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CITY OF CARMEL-BY-THE-SEA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

ROYAL CALKINS, an Individual,

Petitioner,

v.

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

Respondents.

CASE NO.: 18CV002532

RESPONDENT CITY OF CARMEL-BY-THE-SEA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION/PETITION FOR WRIT OF MANDATE

Date: September 7, 2018
Time: 9:00 a.m.
Dept: 14

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Citations

Other Authorities

Respondent City of Carmel-by-the-Sea (the "City") respectfully submits this memorandum of points and authorities in opposition to petitioner Royal Calkins' ("Calkins" or "Petitioner") Petition for Writ of Mandate (the "Petition").

INTRODUCTION

The most recent victim of blogger and Petitioner Calkins' defamatory attacks is Carmel City Attorney Glen R. Mozingo. Beginning last March, Calkins began publishing "articles" via an online blog to disseminate defamatory allegations that Mr. Mozingo had made false representations to the City and that he defrauded the public. Specifically, Calkins took issue with statements contained in materials submitted to the City by Mr. Mozingo in connection with his 2017 application to become City Attorney. Calkins claimed, in part, that Mr. Mozingo's "qualifications and experience [were] exaggerated," that "some of [the resume] was simply not true," and that Mr. Mozingo "mischaracterized the nature and significance of awards he had received and exaggerated his role."[1] On May 1, a request (the "Request") was submitted to the City pursuant to the Public Records Act, Government Code §§6250 *et seq.* (the "Records Act"). The Request sought the City's production of all records submitted to the City, or considered by the City, in connection with Mr. Mozingo's application for the position of City Attorney. *See* Petition ¶11. The City subsequently produced all such records.

On June 4, 2018, as part of Mr. Mozingo's first annual performance review, and additionally to address allegations of misrepresentations in Mr. Mozingo's resume/application, the City held a closed session (the "Closed Session") pursuant to California's Ralph M. Brown Act, Government Code §54950 *et seq.* (the "Brown Act"). The Closed Session agenda items included a "Public Employee Performance Evaluation" for Mr. Mozingo, and a "Conference with Legal Counsel" pertaining to anticipated litigation from Petitioner regarding Mr. Mozingo. At the Closed Session, Mr. Mozingo brought and showed the Council documentation

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[1] *See, e.g.*, Calkins blog posts *available at* https://voicesofmontereybay.org/2018/03/27/the-partisan-a-paper-trail-tale/; https://voicesofmontereybay.org/2018/04/12/the-partisan-a-curious-connection-to-daryl-gates/; https://voicesofmontereybay.org/2018/07/09/breaking-voices-goes-to-court-for-answers-about-carmel-city-attorneys-specious-resume/ (last visited Aug 17, 2018).

substantiating the statements made in Mr. Mozingo's resume and application (the "Closed Session Materials"). Following review of the Closed Session Materials, Council Member Carrie Theis announced "[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." Calkins subsequently demanded the City produce the Closed Session Materials pursuant to the Request. The City denied the demand.

Calkins then filed for the instant Petition. For purposes of these proceedings, it is important to understand that the Court is presented with a narrow scope of inquiry. None of Mr. Mozingo's qualifications or statements regarding the same are relevant. This is not a fraud, misrepresentation, or defamation case. At issue is simply Calkins' request to require the City to allow inspection of the Closed Session Materials. The inquiry involves an examination into the parameters of the Closed Session, the Brown Act, the Records Act, and the exceptions and exemptions to the general policies contained in those Acts.

With the foregoing in mind, the Court should decline to issue any writ. To require the City to produce the Closed Session Materials would upend the workings of local government in a manner contrary to explicit exemptions and exceptions contained in the Brown Act and the Records Act. Although the Brown Act generally provides for meetings of the legislative bodies of local government entities (here, the City Council) to be open and public, the Government Code's statutory scheme explicitly provides for closed sessions at which public attendance is precluded on the basis that the closed nature of proceeding would provide greater benefit to the decision-making processes and the public.

