of prematurity.

After the attorneys' fees hearing on October 4, 2014, the plaintiff submitted an unsolicited letter brief, and the intervenor responded with an unsolicited letter brief of its own. The Court disregards these unauthorized supplemental briefs, although it has conducted its own research.

2. **Motion to Strike Portions of Declarations**

Plaintiff filed a *Motion to Strike Portions of Declarations*, seeking to strike certain portions of the declarations offered by intervenor in opposition to the motions for fees. Plaintiff does not identify the statute upon which her motion is based, but presumably she makes the motion under

---

[6] The Court does not know when the City was served with the complaint, because it has not located any proof of service of the summons in the file. (See Code Civ. Proc., § 583.210, subd. (b) [requiring proof of service of the summons to be filed within 60 days].) Apparently, the plaintiff and City had agreed to toll the City's time for a responsive pleading. The California Rules of Court allows the parties to stipulate without leave of court to one 15-day extension beyond the 30 days allowed for response. (Cal. Rule of Court 3.110, subd. (d).) The City filed its responsive pleading (a demurrer) on July 5, 2013.

Code of Civil Procedure section 436, which allows courts to "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

A "pleading" is "a formal allegation by the parties of their respective claims and defenses." (Code Civ. Proc., § 420.) Declarations are not pleadings under this definition and therefore are not subject to a motion to strike.

Even if the motion is interpreted as an evidentiary objection rather than a motion to strike, it still must denied as overbroad and imprecise. The motion covers wide swathes of the declarations, and does not pinpoint which objections apply to which statements. For instance, the objection to the declaration of Rich Rifkin covers paragraphs three through 19 (eight pages of statements) under the general objections of relevancy, hearsay and lack of foundation, but the Court is not given any guide to determine which objections cover which particular statements. The burden is on the party making the objection to identify the *precise* evidence at issue, and the *precise* grounds for objections, and since the motion fails to do that, it is denied.

3. **Request for Attorneys' Fees Under Code of Civil Procedure Section 1021.5**

The intervenor has moved under Code of Civil Procedure section 1021.5 for approximately $95,000 in fees and costs against plaintiff. Section 1021.5 provides in relevant part that:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the

> award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

The requirements of this statute are analyzed below, but first the Court must determine whether Section 1021.5 applies at all.

3.1. **Does the Public Record Act Provide the Exclusive Basis for a Fee Award?**

The plaintiff argues that the CPRA provides the exclusive means for a requesting party to obtain a fee award in a reverse-CPRA action. This argument has two implicit premises: (1) that the plaintiff in a reserve-CPRA case is suing under the CPRA, and therefore is at least potentially eligible for fees under that law, and (2) that Section 1021.5 is preempted or displaced in any action in which there is an alternative basis for a fee award. Both of these premises are false, and so the plaintiff's argument fails.

Plaintiff relies[7] on the *California Judges Benchbook*, which states "[w]hen another statute expressly authorizes an award of attorney's fees in a particular action, however, a judge may not award fees under CCP § 1021.5." (California Center for Judicial Education and Research; California Judges Benchbook: Civil Proceedings – Before Trial, 2d Vol., Section 16.73, p. 325.)

As explained below, the conclusion is questionable, but even if it is true, it is inapplicable here because the CPRA does not "expressly authorize[e] an award of attorney's fees" in a reverse CPRA action.

---

[7] The *Benchbook* relies on *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672 for this proposition.

By its plain and unambiguous terms, the CPRA's attorneys' fee provision only extends to plaintiffs in CPRA enforcement actions, and a reverse CPRA litigant is simply ineligible for a CPRA fee award. (Gov. Code, § 6259, subd. (d); *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1268.)

It is not as if the intervenor here was theoretically eligible for a CPRA fee award, but failed to satisfy one of the substantive requirements. Instead, the intervenor is simply not a party who is eligible for fees in this action under the CPRA under any circumstance. Thus, the case presents a different scenario than that discussed in the *California Judges Benchbook* and *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672.

Moreover, California courts have held that a Section 1021.5 award is available even when there is an alternative basis for a fee award. (See *Riverside Sheriff's Association v. County of Riverside* (2007) 152 Cal.App.414, 420 ["we do not regard the two [fee award] statutes as mutually exclusive or Government Code section 3309.5 subdivision (e) as supplanting section 1021.5"]; *Ventas Finance I, LLC v. California Franchise Tax Board* (2009) 165 Cal.App.4th 1207, 1235 [rejecting argument that "section 19717 [of the Revenue and Taxation Code] is the exclusive means of recovering attorney fees in a tax refund suit," and remanding for, *inter alia*, consideration of fees under Section 1021.5]; *Northwest Energetic Services, LLC v. California Franchise Tax Board* (2008) 159 Cal.App.4th 841, 874 – 875 [same].)

