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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE IDAHO PRESS CLUB, INC.,

Petitioner

vs.

ADA COUNTY,

Respondent.

Case No. CV01-19-16277

REPLY MEMORANDUM IN SUPPORT OF VERIFIED PETITION TO COMPEL DISCLOSURE OF PUBLIC RECORDS AND FOR DECLARATORY JUDGMENT

The County's position in this case turns the presumption of Government transparency and disclosure upside down. It relies on generalized notions of privacy that are unmoored from the text of the Public Records Act or other controlling law. Its interpretation of the attorney-client and the attorney work product privileges goes far beyond the narrow scope of those doctrines. And its claim of a "deliberative process privilege" is not found in Idaho law and, even if it were, it would not be nearly as broad as the County claims.

At the outset, Petitioner wishes to re-emphasize a few fundamental principles. There is "a

presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." Idaho Code § 74-102(1). The governmental entity has the burden to show cause to the Court and prove that withheld records fit within an exemption to disclosure. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002). Because there is a presumption of openness, exemptions from disclosure are to be construed narrowly. *Id*. The entity can meet its burden only by making a "specific demonstration" proving that the exemption it relied on truly applies to the requested records. *Ward v. Portneuf Medical Center, Inc*., 150 Idaho 501, 504 n.3, 248 P.3d 1236, 1239 n.3 (2011). Because public records are, in fact, public, the Court should order disclosure unless it is obvious that the records are exempt. *Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250, 1256 (2014).

I.

The Act does not permit a governmental entity to withhold information that it deems "private" in its sole discretion that is not otherwise expressly exempt from disclosure.

Rather than making a specific demonstration that a withheld public record fit within a narrowly construed exemption, the County begins with a sweeping discourse on privacy and the supposed dangers of disclosing personal information through a public records request. (Memo. in Opp., pp. 9-15.) In defiance of the Act and established Idaho Supreme Court case law, the County believes "Idaho governments must proceed cautiously when making records publicly available." (Memo in Opp., p. 14.) This would explain its expansive view of its right to withhold reams of information from the public and from the requesters in this case. At several points in its briefing the County indicated that responding to public record request was "a significant decision" and "difficult" for it, and the Act foisted upon it, as a government, the need to make privacy "risk" decisions. (Memo in Opp., pp. 3,5.) But nowhere does the Act allow the County to

conduct its own risk determinations.

Throughout its Memorandum, the County points to Idaho Code § 74-104(1), which exempts from disclosure "any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided by such law or regulation." (*Id*. at 14.) From there, the County seems to argue that a generalized right to privacy prohibits it from disclosing certain undefined personal information. (*Id*.) The County does not clearly state the legal basis or the source of this sweeping privacy right, the scope of this alleged right, or any test to apply it.

To the extent it is relying on federal law, it treads on unstable ground. The very existence of the right itself is not clearly established and the Constitution does not explicitly recognize a right to informational privacy. The Supreme Court has not specifically held that such a right exists, but rather has only assumed its existence for the purposes of analyzing the cases before it. *National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 138 (2011). Two Supreme Court justices in *NASA v. Nelson* recently voiced their opinion that a constitutional right to informational privacy does not exist at all. *Id.* at 160 (Scalia, J., concurring) ("A federal constitutional right to 'informational privacy' does not exist."). Three jurists in the Ninth Circuit have also questioned the continued existence of a right to informational privacy. *Nelson v. NASA*, 568 F.3d 1028, 1052 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc) ("Is there a constitutional right to informational privacy? Thirty-two Terms ago, the Supreme Court hinted that there might be and has never said another word about it."). There is no clear and well-established federal privacy law for the County to rely upon. To the extent that such a right exists, it would be very narrow, involving only the most private, intimate details of one's life, such as one's personal medical information, and would not protect names, phone numbers,

physical addresses, email addresses or the like. [1] *E.g*, *Norman-Bloodsaw v. Lawrence Berkeley Lab*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up.").

The County's concerns are exaggerated in any event, as there are dozens of exemptions that the Legislature has seen fit to put into the Act itself *with the very purpose of protecting personal and private information*. *See e.g*. I.C. §74-106 (28) (exempting certain personal information of applicants for Fish and Game licenses). But nowhere does the Act require, let alone allow, an agency to make its own subjective rules about privacy "risk" decisions, as the County admits is it current practice. (Memo in Opp., p. 3.) The County's broad interpretation of Idaho Code § 74-104(1) would swallow the other specific exemptions into some type of free-floating, ill-defined, and all-encompassing privacy exemption that allows different governmental agencies across the state to conclude what is protected private information and what is not.

