Filed 1/13/26 Creech v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THOMAS EUGENE CREECH, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; SAN BERNARDINO COUNTY, Real Party in Interest.	E085656 (Super. Ct. No. CIVSB2431147) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Michael A. Sachs, Judge. Petition granted in part with directions.

Christopher M. Sanchez, Federal Defender Services of Idaho, for Petitioner.

Wesierski & Zurek, Christopher P. Wesierski and Valerie R. Chrissakis, for Real Party in Interest.

No appearance for Respondent.

I.

INTRODUCTION

Thomas Creech is on death row in Idaho for a murder he committed in that state. During a clemency hearing before the Idaho Commission of Pardons and Parole in January 2024, an Idaho prosecutor told the Commission that Creech murdered Daniel Walker in San Bernardino County. About a month later, Idaho tried to execute Creech by lethal injection, but he survived.

In the weeks between that hearing and Creech's execution attempt, Idaho prosecutors, the San Bernardino County Sheriff's Department (the Sheriff), and the San Bernardino District Attorney (the DA)[1] made public statements identifying Creech as Walker's murderer. Creech denies that he murdered Walker and maintains he had not even heard of the murder until the Commission hearing. Creech thus sought records from the Sheriff and the DA under the California Public Records Act (Gov. Code §§ 7921.000 et seq.; CPRA) to challenge their claims that he murdered Walker.[2]

The records Creech sought fall into two categories: (1) all County investigative records related to Walker's murder, and (2) all communications the Sheriff and the DA had with Idaho prosecutors and law enforcement between January 2023 and January 2024 that concern Creech's clemency proceedings (clemency-related communications). The

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[1] We sometimes refer to the Sheriff and the DA collectively as "the County."

[2] Unless otherwise indicated, all further statutory references are to the Government Code.

County denied both requests, so Creech filed a petition for a writ of mandate in the trial court.

The trial court ordered the County to disclose to Creech the approximately 3,000 pages of investigative records that had been given to Walker's relative (the Walker file),[3] subject to a protective order that, among other things, precluded Creech and his counsel from publicly disclosing the documents. The trial court denied Creech's petition as to the clemency-related communications on the ground they do not exist.

Creech timely filed a petition for a writ of mandate in this court, asking us to direct the trial court to vacate its protective order and enter an order (1) directing the County to give Creech a copy of the Walker file without restrictions on its use and (2) directing the County to give Creech a copy of all clemency-related communications. We grant the petition in part and remand for further proceedings.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Creech was sentenced to death in 1982 for murdering a fellow inmate in Idaho prison. (See *Creech v. Richardson* (9th Cir. 2023) 59 F.4th 372.) In January 2024, Creech had a hearing before the Commission to petition to commute his death sentence to life in prison without the possibility of parole. (*Creech v. United States Dist. For Dist. of Idaho (In re Creech)* (9th Cir. 2024) 119 F.4th 1114, 1116.) At that hearing, a prosecutor

[3] All further references to "the Walker file" pertain only to the documents disclosed to the Walker family.

for the Ada County Prosecuting Attorney's Office (the Idaho prosecutor) told the Commission that Creech murdered Walker in San Bernardino in 1972. The prosecutor thus opposed Creech's request for commutation in part because granting it would allow Creech to "get[] away with the murder of Mr. Walker." The Commission's vote was a tie, so Creech's death sentence was not commuted, and his execution was scheduled for a month later.

In the interim, the Idaho prosecutor's office made a press statement claiming that "'[e]arlier this week, a cold case was solved in San Bernardino, California when after law enforcement's thorough investigation, they determined Mr. Creech had murdered Daniel A. Walker in October 1974." The Sheriff put out a similar press release identifying Creech as Walker's murderer. The Sheriff stated that in November 2023, detectives "obtained additional information related to [Walker's] murder and identified the suspect" as Creech. The statement went on to explain that the detectives "were able to corroborate intimate details from statements Creech made regarding [Walker's] murder" by working with the Idaho prosecutor. The Sheriff also noted that the DA had "reviewed the case and is in consultation with" the Idaho prosecutor. In a separate public statement, the DA said, "Creech would not have been named a suspect without evidence that he believed prosecutors could prove beyond a reasonable doubt." The DA, however, stated he would not prosecute Creech for Walker's murder because "it's a jurisdictional issue and we are going to let the process play out."

