STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PASADENA CITY COLLEGE FACULTY ASSOCIATION, Charging Party, v. PASADENA AREA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6601-E PERB Order No. Ad-490 January 27, 2022

Appearances: Law Offices of Robert J. Bezemek by David Conway, Attorney, for Pasadena City College Faculty Association; Erickson Law Firm by Rex Randall Erickson and Joshua Taylor, Attorneys, for Pasadena Area Community College District.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on an interlocutory appeal filed by the Pasadena Area Community College District to an administrative law judge's (ALJ) order compelling it to produce an e-mail to the Pasadena City College Faculty Association that the District claims must be partially redacted.

At issue is a single e-mail that the District asserts includes internal bargaining strategy and is thus protected from disclosure by PERB precedent. The District provided the Association with a partially redacted version of the e-mail, together with a privilege log covering the e-mail and several other items. After the parties reached

agreement regarding the other privilege log entries, they asked the ALJ to decide whether the District had to produce the e-mail in unredacted form. The Association asked the ALJ to review the unredacted e-mail in camera before ruling. The ALJ denied the Association's request for in camera review and ordered the District to produce the e-mail without redactions. The District appealed the part of the ALJ's order directing production, contending that Board review is necessary to resolve two novel legal questions related to the qualified negotiations protection for internal bargaining strategy.[1]

We have reviewed the record related to the District's appeal, including the ALJ's interlocutory certification, the ALJ's underlying order, and the parties' various filings, as well as the Association's underlying unfair practice charge, the amended complaint, and the District's respective responses. In light of these documents, and relying on PERB precedent recognizing a qualified protection for internal negotiations strategy as well as current PERB Regulations, we: (1) hold that the qualified negotiations protection is not limited to maintaining confidentiality for pending negotiations; (2) explain the balancing test for the qualified negotiations protection; and (3) grant the District's appeal and return this matter to the ALJ to review the e-mail in camera and apply the balancing test to determine whether the District must disclose the e-mail without redactions.

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[1] While the ALJ and the District call the protection for internal bargaining strategy "*Colton*/*Berbiglia*," after the relevant PERB and NLRB precedent discussed *post*, and it has alternatively been described as a quasi-privilege, we refer to it throughout this decision as the "qualified negotiations protection." We reference negotiations because this case concerns negotiations strategy, but we do not intend to preclude application of the protection to other types of internal labor relations strategy.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The Association filed its unfair practice charge on November 25, 2020, alleging the District violated the Educational Employment Relations Act (EERA) when it implemented a new calendar for the 2021-2022 academic year without providing the Association notice or an opportunity to bargain, among other alleged related unfair practices.[3] The Office of the General Counsel issued a complaint on April 5, 2021; the District timely answered.[4] After the parties failed to resolve the matter at an informal conference, hearing dates were scheduled for September 15-17 and 27-29.

At hearing on September 17, the ALJ granted the Association's request to amend the complaint. The amended complaint alleges that: (1) on or about October 21, 2020, the District made unilateral changes affecting negotiable subjects by implementing a new calendar for the 2021-2022 academic year; (2) between late May and October 21, 2020, the District outright refused requests by the Association to meet and negotiate over the decision to adopt a new academic calendar and/or over the negotiable effects of that decision; and (3) beginning on or before June 1, 2020 and continuing to October 21, 2020, the District's Superintendent/President Dr. Erika Endrijonas used the District's shared governance process to bypass negotiations with

[2] Because we address only the narrow issues raised on interlocutory appeal, we make no factual findings or legal conclusions as to the underlying claims, and the factual background herein therefore is not binding on the parties.

[3] EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[4] All further dates are in 2021 unless otherwise noted.

the Association and deal directly with the President of Academic Senate, who is exclusively represented by the Association, regarding negotiable changes to the academic calendar. The amended complaint further alleges that each of the above bargaining violations also interfered with employee rights and denied the Association its right to represent employees. The District denies any wrongdoing and asserts numerous affirmative defenses.

At the Association's request, the ALJ authorized several records subpoenas in advance of the hearing. The subpoenas sought production of documents from Endrijonas and various other current and former District officials, including its Custodian of Records, its Assistant Superintendent/Vice President of Human Resources Robert Blizinski, and its former Assistant Superintendent/Vice President of Instruction Dr. Terrance Giugni.

