LAW OFFICES OF KELLY A. AVILES

March 31, 2017

(via U.S. mail and email to CityClerksOffice@cityoffullerton.com)

City of Fullerton
Office of the City Clerk
303 West Commonwealth Avenue
Fullerton, CA 92832-1775

Dear City Clerk:

This office represents Friends for Fullerton's Future. Over the past few months, associates of Friends for Fullerton's Future have made requests for records pursuant to the California Public Records Act, Government Code section 6250, *et seq.* ("CPRA"). The requests related to an early morning incident on November 9, 2016, when then-City Manager Joe Felz was involved in a traffic accident, where he was possibly intoxicated. Apparently, officers responded to the incident but did not take Mr. Felz into custody. Concerns have arisen over whether the incident was properly handled. Associates of Friends for Fullerton's Future have requested phone records for that day, in order to shed light on which City officials were informed of the incident and may have influenced how the incident was handled.

On November 9, 2016, Joshua Ferguson requested records for "the call log of Chief Hughes' phone from last night between 1-3 a.m." for the night of November 9. The City responded that it did not have records because Chief Hughes was not using a City phone. Mr. Ferguson renewed this request on March 2, 2017, after the California Supreme Court issued its decision confirming that public records stored on private devices are disclosable under the California Public Records Act. The City responded that while it recognized the ruling, "the City does not have the requested records and Dan Hughes is no longer employed with the City."

On February 16, 2017, Travis Kiger requested call logs and/or detailed billing records for all mobile or landline phones used by either Councilmember Jennifer Fitzgerald or former Police Chief Danny Hughes on November 9, 2016. In regards to the land lines, the City responded that monthly invoices do not itemize each call, and that phone records for City Hall for November 9 had been "purged by the system prior to the request." In regards to the mobile phones, the City responded that "[t]hose are their private cell phones. We do not have those records."

On March 17, 2017, Mr. Kiger also made the same request for call logs and/or detailed billing records for all mobile or landline phones used by then-City Manager Joe Felz on November 9, 2017. The City responded on March 27 that it "does not have any records for

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mobile/landline phones used by Mr. Felz on November 9, 2016, and Mr. Felz is no longer employed by the City."

The California Supreme Court has recently addressed this issue, in City of San Jose v. Superior Court (2017) 214 Cal.Rptr.3d 274. In a unanimous decision, the Court confirmed that records which concern the conduct of public business, even those not stored on city servers or directly accessible by the city, are "public records" within the meaning of the CPRA. "[A] city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account." Id. at 286. Thus, the City's response that the phones used by city employees and officials are not paid for or owned by the City is not determinative of whether the City must turn those records over in response to my client's previous CPRA requests.

In so holding, the Court also provided guidance to agencies about how to respond to requests for public records not held by the agency. The Court confirmed that the agency's search must be "reasonably calculated to locate responsive documents." San Jose, at 288. "As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question." Id. at 289.

However, the City's responses are entirely inadequate as to what attempts, if any, the City has made to obtain the requested records. If it is the City's position that it has made reasonable efforts, but was unable to obtain the records, please describe the City's efforts. If the City has not made reasonable efforts to obtain the records, we specifically request that you do so now.

In addition to making reasonable attempts to obtain the records of communications between Mr. Felz, Ms. Fitzgerald, and Mr. Hughes, regarding the November 9 incident, the City should also confirm what steps it has taken to obtain its own phone records from that day.

The City states that it has already purged its own phone records. However, destruction of public records is a serious violation of the law, and likely also violates the City's own policies. City records are required to be retained for a minimum of two years. See Government Code section 34090. *et seq.* Destruction of public records may also be punishable criminally. See Government Code section 6200. Therefore, please describe what records the City had and under what purported authority it destroyed those records.

The City also claims that its statements do not detail calls made and received. However, it is unclear at this point whether the City has access to electronic records from its phone service providers which would contain this information. Records are subject to disclosure if they are in an agency's actual or constructive possession. San Jose, at 284–85. Any electronic information accessible by the City would be in its constructive possession, and therefore disclosable.

Finally, in addition to the records previously requested, my client is requesting copies of any and all records which relate to the November 9, 2016, traffic incident that Mr. Felz was involved in and the City's subsequent handling of that matter. This should include, but is not limited to, the following records:

1. Records of any text messages sent on November 9, 2016, from the personal devices of Mr. Felz, Councilmember Jennifer Fitzgerald, or Police Chief Danny Hughes from any personal or city phone;
2. A copy of any report r the incident;
3. The results of any investigation done by the City;
4. Any documents provided to or obtained by the investigator during the course of the investigation;
5. Any communications, including text messages and emails, regarding the incident (including those which may exist on private devices);
6. Any claim or threat of litigation made by Mr. Felz;
7. Any communication from legal counsel for Mr. Felz;
8. Any communications regarding Mr. Felz' leave or subsequent departure from the City;
9. Any severance or settlement agreement between the City and Mr. Felz;
10. Any complaints or charges made against Mr. Felz from 2011 to present;
11. All emails, text messages, or correspondence from Mr. Felz (or sent on his behalf) sent to any member of the City Council or the City Attorney from November 9, 2016, to the present;
12. Any emails, text messages, or correspondence from any member of the City Council or the City Attorney to Mr. Felz (or his representative) from November 9, 2016, to the present; and,
13. All weekly reports, sometimes referred to as Friday Reports, Weekly Reports, Weekly Memos, or Weekly Updates, from the City Manager to the City Council from November 2016 to the present.

Moreover, the purpose of the request is to determine who at the City was contacted about the incident on the night it occurred, whether Mr. Felz was given any special treatment, and how the City handled the information once received. Pursuant to Government Code section 6253.1, the City has a duty to assist us by identifying records and information that are responsive to the "purpose of the request." Please assist us in locating all public records which would shed light on this issue.

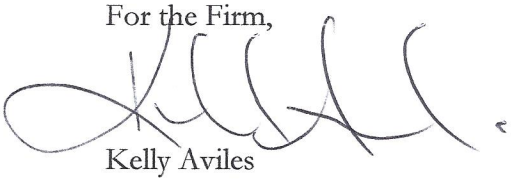
If you claim that any of the responsive requested records are not disclosable, please provide us with a with a written response providing the legal justification for your decision, as required by Government Code section 6255(a)-(b), which states:

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or 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.
>
> A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

Our office will pay the direct costs of duplication of these records. If you anticipate that the charges will exceed $100, please contact our office prior to copying the records to discuss. Also, we prefer to obtain the records on a disc or by email, unless the records are only held in paper format and converting them to electronic format would cause

Please contact our office if you have any questions or concerns. Thank you for your prompt attention to this matter.

For the Firm,



Kelly Aviles

cc: Jones & Mayer