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12 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

13 **COUNTY OF VENTURA**

14 JANE ROZANSKI, an individual,
15
16 Plaintiff/Petitioner,

17 v.

18 CAMARILLO HEALTH CARE
19 DISTRICT, a California Special District,
20
21 Defendant/Respondent,

22 CAMARILLO ACORN,
23
24 Real Party in Interest.

Case No. 56-2016-00489673-CU-WA-VTA

Hon. Rocky J. Baio, Dept. 20

**OPPOSITION OF CAMARILLO ACORN
TO PETITION FOR WRIT OF MANDATE**

[Second Declaration of Daniel Wolowicz Filed
Concurrently Herewith]

Hearing Date: March 16, 2017

Hearing Time: 10:00 a.m.

Department: 20

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1 romantic one, creating a conflict of interest that led to the wrongful payment of \$425,000 in
2 public money to Ferguson. And no provision of law exempts the records from disclosure. First,
3 Rozanski’s assertion of a purported constitutional right of privacy in the District’s records is
4 frivolous. Among other things, Rozanski cannot demonstrate any reasonable expectation of
5 privacy. Second, neither Government Code section 6254, subd. (c) (“Section 6254(c)”) nor
6 section 6255 (“Section 6255”) would allow the District to withhold the requested records given
7 the public interest in their disclosure. And, even if either provision did apply here, both are
8 discretionary; they cannot be read to *require* the District to withhold records it would otherwise
9 release. Finally, neither Government Code section 6254, subd. (k) (“Section 6254(k)”) nor the
10 attorney-client privilege exempts the records from disclosure. The privilege does not apply, and,
11 even if it did, the privilege belongs to the District, who has declined to assert it.¹
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14 Not only is the District’s disclosure of the records requested by the Acorn mandated by
15 the CPRA, it will serve the core purpose of the Act, which is to guarantee the public’s ability to
16 hold government entities and officials “accountable for [their] actions.” (*CBS, Inc. v. Block*
17 (1986) 42 Cal.3d 646, 651 (*CBS*)). Rozanski’s Petition should be denied.
18

19 BACKGROUND

20 Rozanski served as CEO of the District from January 1993 until her resignation in June
21 2015. (Wolowicz Decl. at Ex. B (the “District Complaint”) ¶¶ 5, 7, 21.) In 2011, Rozanski hired
22 Ferguson—who had served as CEO of the Association of California Healthcare Districts, of
23 which the District was at the time a member, from 2001 to 2011—to provide legal services to the

24 ¹ Rozanski incorrectly asserts that the Acorn’s email-related CPRA request seeks emails between
25 Rozanski and Ferguson from January 1, 2011 to July 1, 2015, when Ferguson was providing legal
26 services to the District. (*See* Pet.’s Opening Br. In Support of Pet. for Writ of Mandate at 1 (filed
27 Feb. 10, 2017) (Pet.’s Br.).) Although the Acorn initially sought emails from this time period, it
28 later amended its CPRA request to seek emails between Rozanski and Ferguson from January 1,
2007 to January 31, 2012. (Second Decl. of Daniel Wolowicz, dated Feb. 22, 2017 (“Wolowicz
Decl.”) ¶ 23 & Ex. G.) Only the Acorn’s request for voicemails and amended request for emails
is before this Court.

1 District. (*Id.* ¶ 10.) The District terminated Ferguson’s services in 2015. (*Id.* ¶ 14.)

2 On October 7, 2016, the District filed a complaint against Rozanski in this Court alleging
3 breach of contract, breach of fiduciary duty, constructive fraud, and fraud and deceit arising out
4 of her alleged conduct while CEO. (*Id.* ¶¶ 23–53.) Specifically, the District alleged that
5 Rozanski and Ferguson “carried out a scheme to cause the District to pay Ferguson’s false,
6 inflated, and unnecessary legal bills, and thereby bilk the District out of hundreds of thousands of
7 taxpayer dollars.” (*Id.* ¶ 1.) The District alleged that Rozanski and Ferguson had been engaged
8 in a “secret romantic relationship” since at least 2007, which Rozanski did not disclose when she
9 hired Ferguson. (*Id.* ¶¶ 1, 10–11.) The District also alleged that during Ferguson’s employment
10 the District’s legal fees “dramatically spiked” without justification, and that Rozanski “personally
11 reviewed and approved” Ferguson’s bills. (*Id.* ¶¶ 14–15.) The District also alleged that Rozanski
12 “disguised the amount of Ferguson’s bills on the District’s annual budget.” (*Id.* ¶ 16.) In all, the
13 District paid Ferguson more than \$425,000 in legal fees from 2011 to January 2015. (*Id.* ¶ 14.)

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16 According to the District, during a 2014 review of Ferguson’s invoices, it discovered that
17 he had overbilled the District by, *inter alia*, billing it “for a significant amount of time spent on
18 the telephone with Rozanski and others . . . discussing various, non-legal” matters. (*Id.* ¶¶ 17,
19 19.) Thereafter, the District retained outside counsel to attempt to recoup certain fees paid to
20 Ferguson. (*Id.* ¶ 20.) The District Complaint alleges that, during this time and without the
21 District’s knowledge, “Rozanski and Ferguson were in constant contact about how to stop the
22 District from pursuing a claim against Ferguson.” (*Id.* ¶ 20.) The District ultimately secured a
23 judgment against Ferguson. (Opp. of Resp. Camarillo Health Care Dist. to *Ex Parte* Application
24 for Temporary Restraining Order and Order to Show Cause (“District TRO Opp.”) 1, fn.1 (filed
25 Dec. 8, 2016).) In June 2015, Rozanski stepped down as District CEO after it came to light that
26 she had fired the outside counsel retained by the District to recoup fees paid to Ferguson without
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1 proper approval. (District Complaint ¶¶ 20–21.)