Here, the Closed Session held on June 4 was specifically authorized under two portions of Gov. Code § 54957(b), which provides in relevant part as follows:

> This chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, employment, ***evaluation of performance***, discipline, or dismissal of a public employee ***or to hear complaints or charges brought against the employee*** by another person or employee unless the employee requests a public session.

(emphasis added). The City Council met in closed session both (a) for the purpose of conducting Mr. Mozingo's first annual performance review and (b) to consider and address the allegations of fraud and malfeasance made by Calkins. The purposes of this "personnel exception" are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body. *Fischer v. Los Angeles Unified Sch. Dist.* (1999) 70 Cal.App.4th 87, 96. Both of these policy goals are directly implicated here – first, the Closed Session helped protect Mr. Mozingo's privacy and prevented further unwarranted public embarrassment and scrutiny of Mr. Mozingo arising from Calkins' baseless accusations; second, holding an evaluation of performance and hearing charges brought against Mr. Mozingo in Closed Session permitted free and candid discussion among the City Council and its attorneys (which included more than just Mr. Mozingo). While Calkins now claims that the Closed Session Materials are subject to production under the Records Act, the Brown Act *explicitly prohibits* the unauthorized disclosure of confidential information acquired in a closed session by any person present at the session and is replete with penalties for those who do disclose such information. *See* Gov.. Code §54963 ("A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section . . . 54957 . . . to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information"). For the Court to issue the writ here would be in direct contravention of the Brown Act and related provisions of California law. *See* Evidence Code §1040 (a "public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if . . . disclosure is forbidden by . . . a statute of this State [or] there is a necessity for preserving the confidentiality of the information...."); *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324 (abuse of discretion where the trial court compelled interrogatory answers inquiring in detail about contents of a closed session, explaining "confidentiality may be strongly inferred from the various provisions of the Act pertaining to the recording of closed sessions" and "it would be improper for information received during a closed session to be publicly disclosed without authorization of the governing body as a whole.").

The foregoing walks hand-in-hand with applicable exemptions under the Records Act. There are many strong government interests weighing against production, not least of which is the deliberative process privilege, which protects materials reflecting government decision-making. *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142. The key question is "whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions. Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is actually . . . related to the process by which policies are formulated or inextricably intertwined with policy-making processes." *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1344. The privilege has been held to protect factual information which "compromises the deliberative process," including "predecisional" documents, that is, documents which are prepared to assist an agency decision-maker in making a decision. *Wilson, supra* at 1142; *see Cal. First Amendment Coal. v. Superior Court* (1998) 67 Cal.App.4th 159, 169 (the privilege recognizes that "the deliberative process can be impaired by exposure to public scrutiny . . . disclosure of records containing only factual matters can impair the deliberative process by revealing the thought processes of the government decision maker").

Here, in connection with the performance review, the City Council was shown materials substantiating the statements made in Mr. Mozingo's resume. From that candid discussion in Closed Session, the City concluded that "Mr. Mozingo's resume was correct in every manner and that the representations, allegations and challenges to that resume are entirely without merit." Similar to *California First Amendment Coalition*, where the Court upheld the government's decision to withhold documents under the deliberative process privilege, the "process of review is greatly benefited by an applicant's candor in disclosing potentially embarrassing facts that may be of only marginal relevance to the person's abilities. Candor is less likely to be forthcoming if the applicant knows the facts will be disclosed regardless of the outcome." The City here has a strong interest in maintaining the privilege in its review of the Closed Session Materials ***during a Closed Session*** to foster the objective of candid and frank discussion.

It appears that Calkins' petition has no legal basis, but rather is Calkins' latest politically-motivated effort to defame Mr. Mozingo in a transparent attempt to generate controversy and public attention so as to attract a larger fan base for Calkins' blog, all at the expense of an innocent man's reputation. *See* Petition ¶19 ("Given the election scheduled for November 2018, it is critical that the requested records be available to the public promptly"). As discussed below, other exemptions to the Records Act militate against issuance of a writ here – for example, the City's attorney-client privilege protection and Mr. Mozingo's individual privacy interests under the California Constitution. The City respectfully requests the Court deny the Petition.

