CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

JAN 15 2016

Sherri R. Carter, Executive Officer/Clerk
By Annette Fajardo, Deputy

City of Los Angeles, acting by and through the Los Angeles Department of Water and Power v. Metropolitan Water District of Southern California, BS 157056

Decision on (1) petition for writ of mandate: denied; (2) cross-petition for writ of mandate: granted

Petitioner City of Los Angeles, acting by and through the Los Angeles Department of Water and Power ("DWP") petitions the court for a writ of mandate preventing Respondent Metropolitan Water District of Southern California ("MWD") from disclosing the names and addresses of participants in the Turf Replacement Rebate Program ("Turf Program").

Intervenor and Cross-Petitioner The San Diego Union-Tribune, LLC ("Union") petitions the court for a writ of mandate under the California Public Records Act ("CPRA") ordering Respondent MDW to release the as yet undisclosed names and addresses of Turf Program participants.

The court has read and considered the moving papers, oppositions,[1] and replies, heard oral argument, and renders the following decision.

A. Statement of the Case

1. Complaint

Petitioner DWP commenced this proceeding on July 30, 2015. The operative pleading is the First Amended Verified Complaint and Petition for Writ of Mandate ("FAP"), also filed on July 30, 2015. The FAP alleges in pertinent part as follows.

MWD funded, created, and operated the Turf Program (sometimes "Program") in part as a response to Governor Jerry Brown's April 1, 2014 executive order that California is in a drought and 50 million square feet of lawn and ornamental turf must be replaced with drought tolerant landscapes. The Turf Program was the largest of its kind in the nation. The program totaled $450 million in funds, will remove over 150 million square feet of turf in Southern California, and will save 80,000 acre-feet of water per year. All funds were exhausted on July 8, 2015.

Approximately 7,800 Los Angeles residents participated in the Turf Program. Approximately 20% of the Turf Program recipients were DWP customers. Nowhere in MDW's Turf Program materials, application, fact sheet, or web site did MDW indicate that the applicant's name and address would be released to the public. MDW did not give any notice or obtain consent from any applicant that in exchange for this government-funded money, the applicants agreeing to waive their right to privacy.

On May 19, 2015, MWD received a CPRA request regarding its Turf Program from Morgan Cook ("Cook"), a reporter for Union. Union asked for electronic records regarding the

---

[1]DWP and Intervenors West Basin Municipal Water District ("West Basin"), Foothill Municipal Water District ("Foothill"), and Upper San Gabriel Valley Municipal Water District ("Upper San Gabriel") jointly filed their briefs. For convenience, only DWP will be referred as the moving party. Where necessary, the Intervenor water districts will be referred to as "Districts".

Respondent MWD joins Intervenor Union's opposition to DWP's and Districts' joint opening brief insofar as the brief opposes non-disclosure of customer names.

Turf Program, including at least fifteen data fields such as the name of the recipient; date of award; street address of recipient; city of recipient; zip code of recipient; county of recipient; name of contact person/applicant; type of recipient (business, single-family residential, etc.); description of recipient; amount of award; and description of turf removal project approved for incentive (square footage to be removed, etc.). MDW did not provide any notice to Turf Program applicants or participants that their information would be disclosed to a third party, or that their information would be disclosed to a newspaper for potential publication pursuant to a CPRA request.

DWP learned of the CPRA request on or about June 2, 2015 when MDW informed DWP of its existence. DWP determined that the names and addresses of its customers are confidential in combination with rebate amounts, and did not disclose its customer names and address in response to a separate and different CPRA request.

On June 29, 2015, MWD provided approximately sixteen data fields to Union. MWD redacted all of the data with the names of the applicant and/or recipient, except where a third-party contractor was paid directly. The names of third-party contractors and their full contact information were disclosed. MWD disclosed street addresses only at the general city block number level. On July 7, 2015, Union responded that the records provided were insufficient. Union reiterated its request for installation street addresses numbers, first and last names of all applicants, and first and last names of all recipients of the award.

On July 14, 2015, DWP met with MDW and objected to the disclosure of its customer's name and address, and cited various federal and state laws to support its claim of customer privacy. MWD disagreed with DWP's understanding of the law. On July 29, 2015, MDW informed DWP that it intended to release all responsive records on August 7, 2015.

According to DWP, the California Constitution gives each citizen an inalienable right to pursue and obtain privacy. MDW has an obligation to comply with the California Constitution and protect all persons from disclosure of information that would invade their privacy or compromise their personal safety. MDW's intended disclosure of DWP's customer's names and addresses violates these laws because MDW did not provide any notice to DWP's customers regarding the potential or intended disclosure of their information at the time of application to the program.

Government Code section 6254.16 states that "nothing in this chapter shall be construed to require the disclosure of the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies." MDW has an obligation to comply with Government Code section 6254.16 and protect municipal utility customers from disclosure of information that would invade their privacy or compromise their personal safety. MDW's intended disclosure of DWP's customers' names and addresses violates Government Code section 6254.16 and the Request does not fit any of its exceptions.

2. <u>Cross-Petition</u>

On August 6, 2015, Intervenor and Cross-Petitioner Union filed a Verified Petition in Intervention ("Intervenor Petition") against Respondent MDW. The Intervenor Petition alleges in pertinent part as follows.

On May 19, 2015, Cook, a reporter for the Union-Tribune, submitted a CPRA request to MWD ("CPRA Request"). The CPRA Request sought records related to MWD's Turf Program. The Turf Program provides rebates to persons who replace lawn and ornamental turn with drought

tolerant landscapes. The Request sought data concerning the application for and awards of Turf Program rebate funds, including: the date of the award; the name of the recipient; the full street address, city, zip code, and county of the recipient; name of the applicant; the type of recipient (business, single-family, residential, etc.); description of recipient (school, golf course, residential, etc.); amount of the award; description of the project; and, the street address of the project, including city, zip, and county.

MWD did not provide responsive records until June 29, 2015. MWD did not provide all responsive records because the names and addresses of the applicants and recipients, along with the street addresses of the project, were redacted. When MWD responded to the Union's CPRA request by failing to provide any written determination, MWD violated Government Code section 6255(b), which states that "[al 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."

On July 7, 2015 and July 8, 2015, Cook contacted MWD, objecting to the redactions, as well as MWD's failure to provide any written legal justification for the redactions as required by Government Code section 6255.

On July 29, 2015, Cook received correspondence from Bryan Otake, Senior Deputy General Counsel for MWD, stating that MWD intended to produce the names and addresses requested by the Union on August 7, 2015. The next day, DWP filed a Verified Complaint and Petition for Writ of Mandate for Declaratory and Injunctive Relief, to prohibit MWD from disclosing the unredacted records sought by the CPRA Request.

The names of both the applicants and recipients of MWD rebates, and the address of the qualifying project location, relate to the conduct of the public's business. The documents sought by the Union were prepared, owned, used or retained by MWD, and are, therefore, public records pursuant to Government Code section 6252(e). The redacted names and addresses were responsive to the Union's May 19, 2015 CPRA request, and MWD failed to turn over these records and affirmatively redacted them when it produced the remainder of records.

Union alleges that during the time MWD was withholding the names and addresses, and delaying its written response to the CPRA Request, it was actually working with DWP to find a way to refuse to produce the records, without being subject to a CPRA lawsuit from the Union. The result of the collusion between MWD and DWP resulted in DWP's reverse-CPRA action to enjoin MWD from producing of the records requested by Union.

By intentionally delaying its production of responsive records in order to support DWP's efforts to file a reverse-CPRA lawsuit, MWD violated Government Code section 6253(d), which states that "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." Government Code section 6253.3 states, "A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." When MWD allowed DWP to object to and prevent the disclosure of the records responsive to the Union's CPRA request, MWD violated Government Code section 6253.3 by allowing DWP to control the disclosure of MWD's public records.

3. **Course of Proceedings**

On August 6, 2015, Petitioner DWP applied *ex parte* for a temporary restraining order ("TRO") and order to show cause re: preliminary injunction ("OSC"). The court granted the

application. The MWD was ordered to withhold release of the names and addresses of any DWP customers until further order of the court. MWD was further ordered to provide DWP with a full list of the names and addresses of the Turf Program participants by August 14, 2015. DWP was ordered to provide the names of customers for which there was no objection to disclosure by August 21, 2015.

On August 11, 2015, the court granted the *ex parte* application of Intervenor West Basin for leave to intervene. The August 6, 2015 TRO was broadened to include West Basin.

On August 20, 2015, the court granted the *ex parte* application of Upper San Gabriel and Foothill to intervene. The court broadened the August 6, 2015 TRO to include the Upper San Gabriel and Foothill.

B. Governing Law

The CPRA was enacted in 1968 to safeguard the accountability of government to the public. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App. 762, 771-72. Govt. Code[2] section 6250 declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The CPRA's purpose is to increase freedom of information by giving the public access to information in possession of public agencies. CBS. Inc. v. Block, (1986) 42 Cal. 3d 646, 651. The CPRA was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship. Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1141. This requires maximum disclosure of the conduct of government operations. California State University Fresno Assn., Inc. v. Superior Court, (2001) 90 Cal.App.4th 810, 823.

The CPRA makes clear that "every person" has a right to inspect any public record. §6253(a). The term "public record" is broadly defined to include "any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252(e). The inspection may be for any purpose; the requester's motivation is irrelevant. §6257.5.

"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." §6255(b). "A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." §6253.3.

The right to inspect is subject to certain exemptions, which are narrowly construed. California State University, 90 Cal.App.4th at 831. The exemptions are found in sections 6254 and 6255. In pertinent part, public records exempt from disclosure include (1) personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy [Section 6254(c)], and (2) records subject to a "catch-all" exemption where the facts of the particular case demonstrate that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. §6255. The burden of demonstrating that exemptions apply lies with the governmental entity. §6255.

A petition for traditional mandamus is appropriate in actions "to compel the performance

---

[2]All further statutory references are to the Government Code unless expressly stated otherwise.

of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. This includes actions to compel compliance with CPRA. §§ 6258, 6259. No administrative record is required for traditional mandamus. The court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

C. Statement of Facts[3]

---

[3]The court has ruled on the parties' evidentiary objections, interlineating the original evidence where an objection is sustained.

Union's objections to the three John Doe declarations are sustained in their entirety. Unlike the DWP customer names that are the subject of the court's August 6, 2015 TRO, these declarations offer evidence in support of DWP's position. The Union is entitled to contest that evidence by knowing who the declarants are and what companies they work for. To protect the declarant identities, DWP could have sought an attorneys' eyes only protective order. It also could have sought a sealing order. CRC 2.551. DWP's contention that it tried to file a notice motion for sealing and was unable to do so before the hearing on this matter is unavailing. Stanard Decl., ¶¶ 3-4. Sealing orders typically are issued on an *ex parte* basis, and are permitted by CRC 2.551(b)'s reference to a sealing "motion or application."

Union asks the court to judicially notice (1) various newspaper articles (Ex. T), (2) an audit of DWP by the Controller of the City of Los Angeles, (3) and a California Public Utilities Commission ("PUC") publication listing 113 water and sewer companies regulated by the PUC (Ex. V), printouts from the Districts' websites (Exs. W, C Y), and MWD's publication of its water conservation program (Ex. Z). The requests are granted for agency publications. Evid. Code §§ 452(c), As for the newspaper articles (Ex. T), the court judicially notices only their existence, not the truth of facts contained in them.

MWD's objection to Exhibit A attached to the Declaration of Keith Lewinger as an attorney-client privileged document is sustained. The document is ordered to be unscanned and withdrawn from the court file. A sealed version of Exhibit A will be placed in the court file.

