

# EL DORADO COUNTY 2017-2018 GRAND JURY

## *EL DORADO IRRIGATION DISTRICT* *CALIFORNIA PUBLIC RECORDS ACT COMPLIANCE*

Case 17-09 • June 30, 2018

The El Dorado Irrigation District (EID) Board of Directors requested that the Grand Jury investigate possible violations of the California Public Records Act by one of its members.

### **Note**

*The Grand Jury is keenly aware of political and personality disputes, both real and perceived, related to this issue. Our investigation and this report focused solely on legalities and good governance.*

### **BACKGROUND**

In 1968 California enacted the Public Records Act (CPRA), Government Code §§6250 through 6276.48<sup>1</sup>, which requires that governmental records be made accessible to the public upon request. It is incumbent upon the governmental agency having custody of requested records to make reasonable attempts to locate them, and if they exist, supply them to the requester.

Though the fundamental precept of the CPRA is access to records, it exempts certain records from disclosure<sup>2</sup> such as criminal investigative reports, most personnel records and privileged documents. If an agency improperly withholds records, a member of the public may seek a court order to enforce the right to inspect or copy the records sought<sup>3</sup>. An agency may adopt regulations establishing procedures for requesting public records that allow for faster, more efficient access to records<sup>4</sup>.

On March 2, 2017, the California Supreme Court in *City of San Jose v. Superior Court of Santa Clara County (San Jose)*<sup>5</sup> held that “*when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act)*”. Although the legality of a specific kind of search was not before the Court, it did provide guidance about how to strike the balance between privacy and disclosure.

In September 2017, the El Dorado Irrigation District (EID) adopted Board Policy 3075 (BP3075) *Public Records Act Requests* (Attachment A), which established that the district shall respond to public records requests in accordance with the CPRA and case law interpreting the CPRA. The policy specifically states that ‘written records sent, received, or stored in a personal electronic account or on a personal device of a District employee or officer may be considered “public records” subject to disclosure under the CPRA’.

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<sup>1</sup> [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=6250.&lawCode=GOV](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=6250.&lawCode=GOV)

<sup>2</sup> Gov. Code §6254

<sup>3</sup> Gov. Code §§6258 and 6259

<sup>4</sup> Gov. Code §§6253(e), 6253.4

<sup>5</sup> <http://www.courts.ca.gov/opinions/archive/S218066.PDF>

One month later, in October, EID approved Administrative Regulation 3075 (AR3075), *Responding to Public Records Act Requests* (Attachment B). It established uniform procedures for responding to requests for public records. It includes employee and officer training, procedures for responding to all CPRA requests and additional procedures for responding to CPRA requests regarding personal accounts or devices.

In ~~November 2017~~ January 2018, the Grand Jury received a complaint from EID alleging a Director of their Board was wrongfully failing to follow Board policy and regulations and was violating the law.

## METHODOLOGY

- Interviewed past and present El Dorado Irrigation District (EID) officers
- Reviewed the following documents:
  - California Public Records Act
  - City of San Jose v. Superior Court of Santa Clara County (*San Jose*)
  - California Public Records Act Compliance Manual for Special Districts<sup>6</sup>
  - EID policies and supporting regulations
  - EID public records requests, responses and related correspondence
- Listened to recordings of relevant EID board meetings
- Conferred with legal counsel

## DISCUSSION

El Dorado Irrigation District (EID) responds to public records requests on a regular basis. Most are for specific District business documents such as board minutes and contracts. Since March of 2017, in the aftermath of the *San Jose* case, EID received several public records requests seeking records sent from or received on the private electronic devices used by EID officers. One of those requests has come under scrutiny, both in EID public board meetings and local media.

On March 9, 2017, EID received a public records request seeking records including internet postings, text messages, emails and attachments sent from or received on private electronic devices used by Director Greg Prada. The timeframe identified in this request was from December 2013 to the date the District provided the public records.

EID forwarded a copy of the request to Director Prada requesting he search his own personal files, accounts and devices for public records. The Director responded that he had searched his personal computer and found no communications involving the conduct of EID official public business that would be disclosable under his interpretation of the *San Jose* case. On March 31<sup>st</sup>, EID notified the requester of the availability of the records from their email server and Director Prada's response.

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<sup>6</sup> [www.bwslaw.com/tasks/sites/bwslaw/assets/.../2015-Public-Records-Act-Guide.pdf](http://www.bwslaw.com/tasks/sites/bwslaw/assets/.../2015-Public-Records-Act-Guide.pdf)

After reviewing that information, the requester contested Director Prada's compliance with the Public Records Act. He requested that EID require the Director to submit an affidavit describing the scope and methodology of his search.

In response, EID noted that the CPRA does not require an affidavit. They further explained that while the *San Jose* case noted approval of a procedure adopted in Washington State requiring an employee to submit an affidavit, the California Supreme Court had not interpreted the CPRA to require such an affidavit. EID went on to say that the District had not yet formally adopted internal policies for records retained on private accounts and devices, but such policies were currently being developed.

