

Public Law Update – Court of Appeal Upholds Order Compelling Public Agency Board Member to Return Confidential Reports

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Santa Clara Valley Water District v. Eisenberg concerns confidential reports, prepared by the Water District's outside counsel, regarding investigations of complaints of alleged misconduct relative to interactions between Board Member Rebecca Eisenberg (who is also a practicing attorney) and Water District staff. Eisenberg was permitted to review the confidential reports, but not to retain them. Nonetheless, she took the reports and refused to return them to the Water District, even after the censure by the very Board on which she serves.

The Water District filed suit in Santa Clara County Superior Court, alleging conversion and other causes of action. The Water District successfully moved for a writ of possession, but Eisenberg posted an undertaking (bond) that allowed her to defer returning the confidential reports. The Water District then filed a motion for preliminary injunction, which the Superior Court also granted. Eisenberg appealed.

On appeal, Eisenberg advanced myriad procedural and obstructionist arguments, each of which the Court of Appeal rejected. Ultimately, the Court turned to the key issues: likelihood of success and balance of relative harms. As to likelihood of success, the Court explained: (i) the confidential reports, prepared by the Water District's outside counsel, are the Water District's property; (ii) substantial evidence supported the Superior Court's finding that Eisenberg's "disposition of the property [was] in a manner … inconsistent with the plaintiff's property rights" (citation and internal quotation marks omitted); and (iii) the Water District was damaged, including by Eisenberg jeopardizing Water District policies and procedures.

As to the balance of relative harms, the Water District was clearly harmed by the violation of its policies and procedures, as well as the chilling effect Eisenberg's possession of the confidential reports had on staff members involved in the incidents that were the subject of the investigation. By contrast, Eisenberg's claims of harm were ill-founded—including her claim that return of the confidential reports would result in disclosure of confidential handwritten notes she had made on the reports, which the trial court authorized her to redact and ordered the Water District not to review.

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The facts in *Santa Clara Valley Water District v. Eisenberg* are extreme. But the principles are not, and this opinion will serve as a useful reference point, where necessary to remind public agency representatives (whether elected official or staff) that when they are provided confidential reports to review but not retain, the representatives are obligated to return, and not keep, those reports.

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