The Districts ask the court to judicially notice (1) legislative history for SB 448 (Govt. Code §6254.16) (Ex E), PUC standard practice U-15-W under General Order 96-B (Ex. F), the Governor's declaration of drought emergency (Ex. G), and an appellate decision, League of California Cities v. Superior Court, ("League of California Cities") (Oct. 28, 2015) D067969, certified for publication. The requests are granted. Evid. Code §452(b), (c), (d).

DWP filed a supplemental request in reply asking the court to judicially notice a Notice of Entry of Order filed in Riverside Superior Court case (Ex. A), and a certified August 14, 2015 letter from the City of Poway to MWD and the San Diego County Water Authority (Ex. B). The court document is subject to judicial notice, if relevant, and the request is granted. Ev. Code §452(d). The request to judicially notice the letter (Ex. B) is denied.

MWD filed a request for judicial notice in opposition to Union's Cross-Petition, seeking judicial notice of records and reporter's transcripts from this case. Judicial notice is not required for court review of documents in the pending case. While reporter's transcripts are not part of the court record and not subject to judicial notice, the court may review a transcript from the pending

1. **DWP's and Districts' Evidence**

Petitioner DWP and Intervenors Upper San Gabriel, Foothill, and West Basin are municipal water utility companies and districts that do not release the names and home addresses of their customers to the public. Chapman Decl. ¶5; Jazmadarian Decl. ¶5; Paludi Decl. ¶5.

MWD is the largest water wholesaler in the nation and was created by an act of the California Legislature in 1928 to build and operate the Colorado River Aquduct. Chapman Decl. ¶8; Jazmadarian Decl. ¶8; Paludi Decl. ¶8. MWD is a cooperative of 26 member agencies, including cities and water agencies. Id.

MWD created the Turf Program in 2009 as a conservation measure. Chapman Decl. ¶6; Jazmadarian Decl. ¶6; Pauldi Decl. ¶6; Gentili Decl., ¶5. MWD's 26 member agencies pay a water stewardship rate, which funds conservation/demand management programs including the Turf Program. Id. The Turf Program was the largest of its kind, and MWD has stated that the Program will achieve its program goal of stimulating interest in turf removal to the point that government incentives could be eliminated. Id.

The Turf Program was a member agency program partially or wholly funded by MWD. Gentili Decl. ¶34. In 2009, DWP (not including the Districts) accepted MWD's offer to participate in a pilot program for turf reduction. Gentili Decl., ¶13. DWP authorized the Turf Program for its residential customers in 2009, and in 2015 authorized the Program for its commercial customers. Gentili Decl., ¶¶ 5, 13, 17. Initially, the popularity of the Turf Program was low, but increased when it was expanded to commercial customers and when it later became a regional program open to all MWD member agencies. Gentili Decl., ¶¶ 13, 17.

The Turf Program was able to prevent the red tape and inefficiency involved if 26 member agencies separately administered their programs. Gentilli Decl. ¶36. Each participating member agency had a separate contract with MWD that governed the ability of that agency's customers to participate in the Turf Program. Chapman Decl. ¶8, Ex. A; Jazmadarian Decl. ¶8, Ex. A; Paludi Decl. ¶8, Ex. A. The member agencies' customers who participated in the Program actually received two checks: one from MWD and one from their own water utility. Gentilli Decl. ¶34. MWD essentially acted as a clearinghouse in administering the Program for its member agencies. Chapman Decl. ¶19; Jazmadarian Decl. ¶19; Paludi Decl. ¶19.

The Turf Program had a large response, and many of member agencies' water-using customers applied for and/or participated. Jazmadarian Decl. ¶7; Paludi Decl. ¶7; Chapman Decl. ¶7. Some of them were customers of investor-owned PUC-regulated utilities. Chapman Decl. ¶7; Jazmadarian Decl. ¶7; Paludi Decl. ¶7. The customer was required to file out an online application provided by "SoCal Water$mart", and submit a utility bill to prove they were customers of a member agency. Chapman Decl. ¶9; Jazmadarian Decl. ¶9; Paludi Decl. ¶9. DWP customers accessed the application from either DWP's website or MWD's website. Gentili Decl., ¶¶ 39-41. Intervenor Districts' customers accessed the application through MWD's website. Jazmadarian Decl. ¶20; Paludi Decl. ¶20; Chapman Decl. ¶20. Nowhere in the Turf Program's materials or application did MWD indicate that the applicant's name and address would be released to the public. Chapman Decl. ¶10; Jazmadarian Decl. ¶10; Paludi Decl. ¶10. DWP's supplemental application materials included additional terms and conditions assuring customers that, while

---

case without need for authentication.

DWP would publicize photographs of project properties, their "address[es] will not be published."[4] Chapman Decl., Ex.E, p. 7, ¶7; Jazmadarian Decl., Ex. E, p.7, ¶7. Participants did not submit a one-time online application; they were required to create a password and repeatedly log onto a secure web portal. Gentili Decl., ¶42.[5]

Upon initial approval of their application, Program participants removed turf and from their property and replaced it with drought-resistant planting or artificial turf.[6] *See, e.g.,* Jazmadarian Decl., Ex. E, p. 2. The applicant then submitted proof of completion, which was verified by MWD's contractor, Electric & Gas Industries Association ("EGIA"), and DWP (or the Districts). Gentili Decl., ¶27; Chapman Decl., Ex.E, p. 1; Jazmadarian Decl., Ex. E, p. 1. The Turf Program issued rebates on a first-come, first-served basis until funding was exhausted. Chapman Decl. ¶9; Jazmadarian Decl. ¶9; Paludi Decl. ¶9.

After MWD spent more than $450 million,[7] its funds for the Turf Program were exhausted on July 8, 2015. Gentili Decl., ¶42. After MWD ran out of money, DWP amended the Turf Program to pay rebates at a lower rate, and continues to provide turf rebates to customers at a lower rate. Gentili Decl., ¶42. Customers continue to apply through SoCal Water$mart, and DWP pays all of the rebate. Id.

In administering the Turf Program, MWD was permitted to have direct contact with DWP customers pursuant to a written agreement between WMD and DWP. Gentilli Decl. ¶10, Ex. A. This contact was limited to the purpose of qualifying DWP customers for the Turf Program. Id. The parties' agreement provided that MWD and its contractor, EGIA, would keep confidential all information concerning DWP customers that DWP provided for purposes of administering the Turf Program. Gentilli Decl. ¶11, Ex. A.[8] The agreement contained an exception for "information that is required to be disclosed pursuant to the [CPRA], other applicable law or other legal requirements...." Gentili Decl., ¶11, Ex. 13.

On May 19, 2015, MWD received Union's CPRA request. On July 10, 2015, MWD notified DWP that MWD had received a follow-up CPRA request from Union for DWP customer names and addresses. DWP objected and urged MWD to reconsider its decision to release customer names and addresses. MWD refused on July 22, 2015, and DWP filed this litigation by the next week.

---

[4]It is not clear whether the Districts also had supplemental materials, and whether such materials also contained the statement about non-publication of addresses. At hearing, Districts' counsel thought that they did, but the Districts' evidence shows only applications containing DWP's supplemental materials. *See* Chapman Decl., Ex. E, p. 7; Jazmadarian Decl., Ex. E, p.7, ¶7.

[5]After this litigation was filed, MWD changed its application to provide that the customer's contact information may be disclosed: "By applying for a rebate in this program, personal information listed on your application may be subject to disclosure to requesting parties pursuant to the California Public Records Act." Union Ex. O. *See* Kathi Miers Decl., ¶¶ 1-11, Exs. A-J.

[6] For convenience, the court will refer to both as drought-resistant planting except where otherwise appropriate.

[7] At hearing, MWD's counsel believed the accurate number to be $370 million.

[8] DWP's Privacy Policy is similar, and guarantees customers no disclosure will occur unless required by law. *See* DWP website.

MWD did not inform the Districts of Union's request and follow-up request until July 22, 2015. Chapman Decl. ¶15; Paludi Decl. ¶15. Intervenors Foothill and Upper San Gabriel sent a letter objecting to the disclosure of their customer names and addresses. Jazmadarian Decl. Ex. B; Chapman Decl. Ex. B. The general manager of West Basin made the same objection via a telephone call to the general manager of MWD. Paludi Dec. ¶15.

MWD never obtained consent or authority to disclose user information that MWD agreed in contracts— and admitted in deposition—was confidential. Carson Decl. Ex. A, pp. 87-93, 95-96. MWD also admitted that it has disclosed the names and addresses of the customers of those member agencies that did not obtain a TRO, and that it intends to disclose the same information for DWP's and Districts' customers. Carson Decl.; Ex. B, p.59.

DWP has received numerous CPRA requests for rebate-related information. Nwosu Decl. ¶6. DWP has never disclosed the name and address information for customers unless an enumerated exception in section 6254.16 was met. Id.

2. Union's Evidence

MWD provides water to 26 member agencies, including the Districts. Union Ex. N. Out of the 38 seats on MWD's governing Board, the Districts collectively hold eight seats. Id. The Board is the ultimate decision-making body for MWD and has authority to decide whether to disclose records. Union Ex. H, pp. 83-85.

Intervenors West Basin, Foothill, and Upper San Gabriel are all water wholesalers with no individual retail customers. Union Exs. W-Y. None of the Districts are regulated by the PUC, which only regulates private utilities. Union Exs. V-Y, RJN ¶¶ 3-4. The Districts do not appear in a PUC publication entitled "Regulated Water and Sewer Utilities." Union Ex. V.

MWD has operated the Turf Program since 2009. Union Ex. O. To apply for a rebate, an applicant must accept the terms and conditions, which state, "[b]y applying for a rebate in this program, personal information listed on your application may be subject to disclosure to requesting parties pursuant to the California Public Records Act." Id.

On May 19, 2015, Union made a CPRA request to MWD for information about the participants and projects funded by the Turf Program, including the names, addresses, and amounts of grants. Cook Decl. ¶2, Union Ex. B.

MWD provided DWP with a copy of Union's request on June 2. Union Ex. L, pp. 307-08. On June 3, 2015, Julie Riley, a DWP attorney, emailed MWD and asked that "MWD and DWP…agree upon a way to release the aggregate details of the rebates or redacted versions of the documents." Union Ex. L, p. 271. The next day, Bryan Otake, a MWD attorney, called DWP attorney Tina Shim and agreed to produce "a sample proposed MWD disclosure for DWP staff review." Id., p. 273. MWD gave DWP the proposed disclosure, which included specific street addresses but withheld customer names. Id., p.297. DWP responded that it "appreciate[s] that MWD is willing to redact customers' names, telephone numbers, and email addresses" and reiterated its demands not to disclose specific street addresses. Id., p. 190. DWP acknowledged that MWD would make the "ultimate call", but proposed that MWD provide the aggregate numbers of a street's block to meet the goal of disclosing how public funds were spent. Id.

On June 9, MWD agreed to limit its initial disclosure of information to "generalized block number" without "utility customer name regardless of whether the utility customer is a business or residence," but reserved the right to revisit the issue. If so, MWD would provide notice to DWP

"and an opportunity for [DWP] to get a protective order." Id., p.189. MWD also clarified that the responsive records would not include "the entire rebate amount," only MWD's portion. Id., p. 290.

Despite its June 9 agreement with DWP, MWD did not release the redacted records to Union until June 29. Cook Decl., ¶6; Union Ex. C. MWD simply stated that the production "conclude[d] Metropolitan's response to your PRA request" and did not inform Union that names and street addresses had been withheld, or provide any justification for the redactions. Id.

On July 7, and again on July 8, Union objected to the missing information and to MWD's failure to provide any written legal justification for the redactions. Cook Decl. ¶7.

