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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

ALLEN GROSSMAN, an individual,

Petitioner,

vs.

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

Respondents.

Case No. CPF-13-513221

**RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE**

Hearing Date: October 18, 2013
Hearing Judge: Hon. Marla J. Miller
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 18, 2013
Trial Date: None Set

Attached Documents: Declaration of Andrew Shen
Declaration of John St. Croix
Request for Judicial Notice
[Proposed] Order

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## INTRODUCTION

This case raises the question whether a municipality's voters acting in their legislative capacity may, by ordinance, override the laws of attorney-client privilege and work product doctrine that are set forth in state statutes and rules of professional conduct and incorporated into a City Charter. The answer to this question has to be no. Municipal charters preempt contradictory ordinances, and the San Francisco Charter provides that the City and its constituent officials, commissions, and departments are entitled to representation and advice by a City Attorney elected for the purpose of ensuring the City's legal interests are adequately protected. The City Attorney could not fulfill his paramount obligations under the Rules of Professional Conduct and the Business and Professions Code to protect the confidences of clients if a mere ordinance could prevent city bodies and officials from asserting the privilege or prevent the City Attorney from asserting work product in a broad swath of matters, as Petitioner contends the Sunshine Ordinance did here. If the City could not rely on the privilege or work product, the City Attorney's ability to fulfill his Charter-defined mission of advising and representing the City and its officials would be seriously compromised.

Petitioner's argument also fails because the voters did not authorize the waiver of attorney-client privilege and attorney work product. The ban in the Sunshine Ordinance against the assertion of the attorney client privilege and work product privilege are not waivers. Nor could the voters have done so in the manner the Sunshine Ordinance purports to accomplish that objective. To be effective, a waiver must be knowing and intentional, which cannot be the case without understanding the nature of the specific advice as to which the privilege is being waived. The client with authority to waive the privilege where an entity like the City is involved depends upon the context. Only 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. This is why a waiver cannot be accomplished by a legislative act, at least in a blanket fashion. If it were otherwise a waiver could be made by a person without any knowledge of the communications as to which the waiver is being made who would therefore be in no position to understand or assess the consequences of a waiver. Here, the Ethics Commission and its staff sought and received the advice and only they had knowledge of the communications. Thus only

they could knowingly waive the privilege as to the communications in question. The purported blanket waiver in the Sunshine Ordinance was not a knowing waiver. Further, as to work product, only attorneys may generally waive that protection, and as with the attorney client privilege an ordinance adopted by the voters could not effect a blanket waiver.

## STATEMENT OF FACTS

The relevant facts here are not complicated. The Ethics Commission ("the Commission") is a five-member body that oversees the City's campaign finance, lobbying, conflicts of interest, and governmental ethics laws. Charter §§ 15.100, C3.699-10. The Commission's Executive Director and staff carry out the Commission's day-to-day work, under the general direction of its five appointed members. *See id.* § 15.101.

In 1993, the San Francisco Board of Supervisors enacted San Francisco's Sunshine Ordinance. On November 2, 1999, the voters amended the Ordinance to add section 67.24(b)(1)(iii) – the provision central to this dispute. *See* Request for Judicial Notice ("RJN"), Exh. B. The Sunshine Ordinance and the amendment are part of the City's Administrative Code (*see generally* Admin. Code, Chapter 67); neither amended the City Charter.[1] The Sunshine Ordinance designates the Commission as one of the bodies with authority to enforce it. It states that complaints "involving allegations of willful violations" of the Sunshine Ordinance "by elected officials or department heads of the City and County of San Francisco *shall be handled by the Ethics Commission.*" Admin. Code § 67.34 (emphasis added). The Ordinance also states: "Any person may institute proceedings for enforcement and penalties under this act . . . *before the Ethics Commission* . . . ." *Id.* § 67.35(d) (emphasis added). The Sunshine Ordinance does not specify the procedures that govern the Commission's adjudication or enforcement of complaints alleging Sunshine violations.

The Charter authorizes the Commission to adopt regulations to implement the Charter and ordinances relating to its duties. *See* Charter § 15.102. For years the Commission carried out its

[1] A proposed Charter amendment can only be placed on the ballot if the proponent obtains the signatures of ten percent of all of the City's registered voters. Cal. Elect. Code § 9255(b)(3). An initiative ordinance requires a much lower number of signatures: a number equal to five percent of the votes cast for Mayor in the last mayoral election. Charter § 14.101.