BACKGROUND FACTS

I. The City Selected Glen Mozingo as City Attorney in 2017

In early 2017, Don Freeman, the City's former City Attorney, announced his voluntary retirement after over three decades of service. Thereafter, the City Council appointed members Carolyn Hardy and Jan Reimers to an *ad hoc* committee to facilitate the selection of a successor City Attorney (the "Committee"). As part of its search, the Committee released a Request for Qualification (the "RFQ") that was made available to all persons seeking to succeed Mr. Freeman as City Attorney. *See* July 10 Declaration of Gerard A. Rose in Opposition to Motion for Writ of Mandate (the "Rose Declaration"), at ¶¶4-5; Rose Ex. 1.[2]

Glen Mozingo submitted a response to the RFQ. *See* Rose Decl. ¶¶ 4-5; Rose Ex. 2 (copy of Mr. Mozingo's submission) (the "RFQ Submission"). Mr. Mozingo's RFQ Submission consisted of documents supporting his bid for City Attorney including his *curriculum vitae* and written details of specializations, training, education, scholastic honors and professional affiliations, and municipal and litigation experience. The Committee chose Mr. Mozingo as one of the final three candidates, the City Council interviewed the finalists, and the Council ultimately selected Mr. Mozingo as Carmel's successor City Attorney.

On July 11, 2017, Mr. Mozingo and the City entered into a contract under which Mr. Mozingo's law firm, as an independent contractor, agreed to provide legal services to the City for

[2] All references to the "Giffen Declaration" are to the Declaration of Jon R. Giffen, filed contemporaneously herewith. All references to the Rose Declaration are to the Declaration of Gerard Rose filed July 10, 2018. All references herein to "Exhibit(s)" or "Ex.(s)" are to those Exhibits attached to either the Giffen Declaration or to the Rose Declaration, as indicated herein.

one year with the possibility of renewal at the end of the year. Mr. Mozingo's contract has been recently renewed and he continues to successfully represent the City as its City Attorney.

II. Calkins' Allegations Against the City and Mr. Mozingo

Last March – a little less than a year into Mr. Mozingo's tenure – Calkins began an onslaught of public accusations relating to Mr. Mozingo, and at least on one occasion threatened to sue the City. *See* Rose Ex. 3 (Calkins' e-mail contending he was "prepared to go to court to press [his] claim"). On May 1, the entity "Transparency in Government" submitted the Request to the City pursuant to the Records Act. The Request sought all records submitted to or considered by the City on behalf of Mr. Mozingo's application for the City Attorney job. *See* Petition ¶11. The City responded to the Request on May 22 by producing all responsive documents – i.e., the City produced to Calkins all of the documents that Mr. Mozingo submitted to the City in response to the RFQ and as part of the application process. *See* Rose Declaration ¶¶4, 8; Petition ¶11.

Calkins continued his public barrage of allegations against Mr. Mozingo by questioning Mr. Mozingo's qualifications and by stating that Mr. Mozingo made false representations in his submissions to the City Council. On June 4, 2018, as part of Mr. Mozingo's first annual performance review, and additionally to address allegations of misrepresentations in Mr. Mozingo's resume/application, the City Council held the Closed Session, as authorized under provisions of the Brown Act. Giffen Decl. ¶2. The Closed Session agenda items included a "Public Employee Performance Evaluation" for Mr. Mozingo, and a "Conference with Legal Counsel" pertaining to facts and circumstances of anticipated litigation from Petitioner. Giffen Decl. ¶¶3-4; Giffen Ex. A. During the Closed Session, members of the City Council met with Mr. Mozingo and two additional attorneys representing the City. Giffen Decl. ¶5. The purposes of the Closed Session were (a) to conduct Mr. Mozingo's first annual performance review and (b) to consider and address Calkins' allegations of fraud and malfeasance, and to assess any potential threat of litigation. *See* Rose Decl. ¶9; Giffen Decl. ¶6. During the Closed Session, Mr. Mozingo and counsel were requested to address the substance of the allegations made by Calkins against Mr. Mozingo. These conversations were protected by the attorney-client privilege and work product protections. Giffen Decl. ¶7. Mr. Mozingo provided an extensive and in-depth review of supporting documentation to his resume, including by showing the City Council diplomas, degrees, licenses, membership verifications and National Republican Congressional Committee awards, letters of verification and substantiation, scholastic awards, a letter confirming his