A few weeks later, Idaho tried to execute Creech by lethal injection. (*In re Creech*, *supra*, 119 F.4th at p. 1119.) The attempt was unsuccessful, and Creech survived. (*Ibid*.)

Given the authorities' public statements pinning Walker's murder on him, Creech sought records from the County under the CPRA. Creech sent demand letters under the CPRA to the DA and the Sheriff requesting: (1) all communications from the year prior with various Idaho law enforcement authorities (including the Idaho prosecutor) concerning Walker and/or Creech, and (2) all documents concerning Walker, including all correspondence with the Walker family.

The DA denied the request but identified one responsive document: "a letter sent to the [Idaho prosecutor]." The Sheriff denied the request altogether. Both the DA and Sheriff cited the CPRA's investigation-records exemption (§ 7923.600) as the basis for the denial.

Creech then filed a petition for a writ of mandate under the CPRA in the trial court. As to the Walker file, Creech contended that the Sheriff and DA had waived their right to rely on the CRPA's investigative-records exemption by giving the file to the Walker family. As for the clemency-related communications, Creech argued the investigative-records exemption did not apply because the County's involvement in the commutation proceedings was not motivated by any potential prosecution of Creech since the DA did not intend to prosecute him.

At a hearing on Creech's petition, the trial court began by indicating that it intended to grant Creech's request for any documents in the County's possession that had been provided to the Walker family, subject to a protective order. After a colloquy with Creech's counsel, the trial court explained that it was "not convinced that these documents [released to Walker's family] are such that they should be released to the world." But the court found that Creech was entitled to use those documents "to assist him in his efforts to seek clemency or any type of relief" in court. The court therefore directed the County to produce "the documents that were released to the Walker family," but instructed Creech and his counsel that the documents were "not to be released to the public" or the media without further court order and had to be filed under seal if Creech used them in court filings.[4]

As to the clemency-related communications, the trial court denied Creech's petition outright. The basis for the court's order was that it was "not aware of any" such documents. The court noted that it had no "declaration from anybody from the State of Idaho [that] they were relying on any information from" the DA or the Sheriff. Nor was there any "correspondence from the [Sheriff] or correspondence from folks in Idaho to the Sheriff." Instead, the court believed Creech's request for clemency-related communications was based on "extrinsic material" or "information that [he] may have

[4] The trial court's post-hearing, written order on Creech's petition and its corresponding protective order have the same instructions about the Walker file. The order also directed Creech and his counsel not to post any of the documents on the Internet or social media.

read somewhere." Because there was no "affirmative evidence" supporting Creech's position that County and Idaho officials had been in conversation with one another about Walker's murder or Creech, the trial court denied Creech's request for the clemency-related communications.

III.

DISCUSSION

Creech makes two principal arguments. First, he contends that, because the County waived any right under the CPRA to exempt the Walker file from disclosure by giving it to the Walker family, the trial court erroneously placed the protective order on the file. Second, he contends the trial court erred by not ordering the County to produce the clemency-related communications based on an incorrect finding that they do not exist.

A. *CPRA Overview and Standard of Review*

The CPRA "grants access to public records held by state and local agencies" and "was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. [Citation.] Such 'access to information concerning the conduct of the people's business,' the Legislature declared, 'is a fundamental and necessary right of every person in this state.' [Citation.] Consistent with the Legislature's purpose, the [C]PRA broadly defines 'public records' to include '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.' [Citation.]" (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290.)

We review the trial court's legal determinations under the CPRA de novo and its factual determinations for substantial evidence. (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 66.)

B. *The Walker File*

The County does not challenge the trial court's order directing disclosure of the Walker file to Creech.[5] Creech, however, challenges the trial court's protective order restricting his use of the file.