In September 2017, EID adopted Board Policy 3075, *Public Records Act Requests*. Supporting Administrative Regulation 3075, *Responding to Public Records Act Requests*, was approved in October 2017. AR3075 includes specific procedures for responding to CPRA requests regarding personal accounts or devices. Those procedures require that the subject of the request "perform a reasonable search of his/her personal accounts and/or personal devices", "document their search methodologies, criteria, and terms", and "complete and sign a declaration" (Attachment C).

Early in November, EID received a request to *renew* the March CPRA request. This request was forwarded to Director Prada. The Director responded that he would not reply to this request, unless and until EID provided him with outside counsel. He also contended that AR3075 only applies to requests prospectively<sup>7</sup>.

EID responded to Director Prada that the recently-adopted policy and procedures did apply prospectively from the time of their adoption. But in accordance with the CPRA, EID must produce all responsive records in existence at the time of the request, even if such records were created prior to adoption of AR3075. EID also asked the Director to notify them if he would like to schedule an open-session agenda item asking the District Board of Directors to approve hiring and funding outside counsel to represent him.

On November 17, 2017, EID notified the requester of the availability of records from their email server, noting that the search had been limited to records created after March 9, 2017, since the District already provided all responsive records before that date. They also informed him that the request had been forwarded to Director Prada but, to date, the District had received no records from the Director.

The District received no further communication from Director Prada related to the November CPRA request. Specifically, the Director did not pursue approval for outside counsel, did not search his personal devices, and did not submit a declaration related to the search.

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<sup>7</sup> Relating to or effective in the future

The Grand Jury determined that Director Prada's action had placed EID at risk of potential litigation by the requester for failure to fully comply with the CPRA as interpreted in *San Jose*, and did not comply with EID Board Policy 3075 and Administrative Regulation 3075. While the act of an individual Director can place an agency at legal risk, there is little an agency can do to limit this risk. If an individual Director knowingly violates the law or has a different view of his/her legal duty, there is no direct remedy to bring a recalcitrant Director to compliance. EID initiated one of the few alternatives available – It asked the Grand Jury to investigate.

After conducting this investigation, the Grand Jury carefully examined the various actions it might take. One is the issuance of this report. Another is provided in California Penal Code §919 and Government Code §3060 - §3075, whereby the Grand Jury can prepare an accusation of willful misconduct in office against the noncompliant Director and submit it to the County District Attorney, who could then take potential criminal or civil action.

The Grand Jury thoroughly considered preparing and delivering such an accusation and consulted with the County District Attorney. The Grand Jury concluded that, while the conduct in question did constitute nonfeasance, we were not going to file an accusation at this time based on this single violation of the EID newly adopted policy. However, repeated flagrant disregard of California Public Records Act or other laws and regulations could result in an accusation being filed in the future.

## **FINDINGS**

- F1. Director Prada did not comply with EID Board Policy 3075 and Administrative Regulation 3075.
- F2. Director Prada inappropriately followed his own interpretation of the proper application of the Supreme Court's decision in *San Jose* rather than the official interpretation by the EID Board.

## **RECOMMENDATIONS**

- R1. The EID Board of Directors should consider censure of Director Prada advising him that future violations of BP3075 or AR3075 would be considered willful misconduct in office.
- R2. The EID Board of Directors should consider formally requesting Director Prada to fully comply with Board Policy 3075 and Administrative Regulation 3075 by supplying a properly executed declaration in response to the November 2017 Public Records Act request.

## **ATTACHMENTS**

- A. El Dorado Irrigation District Board Policy BP3075
- B. El Dorado Irrigation District Administrative Regulation AR3075
- C. El Dorado Irrigation District California Public Records Act Form - Declaration Regarding Search of Personal Accounts or Devices

## REQUEST FOR RESPONSES

This Grand Jury report is an account of an investigation or review. It contains findings and recommendations, and names those who should respond to each finding and each recommendation pertaining to matters under the respondent's control.

Responses are requested in accordance with California Penal Code §933 and §933.05.

- Response to all findings and recommendations from The El Dorado Irrigation District Board of Directors.

The written response of each named respondent will be reprinted in a publication to the citizens of El Dorado County. Each must include the name of the Grand Jury report along with the name and official title of the respondent.

California Penal Code Section 933.05 mandates specific requirements for responding to grand jury reports. You are advised to review the Penal Code sections and carefully read the pertinent provisions included below before preparing your official response. Each respondent must use the formats below for each separate finding and recommendation identified above.

Please pay attention to required explanations and time frames. Incomplete or inadequate responses are likely to prompt further investigative inquiries by the grand jury and/or the court.

