

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF TULARE

Visalia Division  
221 S Mooney Blvd, Room 201  
Visalia, CA 93291  
559.730.5000

**Nunley, James Gregory**  
Plaintiff/Petitioner,

vs.

**City of Tulare**  
Defendant/Respondent.

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Case No. **VCU280972**

**CLERK'S CERTIFICATE OF SERVICE BY MAIL**

I certify that I am not a party to this cause.

I certify that I placed the Ruling for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on April 9, 2020.

STEPHANIE CAMERON,  
CLERK OF THE SUPERIOR COURT  
COUNTY OF TULARE

By Jamie Carrillo  
Jamie Carrillo, Deputy Clerk

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UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

MEMORANDUM FOR THE DIRECTOR

DATE: 10/15/68

SUBJECT: [Illegible]

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[Illegible text]

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APR 09 2020

STEPHANIE CAMERON, CLERK  
BY 

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF TULARE  
VISALIA DIVISION

James Nunley,

Petitioner,

vs.

City of Tulare,

Respondent

) Case No.: VCU280972

) **RULING**

The court grants the Petition for Writ of Mandate and orders Respondent, City of Tulare to disclose to Petitioner the report prepared by attorney Daniel Rowley regarding his investigation of hostile work environment claims asserted by city police officer Lieutenant Jerod Boatman relating to incidents with City Council Member Carlton Jones.

A Tulare City police officer filed claims against Respondent asserting a Tulare City Council member had engaged in conduct creating a hostile work environment. He alleged that a city houseman tried on two occasions to engage him in a confrontation and threatened him with physical violence. As part of its statutory obligation to investigate, Respondent City of Tulare hired an outside attorney, Daniel Rowley, who investigated the claims and prepared a report for the city. Respondent advised both the police officer and the city council member of the report conclusions but did not provide copies of the report to any party.

1 Petitioner (also a Tulare City Council Member) submitted a public records request for a  
2 copy of the attorney's report. (Government Code 6253.) Respondent City has refused to  
3 disclose the report asserting it is privileged and exempt from disclosure. The subject petition for  
4 relief followed.

5 Respondent objects to portions of the declaration of Alyson Berg filed in support of the  
6 Petition. The contested portions relate to newspaper articles referenced in paragraphs 2 and 7  
7 of the declaration. Respondent's objections to the articles on hearsay grounds are sustained.  
8 Petitioner has not shown the articles are admissible under any exception to the hearsay rule.  
9 (Evidence Code 1200.)

10 A discussed in *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, "The Public Records  
11 Act, section 6250 et seq., was enacted in 1968 and provides that "every person has a right to  
12 inspect any public record, except as hereafter provided.... As the Legislature declared in  
13 enacting the measure, "the Legislature ... finds and declares that access to information  
14 concerning the conduct of the people's business is a fundamental and necessary right of every  
15 person in this state." (§ 6250.) *Michaelis, Montanari Johnson v. Superior Ct.*, 127 Cal.App.4th  
16 1298, 1303 (Cal. Ct. App. 2005) ("The Public Records Act was intended to safeguard the  
17 accountability of government to the public. (*San Gabriel Tribune v. Superior Court* (1983) 143  
18 Cal.App.3d 762, 771 [192 Cal. Rptr. 415].) "To this end, the Act makes public access to  
19 government records a fundamental right of citizenship.")

20 Respondent initially (and in all of the pre-petition communication between counsel)  
21 asserts the report is exempt from disclosure under Government Code 6254(f). The referenced  
22 exemption relates to law enforcement investigation files. The section provides an exemption for  
23 "any investigatory or security files compiled by any other state or local agency for correctional,  
24 law enforcement, or licensing purposes." Respondent's assertion that the subject report falls  
25 under this exemption is not persuasive. There is nothing in the nature of the report to indicate it  
has any relation to law enforcement, other than the complaining employee was a law

1 enforcement officer. There is nothing in the civil employment discrimination complaint filed here  
2 under FEHA (for creating a hostile work environment) which implicates law enforcement or a  
3 potential of criminal activity. The authority relied on by Respondent is distinguishable. (including  
4 *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169.)

