TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 84-1204
of	:	APRIL 18, 1985
JOHN K. VAN DE KAMP Attorney General	:	
RODNEY O. LILYQUIST Deputy Attorney General	:	

THE HONORABLE MICHAEL D. BRADBURY, DISTRICT ATTORNEY OF VENTURA COUNTY, has requested an opinion on the following question:

Are records of the amounts and reasons for performance awards granted to executive managers of a city subject to disclosure under the Public Record Act?

CONCLUSION

Records of the amounts and reasons for performance awards granted to executive managers of a city are subject to disclosure under the Public Records Act.

ANALYSIS

A city in Southern California has a program for giving performance awards to its executive managers of up to 20% of their annual salaries. Each award is contingent

upon the executive developing a written and approved performance plan for the year; the objectives must be accomplished with exceptional results. The city manager privately consults with the executive managers and his staff, evaluates the performances, and compensates the executives for any extraordinary efforts.

The question presented for resolution concerns whether the amount of each award and the reasons therefor[1] are subject to disclosure under the Public Records Act (Gov. Code, §§ 6250-6265; hereafter "Act")[2] or are exempt from public disclosure pursuant to the "personnel" exception of section 6254 or the "public interest" exception of section 6255. We conclude that neither section 6254 nor section 6255 authorizes nondisclosure here.

The city in question currently discloses to the public the number of executives in the program, the salary range for each executive, the total cost of the awards program, and the average percentage amount for all of the awards.

The reasons asserted for not disclosing to the public the amount of and basis for individual awards are (1) the executives receiving lesser awards might feel publicly embarrassed and (2) the benefits of candid disclosure in the confidential evaluation process might be jeopardized.

Section 6254 states in part:

> "Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
>
> ". . . . . .
>
> "(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[3]

Section 6255 provides:

> "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

[1] We assume for purposes of our discussion that the reasons are recorded.

[2] All section references hereafter are to the Government Code unless otherwise specified.

[3] Section 6254.7 refers to air pollution data, housing code violations and "trade secrets.

> making the record public clearly outweighs the public interest served by disclosure of the record."

The general scheme of the Act is that unless "public records" (broadly defined in section 6752) are exempt under section 6254 or the public agency can show justification for not disclosing them under section 6255, the agency must make the records accessible to the public under section 6253. (See *Braun* v. *City of Taft* (1984) 154 Cal.App.3d 332, 340.)

It should be noted, however, that the Act does not require the withholding of any record from public view. "The exemptions from disclosure provided by section 6254 are 'permissive, not mandatory; they permit nondisclosure but do not prohibit disclosure.'" (*Register Div. of Freedom Newspapers, Inc*. v. *County of Orange* (1984) 158 Cal.App.3d 893, 905; *Berkeley Police Assn.* v. *City of Berkeley* (1977) 76 Cal.3d 931, 941; *Black Panther Party* v. *Kehoe* (1974) 42 Cal.3d 645, 656.) While section 6255 "serves as a residuary statutory exemption for balancing privacy interests with the public's interest in access" (*San Gabriel Tribune* v. *Superior Court* (1984) 154 Cal.App.3d 762, 780), the burden is on the public agency to demonstrate that nondisclosure on balance is "clearly" in the public interest. (*Braun* v. *City of Taft*, *supra*, 154 Cal.App.3d 332, 345-346; *San Gabriel Tribune* v. *Superior Court*, *supra*, 143 Cal.App.3d 762, 780.)

The Act "was enacted in 1968 to safeguard the accountability of government to the public, for secrecy is antithetical to a democratic system of 'government of the people, by the people [and] for the people.'" (*San Gabriel Tribune* v. *Superior Court*, *supra*, 143 Cal.App.3d 762, 771-772.) Section 6250 states in part: "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

One aspect of the "people's business" that requires public disclosure concerns employment contracts. Section 6254.8 states:

> "Every employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255."

We believe that a record specifying the amount of and the reasons for payment of a performance bonus to a public employee comes within the provisions of section 6254.8, thus rendering the nondisclosure provisions of sections 6254 and 6255 inapplicable to such a record.

