

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

EL DORADO CO. SUPERIOR CT.

Date: March 12, 2001
Dept. 3
Judge: SUZANNE N. KINGSBURY
Reporter: None
Clerk: Deborah A. Gwaltney

FILED MAR 12 2001
BY D. Gentry
Deputy

EL DOARADO COUNTY and
EL DORADO COUNTY BOARD OF SUPERVISORS

vs.

EL DOARDO COUNTY GRAND JURY

Case No. SC20010006

Minute Order Ruling On Plaintiffs' Motion for Preliminary Injunction and Protective Order
re: Grand Jury Subpoena; Defendant's Cross-Motion for Judgment on the Pleadings

The verified complaint in this action alleges that on November 27, 2000, the El Dorado County Grand Jury issued a subpoena to Louis B. Green, County Counsel for El Dorado County, commanding his testimony before the Grand Jury on certain subjects. On December 4, 2000 Michael Hanford, Chief Administrative Officer of El Dorado County, was served with a similar subpoena. Plaintiffs contend that such compelled testimony would violate the attorney-client privilege codified in Evidence Code § 950 et seq., the deliberative process privilege [including, *inter alia*, Evidence Code § 1040], the Ralph M. Brown Act [Government Code § 54950 et seq.], and the duty of an attorney to keep inviolate confidences entrusted by his or her client pursuant to Business and Professions Code § 6068.

The issue before the Court is whether the privileges asserted by plaintiffs shield the County, acting through its agent the Board of Supervisors, from Grand Jury investigations into business it conducted in closed sessions under the Brown Act.

The investigations undertaken by the Grand Jury in the present case are pursuant to its public "watchdog" function of investigating and reporting upon the affairs of local government [*McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1170]. The watchdog function "is a unique creature of the California Legislature, which has a long and well respected heritage" [*People v. Superior Court* (1973

Grand Jury) (1975) 13 Cal.3d 430, 436]. "In our system of government, a Grand Jury is the only agency free from possible political or official bias that has an opportunity to see . . . the operation of government . . . on any broad basis." [*Monroe v. Garrett* (1971) 17 Cal. App.3d 280, 284]. "Although [the grand jury's] powers are broad, they are carefully defined and limited by statute, and the grand jury has no inherent investigatory powers beyond those granted by the Legislature." [(1973 *Grand Jury*, *supra* at 437-438)].

Penal Code § 888 provides, in relevant part:

Each grand jury. . . shall be charged and sworn to investigate or inquire into county matters of civil concern, such as the needs of county officers, including the abolition or creation of offices for, the purchase, lease, or sale of equipment for, or changes in the method or system of, performing the duties of the agencies subject to investigation pursuant to Section 914.1.

Plaintiffs do not contend that the subject matter of the Grand Jury investigations is beyond the statutory scope, only that the above-cited privileges shield it from scrutiny by the Grand Jury.

There is no case law directly on the issue presented.¹

A brief review of the facts of the principal cases cited by both sides is in order. In *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* [(1968) 263 Cal.App.2d 41], the Sacramento County Board of Supervisors, together with the county counsel, county executive, the county director of welfare and several members of the Central Labor Council, AFL-CIO met at an "informal luncheon" at the Elks Club to discuss a strike of the Social Workers Union against the County and the County's effort to enforce an injunction secured in connection with the strike. Plaintiffs, newspaper journalists and members of the Newspaper Guild who were barred from attending the lunch, sought an injunction to restrain the Board from holding such informal closed meetings as violative of the Brown Act. Holding that the lunch did violate the open meeting law, the Court said [at p. 50] "An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. . . Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board

¹ Defendant has requested that this Court take judicial notice of several federal cases. "[T]he functioning of the grand jury is regulated by state statute, as interpreted by our state Supreme Court. Federal law is not controlling." *People v. Superior Court* (2000) 78 Cal.App.4th 403, 434.

members designed for the discussion of public business." *Sacramento Newspaper Guild* also held that public agencies and entities may assert the lawyer-client privilege and it was not the legislative intent underlying the Brown Act to abrogate that privilege²:

Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naïve observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. . . . Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. . . . There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. [*Id.* at 55-56]

In *Roberts v. City of Palmdale* [(1993) 5 Cal.4th 363] the City planning commission approved a parcel map for a proposed development. Appellant, a taxpayer and resident of respondent City, appealed to the City Council. The City Council referred a letter from appellant to the city attorney, who prepared a confidential written response which was distributed to council members. After a public meeting at which the development was approved, appellant demanded to see the city attorney's confidential letter. The Supreme Court acknowledged that courts have broadly interpreted the Brown Act to preserve the attorney-client privilege for local government bodies for the same reasons private individuals require that protection, citing the same portion of the opinion in *Sacramento Newspaper Guild* quoted in the preceding paragraph of this ruling.

