CALIFORNIA
Water Boards

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ENVIRONMENTAL PROTECTION

State Water Resources Control Board

TO: **SANTA MONICA BAY RESTORATION COMMISSION GOVERNING BOARD**

FROM: **Frances L. McChesney**
Attorney IV
OFFICE OF CHIEF COUNSEL

DATE: **February 8, 2016**

SUBJECT: ***BALLONA WETLANDS LAND TRUST V. SANTA MONICA BAY RESTORATION COMMISSION,* LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BS 154128: SUMMARY OF COURT'S PROPOSED MINUTE ORDER ISSUED JANUARY 26, 2016**

On February 11, 2015, the Ballona Wetlands Land Trust (BWLT) filed a Petition for Peremptory Writ of Mandate and Declaratory Relief to Enforce the Public Records Act (Petition) in Los Angeles County Superior Court. The Petition asserted that the Santa Monica Bay Restoration Commission (SMBRC) and The Bay Foundation (TBF) have essentially operated as a single entity and, therefore, all the documents BWLT seeks from either entity are public records in the possession of the SMBRC and must be disclosed. The Petition sought documents relating to an agreement between the Annenberg Foundation and TBF (which helped fund TBF employees to assist the California Department of Fish and Wildlife (DFW) in preparing environmental documents for the restoration of the Ballona Wetlands); documents relating to a TBF employee's activities associated with DFW's Ballona Wetlands project; meeting notices, agendas, staff reports, minutes, and resolutions for meetings of TBF; TBF by-laws; TBF fundraising records, and other records BWLT asserts were allegedly "improperly withheld."

In response to BWLT's multiple requests for records under the California Public Records Act (CPRA), the SMBRC had provided many records regarding the Ballona Wetlands, but did not provide Annenberg Foundation documents, TBF's meeting notices, agendas, staff reports, minutes, and resolutions, TBF's by-laws, or TBF's private fundraising records, i.e., invoices (but did provide fundraising letters on SMBRC letterhead). The SMBRC's position was that the SMBRC did not have the legal ability to obtain or disclose documents of the private TBF regarding its private business. BWLT persisted in seeking those documents.

The trial was held on January 26, 2016 in Los Angeles County Superior Court, the Honorable Mary H. Strobel presiding. On January 26, 2016, the Court issued the enclosed Minute Order. The SMBRC substantially prevailed in the lawsuit. Significantly, the Court recognized that the

SMBRC and TBF are not a single entity and that TBF is a private, non-profit organization with its own budget, board of directors, and organizational structure. Only public records used by the TBF for SMBRC public business and in the possession of the SMBRC are subject to disclosure under the California Public Records Act (CPRA), not the private records of TBF regarding its private business. Of the six categories of documents requested by BWLT in its lawsuit, the Court granted the petition with respect to Ballona Wetlands restoration records, the TBF by-laws, and public letters but not private invoices regarding TBF fundraising, but denied the petition with respect to Annenberg Foundation documents, TBF meeting minutes and related documents, and other records allegedly "improperly withheld." The Court acknowledged at the trial that the SMBRC may have already provided nearly all the responsive documents the Court determined were subject to disclosure, and that there may be few additional records to disclose. The Court's Minute Order is a proposed order; the final Order will be issued following the opportunity for the parties to file any objections.

It is important to note that the lawsuit was filed against the SMBRC, not TBF. TBF is not a party and, more importantly, is not subject to the CPRA. The Court's ruling does not in any way conclude that TBF or the SMBRC engaged in any inappropriate conduct. The Court simply disagreed with the SMBRC regarding the disclosure of certain documents, which in SMBRC's view were not in its possession. To the extent TBF employees provide services to the SMBRC, records relating to those services may be public records and subject to disclosure if in the possession of the SMBRC. As you know, the SMBRC substantially revised its Annual Work Plan to clarify the specific services provided by TBF employees to the SMBRC and activities TBF employees conduct as part of the private business of TBF. The Court recognized that the SMBRC and TBF have, going forward, clarified the roles of the entities, but found that in the past, the distinctions were not clearly defined.

If you have any questions, please contact me at FMcchesney@waterboards.ca.gov or at (916)341-5174.

Enclosure

[all via email only]

cc: Tom Ford, Executive Director
TFord@santamonicabay.org

Dr. Guangyu Wang, Deputy Director
Guangyu.Wang@waterboards.ca.gov

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/26/16 | DEPT. 82

HONORABLE MARY H. STROBEL JUDGE | N DIGIAMBATTISTA DEPUTY CLERK
B HALL/COURTROOM ASST

HONORABLE 8 JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

NONE Deputy Sheriff | BUFORD J. JAMES/CSR 9296 Reporter

9:30 am BS154128

THE BALLONA WETLANDS LAND TRUST
VS
SANTA MONICA BAY RESTORATION COMMISSION

Plaintiff Counsel SABRINA D. VENSKUS (x)

Defendant Counsel FRANCES MCCHESNEY (X)
KURT WEISSMULLER (X)

NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE

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Office of Chief Counsel

Matter comes on for hearing and is argued. The court takes the matter under submission.

LATER: The court announces its intended decision and proposed statement of decision as set forth in this minute order.

A court trial was held on January 26, 2016 on the Petition. After considering the evidence submitted and argument of counsel, the court took the matter under submission. Respondents requested a statement of decision. The Court announces its tentative decision and issues this Proposed Statement of Decision.

This Proposed Statement of Decision will become the Final Statement of Decision if objections are not filed within the time allowed by law. Petitioner is ordered to lodge a proposed form of judgment in Department 82 by February 26, 2016.

Petitioner Ballona Wetlands Land Trust ("Petitioner") seeks a writ of mandate pursuant to Code of Civil Procedure section 1085 compelling Respondent Santa Monica Bay Restoration Commission ("SMBRC") to comply with requests for public records pursuant to the California Public Records Act

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NATURE OF PROCEEDINGS:

("CPRA"). Petitioner also prays for declaratory relief related to CPRA requests for which documents were produced after this litigation was filed.