appointment to the London Court of Arbitration, and letters of commendation from the Secretary of the Treasury and then-sitting Supreme Court Justice William O' Douglas. *See* Petition ¶12; Giffen Decl. ¶8 (the "Closed Session Materials"). None of the Closed Session Materials were given to the City nor did the City ever possess them. Rose Decl. ¶11; Giffen Decl. ¶8.

Following the Closed Session, Council Member Carrie Theis announced that the City Council's 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." *See* Petition ¶12. Following the Closed Session and the City Council's announcement, Calkins expanded his Request to seek *all* materials that were considered by the Council at the Closed Session – i.e., all Closed Session Materials, including Mr. Mozingo's private documents and materials that were never submitted to the City in connection with its 2017 hiring process for City Attorney. *See* Rose Decl. ¶8; Petition ¶14. The City did not produce the Closed Session Materials. On June 19, Calkins renewed his threat to sue the City. *See* Rose Ex. 3.

III. The Present Petition and Dispute

On July 9, 2018, Calkins filed his Verified Petition and applied *ex parte* for the issuance of a writ commanding the City to produce the Closed Session Materials. At a July 12 hearing, the Court continued the matter until September 7, 2018, requesting supplemental briefing. For the reasons set forth herein and in the City's Response, Petitioner's application and Petition for a writ should be denied, and the City should not be ordered to produce the Closed Session Materials.

ARGUMENT

I. Applicable Law

The Ralph M. Brown Act, Government Code §§54950 *et seq.*, governs requirements relating to open meetings for local governmental bodies. Under the Brown Act, the public's right to attend meetings is not absolute but rather is subject to numerous exceptions. For example, the Brown Act explicitly permits entities to exclude the public from "closed" or "executive" sessions involving those with its negotiator to grant authority regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property (*see* Gov. Code §54956.8) and to meet with certain individuals on matters posing a threat to the security of public buildings, a threat to the security of essential public services, or a threat to the public's right of access to public services or public facilities. *See* Gov. Code §54957(a). Similarly, and at issue here, the Brown Act provides for (1) the "personnel exception," to permit closed sessions for agencies to consider employees'

performance evaluations, and/or to hear complaints or charges brought against an employee, and (2) the "existing or anticipated litigation" exception, permitting closed sessions for legal counsel to provide advice regarding threatened litigation, including to inform of facts and circumstances suggesting exposure to certain litigation. *See* Gov. Code §54957(b)(1); §54956.9(d).

The Records Act, §§6250 *et seq.* of the Government Code, governs the public's right to access documents in the possession of public agencies comprising the public record. However, "the right of access to public records under the CPRA is not absolute." *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282. As discussed herein, the Records Act is subject to numerous exemptions, several of which apply here, including (1) where the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record, (2) where disclosure would harm the government's interest in maintaining its deliberative process, (3) where the materials are subject to attorney-client or work product protections, and (4) where production would impinge upon an employee's or individual's right to privacy. *See* Gov't. Code §6255 (deliberative process privilege); §6254(k) (incorporating attorney-client privilege from Evidence Code); §6254(c) (exemption for personnel records); Article I, section 1 of California Constitution, *New York Times v. Superior Court* (1990) 218 Cal.App.3d 1579 (privacy).

