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ALLEN GROSSMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

ALLEN GROSSMAN, an individual,

Petitioner,

v.

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION,

Respondents.

Case No. CPF-13-513221

PETITIONER'S REPLY IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE

Hearing Date:	October 18, 2013
Hearing Judge:	Hon. Marla J. Miller
Time:	9:30 a.m.
Location:	Dep't 302

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I. INTRODUCTION

Respondents' opposition asserts the novel legal proposition the voters of San Francisco are powerless to adopt a law requiring that their own public officials disclose public records, so long as those records involve communications with the City Attorney. That concept is unfounded and untenable.

The voters of San Francisco are the City's ultimate source of authority and exercise plenary power over its legislative affairs. They validly initiated and enacted a law that stated that "*[n]otwithstanding a department's legal discretion to withhold certain information* under the California Public Records Act," upon request a San Francisco agency must produce "[a]dvice on compliance with, analysis of, an opinion concerning liability under, *or any communication otherwise concerning* the California Public Records Act … any San Francisco governmental ethics code, or this Ordinance [*i.e.*, the Sunshine Ordinance]." San Francisco Admin. Code § 67.24(b)(1)(iii). In other words, the law says that such communications are—from the outset—not confidential. It does not matter that such communications might be with a lawyer; communications that were never confidential cannot be the subject of the attorney-client privilege. In that respect, subsection 67.24(b)(1)(iii) is no different from a law stating that a commission's meeting on those matters must be held open to the public. Any communications between the commission and its lawyers in a session mandated to be open to the public could not be deemed privileged. Notably, the Ethics Commission bylaws expressly state that it will comply with the Sunshine Ordinance.

Respondents ask the Court to create new law by carving out an exception to the express terms of the Sunshine Ordinance to be applied across the board to all communications with counsel. It should not do so—and, moreover, it need not do so in these circumstances. Here, Petitioner has requested a narrow set of public records concerning the Ethics Commission's drafting of procedures governing its enforcement of the Sunshine Ordinance. Even if an attorney's thoughts on those regulations were encompassed within the request, disclosing that information would not "seriously compromise[]" the City Attorney's ability to advise his clients. The voters of San Francisco decided that such advice must be provided in the open, and the

Court need only follow the letter of the law they enacted. Not at issue here are the perhaps more difficult concerns raised if the request sought attorney-client communications about ongoing litigation or contract negotiations with the requesting party. If those issues arise, they are for another day.

Petitioner respectfully requests that his Petition be granted and that Respondents be compelled to make the requested public records immediately available.

II. RESPONDENTS ADMIT THEY DID NOT COMPLY WITH THE REQUEST

In their supporting declaration, Respondents admit that they did not comply with their obligation to produce all of the public records sought by Petitioner's request. (Declaration of Andrew Shen ("Shen Decl.") ¶¶5–6.) The declaration states that the "Commission initially withheld a total of 28 documents responsive to Mr. Grossman's request." (Id. at ¶5.) It continues to withhold the majority of those, for the reasons set out in Respondents' opposition. However, in response to the filing of this Petition, Respondents have now produced four public records they now admit "are either (1) not subject to attorney-client privilege or attorney work product protection or (2) may be disclosed with minor redactions." (Id. at ¶6.) Respondents provide no explanation for their delay of more than *one year* in producing those public records, which are not covered by the "privileges" originally invoked as the basis for their withholding.

The relatively low volume and even the relative insignificance of the additional public records sought by Petitioner do not excuse Respondents' failure to comply with Petitioner's request. To the contrary, their failure to identify and deliver the records after three public hearings on Petitioner's complaint before the Sunshine Ordinance Task Force and after the Task Force's issuance of an Order requiring such delivery, underscores the problems inherent to allowing responding parties to make blanket assertions of privilege without providing *any* substance whatsoever. That Petitioner was forced to file this Petition in order to force Respondents to act with the minimal diligence required to ascertain those even arguably covered by a "privilege" evidences Respondents' strategy of stonewalling and evasive response. An individual seeking public records under the CPRA or Sunshine Ordinance should not be required to burden the Court to obtain compliance with those statutes. Because this Petition has *already*