The protection afforded to local governments by the attorney-client privilege serves the public interest "because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public" [*Id.* at 381].

² The "loophole" created by *Sacramento Newspaper Guild* was closed with the enactment of Government Code § 54956.9, which was "intended to make it clear that closed sessions with counsel could only occur as provided in the Brown Act, that is, after written notice, and in connection with pending or threatened litigation" [*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 378].

The Supreme Court therefore held that the Public Records Act [Government Code § 6250 et seq.] did not require public disclosure of the letter because it was privileged under the lawyer-client privilege.

In *Register Division of Freedom Newspapers, Inc. v. County of Orange* [(1984) 158 Cal. App.3d 893] a child molester had his throat slashed by a fellow inmate while incarcerated in the Orange County Jail. He filed a claim against the County, alleging that the County had negligently transferred him from a protective custody cell to a cellblock with other inmates where he could be harmed. The County's claims settlement committee approved a settlement with the inmate at a secret meeting. The Orange County Register requested access to the settlement documents but was refused; it then petitioned the Superior Court for disclosure under the Public Records Act. The Court held that the documents relating to the settlement constituted public records subject to public inspection and disclosure under the Public Records Act and ordered disclosure of all documents with the exception of a crime report and rough notes made by the county's risk management staff. Responding to the County's objections that such disclosure would result in frivolous tort claims against the County and would have an adverse impact on the County's economic ability to sustain itself as a tort defendant, the Court said:

Against this interest must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs fostered by both the CPRA [California Public Records Act] and Brown Act [*Id.* at 909]

In *Kleitman v. Superior Court* [(1999) 74 Cal. App.4th 324] a resident of the City of Mountain View (real party in interest) contended that a meeting of the City Council, held in closed session under the Brown Act, was illegal. Real party brought suit naming the individual city council members as defendants. In the course of discovery, real party propounded interrogatories seeking, *inter alia*, the personal recollections of the council members with regard to the closed session. The City Council neither kept a minute book nor made tape recordings of the closed session, as is authorized (but not required) by Gov. C. §54957.2. The trial court ordered the defendants to respond to interrogatories regarding their personal recollections.

The Court of Appeals issued a writ of mandate ordering the trial court to vacate its previous order and deny the motion. The Court found that the Brown Act provides for disclosure of proceedings in a closed session in two situations:

(1) in camera review by the trial court of the minute book when it is alleged that a violation of the Brown Act has occurred during a closed session (§ 54957.2, subd. (a)); and (2) in camera review and disclosure of the tape recording of a closed session where there exists a prior judgment that the legislative body held unlawful closed sessions, a court order to make tape recordings, and a factual showing that another violation has occurred (§ 54960, subd. (c)).*[d. at 333]*

The Court held that because the Brown Act makes no provision for compelled disclosure of the personal recollections of members of a legislative body, it would be improper to read such a provision into the Act.

The city council meeting that was the subject of the litigation was for the purpose of negotiating renewal of the Chamber of Commerce's lease to certain property and was closed pursuant to Gov. C. § 54956.8, the provision in the Brown Act for closed sessions held for the purpose of giving instructions to a real property negotiator. In connection with this provision of the Brown Act, the Court observed:

The need for executive [closed] sessions in this circumstance is obvious. No purchase would ever be made for less than the maximum amount the public body would pay if the public (including the seller) could attend the session at which the maximum was set, and the same is true for minimum sales prices and lease terms and the like. *[d. at 331]*

This Court has reviewed these cases because in each case what was at stake was *public* disclosure to newspapers and to individual citizens. To the extent that courts have refused to permit disclosure, the rationale has been the prevention of disclosure of confidential information to civil litigation adversaries or to keep secret the local agency's position in prospective real estate transactions from those with whom it might be negotiating. By contrast, in the case at bar disclosure is being sought not by an adversary but by the County Grand Jury in performance of its statutory watchdog function of investigating and reporting upon the affairs of local government. The deliberations of the Grand Jury are secret. While the Grand Jury may issue a report in any civil grand jury investigation, evidentiary materials, findings, and

information subject to privilege may not be included in the report and the report itself may be redacted by the judges [Penal Code § 929].