We first note that the County effectively concedes, and we agree, that the trial court found (at least implicitly) that the County waived any right to withhold the file from Creech under the CPRA's investigative-records exemption by giving the Walker file to the Walker family. The trial court was right to do so. (See § 7921.505, subd. (b) ["[If a state or local agency discloses to a member of the public a public record that is otherwise exempt from this division, this disclosure constitutes a waiver of the exemptions specified in . . . [s]ection[] 7924.510 (investigative-records exemption)"]; see also *Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 901.) The only question, then, is whether the trial court properly imposed the protective order on Creech's use of the Walker file. We conclude the court did not do so.

[5] We reiterate that our reference to "the Walker file" is only to the documents the DA voluntarily disclosed to the Walker family.

When, as here, a party waives its right to exempt records from disclosure that otherwise should be disclosed under the CPRA, the records must be disclosed. (See generally *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 (*Kehoe*).) This is because records are either "completely public or completely confidential" for CPRA purposes. (*Ibid*.) Thus, our Supreme Court held over 40 years ago that "once information is held subject to disclosure under the [CPRA], the courts can exercise *no restraint* on the use which it may be put." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 451 (*ACLU*), italics added.) This is because the CPRA "imposes no limits upon who may seek information *or what he may do with it*." (*Ibid*., italics added.) The trial court thus had no authority under the CPRA to impose the protective order.

But the County argues the court had that authority under Evidence Code section 1040 (section 1040). That statute creates a privilege for "official information," which allows government entities not to disclose "information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (§ 1040, subd. (a).) The "privilege is granted to enable the government to protect its secrets." (Assem. Com. on Judiciary com., 29B pt. 3 West's Ann. Evid. Code (1995) foll. § 1040, p. 375.)

The parties strenuously dispute whether the trial court imposed the protective order under section 1040. We agree with Creech that nothing in the court's statements at the hearing or its written, post-hearing order suggest that it relied on section 1040 to impose the protective order. But we must affirm the court's ruling if correct on any ground presented by the record, regardless of the court's reasoning. (*People v. Geier* (2007) 41 Cal.4th 555, 602, overruled on other grounds by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.) Assuming the trial court relied on section 1040 to impose the protective order, as the County contends, we conclude the court erred in doing so. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-84 [finding of section 1040 privilege reviewed for abuse of discretion].)

Like any privilege, the official information privilege may be waived. (See *People v. Tockgo* (1983) 145 Cal.App.3d 635, 641-642.) In *Tockgo*, for instance, a police officer waived any claim that "identifying characteristics" of stolen goods was privileged official information "by disclosing [them] in [an] affidavit, a public document." (*Ibid*.) But the privilege is not waived when government agencies share official information in a nonpublic fashion. (*Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036, 1048 (*Michael P.*).) Nor is the privilege waived when law enforcement publicly discloses limited information about an ongoing investigation. (See, e.g., *People v. Jackson* (2003) 110 Cal.App.4th 280, 289-290.)

These cases reflect the principle that, as to criminal investigations, the "privilege applies to official *nonpublic* information obtained by prosecutors and their law enforcement counterparts." (*Electronic Frontier Foundation Inc. v. Superior Court of San Bernardino* (2022) 83 Cal.App.5th 407, 417, italics added.) But the Walker file is no longer nonpublic. As the County admitted below and acknowledges in this court, the DA gave the Walker file—a total of about 3,000 pages—to Walker's family. There is no real dispute that, by doing so, the County waived any right to claim those records are exempt from disclosure under the CPRA's investigative-records exemption (§ 7921.505, subd. (b)(2).)[6]

For the same reason, we conclude the County waived any claim of privilege under section 1040 as to the Walker file. (See *People v. Tockgo*, *supra*, 145 Cal.App.3d at pp. 641-642; see also *ACLU*, *supra*, 32 Cal.3d at p. 451 [noting section 1040 "serves essentially the same purposes as the [investigative-records] exemption"].) The trial court erred to the extent it found otherwise.

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[6] The County correctly notes that the trial court never expressly "found a waiver of the [investigative-records] exemption . . . to have occurred." But because the trial court found that Creech was entitled to the Walker file (which contains investigative records), the court at least impliedly found that the County waived its right to withhold the file under the investigative-records exemption. The court was right to do so. (See *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1189 [government agency waives CPRA exemption "by making a voluntary and knowing disclosure"].)