On July 10, MWD sent Union's objections to DWP and asked for a meeting. Union Ex. L, p. 291. Four days later, DWP and MWD met at MWD's offices where they discussed whether Union's objections. Union Ex. H, pp.59-61 (Zinke Depo.). In the meeting, MWD asked whether DWP was amenable to releasing only street addresses. MWD understood that Union wanted to verify that public funds had, in fact, been used for the rebate's purpose and believed that the street addresses would enable the newspaper to do so. Ex. H, p. 61. MWD did not believe that the names of rebate recipients should be disclosed, and wanted to see if Union would accept this a resolution of its objections. Ex. H, p. 60. DWP threatened to file a lawsuit if MWD disclosed names and addresses of its customers. Ex. H, p. 59; Ex. K, p.43 (Wright Depo.).

DWP obtained authorization from its board to sue (Union Ex. K p.55) and on July 31, DWP filed the lawsuit and sought a TRO preventing MWD from disclosing information regarding anyone who applied for the Program, regardless of whether they were DWP customers. In response, MWD asked for "an Order authorizing [MWD] to disclose additional name and specific address information…." Union appeared on August 6 and was granted leave to intervene. Upon Union's objections, the court limited the TRO to only DWP's customers.

On August 7, after Union pointed out that the court's TRO did not prevent disclosure of requested records for the customers of member agencies besides DWP, MWD provided records not subject to the TRO, but only through June 2015. Cook Decl., ¶9, Union Ex. E. It also withheld information about participants in West Basin's service area because West Basin had given notice that it planned to intervene and seek a TRO. Cook Decl. ¶9; Union Ex. Q.

On August 10, Union objected to the incomplete production because it did not include any records after June. Cook Decl. ¶9; Union Ex. C. On August 17, Bob Muir, MWD's press officer, confirmed that MWD would not provide any further information while other member agencies were seeking TROs. Cook Decl. ¶12.

MWD received no complaints from persons whose information was disclosed following Union's CPRA Request. Union Ex. H p.22. Rebate recipients also have been willing to speak to the press regarding their participation in the Turf Program. Union Ex. O. DWP has previously disclosed information about its customers who have been fined for violating water conservation ordinances in response to CPRA requests without objection. Aviles Decl., ¶3: Ex. S.

The City of Los Angeles ("City") Controller has raised questions about the efficacy and utility of turf removal programs, calling DWP's program "largely a gimmick – a device intended to attract attention and publicity." Ex. U, p. 2. The Controller found that the Turf Program "came at a rather high cost and, arguably at the cost of some fairness" and "DWP does not adequately prioritize water conservation projects based on which are the most effective." Id., p.3. The Controller also found that the Program's rebates were concentrated in the western San

Fernando Valley, and beneficiaries included "some affluent households," "some private golf courses," and "[o]ne particular contractor." Id. The Controller stated that the Turf Program "gave DWP the lowest return on investment…than other conservation programs, by a wide margin." Id. The Controller advocated that DWP release the names and addresses of residents receiving rebates, stating that "[b]illing information for customers…is different than the person who chooses to ask for an incentive or rebates (*sic.*) and gets money from ratepayers for that." Ex. T.

3. MWD's Evidence

MWD's Water Efficiency Team launched the Turf Program in January 2014 at $1 per square foot. McDonnell Decl. ¶4. In May 2014, the rebate was increased to $2 per square foot. Id. MWD's member agencies have the option of participating in the Turf Program in different ways. McDonnell Decl. ¶5. Some agencies choose to offer a supplemental rebate payment in addition to the MWD rebate. McDonnell Decl. ¶5. Others allow MWD to administer the Program completely, while still others forego MWD's administrative help. Id.

All CPRA requests about the Turf Program were referred to the Water Efficiency Team. McDonnell Decl. ¶14. The Water Efficiency Team staff, which had had previously received only five CPRA requests in the twenty years preceding the Turf Program, received forty-one CPRA requests between May 1 and August 20, 2015. McDonnell Decl. ¶14; Kassa Decl. ¶3. Staff experienced difficulties assembling data due to insufficient personnel, limited computer capabilities, and the need to manually enter over one year of backlogged data entries. McDonnell Decl. ¶¶ 12-15; Kassa Decl. ¶3. Data was further complicated by the fact that data was stored offsite and required electronic extraction and downloading. McDonnell Decl. ¶¶ 9-10. Each of these difficulties impacted the amount of time needed by MWD to respond to CPRA requests. Data assembly required significant time—not just a few seconds of keystrokes—and significant resources to gather and download. McDonnell Decl. ¶¶ 12-13.

MWD's Water Efficiency Team attempted to address conflicts between computer capacity and big data. McDonnell Decl. ¶13. Data extraction was known to cause computer crashes. Id. Data extraction of even a one-month test run of potential records consisted of 1.3 million entries for 20,373 application rows, not including Opt-out Agency data. McDonnell Decl. ¶17. There was sixteen months of backlogged data entry for nine Opt-Out Agencies as of May 19. McDonnell Decl. ¶12. Staff had documented and complained of these difficulties before receiving any CPRA requests. McDonnell Decl. ¶13. MWD's Turf Program staff was laboring under these difficulties even before Union's May 19 CPRA request. *See* McDonnell Decl. ¶¶ 12-13, 15.

Union's May 19 CPRA request even further overburdened the technical capabilities of existing equipment and staff. McDonnell Decl. ¶16. In response to Union's request, MWD promptly investigated the scope of potentially responsive records and responded within eight days of the request's submission. Muir Decl. ¶4. By email, MWD stated on May 27 that pursuant to section 6253 (c) ("unusual circumstances" exception) "Because of your broad request, and the volume of documents that may have to be assembled, Metropolitan will require at least 30 more days to search and review records before determining what documents are disclosable. I will advise you of the results of our efforts on or before June 29, 2015." Muir Decl. ¶4; Union Ex. M.

MWD's May 27 email extending its response time to Union's CPRA request pre-dates DWP's initial June 1 contact with MWD. Stites Decl. ¶2, Ex. 13. On June 29, MWD produced all information sought by Union's May 19 request, but substituted block-level street addresses

(*e.g.*, 700 block of Alameda Street) for the names and addresses of participants. This information would permit Union to verify whether funds had been spent and projects completed on a particular block. Kassa Decl., ¶3; Muir Decl., ¶5; Zinke Dep. pp. 46, 51.

On July 7, Union's Cook requested applicant names and specific street number addresses. Muir Decl. ¶6. MDW informed Cook both telephonically and by email that MWD was consulting internally and with its member agencies about the release of information responsive to the follow up request. Id., MWD Ex. 14.[9] On August 3, MWD informed Cook that MWD intended to produce the names and addresses of the Turf Program applicants. Muir Decl. ¶7.

On August 7, MWD provided Union with information beyond May 19, up to and including June 15, which included customer participant information for all member agencies except those protected by the TRO and the Districts that had given MWD notice that they would file for a TRO. MWD RJN Exs. 2-5; Muir Decl. ¶7; Kassa Decl, ¶3.

MWD has produced all participant information through June, except for customers of DWP and West Basin. Muir Decl. ¶8, MWD Ex. 15. The remaining unproduced information is barred from disclosure by the court's TRO. Muir Decl. ¶8.

On August 5, 2015, Cook made a new request to MDW for data from June 15 through and including August 5, 2015. Muir Decl. ¶8. This request was later modified. Id.; Kassa Decl. ¶3. The modified request required MDW staff to extract additional data from the EGIA portal. McDonnell Decl. ¶18. The production had to be redacted and reviewed to ensure removal of participant information to comply with the court's TRO. Kassa Decl. ¶3; Muir Decl. ¶8. The requested data was provided to Union on August 20, 2015. Kassa Decl. ¶3; Muir Decl. ¶8; MWD Ex. 15. MWD has released all records sought by Union in its May 19, July 7, and August 5 CPRA requests except as expressly restrained by the TRO. Kassa Delc., ¶3; Muir Decl., ¶¶ 5,7-8; MWD RJN Exs. 3-4, 6.

D. The DWP Petition

DWP seeks to prevent MWD from disclosing the names and addresses of participants in the Turf Program in response to Union's CPRA request.[10]

1. Standing

Union contends that DWP and the Districts do not have standing to bring this reverse-CPRA action. Union argues that DWP is not an interested third party because it is not asserting its own privacy rights, but rather the privacy rights of its customers. Privacy rights are personal and cannot be asserted by anyone other than the person whose rights have been invaded. Hendrickson v. California Newspapers, (1975) 48 Cal.App.3d 59, 62. Corporations have no constitutional right of privacy, which protects only the rights of people. Roberts v. Gulf Oil Corp., (1983) 770, 790-93. Supp. Union Opp. at 1-2.

Union relies on Association for Los Angeles Deputy Sheriffs v. Los Angeles Times

---

[9]In a July 22 telephone call, DWP threatened to sue MWD if customer names and addresses were released. Zinke Depo p. 63.

[10]At hearing, Union's counsel clarified that Union seeks disclosure only of the names and addresses of Turf Program participants receiving a rebate, and does not seek the names and addresses of rejected applicants.

Communications LLC, ("ALADS") (2015) 239 Cal.App.4th 808, 821, for the principal that an agency or association cannot assert privacy rights on behalf of others. Supp. Union Opp. at 2. In ALADS, a union representing Los Angeles Sheriff's Department deputy sheriffs, joined by deputies as "Doe" plaintiffs, sought to prevent the publication of a newspaper article discussing the hiring of deputy sheriffs who used to work for the county's defunct office of public safety. Id. at 811. The court held that the union had no standing to raise the privacy rights of the individual Doe deputies (id. at 821), and then held that the Doe deputies' privacy claim sought an injunction against publication that was an unlawful prior restraint under the First Amendment. Id. at 821-24.

In Pioneer Electronics (USA), Inc. v. Superior Court ("Pioneer") (2007) 40 Cal.4th 360, 368, the California Supreme Court held that a private company had standing as custodian of records to assert the privacy interests of its customers in the identifying information provided by its customers and contained in the records. *See also* Valley Bank of Nevada v. Superior Court, (1975) 15 Cal.3d 652, 658 (bank has standing to raise privacy rights of customers in financial documents submitted to it).

The parties dispute whether the Turf Program was solely a MWD program or a joint effort between MWD and DWP (and the Districts). At hearing, MWD and Union contended that the Turf Program is an MWD regional program that DWP and the Districts were entitled to supplement but not control. MDW ran the Program through its website using the name SoCal Water$mart, and applicants reasonably believed they were applying to a third party for a rebate. Counsel pointed out that the only in a drop down menu on the website were supplemental materials from DWP (or the Districts) even identified. Therefore, MWD should control the release of names and addresses of its own customers.

In contrast, DWP contends that the Turf Program was a joint effort between it and MWD. DWP approved the Program for its customers in 2009, and partly funded it. MWD acted as the clearinghouse for gathering information and qualification, approval, and verification of customer projects, but DWP had its own specific program requirements, conducted pre-turf removal inspections until the Program went region-wide, and even then conducted post-inspections. Gentili Decl., ¶¶20- 33. After MWD ran out of money, DWP continues today to provide turf rebates to its customers through an amended application.

Although not free from doubt, this case is more like Pioneer than ALADS. DWP provides water service to its customers, and that service requires DWP to collect its customers' identifying personal information. DWP approved the participation of its customers in the Turf Program, and contracted with MWD concerning the confidentiality of customer information provided by DWP. Chapman Decl. ¶8, Ex. A; Jazmadarian Decl. ¶8, Ex. A; Paludi Decl. ¶8, Ex. A. While customers provided their DWP water bills directly to MWD, they did so in a Program in which DWP jointly participated. As such, DWP is the co-custodian of the water usage data provided by its customers to MWD. Since the Turf Program is partly a DWP program, and since DWP is co-custodian of its customer information provided to MWD as the clearinghouse, DWP may raise its customers' privacy rights under Pioneer.[11]

---

[11]DWP also argues that it has public interest standing in which the requirement of a beneficial interest is relaxed if a litigant is seeking enforcement of a public duty. *See* Save the Plastic Bag v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 166-69. The court need not decide this issue.

