

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

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| DATE/TIME: | 10:00 a.m. January 9, 2014 | DEPT. NO.: | 14 |
| JUDGE: | HON. EUGENE L. BALONON | CLERK: | P. MERCADO |
| ISAAC GONZALEZ, JAMES CATHCART, and JULIAN CAMACHO, Petitioners and Plaintiffs, vs. KEVIN JOHNSON, JOHN SHIREY, JOHN DANGBERG, CITY OF SACRAMENTO, and DOES 1 through 40, inclusive, Respondents and Defendants. | | Case No.: 34-2013-80001489 | |
| Nature of Proceedings: | | MOTION TO COMPEL DISCOVERY; MOTION FOR STAY OF DISCOVERY AND PROTECTIVE ORDER | |

The following shall constitute the Court’s tentative ruling on the above matter, set for hearing in Department 14, on Thursday, January 9, 2014, at 10:00 a.m. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

If a hearing is requested, oral argument shall not exceed 20 minutes per side.

Defendants and Respondents (Defendants) move for a protective order (1) prohibiting the deposition of Councilmember Kevin McCarty (McCarty) and relieving him from responding to requests for producing documents, (2) limiting the deposition of and production of documents sought from Jim Rinehart (Rinehart), Director of the Economic Development Department for the City. Defendants also move for an order staying all discovery unless and until Plaintiffs file a complaint that is not subject to demurrer.

In response, Plaintiffs move to compel discovery—specifically the production of documents from McCarty and Rinehart. Because both motions involve the same discovery dispute, the Court considers both motions in this ruling.

I. BACKGROUND

Plaintiffs' First Amended Complaint (FAC) challenges the City Council of the City of Sacramento's (City) adoption of a Term Sheet for development of a sports arena and entertainment center (ESC), made between the City and the Sacramento Investor Group (SIG). The gravamen of the FAC is that Defendants fraudulently concealed or misrepresented information regarding the value of items specified in the Term Sheet, so that when the City Council approved the Term Sheet, SIG would receive more City monies or subsidies than disclosed.

On October 23, 2013, this Court granted Defendants' request to stay discovery pending its consideration of Defendants' demurrer. On November 19, 2013, the Court then sustained Defendants' demurrer with leave to amend. The Court's order stayed discovery as to McCarty and Rinehart for 15 days after an amended complaint was served on the parties.

Petitioners filed and served the FAC. The parties then filed the respective motions to compel discovery and motion for a stay and protective order. Defendants have also filed a demurrer to the FAC.

II. DISCUSSION

As a preliminary matter, Defendants' request for a judicial notice is **GRANTED**. Defendants' objections to the separate statement of Plaintiffs in support of their motion to compel are **OVERRULED**.

1. Discovery is Not Stayed Pending Consideration of Another Demurrer

Defendants argue in their motion for a stay and protective order that discovery should be stayed pending another ruling on their demurrer to the FAC. Defendants argue that the FAC is subject to demurrer because it is not ripe for review. The Court previously issued such a stay because it was able to consider Defendant's demurrer shortly after the stay request was filed. However, the Court's order on the demurrer stated that discovery was only stayed as to Rinehart and McCarty for 15 days following service of an amended complaint.

Generally, discovery is available in civil actions regarding "...any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter is either admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc. § 2017.010.)

Pleading deficiencies generally do not affect the right to conduct discovery. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436, fn.3 (citing *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, 797 and *Union*

Mutual Life Ins. Co. v. Sup. Ct. (1978) 80 Cal.App.3d 1, 12.) Because the FAC has been filed and served, discovery is not stayed. Moreover, Defendants seek to stay all discovery, not just discovery as to McCarty and Rinehart. Defendants have not persuaded the Court that discovery should again be stayed until the Court considers Defendants' demurrer to the FAC.

Defendants' request for a stay of all discovery pending the ruling on another demurrer is **DENIED**.

2. Councilmember Kevin McCarty

Defendants seek a protective order to prohibit the deposition of Councilmember McCarty and any accompanying request for production of documents. In turn, Plaintiffs oppose this motion and move to compel the deposition of and production of documents from Councilmember McCarty.

Defendants argue that because Plaintiffs seek to depose or request information from Councilmember McCarty about his communications and personal viewpoints regarding the Term Sheet or information therein, this is barred by the legislative/deliberative process privilege and "mental process privilege."

Plaintiffs seek to discover from Councilmember McCarty communications and documents supporting or informing City Council's decision to approve the Term Sheet. These include Councilmember McCarty's communications to the SIG and its attorney regarding the Term Sheet, valuation of the Kings, subsidies to the SIG, valuation of the City land, ESC, City parking and signage, and his communications with the city manager or city council regarding the same.

The deliberative process privilege protects city councilmembers from responding to inquiries about why particular legislative action was taken. (*See, County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721 [improper to depose county supervisors or high-level county officials to show that salary ordinance was passed under duress and coercion from threatened illegal strike].)

"Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated. [Citation.] The privilege rests on the policy of protecting the decision making processes of government agencies. [Citation.] The key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' [Citation.]" (*San Joaquin County Local Agency Formation Commission v. Superior Court (San Joaquin LAFCO)* (2008) 162 Cal.App.4th 159, 170 (citations and internal quotations omitted).)