2 During her tenure as CEO, Rozanski utilized a District-owned cellphone and laptop
3 computer, as well as a District email account, to conduct District business, including to
4 communicate with Ferguson. (Am. Verified Compl. and Pet. for Writ of Mandate (“Am.
5 Compl.”) ¶¶ 19–21 (filed Feb. 6, 2017).) Following her resignation, Rozanski returned the
6 cellphone and laptop to the District, as required by the District’s employee handbook (the
7 “District Handbook”). (*See id.* ¶ 23; Declaration of Karen Ralston, dated Dec. 8, 2016 (“Ralston
8 Decl.”) Ex. A.) The District Handbook states that computers and cellular phones “are the
9 property of the District.” (Ralston Decl. ¶ 2 & Ex. A.) It further states that “[v]oicemail, email
10 and the internet are intended for business purposes only. The District reserves the right to listen
11 to voice mail [*sic*] messages and to access e-mail and internet contacts to ensure compliance with
12 this rule, without notice to the employee and/or in the employee’s absence.” (*Id.* Ex. A.) In
13 addition, the District Handbook states that the District “reserves the right to inspect the contents
14 of all District property including, but not limited to, desks, offices, vehicles and computers,
15 without notice to the employee and/or in the employee’s absence, and/or upon separation.” (*Id.*)

16 Following Rozanski’s resignation, the District reviewed approximately 180 voicemails on
17 the cellphone, which date from December 9, 2014 through May 26, 2015. (District Complaint ¶
18 22; Decl. of Michael Velthoen, dated December 8, 2016 (“Velthoen Decl.”) ¶ 2.) According to
19 the District, the voicemails revealed to it for the first time “the romantic nature” of Rozanski’s
20 relationship with Ferguson, “as well as their close collaboration in response to the [District’s]
21 inquiry into Ferguson’s fees.” (District Complaint ¶ 22.) According to the District, “[a]
22 significant number of voicemails reflect communications between Mr. Ferguson and Ms.
23 Rozanski regarding the District’s investigation into the fees collected by Ferguson from the
24 District.” (Velthoen Decl. ¶ 2.)

1 Following the filing of the District Complaint, the Acorn submitted two CPRA requests to
2 the District via email. The first request sought “voicemail recordings from Jane Rozanski’s
3 [D]istrict-owned cellphone between her and Ralph Ferguson which show their romantic
4 relationship and their collaboration in response to the [District’s] inquiry into Ferguson’s fees.”
5 (Wolowicz Decl. ¶ 12 & Ex. C (the “Voicemail Request”).) The Acorn’s second request sought
6 “emails [sent] between Jane Rozanski and Ralph Ferguson between Jan. 1, 2007 and Jan. 31,
7 2012.” (*Id.* ¶ 23 & Ex. G (the “Email Request”).)² After receiving the Acorn’s requests, the
8 District informed Rozanski’s counsel of its intention to comply with the CPRA by releasing
9 copies of the requested voicemails and emails to the Acorn. (*See* App. of Exs. in Support of
10 Pet.’s Opening Br. (“App.”), Ex. 4; Joint Stipulation and [Proposed] Order Continuing Briefing
11 Schedule and Hearing on Pet. for Writ of Mandate at 2 (filed Jan. 23, 2017).)

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14 On December 2, 2016, Rozanski filed a Verified Complaint and Petition for Writ of
15 Mandate seeking an order preventing the District from releasing records responsive to the
16 Voicemail Request. (*See* Verified Compl. & Pet. for Writ of Mandate (filed Dec. 2, 2016).) The
17 Court granted a Temporary Restraining Order and Preliminary Injunction prohibiting the District
18 from releasing such records pending a final determination on the merits of Rozanski’s Petition.
19 (Minute Order (Dec. 5, 2016); Order Issuing Preliminary Inj. & Establishing Briefing and
20 Hearing Schedule (Dec. 30, 2016).) On February 6, 2017, Rozanski filed an Amended Verified
21 Complaint and Petition for Writ of Mandate, which also seeks to prevent the District from
22 releasing records responsive to the Email Request, in addition to the Voicemail Request.
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27 ² The Acorn initially requested emails sent between Rozanski and Ferguson from January 1, 2011
28 to July 1, 2015. (*See* Wolowicz Decl. ¶ 23.) The Acorn later amended its request to seek only
emails from January 1, 2007 to January 31, 2012. (*Id.*)

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ARGUMENT

I. Nothing in the Act permits this “reverse-CPRA” action.

In enacting the CPRA, the Legislature declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state,” Gov. Code § 6250, and it established procedures by which a requester can enforce his or her right of access to public records. (*See* Gov. Code § 6258 (“Section 6258”); *id.* § 6259 (“Section 6259”).) The Act does not, however, authorize “reverse-CPRA” actions like this one—*i.e.*, lawsuits to block an agency from releasing public records in response to a CPRA request.

The California Supreme Court has concluded that Sections 6258 and 6259 provide “the *exclusive* procedure for litigating the issue of a public agency’s obligation to disclose records to a member of the public” (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 423 (*Filarsky*) (emphasis added).) In *Filarsky*, the Court held that an agency was prohibited from filing an action seeking a declaration that it was not required to disclose records requested under the Act. (*Id.*) The Court found that such litigation would frustrate the Legislature’s purpose in enacting the CPRA by “eliminat[ing] statutory protections and incentives for members of the public in seeking disclosure of public records.” (*Id.*) Although *Filarsky* did not involve a reverse-CPRA action brought by a current or former agency official, its reasoning applies equally to such cases.

Under the CPRA “*only a person seeking disclosure*” may seek a judicial determination of an agency’s obligation to disclose requested records. (*Id.* at p. 428 (emphasis added); *see also* Gov. Code. § 6258 (providing that “[a]ny person may institute proceedings . . . to enforce his or her right to inspect or to receive a copy of any public record or class of public records”).) Thus, “[t]he CPRA’s judicial remedy is limited to a *requester’s action* to determine whether a particular record or class of records must be disclosed.” (*Cty. of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130 (emphasis added).) Relief is available “*only to a person or*

1 entity who is seeking disclosure of public records and *only* where the public entity is allegedly
2 improperly withholding those records.” (*Id.* at p. 127 (emphasis in original).) There “is *no*
3 provision [in the Act] for an action by the government agency or for any action to *prevent*
4 disclosure.” (*City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1320
5 (emphasis in original).) In short, the CPRA does not contemplate that requesters will be forced
6 “to defend lawsuits they otherwise might not initiate.” (*Filarsky, supra*, 28 Cal.4th at p. 432.)

