NEIL L. SHAPIRO (SBN 51547)
LAW OFFICES OF NEIL L. SHAPIRO
P.O. Box 4086
Carmel, California 93921
Telephone: (831) 372-3700
Email: nlshapiro@ sbcglobal.net

Attorneys for Petitioner
ROYAL CALKINS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

ROYAL CALKINS
Petitioner,

v.

CITY OF CARMEL-BY-THE-SEA, and
Does 1 through 10, inclusive,

Respondents.

Case No.:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: July 12, 2018
Time: 10:00 a.m.
Dept.: 13

Petitioner Royal Calkins ("Calkins" or "Petitioner") relies on the following points and authorities in support of his Petition for Writ of Mandate compelling Respondent City of Carmel-by-the-Sea ("City" or "Respondent") to disclose public records in accordance with the provisions of the California Public Records Act, Government Code §§ 6250 *et seq*.:

INTRODUCTION

The California Public Records Act was enacted to allow the public to review, and to request copies of, records regarding the conduct of their government. "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to

information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Government Code § 6250 (together with the statutes that follow, the "Act"). The governmental records at issue here exist clearly in the arena of public records and there is no legal justification to deny the public its statutory and constitutional right of access to them.

Here, City's long-time City Attorney retired and City issued a form of Request for Qualifications ("RFQ") for completion by anyone interested in replacing him. Attorney Glen R. Mozingo ("Mozingo") responded to the RFQ with an impressive list of qualifications, including awards he said that he received, numerous accomplishments he said that he completed, and more. Ultimately, Mozimgo was offered the position and a contract was signed between Mozingo's professional corporation and the City for the former to provide the latter with legal services.

In the ensuing months, questions arose about the truthfulness of Mozingo's response to the RFQ. As it became apparent that portions of that response were fabricated, and that others were, at best, grossly misleading, Mozingo refused to respond to inquiries. On July 5, 2018, Mozingo brought to a closed session of the City Council ("Council") documentation ostensibly supporting his RFQ response. The Council then considered all of that material before returning it to Mozingo and stating in an open session of the Council that Mozingo's response to the RFQ was absolutely truthful. The Council thereafter refused to make available to the public any of that material in large part because, it said, it no longer had the records and therefore could not grant anyone access to them. This proceeding then commenced.

FACTUAL BACKGROUND

The salient facts, recounted in the Petition, are not in dispute. Questions arose as to the accuracy of Mozingo's RFQ response, Mozingo brought what has been described as documentation supporting his response to a closed session of the Council, and retrieved that documentation at the end of the closed session of the Council. The Council apparently reviewed that documentation and said that "[w]e can assure you that this thorough review confirms that Mr. Mozingo's resume was correct in every manner and that the representations, allegations and

challenges to that resume are entirely without merit. In other words, the Council said "trust us." But the Public Records Act was enacted to allow members of the public to see public records themselves rather than have to accept a governmental "trust us."

LEGAL ARGUMENT

As is noted above, Government Code § 6250 sets the philosophical purpose of the Act – making the records of the conduct of the people's government open to the public. Government Code § 6252 provides the definitions for the key words used in the Act. Relevant here are the definitions of "local agency" – "a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952" – and "public records" – "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."

Government Code § 6253 sets forth the rules governing access to public records:

> (a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.
> (b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

Government Code § 6258 provides the mechanism for enforcement of the right of access:

> Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as

to these matters at the earliest possible time.

Government Code § 6259 sets the procedure for a legal action brought to enforce the Act:

> (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.
> (b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. . . .
>
> (d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

There is no credible argument here that the records sought are not public records under the Act; each constitutes a "writing containing information relating to the conduct of the public's business" – the hiring of Glen Mazingo as City Attorney and the resolution of claims that his Response to the RFQ is riddled by fabrications – "prepared, owned, used, or retained by any state or local agency . . ." Nor is there be any credible argument that the records are exempt from public inspection pursuant to Government Code §§ 6254 or 6255.

Respondent is left with but a single argument against the disclosure of the records at issue here: That the records do not belong to the City and the City does not have a copy. Established case law makes clear that such a contention has no merit.

In *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, a member of the public

sought numerous records from the city of San Jose and its officials. The targeted documents concerned redevelopment efforts in downtown San Jose and included e-mails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and e-mail accounts but did not disclose communications made using the individuals' personal accounts. It contended that such records belonged to the officials, and were not within the custody or control of the City. In a unanimous Opinion, the California Supreme Court disagreed.

After addressing the standard rules of statutory interpretation, the Court recognized that in cases implicating the Act, "this standard approach to statutory interpretation is augmented by a constitutional imperative. (See *Sierra Club v. Superior Court*, *supra*, 57 Cal.4th at p. 166.)"

> Proposition 59 amended the Constitution to provide "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be *broadly* construed if it furthers the people's right of access, and *narrowly* construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2), italics added.) "'Given the strong public policy of the people's right to information concerning the people's business (Gov. Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)), "all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary."'" (*Sierra Club*, at p. 166.)