Again, the purpose of the privilege is "to enable the government to protect its secrets." But the Walker file is now public information in the hands of the Walker family, so the County can no longer maintain any secrecy in the file. In fact, Walker's brother, Douglas Walker, recently filed a declaration in Idaho federal court claiming that the County gave him "some 3,000" pages of documents concerning his brother's murder and describing the purported contents of some of the documents.[7] Given this, we agree with Creech that the County cannot now claim that the Walker file is nonpublic information that has not been "officially disclosed" to the public. (§ 1040; *Electronic Frontier Foundation Inc. v. Superior Court of San Bernardino* (2022) 83 Cal.App.5th 407, 417; see also *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759.)

In short, the County waived any claim of privilege as to the Walker file under section 1040 by voluntarily producing the file to the Walker family with no apparent restrictions. (See *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1186-1187 [explaining that privileges can be waived by knowing, voluntary disclosure of privileged documents].) The County cannot now withhold the Walker file as privileged under section 1040. (See *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 128, overruled on other grounds in *People v. Holloway* (2004) 33 Cal.4th 96.)

[7] We take judicial notice of Mr. Walker's declaration under Evidence Code section 452, subdivision (d). (See *Creech v. Idaho Commission of Pardons & Parole* (D. Idaho 2024), 1:24-cv-66-GMS, ECF No. 63-2.)

The County suggests that the trial court nonetheless properly imposed the protective order under *County of Orange v. Superior Court*, *supra*, 79 Cal.App.4th 759, and *Michael P.*, *supra*, 92 Cal.App.4th 1036. These cases are distinguishable.

The *County of Orange* court held the trial court improperly ordered disclosure of documents about an ongoing criminal investigation because the documents were privileged under section 1040. (*County of Orange v. Superior Court*, *supra*, 79 Cal.App.4th at p. 767.) The court therefore did not decide whether the trial court's protective order was proper, though the court noted that "[w]hat parts or how much of the file to disclose to the [plaintiffs] is a question for the trial court" in the future and that the trial court may need to issue a protective order someday. (*Id*. at pp. 769 & 769 fn. 4.) Here, however, the documents at issue are not privileged under section 1040.

In *Michael P.*, the trial court found "the official information privilege applied and precluded disclosure of materials relating to an ongoing criminal investigation." (*Michael P.*, *supra*, 92 Cal.App.4th at p. 1040.) The trial court therefore did not issue a protective order. The only issue was whether the trial court properly denied the petitioner's request for documents about the criminal investigation without conducting an in-camera review of the documents. (*Ibid*.)

County of Orange and *Michael P.* thus do not provide much guidance here.[8] But our Supreme Court's decision in *ACLU* does, and it leads us to conclude the trial court's protective order was improper.

As noted, *ACLU* explained that "once information is held subject to disclosure under the [CPRA], the courts can exercise *no restraint* on the use to which it may be put" because the CPRA "imposes no limits upon who may seek information *or what he may do with it*." (*ACLU*, *supra*, 32 Cal.3d at p. 451.) Our Supreme Court went on to explain, "by way of contrast to the *unrestricted seeking and use of information* acquired under the [CPRA], the discovery procedures employed under [] section 1040." (*Ibid*.) Continuing its comparison to the CPRA, the court explained that, under section 1040, "a court will uphold disclosure only if the public interest in disclosure outweighs the necessity for preserving confidentiality . . . and can in some cases impose protective orders to limit the use and dissemination of the information." (*Ibid*.)

This discussion from *ACLU* shows that, unlike documents protected by section 1040, documents sought in a CPRA suit that must be disclosed as nonexempt become fully public. This means that courts cannot place restrictions on who uses them or how they are used.

[8] The County has not cited, nor can we find, any case in which a party waived its section 1040 privilege, but the trial court nonetheless properly imposed a protective order.