Sunshine enforcement using regulations it had adopted for its enforcement of campaign finance, lobbying, conflicts of interest, and governmental ethics laws. Declaration of John St. Croix ("St.Croix Decl.") ¶ 4. In 2009, Commission staff decided to propose separate regulations for Sunshine enforcement for two reasons: (1) to make Sunshine enforcement proceedings more transparent (unlike investigations into campaign finance, conflict of interest, and ethics matters, and initial hearings on complaints about such matters, which the Charter requires to be confidential, Charter § C.699-13(a)); and (2) to effectuate quicker resolution of Sunshine-related complaints. St.Croix Decl. ¶¶ 5-6.

Throughout the process of develping Sunshine-specific regulations, the Commission consulted the Sunshine Ordinance Task Force ("Task Force"),[2] including convening two joint Commission-Task Force meetings, submitting drafts of proposed regulations to the Task Force for review, incorporating Task Force suggestions, and holding two public meetings at which members of the public provided comment on the final draft regulations. St.Croix Decl. ¶¶ 6-7. The process was lengthy in significant part because of the Commission's efforts to include the Task Force in the process of developing the regulations. *Id.* ¶ 6. The Commission finally adopted the regulations in November 2012. *Id.* ¶ 7.

Around the time of the Commission's September 2012 meeting, Petitioner apparently inferred that the Commission's failure to hold a *third* joint Commission-Task Force Meeting, or to submit the final draft of the regulations to yet another round of Task Force review, reflected a nefarious scheme to deny the Task Force input into the proposed regulations. *See* Petition for Writ of Mandate ("Pet.") ¶¶ 13-14. Petitioner so inferred despite the fact that the Task Force took almost an entire year to provide comments on the prior draft causing delay to an already lengthy process. St. Croix Decl. ¶ 6. To confirm his suspicions, Petitioner submitted a public records request under the California Public Records Act ("CPRA") and the Sunshine Ordinance. He sought the Commission's and its staff's documents relating to the Sunshine regulations, including all prior and final drafts of the regulations, a September 14, 2012 staff report regarding the regulations, and all documents relating to "the preparation, review, revision and distribution of all prior drafts and final versions of the Draft

[2] Under the Sunshine Ordinance, the Task Force is an advisory body charged with advising City agencies regarding compliance, making recommendations, and if necessary, referring disputes to other City bodies with enforcement authority. S.F. Admin. § 67.30(c).

Regulation and Staff Report, *including, without limitation, emails, memoranda, notes, letters or other correspondence or communications to or from the San Francisco City Attorney, any Deputy City Attorney or any other person in the Office of the City Attorney.*" Pet., Exh. A (emphasis added).

The Commission responded to Petitioner's request within the 10-day time-frame established by the Sunshine Ordinance, producing 133 documents, six of which were partially redacted. *Id.*, Exhs. B, G. As explained in its response, the Commission withheld other documents in their entirety based on attorney-client privilege and work product, citing Evidence Code sections 952 and 954 and Code of Civil Procedure section 2018.030. *Id.*, Exh. B. In further correspondence, Petitioner argued it was improper for the Commission to claim attorney-client privilege and attorney work product without providing a specific description of each document, *i.e.*, a privilege log. *Id.*, Exh. C. Executive Director St. Croix responded that the Sunshine Ordinance did not require the Commission to create a privilege log in response to a records request. *Id.*, Exh. E.

In November 2012, Petitioner pursued the matter by filing a complaint with the Task Force. *Id.*, Exh. F. Delays by Petitioner and the Task Force delayed its consideration until June 5, 2013. *Id.*, Exh. H; St. Croix Decl. ¶¶ 9, 11. The Task Force advised that the Commission could not assert attorney-client privilege or attorney work product. Pet., Exh. H. The Task Force has no authority to enforce such decisions, which are only advisory. *See* S.F. Admin. Code §§ 67.21(e), 67.30(c).