### Response to Findings

Finding F# *[Retype the text of the finding as written in the Grand Jury report, # is the finding number in the report.]*

Response: *[Review California Penal Code section 933.05 (a) (1) and (2). Respondents must specify one of three options – a) Respondent agrees with finding, b) Respondent disagrees wholly with finding or c) Respondent disagrees partially with finding. If respondent uses option b or c then the response shall specify the portion of the finding that is disputed and shall include an explanation.]*

#### **IMPORTANT NOTE ABOUT GRAND JURY FINDINGS**

*Grand Jury Findings are derived from testimony and evidence. All testimony and evidence given to the Grand Jury is confidential by law, and it is the Grand Jury's responsibility to maintain it. California Penal Code §929 provides "... the name of any person, or facts that lead to the identity of any person who provided information to the grand jury, shall not be released." Further, 86 Ops. Cal. Atty. Gen. 101 (2003) prohibits grand jury witnesses from disclosing anything learned during their appearance including testimony given. This is to ensure the anonymity of witnesses and to encourage open and honest testimony.*

## **Response to Recommendations**

Response R# [*Retype the text of the recommendation as written in the Grand Jury report, # is the recommendation number in the report.*]

Response: [*Review California Penal Code section 933.05 (b) (1) - (4). Respondents must specify one of four options – a) recommendation has been implemented, b) recommendation has not been implemented but will be implementing noting a timeframe, or c) recommendation requires further analysis or study noting a timeframe not to exceed six months from date Grand Jury Report was issued or d) recommendation will not be implemented because it is not warranted or reasonable, with an explanation.*]

## **Response Times**

The California Penal Code specifies response times.

### *PUBLIC AGENCIES*

The governing body of any public agency (also referring to a department) must respond within 90 days from the release of the report to the public.

### *ELECTIVE OFFICERS OR AGENCY HEADS*

All elected officers or heads of agencies/departments are required to respond within 60 days of the release of the report to the public.

## **Failure to Respond**

Failure to respond as required to a grand jury report is a violation of California Penal Code Section 933.05 and is subject to further action that may include further investigation on the subject matter of the report by the grand jury.

## **Where to Respond**

All responses must be addressed to the Presiding Judge of the El Dorado County Superior Court.

Honorable Suzanne N. Kingsbury  
Presiding Judge of the El Dorado County Superior Court  
1354 Johnson Blvd, Suite 2  
South Lake Tahoe CA 96150

Response via Email to [courtadmin@eldoradocourt.org](mailto:courtadmin@eldoradocourt.org) is preferred.

The Court requests that you respond electronically with a Word or PDF document file to facilitate economical and timely distribution.

## **California Penal Code Section 933**

### **933.**

(a) Each grand jury shall submit to the presiding judge of the superior court a final report of its findings and recommendations that pertain to county government matters during the fiscal or calendar year. Final reports on any appropriate subject may be submitted to the presiding judge of the superior court at any time during the term of service of a grand jury. A final report may be submitted for comment to responsible officers, agencies, or departments, including the county board of supervisors, when applicable, upon finding of the presiding judge that the report is in compliance with this title. For 45 days after the end of the term, the foreperson and his or her designees shall, upon reasonable notice, be available to clarify the recommendations of the report.

(b) One copy of each final report, together with the responses thereto, found to be in compliance with this title shall be placed on file with the clerk of the court and remain on file in the office of the clerk. The clerk shall immediately forward a true copy of the report and the responses to the State Archivist who shall retain that report and all responses in perpetuity.

(c) No later than 90 days after the grand jury submits a final report on the operations of any public agency subject to its reviewing authority, the governing body of the public agency shall comment to the presiding judge of the superior court on the findings and recommendations pertaining to matters under the control of the governing body, and every elected county officer or agency head for which the grand jury has responsibility pursuant to Section 914.1 shall comment within 60 days to the presiding judge of the superior court, with an information copy sent to the board of supervisors, on the findings and recommendations pertaining to matters under the control of that county officer or agency head and any agency or agencies which that officer or agency head supervises or controls. In any city and county, the mayor shall also comment on the findings and recommendations. All of these comments and reports shall forthwith be submitted to the presiding judge of the superior court who impaneled the grand jury. A copy of all responses to grand jury reports shall be placed on file with the clerk of the public agency and the office of the county clerk, or the mayor when applicable, and shall remain on file in those offices. One copy shall be placed on file with the applicable grand jury final report by, and in the control of the currently impaneled grand jury, where it shall be maintained for a minimum of five years.

(d) As used in this section "agency" includes a department.

## **California Penal Code Section 933.05**

### **933.05**

(a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) However, if a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the board of supervisors shall respond if requested by the grand jury, but the response of the board of supervisors shall address only those budgetary or personnel matters over which it has some decisionmaking authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

(d) A grand jury may request a subject person or entity to come before the grand jury for the purpose of reading and discussing the findings of the grand jury report that relates to that person or entity in order to verify the accuracy of the findings prior to their release.

(e) During an investigation, the grand jury shall meet with the subject of that investigation regarding the investigation, unless the court, either on its own determination or upon request of the foreperson of the grand jury, determines that such a meeting would be detrimental.

(f) A grand jury shall provide to the affected agency a copy of the portion of the grand jury report relating to that person or entity two working days prior to its public release and after the approval of the presiding judge. No officer, agency, department, or governing body of a public agency shall disclose any contents of the report prior to the public release of the final report.