SMBRC's Evidentiary Objections to the Amended Declaration of Walter Lamb

(1) Sustained.
(2) Overruled.
(3) Sustained.
(4) Overruled.
(5) Sustained.
(6) Sustained.
(7) Overruled.
(8) Overruled.
(9) Overruled.
(10) Overruled.
(11) Overruled.
(12) Overruled.

Petitioner's Evidentiary Objections and Requests to Strike

SMBRC's Opposition Brief

(1)-(9) Overruled. Statements made in the opposition brief are not evidence and may not be objected to as such. The Court does not consider any arguments in the opposition brief not supported by the evidence.

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KURT WEISSMULLER (X)

NATURE OF PROCEEDINGS:

Declaration of Scott Valor

(1) Overruled.
(2) Overruled.
(3) Overruled.
(4) Overruled.
(5) Overruled.
(6) Overruled.
(7) Overruled.
(8) Sustained as to "It is my understanding that no state employees are provided access to the TBF server;" otherwise Overruled.
(9) Overruled.
(10) Overruled.
(11) Overruled.
(12) Overruled.
(13) Overruled.
(14) Overruled.
(15) Overruled.
(16) Overruled.
(17) Overruled.
(18) Overruled.
(19) Overruled.

Declaration of Laurie Newman

Overruled

Declaration of Marcelo Villagomez

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NATURE OF PROCEEDINGS:

(1) Motion to strike - Denied.
(2) Objection to entire declaration - Overruled.

Declaration of Frances McChesney

(1) Motion to strike - Denied..
(2) Objection to entire declaration - Overruled. .

Declaration of Dr. Guangyu Wang

(1) Motion to strike - Denied.
(2) Objection to entire declaration - Overruled.

Declaration of Thomas Ford

(1) Motion to Strike - Denied.
(2) Objection to entire declaration - Overruled.

Statement of the Case

The Ballona Wetlands Land Trust

Petitioner is a 501(c)(3) non-profit organization founded in 1994 to facilitate the public acquisition, restoration, and preservation of the Ballona Wetlands ecosystem, located on the Westside of Los Angeles near Playa del Rey. (Amended Lamb Decl. 5.)

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NATURE OF PROCEEDINGS:

Santa Monica Bay Restoration Commission

In 1988, the State of California and the United States Environmental Project Agency (U.S. EPA) designated the Santa Monica Bay Restoration Project (Project) as an agency to plan for the Santa Monica Bay's restoration, and to oversee implementation of the Santa Monica Bay Restoration Project. (Pub. Resources Code § 30988(c).) In 2002, the legislature renamed the Project as the Santa Monica Bay Restoration Commission. (Id. § 30988.2(a).) The legislature directed the Secretary for Environmental Projection, the Secretary of the Resources Agency, and SMBRC's Chair to execute a Memorandum of Understanding (MOU) to delineate SMBRC's authority, governance structure, and membership. (Id. § 30988.2(b)(1).) Under the MOU subsequently adopted, SMBRC is composed of the Governing Board, the Watershed Advisory Council, and a Technical Advisory Committee. (Weissmuller Decl. Exh. F.)

The MOU states that SMBRC is authorized to "request and receive federal, state, local, and private funds from any source and to expend those moneys for the restoration and enhancement of the Santa Monica Bay and its watershed." (Weissmuller Decl. Exh. F.) SMBRC is also authorized to "monitor, assess, and coordinate activities among federal, state, and local agencies, and where appropriate, private

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firms, to restore and enhance Santa Monica Bay and its watershed." (Ibid.)

Although the legislature created a state treasury account for SMBRC (Pub. Resources Code § 30988.2(d)(1)), SMBRC indicates that the account was never funded. (See Oppo. 5-6; see also Cossart-Daly Decl. Exh. 12 at 6-7.) Instead, SMBRC has stated, as recently as June 11, 2014 in a letter to its Governing Board, that the Santa Monica Bay Restoration Foundation (Foundation) is the "primary fiscal agent for the US EPA Section 320 grant funding" used for SMBRC's activities. (Cossart-Daly Decl. Exh. 12 at 2; Exh. 45.)

The day-to-day functions of SMBRC are delegated to an executive director, currently Thomas Ford. (Ford Decl. Exh. A.) Other than its executive director, SMBRC claims to have no employees of its own. (Wang Decl. 6.) Its functions are carried out largely by personnel provided by other entities, including Foundation and the State Water Resources Control Board. (Id.; see Pub. Resources Code § 30988.2(a).)

The Santa Monica Bay Restoration Foundation

The Santa Monica Bay Restoration Foundation, also known as The Bay Foundation, ("Foundation") is a 501(c)(3) non-profit organization founded in 1990. (Wang Decl. Exh. A.) Foundation's mission is to

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contribute to the restoration and enhancement of the Santa Monica Bay and other coastal waters. (Ibid.) Foundation receives an annual grant from the US EPA pursuant to section 320 of the Clean Water Act, as well as grants and donations other funding sources. (Ibid.)

Foundation's bylaws state that SMBRC's Governing Board may appoint up to seven members of Foundation's Board. (Cossart-Daly Decl. Exh. 20, Art. VI.) The bylaws state that Foundation's purpose "is to assist in the restoration and enhancement of the Santa Monica Bay and other coastal waters." The Foundation "shall complement the work of the [SMBRC] as directed by its Board of Directors." (Newman Decl. Exh. B, Art. III.) Foundation may "hold and disburse" funds" and enter into contracts of any kind for this purpose. (Ibid.)

The 2013 Annual Report of SMBRC, which is signed jointly with Foundation, states that the purpose of Foundation is "to complement the work of the SMBRC, with a focus on obtaining and expending funds not otherwise available to the SMBRC." (Cossart-Daly Decl. Exh 44; see also Exh. 28.)

Shared Staff and Operations

The Memorandum of Agreement, as amended June 18,

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2015, between SMBRC and Foundation states that SMBRC "has not directly received any state, federal, or private funding" to date. (Cossart-Daly Decl. Exh. 8 at 3.) Instead, to carry out its mission, SMBRC relies on services provided by other entities. (Ibid.) Foundation "provides staff, including the Executive Director of [SMBRC], and administrative services that are funded by grants from U.S. EPA and other funding sources." (Ibid.)