City of San Jose v. Superior Court (2017) 2 Cal.5th 608, 617. The City of San Jose argued that it did not have possession of the requested records, but the Court recognized that:

> Appellate courts have generally concluded that records related to public business are subject to disclosure if they are in an agency's actual *or constructive* possession. (See, e.g., *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 598 [160 Cal. Rptr. 3d 285]; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710 [140 Cal. Rptr. 3d 622] (*Consolidated Irrigation*).) "[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person."

City of San Jose v. Superior Court, *supra*, 2 Cal. 5th at 623. In his response to the RFQ, Mozingo

claimed to have qualifications that added weight to his application. When his claims were challenged he brought documents to the Council that he said support his RFQ response, allowed the Council to review them, and then whisked them away when the closed session concluded. There is no question that those documents were ***used*** by the Council to reach its conclusion as to the ostensible accuracy of Mozingo's representations in his RFQ response and are producible public records. The Council continues to try to shield those records from public examination – perhaps because they are embarrassing to the Committee and the Council as well as Mozingo – and instead embrace the classic "trust us" attitude that courts routinely find wanting.

> It is no answer to say, as did the Court of Appeal, that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is for the *public* to make that determination, based on information to which it is entitled under the law. Open access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the public they serve. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal. Rptr. 362, 725 P.2d 470].) "Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*Ibid*.) The whole purpose of CPRA is to ensure transparency in government activities.

City of San Jose v. Superior Court, supra, 2 Cal. 5th at 625.

In *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, the City of West Covina entered into a long-term contract with a private waste disposal company under which the waste disposal company collected waste in exchange for payments by the City outlined in the contract. In accordance with the terms terms of the contract, the waste disposal company sought a rate increase. Relying on financial data supplied by the waste disposal company, the City approved a proposed rate increase of 15 to 25 percent over a two-year period. The *San Gabriel Tribune*, a newspaper, sought disclosure of the financial data submitted by the disposal company and relied upon by the City in granting the rate increase. The City refused, and the newspaper brought a petition in the superior court for a writ of mandate to compel disclosure of the records pursuant to

the Act. The superior court denied the writ, in part because of the City's promise to keep the relevant financial records supporting the proposed rate increase confidential. The Court of Appeal reversed.

> We conclude that the financial data that the City relied on in granting the rate increase constitutes a public record subject to public disclosure. The City has a contractual relationship with the Disposal Company. The City delegated its duty of trash collection to the Disposal Company but still retained the power and duty to monitor the Disposal Company's performance of its delegated duties, under the express terms of the contract.

San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at 775. The same is true of the contract between G.R. Mozingo, Esq, APC and the City.

> Assurances of confidentiality by the City to the Disposal Company that the data would remain private was not sufficient to convert what was a public record into a private record. (*Johnson* v. *Winter* (1982) 127 Cal.App.3d 435, 439 [179 Cal.Rptr. 585].) Unless one of the exemptions applies to bar disclosure then the City must yield to its statutory duty that compels disclosure of the data.

Ibid.

> [I]n the case at bench, the City publicly based its decision on financial data supplied to it by the Disposal Company. It cannot now be heard to call for concealment after it voluntarily injected the data into the decision-making process of government. This was precisely the type of governmental action that the Brown Act and the Public Disclosure Act were designed to keep open to public scrutiny.

Id. at 778.

> Petitioners argue that respondent Disposal Company waived any privacy interests it may have had by voluntarily injecting itself into the public arena by seeking a rate increase and submitting financial data in support of same . . . We agree . . . respondent City publicly based its decision to grant the rate increase on financial data voluntarily submitted by the Disposal Company. Any privacy interest that may have existed in this data was converted once it was used not only to support but to justify the rate increase.

Id. at 780-81. The same is true here; the City relied on Mozingo's representations to contract with his professional corporation, and on the documents he brought to a Council meeting to support those representations. The records shown to the Council and referenced in the Council's public statement are public records, and as such must be disclosed to the public.

The access by the public to public information is one of the bedrock principles of our system of governance. And for good reason.

> "Nearly two hundred years ago, James Madison stated, [knowledge] will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both'" (Schaffer, *supra*, pp. 203, 204 quoting from S. Rep. No. 813, 89th Cong., 1st Sess., p. 1 (1965).)

Id. at 772. Under constitutional and statutory precedent his Court has the power, and the obligation, to prevent the government of the City from becoming either by requiring that public records remain public.

CONCLUSION

For all of the foregoing reasons, and based on the evidence contained in the Petition filed herewith, this Court should issue an alternative writ of mandate commanding the City to provide access to those records reviewed by the Council in making the decision expressed by Council Member Carrie Theis on June 5, 2018, and subscribed to by the other four members of the Council, or to show cause why it should not be required to do so. Following a hearing on the Petition, this Court should issue a peremptory writ of mandate commanding such public access.

Dated: July 7, 2018

NEIL L. SHAPIRO
LAW OFFICES OF NEIL L. SHAPIRO

By ____________________________
Neil L. Shapiro
Attorneys for Petitioner ROYAL CALKINS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28