The Commission is withholding 24 documents that fall squarely within the attorney-client privilege and work product protections. Shen Decl. ¶¶ 5-6.[3] Many of the documents are requests, generally e-mails, from the Commission's staff to its deputy city attorneys for legal advice concerning the proposed regulations. *Id.* ¶ 6. Some consist of the deputy city attorneys' replies to those requests. *Id.* One document is a memorandum prepared by the City Attorney's Office directed to the Commission and its staff advising of legal issues and risks relating to the proposed regulations. *Id.*

[3] On October 9, the City Attorney's Office provided Petitioner with four documents responsive to his public records request. After further review, these additional documents were determined not to be subject to the privilege or work product or to be capable of production with redactions. *Id.* ¶ 6.

## ARGUMENT

### I. THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINES ARE ESSENTIAL TO A FUNCTIONAL ATTORNEY-CLIENT RELATIONSHIP.

The attorney's duty of confidentiality is set forth in the Business and Professions Code, which requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e)(1). The Rules of Professional Conduct, which govern every attorney licensed to practice law in this state, similarly prohibit an attorney from "reveal[ing] information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . . ." Rules of Prof. Cond. 3-100. As note 2 to Rule 3-100 reflects, "the principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule, and policy."

Note 1 to Rule 3-100 cogently explains the purposes served by these doctrines:

> A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr.371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

The California Supreme Court has likewise recognized the central importance to our justice system and to the attorney-client relationship of the attorney-client privilege.[4] "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system,"

[4] The attorney-client privilege is codified in the Evidence Code. *See* Evid. Code §§ 950-962. A lawyer "who received or made a communication subject to the privilege" is duty bound to claim the privilege "whenever he is present when the privilege is sought to be disclosed" unless there is "no holder of the privilege in existence" or the lawyer is instructed by the client to permit disclosure by the holder of the privilege. *Id.* §§ 954, 955. The privilege belongs to entities as well as natural persons. *Id.* § 954.

and the privilege that applies to those communication is a "hallmark of our jurisprudence." *People v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146. "The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client." *People v. Gionis* (1995) 9 Cal.4th 1196, 1207. The attorney-client privilege allows clients to share all of the relevant facts with their counsel, and counsel to be equally frank in providing clients with appropriate legal advice. "[B]y encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation." *Id.* Without the privilege, the attorney-client relationship cannot properly function.

The attorney work product doctrine is also vital to our system of jurisprudence. That doctrine recognizes that it is "essential" for an attorney to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor* (1947) 329 U.S. 495, 510. If an attorney's work product were to be "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten" and would consequently impact the quality of the legal advice provided to clients. *Id.* at 511. In such instances, "the interests of the clients and the cause of justice would be poorly served." *Id. See also* Code Civ. Proc. §§ 2018.020-2018.030 (setting forth purpose of attorney work product doctrine and describing scope of coverage).

Government bodies and officials need "freedom to confer with [their] lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel." *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380. *Accord Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 798.

> There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. California law, now expressed in sections 950 through 962 of the Evidence Code, protects confidential communications between attorney and client against forced disclosure. Several California decisions recognize that the attorney-client privilege is as vital to public as to private clients.

*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54. *See also Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 (similar considerations apply to attorney work product doctrine).

## II. IN PROVIDING FOR A CITY ATTORNEY TO SERVE AS LEGAL ADVISOR AND REPRESENTATIVE OF THE CITY AND ITS OFFICIALS, THE SAN FRANCISCO CHARTER INCORPORATES THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINES.

The San Francisco Charter provides for an elected City Attorney, who is charged with representing the City and its officials in all legal matters in which the City has an interest.[5] Charter §§ 6.100, 6.102(1)-(3). The City Attorney is also the legal advisor to the City as a whole, providing oral and written legal advice to the Mayor and Board of Supervisors as well as City officers, department heads, boards and commissions. *Id.* § 6.102(4). The City Attorney's responsibility for the City's legal affairs is broad, and includes representing the City and its officials in litigation and other proceedings, investigating and resolving claims, drafting proposed legislation, regulations, and contracts, and advising City officials, boards, commissions and departments on all aspects of their operations. *See id.* § 6.102(1)-(9); Shen Decl. ¶ 3. The scope of the City Attorney's role is broad. The City Attorney advises and represents the City and its constituent bodies and officials on a huge array of subjects, from transportation to energy, telecommunications and public utilities, from environmental and land use to real estate and finance, from law enforcement and health and safety code enforcement to child and family services, from ethics and campaign finance to elections, and from labor and employment to litigation of all kinds.[6] *Id.* In all of these engagements, the City

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[5] The Charter excepts situations in which the City Attorney has a conflict of interest and, in regard to city officers and officials, where the City has a cause of action against them. *Id.* § 6.102(1), (2). City boards and commissions can retain temporary outside counsel for specific purposes, but only with the consent of the Mayor and the City Attorney. Charter § 4.102(11).