This conclusion finds support in *Kehoe*. There, the plaintiffs sought documents from a government agency concerning citizens' complaints about collection agencies' allegedly illegal practices. (*Kehoe*, *supra*, 42 Cal.App.3d at p. 648.) The *Kehoe* court held the documents had to be disclosed to the plaintiffs under the CPRA because the government agency "routinely disclose[d]" the citizen complaints to the collection agencies. (*Id*. at p. 654.) The court reasoned: "When a record loses its exempt status and becomes available for public inspection, section 6253, subdivision (a), endows *every citizen* with a right to inspect it. *By force of these provisions, records are completely public or completely confidential* . . . . When defendants elect to supply copies of complaints to collection agencies the complaints become public records available for public inspection." (*Id*. at pp. 656-657, italics added.)

The Legislature codified this holding from *Kehoe* in section 7921.505, subdivision (b), the CPRA's exemption-waiver provision. (*Newark Unified School Dist. v. Superior Court*, *supra*, 245 Cal.App.4th at p. 901.) By passing that provision, the Legislature intended to ensure that "'once a document has been released *to any member of the public*, it becomes open to public scrutiny.'" (*Id*. at p. 903, italics added.) "'[d]isclosure to one member of the public would constitute a waiver of the exemption [citation], requiring disclosure to any other person who requests a copy.'" (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321-1322.) Government agencies thus cannot "'selective[ly] withhold[] government documents'" or "manipulat[e] the [C]PRA exemptions by asserting them against some members of the public while waiving them as

to others." (*Newark Unified School Dist. v. Superior Court*, *supra*, 245 Cal.App.4th at p. 903.)

That is what the County is attempting to do here. The Walker file lost its exempt status under the CPRA when the County knowingly and voluntarily provided it to the Walker family. (§ 7921.505, subd. (b); *Newark Unified School Dist. v. Superior Court*, *supra*, 245 Cal.App.4th at p. 901.) The Walker file thus became "completely public," meaning it became "open to public scrutiny" and usable by any member of the public for any lawful purpose. (See *ACLU*, *supra*, 32 Cal.3d at p. 451.) The trial court thus had no authority to place restrictions and limitations on its use, including those in its protective order. (*Ibid*.; *City of San Jose v. Superior Court* 1999) 74 Cal.App.4th 1008, 1018 ["[O]nce a public record is disclosed to the requesting party, it must be made available for inspection by the public in general."].) We therefore direct the trial court to vacate its protective order.

C. *Clemency-Related Communications*

The trial court denied Creech's request for clemency-related communications between the County and Idaho law enforcement on the ground that they do not exist. As the County concedes, this was an error.

At no point below did the County suggest there was no communication or records of communication between the County and Idaho authorities. In fact, the County admitted in its answer to Creech's petition that "there was communication between the [Sheriff] and [the Idaho prosecutor] regarding Mr. Creech's commutation request." The

County likewise did not deny the petition's allegations that the Sheriff was "working with Idaho prosecutors" and that "the DA and the Idaho prosecutors were in consultation." Instead, the County's answer admitted that the DA "was in consultation with" the Idaho prosecutor. There is thus no dispute that the County and its Idaho counterparts were in communication about Creech and his alleged involvement in Walker's murder. (Code Civ. Proc., § 431.20, subd. (a) [fact admitted in answer is "taken as true"].) For that reason, the trial court erred in denying Creech's request for clemency-related communications on the ground they do not exist.

The County contends the trial court nonetheless did not prejudicially err because the communications are exempt from disclosure under the investigative-records exemption. "Our role in the CPRA process is to 'conduct an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence. [Citation.]" (*Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1422.) The trial court here incorrectly found that no clemency-related communications existed, so the court made no finding as to whether those communications are exempt from disclosure. We believe the trial court should consider the issue in the first instance on remand. (See *ibid*.; *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 832; *Edais v. Superior Court* (2023) 87 Cal.App.5th 530, 543.)

IV.

DISPOSITION

Creech's petition is granted in part. Let a peremptory writ of mandate issue directing the trial court to vacate its February 28, 2025 order on Creech's CPRA petition and the court's corresponding protective order. The matter is remanded to the trial court to conduct further proceedings consistent with this opinion. The parties shall bear their own costs on appeal (Cal. Rules of Court, rule 8.493(a)(1)(B)).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.