Union also asserts that DWP does not have standing to sue its parent body. A person may not exercise his or her citizen's right to sue an administrative board while simultaneously serving on the same board. Carsten v. Psychology Examining Com., ("Carsten") (1980) 27 Cal.3d 793, 800. The holding in Carsten was recently applied to a Brown Act enforcement action in Holbrook v. City of Santa Monica, (2006) 144 Cal.App.4th 1242, where the court concluded that city council members were effectively suing themselves, and therefore lacked a beneficial interest in the outcome of the litigation. Id. at 1257. Union argues that DWP is effectively suing itself as in Carsten and Holbrook. DWP and the Districts hold eight of 38 seats on MWD's governing board, which has the authority to decide whether to disclose public records. This case has created a conflict within the board, and individual members of MWD's board should not be permitted to sue the agency. Union Supp. at 2-3.

MWD is not DWP's parent. Instead, DWP is a member agency of MWD, and they are separate entities. *See* Water Code App. §109 -12, -17; *see* San Diego County Water Authority v. Metropolitan Water District, (2004) 117 Cal.App.4th 13, 17-18 (describing MWD). DWP is not suing MWD as a member of MWD's board or because it was in the minority of a board vote, but rather in its capacity as MWD's joint venturer. DWP seeks to prevent MWD's disclosure of DWP's customer information supplied in a program in which MWD and DWP were joint participants. Each participating member agency has a separate contract with MWD that governs the participation of that agency's customers in the Turf Program, and MWD acted as clearinghouse. DWP is suing MWD in this joint venture capacity to compel MWD's compliance with its customers' privacy rights, not as a subsidiary entity. *See also* League of California Cities v. Superior Court, (2015) 241 Cal.App.4th 976, 984-85 (entity that was not a party before the trial court has standing to assert attorney-client privilege in CPRA action because it had special interest to be served or particular right to be protected beyond the public interest).[12]

DWP has standing to seek to prevent disclosure of its customers' names and addresses.

2. Filarsky

Union claims that DWP's lawsuit violates Filarsky v. Superior Court, ("Filarsky") (2002) 28 Cal.4th 419, 423, in which the Supreme Court held that a public agency may not initiate an action for declaratory relief to determine its own obligation to disclose documents to a member of the public. Rather, an action by a person seeking to compel disclosure pursuant to the procedures set forth in CPRA sections 6258 and 6259 is the exclusive method for litigating this issue. Id. The Court stated that if a public agency could circumvent the CPRA procedure by filing a declaratory relief action, it would frustrate the CPRA's statutory purpose of enabling a requestor's prompt access to public records without having to defend civil actions that would not otherwise have been commenced. Id.

---

[12] DWP also argues that Carsten and Holbrook are inapplicable because DWP is seeking enforcement of a public duty, which does not require a showing of beneficial interest in the result. Save the Plastic Bag v. City of Manhattan Beach, (2011) 52 Cal.4th 155, 166-69. DWP Standing Reply at 3-4. This argument raises the issue whether, although the number of DWP customers is large, that number does not necessarily make it a matter of public duty for purposes of public interest standing. The court need not decide this issue because DWP is not acting through its board member status.

Union acknowledges that authority exists for a reverse-CPRA action in which a third party seeks mandamus to prevent a public agency from releasing information pursuant to a CPRA request. Marken v. Santa Monica-Malibu Unified School Dist., ("Marken") (2012) 202 Cal.App.4th 1250, 1267. Union notes that Marken admitted that permitting a reverse-CPRA action is not "free from doubt" (id. at 1265), and that the California Supreme Court has stated that it "remains open" whether CPRA procedure is the exclusive means of determining whether public records must be disclosed. Long Beach Police Officers Assn. v. City of Long Beach, (2014) 59 Cal.4th 59, 66, n.2. Union Supp. Opp. at 5.

While the Supreme Court has not finally decided the issue, Marken has. In permitting reverse CPRA lawsuits, Marken noted that there is no other remedy for an interested party who opposes an agency's decision to improperly release confidential documents, and a reverse-CPRA will not impair the procedural protections available to the requesting party. 202 Cal.App.4th at 1265-68. Marken also noted that reverse-FOIA actions are authorized by the FOIA statute itself. Id. at 1266. *See, e.g.,* CAN Financial Corp. v. Donovan (D.C. Cir. 1987) 830 F.2d 1132, 1133, n.1; [13] Artesion Industries, Inc. v. Department of Health & Human Services, (D.C. 1986) 646 F.Supp. 1004, 1005 (approving consultation between federal agencies before disclosure).[14] Marken is binding on this court, and it held that a reverse-CPRA lawsuit is authorized by law. *See* Auto Equity Sales, Inc. v. Superior Court, (1962) 57 Cal.2d 450, 455 (Decisions of every division of the district courts of appeal are binding upon all superior courts of California).

The issue becomes whether DWP is some sort of stalking horse for MWD's litigation effort – in effect, enabling MWD to seek declaratory relief that is foreclosed by Filarsky. Union argues that the agencies worked behind the scenes, shared legal theories, and conducted numerous phone calls and meetings to avoid disclosure. Union Supp. Opp. at 4. Their efforts eliminated CPRA protections for Union, encouraged delay and gamesmanship, and forced Union to intervene to protect its rights because the behind-the-scene alliance between DWP and MWD made clear that its rights would not be protected. Id. at 5.

Union spends a number of pages discussing MWD's delay in production from Union's May 19 request date to August 7. Union Cross-Pet Op. Br. at 14, Reply at 1-8. Union argues that MWD allowed DWP to control the disclosure issue and capitulated to DWP's demands, MWD's excuses concerning the difficulties of production are feigned, the data was available for production on June 8 and still not provided in violation of section 6253(d), and section 6253(c)(1) does not permit MWD to consult with another agency to delay production for a total of 79 days. Id.

Union's evidence and argument concerning delay are mostly irrelevant. The CPRA requires an agency to notify the person making the request if any disclosable records exist within ten days of the request. §6253(c). In unusual circumstances, the time limit may be extended by written notice to the requestor, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched, but no more than 14 days. Id. When the agency determines whether disclosable records exist, it shall state the estimated date and time when they

---

[13]CPRA was modeled after FOIA, and California courts look to federal FOIA case law in interpreting CPRA except where the statutory language in the schemes differs. *See* Times Mirror Co. v. Superior Court, (1991) 53 Cal.3d 1325, 1338.

[14]Union's argument that DWP is not a third party, but only a member of MWD's board, mixes the standing issues. *See* Union Supp. Opp. at 5.

will be available to the requestor. Id. The agency also is prohibited from obstructing or delaying the production of the public records. §6253(d).

While CPRA production must be timely, the requesting party's only remedy for untimely production is to file a mandamus action compelling production. *See* Michaelis, Montanari & Johnson v. Superior Court, ("Michaelis") (2006) 38 Cal.4th 1065, 1072 (order that exempt records be disclosed as remedy for failure to meet time requirements was "unduly harsh"); Rogers v. Superior Court, (1993) 19 Cal.App.4th 469, 483 (CPRA contains no remedy for failure to timely comply). Thus, any delay in MWD's production is irrelevant unless it supports a conclusion that DWP controlled MWD's production in violation of section 6253.3 (prohibiting any other party from controlling the disclosure of information).

The evidence shows that MWD received Union's request on May 19, and had numerous other requests concerning the same Turf Program. MWD had difficulty responding and informed Union on May 27 that it would need at least 30 more days to search and review records before making its determination.[15] This occurred before DWP was even notified about Union's request, which occurred on June 1. The 30 day extension had nothing to do with the DWP, and was caused by the large number of records requested, the unprecedented number of CPRA requests that came in around the same time as the Union CPRA Request, and the technological failings of MWD's Water Efficiency Team.

MWD provided DWP with a copy of Union's request on June 2 (Union Ex. L, pp. 307-08), and the next day DWP's attorney emailed MWD and expressed hope that "MWD and DWP can agree upon a way to release the aggregate details of the rebates or redacted versions of the documents." Id., p. 271. One day later, a MWD attorney called a DWP attorney and promised to produce "a sample proposed MWD disclosure for DWP staff review." Id., p. 273. MWD gave DWP the proposed disclosure, which included street addresses but withheld customer names. Id., p.297. DWP responded that it "appreciate[s] that MWD is willing to redact customers' names, telephone numbers, and email addresses", but reiterated its demand that MWD not disclose street addresses. Id., p. 190. DWP acknowledged that MWD would make the "ultimate call", but proposed that MWD provide the aggregate numbers of a street's block to meet the goal of disclosing how public funds were spent. Id.

On June 9, MWD agreed to limit its initial disclosure of information to "generalized block number" without "utility customer name regardless of whether the utility customer is a business or residence," but reserved the right to revisit the issue. If so, MWD would provide notice to DWP "and an opportunity for [DWP] to get a protective order." Id., p.189. MWD also clarified that the responsive records would not include "the entire rebate amount," only MWD's portion. Id., p. 290.

When Union objected to the missing information, MWD sent Union's objections to DWP and asked for a meeting. On July 14, DWP and MWD met and discussed the issue. MWD proposed to release specific addresses instead of block number, but not names. DWP opposed the release of names and street addresses, and threatened to file a lawsuit to prevent the disclosure.

Union relies on the law that an agency may not rely on another party to control the disclosure (§6253.3), and contends that DWP controlled MWD's disclosure. Union X-Pet. Op.

---

[15]The 30-day extension for MWD's initial determination was unlawful under section 6253(c), which only permits 14 days for an extension based on unusual circumstances.

Br. at 14. Contrary to Union's argument, DWP did not control MWD's public record production. Under section 6253(c)(3), MWD had a statutory right to consult with DWP as "another agency having substantial interest in the determination of the request." MWD Opp. at 9-11. MWD tried to accommodate both DWP and Union by initially disclosing block address information, but not names. In doing so, MWD informed DWP that this initial position might change if Union objected, and MWD would be the final decision-maker on the issue of disclosure. When Union did object, MWD met with DWP and the two agencies could not come to an agreement. The result was DWP's lawsuit. DWP did not control MWD's production.

Even if *arguendo* DWP did control the production, that conduct would violate section 6253.3, but would not violate Filarsky. Under Filarsky, the issue is whether DWP is a stalking horse for MWD's otherwise unlawful declaratory relief litigation. If DWP controlled the document production, it would not be a stalking horse hiding MWD's effort to sue. MWD could be expected to do exactly as DWP asked and there would be no need for DWP to file a reverse-CPRA lawsuit. The fact that DWP did file a lawsuit by itself demonstrates that MWD acted independently in deciding to disclose names and addresses and was not acting on DWP's behalf.

Whether the delay in production was warranted or not, DWP's lawsuit is not a disguised declaratory relief action for MWD in violation of Filarsky.[16]

3. Justiciability of the Cross-Petition

Union and MWD debate whether Union's Cross-Petition was necessary. *See* Union Reply at 8-10; MWD Opp. at 13-15. MWD argues that both it and Union agree that the remaining names and addresses should be disclosed. Where both litigants desire the same result, there is no justiciable controversy to be decided. *See* Moore v. Charlotte-Mecklenburg v. Board of Education, (1970) 402 U.S. 47, 48. Thus, MWD argues that Union's Cross-Petition should be dismissed. MWD Opp. at 13-14.

As Union correctly argues, it has not always been clear that MWD intended to disclose. MWD received Union's request on May 19, and could have produced all requested information on June 8. MWD did produce the information on June 29, but substituted block-level street addresses (*e.g.*, 700 block of Alameda Street) for participant names and addresses. After Union objected, MDW met with DWP, but did not inform Union until August 3 that it intended to produce the names and addresses of Turf Program applicants. Union intervened three days later, on August 6.