This Court strongly believes in open government. The assertion of the attorney-client privilege based upon the presence of the county counsel at closed board sessions and the assertion of the deliberative process privilege in an effort to block scrutiny by "the only agency free from possible political or official bias" is an invitation to charges of bias and corruption and is simply at odds with the principle of open and fair government.

The Court will note that the El Dorado County Charter, Article VII, Section 703 provides:

Every county officer and employee shall cooperate in providing the Grand Jury with any requested information or documents, except when disclosure is prohibited by law. The Board of Supervisors shall establish the format for county responses to the Grand Jury report.

Disclosure of the documents and the information requested by the Grand Jury in connection with Investigation A and Investigation B is not prohibited by law; on the contrary, the Board of Supervisors, as the holder of the privileges which it asserts here, could have simply waived those privileges and entrusted the requested information to the Grand Jury in its civic "watchdog" capacity.

As the discussion above shows, the public policy interest favoring nondisclosure to journalists, the general public, or potential adversaries is entirely different from the public policy interest in providing information to the Grand Jury in performance of its civil investigatory function. Accordingly, the application for preliminary injunction and to quash subpoenas is denied.

PROOF OF SERVICE

I, Deborah A. Gwatney, Clerk of the Superior Court of the State of California, County of El Dorado, do hereby certify that I am not a party to the action and that I served the attached document(s) via Facsimile and U.S. Mail on all parties in said action by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. Mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of South Lake Tahoe, California. I further certify that local counsel are served a copy of said document (s) either by local attorney service, by Inter-Office Mail or by placement in their boxes in the Superior Court Clerk's Office.

LOUIS B. GREEN, County Counsel, (Fax 530/621-2937), 330 Fair Lane, Placerville, CA 95667
RICHARD W. NICHOLS, Esq., (Fax 530/ 676-5327), 5361 Reservation Road, Placerville, CA 95667

Executed on March 12, 2007 in South Lake Tahoe, California.

Clerk of the Superior Court
By Deborah A. Gwatney
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

Date: April 3, 2001
Dept. 3
Judge: SUZANNE N. KINGSBURY
Reporter: None
Clerk: JoAnne M. Jones

EL DORADO CO. SUPERIOR CT.
APR 03 2001
FILED
BY JoAnne M. Jones
Deputy

EL DORADO COUNTY and
EL DORADO COUNTY BOARD OF SUPERVISORS

vs.

EL DORADO COUNTY GRAND JURY

Case No. SC20010006

MINUTE ORDER

MINUTE ORDER RULING ON REQUEST FOR CLARIFICATION

The Court believed that the intent of its March 12, 2001 ruling was quite clear but obviously it was wrong. In order to avoid further parsing of the Court's opinion and attempts to divine the thought processes involved in arriving at its conclusion, the Court will address the issues raised in the parties respective requests for clarification¹ as briefly as possible. The Court's ruling was not intended to be narrowly focussed; it was intended to give the grand jury the broadest latitude in carrying out its statutorily mandated duties.

The attorney/client privilege does not shield local government from grand jury investigation when the grand jury is acting "as the public's 'watchdog' by investigating and reporting upon the affairs of local government" [*Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 887-888], neither does the Brown Act, whether or not a closed session was held, nor does the deliberative process privilege or the official information privilege.

It was the intent of the Court in making its March 12, 2001 ruling that Messrs. Green and Hanford appear before the grand jury and fully answer all questions put to them by the grand jury.

¹ The Court feels constrained to state that it understands that no document called "Request for Clarification" was filed. However, the Court believes that the March 19, 2001 letter from Mr. Nichols, the March 19 and March 22, 2001 letters from County Counsel, the proposed judgments filed by the parties, and the objections to proposed judgment filed by the County basically are a request for clarification.


April 3, 2001

The Court did not rule that § 703 of the County Charter constitutes a waiver of privilege.