On the first day of hearing, the parties advised the ALJ of a dispute over the production of documents. The District acknowledged that it had withheld six categories of documents that were responsive to the Association's records subpoena. After several discussions and clarifications, the dispute was reduced to one e-mail thread which the District produced partially redacted. The e-mail thread consists of three printed pages containing five e-mails exchanged on May 6, 2020, between Endrijonas, Giugni, and Blizinski. The subject line of these e-mails is "request to negotiate." The disputed portion is the following e-mail Endrijonas sent on May 6, 2020, at 2:14 p.m.:

> "Hi Terry [Giugni]:
> Thanks for the update. Interesting that the Calendar Committee voted down the motion. Congrats on the Fall Side!"

Immediately below this text, the version of the e-mail produced by the District contains a redaction of approximately three lines, before the message ends with:

> "Fascinating . . . .
> Thanks
> Erika [Endrijonas]"

The parties orally argued their dispute before the ALJ.[5] According to the District, the material redacted from Endrijonas's message contains information shielded from disclosure by the qualified negotiations protection. It argued to the ALJ that, based on this protection, the redacted portion should not be disclosed, notwithstanding the PERB-authorized records subpoena. The Association countered that the privilege did not apply under the circumstances, including because when Endrijonas sent the e-mail, the District's official position was that it had no bargaining obligation with respect to the academic calendar because no firm decision had yet been made.

On September 19, the ALJ denied the Association's oral request for in camera review of the e-mail, and ordered the District to produce an unredacted version.[6] The

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[5] The ALJ's order correctly notes that whether treated as an oral motion by the Association to compel production required by an authorized records subpoena under PERB Regulation 32190, or as an oral motion by the District to partially revoke a subpoena or otherwise limit production of privileged or protected information under PERB Regulation 32150, the underlying issues in this dispute are the same. The ALJ treated it as the District's motion.

[6] The ALJ's underlying order directs the District to specifically produce "an unredacted version of Dr. Endrijonas's May 6, 2020 e-mail message as required by the subpoenas duces tecum executed on August 23, 2021." We understand the ALJ's subsequent Order Certifying Interlocutory Appeal to refer to this single document though it more broadly states "unredacted documents responsive to authorized subpoenas."

ALJ found that the District had not met its burden of an initial showing that the redacted material is subject to the qualified negotiations protection, based on the fact that the successor contract negotiations at issue had been completed in October 2020, when the contract was ratified by both parties. In the alternative, the ALJ found that under the balancing analysis used for a qualified protection, the District did not show that its asserted interest in maintaining confidentiality outweighs the public's interest in disclosure.

On September 22, the District appealed the portion of the ALJ's order directing it to disclose the unredacted e-mail, and requested Board review under PERB Regulation 32200.[7] On September 23, the ALJ certified the District's interlocutory appeal for Board review. The District seeks Board review to address two legal questions: (1) whether the qualified negotiations protection may be overcome by weighing the asserted protection against the need for disclosure; and (2) whether the qualified negotiations protection is intended to be narrowly construed only to maintain confidentiality of each party's collective bargaining strategy during pending negotiations. The Association filed no response to the District's appeal.

DISCUSSION

I. PERB and Federal Precedent

PERB caselaw recognizes that a party's internal collective bargaining discussions are confidential and subject to a qualified protection against disclosure.

[7] PERB Regulation 32200 governs appeals of interlocutory orders and provides, in pertinent part: "A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself . . . The Board itself will not accept the request unless the Board agent joins in the request."

PERB first confronted the confidentiality of internal collective bargaining discussions in *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113 (*Colton*). In *Colton*, a group of public school employers alleged that several teachers' unions had failed to bargain in good faith by entering into a secret mutual aid agreement with each other. (*Id*. at p. 3.) During a hearing before a PERB ALJ, the employers' counsel inquired about the unions' negotiating strategy. (*Id*. at p. 4.) The unions' counsel objected, and the ALJ overruled the objection. (*Ibid*.) On interlocutory appeal to the Board itself, the Board considered whether to compel disclosure of the unions' bargaining strategy communications. (*Id*. at pp. 5-8.) The Board noted:

> "If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned." (*Id*. at p. 6 [quoting *Berbiglia, Inc*. (1977) 233 NLRB 1476, 1495 (*Berbiglia*)].)