Even after August 6, MWD expressed uncertainty about disclosure because one or more of its member agencies may object. This fact was reflected by the court's comments at the August 20 hearing on the *ex parte* application for a TRO by Upper San Gabriel and Foothill:

> "COURT: It is time for the Water District to fish or cut bait... When did you say you were going to disclose? What date was that?
>
> MWD: We were trying to disclose on August 7th.
>
> COURT: Okay. So August 7th. We're not at August 20th, and you haven't disclosed. You are waiting and waiting and waiting and waiting. There is no reason for you to wait." Union Ex. CC at 1-2.

---

[16]Plainly, the Intervenor Districts are not stalking horses for MWD either.

Given MWD's undue waiting, Union had a right to believe that MWD would not fully disclose the names and addresses, and filed its Cross-Petition. Union also is correct that MWD had not actually produced the documents at the time the Cross-Petition was filed, and an intent to disclose is not dispositive. Only actual disclosure would moot the Cross-Petition. *See* Union Reply at 10.[17]

4. The Burden of Proof

DWP contends that MWD should be prohibited from releasing the names and addresses of customers who applied for or participated in the Turf Program under section 6254.16(f) unless it shows that the public interest in disclosure clearly outweighs the public interest in nondisclosure, and there is no less intrusive means of assessing government actions. *See* City of San Jose v. Superior Court, ("City of San Jose") (1999) 74 Cal.App.4th 1008, 1018-19. DWP Op. Br. at 3-4.

Section 6254.16 provides: "Nothing in this chapter shall be construed to require the disclosure of the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies...." (Emphasis added.) One of the exceptions to this provision states that disclosure may be made "upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure." §6254.16(f).

Absent certain exceptions, section 6254.16 permits DWP to withhold from CPRA requests its customer's utility bills, credit history, and contact information. Turf Program information is not necessarily covered by section 6254.16. The Program was intended to aid water conservation, and applicants sought a rebate for installing drought-resistant planting. The Program required applicants to be water utility customers of DWP (or of another participating member agency), and prove it by submitting a utility water bill. DWP's customers voluntarily submitted their name, address, the amount of rebate sought, and their DWP (or District) water bill to MWD, aka SoCal Water$mart.[18] Thus, the customers submitted their names and addresses as rebate applicants, not as utility customers, and the mere location of rebate application information in a DWP customer file does not necessarily make the information customer utility information.

Just as with standing, the issue of section 6254.16's application is not free from doubt. However, the most prudent approach is to assume that Turf Program names and addresses are customer utility information protected by section 6254.16 for the same reasons that support DWP's standing -- the Turf Program is partly a DWP program, and DWP is co-custodian of its customer information provided to MWD as the clearinghouse. Consequently, the names and addresses of Program participants who are DWP customers and whose information is possessed by MWD are protected utility customer information under section 6254.16.

The legislative history of section 6254.16 supports this conclusion that prudence requires its application. The Bill Analysis for SB 448 (codified as section 6254.16) provides in part that it is intended to provide parity with PUC protections for customers of privately-owned electric and gas utilities. DWP RJN Ex. E. PUC sections 8380-81 protect the customer from disclosure of

[17] MWD's statement of its intent to disclose does undermine any award of CPRA attorney's fees on the Cross-Petition, however.

[18] The Union did not ask for utility bills and none were produced.

"electrical or gas consumption data", which includes the customer's energy usage, name, account number, and residence. Id. The PUC-regulated utility is prohibited from releasing this data except with the customer's consent. PUC §§ 8380(b)(1), 8381(b)(1). There is no exception in these provisions for contact information that is acquired by the utility in a program related to, but distinct from, electricity or gas usage. To the extent there is ambiguity in section 6254.16, it should be interpreted to provide protection for DWP's customer contact information, whether acquired for purposes of water service or the related purpose of a turf rebate.

Union argues that, even if section 6254.16 applies to DWP, it does not apply to MWD's records because MWD does not have any customers of its own. Union Opp. at 4. The answer is that the protection of DWP customer contact information is not predicated on a CPRA request aimed only at DWP itself. The court has concluded that the Turf Program was a WMD regional program, but also was partly a joint effort by DWP and MWD in which DWP customers were eligible for a turf rebate. The applications were submitted to directly to MWD, with some submitted directly to DWP. DWP is a joint custodian of the information held by MWD, which MWD possesses because it acted as the clearinghouse for the Program.

Government agencies often must share information to carry out their official duties. MWD and DWP are required to implement water conservation programs, and DWP elected to participate in the Turf Program. A government agency does not waive confidentiality by virtue of providing a document to another government agency in the course of its duties. Rackauckas v. Superior Court, (2002)104 Cal.App.4th 169, 178 (district attorney did not waive privilege by providing nonpublic letter to police department which declined to prosecute police officer with understanding that the document would remain confidential). DWP contracted with MWD to operate the rebate program and expected their customers' privacy would be maintained. DWP provided the customer information to MWD within the scope of its authority as part of the Turf Program and never waived its confidentiality. *See* Nwosu Decl., ¶6. Nor did the Districts. Chapman Decl. ¶17; Jazmadarian Decl. ¶17; Paludi Decl. ¶17.[19]

A public agency has a privilege to refuse to disclose, and prevent another agency from disclosing, official information, defined as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Evid. Code §1040. The information is privileged if "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Evid. Code §1040(b)(2). This privilege is incorporated into the CPRA exemptions. §6254(k).

The Evid. Code section 1040(b)(2) test is similar to the test for disclosure under section 6255's catch-all provision, in which public records are exempt from disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." §6255(a). Under section 6255, the agency must demonstrate a clear overbalance on the side of confidentiality. California State University, Fresno Assn., Inc. v. Superior Court, (2001) 90 Cal.App.4th 810, 831. The difference is that section 6255 requires a "clear" overbalance instead of the preponderance required by Evid. Code section 1040(b)(2).

---

[19] DWP has disclosed customer names and addresses for water usage violators who meet the exception under section 6254(d).

Section 6254.16(f) adds a third similar test. Section 6254.16(f) permits the disclosure of utility customer information if the public interest in disclosure clearly outweighs the public interest in non-disclosure. DWP suggests that this test is the equivalent of section 6255's catch-all exemption. DWP Op. Br. at 4. There is a difference between section 6254.16(f) and 6255, which lies in the fact that, to justify nondisclosure, the clear demonstration must lie on the side of confidentiality under section 6255, but must lie on the side of disclosure under section 6254.16(f). The court will apply the section 6254.16(f) test as it is the most protective of customer information.

The remaining question is whether a less alternative means criteria must be added to this evaluation as DWP suggests. The CPRA contains no express "least restrictive means" test, and City of San Jose did not layer such a test over the section 6255 balancing. The court did mention that the requesting newspaper's investigation would be aided by a list of names and addresses, but facilitating investigations is not the purpose of public access to government records. The newspaper had other ways to identify the complainants about airport noise – such as locating them at city council meetings, through anti-airport noise groups and their websites -- but this factor was relevant to the First Amendment issue of chilling the exercise of complaints. 74 Cal.App.4th at 1024-25. In a later case, the same court clarified that consideration of less intrusive means is merely a factor, noting that "the existence of alternatives does not wholly undermine the public interest in disclosure...Even where a requester "has an alternative means to access the information, it should not prohibit it from obtaining the documents under the CPRA." County of Santa Clara v. Superior Court, (2009) 170 Cal.App.4th 1301, 1325 (citations omitted.) Nonetheless, the existence of alternative, less intrusive means of obtaining the names and addresses reflects on whether the public interest in disclosure is minimal. *See* City of San Jose, *supra*, 74 Cal.App.4th at 1020; Los Angeles Unified School District v. Superior Court, ("LA Times") 228 Cal.App.4th 222, 242.

In sum, the CPRA requires an agency to justify withholding records, not their production. *See* §6255. The requesting party also is not required to defend its request; all public records are presumed to be disclosable. ACLU of Nor. Cal. v. Superior Court, (2011) 202 Cal.App.4th 55, 85. DWP as the "proponent of non-disclosure" must overcome the statutory presumption in favor of disclosure and demonstrate that the records should not be produced under section 6254.16(f) because the public interest in disclosure does not clearly outweigh the public interest in non-disclosure. As the records are held by MWD, DWP must also show that "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Evid. Code §1040(b)(2). This second test is subsumed within the first. The existence of a less intrusive means of evaluating the Turf Program's efficacy is a pertinent factor for the public interest in disclosure.

5. The Public Interests

Under section 6254.16(f), the court considers (1) the public interest in non-disclosure of customer names and addresses; (2) the public interest in disclosure; and (3) whether the public interest in disclosure clearly outweighs the interest in confidentiality.

The CPRA does not define the term "public interest." In considering this term, the analogous purpose of FOIA may be considered. LA Times, *supra*, 228 Cal.App.4th at 240-41. Under FOIA, the only relevant public interest is the extent to which disclosure of the information

sought would "'she[d] light on an agency's performance of its statutory duties'" or otherwise let citizens know what their government is up to." Id. (Citation omitted). The countervailing public interest is society's interest in protecting private citizens from unwarranted invasions of privacy. Id. One way to resolve the tension is try to determine the extent to which disclosure will shed light on the agency's performance of its duties. Id. The weight of the public interest in disclosure stems from the gravity of the governmental tasks to be illuminated and the directness with which disclosure will serve to illuminate it. Id.

a. The Public Interest in Confidentiality

DWP argues that there is a clear public interest in protecting the privacy of those customers who participated in the Turf Program. DWP argues that the names paired with addresses of its customers constitutes contact information which, if readily available to anyone, would endanger the safety of the customers. DWP Op. Br. at 5. Union responds that DWP fails to address whether its customers have a privacy claim. Union Opp. at 5.

While the evaluation of an individual's privacy claim is not essential to determining the public interest in protecting confidentiality, it is useful to do so. The elements for a party claiming a violation of his or her constitutional right of privacy must establish (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of a privacy interest. International Federal of Professional & Technical Engineers, Local 21, AFL-CIO, ("IFPTE") (2007) 42 Cal.4th 319, 338 (evaluating public employees' reasonable expectation of privacy in the amount of their salaries).

(i) Legally Protected Interest

As to the first element – legally protected privacy interest -- Union argues that the rebate applicants have no privacy interest in their name and address. Union Op. Br. at 6-7.

The litany of statutes listed by DWP[20] demonstrates that the Legislature has determined

---

[20]DWP points out that customer names and addresses have statutory protection in other contexts. The Department of Motor Vehicles ("DMV") does not disclose the home address of a person who is a judge, district attorney, public defender, member of the Legislature, and other members of law enforcement. Veh. Code §1808.4. The residence address in a DMV record may be suppressed if the person demonstrates that he or she is the subject of stalking or threat of great bodiliy injury. Veh. Code § 1808.21(d)(B)(i), (ii). The federal government does not release the names and addresses of individuals who received the federal tax credit of $7,500 for electric vehicles. DWP Ex. 6, p. 4. The names and addresses of those who receive food stamps cannot even be released to a state prosecutor unless there is more than a suspicion of fraud. Roberts v. Austin, (5th Cir. 1980) 632 F.2d 1202, 1211. Names and addresses of individuals who receive unemployment is also confidential as taxpayer information, and cannot be released to fellow government agencies unless an exception is met. 42 U.S.C. 503.

The CPRA itself provides exemptions for residence addresses for certain classes of persons: §6253(f)(arrestees and victims of crime); §6254(u)(prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates); §6254.1(Department of Housing and Community Development, and DMV records); §6254.21(elected or appointed officials, their spouses and children on the Internet, including state constitutional officers, members of the

that certain classes of persons whose status creates a safety risk are entitled to have their names and addresses protected. The court has determined that section 6254.16 protects the names and addresses DWP's utility customers, and that the scope of section 6254.16 includes the information provided by DWP customers for the Turf Program. This creates a legally protected interest, albeit one qualified by section 6254.16(f)'s exception that customer information may be disclosed if the public interest in doing so clearly outweighs the public interest in non-disclosure.

