

PARTIES/ATTORNEYS

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| Plaintiff | Elvia Reyes | Mario A. Juarez Juarez, Adam & Farley LLP |
| Defendant | Cynthia Valles and Joaquin Lopez | A. Maria Plumtree Nicholas Brunner Jonathan Gonzalez Plumtree & Brunner LLP |
| Cross- Complainant | Cynthia Valles dba A+ Plastering | A. Maria Plumtree Nicholas Brunner Jonathan Gonzalez Plumtree & Brunner LLP |
| Cross- Defendant | Elvia Reyes and Steven Hunter | Mario A. Juarez Juarez, Adam & Farley LLP |

TENTATIVE RULING

The court rejects the theories that the Public Records Act or deliberative process privilege afford protection from production. The court also rejects the theory that the records sought are not “business records” of CLSB. The court finds that the Notice to Consumer given to Elvia Reyes and Stephen Hunt satisfies the notice to individuals to whom the records pertain under the Information Practices Act. That being said, the court directs further argument on why *the unlicensed contractors* should not also be considered individuals to whom the records pertain under the Information Practices Act and whether any such notice was given. Assuming the court is convinced that notice was given (or the defect can otherwise be resolved), the motion may be granted.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See [Remote Appearance \(Zoom\) Information | Superior Court of California | County of Santa Barbara.](#))

Plaintiff Elvia Reyes alleges that on or about January 4, 2021, she and defendant Cynthia Valles entered into a written agreement for defendant to perform stucco work on plaintiff's property. Plaintiff alleges the work was not performed in a workmanlike manner. On May 26, 2021, plaintiff filed a complaint against Valles and Joaquin Lopez alleging causes of action for (1) breach of a written contract; (2) breach of contract implied in fact; (3) declaratory relief; (4) negligent misrepresentation; (5) intentional misrepresentation; (6) unfair business practice; and (7) negligence.

On September 1, 2021, Cynthia Valles dba A+ Plastering filed a cross-complaint against plaintiff and Steven Hunter (co-owner of the home) for (1) breach of contract; (2) enforcement of mechanic's lien; and (3) declaratory relief.

A+ Plastering is owned by Cynthia Valles. Her husband, Joaquin Lopez, performed and supervised all the work performed for Reyes. He states A+ Plastering (A+) performed limited stucco work on the Property. More specifically, A+ applied Base X Merlex and a color coat of stucco to the exterior of the Property. (Lopez Decl., ¶ 4.) He further states that Reyes hired an unlicensed contractor named Ignacio Bernal-Torres to perform construction work on the property prior to A+ performing its work, and, further, Reyes hired another unlicensed contractor named Moises Ismael Solano Soto to perform work on the property while A+ was performing work. (Lopez Decl., ¶ 6.) These unlicensed contractors performed window installation, replaced damaged wood, demolished stucco, and installed paper and wire, which underlay the Merlex color coat applied by A+. (Lopez Decl., ¶ 7; see also Exhibits 5-6.) Reyes reportedly filed a complaint against Mr. Bernal-Torres with the Contractors State License Board ("CSLB"), which is the administrative agency charged with regulating the conduct of persons and entities that perform construction work—both with and without a license. The CSLB then investigated Mr. Soto's work performed on the property. The CSLB found the unlicensed contractors were acting in the capacity of contractors without a license and fined each of them. (See Exhibits 5-6.)

A+ asserts that Reyes is attempting to recover damages from it for the work performed by the unlicensed contractors. To prove A+ did not perform this work, it served a subpoena on the CSLB for production of business records only, requesting production of the following documents:

REQUEST FOR PRODUCTION NO. 1:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the Contractors State License Board file for citation #2-2018-1124.

REQUEST FOR PRODUCTION NO. 2:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the Contractors State License Board file for citation #5-2021-1948.

REQUEST FOR PRODUCTION NO. 3:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the citation issued on 02/16/2022, citation #5-2021-1948.

REQUEST FOR PRODUCTION NO. 4:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the complaint No. NI2021-11160

REQUEST FOR PRODUCTION NO. 5:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the Contractors State License Board file for NA 2020008441.

REQUEST FOR PRODUCTION NO. 6:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the Contractors State License Board file for Ignacio Bernal-Torres.

REQUEST FOR PRODUCTION NO. 7:

Produce all DOCUMENTS that COMPRISE, REFER OR RELATE to the Contractors State License Board file for Moises Ismael Solano Soto.

The CSLB objected based on attorney-client communications and attorney work product; the requests were not reasonably particularized; and the privileges related to the protection of the reporting party. It produced citation Nos. 2-2020-2128 (#NA2020-8441) [Ignacio Bernal-Torres] and 5-2021-1948 (#NI2021-11160) [Moises Ismael Solano Soto]. Each citation includes a section describing the “cause” for the citation. Any information identifying the “complainant” and the location of the home has been redacted from the citation.