[6] The Charter and City codes repeatedly refer to the City Attorney and entrust him with myriad responsibilities, from advice, to appointments, to enforcement, to training - demonstrating the key role he plays in City government. *See, e.g.*, Charter §§ 8A.100 (Municipal Transportation Agency must ensure sufficient oversight of agency by preserving, among other things, the role of the City Attorney as to legal matters); 8.102(c)(3) (requiring Municipal Transportation Agency board members to attend trainings by City Attorney regarding their legal responsibilities); 13.103.5 (City Attorney appoints one member of Elections Commission with background in elections law); 13.104.5 (City Attorney serves as legal counsel to Elections Commission and Department); 15.100 (City Attorney appoints member of Ethics Commission with background in government ethics laws); 15.102 (City Attorney shall be legal advisor to Ethics Commission); B3.585 (City Attorney shall be legal advisor of Port Commission); F1.107(b) (Controller shall forward complaints alleging violation of government ethics laws to Ethics Commission and City Attorney).

Attorney's ability to provide confidential advice to its City clients is crucial to protecting the City and County's interests.

One of the City Attorney's Charter-mandated duties is to "provide advice or [a] written opinion to any officer, department head or board, commission or other unit of government of the City and County." Charter § 6.102. In fulfilling this responsibility, the City Attorney often provides written advice to City employees and officers, either through formal memoranda or more informal means such as e-mails. Shen Decl. ¶ 4. The City Attorney's Office generally provides its advice confidentially. Communicating with clients in confidence is important because it encourages clients to confide in the City Attorney and provide the full information that may be critical to the City Attorney's ability to give thorough and accurate advice. *Id.* The City's interest in receiving confidential advice is heightened where there is a risk that the policy decision or practice at issue may expose the City to litigation. Not infrequently, the City's policy makers exercise their prerogative to choose a course of action that is not the legally safest. The City Attorney frequently provides confidential memos referred to as "cautionary memos" to advise City policymakers and officials about the legal risks associated with such a proposed course of action. The confidentiality of the City Attorney's advice about the risks entailed in such action can be critical to his ability to defend policymakers' judgments. Without it, the City would be at a tremendous disadvantage, since its opponents could use the City Attorney's own analysis of the risks of the City's actions against the City in litigation. If the City simply did not provide any written advice, that too would undermine the City's right to counsel.

> [W]e recognize public agencies' constant embroilment in civil litigation, much of it highly adversary, involving large values and requiring public attorneys to pit themselves against vigorous and skilled private practitioners. Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious.

*Sacramento Newspaper Guild, supra*, 255 Cal.App.2d at 54.

In adopting the Charter provisions setting forth the duties of the City Attorney and describing the City Attorney's relationship with City officials, boards and commissions, the voters plainly

intended for the City to have competent and adequate representation. As the California cases and authorities cited in Part I above explain, adequate legal representation is impossible without the ability to communicate in confidence. The inescapable conclusion is that by charging the City Attorney with advising and representing the City and its officials, the Charter imported the Rules of Professional Conduct regarding attorney-client relationships, including the duty of confidentiality generally and the attorney-client privilege and work product doctrines specifically.[7] And while the inference alone is inescapable, the Charter also expressly incorporates these powers and duties by stating in section 6.100 that "[s]ubject to the powers and duties set forth in this Charter," the City Attorney "shall have such additional powers and duties prescribed by state laws for [his or her] office."

## III. NEITHER THE BOARD OF SUPERVISORS NOR THE VOTERS ACTING BY ORDINANCE COULD PRECLUDE THE CITY FROM ASSERTING THE PRIVILEGE IN A SIGNIFICANT SWATH OF MATTERS.

