

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE:	September 8, 2021	DEP. NO.:	27
JUDGE:	HON. STEVEN M. GEVERCER	CLERK:	N. SMITH
AMERICAN TRANSPARENCY, a 501c Public Charity (dba OPENTHEBOOKS.COM), and ADAM ANDRZEJEWSKI, an individual, Petitioners and Plaintiffs, v. CALIFORNIA STATE CONTROLLER, Respondent and Defendant.		Case No. 34-2020-80003296	
Nature of Proceedings:		Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief: Order vacating hearing and directing further briefing	

I. Order.

Petitioners have filed a complaint for declaratory and injunctive relief and a petition for writ of mandate (Petition) pursuant to the Public Records Act (PRA) (Gov. Code, §§ 6250 *et seq.*) Petitioners seek a writ of mandate directing Respondent State Controller (SCO) to comply with the PRA and other related relief.

1. Background.

The SCO is responsible for accountability and disbursement of California's financial resources. (See Gov. Code, §§ 12410 [noting that "[t]he Controller shall superintend the fiscal concerns of the state...[and] shall audit all claims against the state, and may audit the disbursement of any state money..."], 12440 [noting that "[t]he Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury"].)

The SCO also: 1) produces payments from the State Treasury, including payments for state payroll, retirement rolls, Medi-Cal, personal income tax refunds, and vendors of goods and services used by state agencies; 2) audits funds disbursed or claims presented for payment; 3) processes the civil service payroll; 4) performs statewide accounting and reporting functions; and 5) safeguards lost and forgotten property. (See *generally* Cal. Gov. Code, Tit. 2, Div. 3, Pt. 2, Ch. 5 [statutes setting forth duties of State Controller]; Declaration of Ryan P. Mulvey (Mulvey Decl.), Exh. B.)

On August 23, 2019, Petitioners submitted a PRA request to the SCO¹ for 1) "an electronic copy of all records relating to state spending information, including but not limited to all vendor (transfer of property or services) payee payments, checkbook payment data, warrant payment information, line-by-line vendor payments, batched claim reports, and batched claim depository data"; 2) "Any current or past iteration of a compendium, collection, software package tool, or report record of all state vendor payment warrants with *all available fields*, including, but not limited to: (i) checkdate/ACH Date, (ii) payee/vendor name, (iii) payee/vendor address, (iv) check number ACH code, (v) check amount/ACH amount, (vi) description of products or services, (vii) organization/agency identifier number, (viii) purpose of payment, (ix) department or agency, and (x) type of payment (i.e., contract, grant, etc.); and 3) "records of all vendor payments for California State purchase and services rendered..." (Petition; Exh. 1 [emphasis in original].) The PRA request sought records for the time period of January 2018 to the present. (*Id.*)

On October 16, 2019, Petitioners notified the SCO of a change in counsel and requested an update on the status of their PRA request. (Declaration of Richard J. Chivaro (Chivaro Decl.), Exh. B.)

On November 4, 2019, the SCO responded to Petitioners' PRA request. (Chivaro Decl., ¶4. Exh. C.) The response first noted that the request mirrored a prior request in 2013 by Petitioners (Mr. Andrzejewski and American Transparency) to which the SCO had responded. (*Ibid.*) The SCO stated that Petitioners' current request "is not entirely clear with respect to vendor payments," and, as such, the SCO "is unable to comply with [Petitioners'] request." (*Ibid.*)

The SCO noted that it receives "literally thousands of claims for payment daily," and: 1) it does not maintain a centralized vendor contract database or "check" register, that would allow it to identify all contracts; 2) each state agency (of which there are approximately 500 in California) often paid for contracts directly; and 3) that claims are batched by date received and not segregated or logged by state agency, employee, or payment type. (Chivaro Decl., Exh. C.) The SCO concluded that "because of the way claims are batched and processed... we are unable to locate or otherwise provide you with the documents requested." (*Id.*)

The SCO further explained in its letter the process by which vendors were paid for providing goods and services to state agencies: the state agencies either 1) paid the vendor directly for goods and services and then filed a claim for

¹ In 2013, Petitioners submitted a similar PRA request to the SCO's office for "2008 Fiscal Year claims to the State Controller from agencies requesting that their Revolving Fund account be replenished." (Chivaro Decl., ¶7, Exh. F, [AGO_AMERTRANSP_142].) Over the course of several months, Petitioners and the SCO exchanged numerous communications on this PRA request, during which the SCO explained how State payments are processed and the way that the SCO stores and processes payment information. (*Id.*)

reimbursement with the SCO; or 2) the SCO paid the third-party vendor directly. The SCO also noted that it receives “literally thousands” of claims for payment daily. (*Id.*) The SCO’s letter concluded that “absent any clarification to your request” the SCO could not comply with Petitioners’ request. (*Id.*)