5 Respondent asserts the report is exempt from disclosure under Government Code  
6 6254(c). The subsection excludes from disclosure "personnel, medical, or similar files, the  
7 disclosure of which would constitute an unwarranted invasion of privacy." Respondent has  
8 shown the report is a result of a mandated investigation of the claims asserted by Respondent's  
9 employee. The report contains sensitive information about the police officer's claims. The  
10 police officer and the City Council Member have a substantial privacy interest in the contents of  
11 the report. The court finds the report constitutes a personnel record or other similar file under  
12 the statute. The report was to remain confidential at the time it was prepared and comments  
13 from the officer and city council member were considered confidential at the time the  
14 investigation by the outside attorney was conducted.

15 The report's conclusions provided to the parties indicate the investigation of the police  
16 officer's hostile environment claims, were found at least partially sustained. There is a  
17 substantial public interest in knowing what actions of its elected official with a city employee  
18 might result in liability to the city. This weighs heavily in favor of disclosure and offsets privacy  
19 interests which might be asserted by the subjects of the report. (See: *Associated Chino*  
20 *Teachers v. Chino Valley Unified School District* (2018) 30 Cal.App.5th 530.)

21 Counsel argued at the hearing on this motion that the *Chino* case that the appellate  
22 court did not did not allow production of the investigation records sought by the petitioning  
23 parties. But that case concerned an investigation into alleged misconduct by a school employee  
24 who coached the girls' volleyball team. The court found the allegations to be of little importance  
25 to the public as they concerned a fairly low level employee whose conduct painted him as little  
more than a tough coach whose conduct was "objectively reasonable." The court in the *Chino*

1 case discussed certain complaints as being more serious and thereby more worthy of disclosure  
2 and noted that "threats of violence" (as is the case here) would be more likely deemed serious.

3 Here the allegations were of a threat of physical violence by a highly placed city official, a  
4 member of the Tulare City Council against a ranking member of the Tulare Police Force.

5 The *Chino* court found the documents sought to be personnel records, but concluded  
6 that there were substantial privacy issues as the allegations were not substantiated by the  
7 investigation. In that case the appellate court noted that the allegations were not deemed  
8 serious given that no outside investigator was hired, as was the case here. And in this case  
9 Councilman Jones, the primary subject of the investigation, has asserted no privacy rights and  
10 has not sought to block release of the investigative report. Counsel sought to paint this as a two-  
11 way investigation, but it was instigated based on the complaint by Officer Boatman. On balance,  
12 the court does not find the *Chino* case persuasive in preventing disclosure of the records sought.

13 Respondent asserts that the report is privileged under the attorney-client privilege and  
14 attorney work-product privilege under Government Code 5254(k). (*Wellpoint Health Networks,*  
15 *Inc. v. Sup. Ct. (McCombs)* (1997) 59 Cal.App.4th 110.) Respondent asserts the report at issue  
16 here has not been disclosed to any other party and that Respondent has not waived its  
17 privilege. Respondent has not provided sufficient authority to show that it is exempt from  
18 disclosure of records under the California Public Records Act based on a claim of attorney-client  
19 privilege. *The Roberts v City of Palmdale* (1993) 5 Cal. 4th 363 cited by respondent, discusses  
20 privilege issues, and notes that "a local governing body is the holder of the attorney-client  
21 privilege with respect to written legal opinions by the governing body's attorney." Respondent  
22 argues that the report states Mr. Rowley was "retained as an attorney," but the following  
23 sentence qualifies the scope of the duties by noting that he would provide only "conclusions  
24 regarding the facts" and that city attorney Mario Zamora "will use my report to provide the City  
25 with advice regarding the matters that are the subject of the report."