In its Objections, plaintiffs state the obvious when they state that the County believes the Court's ruling to be legally erroneous. That is why the Court welcomes plaintiffs to take the matter up with the Third District Court of Appeals. As there is no guidance in the case law on the issues raised, the Court believes that a published opinion by the Court of Appeals would be beneficial.

The Court believes that the proposed judgment submitted by the El Dorado County Grand Jury precisely follows the Court's intent in its March 12, 2001 ruling. Accordingly, the Court will sign that judgment.

Date signed: April 3, 2001


SUZANNE N. KINGSBURY
Judge of the Superior Court

CLERK'S CERTIFICATE OF MAILING

I, JoAnne M. Jones, Judicial Assistant in the Superior Court, County of El Dorado, State of California, do hereby certify that I am a citizen of the United States and employed in the County of El Dorado; I am over the age of eighteen years and not a party to the within action; my business address is Superior Court of the State of California, County of El Dorado, 1354 Johnson Blvd., Suite 2, South Lake Tahoe, California, 96151; and that I mailed the attached document: **MINUTE ORDER RULING ON REQUEST FOR CLARIFICATION**, to the parties as indicated below:

LOUIS B. GREEN,
County Counsel
330 Fair Lane
Placerville, CA 95667

RICHARD W. NICHOLS, Esq.
5361 Reservation Road
Placerville, CA 95667

I am familiar with the business practice of El Dorado County Superior Court with regard to collection and processing of documents for mailing. The documents described above were placed for collection and mailing in South Lake Tahoe, California, through either the United States Post Office, Inter-Departmental Mail, or Courthouse Attorney Box. Executed on April 3, 2001 in South Lake Tahoe, CA

J. MARK NIELSEN, COURT EXECUTIVE OFFICER
EL DORADO COUNTY SUPERIOR COURT

By 
Judicial Assistant

1 RICHARD W. NICHOLS, Esq. (#32604)
2 5361 Reservation Road
3 Placerville, CA 95667-9768
4 Telephone: (530) 676-4667
5 Telefax: (530) 676-5327

6 Member of and Attorney for the
7 El Dorado County Grand Jury

FILED

01 APR -9 PM 2:57

EL DORADO COUNTY
SUPERIOR COURT

BY **S4** DEPUTY

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF EL DORADO

11 EL DORADO COUNTY and EL DORADO
12 COUNTY BOARD OF SUPERVISORS,)

Case No. SC20010006

13 Plaintiffs,)

14 v.)

15 EL DORADO COUNTY GRAND JURY,)

16 Defendant.)

**NOTICE OF
ENTRY OF
JUDGMENT**

17
18 To the Plaintiffs and to Louis B. Green, County Counsel, their attorney of record:

19 PLEASE TAKE NOTICE that on April 3, 2001, Judgment was filed and entered
20 in the above-captioned action. A true and correct copy of that Judgment is attached
21 hereto as Exhibit A.

22
23 DATED: April 6, 2001

24 *Richard W. Nichols*

25 RICHARD W. NICHOLS
26 Member of and Attorney for Defendant
27 El Dorado County Grand Jury
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Notice of Entry of Judgment


1 RICHARD W. NICHOLS, Esq. (#32604)
5361 Reservation Road
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4 Member of and Attorney for the
5 El Dorado County Grand Jury

FILED

01 APR -3 PM 2:17

EL DORADO COUNTY
SUPERIOR COURT

BY  DEPUTY

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF EL DORADO

10
11 EL DORADO COUNTY and EL DORADO
12 COUNTY BOARD OF SUPERVISORS,)

13 Plaintiffs,)

14 v.)

15 EL DORADO COUNTY GRAND JURY,)

16 Defendant.)

Case No. SC20010006

~~PROPOSED~~

JUDGMENT

17
18 The above-captioned action came on regularly for hearing on February 8, 2001,
19 before the Honorable Suzanne N. Kingsbury, Presiding Judge of the Superior Court,
20 on the following motions:

- 21 1. Plaintiffs' motion for a preliminary injunction;
22 2. Plaintiffs' motion to quash grand jury subpoenas;
23 3. Defendant's motion for judgment on the pleadings; and
24 4. Defendant's motion for enforcement of grand jury subpoenas duces
25 tecum.