On November 11, 2019, Petitioners sent a letter in response to the SCO’s November 4, 2019 letter. In that letter, Petitioners purported to “clarify” their original PRA request, and also requested that their November 11, 2019 letter be treated as a “new” PRA request. (Chivaro Decl., Exh. E.) Petitioners doubled down on their August 2019 PRA request for “*all* records relating to state spending information,” including, “records of *all* vendor payments.” (*Id.* [emphasis in original].) Petitioners further requested the SCO to “provide a written determination as to whether any non-exempt responsive records are under [its] legal control...within 10 working days.” (Chivaro Decl., Exh. E.) The SCO did not provide a written response.

On January 10, 2020, Petitioners filed the Petition.

Thereafter, the parties engaged in discovery. In April 2020, Petitioners served a Request for Production of Documents, Set One (RFP) upon the SCO, to which the SCO responded. (Declaration of Ryan P. Mulvey, ¶ 9, Exhs. F-V.) The RFP generally sought to discover the bases for the SCO’s assertions about the method in which it maintains documents, and why the SCO was unable to respond to Petitioners’ PRA request. In October 2020, Petitioners served the SCO with Interrogatories, Set One, which were generally based on the documents the SCO provided in response to Petitioners’ RFP. (*Id.*, Exh. W.) In February and in April 2021, the SCO served responses. (*Id.*, ¶¶ 10-11; Exhs. X-Z.)

2. Discussion.

As a preliminary matter, the Court grants the SCO’s unopposed request for judicial notice.

a. Legal Standard.

Under the PRA, a public agency must make public records promptly available to any person who submits a PRA request that “reasonably describes an identifiable record or records.” (Gov. Code, § 6253, subd. (b).) The PRA enables persons to seek “injunctive or declarative relief or writ of mandate” to enforce that person’s right to inspect or receive copies of public records. (Gov. Code, §§ 6258, 6259.)

The PRA imposes on agencies an affirmative obligation to make available to the public any public records in their possession, absent a specific statutory basis for exempting the records from disclosure or a showing that the public interest

served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, §§ 6253, 6254, 6255.)

The PRA is construed broadly in favor of access, and exemptions from disclosure must be narrowly construed. (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 825; *see also Am. Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1040.) The agency withholding the records bears the burden of proving that an exception from disclosure applies. (*Am. Civil Liberties Union Foundation of Northern California v. Superior Court* (2011) 202 Cal. App. 4th 55, 85.)

The PRA requires the requestor to “reasonably describe” the record. (Gov. Code, § 6253, subd. (b).) “The [reasonable description] requirement of clarity must be tempered by the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought.” (*Cal. First. Amend. Coal. v. Superior Court* (1998) 67 Cal.App.4th 159, 165-166.) In turn, the “agency is thus obliged to search for records based on criteria set forth in the search request.” (*Id.* at p. 166.) “[PRA] [r]ecords requests, however, inevitably impose some burden on government agencies. An agency is obliged to comply so long as the record can be located with reasonable effort.” (*Ibid.*)

But, a “clearly framed request which requires an agency to search an enormous volume of data for a ‘needle in the haystack’ ” or that “compels the production of a huge volume of material may be objectionable as unduly burdensome.” (*Cal. First. Amend. Coal., supra*, 67 Cal.App.4th at p. 166 [citing *Am. Civil Liberties Union Foundation v. Deukmejian* (*ACLU v. Deukmejian*) (1982) 32 Cal.2d 440].) A governmental agency is only obliged to disclose public records that can be located with reasonable effort and cannot be subjected to a “limitless” disclosure obligation. (*Ibid.*)

Accordingly, pursuant to subdivision (a) of Section 6255² (the “catch-all” exemption), disclosure of otherwise responsive public records may be blocked as overly burdensome if “on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.” (See *ACLU v. Deukmejian, supra*, 32 Cal.3d at p. 452.)

This is because the phrase “public interest” in Section 6255 encompasses concern with the cost and efficiency of government in responding to a request for a large volume of records. (*ACLU v. Deukmejian, supra*, 32 Cal.3d at pp. 452-453.) “To refuse to place such items on the section 6255 scales would make it possible for any person requesting information, for any reason or for no particular

² Section 6255 allows an agency to withhold documents from disclosure if the agency demonstrates that “on the facts of the 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, subd. (a).)

reason, to impose upon a governmental agency a limitless obligation. Such a result would not be in the public interest.” (*Ibid.*)

Thus, although a situation could arise where a petitioner makes a strong case for disclosure under the PRA, under the circumstances of that case, the public interest in nondisclosure may still justify withholding access to the public documents at issue. For example, in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, the California Supreme Court concluded that “whatever merit disclosure might otherwise warrant in principle is simply crushed under the massive weight of [petitioner] the Times’s request in this case: the newspaper seeks almost five years of the [respondent] Governor’s calendars and schedules, covering undoubtedly thousands of meetings, conferences and engagements of every conceivable nature. We are not persuaded that any identifiable public interest supports such a wholesale production of documents.” (*Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at 1345.)

b. Whether Petitioners Have Shown a Violation of the PRA.