8 In addition to authorizing *only* the requester to seek a judicial determination of an
9 agency’s obligation to disclose public records, the CPRA also provides incentives and other
10 procedural protections for requesters who pursue judicial enforcement of their right of access.
11 Notably, the CPRA mandates that requestors who prevail in litigation be awarded their attorney’s
12 fees. (Gov. Code § 6259(d); *Galbiso v. Orosi Pub. Util. Dist.* (2008) 167 Cal.App.4th 1063, 1088
13 (stating that “the very purpose of the attorney fee provision” is to incentivize members of the
14 public to vindicate their rights under the CPRA in court).) Yet there is confusion as to whether a
15 prevailing requester in a reverse-CPRA lawsuit must be awarded fees under the Act. (*See*
16 *Fontana Police Dep’t v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249, 1253; *Marken v. Santa*
17 *Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1268 (*Marken*) (stating, in *dicta*,
18 that a requester who participates in a reverse-CPRA lawsuit would not be entitled to attorney’s
19 fees under the CPRA’s mandatory fee provision).) Such uncertainty, alone, undermines the
20 Legislature’s intent to guarantee that a requester will never be forced to bear the financial burden
21 of vindicating his or her right of access to public records in court.³

22 Moreover, the Act provides expedited procedures for a trial court to determine an
23 “agency’s obligation to disclose public records, as well as for appellate review by writ of mandate

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26 ³ To date, the Acorn has incurred more than \$6,400 in legal fees in this reverse-CPRA action.
27 (Wolowicz Decl. ¶ 38.) Following a ruling on the merits, the Acorn intends to seek all reasonable
28 attorney’s fees and costs associated with this case, which it is entitled to under both the CPRA
and the California Private Attorney General Statute (Code Civ. Proc. § 1021.5).

1 of that decision.” (*Marken, supra*, 202 Cal.App.4th at p. 1268.) These procedures “reflect a clear
2 legislative intent that the determination of the obligation to disclose records requested from a
3 public agency be made expeditiously.” (*Filarsky, supra*, 28 Cal.4th at p. 427.) Moreover, they
4 ensure that the disclosure of records is not delayed for months or years, as information becomes
5 less newsworthy over time. (*See Powers v. City of Richmond* (1995) 10 Cal.4th 85, 111; *Times*
6 *Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335.) Reverse-CPRA actions, on the other
7 hand, can lead to “additional delay” in the disclosure of public records that is counter to
8 legislative intent. (*See Marken, supra*, 202 Cal.App.4th at p. 1268.)

10 A public records requestor cannot rely upon a public agency to vigorously defend
11 disclosure in reverse-CPRA actions. Because access to public records “makes it possible for
12 members of the public to expose corruption, incompetence, inefficiency, prejudice, and
13 favoritism,” *Int’l Fed’n of Prof’l & Technical Eng’rs v. Superior Court* (2007) 42 Cal.4th 319,
14 333 (*International Federation*) (quotation omitted), the requester’s and the agency’s interests will
15 generally not be aligned. And even an agency that recognizes that it must release public records
16 under the CPRA may be unwilling to invest the time and resources needed to robustly defend that
17 position in court. Moreover, reverse-CPRA lawsuits filed by current or former government
18 officials or agency employees are particularly susceptible to abuse by those seeking to evade
19 *Filarsky*’s prohibition on agency-initiated reverse-CPRA lawsuits. Permitting a current or former
20 government official to pursue a reverse-CPRA action against her agency to prohibit the disclosure
21 of records concerning her actions as a government official allows for *precisely* the type of lawsuit
22 that *Filarsky* prohibits, and would encourage current or former officials and agencies to work
23 together to pursue “third-party” reverse-CPRA litigation to block the disclosure of public records.
24 Indeed, examples of such cases abound. (*See, e.g., Long Beach Police Officers Ass’n v. City of*
25 *Long Beach* (2014) 59 Cal.4th 59, 64 (*LBPOA*) (explaining that the defendant city “aligned itself”
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1 with the “third-party” plaintiff opposing disclosure of requested records in a reverse-CPRA
2 lawsuit); *Marken, supra*, 202 Cal.App.4th at p. 1276 (noting the requester’s “persuasive
3 argument” that the public agency was not “adequately representing his interests” in reverse-
4 CPRA action “beginning with its unauthorized delay in producing the records to permit [a third
5 party] to file the action” and continuing with its “tepid arguments” in support of disclosure)).
6

7 Rozanski’s contention that reverse-CPRA lawsuits are permissible because the federal
8 Freedom of Information Act (“FOIA”) purportedly allows “reverse-FOIA” actions warrants little
9 attention. (*See* Pet.’s Br. at p. 9.) The California Supreme Court has already rejected an attempt
10 to analogize a reverse-CPRA action to a reverse-FOIA action. (*Filarsky, supra*, 28 Cal.4th at pp.
11 431–32.) In addition, although the CPRA and FOIA “have similar policy objectives and should
12 receive a parallel construction” the CPRA “may not, however, be construed to read into it FOIA
13 language which the CPRA itself does not contain.” (*Cty. of L.A. v. Superior Court* (2000) 82
14 Cal.App.4th 819, 825, 825 fn.4.) Accordingly, whether or not a reverse-FOIA lawsuit is
15 permissible under federal law does not speak to whether a reverse-CPRA lawsuit is permissible.
16

17 In sum, reverse-CPRA actions like this one are fundamentally inconsistent with the Act.
18 They are contrary to express provisions of the CPRA and the Legislature’s intent to encourage
19 members of the press and the public to seek disclosure of public records. Because nothing in the
20 CPRA authorizes or permits this reverse-CPRA action, Rozanski’s Petition should be denied.
21

22 **II. A writ of mandate cannot lie to prevent disclosure of records under the CPRA.**

23 This Court should also deny Rozanski’s Petition because a writ of mandate cannot lie to
24 compel an agency to withhold records under the CPRA—a discretionary act. A writ of mandate
25 may issue “to compel the performance of an act which the law specifically enjoins, as a duty
26 resulting from an office, trust, or station” (Code Civ. Proc. § 1085(a).) Thus, “[m]andamus
27 will lie to compel a public official to perform an official act required by law” but “will not lie to
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1 control an exercise of discretion, *i.e.*, to compel an official to exercise discretion in a particular
2 manner.” (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442 (*Common Cause*)).
3 Because the duty to disclose nonexempt public records is mandatory, *see* Gov. Code § 6253, a
4 writ of mandate can issue to compel an agency to disclose such records, *see id.* § 6258. However,
5 “the exemptions from disclosure provided by [S]ection 6254 are permissive not mandatory: They
6 allow nondisclosure but do not prohibit disclosure.” (*Marken, supra*, 202 Cal.App.4th at p. 1262;
7 *see also CBS, supra*, 42 Cal.3d at p. 652; Gov. Code § 6254)). A writ of mandate cannot issue to
8 control this exercise of discretion.
9