In the bonus incentive plan of the city in question, the offer of the bonus is the offer of a unilateral contract which the executive accepts and for which he gives "consideration" by the performance of the exceptional services pursuant to the agreed upon performance plan. (See *Hill* v. *Kaiser Aetna* (1982) 130 Cal.App.3d 188, 196; *Newberger* v. *Rifkind* (1972) 28 Cal.App.3d 1070, 1076; *Sabatini* v. *Hensley* (1958) 161 Cal.App.2d 172, 175; *Frebank Co.* v. *White* (1957) 152 Cal.App.2d 522, 525-526; *Chinn* v. *China Nat. Aviation Corp*. (1955) 138 Cal.App.2d 98, 99-103; *Sieck* v. *Hall*, (1934) 139 Cal.App. 279, 294-295; *Redd* v. *Williams Radiator Co*., (1931) 112 Cal.App. 353, 358; *Hunter* v. *Ryan* (1930) 109 Cal.App. 736, 738.) No "gift" is involved, and it matters not that the bonus amount is left to the discretion of the city manager and is made contingent upon performance by the executive. (See Civ. Code, § 1611; *Frebank Co*. v. *White*, *supra*, 152 Cal.App.2d 522, 526; *Chinn* v. *China Nat. Aviation Corp*., *supra*, 138 Cal.App.2d 98, 100; *Hunter* v. *Ryan*, *supra*, 109 Cal.App. 736, 738.) Each bonus constitutes "wages" and forms part of the employment contract; it is not retroactive. (See *Lucian* v. *All States Trucking Co*. (1981) 116 Cal.App.3d 972, 975-976; *Ware* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1972) 24 Cal.App.3d 35, 44, aff'd. sub.nom., *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware* (1973) 414 U.S. 117; *Sieck* v. *Hall*, *supra*, 139 Cal.App. 279, 294; *Redd* v. *Williams Radiator Co.*, *supra*, 112 Cal.App. 353, 358.)[4]

Accordingly, any record specifying the amount of the bonus or the exceptional services for which the bonus is paid manifests provisions of the executive's employment contract within the scope of section 6254.8. (See 63 Ops.Cal.Atty.Gen. 215, 221 (1980).) We thus conclude that sections 6254 and 6255 are inapplicable to such records under the express provisions of section 6254.8.

Moreover, we believe that neither subdivision (c) of section 6254 nor section 6255 would under their own terms authorize the withholding of the information here.

As with the other exemptions contained in section 6254, the "personnel" exception of subdivision (c) is to be read narrowly. (See *San Gabriel Tribune* v. *Superior Court*, *supra*, 143 Cal.App.3d 762, 772-773; *Cook* v. *Craig* (1976) 55 Cal.App.3d 773, 781; *Black Panther Party* v. *Kehoe*, *supra*, 42 Cal.App.3d 645, 653, fn. 7.)

---

[4] These aspects of the program render inapplicable the constitutional prohibitions against the making of a gift of public money (Cal. Const., art. XVI, § 6) and the granting of extra compensation after services are rendered (Cal. Const., art. IV, 17; art. XI, § 10). (See *Jarvis* v. *Cory* (1980) 28 Cal.3d 562, 569-578; *Goleta Educators Association* v. *Dall-Armi* (1977) 68 Cal.App.3d 830, 834; *Johnston* v. *Rapp* (1951) 103 Cal.App.2d 202, 206-207; 23 Ops.Cal.Atty.Gen. 271, 273-275 (1954).)

In *Braun* v. *City of Taft*, *supra*, 154 Cal.App.3d 332, 344, the Court of Appeal ruled that letters of appointment and rescission of the appointment of a city transit administrator did not come within the "personnel" exception:

> "The letters of June 25 and June 29 contain no personal information. Although reclassification may be embarrassing to an individual (*Campbell*), in California, employment contracts are public records and may not be considered exempt. (§ 6254.8.) The letters were memoranda of Polston's appointment to a position and the rescission thereof; they therefore manifested his employment contract. Because the letters regarded business transactions and contained no personal information, the court properly ordered disclosure of the letters."

In so concluding, the court relied upon language in *Sims* v. *Central Intelligence Agency* (D.C. Cir. 1980) 642 F.2d 562, 575, that the federal statutory counterpart to subdivision (c) of section 6254 "'was developed to protect intimate details of personal and family life, not business judgments and relationships.'"

The *Sims* case is in full agreement with other federal cases interpreting the federal "personnel" disclosure exception. (See *Board of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n.* (D.C. Cir. 1980) 627 F.2d 392, 399; *Rural Housing Alliance* v. *U.S. Dep't. of Agriculture* (D.C. Cir. 1974) 498 F.2d 73, 77; *Robles* v. *EPA* (4th Cir. 1973) 484 F.2d 843, 845.) The subject matter that may be covered by the "personnel" exception has been judicially limited to such topics as "'marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights, reputation, and so on.'" (*Sims* v. *Central Intelligence Agency*, *supra*, 642 F.2d 562, 574.) The critical question is whether the information associates the person with the business of the public agency or with an aspect of the individual's personal life. (*Board of Trade of City of Chicago* v. *Commodity Futures Trading Comm'n.*, *supra*, 627 F.2d 392, 399-400.) While public embarrassment may be a factor to be considered, the "personnel" exception may not be invoked "to protect the concerns of a contractor who would be embarrassed by disclosure of his responsibility for shoddy work." (*Sims* v. *Central Intelligence Agency*, *supra*, 642 F.2d 562, 575.)

These federal cases construing the Freedom of Information Act may be used "to illuminate the interpretation of its California counterpart" (*American Civil Liberties Union Foundation* v. *Deukmejian* (1982) 32 Cal.3d 446, 447; see *Northern Cal. Police Practices Project* v. *Craig* (1979) 90 Cal.App.3d 116, 120) and fully support our conclusion that section 6254, subdivision (c), is inapplicable here.