Petitioners contend that the SCO has violated the PRA by “refusing to timely comply with the [PRA] and provide a reasoned response that denies access to records, applies a valid statutory exemption, or otherwise provides a recognized basis for refusing to conduct a search.” Petitioners seek a writ of mandate directing the SCO respond to Petitioners’ “request(s)” and disclose “all non-exempt responsive records.”

Petitioners argue that responsive records must, and do, exist.

Petitioners contend that the nature of the SCO’s duties implies that *some* documents are generated in the claim and audit process. Petitioners note that, for example, because the SCO must provide auditing services and financial oversight to the State of California, it must necessarily be able to keep track of vendor payments or maintain those records in a searchable database, and documents must exist, such as “claim schedules, invoices, and other records [created or obtained] in the course of paying individual claims.” (Opening Brief, p. 6:11-12 [citing Chivaro Decl., Exh. C].) The SCO produced documents in discovery that support this contention; the SCO’s “Claims Audits Procedures Manual” states that “for a state agency to issue payment from the Treasury for purchases or expenses the agency is required to submit a Claim Schedule STD.218 (Continuous)/Voucher (Fi\$Cal)... The claim schedule/voucher must contain appropriation and accounting information as well as adequate supporting documentation to support the expenditure claimed. (Mulvey Decl., Exh. J [AGO_AMERTTRANSP_025].)

Petitioners make the same argument as to records regarding replenishing of agency Revolving Fund Accounts. (Opening Brief, p. 6:12-13 [citing Chivaro Decl., Exh. C].)

Petitioners also take issue with the SCO's contentions that it does not have "checkbook" or easily accessible "warrant" information, and that it does not "batch" state agency claims for reimbursement by date, rather than by state agency or payment type. Petitioner argues the SCO *can* extract and compile this information, and in doing so, would not be producing a substantively new record under the PRA.

Based on the foregoing, Petitioners argue the SCO should have 1) taken reasonable steps to assist Petitioners in identifying responsive records and information; and 2) made a "reasonable effort" to elicit additional clarifying information. Petitioners contend that the SCO is capable of doing this, yet it has chosen not to, in bad faith, and in violation of the PRA. Rather, Petitioners contend that the SCO is improperly "feigning confusion" at their request, and stonewalling by refusing to produce any records or respond at all.

The SCO responds that Petitioners essentially seek a "checkbook" of state spending, which the SCO does not have. The SCO also argues that it does not have a duty to create one, because it would be creating an entirely new record, which the PRA does not obligate it to do.

The SCO also argues that Petitioners' request for "*all* records related to state spending" is overly broad and burdensome. The SCO notes that it processes over 50 million financial transactions a year, ranging from state employee payroll and travel expense claims, payments to Medi-Cal providers, tax refunds, vendor payments, and retirement payments. (Chivaro Decl., ¶¶8.) The SCO also audits state agency expenditures, manages and processes claims for unclaimed property, reviews other expenditures, and allocates funding to local governments, monitors the cash flow of the State's General Fund, and administers, collects, and maintains estate, inheritance, and gift taxes. (*Ibid.*) The SCO may issue 45,000 warrants on a typical day, and may receive over 4,600 paper and electronic claims per day. (*Id.*, at ¶¶9-10.)

The SCO argues that a "limitless" search for public records, such as the one requested by Petitioners, is not in the public interest, under the "catchall exemption" of Government Code section³ 6255. Thus, the SCO contends, the Court should find that Petitioners' request is not in the "public interest" or justified under Section 6255, and the Court should deny the Petition.

Petitioners seek a huge volume of records--"all records relating to state spending information." Additionally, it is undisputed that Petitioners have sought similar information from the SCO in the past and are familiar with the workings of the SCO. Further, after the SCO responded to Petitioner's 2019 PRA request, it

³ Unless otherwise specified, all statutory references shall be to the Government Code.

requested that Petitioners clarify the request, and Petitioners reiterated that they sought "all records relating to state spending information."

There are two dispositive issues.