Defendant and cross-complainant Cynthia Valles (A+ Plastering) now moves for an order compelling the CSLB to comply with deposition subpoena.¹ The CSLB filed opposition on October 21, 2024, which was untimely. (See Code Civ. Proc., § 1005, subd. (b).) The court nevertheless exercises discretion to consider it as no prejudice has been demonstrated.

Merits

To obtain business records from a non-party, a party to litigation may serve a subpoena. (Code of Civil Procedure §§ 2020.010, 2020.020.)² A failure to comply is properly addressed by a motion requesting a court order directing compliance with a subpoena that requires the production of records. (Code Civ. Proc., §§ 1987.1; 2025.480, subd. (a).)³

¹ A+ reports that it has tried but has been unable to obtain the information from the plaintiffs, who claim under the penalty of perjury that they have produced all responsive documents, which did not include the CSLB complaints against the Unlicensed Contractors.

² When the business records described in the deposition subpoena are personal records pertaining to a consumer, the deposition subpoena and a notice of privacy rights shall be served on the consumer. (Code Civ. Proc., § 1985.3(e).) The Notice to Consumer must be served at least 5 days before service on the records custodian. (Code Civ. Proc. § 1985.3, subd. (b)(2), (3).) It appears that this procedure has been followed.

³ “This motion shall be made no later than 60 days after the completion of the record of the deposition, and shall be accompanied by a meet and confer declaration” (*Id.*, § 2025.480, subd. (b).) Here, the moving party reports (and

While a showing of good cause is required on motions to compel document discovery from a party per Code of Civil Procedure sections 2025.450(b)(1) (depositions) or 2031.310(b)(1) (inspection demands), the relevant statutes for a nonparty are silent on such a requirement. (See Code Civ. Proc., §§ 1987.1, 2025.480.) At least one court has held that if there is a “good cause” showing required to compel production of party documents, such a requirement also applies to nonparty production. (*Calcor Space Facility, Inc. v. Sup.Ct. (Thiem Indus., Inc.)* (1997) 53 Cal.App.4th 216, 223-224 [“since it is unlikely the Legislature intended to place greater burdens on a nonparty than on a party to the litigation, we read a similar [good faith] requirement” into the relevant statutes”].)

Here, A+ argues that good cause exists because “Despite only paying [A+] \$2,430.00, Plaintiff claims that [A+] is liable for over \$100,000 in defective work. The astronomical difference between these numbers is directly attributable to the fact that Plaintiff is disingenuously attempting to hold [A+] liable for work that [A+] did **not** perform but that the Unlicensed Contractors **did** perform.” (Motion, p. 10:25 - p.11:2.) This is sufficient to establish good cause.

Objections

A. Privacy Protections and Privileges

CLSB objects to production on the basis that the documents requested contain private information subject to privacy protections. The court will consider each asserted protection separately.

1. Information Practices Act

Under the Information Practices Act, “[a]n agency shall not disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains” except under defined circumstances. (Civ. Code, § 1798.24; see *Doe v. Department of Motor Vehicles* (2024) 102 Cal.App.5th 1004, 1022) Among these circumstances is disclosure “[t]o any person pursuant to a subpoena, court order, or other compulsory legal process if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law.” (*Id.*, § 1798.24, subd. (k).)

The IPA works hand-in-hand with the consumer notice provisions applicable to deposition subpoenas. A deposition subpoena that seeks “personal records pertaining to a consumer” must be accompanied by proof that the consumer was served with notice of the subpoena or by the consumer's written authorization to

release his or her personal records. (Code Civ. Proc., § 2020.410, subd. (d).) The statute “requires that consumers be informed when certain personal records have been subpoenaed, and it offers them the opportunity to challenge that subpoena before the documents sought are produced. [Code of Civil Procedure s]ection 1985.3 offers a consumer a ‘statutory procedural mechanism for enforcing his or her right to privacy.’” (*Foothill Federal Credit Union v. Superior Court* (2007) 155 Cal.App.4th 632, 639.) State agencies are specifically included in the consumer notice requirement. (Code Civ. Proc., § 1985.4.) The statutory procedures are applicable to any subpoena seeking “‘personal information’” maintained by an agency that is otherwise exempt from public disclosure. (*Ibid.*) The term “personal information,” as adopted by the consumer notice statutes, means “any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.” (Civ. Code, § 1798.3, subd. (a), adopted by Code Civ. Proc., § 1985.4.) The definition of “personal information” is taken from the IPA. (Civ. Code, § 1798 et seq.)

Thus, an agency may disclose personal information as it is defined by the IPA pursuant to a subpoena if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains. (Civ. Code, § 1798.24, subd. (k).) Because a deposition subpoena that implicates a consumer’s personal information must be accompanied by proof of service on the consumer, the notice requirement is satisfied. Under such circumstances, the IPA is not an impediment to production.

