



City and Borough of Sitka

100 Lincoln Street • Sitka, Alaska 99835

MEMORANDUM

To: Sara Peterson, Municipal Clerk
From: Brian Hanson, Municipal Attorney
Date: June 17, 2020

The following is my submission for the appeal by Mr. Feronti of the decision denying his Public Record Request (PRR) submitted on April 14, 2020. I have copied Mr. Feronti. Please distribute to the Assembly for the June 23, 2020, appeal hearing at the Assembly's regular meeting.

Introduction

This is an appeal of a denial of a PRR made by Mr. Feronti. The Assembly is required to hear the appeal as a quasi-judicial body. The Assembly must decide to deny or grant, in whole or in part, the appeal, after receiving evidence and argument from Mr. Feronti and myself (on behalf of CBS). There are no code provisions which govern procedure. There are no applicable formal rules of evidence or procedure. The Assembly is expected to proceed informally in hearing this appeal. The Mayor will preside over the hearing with the authority to make rulings on procedure. I am available for counsel regarding procedure.

Procedural and Factual Background

A PRR, dated April 14, 2020 (Exhibit A), was submitted by Nicholas Feronti, an attorney working for Northern Justice Project (NJP), to the Municipal Clerk of the City and Borough of Sitka (CBS) by email on April 14, 2020. That PRR requested "[a]ll records from and concerning Sitka Police Department case number 20-0020." In his additional description of the records requested, Mr. Feronti states "[t]his case concerns Ryan Silva." Note, NJP, through its attorneys James Davis and Mr. Feronti, represented

Ryan Silva in the civil case Mr. Silva brought against CBS and the Sitka Police Department (SPD), Case No. 1SI-18-00176 CI, which was settled by agreement after mediation and subsequently dismissed with prejudice in the fall of 2019. Further note, the case number referenced by Mr. Feronti in his PRR is an internal administrative designation for the investigation. Such numbers are not public and, consequently, could only be obtained by Mr. Feronti if there was a breach of administrative protocol at SPD. This breach of administrative protocol is currently under investigation.

Mr. Feronti's PRR was denied by the Municipal Clerk, pursuant to my counsel (as required by code and practiced by the Municipal Clerk and the Legal Department), by letter dated April 28, 2020 (Exhibit B). Mr. Feronti submitted a written appeal and request for reconsideration to the Municipal Clerk by letter dated April 30, 2020 (Exhibit C). In his letter, Mr. Feronti stated "we hereby appeal the denial of this request" and, in his concluding sentence, states "[p]lease reconsider the errant denial and provide the requested records." By email sent to Mr. Feronti on April 30, 2020 (Exhibit D), I advised Mr. Feronti of my intent to reconsider the denial of his PRR and only to proceed with the appeal if that reconsideration was denied. By email sent to me on April 30, 2020 (Exhibit D), Mr. Feronti insisted I proceed with the appeal. By email sent to Mr. Feronti on April 30, 2020 (Exhibit D), I assured Mr. Feronti that I would advance the appeal; but, in the meantime, I would reconsider the denial and potentially disclose the records requested. After reconsidering the denial, by notice given by email dated May 27, 2020 (Exhibit E), I advised Mr. Feronti that the denial stands and that his appeal would proceed. In my email to Mr. Feronti, I advised him that the appeal hearing was set for June 23, 2020, with "written materials" due for submission by noon on June 17, 2020.

Argument

At the outset it should be noted that there is a presumption by Alaska courts in favor of disclosure and that Alaska courts are required to narrowly construe exceptions in favor of disclosure. See *Fuller v. City of Homer*, 73 P.3d 1039, 1061-62 (Alaska 2003). I followed that presumption when making my decision and narrowly construed the exception I applied in making my decision. The Assembly, when considering Mr.

Feronti's appeal, when substituting its judgment for me should follow the presumption and narrowly construe the exception I applied.

In addition, it should be noted at the outset that the burden is on me, on behalf of CBS, to justify denying Mr. Feronti's PRR. See *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 593 (Alaska 1990). I accept that burden.