10 Apart from a frivolous claim of a constitutional privacy right in the District’s records,
11 Rozanski’s Petition is premised *entirely* on the District’s stated intention not to withhold records
12 she claims fall within *discretionary* exemptions. Although one court has held that a petition for
13 writ of mandate may be used to require an agency to assert *mandatory* exemptions under the
14 CPRA, *see Marken, supra*, 202 Cal.App.4th at p. 1266 fn.12, whether to assert the exemptions
15 Rozanski cites—Section 6254(c), Section.6255, and the attorney-client privilege—is within the
16 District’s discretion; those discretionary exemptions cannot, as a matter of law, support the
17 issuance of a writ of mandate. (*See Common Cause, supra*, 49 Cal.3d at p. 442.) Rozanski’s
18 claim that the California Constitution affords her a right of privacy that bars the release of the
19 requested records—which, in any event, is subject to the same standard as the discretionary
20 Section 6254(c) exemption (*see Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347 (*Braun*))—
21 is a red herring and should be treated as such. *See supra* Section IV.A. Inclusion of a meritless
22 constitutional argument cannot save Rozanski’s Petition, which ultimately seeks, improperly, “to
23 control an exercise of discretion, *i.e.*, to compel [the District] to exercise discretion in a particular
24 manner.” (*Common Cause, supra*, 49 Cal.3d at p. 442.)
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27 The cases on which Rozanski relies to support her petition for writ of mandate are
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1 distinguishable. (See Pet.’s Br. at pp. 8–9.) *Los Angeles Unified School District v. Superior*
2 *Court* is not a reverse-CPRA action. In that case, a requester initiated a CPRA suit after the
3 public agency refused to release requested records; the public agency and a third party filed
4 petitions in the Court of Appeal challenging the trial court’s ruling against them. (*L.A. Unified*
5 *Sch. Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 230–31 (*L.A. Unified*.) In two of the
6 other cases Rozanski cites, the third-party plaintiffs sought injunctions, not writs of mandate.
7 (*LBPOA, supra*, 59 Cal.4th at p. 64; *Pasadena Police Officers Ass’n. v. Superior Court* (2015)
8 240 Cal.App.4th 268, 275, 277.) And, finally, the petitioner in *Marken* sought to prevent
9 disclosure of his personnel records not merely because he claimed they could be withheld under
10 Section 6254, but because disclosure was “otherwise prohibited by law,” including by provisions
11 of the California Education Code. (*Marken, supra*, 202 Cal.App.4th at pp. 1257, 1271.) Unlike
12 Rozanski, who has asserted only discretionary CPRA exemptions and a frivolous state
13 constitutional privacy claim, the petitioner in *Marken* asserted plausible claims that the agency
14 had a mandatory duty not to disclose the requested records.
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16
17 **III. The requested voicemails and emails are public records under the CPRA.**

18 Contrary to the plain language of the Act and California appellate precedent interpreting
19 it, Rozanski argues that the voicemail and email records requested by the Acorn are not “public
20 records” within the meaning of the CPRA. (Pet.’s Br. at pp. 11–16.) Yet those records relate
21 *directly* to the conduct of the public’s business—namely, the use of public funds by the District’s
22 then-CEO and its attorney, and the impact of their personal relationship on their professional
23 conduct. The requested records thus clearly meet the Act’s definition of “public records.”
24

25 The CPRA defines “public records” to “include[] any writing containing information
26 *relating to the conduct of the public’s business* prepared, owned, used or retained by any state or
27 local agency regardless of physical form or characteristics.” (Gov. Code § 6252(e) (emphasis
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1 added.) This definition is intentionally “broad”; it is “designed to protect the public’s need to be
2 informed regarding the actions of government” (*Poway Unified Sch. Dist. v. Superior Court*
3 (1998) 62 Cal.App.4th 1496, 1501.) Indeed, the CPRA’s definition of a “public record” is
4 “intended to cover every conceivable kind of record that is involved in the governmental
5 process” (*Braun, supra*, 154 Cal.App.3d at p. 340 (internal quotations omitted).) Put
6 simply, “[t]he CPRA establishes a presumptive right of access to any record created or
7 maintained by a public agency *that relates in any way* to the business of the public agency.”
8 (*Sander v. State Bar of Cal.* (2013) 58 Cal.4th 300, 323 (emphasis added).)
9

10 Rozanski’s claim that the requested records are “private communication[s]” that have
11 “nothing to do with the public’s business” (Pet.’s Br. at p. 15) is patently wrong. As an initial
12 matter, Rozanski’s argument rests on an outdated definition of “public records” from *People v.*
13 *Olson* (1965) 232 Cal.App.2d 480, a case decided *before* the CPRA was enacted. The CPRA
14 does not limit the definition of “public records” to only those records that “actually discuss the
15 public’s business,” as Rozanski asserts, without citation to any authority. (Pet.’s Br. at p. 15.) To
16 the contrary, the Act states that public records are records that “contain[] *information relating to*
17 *the conduct of the public’s business.*” (Gov. Code § 6252(e) (emphasis added).)
18

19 The requested records clearly fall within the CPRA’s definition of “public records.” First,
20 a “significant number” of the requested voicemails “reflect communications between” Ferguson
21 and Rozanski “regarding the District’s investigation into the fees collected by Ferguson from the
22 District.” (Velthoen Decl. ¶ 2.) Thus, they contain information related to the conduct of the
23 public’s business, specifically, the expenditure of public funds on Ferguson’s fees, the District’s
24 investigation into the propriety of those fees, and communications between Rozanski and
25 Ferguson concerning that investigation. Second, the remaining records requested by the Acorn
26 contain information related to the conduct of the public’s business because they relate, *inter alia*,
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1 to the effect of Rozanski's and Ferguson's personal relationship on Rozanski's administration of
2 public money and Ferguson's alleged provision of unnecessary legal services to the District. As
3 District CEO, Rozanski hired Ferguson, reviewed his bills, and reported his fees in the District's
4 annual budget. (District Complaint ¶¶ 10, 15–16.) Rozanski's personal relationship with Ferguson
5 created a conflict of interest that, according to the District, led to the misuse of \$425,000 in public
6 funds. Rozanski's and Ferguson's alleged failure to act in accordance with their professional
7 obligations to the District and the public, which was inextricably intertwined with their personal
8 relationship, unquestionably relates to the conduct of the public's business.

9
10 Finally, the requested records contain information related to the conduct of the public's
11 business because they will presumably corroborate the District's allegations against Ferguson and
12 Rozanski. The District has accused Ferguson of charging it more than \$400,000 in unnecessary
13 legal fees. And it has accused Rozanski of, among other things, conspiring with Ferguson inflate
14 his legal bills, and approving and directing payment of legal bills that she knew were false and
15 grossly inflated. (District Complaint ¶¶ 23–53.) The District alleges that it was Rozanski's
16 personal relationship with Ferguson that caused her to have “divided loyalties,” and led her to
17 defraud the District and the public. (*Id.* ¶¶ 31, 39, 47.) The voicemail and email records that
18 provided the basis for the District's allegations against Rozanski, all of which go directly to her
19 performance as District CEO, certainly relate to the conduct of the public's business.