26 Plaintiffs El Dorado County ("County") and El Dorado County Board of
27 Supervisors ("Board"), referred to herein collectively as "plaintiffs," were represented
28 by Louis B. Green, County Counsel, and Thomas D. Cumpston, Deputy County

Judgment ~~Proposed~~

EXHIBIT A

1 Counsel. Defendant El Dorado County Grand Jury ("Grand Jury" or "defendant") was
2 represented by Richard W. Nichols, Esq., a member of the Grand Jury. Kenneth
3 Womack, Foreman of the Grand Jury, also appeared.

4 The matters having been briefed and argued, and the Court being fully
5 apprised in the premises, and the Court having issued its Minute Order on March 12,
6 2001, the Court now finds and determines:

7 i. That the public policy interest favoring nondisclosure of confidential
8 and/or privileged information to journalists, the general public, or potential
9 adversaries is entirely different from, and is outweighed by, the public policy interest
10 in providing information to the Grand Jury in aid of the performance of its statutory
11 civil watchdog function of investigating and reporting upon the affairs of local
12 government;

13 ii. That plaintiffs' assertions of confidentiality and privilege, whether as to
14 closed session matters or otherwise, in an effort to block scrutiny by the Grand Jury,
15 which has been described as being "the only agency free from possible political or
16 official bias," is an invitation to charges of bias and corruption and is at odds with the
17 principle of open and fair government;

18 iii. That the attorney-client privilege [Sections 951 et seq. of the California
19 Evidence Code], the deliberative process privilege [including Section 1040 of the
20 California Evidence Code], the Ralph M. Brown Act [Sections 54950 et seq. of the
21 California Government Code], and the duty of an attorney to keep inviolate
22 confidences entrusted by his or her client [Section 6068(e) of the California Business
23 and Professions Code] do not shield the County or the Board from Grand Jury
24 investigations into county business conducted in closed session or otherwise; and

25 iv. That disclosure to the Grand Jury of the documents and the information
26 requested by it in connection with the two investigations referenced in the grand jury
27 subpoenas duces tecum which are the subject of this action ("the subject subpoenas")

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1 is not prohibited by law, within the meaning of Article VII, Section 703, of the
2 El Dorado County Charter.

3 Accordingly, good cause appearing therefor,

4 1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs'
5 motions for a preliminary injunction and for a protective order against the
6 enforcement of the subject subpoenas, issued by the Grand Jury to and served upon
7 (i) Louis B. Green ("Green"), El Dorado County Counsel, and (ii) Michael B. Hanford
8 ("Hanford"), El Dorado County Chief Administrative Officer, directing and
9 commanding their appearance and testimony, and production of documents,
10 pertaining to the two investigations which are referenced in the subject subpoenas, be,
11 and they are, denied;

12 2. AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
13 plaintiffs take nothing by reason of their complaint, and that defendant be awarded its
14 costs of suit in this action;

15 3. AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED,
16 consistent with the findings hereinabove set forth, that defendant's motion for
17 judgment on the pleadings, be, and it is hereby, granted;

18 4. AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
19 neither (i) the lawyer-client privilege set forth in California Evidence Code Sections
20 950 et seq., nor (ii) the official information privilege set forth in California Evidence
21 Code Section 1040 and/or any deliberative process privilege and/or any related
22 doctrines, nor (iii) the lawyer's duty to protect client confidences expressed in
23 California Business and Professions Code Section 6068(e), nor (iv) any provision or
24 provisions of the Ralph M. Brown Act (California Government Code Sections 54950
25 et seq.), permit plaintiffs, or any of their present or former agents or employees, to
26 refuse or decline to provide and produce evidence by way of testimony and
27 documents as demanded by the subject subpoenas, and that the subject subpoenas are

28 / / /

1 not invalid, unlawful or void to the extent that they seek to compel such testimony or
2 document production, or at all;

3 5. AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that
4 defendant's motion for enforcement of the subject subpoenas be, and it is hereby,
5 granted, and that Messrs. Green and Hanford appear before the Grand Jury, at a date
6 and time to be mutually agreed upon by them, or to be established by the Grand Jury
7 in the absence of such mutual agreement, to give testimony and produce documents
8 as commanded by the subject subpoenas.

9 JUDGMENT IS HEREBY ENTERED ACCORDINGLY.

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11 DATED: March 29, 2001

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13 SUZANNE N. KINGSBURY
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SUZANNE N. KINGSBURY
15 Presiding Judge of the Superior Court
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