II. Production of the Closed Session Materials Would Undermine Explicit Statutory Exceptions to the Brown Act

This Court's determination has implications far beyond the instant matter. An adverse determination for the City would impact its ability to effectively conduct affairs and act in the public interest, including in matters of public safety and fundamental concerns of individual privacy. Should the Court issue the writ, it will effectively create a loophole to the Brown Act's explicit provisions for closed sessions, undermine the purpose of the statutory scheme, and seriously impede the government's ability to effectively or efficiently operate.

The Brown Act's provision for closed session meetings with negotiators to discuss the purchase, sale, exchange, or lease of real property (Gov. Code §54956.8) makes sense as a matter of policy because without such allowance, the public agency's bargaining position and strategy would be publicly known, making it difficult to secure the best deal for the public in negotiations. Similarly, the Brown Act's authorization to hold closed sessions pertaining to issues of public security or safety also makes sense because without such allowance, the public's safety and

security may be put at risk by the forced public disclosure of sensitive security procedures and confidential information. Here, there are two major exceptions to the Brown Act that apply. First, the "personnel exception":

> This chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, employment, ***evaluation of performance***, discipline, or dismissal of a public ***employee or to hear complaints or charges brought against the employee by another person*** or employee unless the employee requests a public session.

Gov't Code § 54957(b) (emphasis added). The core purposes of the personnel exception to the general public meeting requirements of the Brown Act are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body. *See Fischer v. Los Angeles Unified Sch. Dist.* (1999) 70 Cal.App.4th 87, 96.

The City Council's Closed Session was explicitly permitted by the personnel exception. The purpose of the Closed Session was both to conduct Mr. Mozingo's first annual performance review and to consider and address Calkins' allegations of fraud and malfeasance. *See* Rose Decl. ¶9; Giffen Decl. ¶¶4, 6. Either purpose standing alone would be sufficient basis for the holding of a closed session. Here, both applied. Policy goals were directly furthered by the Closed Session – first, holding the review in Closed Session in part helped protect Mr. Mozingo's privacy, and was directed to prevent further unwarranted public embarrassment and scrutiny of Mr. Mozingo arising from Calkins' baseless accusations. Giffen Decl. ¶9. Second, holding evaluation of performance and hearing charges brought against Mr. Mozingo in Closed Session permitted free and candid discussion about Mr. Mozingo among the Council Members and their counsel. Giffen Decl. ¶10.

A second and independent basis for the City Council to meet in closed session was the potential exposure to litigation that had been threatened by Calkins. *See* Gov. Code §54956.9(d) (closed sessions where "a point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency"). Here, Calkins had acted in a manner suggesting he intended to bring a claim against Mr. Mozingo for fraud. The Closed Session was attended by not only Mr. Mozingo, but at times by two other attorneys for the City. Giffen Decl. ¶5. During the Closed Session, Mr. Mozingo and counsel were requested to address the claims alleged by Calkins and the likelihood of litigation. These conversations were protected

by the attorney-client privilege. Giffen Decl. ¶7. Closed session discussion was necessary to best permit the City to conduct legal analysis and litigation planning.

Although the Petition does not directly address the Brown Act, a writ based on Calkins' Records Act claims would eviscerate the Brown Act's protections for closed sessions. Nothing in the Records Act suggests that it was intended to undermine or destroy the Brown Act's open meeting exceptions (and thereby harm public safety and the ability for the government to negotiate). In fact, in recognition of the importance and necessity of closed sessions, the Brown Act explicitly ***prohibits*** the disclosure of confidential information. *See* Gov. Code §54963 ("A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section . . . 54957 . . . to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information"). Members of a legislative body cannot be compelled to divulge information from closed sessions – the entire body is the holder of such privilege, and only the entire body can decide to waive it as such. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363. Accordingly, for the Court to issue this writ would be contrary to the policy of the Brown Act and, indeed, violate California law. *See id.*; *see also* Evidence Code §1040 (a "public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if . . . disclosure is forbidden by . . . a statute of this State [or] there is a necessity for preserving the confidentiality of the information"); *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324.