"result[ed] in defendant releasing a copy of a previously withheld document," Galbiso v. Orosi Pub. Util. Dist., 167 Cal. App. 4th 1063, 1085 (2008), he is entitled to his fees and costs. "Prevailing" includes circumstances in which "'the lawsuit motivated the defendants to produce the documents," id., and compels a mandatory fees and costs award under both the CPRA and Sunshine Ordinance. Gov. Code § 6259(d); San Francisco Admin. Code § 67.35(b); Filarsky v. Super. Ct., 28 Cal. 4th 419, 427 (2002) (CPRA fees and costs award mandatory).

III. RESPONDENTS MISCONSTRUE THE SUNSHINE ORDINANCE

A. SECTION 67.24(B)(1)'S BROADENING OF ACCESS TO LOCAL PUBLIC RECORDS IS EXPRESSLY AUTHORIZED BY THE CPRA

Under the CPRA, "every person has a right to inspect any public record." Gov. Code § 6253. The defined statutory exceptions to that complete right of access, which must be narrowly construed, are "islands of privacy upon the broad seas of enforced disclosure." Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 653 (1974). The CPRA public right of access mandated by the CPRA operates as a floor, not a ceiling—the law expressly authorizes local governments to "adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]" Gov. Code § 6253(e).[1]

The provision at issue here, Sunshine Ordinance section 67.24(b)(1)(iii), is just one such adoption expressly authorized by the CPRA. It does nothing more than shrink one of the islands of privacy, by precluding San Francisco agencies from invoking certain statutory exceptions when the public records concern a narrow set of laws relating to public access itself. Through the Sunshine Ordinance, the voters of San Francisco provided "enhanced rights of public access to information and records" with respect to "[a]dvice on compliance with, analysis of, an opinion

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[1] The California Constitution, as amended in 2004 by Proposition 59, with approval by more than 83 percent of voters, declares that "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny," and mandates that "[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(b)(1), (2) (emphasis added).

concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or [the Sunshine] Ordinance." San Francisco Admin. Code § 67.24(b)(1)(iii). The law is narrow in scope and expressly authorized by the CPRA.

B. THE ETHICS COMMISSION BY-LAWS STATE THAT IT WILL COMPLY WITH THE SUNSHINE ORDINANCE

The by-laws of the Ethics Commission expressly state that it will comply with the Sunshine Ordinance: "*The Commission shall comply with all applicable laws, including, but not limited to, the... San Francisco Sunshine Ordinance (Administrative Code sections 67.01 et seq.)* [and], the Ralph M. Brown Act (Government Code sections 54950 et seq.)." Ethics Commission By-laws, Art. I, §3 (emphasis added). It should not now be allowed to argue that it need not comply with the provisions its by-laws mandate that it follow.

C. OPEN GOVERNMENT LAWS ARE NOT INCOMPATIBLE WITH THE ATTORNEY-CLIENT RELATIONSHIP

Respondents' contention that section 67.24(b)(1)(iii) prevents the City Attorney from carrying out his duties as attorney for the City and its agencies is a gross exaggeration. The section merely provides that communications on certain subject matters, namely those *pertaining to open government laws*, remain accessible to the public. It is not a reorganization of the relationship between the City Attorney and his clients, nor is openness fundamentally incompatible with the attorney-client privilege.[2]

The law is no more an attack on the attorney-client relationship than the Brown Act's mandate that public meetings be conducted in the open, including any communications with counsel not related to pending litigation. Gov. Code § 54956.9. Even when the purpose of a local legislative body's communications is "to confer with, or receive advice from … legal counsel," the body's sessions must remain public, and may go into close session only if "open

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[2] Section 67.24 contains other provisions precluding San Francisco agencies from asserting CPRA exemptions that have not been challenged by the City. For example, section 67.24(c) allows disclosure of a broad range of personnel information, and section 67.24(h) precludes assertion of the deliberative process privilege, and section 67.24(g) precludes reliance on the CPRA's "catch-all" provision. To Petitioner's awareness, none of the above have been attacked.