The hierarchy of local laws in a Charter City or County (or here a Charter City and County) begins with the Charter, which is the organic document defining City officials' and bodies powers and duties. *See Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034. Local ordinances, whether adopted by the regular legislative body (here the Board of Supervisors) or voters through the initiative, cannot conflict with the Charter. *Id.* ("an ordinance cannot alter or limit the provisions of a city charter"). Ordinances that purport to require action prohibited by, or prohibit action permitted by, the Charter are not binding on the City or ifs officials.

Because the Charter creates the office of the City Attorney and defines his duties and relationship with his clients, only a Charter amendment could alter how the City Attorney performs his core functions and how city clients exercise their privileges. The Sunshine Ordinance provision Petitioner relies on purports to define as public records all "[a]dvice on compliance with, analysis of,

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[7] There are a many other indications in the Charter that the voters intended to ensure adequate legal representation of the City and to incorporate the Rules of Professional Conduct when they adopted the provisions governing the City Attorney and his or her responsibilities. Section 6.102 provides that the conflict of interest provisions of the Rules govern when the City Attorney may not represent or advise the City and its officials. Section 6.100 requires the City Attorney to represent the City full time, and prohibits him or her from engaging in the private practice of law. The same section requires the City Attorney to be "licensed to practice law in all courts of the State of California and [to] have been so licensed for at least ten years next preceding his or her election." Charter § 6.100.

an opinion 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 this Ordinance." S.F. Admin. Code § 67.24(b)(1)(iii). Thus, the Ordinance purports to bar the City from asserting the attorney-client privilege and the City Attorney from asserting attorney work product to withhold legal advice provided to City officials, boards and commissions regarding "compliance with, analysis of, [or] liability under" state and local public records and meeting laws, campaign finance laws, and governmental ethics laws. In particular, the Ordinance is invalid because it attempts to "alter or limit the provisions of [the San Francisco] city charter." *Citizens for Responsible Behavior, supra,* 1 Cal.App.4th at 1034. Altering the relationship between the City Attorney's Office and its clients is beyond the Sunshine Ordinance's reach.

To comprehend the effects such a change would have on the City Attorney's role and effectiveness, one need only consider the City Attorney's Office's role with respect to advising the Board of Supervisors ("Board") on potential ethics legislation. If section 67.24(b)(1)(iii) of the Administrative Code were not in conflict with the Charter, the City Attorney's Office could not provide the entire 11-member body with a single document, a legal memorandum, addressing the potential legal issues and risks involved in a fast-changing area of the law to ensure that they all receive exactly the same legal advice. The City Attorney's Office could not do so because its memorandum to the Board would give a roadmap to a prospective plaintiff to challenge the legality of such ethics legislation. In such a circumstance, the City Attorney could not provide adequate legal advice, possibly frustrating the efforts of the Board to address an ethics issue facing the City and explore alternate vehicles to achieve its policy objectives.

Even more drastic would be the effect on the City Attorney's ability to advise the Ethics Commission about complaints that a city official has violated governmental ethics rules or campaign finance laws. The Charter requires that investigations into such matters be kept confidential through the initial hearing – on pain of termination or removal of an employee or commissioner who discloses information about the matter. Charter § C3.699(a), (b). The City Attorney's advice to the Commission about such a matter, however, including drafts of findings or analyses of evidence would

be public. Thus, even by seeking the advice from the City Attorney in such matters -- which the Charter plainly contemplates the Commission will do, *see id.* §§ 15.102 (City Attorney shall be advisor to Ethics Commision), F1.107(b) (Controller shall forward complaints alleging violation of government ethics laws to Ethics Commission and City Attorney) – the Commission would be opening such matters to potential public scrutiny in violation of the Charter. It is hard to imagine a more direct inference with the City Attorney's and Commission's ability to fulfill their Charter-prescribed duties than the Ordinance's blanket ban on asserting the privilege for ethics advice.