III. The Closed Session Materials Are Exempt from Production under the Public Records Act

A. The Government's Interest in Non-Disclosure Supports Denial of the Writ[3]

Section 6255 – known as the "catchall exemption" – allows a government agency to withhold records under the Records Act where "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by

[3] As a threshold matter, and as set forth in the City's Answer and the Rose Declaration filed July 10, the Closed Session Materials are not even the type of "public record" contemplated under the Records Act. The Closed Session Materials were never given to the City (they were merely presented at the Closed Session, Giffen Decl. ¶8), and the content therein does not sufficiently relate to the conduct of the public's business. *See San Jose v. Super. Ct.*, 2 Cal.5th 608, 617 (2017).

disclosure of the record." Cal. Gov. Code §6255; *Humane Soc'y of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1255 (balancing test on a "case-by-case basis"). Where the public interest in nondisclosure clearly outweighs the public interest in disclosure, refusal to release records will be upheld. *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1344. The government has multiple compelling interests here in non-disclosure: (1) promoting and maintaining the integrity of the Brown Act; (2) encouraging candid and productive discussion under its deliberative process privilege; and (3) and protecting Mr. Mozingo's privacy interests.

1. The Government Has Extraordinarily Strong Interests in Maintaining the Integrity of the Brown Act's Provision for Closed Sessions

Granting the Petition and commanding production of the Closed Session Materials would effectively eliminate the ability for local government to hold closed sessions under the Brown Act. *See supra*, Section II (import of closed sessions under Brown Act). It cannot logically follow that these protections can be circumvented simply by serving a Public Records Act request – yet, that is exactly what Calkins is attempting to do by pursuing the instant Petition.

2. The Government Has Extraordinarily Strong Interests in Maintaining Confidentiality of Materials to Protect its Deliberative Process

Section 6255 exempts from disclosure documents which are protected by the deliberative process privilege (which protects materials that reflect government deliberations or decision making). *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142. The privilege protects materials reflecting "mental processes by which a given decision was reached" and "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 deliberative process privilege is intended to address concerns that frank discussion of legal or policy matters might be inhibited if subject to public scrutiny, and supports the concept that access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence are essential to effective governance. *Times Mirror, supra*, 53 Cal.3d at 1338. In applying the privilege, "[t]he 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.' Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is 'actually . . . related to the process by which policies are formulated or inextricably intertwined with policy-making processes.'" *Times Mirror*, *supra*, 53 Cal.3d at 1342. *Wilson*, *supra*, 51 Cal.App.4th at 1142.

The Closed Session Materials fall squarely within the deliberative process protection. They are the type of materials where forced disclosure under the Records Act may threaten to expose the City's decision-making process, discourage candid discussion at the City Council, and undermine the City's ability to function. While the materials are "factual" in nature – diplomas, degrees, etc., – the City's consideration of the materials are interrelated with the City's policy making process. In particular, during the Closed Session and as part of the performance evaluation, Mr. Mozingo was requested to address Calkins' accusations that Mr. Mozingo's resume contained false statements. Giffen Decl. ¶7. Mr. Mozingo provided an extensive and in-depth review of supporting documentation. Giffen Decl. ¶8. The City Council concluded that Calkins' claims were utterly without merit. Giffen Decl. ¶11. The Closed Session Materials were reviewed during the Closed Session in order to reach such conclusion, and disclosure here would threaten to discourage future candid discussion within the agency and thereby undermine the agency's ability to perform its functions. Giffen Decl. ¶¶9-11.

