

February 27, 2013
(Sent via email)

Trustees of the Mt. Diablo School Board:

I want to call your attention to problems we have been having obtaining a proper response to a recent Public Records Act request, and ask that you take prompt action to ensure full disclosure in a timely manner.

On Jan. 21, I submitted via email to Greg Rolan and Steve Lawrence a request to inspect all documents and communications in the possession of the district pertaining to the contract extensions of the five top administrators. This is a fairly straightforward request to determine what went into a major decision pertaining to the expenditure of public funds.

In a letter dated Jan. 31, and sent via snail mail, Rolan responded. His letter contained three points: 1. He believed I was in possession of some of the publicly released documents, so he would not be providing those again unless I requested. 2. He cited privileges for withholding other documents. 3. He said that "The remaining non-privileged records are available for your inspection." I was to contact him to set a time to inspect them.

After a couple of time changes because of developments on my end, we set a time of 2 p.m. Feb. 14 for me to travel to his office to inspect the documents. When I arrived, I discovered that the "records" (plural) referred to in Rolan's letter consisted of one six-page letter, from Gagen McCoy to Namita Brown. Clearly, Rolan could have specified that he had only one letter and that letter could have easily been mailed or emailed to me. Rolan had asked that I come in at a "mutually agreeable time," yet he was not available when I showed up and never responded to my request while I was there that he call me.

As for the substance of the privileges he claims, Rolan asserts two privileges: attorney-client and deliberative process. To examine these claims, let's divide this into two periods, the eras before and after you retained outside counsel for this matter.

A. Attorney-client privilege claim

1. Pre-outside counsel period. The board approved the contracts last year, long before outside counsel was retained by the board to look into this matter. This is the period of greatest concern. As you know, we have editorially called into question Rolan's role in reviewing his own contract and that of his boss, the superintendent, who oversees him in one of his two functions. In a Jan. 28 email to me, Rolan responded:

“Each contract, by direction of the superintendent, had the termination date of the contract changed to reflect the Board approved contract extensions. An administrative assistant asked me to ‘look at’ the contracts to determine whether the changed dates reflected that (sic) the Board action. I confirmed that the contracts had the correct termination dates. Again, I had never previously, nor at this time did I negotiate, draft, examine or alter my contract in any manner. In my opinion, as a matter of law, the foregoing does not constitute a violation of Government Code section 1090 et seq.”

If that is true, then Rolén did not act as attorney in this matter. In his email, he claims there was no legal review of the contracts. Thus, no attorney-client privilege would exist because there was no legal opinion formed and advice given by Rolén. In which case, there is no justification for asserting attorney-client privilege for the pre-outside counsel period.

2. Outside counsel period. To the extent that the trustees have had direct communication with outside counsel on this matter, we respect that there may be an attorney-client privilege. However, we find it inexplicable why Rolén, who is a subject of the outside counsel’s investigation, would be asserting that privilege. If such a claim is to be asserted, it should come from the trustees or their outside counsel.

3. The privilege is yours. I want to emphasize to you, the trustees, that the privilege Rolén asserts is the client’s privilege, not his. And, as such, you, the client, can waive this privilege. We see no reason why you would want to maintain this privilege, especially for the documents in the pre-outside counsel period. Indeed, in the interest of transparency, we would encourage you to waive the privilege for all documents pertaining to this matter.

B. Deliberative process claim

The deliberative process exemption to the Public Records Act was established in 1991 by the state Supreme Court in a case involving release of the appointment calendars of then-Gov. George Deukmejian. To assert this privilege to protect communications about the extension of contracts for top administrators is a blatant and patently self-serving misapplication of case law.

Courts have recognized the privilege in only four instances – three protecting a governor’s deliberations and one protecting a city council members’ communications with individual constituents and other non-governmental contacts. In this case, it’s unclear whether Rolén is trying to protect the deliberations of the trustees, the staff, or both. Suffice it to say, the privilege has never been recognized as extending to either internal discussion among state or local agency personnel, between them and elected officials, or among the local officials themselves.

Moreover, it has never been applied to issues of public employees’ compensation (either in general or with respect to particular employees), which have in fact been declared by the state

Supreme Court to be subject to citizens' inquiry and review under the Public Records Act. An assertion in a case such as this would suggest staff and trustee communications about public expenditures for staff compensation or anything else can always be exempted from disclosure, a claim that would essentially gut the Public Records Act.

To the extent Rolen is claiming such a privilege on your behalf, we urge you to reconsider this unsupported position. As for any assertion of this claim for staff members, we know of no case law supporting such a privilege for staff, especially when the matter pertains to public expenditure of funds for their own contracts.


C. Reasserting our Public Records Act request

Ultimately, responsibility for the district's responses to Public Records Act requests lies with the board. So, in the interest of giving the district one more chance, and respecting the board's recent declaration of a new era of transparency, we hereby reassert directly to you, the trustees, our original request:

Pursuant to the Public Records Act, please provide for inspection all documents and communications in the possession of the district pertaining to the contract extensions of the five top administrators. This request covers all written and electronic materials. Please note that at this time I am only requesting access for inspection. I am not requesting copies that would trigger copying charges, although I reserve the right to request copies at a later date. Although the act allows you 10 days to respond, it forbids you using that time period to delay response. In this case, the materials are probably easily retrievable, so I would appreciate if you would respond in a more timely fashion.

Thank you for your time. I look forward to your prompt response.

Sincerely,



Daniel Borenstein

Copies via to: Greg Rolen, Steve Lawrence