To implement the Bay Restoration Project, SMBRC adopts an Annual Work Plan. (Wang Decl. 9, Exh. A.) Although the 2016 Work Plan distinguishes between employees of SMBRC and Foundation, prior work plans suggested overlapping functions of certain SMBRC and Foundation employees. (Wang Decl. 11; Ford Decl. 16; see Cossart-Daly Decl. Exh. 17.)

Some staff members of SMBRC hold positions with Foundation. (See Mot. 5; see e.g., Cossart-Daly Decl. Exh. 16 at 13; Exh. 22 at 38; Exh. 21 and 38.) For instance, Dr. Shelly Luce was executive director of both SMBRC and Foundation from 2005 to 2014. (Id., Exh. 16 at 13.) Thomas Ford is currently the executive director of both organizations. (Id., Exh. 22 at 38, 49; see Ford Decl. 4, 16.) Scott Valor is the Director of Government Affairs for SMBRC and Foundation, and he is responsible for responding to CPRA requests for SMBRC. (Valor Decl. 6.)

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Thomas Ford describes the operations of both entities. (Ford Decl. 4-19.) Ford asserts that, although it provides some administrative services to SMBRC, Foundation is a private organization that operates independently of SMBRC. (Id. 7-11.) Ford states that no funds from Foundation are provided to SMBRC, or vice versa. (Id. 10.) He represents that SMBRC has delegated to him "to manage staff who perform services for the SMBRC." (Id. 19.) Ford acknowledges that Foundation employees have inadvertently used SMBRC's address when they should have used Foundation's address, and that employees have inaccurately used "SMBRC" as a shorthand for the entire Santa Monica Bay National Estuary Program. (Id. 16.) He states that these inaccuracies do not reflect the structure of the SMBRC and Foundation as organizations, which remain two separate entities. (Ibid.)

Office Space and Computer Servers of SMBRC and Foundation

SMBRC uses office space of the Regional Water Quality Control Board at 320 W. 4th Street, Suite 200, Los Angeles, CA 90013. (Valor Decl. 8; Cossart-Daly Decl. Exh. 21 at 51.) SMBRC also uses office space at the campus of Loyola Marymount University (LMU) in Los Angeles, close to the Ballona Wetlands. (Cossart-Daly Decl. Exh. 7 and

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34.)

Foundation's primary place of business is at the SMBRC offices on the LMU campus. (Valor Decl. 2.) However, some Foundation employees use the Regional Board's downtown office. (Id. 9.)

SMBRC represents that Foundation operates its own computer servers to store documents at the LMU offices. (Valor Decl. 9.) Some Foundation employees who use the Regional Board's downtown office are provided access to certain shared SMBRC folders on the Regional Board server. (Ibid.) Although SMBRC contends that Foundation operates its own computer server, it appears that employees, such as Thomas Ford and Scott Valor, performing functions for SMBRC have access to Foundation's server. (See Cossart-Daly Decl. Exh. 23 at 142-143; Exh. 21 at 40-41, 50-58.)

Petitioner's CPRA Requests

On July 21, 2014, Petitioner's president, Walter Lamb, made a CPRA request to SMBRC for the following documents:

1) Copies of all minutes of meetings of the Board of Directors of The Bay Foundation between August 1, 2011 and the present date;
2) Copies of the most up-to-day calendar or

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schedule of meetings of The Bay Foundation's Board of Directors for 2014;
3) A copy of The Bay Foundation's bylaws or any similar governing documents;
4) Copies of any records of, or records relating to, grants or donations to The Bay Foundation from private entities;

[.]

7) All correspondence or other records, not previously disclosed or covered by the preceding requests, relating to the Annenberg Foundation's involvement as a partner in the Ballona Wetlands Restoration project, to include internal records and correspondence, correspondence with external individuals or entities, and records that relate either to the Annenberg Foundation's plans for an "urban ecology center" or to the larger restoration effort in general. (Lamb Decl. Exh. B.)

In a responsive letter dated August 26, 2014, Frances McChesney, an attorney for SMBRC, stated: "The Commission has no authority to respond to a request for public records on behalf of the Foundation and can only provide records that the Commission retains in the normal course of business." (Cossart-Daly Decl. Exh. 33; McChesney Decl. Exh. A.) McChesney indicated that SMBRC had no responsive documents for items 1 through 4, but

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that responsive documents would be provided for Item 7. (McChesney Decl. Exh. A.)

According to the verified petition, on November 18, 2014, Lamb submitted a CPRA request to SMBRC requesting, in part: "all written records prepared, owned, used or retained by any representative of the Santa Monica Bay Restoration Commission relating either to the Ballona Wetlands Restoration Project in general or the Annenberg Foundation's proposed 'Urban Ecology Center' specifically, that have not been previously disclosed to the Land Trust." (Pet. 29, Exh. I.)

On December 8, 2014, Lamb submitted a CPRA request to SMBRC for: "all written correspondence, including any attached or enclosed documents, between SMBRC staff, as identified in the current SMBRC Annual Work Plan, and the project manager for the Ballona Wetlands Restoration project, also identified in the Annual Work Plan." (Reply Lamb Decl. Exh. I; see also Pet. 21, Exh. L.)

According to the verified petition, on January 7, 2015, Lamb submitted a CPRA request to SMBRC for: "written records relating to requests to SMBRC Governing Board member organizations soliciting funds as part of a 'community fundraising initiative.'" (Pet. 33, Exh. M.) Lamb made a similar request for undisclosed records relating to

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the "community fundraising initiative" on January 26, 2015. (Id. 40, Exh. P.)

On July 13, 2015, after the verified petition was filed, SMBRC sent a letter to Laurie Newman, the president of Foundation, asking Foundation to voluntarily provide documents requested by Petitioner in the CPRA requests. (Newman Decl. Exh. A.) Newman represents that Foundation has produced the responsive documents within its possession, except those that Foundation states are confidential. (Newman Decl. 4.) As discussed further below, SMBRC also claims to have produced documents in response to some, but not all, of the CPRA requests. (Ford Decl. 12; Valor Decl. 17-20.)