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22 Rozanski's attempt to recast the records at issue as “wholly personal and private
23 communications” (Pet.'s Br. at p. 13) is unavailing. Contrary to Rozanski's claim that these
24 records are “unrelated to the conduct of the public's business” (*id.*), the District's records reflect
25 the nature, scope, and effect of the conflict of interest created by Rozanski's undisclosed romantic
26 relationship with Ferguson—a relationship that, according to the District, directly impacted the
27 performance of their public duties. While the court of appeal in *Braun* noted that “purely
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1 personal information unrelated to ‘the conduct of the public’s business’ could be considered”
2 outside the scope of the CPRA (*Braun, supra*, 154 Cal.App.3d at p. 340 (internal quotations
3 omitted)), the records at issue here are not “purely personal” and differ significantly from the
4 examples of “purely personal records” identified in *Braun*, which include “the shopping list
5 phoned from home,” or “the letter to a public officer from a friend which is totally void of
6 reference to governmental activities.” (*Id.* (internal quotations omitted).) As set forth above, the
7 email and voicemail records at issue are communications between Rozanski and Ferguson about
8 the District’s investigation into Ferguson’s fees, (Velthoen Decl. ¶ 2), and reflect a relationship
9 between two District employees, one of whom hired and supervised the other, accused of
10 conspiring to defraud the District of hundreds of thousands of dollars in taxpayer funds. Such
11 communications are not “totally void of reference to governmental activities” (*Braun, supra*, 154
12 Cal.App.3d at p. 340 (internal quotations omitted)) and are a far cry from “purely personal.”

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15 Moreover, Rozanski’s use of a District-owned cellphone, laptop, and District email
16 address to communicate with Ferguson undercuts her claim that the requested records are “purely
17 personal.” The District Handbook provides that voicemail and email are “intended for business
18 purposes only” and that computers are “the property of the District” and must be “used properly.”
19 (Ralston Decl. Ex. A.) While mere possession of records by a public agency does not alone make
20 them public records, the District’s ownership of the devices on which the records were kept is not
21 “irrelevant,” as Rozanski claims. (Pet.’s Br. at p. 14.) In *League of California Cities v. Superior*
22 *Court*, the court of appeal held that a city attorney’s forwarding of emails from his personal email
23 account to his city-owned account, and his retention of those emails in his city-owned account
24 was “strong evidence” that they were public records, especially when he knew of the city’s policy
25 limiting use of its computer system to “work-related [c]ity business purposes only.” (*League of*
26 *Cal. Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 987–88.) Similarly, here, Rozanski’s
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1 use of her District email address and a District-owned cellphone and laptop to send, receive, and
2 retain the requested records is “strong evidence” that they are public records (*id.*), particularly
3 given the District Handbook’s provisions limiting their use to “business purposes only.”

4 Rozanski’s attempted reliance on a Colorado Supreme Court case, *Denver Publishing*
5 *Company v. Board of County Commissioners* (Colo. 2005) 121 P.3d 190, as support for the
6 proposition that the records requested by the Acorn are not public records under the CPRA fails
7 for a number of reasons. (Pet.’s Br. at pp. 12–13.) First, the definition of “public records” in the
8 Colorado Open Records Act (“CORA”), under which *Denver Publishing* was decided, is more
9 limited than the CPRA’s definition of “public records.” CORA defines public records as “all
10 writings made, maintained, or kept by the state [and various entities of the state] . . . *for use in* the
11 exercise or functions required or authorized by law or administrative rule or involving the receipt
12 or expenditure of public funds. (§ 24-72-202, C.R.S. (2004) (emphasis added).) In addition,
13 although *Denver Publishing* involved records reflecting a sexual or romantic relationship between
14 two government employees, there were no allegations that the relationship affected either
15 employees’ performance of their duties, or resulted in favoritism, nepotism, or the misuse of
16 public funds. In contrast, the alleged romantic relationship between Rozanski and Ferguson is
17 believed to have influenced Rozanski’s hiring and oversight of Ferguson, as well as actions she
18 took to allegedly thwart the District’s investigation of wrongdoing on the part of Ferguson.
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22 Courts in other states have concluded that records reflecting public employees’ romantic
23 relationships are “public records” subject to disclosure under state public records laws when those
24 relationships may have impacted professional conduct. In *Cowles Publishing Company v.*
25 *Kootenai County Board of County Commissioners* (Idaho 2007) 159 P.3d 896, 900 (*Cowles*
26 *Publishing*), the Idaho Supreme Court held that emails revealing an “improper relationship”
27 between the manager of a Juvenile Education and Training (“JET”) Court and her manager, a
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1 county prosecutor, were “public records” related “to the conduct and administration of the
2 public’s business.” In that case, the county prosecutor publicly defended the manager following
3 the manager’s failure to provide a required financial report and her eventual termination.⁴ (*Id.* at
4 898.) Similarly, in *Pulaski County v. Arkansas Democrat-Gazette, Inc.* (Ark. 2007) 264 S.W.3d
5 465, 466, 468, the Arkansas Supreme Court affirmed a trial court ruling that emails between a
6 county comptroller and the representative of a county contractor were public records where the
7 comptroller represented the county in its contractual relationship with the contractor, the
8 comptroller and the representative entered into a romantic relationship during the course of their
9 business relationship, and the comptroller was arrested for embezzling from the county. As in
10 these cases, the records requested by the Acorn are “public records” under the CPRA.
11

12 **IV. The requested voicemail and email records are not exempt from disclosure.**

13 *A. The requested voicemails and emails are not exempt under the California*
14 *Constitution.*

15 Rozanski’s claim that the requested records are exempt from disclosure under the right to
16 privacy found in article I, section I of the California Constitution (Pet.’s Br. at pp. 16–17) is
17 meritless. She has failed to establish that the state constitutional right applies at all, much less
18 that the public interest in disclosure of the requested records does not overcome it.
19

20 The party claiming a violation of the state constitutional right to privacy must establish
21 “(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the
22 circumstances, and (3) a serious invasion of the privacy interest.” (*International Federation,*
23 *supra*, 42 Cal.4th at p. 338.) If any of these requirements are not satisfied, the claim is defeated.
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25 ⁴ Idaho’s public records act states that that a public record “includes, but is not limited to, any
26 writing containing information relating to the conduct or administration of the public’s
27 business” (I.C. § 9-337(13).) In *Cowles Publishing*, the Idaho Supreme Court expressly
28 held that the requested emails “contain[ed] information relating to the conduct and administration
of the public’s business” and did not apply the “but not limited to” language of the definition to
reach its holding. (*Cowles Publishing, supra*, 159 P.3d at p. 900.) Thus, the definition of “public
records” that the court applied in *Cowles* is nearly identical to that of the CPRA.