session concerning those matters would prejudice the disposition of the local agency in the litigation." Id. In other words, the Brown Act mandates that *most* attorney-client communications with a local legislative body take place in *open* session. When the advice being sought or provided by the attorney does not concern pending litigation, that attorney-client communication must be in public. See, e.g., Stockton Newspapers, Inc. v. Members of Redevelopment Agency, 171 Cal. App. 3d 95, 105 (1985) (no exemption where "purpose of the communications with the attorney is a *legislative* commitment").[3]

The Brown Act makes clear that the California Legislature believes that the relationship between a municipal body and its attorney does *not* require secrecy, and that advice outside of the context of pending litigation may be carried out in full view. Respondents' quotes from various cases extolling the virtue of confidentiality in the attorney-client relationship, but those statements do not add up to a requirement that an attorney can perform his or her duties only in secret.[4] The City Attorney regularly provides advice to the Board of Supervisors, the Ethics Commission, and other city boards, in open session.

Respondents also contend that section 67.24(b)(1)(iii) makes it impossible for the City Attorney to carry out his obligations under Business and Professions Code section 6068(e)(1), which requires an attorney to protect a client's "confidence" and to "preserve the secrets[] of his or her client," and Rule of Professional Conduct 3-100 which similarly prohibits disclosure of client confidences. The logic is backward: what an attorney is required to do says nothing about

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[3] The provision is sometimes referred to as a legislative abrogation of the attorney-client privileges. Shapiro v. Bd. of Directors of Ctr. City Dev. Corp., 134 Cal. App. 4th 170, 174 (2005).

[4] Academic studies agree that an attorney's representation of a public entity client can be fulfilled in an environment where the attorney-client privilege has been limited or altogether eliminated. The author of the leading treatise on the attorney-client privilege wrote, "Under the logic of open meetings, sunshine, and freedom of information acts, seven states" have abolished the attorney-client privilege altogether. Rice, Paul R., The Government's Attorney-Client Privilege: Should It Have One?, PuB. COUNS. NEWSLETTER, (Md. St. B. Ass'n, Baltimore, MD) (cited in Leong, Nancy, "Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys," (2007) William & Mary Law School Scholarship Repository, Faculty Publications Paper.) He notes, "Significantly, there have so far been no reported adverse consequences from this action." Id.

whether his client is under an obligation to produce information. Those provisions governing an attorney's duty of confidentiality have no bearing on the principal's duties, and even with respect to the attorney, do not apply to communications that were not confidential in the first place. The City Attorney would not run afoul of his confidentiality obligations by disclosing advice provided to a local board in open session. Similarly here, he does not risk a violation governing only "secrets" and "confidence[s]" when the communications were, by operation of law, publicly accessible and therefore never confidential in the first place.

Other courts addressing the identical arguments being made here are in agreement. For example, in Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough, 395 Mass. 629, 633–34 (1985), the Massachusetts Supreme Judicial Council (the Commonwealth's highest court) ruled that a municipal board could not invoke the attorney-client privilege to create an exception to the state's open meeting law: "We view § 23B as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." Id. at 634. The Court expressly held that the law did not require attorneys to violate their ethical duties because the "attorney-client privilege is the client's privilege to waive," meaning that if "a client chooses to waive the privilege of confidentiality, the attorney is under no further ethical obligation to keep the communications secret." Id. at 633–34.

D. RESPONDENTS CANNOT SHOW WHY DISCLOSURE OF *THESE* COMMUNICATIONS WOULD IMPEDE THE CITY ATTORNEY'S REPRESENTATION

The premise that the City Attorney cannot carry out his duties if his client may be under an obligation to make those communications public is simply wrong, and wholly incompatible with the California Legislature's judgment in the Brown Act context that an attorney's advice to local bodies *should* be carried out in public. The subject matter of Petitioner's request epitomizes the type of advice that does not depend on confidentiality. He sought drafts and final versions of the Ethics Commission's regulations governing the handling of Sunshine Ordinance matters, the associated staff report, and records relating to the "preparation, review, revision and distribution" of the drafts and staff report. The drafting of procedural regulations is akin to a legislative function—different members of the public may have different views about what the

procedures should look like, but the process is fundamentally non-adversarial. No unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions. Notably, at the most recent Ethics Commission meeting, the Deputy City Attorney provided legal advice in open session on further proposed changes to the Sunshine Ordinance regulations at issue.