Procedural History

The verified petition was filed on February 11, 2015.

On August 18, 2015, the Court set trial on the petition for January 26, 2016. The opening brief was due 60 days before the hearing; the opposition 30 days before the hearing; and the reply 15 days before the hearing.

The Court has received an opening brief, opposition brief, and reply brief.

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NATURE OF PROCEEDINGS:

Summary of Applicable Law

Code of Civil Procedure section 1085(a) provides in relevant part:

A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.

There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present and ministerial duty on the part of the SMBRC, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (California Ass'n for Health Services at Home v. Department of Health Services (2007) 148 Cal.App.4th 696, 704.) "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy " (Pomona Police Officers' Ass'n v. City of Pomona (1997) 58 Cal.App.4th 578, 583-84.)

Pursuant to the CPRA (Gov. Code § 6250, et seq.),

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individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that:

[E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available . . ." (Gov. Code § 6253(b).)

The CPRA defines "public records" submit to its provisions as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. (Gov. Code § 6252(e).)

"Private nongovernmental records are not subject to

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the CPRA." (Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun v. Sup. Ct. (2013) 218 Cal.App.4th 577, 592..) "'[T]he mere possession by a public [officer] of a document does not make the document a public record.' [Citations.] 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' [Citaitons]." (Id. at 593-594.)

The trial court should first consider whether the record is a "public record" under section 6252(e), and then whether such public records are in the possession of the public agency. (Regents of University of California v. Sup.Ct. (2013) 222 Cal.App.4th 383, 401-402.) Moreover, "if the document sought is not 'prepared, owned, used, or retained' by the public agency it is not a public record even though it may contain information relating to the conduct of the public's business." (Id. at 404.)

Analysis

To prevail on its petition under the CPRA, Petitioner must establish that the contested records (1) qualify as public records under the CPRA; and (2) were in the possession of SMBRC. (See Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun v. Sup. Ct. (2013) 218

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Cal.App.4th 577, 598.) "'Possession' in this context has been interpreted to mean both actual and constructive possession." (Ibid.) "[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person." (Ibid.; see also Consolidated Irr. Dist. v. Sup. Ct. (2012) 205 Cal.App.4th 697, 710-711.)

Shared Operations between SMBRC and Foundation

Petitioner argues that SMBRC and Foundation "have consistently operated as though they are a single entity, sharing identical mission statements, multiple staff and board members, annual reports, office space, server, letterhead, and logos." (Mot. 5, see also Mot. 9-13.) Petitioner relies on this factual premise to argue broadly that all responsive Foundation records should be disclosed by SMBRC. Petitioner argues that SMBRC has constructive possession of the contested records held by Foundation. (Mot. 13.) Petitioner further asserts that the contested records are "necessary or convenient" to the discharge of official duties of SMBRC staff members. (Mot. 14.) Finally, Petitioner contends that Foundation's records are disclosable public records because the evidence shows duties were delegated to the Foundation by SMBRC. (Mot. 15.) The Court finds the following cases instructive in addressing these arguments.

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In California State University v. Superior Court (2001) 90 Cal.App.4th 810, the court concluded that a public university-affiliated nonprofit auxiliary corporation was not a "state agency" for purposes of the CPRA. The court found that it was bound by the words of the CPRA in determining whether an entity was subject to its provisions, concluding that "a nongovernmental auxiliary organization is not a 'state agency' for purposes of the CPRA. The words 'state body' and 'state agency' simply do not include a nongovernmental organization." (Id. at 829.) The court contrasted this language with that used in the FOIA, which defined agency to include "government corporation, " and "government controlled corporation." (Id. at 829-830.) However, the Court of Appeal ordered the university to produce records related to the auxiliary corporation's operation of a sports arena on the university's campus. (Id. at 816, 835-836.)

In San Gabriel Tribune v. Sup.Ct. (1983) 143 Cal.App.3d 762, the City of West Covina "delegated its duty of trash collection" to a waste management company. (Id. at 775.) After the City raised trash rates, a CRPA request was submitted for financial statements of the waste management company that were used by the City in deciding to grant the rate increases. (Id. at 769.) The City claimed that the records were not public records because they were "a

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private corporation's confidential documents." (Id. at 770.) The Court of Appeal held that, because the City had delegated a duty to the waste management company, and the waste management company "provid[ed] a service to the residents of the City," the financial data was a public record. (Id. at 775.) The court also noted that the City Council had relied on the financial data as part of its decision-making and the data had been interjected into the public process. (Id. At 778)

In Board of Pilot Commissioners, supra, 218 Cal.App.4th, the Court of Appeal held that, although a designated port agent was a public official, a database of pilot assignments to vessels held by the port agent were not "public records." In addition to his public duties, the port agent had private duties as the president of a private association of licensed pilots. (Id. at 582.) The Court of Appeal found that there was no substantial evidence that the port agent used information from the database in the performance of his official duties. (Id. 596-597.)

Petitioner has not brought the petition against Foundation. Therefore, unlike in California State University, supra, the issue presented is not whether a third party, private entity may be compelled to disclose documents.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NONE Deputy Sheriff | BUFORD J. JAMES/CSR 9296 Reporter

9:30 am BS154128

THE BALLONA WETLANDS LAND TRUST
VS
SANTA MONICA BAY RESTORATION COMMISSION

Plaintiff Counsel SABRINA D. VENSKUS (x)

Defendant Counsel FRANCES MCCHESNEY (X)
KURT WEISSMULLER (X)

NATURE OF PROCEEDINGS:

Despite the wording in SMBRC's Work Plans and annual reports, the Court is not able to conclude on this record that the operations of SMBRC and Foundation are intertwined to an extent that all Foundation documents are "necessary and convenient" to SMBRC or that SMBRC has constructive possession of such documents. Foundation is a private, non-profit organization with its own budget, board of directors, and organizational structure. (Valor Decl. 2; Ford Decl. 10-12.) Foundation's bylaws suggest that, although it complements SMBRC, Foundation receives its own funding and has an independent directive to restore and enhance the Santa Monica Bay and "other coastal waters." (Newman Decl. Exh. B; see also Lamb Reply Decl. Exh. K [summary of Foundation's funding sources].) Petitioner does not present any evidence that the two organizations commingle funds or do not hold separate board meetings.