1 (See *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 40 (*Hill*)). And, even if all three
2 elements are established, the privacy right may be overcome by a countervailing interest.⁵ (*Id.*)

3 The second element—a reasonable expectation of privacy—“is an objective entitlement
4 founded on broadly based and widely accepted community norms”; “the presence or absence of
5 opportunities to consent voluntarily to activities impacting privacy interests obviously affects the
6 expectations of the participant.” (*Id.* at p. 37.) Surrounding circumstances, such as advanced
7 notice, affect whether a person has a reasonable expectation of privacy, as do “customs, practices,
8 and physical settings surrounding particular activities.” (*Id.* at p. 36.) Here, Rozanski has not and
9 cannot demonstrate a reasonable expectation of privacy in the requested records.
10

11 First, Rozanski’s claim that she had a *subjective* belief or desire that the records would
12 remain private (*see* Pet.’s Br. at pp. 5–6, 18, 21–22) is irrelevant. A reasonable expectation of
13 privacy is an “*objective* entitlement” (*Hill, supra*, 7 Cal.4th at p. 37 (emphasis added)), and when
14 viewed in light of the surrounding circumstances, Rozanski could have no objectively reasonable
15 expectation of privacy in either the voicemail or email records, all of which were retained on
16 District-owned property. California courts have recognized that “the use of computers in the
17 employment context carries with it social norms that effectively diminish the employee’s
18 reasonable expectation of privacy with regard to his use of his employer’s computers.” (*TBG Ins.*
19 *Servs. Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 452 (“*TGB*”).) Such norms apply
20 equally to an employee’s use of an employer’s cellphone. Moreover, the District gave Rozanski
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⁵ Because Rozanski does not have a reasonable expectation of privacy in the requested records no constitutional right to privacy is implicated by their disclosure and the Court need not reach the question of whether a countervailing interest overcomes that privacy right. However, should the Court reach that issue, the test to determine whether “the right of the public to oversee the actions of governmental employees” overcomes the state constitutional right to privacy is the same as that used to determine whether records may be withheld under Section 6254(c). (*See Braun, supra*, 154 Cal.App.3d at p. 347.) Because the requested records may not be withheld under Section 6254(c), *see infra* Section IV.B, they must be disclosed even if the state constitutional right to privacy applies. (*See Marken, supra*, 202 Cal.App.4th at p. 1271 fn.18.)

1 unambiguous advanced notice, through the District Handbook, that the records at issue were not
2 private. (*See id.*) The District Handbook states: “Voicemail, email and the internet are intended
3 for business purposes only. The District reserves the right to listen to voice mail [*sic*] messages
4 and to access e-mail and internet contacts to ensure compliance with this rule, without notice to
5 the employee and/or in the employee’s absence.” (Ralston Decl. Ex. A.) In addition, it states that
6 the District “reserves the right to inspect the contents of all District property including, but not
7 limited to, desks, offices, vehicles and computers, without notice to the employee and/or in the
8 employee’s absence, and/or upon separation.” (*Id.*) Rozanski was thus well aware that the
9 voicemails and emails at issue here were accessible by the District at any time and for any reason.
10 Accordingly, she had no reasonable expectation of privacy in them.
11

12 This is precisely the conclusion that was reached by the court of appeal in *TBG Insurance*
13 *Services Corp. v. Superior Court*. In that case, the court held that an employee had no reasonable
14 expectation of privacy in a home computer that was owned by his employer. (*TBG, supra*, 96
15 Cal.App.4th at p. 453.) The court relied upon a company “policy statement” that stated that “the
16 home computer was ‘the property of the Company’ and, as such, ‘to be used for business
17 purposes only and not for personal benefit or non-Company purposes.” (*Id.* at pp. 452–53) The
18 policy statement also stated that authorized personnel may “‘monitor messages and files on an “as
19 needed” basis.’” (*Id.* at p. 453.) The court found that because the employee “agreed to [the
20 company’s] policy *and* chose to use his computer for personal matters,” he “fully and voluntarily
21 relinquished his privacy rights in the information he stored on his home computer, and he will not
22 now be heard to say that he nevertheless had a *reasonable* expectation of privacy.” (*Id.*
23 (emphasis in original).) The court also rejected the employee’s argument that it was “‘universally
24 accepted and understood by all [senior executives at the company] that the home computers
25 would also be used for personal purposes’” as uncorroborated self-serving statements that “cannot
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1 be viewed as substantial evidence of anything.” (*Id.*)

2 Finally, Rozanski’s claim that she had a reasonable expectation of privacy in the requested
3 records vis-à-vis the public at large is unconvincing. (Pet.’s Br. at p. 22.) The relevant inquiry is
4 whether Rozanski had a reasonable expectation of privacy in the requested records, generally,
5 which she did not. In any event, at no time did the District even suggest to Rozanski that it would
6 not publicly disclose voicemails and emails related to her employment. Nor could it have done
7 so. The CPRA *requires* the District to disclose, upon request, all non-exempt “public records”
8 including voicemail and email records. There was no need for Rozanski and the District to
9 “agree” that her voicemails and emails would be treated as public records in accordance with the
10 CPRA, as Rozanski suggests. (Pet.’s Br. at p. 5.) As the CEO of a public agency, Rozanski knew
11 or should have known of the agency’s duties under the CPRA, making any supposed belief that
12 her emails or voicemails could not be disclosed to the “public at large” patently unreasonable.
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15 *B. The requested voicemails and emails are not exempt from disclosure under Section*
16 *6254(c) or Section 6255.*

17 Rozanski claims that the requested records are exempt from disclosure under
18 Section 6254(c), which permits an agency to withhold “[p]ersonnel, medical, or similar files, the
19 disclosure of which would constitute an unwarranted invasion of personal privacy” and under
20 Section 6255, which provides that an agency may withhold public records if “on the facts of the
21 particular case the public interest served by not disclosing the record clearly outweighs the public
22 interest served by disclosure of the record.” (Pet.’s Br. at p. 17.) Neither provision applies here.⁶