1 With this in mind, the court has reviewed the report and is not convinced that the report  
2 constitutes, a "written legal opinion" by the governing body's attorney as defined in that case.  
3 The vast majority of the report consists of summaries of interviews and contentions of the  
4 parties. The court finds no formal legal opinions, only conclusions that certain allegations were  
5 sustained or not sustained based upon the investigator's review of the evidence. The report  
6 offers no advice or conclusions about potential liability, application of statutes or case law,  
7 advice about mitigation, remediation or potential solutions. It is simply a thorough, rather lengthy  
8 finding of facts devoid of legal recommendations. And the part of the report that is even  
9 arguably privileged, the conclusions of Mr. Rowley, has already been released by Respondent.

10 Limits to the public's rights to access under the Act are to be narrowly construed. (Cal.  
11 Const. art. I, section 3(b)(2).) Further case law makes it clear that the dominant purposes of the  
12 communication must be in furtherance of the attorney-client relationship. *Holm v. Superior Court*  
13 (1954) 42 Cal.2d 500. Where the party engaged in the communication was acting in a capacity  
14 that could have been handled by a non-attorney, the communications are not privileged.  
15 *Montebello Rose Co. v. Agricultural Labor Relations Board* (1981) 119 Cal. App 3d. 1.

16 Counsel for the city argued that this case was distinguishable as in the ALRB case the  
17 labor negotiator was a lawyer but that wasn't his primary purpose, and here Mr. Rowley was  
18 hired as an attorney investigator. The court finds the case still is applicable, as Mr. Rowley  
19 wasn't required to be an attorney to perform an investigation and specifically deferred all "advice  
20 regarding the matters that are the subject of the report" to the city's lawyer. Juries make findings  
21 on issues related to the burden of proof and witness credibility in every trial. Counsel for  
22 petitioner pointed out that many law enforcement personnel investigations are done by non-  
23 lawyers and that the city had released an earlier personnel investigation without raising privilege  
24 concerns.

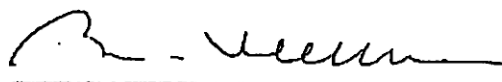
25 Finally, Respondent asserts the report is exempt from disclosure under the catchall  
provision of the CPRA. (Gov't. Code 6255(a).) To fall under this exemption, Respondent must

1 show there is a clear overbalance on the side of confidentiality. (*Michaelis, Montanari &*  
2 *Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.) The police officer and the city council  
3 member involved in the reported incidents clearly have privacy interests in the confidential  
4 investigation. The subject of the investigation, Council Member Jones, does not appear to  
5 assert any privacy interests here, and as petitioner points out in his reply, those interests are  
6 paramount in weighing privacy considerations. The report relates to two specific incidents  
7 involving the officer and council member. The incidents occurred near, but not during or part of  
8 City Council meeting. There do not appear to be other factors weighing in favor of non-  
9 disclosure. There are no public safety questions implicated by the investigation or report.  
10 There does not appear to be any basis for attempting to segregate exempt from non-exempt  
11 information in the report. Counsel for the city argues that there would be a chilling effect  
12 discouraging other employees from making personnel complaints if this were released, but the  
13 court does not find that outweighs the clear public policy directive of the Public Records Act to  
14 encourage and facilitate disclosure. In weighing the competing interests, the court finds  
15 disclosure is warranted.

16 The public has an interest in the interactions of its city council members and police  
17 officers, especially when those interactions create potential liability for the city. Further, the  
18 public also has an interest in knowing whether the city council as an employer is violating the  
19 rights of its employees under FEHA. It does not appear Respondent has met its burden to  
20 establish that the exemption under section 6255(a) applies.

21 The Rowley report shall be released to petitioner within five days of the date of this  
22 order. The case management conference in this matter is continued to June 18, 2020 at 8:30  
23 AM in Department 7 of the Tulare County Superior Court.

24 Dated: April 9, 2020



25 Bret D. Hillman  
Judge of the Superior Court