Although the Court does not adopt Petitioner's "Delegation of Duties Test" (see Mot. 15), Petitioner does persuasively argue that records relating to the public business may be "public records," even if prepared by employees of a private entity, if those persons were delegated duties of a public entity. (See Reply 9-10; see San Gabriel Tribune v. Sup.Ct. (1983) 143 Cal.App.3d 762, 775.) The Court analyzes the specific CPRA requests at issue in light of this legal framework.

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NATURE OF PROCEEDINGS:

Karina Johnston's Responsibilities in SMBRC's 2015 Annual Work Plan

Petitioner's prayer for relief "b." seeks a writ of mandate compelling production of "all records relating to SMBRC staff member Karina Johnston's responsibilities, as outlined in the SMBRC's 2015 Annual Work Plan." Petitioner contends that this category of documents falls within the a CPRA request made to SMBRC on December 8, 2014, which requested: "all written correspondence, including any attached or enclosed documents, between SMBRC staff, as identified in the current [2015] SMBRC Annual Work Plan, and the project manager for the Ballona Wetlands Restoration project, also identified in the Annual Work Plan." (Reply Lamb Decl. 10-11, Exh. I; see also Pet. 31, Exh. L.) 1 Petitioner alleges in the verified petition that Scott Valor responded to this request on December 19, 2014, stating: "The SMBRC does not have any documents that are responsive to this request." (Pet. 32,Exh. N.)

1- In opposition respondent's counsel states that she has not received a CPRA request for such documents from petitioner. (McChesney Decl. Parg. 19.) In his reply declaration Lamb refers to the December 8, 2014 request. (Reply Lamb Decl. Pargs 10-11.)

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NATURE OF PROCEEDINGS:

SMBRC's Fiscal Year 2015 Work Plan, which covers the period of October 1, 2014 to September 30, 2015, states that "restoration of the Ballona Wetlands Ecological Reserve has been a top priority of the SMBRC for many years." (Coddart-Daly Decl. Exh. 10.) The Work Plan states that "SMBRC works closely with the lead agencies, mainly the State Department of Fish and Wildlife [DFW] and the State Coastal Conservancy [SCC], to facilitate an inclusive, participatory process involving many stakeholders." (Ibid.) "Under this collaborative partnership, the SMBRC assisted the [SCC] to initiate and proceed with the CEQA/NEPA process for the Ballona Wetlands Ecological Reserve restoration planning." (Ibid.)

SMBRC's 2015 Work Plan states that Karina Johnston is the Director of Watershed Programs. Her responsibilities include overseeing development of restoration projects in the wetlands; directing the CEQA project manager; and developing projects under the direction of the SMBRC Executive Director. (Id. at 29.) Although the full version of the 2015 Work Plan was not submitted into the record, the 2014 Work Plan explicitly identifies Johnston as a staff member of SMBRC that contributes "to the mission of the SMBRC by carrying out specific tasks outlined in this annual Work Plan." (Coddart-Daly Decl. Exh. 7 at 25-28.)

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Johnston's correspondence also suggests that she performed work on Ballona Wetlands restoration projects in an official capacity with SMBRC. For instance, on April 15, 2013, she sent a progress report relating to Ballona Wetlands Restoration Planning to the State Coastal Conservancy signed as the Director of Watershed Programs for SMBRC and using letterhead bearing SMBRC's name and downtown Los Angeles address. (Id., Exh. 56 and 49; see also Lamb Reply Decl. Exh. E [April 1, 2014 letter signed as Director of Watershed Programs for SMBRC; Exh. F [January 26, 2012 letter]; Exh. G.) 2

2- Although Parg. "b." in petitioner's prayer for relief is directed only at records relating to Johnston's responsibilities, petitioner argues in its moving papers that other SMBRC staff members "with duties pertaining to the Ballona Wetlands Restoration also prepared, owned, used or retained records relating to the Ballona Wetlands Restoration." (Mot. 10.) The 2014 SMBRC Work Plan states that executive director Dr. Shelly Luce develops and implements "projects that restore and enhance the ecological values of the Santa Monica Bay and its watersheds." (Coddart-Daly Decl. Exh. 17 at 25.) The 2014 Work Plan identifies the Ballona Wetlands CEQA Project Manager as Diana Hurlbert. (id. At 29; see also Exh. 25 [Scott Valor's services for SMBRC for October 2014]; Exh. 10 at 32 [identifying Ivan Medel as Watershed

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NATURE OF PROCEEDINGS:

Programs Managers].)

SMBRC does not specifically discuss the December 8, 2014 CPRA request in its opposition brief, and its position on whether it had (or has) responsive documents is unclear. (Oppo. 8; see also Ford Decl. 12.) Thomas Ford states that "it is my understanding that documents related to [the Ballona Wetlands Restoration Project] that were in the possession of the SMBRC or even of [Foundation] staff, including documents of Ms. Hulbert, Ms. Johnston, and Ms. Luce, were provided to Mr. Lamb." (Ford Decl. 12.) Ford provides no foundation for how he came to this understanding.

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NATURE OF PROCEEDINGS:

CONTINUATION FROM PRIOR MINUTE ORDER

Lamb also states in his reply declaration SMBRC has not disclosed email correspondence between Johnston and Ballona CEQA/NEPA project manager, Jeff Thomas, or other Ballona Project consultants. (Lamb Reply Decl. 12-13.)

SMBRC appears to argue that, despite the language from the 2015 Work Plan, SMBRC and its staff do not directly work on Ballona Wetlands restoration projects.
Dr. Wang suggests that prior Annual Work Plans, as well as staff members, "confuse the names" of SMBRC and the Santa Monica Bay National Estuary Program (SMBNEP). (Wang Decl. 11.) Dr. Wang states that the 2016 Annual Work plan has been revised to accurately reflect that other entities, particularly the SCC and the DFW, "are the lead agencies for the development of the Ballona Wetlands Restoration Project" and that SMBRC does not manage that project. (Id. 11, Exh. A at 16-18.) SMBRC states that Karina Johnston has performed services for SMBRC, such as assisting in the meetings of SMBRC's Governing Board, Technical Advisory Committee, and Watershed Advisory Council, but that 80 percent of her time supports the SCC and DFW . (Ford Decl. 11.)