The deposition request as to Councilmember McCarty essentially seeks to discover what information he or other Councilmembers did or did not consider in approving the Term Sheet. This information is protected by the deliberative process privilege. (*See San Joaquin LAFCO, supra*, 162 Cal.App.4th 159 [deliberative process privilege prohibits petitioner from deposing LAFCO members as to what information they considered when deciding permit application and what other information applicant should have submitted]; *City of Santa Cruz v. Superior Court* (1995) 40 Cal.App.4th 1146 [petitioner challenging City’s adoption of general plan could not depose council and planning commission members regarding existence of agreement to refuse to consider zoning for greenbelt properties].)

Plaintiffs respond that they do not seek to discover the mental process by which the City Council approved the Term Sheet, but rather whether a secret agreement to compensate the investors group existed of which the City Council was unaware. However, even assuming that the ulterior purpose—the alleged secret agreement—underlying the Term Sheet approval is relevant, “the taxpayer may not prove such ulterior purpose by requiring legislators to testify about their reasoning process or by questioning others about the factors that may have led to the legislators’ votes.” (*County of Los Angeles v. Superior Court, supra*, 13 Cal.3d at p. 729.)

Plaintiffs also argue that a common law “deliberative process privilege” does not apply to these proceedings. The Court disagrees. Plaintiffs also submit that if the privilege does apply, it is not absolute. Plaintiffs argue that the Defendants must show that City’s interest in nondisclosure clearly outweighs the public interest in disclosure of the communications and documents. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307.) This argument is well taken. Defendants have not made this showing in asserting this privilege as to Councilmember McCarty.

Accordingly, Plaintiffs’ motion to compel the discovery of Councilmember McCarty is tentatively **GRANTED** and Defendants’ motion for a protective order as to Councilmember McCarty is tentatively **DENIED**.

3. Jim Rinehart

Defendants seek a protective order as to Jim Rinehart that prohibits any deposition inquiries or requests for documents that seek privileged information.

Generally, Plaintiffs seek to discover from Jim Rinehart documents regarding the value of the City properties or other Term Sheet items, his opinions about the valuation, and his communications to City staff or councilmembers regarding the same. Defendants argue that these documents and communications are all protected by the deliberative process and official information privileges.

To the extent that Plaintiffs seek information from Rinehart regarding “the mental processes by which the Term Sheet was approved, ...the substance of conversations,

discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated,” this information is protected by the deliberative process privilege. (*San Joaquin LAFCO*), *supra*, 162 Cal.App.4th at p. 170.) This privilege also extends to senior City officials. (*City of Santa Cruz v. Superior Court*, *supra*, 40 Cal.App.4th at p. 1148.) The parties do not dispute that Jim Rinehart is a senior City official. However, as with Councilmember McCarty, Defendants have not shown that the City’s interest in nondisclosure clearly outweighs the public interest in disclosure of the communications and documents. (*Citizens for Open Government v. City of Lodi*, *supra*, 205 Cal.App.4th at 307.) Thus, the Court cannot make the finding that this particular privilege applies.

Defendants also argue that the “Official Information Privilege” of Evidence Code section 1040 prohibits or limits Plaintiffs’ discovery requests. This statute provides that a public entity may refuse to disclose (1) information acquired in confidence by a public employee in the course of his duty and not open or disclosed prior to the claim of privilege, (2) when disclosure would be against the public interest.

Plaintiffs do not dispute that the information sought was acquired in confidence. Accordingly, the only question for the Court to resolve is whether it would be against the public interest to disclose appraisals, opinions, documents, communications, or other information.

Defendants argue that by demanding the documents and communications from Rinehart, Plaintiffs are attempting to “second-guess” the economic motivations behind the City Council’s approval of the Term Sheet, and that disclosure of this information is against the public interest. In earlier papers, Defendants argued that disclosure was against the public interest, because the information will not enable Plaintiffs to state a valid cause of action, and the secrecy of “legislative process” should be protected. Plaintiffs argued that there is no expectation of privacy in a secret agreement to subsidize the SIG and conceal it from voters.

Defendants have not made a showing as to why disclosure would be against the public interest as to the “Official Information Privilege.” Accordingly, this Court cannot make a finding as to why this privilege applies.

Thus, Defendants’ motion for a protective order as to Jim Rinehart is tentatively **DENIED**.

4. Sanctions

Defendants, in opposing Plaintiffs’ motion to compel discovery, request that the Court impose monetary sanctions against Plaintiffs pursuant to Sections 2025.420, and 2031.310. The Court **DENIES** this motion. Plaintiffs’ desire to bring a motion to compel was motivated by the City’s objection following the expiration of the 15-day discovery stay articulated in the Court’s ruling on the demurrer. Moreover, Plaintiffs’ motion has some merit, as discovery is *not* stayed pending ruling on another demurrer,

and the Court has found that Defendants have not sufficiently articulated why the information sought to be discovered is privileged.

III. DISPOSITION

Defendants' motion for a stay as to all discovery pending the Court's consideration of a second demurrer is **DENIED**. Defendants' motion for a protective order prohibiting the deposition or and request for production of documents from Councilmember Kevin McCarty and Defendants' motion for a protective order limiting the deposition of Jim Rinehart is **DENIED**. Defendant's request for sanctions is **DENIED**.

If this tentative ruling becomes the final ruling of the Court, counsel for Plaintiffs is directed to prepare a formal order, attaching this ruling as an exhibit; submit it to opposing counsel for approval as to form; and thereafter submit it to the Court in accordance with California Rule of Court rule 3.1312.