The Board observed that the purpose of EERA set forth by the Legislature was to establish a collective bargaining scheme for the public school system, and "of crucial importance" to that scheme was the ability of the parties to "establish[ ] goals for negotiations, and . . . map[ ] out the strategy and tactics for the attainment of those goals . . . ." (*Colton*, *supra*, PERB Order No. Ad-113, pp. 5-6.) Accordingly, the Board found that the "provisions and policies set forth in EERA" authorized it to find that "[n]egotiating team members should generally not be compelled to disclose the content or substance of communications regarding planning of strategy and tactics for negotiations." (*Ibid*.) Then, the Board balanced the confidentiality concerns with the need for disclosure. (*Id*. at pp. 6-8.) The Board noted that a bad faith bargaining

allegation generally turns on a party's conduct, and the employers had failed to present evidence in the hearing regarding the unions' conduct. (*Ibid*.) The Board found that "[w]ithout some affirmative showing of conduct . . . tending to indicate the lack of good faith" the unions should not be compelled to disclose private communications relating to negotiation strategy. (*Id*. at p. 8.)

Following *Colton*, PERB has repeatedly recognized a protection for both public employers' and unions' internal negotiation strategy communications. (See, e.g., *County of Tulare* (2020) PERB Decision No. 2697-M, pp. 14-15, fn. 9 [an "employer benefits . . . from the . . . limited privilege that protects both unions and employers from being forced to reveal to the other party their internal collective bargaining strategies or tactics"]; *Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 4 [PERB follows *Berbiglia*, *supra*, 233 NLRB 1476 by protecting certain confidential bargaining communications].) Most recently, in *Carpinteria Unified School District* (2021) PERB Decision No. 2797 (*Carpinteria*), the Board reiterated the qualified protection for internal negotiation strategy documents. (*Id*. at pp. 21-22.) There, a school district excepted to an ALJ's refusal to compel production of union notes from bargaining and committee meetings. Though the Board also rejected the district's exception on other grounds, the Board found that the union's internal notes from bargaining sessions fell under the protection articulated in *Colton*, particularly as the district's tenuous arguments for relevance weighed against disclosure. (*Ibid*.)

PERB precedent recognizing the qualified negotiations protection in California public sector labor relations relies upon and is consistent with the federal approach.[8] The NLRB recognized the confidentiality of private sector bargaining strategy communications in *Berbiglia*, *supra*, 233 NLRB 1476. There, a union brought an interference charge against a private employer. (*Id*. at pp. 1477-1478.) The employer served a subpoena seeking, among other documents, information about discussions during meetings between the union and its members. (*Id*. at p. 1495.) An NLRB ALJ quashed the subpoena, noting that "requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members." (*Ibid*.) On appeal, the NLRB affirmed and adopted the ALJ's ruling as a precedential decision. (*Id*. at p. 1476.)

As the Illinois Supreme Court explained in following *Berbiglia* to protect internal bargaining strategy communications in that state's public sector labor relations, "there exists a strong public policy protecting the confidentiality of labor-negotiating strategy sessions." (*Illinois Educational Labor Relations Bd. v. Homer Community Consol. School Dist. No. 208* (1989) 132 Ill.2d 29, 39 [547 N.E.2d 182] (*Homer*).) While the California Supreme Court has not explicitly considered internal bargaining strategy communications, it has held in other contexts that even in the absence of a formal privilege it is appropriate to limit discovery where confidentiality concerns outweigh the

[8] Federal judicial and administrative precedent is not binding on PERB, though we may find such precedent persuasive in construing California's public sector labor relations statutes. (*City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9, fn. 13.)

need for disclosure. (See, e.g., *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-658.)

II. Scope of the Qualified Negotiations Protection

The ALJ ordered disclosure of the District's e-mail based in part on his reasoning that the e-mail was not protected because it was not related to currently pending negotiations. More broadly, the ALJ found that the qualified negotiations protection only applies to pending negotiations. We disagree. As we explain, the qualified negotiations protection is not narrowly construed to maintain confidentiality only for pending negotiations, though PERB may consider the status of negotiations as part of all circumstances in the balancing test discussed *post*.