Bell reaches the opposite conclusion, but it is less persuasive than *Riverside Sheriff's Association, Ventas Finance,* and *Northwest Energetic Services* because it relies on an apparent *non sequitur.*

Bell starts with the premise that Section 1021.5 does not affect the interpretation of other fee-shifting statutes, *i.e.* that the substantive requirements of Section 1021.5 should not be imported into the interpretation of other fee statutes. (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 690 [citing *Common Cause v. Stirling* (1981) 119 Cal.App.3d 658].)

From this uncontroversial premise that Section 1021.5 does not displace existing fee-shifting provisions, *Bell* concludes that Section 1021.5 is inapplicable whenever there is another potential basis for a fee award. (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 690).

But this does not follow – just because Section 1021.5 does not displace other fee-shifting statutes does not mean that those statutes displace it. Both statutes may well continue to apply, and provide concurrent or alternative grounds for a fee award in certain cases. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478 ["[i]f we can reasonably harmonize two statutes dealing with the same subject, then we must give concurrent effect to both, even though one is specific and the other general"].)

Of course, if the CPRA's fee-award provision stated or indicated that it was the only basis for a fee award in any case related to the CPRA, or if the language of Section 1021.5 suggested that it was inapplicable whenever there was another basis for a fee award, then plaintiff's argument would have traction. But the CPRA's fee-shifting provision contains no indication of exclusivity, and Section 1021.5 applies by its own terms to "any action." There is thus no basis to conclude that the Legislature intended for the CPRA to be the exclusive basis for a fee award in all actions related to it.

///

///

3.2. **Have the Requirements for an Award of Fees Section 1021.5? Been Satisfied?**

To recover fees under Section 1021.5, a winning litigant must show: "(1) 'the enforcement of an important right affecting the public interest,' (2) the conferring of a 'significant benefit' on 'the general public or a large class of individuals' and (3) 'the necessity and financial burden of private enforcement renders the award appropriate.'" (*Jarmillo v. County of Orange* (2011) 200 Cal.App.4th 811, 829.)

The plaintiff does not appear to dispute that these elements have been met. It is clear that the first two elements are satisfied, and so the Court will not discuss them.

However, was private enforcement necessary[8]? Did the intervenor need to insert itself into this case, at the cost of tens of thousands of dollars, or could it have simply relied on the City to defend its right to receive the unredacted Aaronson Report?

The City did not participate in the preliminary injunction proceedings, although it did later file a demurrer and a motion to strike, after the plaintiff dropped its request for a preliminary injunction. The Court does not know why the City did not oppose the temporary restraining order or the preliminary injunction.

The Court also has received no evidence showing that the intervenor knew, at the time that it opposed the preliminary injunction, that the City would later file a demurrer. If the intervenor

---

[8] By its failure to present argument or evidence on this issue, the plaintiff has waived its right to argue that private enforcement was unnecessary. Had the plaintiff contested this element, the intervenor may have had additional evidence and argument to add on the subject. The Court nonetheless discusses this element for analytical completeness.

knew that the City would be actively defending the lawsuit at a later stage, then the intervenor would have much less need to become involved in this litigation.

Based on the evidence presented, the Court finds that there was a need for private enforcement, because the City did not oppose the temporary restraining order or the preliminary injunction, and because there is no evidence that the City otherwise gave any indication that it would be actively defending the lawsuit. *(Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214 – 1215 ["[t]he 'necessity' of private enforcement looks to the adequacy of public enforcement and seeks economic equalization of representation in cases where private enforcement is necessary"].)

3.3. **Should the Court Deny or Limit the Award Based on the Burden to Plaintiff?**

The Court appreciates that the imposition of a fee award here would impose a burden on the plaintiff, who is an individual and not a government agency or business enterprise.

A fee award under Section 1021.5 is required where the elements are met, as they are here. (*Lyons v. Chinese Hosp. Assn.* (2006) 136 Cal.App.4th 1331, 1356 ["[i]nsofar as Lyons established he was entitled to an attorney fee award under the statutory criteria, the trial court here erred in requiring Lyons to shoulder the *additional* burden, not contemplated by the statute, of showing that the award of attorney fees was 'in the interests of justice'"].)

The Court's discretion is to be exercised within the confines of the statutory requirements of Section 1021.5, and the Court cannot deny a fee award based on extra-statutory considerations. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1305, fn. 3 ["we read 'may' in section 1021.5 as simply signifying that a court has discretion to act *within* the criteria of section 1021.5"].)