(ii) Reasonable Expectation of Privacy

On the second element – whether an expectation of privacy is objectively reasonable – corporate and public agency applicants to the Turf Program have no constitutional privacy right. *See* Roberts v. Gulf Oil Corp., (1983) 147 Cal.App.3d 770, 791("The constitutional provision simply does not apply to corporations). While such entities have a legally protected interest under section 6254.16, they have no reasonable expectation of privacy beyond that inherent in section 6254.16.

DWP argues that all applicants to the Turf Program had a reasonable expectation of privacy, contending that it is one thing for a public agency to disclose the amount of money spent by government on a rebate or the geographic distribution of recipients and it is quite another to disclose which person received a rebate and where he or she lives. MWD gave no notice that participant information would be disclosed, and for DWP and at least some Districts, and MWD's application included DWP's additional terms assuring customers that while DWP would publicize photographs of project properties, "address[es] will not be published."[21] Confidential information submitted to a governmental agency does not become a public record if the agency "agrees to treat the disclosed material as confidential." §6254.5(e). Participants also did not simply submit a one-time online application; they were required to create a password and repeatedly log onto a secure web portal. As a result, DWP's customers should have reached a common sense conclusion that their information was secure and private. DWP Op. Br. at 12-13.

The CPRA mandates disclosure of information related to the conduct of public business. The voluntary disclosure of information can waive a privacy right. *See* San Gabriel Tribune v. Superior Court, ("San Gabriel Tribune") (1983) 143 Cal.App.3d 762, 781("voluntary entry into the public sphere diminishes one's privacy interests."). Customers who voluntarily give their

---

Legislature, judges and court commissioners, district attorneys, public defenders, members of a city council, members of a board of supervisors, appointees of the Governor, appointees of the Legislature, mayors, city attorneys, police chiefs and sheriffs, public safety official, state administrative law judges, federal judges and federal defenders, and members of the United States Congress); §6254.3(workers of the state, a school district, or county education office); and §6254.4(voter registration information).

[21]DWP relies on its Confidentiality Agreement with MWD, but that contract only provides that MWD would maintain the confidentiality of customer information provided to MWD by DWP. Gentili Decl., ¶11, Ex. 13. Moreover, government agencies cannot contract away their obligations under the CPRA. San Gabriel Tribune, *supra*, 143 Cal.App.3d at 776. Both MWD and DWP must comply with the CPRA regardless of their agreement, and the Confidentiality Agreement expressly acknowledges that it does not "cover information that is required to be disclosed pursuant to the [CPRA]…." Id.

contact information to a manufacturer in connection with a product complaint have a reduced expectation of privacy. Pioneer Electronics v. Superior Court, (2007) 40 Cal.4th 360, 372. The voluntary submission of medical records to substantiate a personal injury claim waives any privacy right which may have existed. Register Division of Freedom Newspapers v. County of Orange, (1984) 158 Cal.App.3d 893, 902. In ruling that the names of licensees of luxury suites at an arena owned by a public university were disclosable, the court likened the "purchase of luxury suites....to a commercial transaction," and stated that by entering "the public sphere...they voluntarily diminished their own privacy interests." Cal State Univ., Fresno Ass'n v. Superior Court, ("Cal State") (2001) 90 Cal.App.4th 810, 834.

Rebate recipients stand in the same position as other private parties doing business with the government. They voluntarily submitted their name and address to MWD in order to obtain a rebate. They did so on a MWD application in the name of SoCal Water$Smart. As Union and MWD argued at hearing, Program participants may well have believed that they were dealing with a third party, not a government agency, and certainly not with DWP. As a result, they had a reduced expectation of privacy in their names and addresses, and this reduced expectation is not significantly benefitted by DWP's supplemental statement that addresses will not be published.

Courts have upheld disclosure about public agency transactions in a variety of circumstances. Companies that want to do business with public entities and submit proposals as part of a process for qualifying for the public contract know that there is a strong public interest in disclosure of the proposal information and that it will be disclosed. *See* Pub. Contract Code §10305; Michaelis, *supra*, 38 Cal.4th at 1073 (discussing timing of disclosure). There is also a variety of contexts in which courts have compelled disclosure of names and addresses for individuals and businesses that make use of agency authority: (a) the names and addresses of gun permit applicants (CBS, Inc. v. Block, ("Block")(1986) 42 Cal.3d 646, 652-53); (b) names of vendors hired by the State Controller and amounts disbursed for goods and services (Connell v. Superior Court, ("Connell") (1997) 56 Cal.App.4th 601, 613); (c) name of contractor in connection with financial statements used to evaluate a waste collection rate increase agreed to by city and contractor (San Gabriel Tribune, *supra*, 143 Cal.App.3d at 777); (d) names of pesticide operators and owners of field where pesticides were applied, chemicals used, crops to which they are applied, and related information (Uribe v. Howie, (1971) 19 Cal.App.3d 194, 199-200); and (e) names of persons who purchased luxury suites from a school (Cal State, *supra*, 90 Cal.App.4th at 833-35.[22]

DWP's practice of maintaining the confidentiality of Turf Program customers also does not embellish its customers' expectation of privacy. In ordering disclosure of the names and salaries of public employees, the California Supreme Court in IFPTE expressly disagreed with a lower court holding (Teamsters Local 856 v. Priceless, (2003) 112 Cal.App.4th 1500) that a city's practice of maintaining the confidence of public employee salaries created their reasonable expectation of privacy in those records. 42 Cal.4th at 335-36. The Supreme Court concluded that government entity practice could not transform a public record into a private one simply by

[22]Courts also have compelled disclosure of the names and other information for public employees. *See* Long Beach Police Officers Assn. v. City of Long Beach, (2014) 59 Cal.4th 59, 64 (names of officers involved in shootings); IFPTE, *supra,* 42 Cal.4th at 333-34 (names and salaries of public employees).

refusing to disclose it over a period of time. Id.[23]

DWP attempts to shoehorn its customers into the constitutional and CPRA protection of financial information. *See, e.g.,* §6254(n) (statements of personal worth or personal financial data required by a licensing agency). DWP argues that a participant's decision to apply for a turf rebate "reflects on his or her cash flow to pay in advance, financial abilities, investment in their property, reportable income, and tax calculations – in other words, their financial affairs." DWP Reply at 4-5. This argument is spurious. The fact that an individual applied for a rebate in the Turf Program reveals that person to be a property owner and DWP water customer, nothing more. Their motivations – philanthropic, aesthetic, financial, or otherwise -- are irrelevant and not revealed. Disclosure of names and addresses has nothing to do with financial privacy.

In addition to the voluntary submission of information to what appeared to be a third party, Union argues that participants have no reasonable expectation of privacy because their names and addresses are available elsewhere. Union points out that participants' names and property addresses are readily available through the County Recorder's property records (Union Ex. P), and pictures of their properties are available on Google Earth. Union Op. Br. at 6-7. DWP responds that the availability of data elsewhere diminishes an expectation of privacy was rejected by the United States Supreme Court in U. S. DOJ v. Reporters Comm. for Freedom of Press, ("US DOJ") (1989) 489 U.S. 749, 770, where Justice Stevens wrote that the fact "an event is not wholly private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." DWP Op. Br. at 5. DWP overstates this language. While the availability of names and addresses from other sources does not void a legally protected interest, it does lessen its significance and any reasonable expectation of privacy.

In sum, the individuals who voluntarily signed up for the Turf Program and provided their names and addresses to obtain a rebate for turf removal had some reasonable expectation of privacy

---

[23]DWP further argues (Reply at 1-2) that the recent case of City of Los Angeles v. Superior Court (Cynthia Anderson-Barker), ("Anderson") (2015) 242 Cal.App.4th 475, shows that persons whose privacy information is protected by statute must be able to choose when to release personal information and to whom. In Anderson, the court considered a CHP form 180, which is a form filled out by a deputy sheriff when a vehicle is impounded. The form includes the vehicle owner's name and address, and a copy was given to the tow company. Id. at 478-79. The owner's name and address were protected by Veh. Code section 1808.21, Govt. Code section 6254.1, and the federal Driver's privacy Protection Act of 1994 (18 U.S.,C. §2721 *et seq.*). Id. at 483, 486. The court held that disclosure of information to the tow company and storage facility did not waive the vehicle owners' statutory privacy rights because other statutory provisions required the tow company to give notice to the owner that his or her vehicle had been impounded. Id. at 485-86.

Anderson is distinguishable as a case in which various statutes protected the vehicle owner's name and address without qualification. Section 6254.16 provides statutory privacy protection for DWP's utility customers, but is subject to the exception in section 6254.16(f). DWP also wrongly characterizes Anderson as a case requiring "notice as a requisite to disclosure of records." DWP Reply at 2. Anderson did not require notice; it held that the owner names and addresses were statutorily protected and could not be disclosed without the owner's consent. Therefore, Union is correct in stating that no CPRA case requires notice before disclosure. *See* Union Opp. at 9.

-- at least in their addresses, if not their names, and in their addresses paired with their names. The voluntary nature of their submission, the fact that the application led participants to believe they were submitting to a non-government agency third party, and the availability of the information from other sources significantly diminishes the reasonableness of this expectation, but does not reduce it to a minimal level. Corporate, public agency, and business applicants to the Turf Program had no constitutional privacy right and had only the protection of section 6254.16. The same facts demonstrate that these entities had no reasonable expectation of privacy.

(iii) **Seriousness of the Invasion**

For the third element – serious invasion of the privacy interest -- section 6264.16 was passed to address the risk of easy access to personal information for purposes of committing a crime against the person. DWP Ex. E. While there is no particularized evidence of this risk, the statute itself supports the Legislatures finding that the risk exists.

On the other hand, section 6254.16's protection is not absolute. The statute has several exceptions, including section 6254.16(f) and section 6254.16(d), the public disclosure of a utility customer's name and address if DWP determines that the customer has violated local ordinances.[24] If a utility customer's name and address can be disclosed simply because they violate a water ordinance, then the statute's privacy protection of customers from safety risk is not compelling. If the risk were serious, one would expect the statute's protection to be absolute or have fewer exceptions.

There are two other reasons to believe that disclosure of Program recipient names and addresses is not a serious privacy invasion. First, as discussed *ante*, the same information is available to the public through other means such as a property records search. Second, there is no apparent stigma from participating in the Program. Applicants voluntarily provide their names and addresses in applying for a government benefit. Unlike entitlement programs such as welfare or social security, no stigma exists from obtaining a turf removal rebate. Despite wide publicity and MWD's disclosure of the names and addresses of participants from other member districts, there is no evidence of a participant's complaint that his or her name and address was revealed. Union Ex. H, pg. 22 (Zinke Depo). In fact, Union presents anecdotal evidence that participants are proud of their involvement in the Turf Program. Union Ex. E.

The invasion of privacy in disclosing the names and addresses of Turf Program participants would not be serious.[25]

---

[24]Section 6254.16(f) codifies the holding in New York Times Co. v. Superior Court, ("New York Times") (1990) 218 Cal.App.3d 1579.