23 To determine whether either provision may be used to withhold requested records, the
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25 ⁶ Even if Sections 6254(c) and 6255 applied in this case, neither would justify the issuance of a
26 writ of mandate prohibiting the District from releasing the requested records. Both provisions are
27 *discretionary*. (*CBS, supra*, 42 Cal.3d at p. 652 (stating that Section 6254’s exemptions are
28 “permissive, not mandatory” and that Section 6255 “permits the government agency to withhold a
record” if its requirements are met).) The District is expressly permitted under the CPRA to
“override the statutory exceptions” set forth in those provisions even if they apply. (*Id.*)

1 Court must engage in a balancing test, weighing the public interest in disclosure against (1) “the
2 individual’s interest in privacy” for Section 6254(c) and (2) “the public interest in nondisclosure”
3 for Section 6255. (*L.A. Unified, supra*, 228 Cal.App.4th at p. 240.) Contrary to Rozanski’s
4 unsupported assertion that there must be a “compelling interest” justifying disclosure of public
5 records (Pet.’s Br. at p. 20), both exemptions place the burden on the proponent of nondisclosure
6 to demonstrate a “clear overbalance” in favor of confidentiality. (*See LBPOA, supra*, 59 Cal.4th
7 at pp. 67, 70; *Cal. State Univ. v. Superior Court* (2001) 90 Cal.App.4th 810, 831 (*Cal. State*
8 *Univ.*.)

10 In determining whether there is a public interest in disclosure, the court considers “the
11 extent to which disclosure . . . will shed light on the public agency’s performance of its duty.”
12 (*Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1519.) “If the records
13 sought pertain to the conduct of the people’s business there is a public interest in disclosure.”
14 (*Citizens for a Better Env’t. v. Dep’t of Food & Agric.* (1985) 171 Cal.App.3d 704, 715.) And the
15 weight of the public interest is “proportionate to the gravity of the governmental tasks sought to
16 be illuminated and the directness with which the disclosure will serve to illuminate.” (*L.A.*
17 *Unified, supra*, 228 Cal.App.4th at 242 (quotation omitted).)

19 Numerous California appellate decisions have held that there is a strong public interest in
20 the disclosure of information concerning the management of public funds. (*See, e.g.*,
21 *International Federation, supra*, 42 Cal.4th at p. 333 (recognizing “the strong public interest in
22 knowing how the government spends its money”); *Coronado Police Officers Ass’n v. Carroll*
23 (2003) 106 Cal.App.4th 1001, 1011; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 617
24 (noting that “bill-paying is no less essential to the proper workings of state government than
25 legislating (or, dare we say, adjudicating)”); *Cal. State Univ., supra*, 90 Cal.App.4th at p. 833.)
26 Courts in other states have reached the same conclusion. (*See, e.g., Bergen Cty. Improvement*
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1 *Auth. v. N. Jersey Media Group, Inc.* (N.J. Super. Ct. App. Div. 2004) 851 A.2d 731, 742
2 (holding that the public interest in reviewing financial records of affiliates of a public medical
3 center is “self-evident” and that citizens “have an unquestioned interest in ensuring that public
4 funds . . . are being spent wisely, efficiently, and consistent with the [agency’s] mission”).) In
5 addition, Californians “have a strong interest in knowing how government officials conduct
6 public business, particularly when allegations of malfeasance by public officers are raised.”
7 (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 746 (*BRV*.) “[P]ublic access makes it
8 possible for members of the public to expose corruption, incompetence, inefficiency, prejudice,
9 and favoritism.” (*International Federation, supra*, 42 Cal.4th at p. 333 (internal quotation
10 omitted).)

11
12 The public interest in disclosure is especially strong in this case. The requested records
13 will shed light on the District’s spending of public funds on Ferguson’s legal services, the
14 District’s investigation into Ferguson’s fees, and the actions of Rozanski and Ferguson in
15 response to that investigation. Rozanski’s claim that the voicemails contain only her and
16 Ferguson’s “personal opinions” regarding the billing investigation (*see* Pet.’s Br. at p. 20) ignores
17 the fact that she was District CEO at the time of those communications and the fact that the
18 requested records are directly relevant to allegations of malfeasance on the part of her and another
19 District employee—namely that their romantic relationship led them to conspire to bilk the
20 District out of more than \$400,000 in public funds. Because the requested records will inform the
21 public about the District’s handling of taxpayer money and Rozanski’s and Ferguson’s alleged
22 misconduct, the public interest in their disclosure is at its height.

23 In contrast, Rozanski’s has not demonstrated *any* public interest in nondisclosure of the
24 requested records, as required by Section 6255, and the purely private interest she claims is
25 insufficient to justify nondisclosure. As a public employee, particularly the head of a public
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1 agency, Rozanski’s purported privacy interest in information related to her employment is
2 “significantly less” than that of a private employee. (*International Federation, supra*, 42 Cal.4th
3 at p. 331; *BRV, supra*, 143 Cal.App.4th at p. 758.) Moreover, according to Rozanski herself, she
4 has “made a career of public service, and is a prominent member of the Venture County
5 community.” (Am. Compl. ¶ 14–18). Such notoriety within the community further diminishes
6 the weight of any possible privacy interest. (*See Johnson v. Harcourt, Brace, Jovanovich, Inc.*
7 (1974) 43 Cal.App.3d 880, 892 (stating that “[a] person may, by his own activities or by the force
8 of circumstances, become a public personage and thereby relinquish a part of his right of privacy
9 to the extent that the public has a legitimate interest in his activities”).) In short, any potential
10 injury to Rozanski’s asserted interest must be discounted by the fact that, “as a public official,
11 [she] knew [her] performance could be the subject of public, vehement, caustic, and sometimes
12 unpleasantly sharp attacks” (*BRV, supra*, 143 Cal.App.4th at p. 758 (quotation omitted).)

15 The weight to be accorded Rozanski’s asserted privacy interest, if any, is also diminished
16 because the allegations of her relationship with Ferguson and her related misconduct are already
17 public. The District filed a complaint detailing the nature of her relationship with Ferguson, and
18 accusing her of fraud and other claims related to that relationship. Rozanski does not explain
19 how, given this already public information, disclosure of the requested records would implicate
20 any serious privacy interest. (*See CBS, supra*, 42 Cal.3d at p. 652 (holding that “conjectural”
21 concern regarding disclosure is insufficient to outweigh public interest).)

23 In sum, when weighing the particularly powerful public interest in access in this case
24 against the incredibly weak private interest in nondisclosure asserted by Rozanski, the balance
25 clearly favors disclosure. Neither Section 6254(c) nor Section 6255 would permit the District to
26 withhold the records requested by the Acorn.