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SMBRC's after-the-fact revision of its Annual Work Plan does not undermine the substantial evidence, discussed above, that Johnston performed her work as Director of Watershed Programs for SMBRC. The 2014 and 2015 Work Plans were explicit in stating that Johnston performed the tasks outlined in the Work Plan as a staff member for SMBRC. The opposing papers also do not persuasively explain Johnston's correspondence which suggests she performed her work as Director of Watershed Programs for SMBRC.

Petitioner has made a prima facie showing that SMBRC has not produced all public records responsive to the December 8, 2014 CPRA request. In reply, Petitioner cites to evidence (submitted with the moving papers) that Johnston testified in deposition that she sent between 10 and 500 e-mails with Jeff Thomas regarding the Ballona Wetlands Restoration Project. (Reply 6; Cossart-Daly Decl. Exh. 24 at 61-62.) An October 2014 email from Thomas Ford, as well as the 2015 Work Plan, suggests that Jeff Thomas was hired to serve as the Ballona Wetlands CEQA Project Manager. (Exh. 10, 30.) Substantial evidence suggests that these emails are public records because they concern an issue that, according to SMBRC's 2015 Work Plan, "has been a top priority of the SMBRC for many years." (Cossart-Daly Decl. Exh. 10 at 11.) The evidence reflects that Johnston functions as a public officer

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for SMBRC, and that she performed work on Ballona Wetlands Restoration Projects for SMBRC.

The evidence also reflects that responsive documents are in the possession of SMBRC. Johnston, a public officer for SMBRC, concedes that her documents are stored on the computer server at the LMU offices of SMBRC and Foundation, and that she has access to those documents. (Cossart-Daly Decl. Exh. 24 at 87-88.) Also, officers of SMBRC, such as Thomas Ford and Scott Valor, use Foundation's server for SMBRC business. (See Cossart-Daly Decl. Exh. 23 at 142-143; 21 at 40-41, 50-58.) This is substantial evidence that Johnston's emails are within SMBRC's actual or constructive possession.

The petition is granted as to the records identified in paragraph "b." of Petitioner's prayer for relief.

Annenberg Foundation Documents

Petitioner's prayer for relief "a." seeks a writ of mandate compelling production of "documents relating to the grant agreement between the Annenberg Foundation and SMBRF [Foundation] that were prepared, owned, used or retained by SMBRC staff." This prayer is based on a CPRA request made on July 21, 2014 for: "All correspondence or other records, not previously disclosed or covered by the preceding requests, relating to the Annenberg Foundation's

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involvement as a partner in the Ballona Wetlands Restoration project, to include internal records and correspondence, correspondence with external individuals or entities, and records that relate either to the Annenberg Foundation's plans for an 'urban ecology center' or to the larger restoration effort in general." (Lamb Decl. Exh. B.) 3

3- Petitioner refers to this category of documents, as well as the records relating to Karina Johnston's responsibilities, as the 'Ballona Records." (Mot. 6-7.)

Petitioner submits evidence that federal funds from the EPA Grant, which has the express purpose to support SMBRC to implement the Bay Restoration Plan, are matched with non-federal funds. (Cossart-Daly Decl. Exh. 14 at 59; Lamb Decl. Exh. G.) In a letter to the U.S. E.P.A. dated June 2, 2014, Marcelo Villagomez includes a grant application and budget that suggests that the Annenberg Foundation provided matching funds to Foundation. (Lamb Decl. Exh. H.)

In January 2013, SMBRC and Annenberg entered into a memorandum of understanding regarding restoration planning for the Ballona Wetlands. (Ford Decl. 13, Exh. C.) The MOU sets forth an objective for Annenberg to construct a 46,000 interpretative facility (the "Ballona Interpretative Center") in

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the wetlands. (Ibid.) On December 10, 2014, the Annenberg Foundation sent a letter to Thomas Ford, as Executive Director of SMBRC, indicating that Annenberg was suspending its involvement in the restoration planning at Ballona Wetlands Ecological Reserve. (Cossart-Daly Decl. Exh. 29.)

Petitioner submits an agreement between Foundation and Annenberg, executed October 3, 2013, which commits $107,250 to Foundation to employ a staff coordinator for the Ballona Wetlands restoration project, which includes an "Urban Ecology Center." (Cossart-Daly Decl. Exh. 37.)

In his reply declaration, Lamb states that SMBRC has not disclosed to Petitioner "records relating to the Annenberg Payment agreements, such as any invoices, progress reports, or other correspondence relating to those payment agreements." (Lamb Reply Decl. 12.) Attorney McChesney and Scott Valor do not specifically show what documents, if any, SMBRC produced in response to the CPRA request for the Annenberg grant agreement. (See McChesney Decl. 7.) Newman, the president of Foundation, states in her declaration that while Foundation does possess responsive documents, they are confidential documents abount private entities that Foundation is bound to keep confidential. (Newman Decl. 4.)

The evidence discussed above suggests that the

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Annenberg grant was used to employ a staff coordinator for the Ballona Wetlands restoration project, which is the subject of an MOU between SMBRC, a public entity, and Annenberg. The restoration project also "has been a top priority of the SMBRC for many years." (Cossart-Daly Decl. Exh. 10.) As discussed above, although Foundation may use funding to support SMBRC's services, the evidence reflects that Foundation independently receives and manages the funding. (Valor Decl. 2; Ford Decl. 10-12; Newman Decl. Exh. B.) The Ballona Wetlands restoration project is public business, but the Annenberg grant agreement itself appears to fall squarely within Foundation's private function of obtaining funds to supports SMBRC and other projects within its mission. Nevertheless, since the payment records relate to the Ballona Wetlands restoration project, they relate to public business.