Similarly, if section 67.24(b)(1)(iii) were not in conflict with the Charter and therefore governed the City Attorney and other officials, the City Attorney could not adequately defend any City board or official in a case such as this one, since the City Attorney's communications with the official or body whose conduct was claimed to violate open meetings or public records laws would be open to their adversaries. Nor could the City Attorney effectively carry out his duty to advise City officials and boards about ethics, political reform or public records and public meeting laws, since the possibility of receiving advice that a city actor's course of conduct entailed some legal risk—advice that an adversary would be entitled to review—would discourage officials from ever seeking such advice in the first instance. Of course, the City Attorney could refrain from ever putting such advice in writing, but this would not be in the best interests of the City, since advice about ethics, political reform, and public records and meetings laws can be complicated and fact dependent. Leaving the City Attorney with only the option to give oral advice would mean City officials would often be unable to comprehend or use that advice to arrive at a sound decision.

These examples pertain to the Sunshine Ordinance and its purported bar against asserting privilege and work product in regard to all legal advice about ethics, political reform and open government laws, but the potential implications of holding that legislators may by ordinance enact a blanket waiver of the privilege are broader still. If voters by adopting an ordinance could withdraw the privilege in regard to the matters mentioned above, why couldn't they (or even the Board of Supervisors) do the same for *any* subject on which the City Attorney advises City officials. If a majority of the Supervisors were for some reason unhappy with the Mayor or a department head, could

the Board simply adopt legislation withdrawing all privilege as to the City Attorney's advice to the Mayor's Office or the offending department? If the voters disagreed with the City Attorney's defense of a case against City police officers, could they legislate that the City Attorney must turn its work product and advice on civil rights issues to the City's adversaries?

In short, an ordinance that purports to withdraw the privilege in wholesale fashion for a broad swath of legal advice would significantly alter the City Attorney's Charter-prescribed responsibilities and relationship with the and undermine his ability to carry out his duties. For this reason, the Charter must control, and section 67.24(b)(1)(iii) of the Sunshine Ordinance cannot be enforced.

## IV. NOR WERE THE VOTERS AUTHORIZED TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT DOCTRINE.

As already mentioned, Section 67.24(b)(1)(iii) defines certain privileged and work product materials as public records subject to disclosure, in effect purporting to prohibit the City or its officials from asserting the attorney client privilege or work product doctrine as grounds for withholding such materials. The provision is not framed as a waiver of the privilege. But even if the provision were construed as purporting to waive the privilege and work product protections, it would be invalid. A blanket waiver is just as much an incursion on the attorney-client relationship and just as much in conflict with the Charter as a bar on assertion of the privilege and work product in the first instance. Thus for all the reasons discussed in Parts II and III above, the section would still be unenforceable.

But even if the Ordinance were not in conflict with the Charter, a categorical waiver such as that in the Sunshine Ordinance would not be effective. This is because a waiver of the privilege must be knowing and voluntary, which it cannot be if it is prospective and outside the context of any particular communication. "[T]he waiver of a privilege must be a voluntary and knowing act, *done with sufficient awareness of the relevant circumstances and likely consequences*." *Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, 606 (emphasis added). For these reasons, waivers are "strictly construed." *Id.* The voters' adoption of section 67.24(b)(1)(iii), given its blanket categories and prospective nature, could not have been done with knowledge of "the relevant circumstances and likely consequences" of disclosing the attorney client advice it purported to make public.

The attorney-client privilege belongs to the client, and only the client may waive it. Cal. Evid. Code §§ 912(a), 954(a). When the holder of the privilege is an entity, the privilege belongs to the entity as a whole rather than to any individual officer or employee. *See People ex rel. Lockyer v. Superior Court*, 83 Cal.App.4th 387, 398 (2000); *Ward*, 70 Cal.App.3d at 35. However, the analysis of who has authority to waive the privilege, on behalf of the City, requires an assessment of who is the "client" on each item of City business. California Rule of Professional Conduct 3-600 addresses "organizational clients," and provides that the attorney's client is "the organization itself, acting through its highest authorized officer, employee, body or constituent *overseeing the particular engagement*." (Emphasis added.) This rule gives meaning to the requirement that a waiver be knowing, since only those responsible for the engagement, who sought and received the legal advice in question, can possibly understand what is being disclosed and evaluate the consequences of disclosure.