The Notice to Consumer was timely and properly served on plaintiff Elvia Reyes and Stephen Hunter. (See Motion, Exhs. 1-2.) No objection has been reported. However, *all* such consumers must receive notice. A “consumer,” in this context, means any natural person. (Code Civ. Proc., § 1985.4.) The court found no evidence in the record that the unlicensed contractors were given notice that their personal information was sought in connection with this subpoena. The parties should be prepared to address this issue at the hearing. Absent proof of such notice, the subpoena cannot be enforced.

2. Public Records Act

CSLB points out that the Public Records Act limits the disclosure of public agency records such as those produced during state and local investigations. (Gov. Code, § 7923.600.) However, the exemptions contained in the Public Records Act simply do not apply to the issue whether records are privileged in pending litigation so as to defeat a party's right to discovery. (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125, 1130—“party to pending litigation has a stronger and different type of interest in disclosure.”) This affords no protection from production.

3. Deliberative Process Privilege

“Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated.” (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540.) The privilege rests on the policy of protecting the “‘decision making processes of government agencies [.]’” (*Id.* at p. 541.)

However, any common law deliberative process privilege or executive privilege existing where constitutional considerations require judicial recognition of privilege not based on statute is qualified, not absolute. (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1128.) “The key question in every case is ‘whether the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.’ [Citation.]” (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342.)

CSLB has made no attempt to apply this standard to these circumstances. Calif. Rules of Court, rule 3.1113 “rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party’s theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide. On the record in this case, the trial court was justified in declining to look beyond that failure.” (*Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal. App. 4th 927, 934.) The same is true here. Because CSLB has not even attempted to apply these standards to the discovery at issue, the theory affords no protection from production.

B. Records Sought are not “Business Records” of CLSB

The CSLB argues that the subpoena should be denied to the extent it seeks records not prepared by any employee of the CSLB. Such records reportedly include consumer complaints, contracts, estimates, receipts, canceled checks, and photos. In support, it cites *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1030. In that case, plaintiffs sued defendant for personal injuries sustained when defendant drove his car on a street closed to traffic for the Santa Monica Farmer’s Market. The District Attorney also prosecuted defendant criminally. In the civil action, plaintiffs served a subpoena for business records on the District Attorney for “investigative reports, statements by [defendant], photographs, field interview notes, and results of any tests or examinations.” The trial court ordered the DA to comply, and the DA filed a

petition for relief with the appellate court on the basis that it was not the “custodian” of the “business records” on the basis that it did not generate the documents covered by the subpoena.

The appellate court held the argument had merit. It observed that the incident had been investigated by the Santa Monica Police Department and the California Highway Patrol. The court observed that “the custodian of records or other qualified witness contemplated by Evidence Code section 1561⁴ must [] be able to attest to various attributes of the records relevant to their authenticity and trustworthiness.” Because the DA could not make the attestation that the subpoenaed records had been prepared in the ordinary course of business at or near the time of the event pursuant to subdivision (a)(3), the identity of the records pursuant to subdivision (a)(4), or a description of the mode of preparation of the records pursuant to subdivision (a)(5), it was not the custodian. The appellate court mandated the superior court to reverse its order and deny the motion to compel compliance. (*Cooley, supra*, 140 Cal.App.4th at 1044-1046.)

The CSLB argues that it likewise cannot make the necessary attestation. Specifically, the CSLB’s custodian of records cannot attest to the timeliness, identity, or mode of preparation of documents the CSLB received from witnesses or other parties not prepared by CSLB employees. However, A+ convincingly argues that *Cooley* is distinguishable. In *Cooley*, there were separate chains of custody of documents held by the District Attorney, the Santa Monica Police Department and the California Highway Patrol. Here there are no degrees of separation between the documents sought by A+ and the administrative agency holding the documents. The CLSB is the direct custodian of the records sought, and the records were not otherwise prepared or handled by any other party or agency. In other words, the CSLB requested, handled, prepared, and kept all of the documents related to its investigations—including those documents collected as evidence or to process the investigation.

The court finds *Cooley*, under the circumstances, affords no protection from production.

Sanctions

⁴ Evidence Code section 1561 provides in relevant part:

“(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

“(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

“(2) The copy is a true copy of all the records described in the [SDT]....

“(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

“(4) The identity of the records.

“(5) A description of the mode of preparation of the records.”

A+ requests sanctions pursuant to Code of Civil Procedure section 2025.480, which states:

“The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”

While the court has rejected several arguments made by the CSLB, it finds the CSLB acted with substantial justification to the extent it pursued its arguments that the IPA applies and its theory that the records sought are not business records. Although the court rejected the latter theory, it was a colorable argument, making imposition of the sanction unjust.