The Court is unable to conclude, however, that the documents were "prepared, owned, used, or retained" by SMBRC. The payment agreement was sent to Marcelo Villagomez in his administrative capacity with Foundation, and it was signed by Dr. Luce as director of Foundation. (Id. Exh. 37.) Petitioner does not point to evidence that SMBRC officers have used the requested documents in the performance of official duties. (See Board of Pilot Commissioners, supra, 218 Cal.App.4th at 596-597.)

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Petitioner also does not show that SMBRC possesses these documents. It is not clear from his record where these documents are stored, or whether they are stored in electronic format. Petitioner does not point to any evidence of SMBRC's possession of the Annenberg documents in its opening brief. (Mot. 12-13.) Although it seems possible that an officer for SMBRC, such as Thomas Ford or Scott Valor, could control these documents, that fact has not been established by the preponderance of evidence.

The petition is denied as to the documents described in paragraph "a." of Petitioner's prayer for relief.

"Any other written records responsive to past CPRA requests"

Paragraph "f." of Petitioner's prayer for relief seeks a writ of mandate compelling SMBRC to produce "any other written records that would be responsive to past CPRA Requests but that were improperly withheld based on the improper interpretations of the CPRA addressed in this Petition." Petitioner does not specifically discuss this prayer for relief; show which specific CPRA requests are at issue; or show that SMBRC possesses or has improperly withheld responsive documents.

The petition is denied as to the documents described

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in paragraph "f." of Petitioner's prayer for relief.

Petitioner's Prayer for Declaratory Relief

On November 20, 2015, SMBRC's counsel sent a letter to Petitioner indicating that Foundation had agreed to produce responsive documents for categories of documents "c." through "e." in Petitioner's prayer for relief. (Weissmuller Decl. Exh. H.) In the moving papers, Petitioner states that SMBRC has recently produced the documents referred to by Petitioner as the "Meeting Records, Bylaws, and Cash Reserve Funding Initiative Records ." (Mot. 7.) 4

4- On July 21, 2014, petitioner made a CPRA request to SMBRC for "copies of any records of, or records relating to, grants or donations to The Bay Foundation from private entities." (Lamb Decl. Exh. B.) On January 7, 2015, petitioner made a CO\PRA request to SMBRC for: "written records relating to requests for SMBRC Governing Board member organizations soliciting funds as part of a 'community fundraising initiative.'" (Pet. Parg. 33, Exh. M; see also Id. Parg .40, Exh. P.) Petitioner refers to these requests in its legal briefs as the "Cash Reserve Funding Initiative Recocrds." (Mot. 7.)

"Any person may institute proceedings for injunctive

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or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter." (Gov. Code § 6258 [emphasis added].)

In reply, Petitioner cites case law suggesting that a CPRA cause of action may not be rendered moot if a public agency produces requested documents after the initiation of a lawsuit. (See Reply 11; Fairley v. Sup. Ct. (1998) 66 Cal.App.4th 1414, 1419.) These cases point out that the Petitioner may be awarded attorney fees and costs if it was entitled to the documents under the CPRA, and that declaratory relief may also be appropriate for a CPRA cause of action if it would address a legal issue of "continuing concern." (See Ibid.)

Foundation Bylaws

On July 21, 2014, Petitioner made CPRA requests to SMBRC for "a copy of The Bay Foundation's bylaws or any similar governing documents." (Lamb Decl. Exh. B.)

Petitioner argues that SMBRC admitted that its Director of Government Affairs used Foundation bylaws to perform SMBRC business. (Mot. 11.) In his declaration, Scott Valor states that, at a meeting in February 2008 of the Governing Board of

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SMBRC, the agenda included the election of Governing Board members of Foundation. (Valor Decl. 18.) Valor provided information in the staff report for the Board about the Foundation's bylaws, but he did not provide a copy of the bylaws. (Ibid.)

The bylaws state that SMBRC's Board may appoint members of Foundation's Board. (Cossart-Daly Decl. Exh. 20.) Therefore, the bylaws relate to the public's business, i.e. the power of SMBRC, a public entity, to appoint Foundation's Board. They were also used by SMBRC's Governing Board in a meeting, as specified above.

Since the bylaws are public records, (see Board of Pilot Commissioners, supra, 218 Cal.App.4th at 597) the issue is whether SMBRC possesses the documents. Scott Valor represents that the bylaws are stored on Foundation's server at LMU. (Valor Decl. 17-18.) However, the evidence reflects that Foundation shares this space with SMBRC, and that employees of SMBRC, including Thomas Ford, use the same server. (See Cossart-Daly Decl. Exh. 23 at 142-143.) There is also substantial evidence that Scott Valor serves as Director of Government Affairs for both SMBRC and Foundation. Id., Exh. 21 at 40-41, 50-58.) He is also the designated SMBRC official responsible for responding to CPRA requests. (Id., Exh. 21 at 119.) Substantial evidence shows that Valor has access to these documents in his "incarnation" as a public

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official for SMBRC. (Board of Pilot Commissioners, supra, 218 Cal.App.4th at 592.)

The petition for declaratory relief is granted as to Foundation's bylaws.

Foundation Meeting Minutes and Schedules

On July 21, 2014, Petitioner made CPRA requests to SMBRC for: (1) "Copies of all minutes of meetings of the Board of Directors of The Bay Foundation between August 1, 2011 and the present date"; and (2) "Copies of the most up-to-day calendar or schedule of meetings of The Bay Foundation's Board of Directors for 2014." (Lamb Decl. Exh. B.)

Petitioner contends that SMBRC's staff are responsible for supporting meetings of Foundation's Board of Directors and that they have assisted in preparing meeting notices, agendas, resolutions, and other documents for Foundation. (Mot. 11.) SMBRC's 2014 Work Plan states that "SMBRC staff will provide logistical and other staff support for meetings of the Government Board/Bay Watershed Council, and the [Foundation] and SMBRA Boards of Directors." (Cossart-Daly Decl. Exh. 17 at 23.) Executive director Ford testified at deposition that "SMBRC staff" prepare meeting notices, agendas, staff reports, minutes, and resolutions for the Foundation. (Id. at Exh. 23 at 135.) Scott Valor

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testified that he drafted Foundation minutes for a board meeting in August 2007 "because that's what I did for the foundation." (Id. at Exh. 21 at 122-123.)