[25] DWP makes several other arguments that may be disposed of summarily. DWP argues that publicly-regulated utility companies are statutorily prohibited from disclosing names and addresses without customer consent. PUC §8380-81. The parties in this case are municipal utility companies not regulated by the PUC, but some of the Districts' affected customers are investor-owned public utilities whose water users applied and participated in the Turf Program. DWP Op. Br., Exs. 8-10. DWP argues that a customer's privacy right should not depend on whether they are serviced by Southern California Edison or DWP. DWP Op. Br. at 10. The short answer is that the CPRA applies to public agencies, not privately-owned entities. There also is no evidence that these unidentified private utilities ever contracted with MWD to jointly participate in the Turf

(iv) **Summary of the Public Interest in Confidentiality**

The public has an interest in protecting private citizens from unwarranted invasions of privacy. LA Times, *supra*, 228 Cal.App.4th at 240-41. Turf Program participants have a legally protected interest under section 6264.16 in the non-disclosure of their names and addresses, but that interest is subject to the exception in section 6264.16(f). Participants have a reasonable expectation of privacy -- at least in their addresses and in their addresses paired with their names -- but the voluntary nature of their submission, the fact that the application may have led them to believe they were applying to a non-governmental third party, and the availability of the information from other sources significantly diminishes the reasonableness of that expectation. Corporate, public agency, and business applicants to the Turf Program have no constitutional privacy right and, based on the same facts, have no reasonable expectation of privacy at all. Finally, any invasion of the privacy of Turf Program participants by disclosing their names and addresses would not be serious.

b. **The Public Interest in Disclosure**

The weight of the public interest in disclosure stems from the gravity of the governmental tasks to be illuminated and the directness with which disclosure will serve to illuminate it. LA Times, *supra*, 228 Cal.App.4th at 240-41. There is a public interest in the disclosure of the names and addresses of participants only if it will shed light on MWD's or DWP's conduct; the conduct of participants is irrelevant. As the Supreme Court stated in holding that whether an invasion of privacy is warranted in a FOIA request:

"Official information that sheds light on an agency's performance of its

---

Program.

DWP notes that the Information Practices Act (Civil Code §1798, *et seq.*) governs the release of personal information by public agencies, and "personal information" is defined to include names and addresses. Civil Code §1798.80(e). The IPI requires utilities such as DWP to have a customer's consent before sharing that customer's usage data with any other third-party business. DWP Op. Br. at 11. DWP is not being asked to share information with a third party business, and the statute does not prevent disclosure under the CPRA. *See* ACLU of Northern California v. Deukmejian, (1982) 32 Cal.3d 440, 450, n.11.

DWP argues that MWD was required to inform users if their "personally identifying information" would be disclosed to a third party pursuant to the Online Privacy Protection Act. Bus. & Prof. Code §§ 22575-22579. DWP Op. Br. at 12. The Online Privacy Act requires an online service collecting personal information to disclose its privacy policy. Bus. & Prof. Code §22575(a). DWP presents no evidence that MWD violated it, but assuming *arguendo* that it did, that fact would not prevent disclosure under the CPRA.

DWP notes that the turf rebates are reportable income and privileged when reported as "return" and "return information" under 26 U.S.C. section 6103. A "return" is any tax return filed with the IRS, and "return information" is *inter alia* a taxpayer's identity, his income, deductions, exemptions, and credits, which is filed with the IRS. 26 U.S.C. §6103(b)(1)-(3). DWP Op. Br. at 10. Union is not seeking tax return information.

> statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency." US DOJ v. Reporters Comm. for Freedom of Press, ("US DOJ") (1989) 489 U.S. 749, 771-73. (Emphasis added.)

The gravity of the task to be illuminated is significant -- the Turf Program's spending of at least $370 million in public agency funds. As Union argues (Union Op. Br. at 12), there is a strong public interest in the issue of drought and water conservation in California. To effectively participate in the debate, the public and the media must have access to public agency information on how their water conservation programs are administered. Public scrutiny of the governmental decision-making process in spending public funds is particularly critical. IFPTE, *supra*, 42 Cal.4th at 334.Accountability and transparency favor public access to inspect how the government has spent public funds and the efficacy of the program. The right to verify underlies the purpose of the CPRA (Block, *supra*, 42 Cal.3d at 651-52), and the public and media need not accept a public agency's representation that it is performing its program is operating well. Connell, *supra*, 56 Cal.App.4th at 617. By providing accountability and public verification, the CPRA allows the public to expose and prevent "corruption, incompetence, inefficiency, prejudice, and favoritism." Id., at 333.

There is particular reason to require verification and accountability for the Turf Program. The City Controller has called DWP's program "largely a gimmick – a device intended to attract attention and publicity." Union Ex. U, p. 2. The Controller found that the Turf Program was costly, partly unfair, and DWP has failed to prioritize water conservation projects based on what works. Id., p.3. The Program's rebates were concentrated in the western San Fernando Valley, and beneficiaries included "some affluent households," "some private golf courses," and "[o]ne particular contractor." Id. He concluded that the Turf Program "gave DWP the lowest return on investment...than other conservation programs, by a wide margin." Id.

Given its importance, the question becomes how will the disclosure of the names and addresses of Turf Program participants serve this verification and accountability task? Union argues that it is the disclosure of the identity of persons with whom a public agency contracts, and the circumstances of contracting, that shine a light on agency actions. Union's purpose in requesting information about the Program was to analyze its effectiveness, and examine it for inefficiency, waste, fraud, and abuse. MWD's disclosure of names and addresses from other member agencies shows that private citizens received up to $70,000 in rebate money. The public only learned of these amounts when the information became public after the court limited the TRO to DWP and the Districts. Union argues that the remaining names and project addresses are imperative to examine the Program for inefficiency, waste, fraud, and abuse. Union Op. Br. at 13.

Union further contends that, without disclosure of names, the public cannot fully evaluate whether the program was fairly administered. Nepotism, inefficiency, favoritism, and even kickbacks can go undetected when public funds are dispersed without accountability. Project

addresses enable the public to verify if the money was spent for the stated purposes — if citizens removed turf and installed draught-resistant plants. MWD and DWP contend that they verified compliance, but the public has the right to review that verification. Also important, especially where the water crisis is of great public concern, the goal of permanent water savings cannot be evaluated without the names and addresses because there is no way to know whether the drought-resistant plants remain in place. Union Opp. at 11.

DWP notes that considerable information already has been provided, and the names and addresses do not shed any light on MWD's action in administering the Turf Program. DWP Op. Br. at 5. The press has received the expenditures made by MWD on the Turf Program. Zinke Decl; Carson Decl; Ex. A, p. 46. Union has received the addresses to the block level of participants and applicants in the program. Union has received the names and home addresses of applicants and participants who are customers of MWD's member agencies other than DWP and Districts.

DWP argues that, in seeking the names and addresses of private citizens, Union is seeking to publicly scrutinize the decisions and actions of private citizens and publish their names and addresses, an improper purpose under US DOJ. DWP notes that all official agency actions and decision-making occurred when MWD created the Program. Once the Program was created, its operation became clerical in nature. A government employee verified that participants met the Program requirements, but did not modify those requirements. *See* Gentilli Decl., ¶¶ 21-34. If an applicant met the requirements, they received a rebate. Id. DWP concludes there is no need to follow this clerical verification process.

According to DWP, protection of the confidentiality of participant names and addresses is consistent with government entitlement programs: welfare money is required to be spent on necessities, food stamps on food, and Section 8 vouchers on housing. Welf. & Inst. Code §§ 11450-11469.1; Food Stamp Program (7 U.S.C. 2011-2036); and Housing Act of 1937 (42 U.S.C. § 1437f)). After the recipient provides appropriate receipts or documentation, the government cannot invade the recipient's privacy without probable cause, reasonable suspicion, due process, and warrants. City of Ontario v. Quon, (2010) 560 U.S. 746. DWP Op. Br. at 6.

The court agrees with Union (Union Opp. at 7) that disclosure of the names and addresses of Turf Program participants differs significantly from disclosure of information about participants in entitlement programs such as welfare, food stamps, section 8 housing or unemployment. These entitlement programs are protected from disclosure under specific federal and state statutes and regulations. *See, e.g.*, Welf. & Inst. Code §10850; 45 CFR §205.50(a); 20 C.F.R. §603. No statute protects the names and addresses of turf removal rebate recipients if the requirements of section 6254.16(f) are met. The comparison with entitlement programs and the Turf Program is also inapt because receipt of the turf rebate does not carry the stigma associated with receipt of entitlements, which are based on low income or financial indigency.

Union argues that the following questions cannot be fully answered without disclosure of the names and street addresses of project participants in conjunction with the amount of rebate: (1) Was the Program effective? (2) Did applicants tear out their grass lawns? (3) Did their drought-resistant planting funded by the Program actually result in water conservation? (4) Was there preferential treatment in the distribution of funds to particular persons? (5) What happened to the money given to rebate recipients before the water agencies placed caps on individual rebates? (6) "What funds went to corporations and public entities?" (7) Did participants collect multiple rebates from different agencies for the same turf removal projects? Union Op. Br. at 13. Union

contends that disclosure of the names, addresses, and rebate amounts is necessary to answer these basic accountability questions.

The court will address these questions individually, as did DWP. *See* DWP Op. Br. at 7-8.

(1) **Was MET's program effective?** DWP contends that all data answering this question has already been disclosed, and names paired with addresses are irrelevant to the question. Union received the street addresses to the block for those subject to the TRO, so it can go to the site. It can obtain MWD's reports on how much water has been saved since the turf removal; many articles reported on the Turf Program's success and California's conservation percentages. MWD's Turf Program will be responsible for removal of 175 million square feet of lawn, or water for 160,000 households. DWP Op. Br. at 7.

Contrary to DWP's argument, the public is not required to rely on MWD's assessment of its own Program as to whether it has worked or was worth the cost. The CPRA is built around the principle that the public does not have to accept the unsubstantiated declarations of officials, such as DWP's contention that the Turf Program will be responsible for removal of 175 million square feet of lawn. *See* DWP Op. Br. at 7. MWD spent at least $370 million on a Turf Program that the City Controller called a gimmick. The media articles concerning the Turf Program raise concerns about the disbursement of large sums of cash to celebrities, country clubs, wealthy homeowners,[26] and even a brewery. *See* Shim Decl., Ex. 13; Gentili Decl., ¶¶ 44, 46, 47-19. There are also questions regarding the contractor, Turf Terminators, and campaign contributions to Los Angeles Mayor Eric Garcetti. The CPRA exists to provide accountability for government actions and the public retains a right to verify.

The issue is whether disclosure of names and addresses will aid that process. DWP alleges that block addresses are sufficient for Union to go to the site. That is only partly true. A block address coupled with Google Earth would enable Union to determine if that block has drought-resistant planting in place, and Union physically could go on site to evaluate its quality and compliance with Program requirements. However, if a block contains multiple houses with artificial turf or drought-tolerant landscaping, there is no way to know some or all were funded by the rebate Program.

Also, there is no Program requirement that a rebate recipient keep their planting in place. If drought-resistant landscaping was removed after a participant received the rebate, there is no way to that could not be determined from generalized block information. This is particularly significant in evaluating MWD's contention that 175 million square feet of lawn has been removed. If turf is replaced, the Project purpose plainly will be undermined.

There further is an issue with respect to artificial turf and the heat it generates, and whether this heat is a health hazard or adversely affects water conservation. So long as the artificial turf remains in place, Union can evaluate this portion of the Program's effectiveness. But if a participant decides to remove the artificial turf, it cannot be evaluated.

(2) **Did participants tear out their grass lawns?** DWP contends that MWD, DWP, and/or

---

[26] Individual rebate applicants may or may not reside that their project address, but the vast majority do.

Districts conducted a thorough, in-depth verification process that included in-person site visits and photographs. Gentilli Decl., ¶¶ 28-34. DWP argues that there is no reason why a person's name paired with home address will verify compliance better than before-and-after statistics on water use and Google Earth photographs to confirm turf removal. DWP Op. Br. at 7.

It appears unlikely that Union or any other person would use the names and addresses to verify the quality of drought-resistant planting. The investigator would only verify that the turf was, in fact torn out. However, Union cannot verify that a particular drought-resistant lawn on a block is the result of a Turf Program rebate without participant addresses. Nor can it assess whether participants received a rebate, tore out their lawn and planted drought-resistant planting, and then changed their mind and replaced it with grass.