In 64 Ops.Cal.Atty.Gen. 575, 582 (1981), we examined the application of the "personnel" exception of section 6254 to the release of payroll records of nongovernmental employees. We distinguished that situation from the situation where the persons were public officers or employees and thus "'the subject of a legitimate interest to [their] fellow citizens.'"

In 62 Ops.Cal.Atty.Gen 436, 439 (1979), we concluded that the State Treasurer's records specifying the owners of state registered bonds were subject to disclosure since they "reflect the actual conduct of the Treasurer's public business, while personnel and medical files concern more private revelations collected for other than what is normally viewed as 'recorded official action.'"

In 60 Ops.Cal.Atty.Gen. 110, 113 (1977), we concluded that the names of and amounts received by county retirees contained in county payroll records were subject to disclosure under the Act.

In 25 Ops.Cal.Atty.Gen. 90, 91 (1955), we concluded that the State Controller's records of the name of a former state employee receiving a retirement allowance and the amount thereof were open to public inspection:

> "Granting that the statute intends to safeguard certain personal information, nevertheless it is a fact that the name of every public officer and employee, as well as the amount of his salary, is a matter of public record. Thus the state-paid income of a retired person is no less open to the public gaze than the income of any active state officer or employee."

All of these prior opinions support our conclusion that the provisions of the section 6254 "personnel" exception do not govern the release of the records at issue herein.

If a record is found to be nonexempt under section 6254, it may still be withheld under section 6255. A substantial burden, however, is placed upon the public agency to demonstrate a need for nondisclosure under the latter statute. (See *Braun* v. *City of Taft*, *supra*, 154 Cal.App.3d 332, 345; *San Gabriel Tribune* v. *Superior Court*, *supra*, 143 Cal.App.3d 762, 780.)

It would be difficult to conceive of a greater public need for disclosure than where the record specifies how public funds are spent. "[T]he 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" (*Register Div. of Freedom Newspapers, Inc.* v. *County of Orange*, *supra*, 158 Cal.App.3d 893, 910) cannot be overstated. As the Court of Appeal observed in *San Diego Union* v. *City Council* (1983) 146 Cal.App.3d 947, 955:

> ". . . Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. Public visibility breeds public awareness which in turn fosters public activism politically and subtly encourages the government entity to permit public participation in the discussion process. It is difficult to imagine a more critical tie for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds. With ever-increasing demands on public funds which have dwindled so drastically since the passage of Proposition 13, secrecy cannot be condoned in budgetary determinations, including the establishment of salaries."

We do not believe that public disclosure of the total cost of the bonus incentive program and the amount of the average bonus is sufficient here to meet the public need. Additional information is necessary to determine whether the program is being properly administered.

Moreover, the "public embarrassment" incurred by those receiving lesser bonus amounts must be weighed against the benefits of public recognition given to those performing exceptionally well. Public disclosure may indeed provide an incentive for those receiving lesser amounts to be more productive.

On the other hand, it may be argued that the city has a need to withhold the records in question because of a possible adverse effect upon its confidential evaluation process. Would reviewers be less objective if the amount of each bonus were publicly disclosed? We believe not.

First, such a suggestion questions the integrity of the reviewing executive managers. "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) We do not believe that the reviewers would be irresponsible in the performance of their official duties merely because the public may become aware of the ultimate results.

Second, it is the city manager alone who determines the amount of each bonus. Reviews that are not objective may thus be disregarded by the city manager.

Third, each executive manager will, of course, know the amount of his or her own bonus. If the reviewers can be objective when their peers know their own results, surely they may remain objective when the public also becomes aware of the results.

In sum, any interest in not disclosing the amount of and reasons for a performance award pales in comparison with the substantial public need for disclosure.

Hence, we conclude that the requisite showing could not be made under section 6255 for the withholding of the records at issue.

Finally, we note that besides the statutory provisions of sections 6254 and 6255, the Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. 1, § 1.) We have previously observed "that mere compliance with a statute cannot justify an improper invasion of the constitutional right of privacy. (*Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 19.)" (67 Ops.Cal.Atty.Gen. 414, 419 (1984).)

Nevertheless, "the constitutional right to privacy must be balanced against the public's interest in its business." (*Braun* v. *City of Taft*, *supra*, 154 Cal.App.3d 332, 347.) "Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity." (*Ibid.*) If the balancing test under subdivision (c) of section 6254 has been met in favor of disclosure, "no more is required under article 1, section 1 of the California Constitution." (*Ibid.*)

Since we have concluded that the disclosure of the subject records would not constitute an unwarranted invasion of privacy under section 6254, subdivision (c), the test in considering the constitutional right of privacy has also been met in favor of disclosure.

In answer to the question presented, therefore, we conclude that records of the amounts and reasons for performance awards granted to executive managers of a city are subject to disclosure under the Public Records Act.

*****