The County cites a few cases in the "privacy" section of its Memorandum, none of which are relevant to the issues at hand. It first block quotes from a 24-year-old district court opinion, *Howe v. City of Boise*, Case No. 98224 (Fourth Judicial District, 1995). That case is unpublished, and Petitioner does not have access to it. For that reason alone, the Court should disregard it. *Howe* was decided before the more recent Idaho appellate interpretations of the Act cited by Petitioner that underscore a presumption of public access. And even the one sentence summary of *Howe v. City of Boise* in the Attorney General's Public Records Manual under "unpublished decisions" online indicates the County in that case over-redacted certain names, sex, ages, and addresses of persons who were arrested, which should have been disclosed. Idaho Public

[1] The Idaho Supreme Court appears to agree that phone numbers, addresses and emails are not subject to privacy redactions under revised I.R.C.P. Rule 2.6 "Privacy Protection for Filings Made with the Court" which does not protect this information.

Records Law Manual, p. 64,

https://www.ag.idaho.gov/content/uploads/2018/04/PublicRecordsLaw.pdf

The County also frets that releasing information might expose it to liability in a lawsuit for invasion of privacy. It cites a few cases that involved claims for violation of a privacy right. (Memo. in Opp., pp. 10-11, citing *Jensen v. State*, 139 Idaho 57, 72 P.3d 897 (2003), and *Nation v. State Dep't of Corr*, 144 Idaho 177, 158 P.3d 953 (2007).) These were not Public Records Act cases, and they have nothing to say about the County's duties under the Act. In *Jensen,* the Court upheld the denial of Jensen's license renewal as a home health worker when the State discovered from its own records her murder conviction. *Nation* arose as a Section 1983 action, and the Court found no liability for the release of unredacted victim statements in the context of discovery.

Regardless, the County's fears of litigation are unfounded. It has overlooked its absolute immunity from a suit or damages for any information that it has released in good faith. Idaho Code § 74-118.

II.

The County erroneously applies exceptionally broad attorney-client and attorney work product privileges to withhold wide swaths of public records.

The County relies on two privileges related to attorneys and their work: the attorney-client privilege and the attorney work product privilege. (Memo. in Opp., pp. 15-17.)

Idaho law recognizes a privilege from disclosure for confidential attorney-client communications "made for the purpose of facilitating the rendition of professional legal services to the client …" I.R.E. 502; Idaho Code § 9-203. The Press Club does not quibble with that. But here it appears to have been applied carte blanche to dozens if not hundreds of pages of records far beyond the circumscribed parameters of the doctrine. There is good cause to

believe that the County has used the guise of attorney-client privilege to shield public records that should have been disclosed.

The privilege is the client's, and it can be waived when the holder of the privilege voluntarily discloses or consents to disclosure "a significant part of the matter or communication." I.R.E. 510. A paradigmatic example would be if a third party is privy to the communication between the attorney and client. Any employee of an organization who is entitled to the privilege can also waive it by voluntarily disclosing the information. *E.g. Jonathan Corp. V. Prime Computer, Inc.,* 114 F.R.D. 693 (E.D. Va. 1987). Merely copying an attorney on an email between two or more people also does not shield that record from disclosure because it is not a communication that is "for the purpose of facilitating the rendition of professional legal services to the client." I.R.E. 502; *See also Sherwood v. BNSF Railway Co.*, 325 F.R.D. 652, 661 (2018) *citing U.S. V. Chen*, 99 F.3d 1495, 1501(9th Cir. 1996) ("It is well understood that the mere fact that a person is a lawyer does not lay a cloak of privilege upon everything that lawyer prepares, sees or hears.").

Perhaps most importantly, under Idaho law, the party wishing to withhold documents as privileged has the burden of establishing the privileged character of the communication. *Kirk v. Ford Motor Co*., 116 P.3d 27, 34 (2005). The County disregarded that duty. In the Davlin response, the County offered absolutely nothing to establish the privileged character of the records. We don't know who was involved, when the communications, if any, occurred, or what their purpose was. In the Sewell response, the County went a small step further by superimposing language over certain redactions, but that fares no better, since this meager attempt still does not provide enough information for any reasonable outside observer to discern why the redacted portions are privileged.

There may also be a limited privilege under Idaho law for attorney work product, but it only exists to preclude the discovery of materials created by an attorney *in preparation of litigation*. *Cf. Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (establishing the doctrine in the federal courts and even noting that "where production of those facts is essential to the preparation of one's case, discovery may properly be had"). This doctrine doesn't shield every jot and tittle that an attorney happens to write down. It is instead very much a "trial preparation" privilege. The County has put forward no evidence that it was withholding the work product of attorneys who created material while preparing for litigation. There is no work product exemption under Idaho law for the County Commissioners who are not attorneys, despite their futile efforts to assert it.[2] That doctrine simply should not apply to prevent disclosure in this case.

III.

There is no "deliberative process privilege" under Idaho law. Even if there were, it would be much narrower than the County suggests.

The County claims a privilege for its deliberative processes. It relies yet again on Idaho Code § 74-104(1), which looks to exemptions in other federal or state laws "to the extent specifically provided by such law or regulation."

The County initially cites federal cases that define a deliberative process privilege. (Memo. in Opp., pp. 17-18.) Those cases, of course, are defining a deliberative process privilege for cases involving federal agencies. The Freedom of Information Act (FOIA) – which governs public records requests from the federal government – includes a specific exemption for privileges, including a deliberative process privilege. 5 U.S.C. § 552(b)(5). *See Andrus v.*

[2] *See* Lachiondo Declaration, Visser Declaration, and Kenyon Declaration at ¶¶ 5.