The case *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159 is instructive. There, the press sought information under the Records Act from the Governor pertaining to applicants for an appointment to the Plumas County Supervisor office, with the sought-after materials falling within two categories: (1) written applications for appointment submitted by the applicants; and (2) written materials concerning the suitability of the applicant, including all application forms, letters of recommendation, interviews and notes from staff members. *Id.* at 165. The Court of Appeal affirmed that written materials discussing the applicants' suitability for appointment are exempt from disclosure under section 6255 and the deliberative process privilege. *Id.* at 169. The Court explained:

> In an accusatory political system where blame frequently flows upward and public officials, whether appointed or elected, are judged by standards that vary with the shifting political winds, the Governor is well advised to delve deeply into a candidate's background. That process of review is greatly benefited by an

> applicant's candor in disclosing potentially embarrassing facts that may be of only marginal relevance to the person's abilities. ***Candor is less likely to be forthcoming if the applicant knows the facts will be disclosed regardless of the outcome.*** Perhaps probing inquiries and public disclosures are the price one pays to be a public official but it is not likely a cost that one who is merely an applicant for appointment to a position would be willing to suffer. . . . ***The pool of quality applicants from which the Governor might select could be reduced; worthy prospects might elect to forego the opportunity.*** Moreover, ***those choosing to apply may be less forthright in their responses*** . . . The selection process is enhanced by a large applicant pool and by detailed information regarding each applicant, in the same manner that decision making in other contexts is enhanced by access to information and opinions from a variety of sources. ***Disclosure would likely reduce the applicant pool and the candor of those who apply.***

Id. at 172 (emphasis added). This case highlights exactly the importance of the City being able to maintain the integrity of its deliberative process here – issuing the Writ would threaten that future applicants for City positions may be "less likely to be forthcoming if the applicant knows the facts will be disclosed regardless of the outcome" and ultimately "[t]he pool of quality applicants from which the [City] might select could be reduced; worthy prospects might elect to forego the opportunity". *Id.; see also Times Mirror*, 53 Cal. 3d at p. 1345–1346 (Governor's appointment schedules and calendars properly withheld to protect public interest in decision-making process and Governor's security); *Wilson v. Superior Court*, 51 Cal.App.4th at p. 1141 (no disclosure of applications for appointment to county board of supervisors due to chilling effect on applications and negative impact on decision-making process).

3. The Government Has a Strong Interest in Maintaining Mr. Mozingo's Constitutional Right to Privacy

The right of access to public records under the Records Act is not absolute. *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282 (the Records Act "bespeaks legislative concern for individual privacy as well as disclosure"). The California Constitution contains an explicit right of privacy. Cal. Const., art. I, § 1. In enacting the Records Act, the Legislature was "mindful of the right of individuals to privacy." Gov. Code §6250; *see Los Angeles Unified Sch. Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 238.

Here, the City has a strong interest in maintaining Mr. Mozingo's privacy. That right is directly provided by the California Constitution, the production of the Closed Session Materials infringes on that right. The Closed Session Materials consist of Mr. Mozingo's diplomas, degrees, licenses, awards, letters of verification, letters of commendation, and other personal materials unrelated to Mr. Mozingo's job performance which bear on Mr. Mozingo's right to privacy.

Giffen Decl. ¶8. In addition to violating Mr. Mozingo's Constitutional protections, forced production here may harm the government's interests in attracting quality applicants in the future. *See supra*, Section III.A.2. As noted in *California First Amendment Coalition*, should the government be forced to produce materials infringing on employee personal privacy, "[t]he pool of quality applicants from which the Governor might select could be reduced; worthy prospects might elect to forego the opportunity. Moreover, those choosing to apply may be less forthright in their responses . ... Disclosure would likely reduce the applicant pool and the candor of those who apply." 67 Cal.App.4th at 169.[4]

4. There is no "Public Interest" Here to Balance Against – Merely Calkins' Self-Serving Interest in Gossip to Promote his Blog

In balancing the interests of the government and the general public, it is important for the Court to consider "whether disclosure would contribute significantly to public understanding of government activities." *Id. City of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1324. The Petition states in a conclusory fashion (and without reference to any facts) that the sought-after materials "contain substantive information about the operation and conduct of an important part of the public's government" but admits that disclosure is important to Calkins "[g]iven the election scheduled for November 2018." Petition ¶19.