1 C. *The requested voicemails and emails are not exempt from disclosure under*
2 *Section 6254(k) and the attorney-client privilege.*

3 Rozanski’s final argument in support of her Petition—that the requested records should be
4 withheld pursuant to Section 6254(k) and the attorney-client privilege—fails on its face. (Pet.’s
5 Br. at pp. 22–24.) The attorney-client privilege does not apply to the requested records, and, even
6 if it did, the holder of the privilege—the District—is not asserting it.

7 The attorney-client privilege allows “the client . . . to refuse to disclose, and to prevent
8 another from disclosing, a confidential communication between client and lawyer.” (Evid. Code
9 § 954.) A “confidential communication” is “information transmitted between a client and his or
10 her lawyer in the course of [the attorney-client] relationship and in confidence . . . and includes a
11 legal opinion formed and the advice given by the lawyer in the course of that relationship.” (*Id.*
12 § 952.) The privilege “does not apply to every single communication transmitted confidentially
13 between lawyer and client.” (*L.A. Cty. Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282,
14 294 (*L.A. Cty. Bd.*)). It “only protects communications between attorney and client made for the
15 purpose of seeking or delivering the attorney’s legal advice or representation.” (*Id.* at p. 293.)
16 The party asserting the privilege bears the burden “of establishing the preliminary facts necessary
17 to support its exercise, *i.e.*, a communication made in the course of an attorney-client
18 relationship.” (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

19 There was no attorney-client relationship between Ferguson and the District prior to 2011,
20 when he was retained as the District’s attorney. Accordingly, the attorney-client privilege cannot
21 apply to any emails requested by the Acorn that were sent and received before 2011. Remaining
22 emails and voicemails unrelated to the provision of legal advice are also not privileged. (*See*
23 District Compl. ¶ 12 (describing Ferguson’s phone calls as “generally meandering and
24 pointless[.]”); *id.* ¶¶ 19 (describing Ferguson’s extensive non-legal work purportedly on behalf of
25 the District); *id.* ¶ 22 (describing voicemails revealing Ferguson’s romantic relationship with
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1 Rozanski.) In addition, because the attorney-client privilege does not categorically protect
2 billing information, requested records that discuss “issues of billings and fees” are not necessarily
3 privileged, as Rozanski asserts. (Pet.’s Br. at p. 23.) Whether the privilege extends to invoices
4 transmitted confidentially from lawyer to client “turns on whether [they] reveal anything about
5 legal consultation.” (*L.A. Cty. Bd.*, *supra*, 2 Cal.5th at p. 298.) Thus, to the extent that the
6 requested records reflect Ferguson’s and Rozanski’s “personal opinions with respect to the
7 inquiry into Ferguson’s billing” (Pet.’s Br. at p. 20) or their response to the investigation into
8 Ferguson’s fees, they are not shielded by the privilege. In addition, to the extent that the records
9 involve discussions of “fee totals in legal matters that concluded long ago,” the privilege may not
10 apply. (*L.A. Cty. Bd.*, *supra*, 2 Cal.5th at p. 298.)

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12 Moreover, the attorney-client privilege does not apply “if the services of the lawyer were
13 sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”
14 (Evid. Code § 956.) “The word ‘fraud’ in this exception to the privilege includes civil fraud.”
15 (*Freedom Trust v. Chubb Group of Ins. Cos.* (C.D. Cal. 1999) 38 F.Supp.2d 1170, 1172.) If the
16 client is an “active participant” in the fraudulent activity, the crime-fraud exception applies
17 “notwithstanding any assertion that it was the attorney who initiated that activity.” (*People v.*
18 *Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1768 fn.4.) The crime-fraud
19 exception applies where there has been a *prima facie* showing that the communication at issue
20 furthered a crime or a fraud, *i.e.*, “a false representation of material fact, knowledge of its falsity,
21 intent to deceive and the right to rely [on the representation].” (*BP Alaska Exploration, Inc. v.*
22 *Superior Court* (1988) 199 Cal.App.3d 1240, 1262, 1263.) Here, Ferguson’s client—the
23 District—has alleged that Rozanski committed fraud and made a *prima facie* showing of fraud in
24 its civil complaint against her. (District Complaint ¶¶ 11–16, 20–22, 44–50.) To the extent that
25 any of the requested records include communications between Rozanski and Ferguson in aid of
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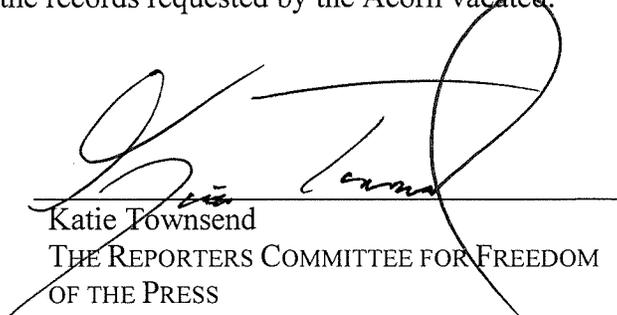
1 their fraudulent scheme, those communications are not attorney-client privileged.

2 In any event, even assuming, *arguendo*, that the attorney-client privilege applies to some
3 of the records requested by the Acorn, Rozanski cannot assert that privilege. The client—the
4 District—has not invoked it and, indeed, has affirmatively consented to disclosure. (*See Evid.*
5 *Code* §§ 954, 912.) As Rozanski has conceded, the District—not Rozanski—was Ferguson’s
6 client. (*See Am. Compl.* ¶ 21 (stating that Ferguson “served as outside legal counsel to the
7 [District] from 2011 to 2015”); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 (holding
8 that public entities can assert the attorney-client privilege).) The District has affirmatively stated
9 its intent to waive any attorney-client privilege and to disclose the records requested by the
10 Acorn; it has not asserted the privilege, to date, at any stage of these proceedings. (*See District*
11 *TRO Opp.* at 9; *App. Ex. 4.*) Rozanski’s argument that the District has not “actually made any
12 such waiver” of the attorney-client privilege (*Pet.’s Br.* at p. 24) is nonsensical. The sole reason
13 that the District has not already disclosed the records requested by the Acorn is because of this
14 lawsuit. Because the District has not asserted the privilege and, to the extent it applies, has
15 waived it, the attorney-client privilege cannot bar disclosure.
16
17

18 **CONCLUSION**

19 For the forgoing reasons, Rozanski’s Petition should be denied and the preliminary
20 injunction enjoining the District from releasing the records requested by the Acorn vacated.

21 Dated: February 24, 2017

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24 
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25 THE REPORTERS COMMITTEE FOR FREEDOM
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