Foundation is a private, non-profit organization with its own budget, board of directors, and organizational structure. (Valor Decl. 2; Ford Decl. 10-12.) Foundation's bylaws suggest that, although it complements SMBRC, Foundation receives its own funding and has an independent directive to restore and enhance the Santa Monica Bay and "other coastal waters." (Newman Decl. Exh. B.) The responsive documents, produced by Foundation, do not provide any information suggesting that the records relate to public business or that officers of SMBRC use or retain these documents. (Newman Decl. Exh. B.)

Petitioner points to conclusory evidence that SMBRC staff helped prepare meeting minutes and related documents. The Court finds this evidence insufficient to conclude that all of Foundation's meeting minutes and related documents were prepared, used, or retained by SMBRC staff.

Petitioner also has not shown that these documents are actually or constructively possessed by SMBRC. It is not clear from his record where these documents are stored, or whether they are stored in

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electronic format. Although it seems possible that an officer for SMBRC, such as Thomas Ford or Scott Valor, could control these documents, that fact has not been established by Petitioner.

The petition for declaratory relief is denied as to Foundation's meeting minutes and related documents.

"Cash Reserve Funding Initiative Records"

On July 21, 2014, Petitioner made a CPRA request to SMBRC for "copies of any records of, or records relating to, grants or donations to The Bay Foundation from private entities." (Lamb Decl. Exh. B.) On January 7, 2015, Petitioner made a CPRA request to SMBRC for: "written records relating to requests to SMBRC Governing Board member organizations soliciting funds as part of a 'community fundraising initiative.'" (Pet. 33, Exh. M; see also Id. 40, Exh. P.) 5 Petitioner refers to these CPRA requests in its legal briefs as the "Cash Reserve Funding Initiative Records." (Mot. 7.)

5- Petitioner concedes that respondent produced these documents. (Mot. 7; Cossart-Daly Decl. Parg. 2.) The evidence reflects that respondent had asked Foundation to voluntarily produce the records. (Weissmuller Decl. Exh. H.)

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Petitioner cites to a letter dated August 20, 2012, from Dr. Shelley Luce to Los Angeles County Supervisor Zev Yaroslavsky which asks for his "participation and leadership in a community-wide initiative of the Santa Monica Bay Restoration Foundation." (Cossart-Daly Decl. Exh. 42.) The letter is presented on SMBRC's letterhead and apparently signed by Dr. Luce as executive director of SMBRC. (Ibid.) Dr. Luce refers to Foundation as the "nonprofit and fiscal agent" of SMBRC, and states that "our community fundraising initiative will provide critical financial support for the activities of the SMBRC." (Ibid.) Petitioner also cites a follow-up letter on the same topic, also on SMBRC's letterhead, apparently signed by Scott Valor for SMBRC. (Id. at Exh. 50.)

SMBRC recently produced to Petitioner documents that it obtained from Laurie Newman, President of Foundation. (McChesney Decl. 18; Newman Decl. Exh. A and B.) Many of those documents are responsive to Petitioner's CPRA request for "Cash Reserve Funding Initiative Records." For instance, Newman produced multiple other letters from Dr. Luce, on SMBRC letterhead, addressed to public officials and requesting their financial support for Foundation, as SMBRC's fiscal agent. (Newman Decl. Exh. B.) Newman also produced responsive letters from public officials addressed to Dr. Luce as executive director of SMBRC. (Ibid.)

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These fundraising letters and responses are public records of SMBRC because they were either prepared by Dr. Luce in her capacity as executive director of SMBRC, or received by her in that same capacity. They also relate to public business in that they request funds for Foundation to support SMBRC activities. Because the records were addressed to SMBRC, there is substantial evidence that SMBRC has possession of these documents.

Exhibit B to Newman's declaration also includes invoices for payments made to Foundation from public officials, apparently in response to Dr. Luce's fundraising letters. By the same reasoning discussed above, these invoices relate to public business because they show funding obtained by efforts of Dr. Luce in her public capacity. However, Petitioner has not shown that these documents are actually or constructively possessed by SMBRC. It is also not clear that Dr. Luce or other officials of SMBRC prepared, used, or retained these documents.

The petition for declaratory relief is granted in part as to the "Cash Reserve Funding Initiative Records." The petition is granted as to all fundraising letters and responsive letters as described above, but not invoices of Foundation.

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DATE: 01/26/16 | DEPT. 82

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B HALL/COURTROOM ASST

HONORABLE 8 JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

NONE Deputy Sheriff | BUFORD J. JAMES/CSR9296 Reporter

9:30 am BS154128

THE BALLONA WETLANDS LAND TRUST
VS
SANTA MONICA BAY RESTORATION COMMISSION

Plaintiff Counsel SABRINA D. VENSKUS (X)

Defendant Counsel FRANCES MCCHESNEY (X)
KURT WEISSMULLER (X)

NATURE OF PROCEEDINGS:

Conclusion

The petition is granted as to the documents described in paragraph "b." of Petitioner's prayer for relief as it relates to records pertaining to Karina Johnston's responsibilities as outlined in the SMBRC 2015 work plan. The petition is denied as to the documents described in paragraphs "a." and "f." of the prayer for relief. The petition with respect to declaratory relief is granted in part, and denied in part, as set forth above as to paragraphs "c" through "e" of the prayer for relief.

If the court receives no objections, the court's minute order shall become the final statement of decision.

A copy of this minute order is mailed via U.S. Mail to counsel addressed as follows:

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FRANCES MCCHESNEY, ESQ., WATER RESOURCES BD., 1001 I ST., 22ND FL., SACRAMENTO, CA 95814

KURT WEISSMULLER, DEPUTY ATTY GENERAL, 300 S. SPRING ST., SUITE 1702, LOS ANGELES, CA 90013

MINUTES ENTERED
01/26/16
COUNTY CLERK