Though *Colton* and *Berbiglia* addressed pending negotiations, PERB has not restricted its application of the qualified negotiations protection to only pending matters. Recently, in *Carpinteria*, *supra*, PERB Decision No. 2797, the Board protected internal bargaining and caucus notes where bargaining was complete and not the subject of the underlying dispute. (*Id*. at pp. 22-23.)[9]

Important policy considerations favor this interpretation. Where parties have an ongoing labor relationship, it is crucial for their internal strategy communications to remain confidential to ensure that similar issues can be discussed freely in future negotiations. Labor negotiations do not occur in a vacuum; some issues are likely to arise again and again. Here, the parties' underlying dispute relates to the District's

[9] We note that the ALJ's order predates the Board issuing *Carpinteria*, *supra*, PERB Decision No. 2797. The ALJ's order includes discussion of other types of qualified privileges that only apply while a matter is pending, which we find distinguishable based on *Carpinteria* and the other discussion herein.

academic calendar. The same parties previously litigated a dispute about academic calendar negotiations arising out of an earlier round of negotiations, illustrating that the academic calendar is more than a one-time subject of negotiations for these parties. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444.) Further, as that decision acknowledges in a review of PERB precedent, the topic arises frequently in negotiations at other community college districts and K-12 school districts. (*Id*. at pp. 13-14 & adopting proposed decision at pp. 13-15 [citing *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96; *Jefferson School District* (1980) PERB Decision No. 133; *San Jose Community College District* (1982) PERB Decision No. 240; *Oakland Unified School District* (1983) PERB Decision No. 367].) Where the subjects of bargaining are likely to remain the same for subsequent negotiations, it is especially important to protect the accompanying internal strategy.

Further, there are policy reasons to protect internal strategy communications even for completed negotiations over topics unlikely to arise again. Public employers and employee organizations operate with the expectation that their internal discussions about negotiation strategy will remain confidential. The statutory scheme supports this interpretation; the uniform system for public school collective bargaining set forth in EERA includes specific provisions indicating the importance of bargaining confidentiality (§ 3540.1, subd. (c)), and an exception in the Ralph M. Brown Act permits closed sessions for discussions related to collective bargaining (§ 54957.6).[10]

[10] The Ralph M. Brown Act is codified at Government Code section 54950 et seq.

Fear of disclosure may have a chilling effect on the free exchange of ideas even if it is not likely that the specific issue under negotiation may arise again. The maintenance of this confidence is required to foster candid communications between union leaders and their members, as well as between district representatives and district governing board members.

As a practical matter, the time it takes for a case to complete the preliminary stages of PERB proceedings means that in some instances parties may have completed negotiations once a related unfair practice charge reaches the point where parties subpoena documents or seek to compel testimony. Though alleged or actual unfair practices may prevent completed negotiations in some circumstances, interpreting PERB precedent to protect the confidentiality of internal bargaining strategy only during the pendency of negotiations would nonsensically favor stalled bargaining.

III. Balancing Test

The qualified negotiations protection is not absolute. Instead, once PERB determines that the protection applies, it triggers a balancing test, where the parties' interest in maintaining confidentiality of the information is weighed against the need for disclosure. In *Colton*, *supra,* PERB Order No. Ad-113, the Board did not set forth a detailed balancing test, but did suggest that more than mere relevance is necessary. (*Id.* at pp. 6-8.) There, the Board found the districts had failed to make an affirmative showing of bad faith conduct by the unions. (*Id*. at p. 8.) The Board then suggested that, had the districts made a threshold showing, disclosure would be proper only if

examination of the unions' internal bargaining strategy discussions was necessary to determine the true motive for the unions' apparently bad faith conduct. (*Ibid*.)

In *Carpinteria*, *supra*, PERB Decision No. 2797, the Board likewise balanced the relevant interests. There, the district argued that the bargaining and committee meeting notes it sought were relevant for the purposes of refuting allegations of anti-union animus and witness credibility. (*Id*. at p. 21.) In finding the notes were protected from disclosure, the Board noted the district's arguments for relevance were tenuous, as neither the ALJ nor the Board relied on evidence related to bargaining and committee meetings in finding the union proved its retaliation claim. (*Id*. at pp. 22-23.)