There is no genuine public interest here. Rather, Calkins only seeks to further his self-serving interests in fostering gossip to promote his own blog. ***This is all at the expense of a respected California attorney's professional reputation.*** None of this is a matter of legitimate public interest. The public has no interest in *minimizing* its pool of qualified applicants for future positions, nor does it have an interest in baselessly tarnishing or defaming its current employees. Indeed, Calkins' arguments already only serve to chill the City's ability to receive applications for

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[4] Gov. Code §6254, subdivision(c) provides an independent basis for exempting the Closed Session Materials from production. Disclosure of records is not required if they are "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." *Los Angeles Unified Sch. Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 239. The term "similar files" has been interpreted to "have a broad, rather than a narrow, meaning." *Dept. of State v. Washington Post Co.* (1982) 456 U.S. 595, 600. In Under Section 6254(c), a court must engage in a balancing similar to the "catch-all exemption," by balancing the public's interest in disclosure against the privacy right that the exemption is designed to protect. *Los Angeles Unified Sch. Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 239. Here, the government has a strong interest in protecting privacy. The disclosure of Mr. Mozingo's personal information would not only impinge upon his individual right to privacy, but also would potentially discourage candor among future applicants, and discourage otherwise qualified applicants from applying for future jobs.

future positions from otherwise qualified applicants, and ordering the production of the Closed Session Materials would assuredly impede on the City's ability to conduct business.

B. Disclosure Prohibited as it Violates Principles of Attorney-Client Privilege and Work Product Protections that Apply to Government Entities in Closed Sessions and for Pending or Threatened Litigation

Government entities need not disclose records where the disclosure itself is a violation of other state law. Section 6254, subd. (k); *see also* 6254, subd. (b) (nothing in the Records Act requires disclosure of "[r]ecords pertaining to pending litigation to which the public agency is a party, ... until the pending litigation ... has been finally adjudicated or otherwise settled"). "By its reference to the privileges contained in the Evidence Code, therefore, the Records Act has made the attorney-client privilege applicable to public records." *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370; *see* Cal. Evid. Code §§ 950, 951.

Accordingly, written attorney-client communications are privileged and exempt from disclosure pursuant to the Records Act. This privilege against disclosure extends to threatened, anticipated, and pending litigation, including to the extent government entities hold closed sessions to confer or discuss such threats. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371. Here, the Closed Session Materials fall under the privilege as they were presented in connection with the City's Closed Session review of anticipated litigation. *See* Giffen Decl. ¶¶7-11.

CONCLUSION

The City respectfully submits that the Petition should be denied, and accordingly, Petitioner's request for fees should also be denied.

Dated: August 17, 2018

KENNEDY, ARCHER & GIFFEN

By _____
Jon R. Giffen
Attorney for Defendant
CITY OF CARMEL-BY-THE-SEA

PROOF OF SERVICE

I am a resident of the County of Monterey. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 24591 Silver Cloud Court, Suite 200, Monterey, California 93940. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal service.

On the date written below, following ordinary business practice, I served a copy of the following documents:

RESPONDENT CITY OF CARMEL-BY-THE-SEA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICATION/PETITION FOR WRIT OF MANDATE

by serving on the parties or their attorney of record in this action listed below by the following means:

[ ] **BY MAIL.** By placing each envelope (with postage affixed and pre-paid thereto) in the U.S. Mail at the law offices of Kennedy, Archer & Giffen, 24591 Silver Cloud Court, Suite 200, Monterey, CA 93940, addressed as shown below. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service and in the ordinary course of business, correspondence would be deposited with the U.S. Postal Service the same day it was placed for collection and processing.

[ ] **BY OVERNIGHT DELIVERY.** By placing with Federal Express for delivery a true copy thereof, enclosed in a sealed envelope, with delivery charges to be billed to Kennedy, Archer & Giffen, to the address(es) shown below.

[X] **BY E-MAIL/ELECTRONIC TRANSMISSION**. Based on an agreement of the parties to accept service by email or electronic transmission, I caused the documents to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Neil L. Shapiro, Esq.
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Carmel, CA 93921
nlshapiro@sbcglobal.net

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 17, 2018, at Monterey, California.

Diane Johnson