To be sure, legislative bodies have, in some circumstances, the ability to waive privilege. For example, if the City Attorney provided a confidential memorandum to the Board concerning legal issues raised by a proposed ordinance to be voted on at an upcoming Board meeting, the Board – acting as a body – could waive attorney-client privilege for that advice on behalf of the City. In that circumstance, other City officials who did not receive the advice could not waive attorney-client privilege on behalf of the City because they would not have "oversee[n] the particular engagement," *i.e.*, the legal risks and implications associated with the proposed ordinance to be voted on at an upcoming Board meeting. Nor could individual members of the Board unilaterally waive the attorney-client privilege on behalf of the entire Board. The "body" to whom the City Attorney's Office would have provided advice in the above example would be the Board, not an individual Board member.

For the attorney work product, only the City Attorney's Office itself could waive its presumptive protection from disclosure. Unlike attorney-client privilege, it is the attorney, not the client, who holds the protection and may claim or waive it. *Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 101. In general, waiver of attorney work product may only occur when an attorney "voluntary disclos[es] or consent[s] to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing." *BP Alaska*

*Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1261. Even if the Board or the voters could legislatively waive the privilege and there were no conflict with the Charter, a blanket legislative waiver would not be effective because it would not be voluntary or knowing.

## V. THE COMMISSION'S RESPONSE TO PETITIONER'S PUBLIC RECORDS REQUEST WAS APPROPRIATE AND SUFFICIENT.

Even if the Commission could claim attorney-client privilege, Petitioner argues that the Commission failed to adequately "justify" the invocation of privilege. Petitioner's Memorandum of Points and Authorities ("MPA") at 16-17. Petitioner's argument relies on the California Public Records Act, Government Code section 6255(a), and Sunshine Ordinance sections 67.21(b) and 67.27(a)-(b). *Id.* But the courts have already concluded that Government Code section 6255(a) does not require the detailed inventory of withheld documents that Petitioner sought. The plain text of the Sunshine Ordinance provisions cited by Petitioner also do not impose a duty on the Commission to provide a privilege log. They merely require a City agency responding to a public records request to state the reasons for any withholding, and it is undisputed that the Commission has done so here.

In *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, the Supreme Court held that section 6255(a) does not require an agency responding to a public records request to provide an inventory or log of documents that it has withheld. In *Haynie*, the petitioner sought records from the Los Angeles County Sheriff's Department concerning his detention and subsequent release after no charges were filed against him. *Id.* at 1065-66. In response to the petitioner's request, the Sheriff's Department refused to provide any documents, claiming a CPRA exemption, and did not identify, list or share any other details concerning the records withheld. *Id.* at 1065.

The Court held CPRA does not "require an agency, as part of its initial response to a CPRA request, to create lists of all potentially responsive documents, including documents statutorily exempt from disclosure." *Id.* As here, the *Haynie* petitioner relied on section 6255(a) ("[t]he agency shall justify withholding any record by demonstrating that the record in question is exempt . . . .")[8] *Id.* at 1074. But the Sheriff's Department had stated it was claiming an existing CPRA exemption, and the

[8] Section 6255(a) is CPRA's "catch-all" exemption, which requires responding agencies to provide a further explanation for its withholding when an explicit exemption is not claimed. *Id.*

Court held further explanation was unnecessary. *Id.* Requiring agencies to catalogue and describe each document withheld and explain the bases for withholding "has the potential for imposing significant costs on the agency" and "be burdensome and of scant public benefit." *Id.* at 1074-75.

Under *Haynie*, the Commission's initial response and refusal to submit a privilege log with a document-by-document explanation of the bases for withholding is entirely proper. As in *Haynie*, the Commission identified specific exemptions, attorney-client privilege and attorney work product, citing the Evidence Code and Code of Civil Procedure sections in its response. Additional explanation of the reasons for withholding is unnecessary here just as it was in *Haynie*.

The language that Petitioner cites from Sunshine Ordinance section 67.21(b) (custodian shall justify withholding any record by demonstrating, in writing that record in question is exempt) does not require the document-by-document explanation he demands. The Commission complied with that section by stating the bases for withholding the documents in writing within 10 days of Petitioner's request. *See* Pet., Exh. B. Section 67.27(a)-(b) is equally unavailing. The justification it requires is simply citation to the provisions of law on the basis of which the documents are withheld. *See* Pet., Exh. B. The Commission did so, and its response to Petitioner's public records request was sufficient.

**CONCLUSION**

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's petition for a writ of mandamus.

Dated: October 9, 2013

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By: _____
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