The balancing test is rooted in fundamental principles of evidence. As explained in *Homer*, *supra*, 132 Ill.2d 29, courts limit discovery of relevant information if four conditions are present. (*Id*. at p. 35, citing 8 Wigmore, Evidence (McNaughton ed. 1961) § 2285, p. 527.) Internal bargaining strategy almost invariably satisfies three of those elements, as such strategy discussions "originate in a confidence that they will not be disclosed," confidentiality is "essential to the full and satisfactory maintenance of the relation between the parties," and the relation is one that "ought to be sedulously fostered." (*Ibid*., emphasis omitted.) The fourth element, whether the injury to the relation is greater than the benefit "gained for the correct disposal of the litigation" (*ibid*.), requires balancing.

While the Board has repeatedly recognized the qualified negotiations protection, it has not considered a case which required it to balance a full complement of factors. Several factors may be relevant when PERB balances the public interest in disclosure of internal bargaining strategy to ensure unfair practices are identified and

remedied against a party's interest in confidentiality. By their nature, disputes regarding whether certain evidence is protected tend to come before the Board without full factual context, because revealing the underlying facts would also reveal the information a party seeks to protect. We consider the below to be an instructive rather than exhaustive list of relevant balancing factors both in this case and in other similar instances. Additional considerations may influence either the public's interest in disclosure or a party's interest in confidentiality in any given case.

A. Impact

In virtually any case, PERB must consider whether the information sought is likely to impact the outcome. (*Colton*, *supra*, PERB Order No. Ad-113, pp. 6-8; *Carpinteria*, *supra*, PERB Decision No. 2797, pp. 22-23.) In *Colton*, the Board ended its balancing analysis after finding the information sought would not impact the outcome, suggesting that when the information cannot impact the outcome, it cannot outweigh the confidentiality concerns. (See *Colton*, *supra*, PERB Order No. Ad-113, pp. 6-8.) Thus, it is not enough that the information is relevant; it must be significant enough to the outcome to justify application of the balancing test. (*Ibid*.)

Whether subpoenaed information is likely to impact the case will depend on both the type of unfair practices alleged and the specific facts raised by the parties. For example, in *Colton* the Board suggested that testimony about union strategy discussions could shed light on the unions' true motives in negotiations, thereby impacting the outcome of bad faith bargaining allegations. On the other hand, when parties seek internal bargaining strategy information to dispute the meaning of a contract provision, the information cannot impact the outcome because the subjective

understanding or intent of one party is irrelevant to contract interpretation. (*Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 617-619; *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 17.) In such cases, the sought information is protected from disclosure.

The instant facts present a different situation. The District seeks to protect part of an e-mail between members of District administration. The title of the e-mail—"request to negotiate"—suggests that its content relates to current or future negotiations. The underlying complaint alleges that the District made unilateral changes to subjects within the scope of bargaining, failed to provide the Association notice and an opportunity to negotiate over the decision to adopt the academic calendar and its effects, and unlawfully bypassed the Association to deal directly with a bargaining unit member.

A public school employer may not "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." (§ 3543.5, subd. (c).) A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Lodi Unified School District* (2020) PERB Decision No. 2723, p. 11; *Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without

first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*); *County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9.) There are three primary means of establishing that an employer changed or deviated from the status quo. Specifically, a charging party satisfies this element by showing any of the following: (1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 9.) Even when an employer has no obligation to bargain over a particular decision, it nonetheless must provide notice and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, pp. 11-12.) The redacted e-mail could contain information related to any of the above elements, and such information may or may not be likely to impact the outcome.

A charging party may demonstrate that an employer has unlawfully bypassed the exclusive representative by showing that the employer dealt directly with its employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7, disapproved on other grounds by *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27.) To the extent the redacted information in the District's e-mail references any

communications directly with Association-represented employees, it could affect the outcome of the complaint allegations that the District unlawfully bypassed the Association to implement the new academic calendar.

Without more information we cannot judge the likelihood that the redacted information would impact the outcome of any allegation in the complaint, much less weigh that likelihood against other factors. The ALJ will be in a better position to do so after conducting an in camera review, as we address *post*.