Respondents argue, "communicating with clients in confidence is important because it encourages clients to confide in the City Attorney and provide full information that may be critical to the City Attorney's ability to give thorough and accurate advice." (Opp. at 8.) Respondents point to a parade of horribles that might ensue if litigation adversaries could attack the attorney-client privilege through Sunshine Act or CPRA requests. Whatever justification might be found for limiting disclosure in the context of active litigation, those admittedly trickier circumstances are not found here. The drafting of regulations is a process that should be open, and the provision of candid, honest, well-reasoned and complete legal advice in connection with that process is not impeded by disclosure. There is no reason to believe the questions to the City Attorney or his answers would be any different regardless of whether communications were public or private. The Court need not reach the issue of whether a litigation exception should be read into the law, and need only apply the law as written.

E. IF THERE WAS A PRIVILEGE, THE VOTERS COULD WAIVE IT

Because San Francisco law requires that the public records at issue be made public, they were never confidential in the first place, and no privilege ever attached. The waiver of privilege is therefore a misleading and inapposite frame of reference here. But if disclosure here were viewed as a waiver of privilege, it is clear that the voters of San Francisco were empowered to make that waiver.

Whatever difficulty a municipal lawyer might have in ascertaining who holds the power to waive the City's privilege dissolves when the voters speak through the ballot box. The California Constitution states: "All political power is inherent in the people." Cal. Const. Art. II, § 1. The San Francisco City Charter grants plenary legislative power through direct action by the voters, providing that "the voters of the City and County shall have the power to enact

initiatives and the power to nullify acts or measure involving legislative matters by referendum." City Charter §14.100. The Sunshine Ordinance was a valid and proper exercise of that authority.

Respondents' arguments to the contrary do not hold up to scrutiny. First, they contend that the designation of the City Attorney as counsel for the City and its agencies and officers means that the City Attorney may not be compelled to violate his duties to advise Respondents in confidence. That has nothing to do with whether the voters can compel their own agencies and officials to take certain action. It may be that the City Attorney is bound not to disclose privileged information, and to act zealously on behalf of his clients, but that says nothing about whether those clients may chose to give up their right to confidentiality. Here, the Sunshine Ordinance instructs the *Respondents* on how to respond to public records requests, but does not compel the City Attorney to do anything at all.

Second, Respondent's argument that "[o]nly those overseeing the particular transaction as to which the advice was provided have authority to waive the privilege on behalf of the entity to which it belongs" is utterly without support. They concede that "[w]hen the holder of the privilege is an entity, the privilege belongs to the entity as a whole rather than any individual officer or employee." (Opp. at 13, citing People ex rel. Lockyer v. Super. Ct., 83 Cal. App. 4th 387, 398 (2000).) From there, they draw the *opposite* conclusion that only particular *subordinate* officers are empowered to waive the privilege. The City would have the voters and the Board of Supervisors deemed powerless to waive privilege so long as the particular official overseeing the matter objected. There is no support for that radical view; voters have plenary legislative authority in San Francisco; the power to waive privilege clearly falls within the bounds of their power.[5]

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[5] Respondents cite Rule of Professional Conduct 3-600 for the proposition that *only* the "officer, employee, body or constituent *overseeing the particular engagement*" may act for the organization. But the rule states that "the client is the organization itself," and the bulk of that rule deals with situations in which the individual acting on its behalf takes actions contrary to the organization's interests, and mandates referral to "the highest internal authority that can act on behalf the organization." That is, the rule itself acknowledges that the individual designee does not exercise sole authority over the privilege, and directs an attorney to seek instruction from the ultimate authority.