The records Mr. Feronti seeks, which are SPD investigation files (e.g., officer reports, witness interview reports), are protected by what is known as the "law-enforcement-interference exception" to the Public Records Act (PRA), found in Sitka General Code (SGC) 1.25.040 "Public records exceptions." I relied on subsections (A)(5)(a), (b), and (c) of SGC 1.25.040 which states in pertinent part (full text attached) ". . . [e]very person has a right to inspect a public record **except** [emphasis added] . . . [r]ecords or information compiled for law enforcement purposes, but only to the extent that production of the law enforcement records or information: (a) Could reasonably be expected to interfere with enforcement proceedings; (b) Would deprive a person of a right to a fair trial or an impartial adjudication; (c) Could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim or witness: . . ." This exception is fundamental to protecting law enforcement investigations from outside interference, which in turn assures the right to a fair trial/impartial adjudication and protects the personal privacy of the suspect, victim and/or witness. It is common for the Municipal Clerk, with counsel from the Municipal Attorney, to invoke this exception when there is a PRR for records from an active SPD criminal investigation.

In this case, the investigation is currently active and will necessitate further investigation by law enforcement. The case is in the process of being turned over to the State of Alaska for investigation and possible prosecution, for the purpose of avoiding any perceived bias or conflict of interest by SPD in light of the aforementioned civil litigation against CBS by Mr. Silva. The need to protect the integrity of the active investigation warrants withholding the requested records at this time. The need to protect the

investigation from interference by Mr. Silva or others working on behalf of Mr. Silva warrants withholding the requested records at this time. Evidence could be compromised. The records, as well as related law enforcement investigation strategies and tactics, could be used to the detriment of the investigation. An unwarranted invasion of the personal privacy of Mr. Silva, the alleged victims, and witnesses warrants withholding the requested records at this time. Mr. Silva's reputation and character should be protected, as well as the reputation and character of the alleged victims and witnesses. The alleged victims and witnesses should be protected from undue influence. Remember, no crime has been charged. This is a matter under investigation. If a crime is charged, the records will be subject to disclosure. If the investigation is closed without a crime charged, the records will be subject to disclosure. The foregoing establishes a reasonable expectation of interference with enforcement proceedings if the records were released at this time and a reasonable expectation of an unwarranted invasion of the personal privacy of the suspect, victims and/or witnesses if the records were released at this time. Please note an important consideration, the nature of the offense being investigated is not being presented in this submission to protect the personal privacy of Mr. Silva, the alleged victims, and the witnesses. Any discussion of the nature of the offense being investigated should be done in executive session.

In his letter of appeal, Mr. Feronti cites *Basey v. State*, 408 P.3d 1173, 1180 (Alaska 2017), for the proposition that CBS cannot invoke the "law-enforcement-interference exception" by merely pointing to a pending criminal investigation involving Mr. Silva. However, CBS is not just pointing to the investigation. As discussed above, CBS is pointing to the fact that the investigation is ongoing, it needs to be protected from interference, the evidence, strategies and tactics need to be safeguarded until a prosecutorial determination is made, and the personal privacy of Mr. Silva, the alleged victims, and the witnesses need to be protected from unwarranted invasion. The *Basey* case provides no holding as to what must be shown to invoke the exception – such was not necessary for its decision. The showing made in this submission and at the hearing will clearly invoke the exception. I have attached a copy of the *Basey* decision for your

review. You will see that only the last three paragraphs (less than a page of the decision) deals with the exception and, most importantly, provides no guidance as what needs to be shown to invoke the exception. Regardless, a proper showing has been made in this submission, and will be made at the hearing, to invoke the exception.

Conclusion

For those reasons stated above and those reasons provided at the hearing to be held on Mr. Feronti's appeal on June 23, 2020, the Assembly should uphold the decision not to produce the requested records to Mr. Feronti which are excepted from disclosure by the "law-enforcement-interference exception" to the PRA.