(3) Did the modifications funded by the program result in water conservation? DWP argues that this question appears to request utility usage records, which are not at issue. Further, the water usage patterns of participants can be provided without names and addresses. DWP Op. Br. at 7.

Union has access to records from MWD and DWP concerning overall water usage in their jurisdictions and, as DWP suggests, obtain redacted water usage records. This information will not enable Union to assess whether a particular water user has actually reduced their water usage as a result of the Program, and participant names and addresses would do so. Information on the water usage reduction, or on the other hand abuse, of a particular identified participant does not bear directly on the conduct of MWD or DWP, except in the broad sense of indicating an unsuccessful Turf Program.

(4) Was there preferential treatment in the way funds were distributed? DWP argues that Union should examine MWD's data processing records to determine whether any applicant was given preferential treatment, which is unlawful. MWD's evidence is that all those applying were approved until funding ran out. Carson Decl., Ex. A, 96-97 (Zinke Depo.) Government employees are presumed to have done their jobs. Evid. Code §664. Union has provided no evidence of unlawful activity that overcomes this presumption. DWP Op. Br. at 7-8.

Union is not required to take MWD's word for it, and the presumption in favor of official duty does not apply in this context. DWP does not explain how MWD's data processing records would show preferential treatment without disclosure of participant names.

In Cal State, the court rejected an argument that there was no public interest in the disclosure of the names of licensees of luxury suites at a public university basketball arena:

> "The University suggests it can see no reasonable public interest in disclosure of licensee names. We beg to differ, and can conceive of many examples where the licensee's identity could be of significant interest to the public. The public should also be able to determine whether any favoritism or advantage has been afforded individuals or entities in connection with the license agreements, and whether any discriminatory treatment exists. Determinations pertaining to the public's business cannot be made without disclosure of the identities of the licensees and the license agreements." 90 Cal.App.4th at 833.

(5) **What happened to the money given to rebate recipients before the water agencies placed caps on individual rebates?** Union does not explain this question, and DWP does not address it. Union appears to be asking which individual participants received more than the capped amount and how it was used for turf replacement. Union indicates that some persons received up to $70,000. Disclosure of addresses would aid in investigating whether the entire amount was used for drought-resistant planting and, if so, how much square footage was involved and why it was so expensive. Disclosure of names would aid in demonstrating whether these persons received preferential treatment.

(6) **What funds went to corporations and public entities?** DWP contends that this information was already provided, but does not cite supporting evidence. DWP also relies on the utility user exemption (§6254.16), which it correctly points out applies to all utility customers, whether corporate or individual. It argues that MWD also can disclose how many corporations versus individuals participated, and the amounts of rebates for each without invading customer's privacy rights. DWP Op. Br. at 6-8.

This is grossly inadequate, given that corporations and public entities have no privacy rights. Union provides as an illustration of the importance of transparency that the records disclosed on Aug. 7 show that public entities received turf rebates in some cases in the six figures. Cook Decl., ¶10, Ex. E. The information also demonstrates large rebates given to businesses and public agencies. Oakmont Country Club in Glendale received $2.3 million, Rancho Sante Fe Association $1.6 million, The Rose Bowl Operating Company received $500,000, and the Temecula Valley School District received more than $200,000. The public remains in the dark about the rebates given to commercial and public agencies within the service areas of DWP and West Basin. Union Op. Br. at 13.

As corporations, public entities, and businesses they have no reasonable expectation of oprivacy, and there is no public interest in non-disclosure and no balancing is required. The names and addresses of businesses, corporations, and public entities must be disclosed.

(7) **Did participants collect multiple rebates from different agencies for the same turf removal projects?** DWP does not address this question. The only way to ascertain whether a participant collected multiple rebates is if the names and addresses are disclosed. Disclosure of either addresses alone or names alone would not show if a participant and received rebates for more than one property owned by him or her.

The existence of a less intrusive means of evaluating the Program is a pertinent factor in evaluating the significance of the public interest, and disclosure will not be compelled if the public interest is rendered minimal by the existence of alternative, less intrusive means of obtaining the names and addresses. *See* City of San Jose, *supra*, 74 Cal.App.4th at 1020; LA Times, *supra*, 228 Cal.App.4th at 242.

DWP argues that there are less intrusive means of evaluating the Turf Program than by disclosure of names and addresses. For example, the press can attend board meetings, go to the neighborhoods where turf was removed and investigate block-level addresses, talk to individuals who favor or oppose the rebate program, and review statistics on water use. DWP made the final determination to authorize payment and verify its customers' turf installations (Gentilli Decl., ¶¶

21-34), and performed comprehensive training on these issues for its employees. Id. Union could request its criteria for verifying compliance with turf program rules, photos of areas where turf was removed, and the rules for compliance. DWP Op. Br. at 8.

DWP's alternatives address a few, but not most, of the issues above. The issues of Program effectiveness, participant compliance, preferential treatment, and waste simply are not adequately addressed by these alternatives. Only disclosure of the names and addresses would provide the complete ability to perform these investigative tasks.

(i) Summary of Public Interest in Disclosure

In evaluating the public interest in disclosure, the relevant question is whether the information sought will shed light on the conduct of MWD and DWP. The gravity of the task to be illuminated is significant -- the Turf Program spent approximately $450 million in agency funds and there are serious questions about the results of the water conservation program. Will the disclosure of the names and addresses of Turf Program participants serve the issue of verification and accountability? While some issues concerning the Program can be assessed based on the current state of information, the public cannot fully evaluate whether the Program was fairly administered without inefficiency or favoritism without disclosure of project addresses and names. Project addresses enable the public to verify if the money was spent for the Program purposes and names will enable the Union to verify whether preferential treatment or double-dipping occurred for individual participants.

Thus, there is a public interest in disclosure of the names paired with addresses of participants, whether individual persons, corporations, businesses, or public entities. This interest is lessened by the disclosures that have taken place to date and the availability of a few alternatives.

6. The Balancing of Public Interests

The court must balance the public interest in protecting the privacy interests of individual participants against the public interest in disclosure of names and addresses. Case law demonstrates that the public interest in disclosure clearly outweighs the public interest in confidentiality under section 6254.16(f).

In City of San Jose, the press requested copies of names and addresses of complainants to monitor the city's response to airport noise complaints. 74 Cal.App.4th at 1011. The public interest in nondisclosure was the privacy rights of citizens and the interest in not chilling public participation. Id. at 1020, 1024. The court held that withholding names paired with addresses of complainants was justified under the CPRA because "airport noise complainants have a significant privacy interest in their names, addresses, and telephone numbers as well as in the fact that they have made a complaint to their government, and that disclosure of this information would have a chilling effect on future complaints." Id. at 1023-24. In so holding, the court noted that the city had disclosed considerable information about public complaints of airport noise, and the public interest in disclosure of personal information about the complainants was minimal. Id. at 1024. Balanced against the chilling effect that disclosure would have, and the alternative means the newspaper had of contacting complainants – including locating complainants at city council meetings, through anti-airport noise groups and their websites, or by canvassing airport neighborhoods – the balance under section under section 6255's catch-all provision clearly weighed against disclosure. Id. at 1023, 1025.

According to DWP, the same privacy rights are implicated by Union's request for the names and addresses of participants in the Turf Program. DWP Op. Br. at 5. However, as Union points out, there is no First Amendment issue in this case as there was with the complaints in City of San Jose. The participants in the Turf Program voluntarily applied for and received government funds, and DWP can point to no chilling effect equivalent to City of San Jose. Indeed, all of the names and addresses for Turf Program recipients not covered by the TRO have already been released, and DWP has not provided any evidence that customers have been harmed by that disclosure.

In any event, City of San Jose was distinguished in San Diego County Employees Retirement Assn. v. Superior Court, ("San Diego County")(2011) 196 Cal.App.4th 1228, 1244, n.12, a case directing CPRA disclosure of public pensioners names paired with the amount and calculation of their retirement benefits. The San Diego County San Diego County court stated that San Jose "it does not pertain to…the public's right to know how the government is spending taxpayer funds." The court noted that City of San Jose was based on the fact that the public's interest in disclosure of the complainants' identity about airport noise was minimal. Id. City of San Jose "does not suggest the public has no right the disclosure of information that would allow it to detect pension abuses." Id. As in San Diego, this case involves disclosure of names and addresses for the purpose of determining how MWD is spending funds.

New York Times, *supra*, 218 Cal.App.3d at 1579, is closer to on point. In New York Times, the petitioner newspaper made a CPRA request for a water district to release the names and addresses of individuals who had exceeded their water allocation under a recent ordinance imposing limitations on water usage in a drought. Id. at 1582. Applying the section 6255 catch-all test, the court noted that the preservation of water resources has long been a matter of concern in California. Id. at 1586. While the district's customers had a privacy interest in their names and addresses, the public's interest in holding the district accountable for enforcing its water allocations outweighed the privacy interest. Id. at 1585. The mere assertion that publication of names could expose the water abusers to verbal or physical harassment did not clearly outweigh the public interest in access to the records. Id. at 1585.

Similarly, the public interest disclosure of participant names and addresses for the purpose of assessing the Turf Program outweighs any privacy interest in non-disclosure. Indeed, the privacy interest in New York Times was arguably stronger than the privacy interest implicated in this case because, although the statutory protection of section 6254.16 did not exist, the stigma attached to a water abuser is significant. DWP has not identified any stigma or chilling effect that may be caused by disclosure of the Turf Program recipient names and addresses. Indeed, Union's anecdotal evidence is that Program participants have been pleased to disclose their participation in a water conservation program.

DWP also relies on US DOJ, *supra*, in which the Supreme Court found that criminal rap sheets compiled by the FBI on more than 24 million persons were not disclosable under FOIA. 489 U.S. at 770. DWP Op. Br. at 5-6. The serious privacy interests that persons have in their criminal histories are not comparable to the privacy interests that turf removal rebate recipients have in their names and addresses. While the persons whose criminal histories were at issue in US DOJ faced loss of reputation and job hurdles if their criminal histories were disclosed, the Turf Program participants face no such stigma.

In cases where public funds are involved, the monitoring of government spending is an

overriding public interest, trumping the privacy interests of those who receive public funds. *See, e.g.*, Cal State, *supra*, 90 Cal.App.4th at 833-35 (names of individuals who purchased luxury suites from public university); Connell, *supra*, 56 Cal.App.4th at 613 [names and amounts of payments to vendors for goods and services). DWP distinguishes these cases as involving "limitations", pointing out that Connell limited disclosure to warrants over $3,000, and Cal State disclosed only identities, not names paired with addresses. DWP Reply at 9-10. True, these cases are not directly on point. But they do show the importance of the public interest in agency spending. The number of recipients of Turf Program funds does not affect the balancing either.

DWP has not met its burden of showing that the names and addresses of Turf Program participants should not be produced because the test under section 6254.16(f) has not been met. Rather, the public interest in disclosure clearly outweighs the public interest in non-disclosure. DWP's Petition is denied.[27]

E. Conclusion

DWP's petition for writ of mandate is denied, and Union's Cross-Petition is granted. MWD's counsel is ordered to prepare a proposed judgment (a writ is unnecessary), serve it on counsel for DWP, Districts, and Union for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for February 25, 2016 at 9:30 a.m.

Dated: January 15, 2016

/s/ JAMES C. CHALFANT

Superior Court Judge

JAMES C. CHALFANT

[27] For the same reasons that DWP's Petition is denied, Union's Cross-Petition is granted. In granting the Cross-Petition, the court acknowledges that MWD has consistently argued that the information subject to the TRO should be produced. The Cross-Petition has been granted instead of denied as moot because the restrained information has not yet been produced.