In the very next paragraph, Respondents acknowledge that "legislative bodies have, in some circumstances, the ability to waive privilege," but argues that they can only do so after the fact and only after having received the advice. The requirement that a waiver be "knowing" does not extend that far. They cite Maas v. Mun. Court, 175 Cal. App. 3d 601, 606 (1985), a case in which a criminal defendant's agreement to provide "truthful and complete" information in exchange for immunity was not deemed to be an unambiguous waiver of attorney-client privilege. Respondents cite *no* authority that suggests that an entity cannot make a blanket waiver of privilege, or that it cannot waive privilege with respect to all matters falling within a specified subject matter. For example, Maas itself recognizes that "[c]onsent to disclosure may be made in advance by contract." Id. Respondents cannot contend that the voters of San Francisco did not fully consider the import of the Sunshine Ordinance merely because they could not have contemplated every circumstance in which it might operate. Moreover, the circumstances here fall squarely within the plain language of Sunshine Ordinance section 67.24(b)(1)(iii), and the disclosure sought here comports exactly with the clear intent of the provision. Even if the provision were read narrowly, it should be applied to require disclosure, which was the voters' purpose in enacting the provision.

Third, Respondents' argument that the City Charter's general designation of the City Attorney as counsel for Respondents trumps the voters' specific directive that certain records be made public holds no water. As explained above, Sunshine Ordinance section 67.24(b)(1)(iii) and the City Charter are not in conflict; the City Attorney may carry out his duties, but must do so in light of the fact that in certain areas his advice will not be confidential. There is nothing so fundamentally contradictory in that limitation to merit voiding the voter's intent. Second, section 67.24(b)(1)(iii) was a proper enactment under the CPRA, namely Government Code section 6253(e). The local rule is expressly authorized by state law, and it is beyond cavil that state law supersedes local law. Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist., 39 Cal. 3d 878, 885 (1985) ("If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."). Whatever the hierarchical relationship between a general provision of the City Charter and a detailed, specific enactment by the voters directly, the fact

that the pertinent section here was authorized by express state law renders the debate of no significance.[6]

IV. THE COURT SHOULD ENFORCE THE SUNSHINE ORDIANCE TASK FORCE'S ORDER

The Court need not revisit the issues raised by Respondents, and need only enforce the Sunshine Ordinance Task Force's valid Order of Determination issued June 24, 2013, finding a violation of Sunshine Ordinance sections 67.21(b) and 67.24(b)(1)(iii), and ordering Respondent St. Croix to produce the requested records to Petitioner. The Sunshine Ordinance Task Force's Order is lawful and binding, and this Court has express authority to enforce it. San Francisco Admin. Code § 67.35(d). Respondents have provided no reason why the Order should be reconsidered, or even if it were, why it should be reversed.

V. CONCLUSION

For the reasons set out above, and in his other submissions to the Court, Petitioner respectfully requests that his Petition be granted.

DATED: October 15, 2013

KERR & WAGSTAFFE LLP

By: _____
MICHAEL NG

Attorneys for Petitioner
ALLEN GROSSMAN

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[6] Respondents also claim that they should be excused from making a disclosure because the documents constitute attorney work product. First, at least some of the documents are requests for advice to the Deputy City Attorney, so they cannot be work product. Second, Respondents overstate the law by suggesting that a client may not disclose communications with their attorney that happen to contain work product without the attorneys' consent. The law is clear that "an attorney's work product belongs absolutely to the client." Kallen v. Delug, 157 Cal. App. 3d 940, 950 (1984).

PROOF OF SERVICE

I, Sarah Guzman, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, Suite 1800, San Francisco, California 94105.

On October 15, 2013, I served the following document(s):

PETITIONER'S REPLY IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE

on the parties listed below as follows:

Dennis J. Herrera
City Attorney
Andrew Shen
Joshua S. White
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Pl.
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San Francisco, CA 94102

☐ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

☐ **By facsimile machine** (FAX) by personally transmitting a true copy thereof via an electronic facsimile machine.

☐ **By personal service** by causing to be personally delivered a true copy thereof to the address(es) listed herein at the location listed herein.

☒ **By Federal Express** or overnight courier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 15, 2013, at San Francisco, California.

Sarah Guzman

Sarah Guzman