First, the Court must ascertain whether the SCO has made a "reasonable effort" to locate potentially responsive records in light of: 1) the scope of Petitioners' request and Petitioners' reiteration of their request following the SCO's request for clarification; 2) the SCO's legally-mandated duties, and functions which indicates that potentially responsive documents exist; and 3) the SCO's discovery responses, which also indicate that potentially responsive documents exist

Second, the Court must determine whether, under the circumstances of this case, the public interest in nondisclosure still justifies withholding access to the records at issue, in light of the massive amount of records requested by Petitioners.

The Court cannot ascertain from the briefs and the declarations whether the SCO made a "reasonable effort," or whether the public interest in nondisclosure justifies withholding access to the records at issue. Nor can the Court determine if it is too burdensome to extract and compile "checkbook" information into a report.

On one hand, it appears that the SCO simply failed to search for documents, and potentially responsive documents exist.

On the other hand, Petitioners seek a huge volume of data. Additionally, after the SCO explained why certain information was not available, and requested Petitioners to clarify the scope of their request (and after the SCO corresponded in detail with Petitioners about a similar prior request), Petitioners simply repeated their request for "all records related to state spending." This request would impose a huge burden upon the SCO in retrieving these records, many of which are publicly available on the Fi\$Cal website.⁴ These factors could support a finding under Section 6255, that it is not in the public interest to search for responsive records, or generate data therefrom. However, it appears that the SCO has not raised this objection until filing its Opposition papers.

The Courts rejects the SCO's superficial claim that it is simply too burdensome to search for records, when some, in fact, exist. The Court is also troubled by the

⁴ Fi\$Cal, is the Financial Information System for California, an independent agency created by the Legislature, and partner agencies the Department of Finance, the SCO, the Department of General Services, and the California State Treasurer (Chivaro Decl., ¶11; Request for Judicial Notice in Support of Opposition (RJN), Exh I.) Fi\$Cal maintains a website with expenditure data from about "150 departments" representing about 65% of the States' budgetary expenditures. (RNJ, Exh. L.)

SCO's failure to discuss, let alone mention, its responses to Petitioners' discovery requests. The Court also questions whether the SCO can extract and produce "checkbook" information.

The Court also criticizes Petitioners for their lack of specificity and apparent insistence for "all records related to state spending."

Accordingly, the Court vacates the hearing on the merits, set for September 10, 2021 at 11:00 a.m., and orders the parties to submit further briefs, with pertinent points supplemented by declarations and/or other evidence, that address the following questions below. The briefs shall be no longer than ten pages. In addition, the Court expects the parties to meet and confer in good faith in an attempt to resolve differences.

Petitioner's initial brief shall be filed by September 24, 2021. SCO's opposition brief shall be filed by October 8, 2021. Petitioner's reply brief, if any, shall be filed by October 15, 2021. After the Court has received the briefs, it will issue a further order or set the matter for hearing.

1. Petitioners requested "all records of state spending" from "January 2018 to the present." Petitioners then reiterated their PRA request. Please clarify what time frame is requested. Explain why the Court should grant production for more than one fiscal year. Explain why records memorializing payment would be insufficient, as opposed to "all" communications related to payment.
2. Petitioners seek "all records related to state spending." However, other parts of Petitioners' briefs indicate that they are primarily concerned with "checkbook" information and payments for state agency spending, and SCO has construed the request as such. In light of this, and the nature of the SCO's other duties, please explain why it is necessary to receive "all records related to state spending," and why Petitioners are unable to narrow the scope of their request.
3. What record or records memorialize claims made by agencies sent to the SCO requesting replenishment of a state agency's revolving fund or reimbursement to state agencies? Where are such records kept and in what format? Why would production of such records be overly burdensome?
4. What record or records memorialize the issuance by the SCO of a warrant, payable to an agency for the reimbursement? Where are such records kept and in what format? Why would production of such records be overly burdensome, especially in light of the SCO's Claims Audit Tracking System (CATS)?

5. With respect to claims paid by the SCO, what record or records memorialize the payment of claims submitted by a state agency? Where are they kept and in what format? Why would production of such records be overly burdensome?
6. The SCO contends that "checkbook" information cannot be extracted or compiled into a report, and this would entail creating a substantively new record under the PRA, which it is not obligated to do. Petitioners claim that the SCO can perform this function without creating a substantively new record. Explain in detail why this is or is not possible.
7. Is the SCO asserting that Section 6255 applies, and exempts it from disclosing responsive records? Did the SCO raise this exemption in any communication to Petitioners prior to this litigation?

IT IS SO ORDERED.

September 8, 2021



Steven M. Gevercer

Steven M. Gevercer
Judge of the Superior Court of California
County of Sacramento

*** A Certificate of Service is attached**

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served: **Order - vacating 09/10/2021 hearing and directing further briefing**, by email and depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, 95814 each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated:

9/8/2021

Superior Court of California, County of
Sacramento

By:

N. Smith

Deputy Clerk