U.S. Dep't of Energy, 200 F. Supp.3d 1093, 1105-1106 (D. Idaho 2016) (providing a thoughtful discuss of the application of the privilege and its scope.). The Idaho Public Records Act does not have that same exemption. A federal deliberative process privilege intended for federal executive agencies in the federal courts does save Ada County from disclosing public records under an Idaho state law. It is inapplicable.

The County admits that it "was unable to find an Idaho case discussing the deliberative process privilege …" (Memo. in Opp., p. 18.) Instead, it notes that some states have recognized such a privilege under their own common laws. (Memo. in Opp., p. 19.) Yet it is equally true that other states have expressly declined to find a privilege in favor of more transparency. *See e.g., Republican Party of N.M. v. N.M. Taxation & Revenue Dep't,* 283 P.3d 853, 868 (N.M. 2012) ("we … hold emphatically that no deliberative process privilege exists under New Mexico law"); *see also Rigel Corp. v. Arizona*, 234 P.3d 633, 640–41 (Ariz.Ct.App.2010); *News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 20 (1992) ("We refuse to engraft upon our Public Records Act exceptions based on common-law privileges, such as a 'deliberative process privilege,' to protect items otherwise subject to disclosure."); *Sands v. Whitnall Sch. Dist*., 754 N.W.2d 439, 458 (2008) ("Wisconsin does not recognize a deliberative process privilege. [State statute] precludes the extension of common law privileges by the court on a case-by-case basis, but rather requires common law privileges not originating in the constitution to be adopted by statute or court rule.").

Even if Idaho had a deliberative process privilege, it would not be as expansive as the County suggests, as the County has ignored the specificity requirements in those jurisdictions that have such a privilege. The deliberative process privilege is a qualified privilege, meaning that it only applies if it furthers its purpose of encouraging the frank exchange of ideas and

opinions critical to the government's decision-making process. *E.g. City of Colorado Springs v. White*, 967 P.2d 1042, 1051 (Colo. 1998) (citation omitted). "In light of the purposes of the privilege, it protects only material that is both pre-decisional (i.e., generated before the adoption of an agency policy or decision) and deliberative (i.e., reflective of the give-and-take of the consultative process)." *Id*. at 1052. The government has the burden to show that information is privileged, and it "cannot meet these requirements by conclusory and generalized allegations of privilege." *Id*. at 1053. Instead, it must typically provide an index with "a specific description of each document claimed to be privileged" and why it qualifies. *Id*. at 1053.

In response to the public records requests in this case, the County made no attempt to carry its burden to show, with specificity, that each withheld or redacted record fit some type of "decisional process privilege." It instead offered the "conclusory and generalized allegations of privilege" disdained by one of the very cases it cites. *See White*, 967 P.2d at 1052.

The Idaho Supreme Court has yet to adopt a "decisional process privilege," and finding one would run counter to the Act's intent of more sunshine and openness in government. But even if one were to exist under Idaho common law, the County has wholly failed to justify its withholding scores of pages of public records under its conclusory and generalized allegations that a decisional process privilege protects them.[3]

IV.

The Act does not exempt all 911 calls

The County claims the Act prevents the disclosure of 911 calls, and the Moeller request

[3] At one point in its Memorandum, the County suggests that any discussions about an employee would be exempt from disclosure by Idaho Code § 74-106(1). (Memo. in Opp, p.17.) That provision of the Act, however, prohibits disclosure only of certain personal information from within an employee's personnel file. It cannot be stretched, as the County seems to do here, to prevent disclosure of any and all discussions "about" a County employee. (*Id*.)

does not constitute a public records request as it was made via email. (Memo. in Opp., pp. 30-32.) Both arguments are without merit. The Act specifically allows a request to be transmitted by "electronic mail". Idaho Code §74-102(4). The exemptions set forth for law enforcement records at Idaho Code §74-124(1) are also inapplicable to the 911 request, as the County concedes the matter did concern a law enforcement investigation. *See* Orr Declar. ¶ 15.

V.

Conclusion

Records in the County's possession belong to the public and are presumptively open for inspection. The County carries the burden to show that a narrow exemption applies. It's heavy and unwarranted reliance on Idaho Code § 74-102(1) creates an exception that swallows the rule.

The Press Club respectfully asks the Court not to take the bait that the County is offering, in which it dangles vague and standardless privacy concerns untethered from the Act, privileges that have not been justified, and, in one instance, a privilege that has not yet been recognized by the Idaho Supreme Court. The Court should review the documents *in camera*, apply the correct and narrow standards, and order the County to disclose those items not legitimately exempted by the Act and produce a privilege log of documents withheld under the Act, detailing the information concerning those documents which is not exempt from disclosure.

Respectfully submitted on this 30th day of September, 2019.

/s/ Deborah A. Ferguson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2019, I electronically filed the foregoing document using the iCourt E-File system, and emailed a copy to counsel for Respondent at:

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