B. Scope

The breadth of the information sought for disclosure and relative scope of the responsive information is another factor PERB will consider in balancing the relevant interests. Here, the parties worked to reduce their dispute to a single document. Board law encourages such efforts and notes that overly broad subpoenas must be modified. (*Carpinteria*, *supra*, PERB Decision No. 2797, p. 21.) Where internal bargaining strategy is concerned, the more information to be disclosed, the larger the risk a party will be forced to reveal confidential information which will harm its interest in candid communications between its leaders. Where, as here, the dispute involves only a single e-mail, the category of information to be released is discrete and knowable. This may lessen the risk of harming the District in this instance. However, if the ALJ finds roughly equal balance between the utility of disclosure and the harm to the District, the ALJ must also consider impacts to harmonious labor relations and future expectations of confidentiality.

The nature and scope of the bargaining topic may also impact the Board's balancing. A party has a higher interest in protecting the confidentiality of internal

strategy information which relates to sensitive or recurring subjects of bargaining. Strategy related to wages, for example, is bound to recur in subsequent bargaining cycles, and once a party has been compelled to reveal its strategy, the genie cannot be returned to its proverbial bottle. As detailed *ante*, the academic calendar negotiations that are the subject of this matter are recurring subjects of bargaining by these parties, which weighs against disclosure.

Disclosure may be less harmful if the topic is unlikely to be negotiated again, though revealing even discrete strategic information may chill future exchange of ideas internally, and protection therefore may still be warranted after weighing all relevant factors.

C. Timing

As noted *ante*, whether negotiations are pending or completed does not, on its own, determine whether the qualified negotiations protection applies as a threshold matter. But the timing of the negotiations related to the request for disclosure may be relevant to the balancing test.

A party forced to reveal internal strategy discussions or documents for active negotiations risks great harm to a pending process, weighing in favor of protection. In contrast, revelations related to completed negotiations do not carry the same level of inherent harm. In concert with other contextual factors, the timing of the communication relative to the disclosure may tip the scales toward disclosure or confidentiality, depending on the specific facts of any given matter.

IV. Resolving the District's Appeal

Because, as found *ante*, the qualified negotiations protection may apply regardless of whether negotiations remain pending, we find the District has met the preliminary threshold for protection by asserting the redacted information is internal bargaining strategy. Though the instant matter implicates an e-mail among bargaining team members, rather than internal caucus notes, the District has asserted a credible claim that the e-mail in question contains material protected by the qualified negotiations protection. Because we cannot say conclusively that the redacted information could not impact the dispute, a full balancing of relevant factors is appropriate.

The individual in the best position to undertake this necessary balancing is the ALJ, after in camera review of the redacted e-mail. Though neither party appealed the portion of the ALJ's underlying order denying in camera review, PERB has recently implemented revised regulations that grant a Board agent conducting a hearing the authority to conduct in camera review of records. (PERB Reg. 32170, subd. (b)(12).)[11] When discovery disputes like this arise under the current regulatory scheme, ALJs may undertake in camera review of the disputed documents, apply the balancing test, and ultimately rule on whether the records should be disclosed.[12] While our discussion

[11] This regulation resolves any ambiguity about Board agents' ability to conduct in camera review that may have arisen from *State of California (Department of Corrections)* (2009) PERB Order No. Ad-382-S.

[12] As occurred in this matter, we anticipate that where parties disagree with an ALJ's order of disclosure or non-disclosure, the interlocutory appeal process in PERB Regulation 32200 remains an avenue for interim review by the Board. Such appeals

ante provides some guideposts and preliminary analysis for potential balancing, we lack the benefit of review of the information the District seeks to protect. In camera review will allow the ALJ to assess the full scope of issues and determine whether the scales tip in favor of disclosure or protection.

ORDER

We hereby GRANT the appeal of the Pasadena Area Community College District, REVERSE the ALJ's order that the District disclose unredacted records to the Pasadena City College Faculty Association, and direct the ALJ to review the relevant records in camera, apply the balancing test set forth above, and provide the parties with a new ruling.

Chair Banks and Members Shiners and Krantz joined in this Decision.

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will be particularly useful to provide a second level of review prior to compelled disclosure of allegedly protected information.