In determining the amount of fees, the Court should consider "the financial circumstances of the losing party and the impact of the award on that party" (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 476 – 477.) Here, the plaintiff's financial position appears to be significantly stronger than the plaintiff in *Garcia.* Also, someone must bear the litigation costs, and there is no evidence showing that the intervenor's financial position is significantly stronger than plaintiff's. The plaintiff brought this suit, causing the intervenor to incur substantial litigation expenses.

While the amount sought (approximately $95,000) may be a disproportionate award for an individual like plaintiff, the Court has considered the plaintiff's financial condition, and has taken that condition into account in exercising its discretion to award the reduced total amount of $43,085.

3.4. **Are There "Special Circumstances" that Justify Denial of the Request?**

Fees may be denied if there are "special circumstances" that would make such an award unjust. (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 632). Plaintiff argues that there are such special circumstances here because she was "placed into her current position solely because of the actions of the City of Davis."

Plaintiff is correct that if the City had actively opposed the temporary restraining order and preliminary injunction, then she would likely not face an attorneys' fee award under Section 1021.5, because private enforcement would have been unnecessary, and a public entity cannot recover fees against a private litigant under Section 1021.5.

Plaintiff cites no authority holding or suggesting that this is the sort of "special circumstance" that would justify the denial of a fee award. While plaintiff did not sue the intervenor, she did start this litigation by suing the City. The fact that the City's passivity contributed to her litigation costs is not the sort of special circumstance that justifies the denial of an otherwise proper fee award.

3.5. **Are the Fees Reasonable?**

The court has exercised its discretion and judgment to reduce the fee award (both the hourly rate and the hours expended) to reasonable levels, as stated in the now-adopted tentative decision.

IT IS SO ORDERED.

Dated: 14 December 2013

Dan Maguire

JUDGE OF THE SUPERIOR COURT

DANIEL P. MAGUIRE

TENTATIVE RULING

Case:	**Conroy v. City of Davis** **Case No. CV CV 13-807**		
Hearing Date:	**October 4, 2013**	**Department Fifteen**	**8:30 a.m.**

Plaintiff Rose Conroy's evidentiary objections are **OVERRULED**. Plaintiff fails to cite legal authority to support her objections.

Plaintiff's request for judicial notice is **GRANTED**. (Evid. Code, § 452.)

Intervenor Jeff McCallum dba The Woodland Record's request for judicial notice is **DENIED**. (Evid. Code, § 452.)

Intervenor's motion for attorneys' fees under Code of Civil Procedure section 1021.5 is **GRANTED IN PART**. (Code Civ. Proc., § 1021.) The Court declines to apply a multiplier to the attorneys' fees claimed by petitioner. The Court awards attorneys' fees based on the services of attorney Boylan at the rate of $350/hour, based on the Court's assessment of the reasonable value of the services rendered and prevailing rates in the surrounding community. The Court awards $29,085 (83.1 hours at $350/hour) for the work performed up to the motion for attorneys' fees. The Court awards $14,000 (40 hours at $350/hour) for the work performed on the motion for attorneys' fees, and denies the remainder of the requested attorneys' fees for the prosecution of the fee motion as excessive.

Intervenor shall comply with California Rule of Court 3.1700 in recovering his costs.

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rule of Court 3.1312, or further notice is required.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF YOLO
725 COURT STREET
275 FIRST STREET
WOODLAND, CA 95695

CASE TITLE: CONROY VS. CITY OF DAVIS

CASE NO: CV-CV-13-0000807

I, the undersigned, certify under penalty of perjury that I am a Deputy Clerk of the above-entitled Court and not a party to the within-entitled action; that on December 17, 2013 I served true and correct copies of the foregoing/attached ORDER AFTER HEARING (MOTION FOR ATTORNEY'S FEES) by depositing the same, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Post Office at Woodland, California addressed as follows:

STEVEN KAISER
2720 GATEWAY OAKS DR., SUITE 140
SACRAMENTO, CA 95833

PAUL BOYLAN
P.O. BOX 719
DAVIS, CA 95617

CHARLETON S. PEARSE
1030 15TH STREET, SUITE 300
SACRAMENTO, CA 95814

At the time of said mailing there was regular communication by United States Mail between the said place of mailing and the places addressed.

Dated: December 17, 2013

SHAWN C. LANDRY
COURT EXECUTIVE OFFICER

By: _____
M.K.Dahlberg, Deputy Clerk

certmail.s (CCM)