

1 MICHAEL A. VELTHOEN (SBN 187909)
2 MAX R. ENGELHARDT (SBN 310968)
3 FERGUSON CASE ORR PATERSON LLP
4 1050 South Kimball Road
5 Ventura, California 93004
6 Telephone: (805) 659-6800
7 Facsimile: (805) 659-6818
8 Email: mvelthoen@fcoplaw.com
9
10 Attorneys for Defendant/Respondent
11 Camarillo Health Care District

8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9
10 COUNTY OF VENTURA

12 JANE ROZANSKI, an individual

14 Petitioner,

15 v.

16 CAMARILLO HEALTH CARE
17 DISTRICT, a California Special Health
18 Care District,

18 Respondent

20 CAMARILLO ACORN,

21 Real Party In Interest

Case No. 56-2016-00489673-CU-WM-VTA_

19
20
21
22
23
24
25
26
27
28
**RESPONDENT CAMARILLO HEALTH
CARE DISTRICT'S SUPPLEMENTAL
BRIEF REGARDING DISCLOSURE OF
VOICEMAILS AND EMAILS**

Hearing Date: April 19, 2017
Hearing Time: 10:00 a.m.
Dept. No.: 20

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

TABLE OF CONTENTS

PAGE

I. INTRODUCTION.....2

II. THIS COURT MAY ONLY PROHIBIT CHCH FROM DISCLOSURE
OF THE EMAILS IF SUCH DISCLOSURE VIOLATES THE LAW3

III. THE PUBLIC RECORDS ACT DOES NOT BAR THE DISTRICT FROM
DISCLOSING THE EMAILS OR VOICEMAILS.....4

IV. ROZANSKI HAS NO RIGHT OF PRIVACY WITH REGARD TO THE
EMAILS AND VOICEMAILS8

V. EVEN IF THE COURT CONCLUDES THAT THE PRA MAY BAR
DISCLOSURE OF RECORDS, THE EMAILS AND VOICEMAILS ARE
PUBLIC RECORDS UNDER THE PRA AND MUST BE DISCLOSED 13

VI. CONCLUSION17

TABLE OF AUTHORITIES

CASES:

1

2

3

4 *Board Of Pilot Commissioners v. Superior Court* (2013)
218 Cal.App.4th 5777

5 *Braun v. City of Taft* (1984)
154 Cal.app.3d 33213

6

7 *BRV, Inc. v. Superior Court* (2006)
143 Cal.App.4th 742.....7, 12, 13

8 *Caldecott v. Superior Court* (2015)
243 Cal.App.4th 212.....13

9

10 *California Public Records Research, Inc. v. County of Yolo* (2016)
4 Cal.App.5th 150.....4

11 *Carmel Valley Fire Protection District v. State of California* (2016)
25 Cal.4th 287.....4

12

13 *City of San Jose v. Superior Court* (2017)
2 Cal.5th 608.....14, 15

14 *Common Cause v. Board of Supervisors* (1989)
49 Cal.3d 432.....4

15

16 *Cook v. Craig* (1976)
55 Cal.App.3d 77314

17 *County of Del Norte v. City of Crescent City* (1999)
71 Cal.App.4th 965.....3

18

19 *Holmes v. Petrovich Development Co.* (2011)
191 Cal.App. 1047.....10

20 *International Federation of Professional and Technical Engineers, Local 21,*
AFL-CIO v. Superior Court (2007) 42 Cal.4th 319.....8, 12

21

22 *Kapellas v. Kofman* (1969)
1 Cal.3d 20.....12

23 *Marken v. Santa Monica-Malibu Unified School District* (2012)
202 Cal.App.4th 1250.....3, 5, 6, 7, 8, 11

24

25 *People v. Olson* (1965)
232 Cal.App.2d 48014

26 *Sander v. State Bar of Cal.* (2013)
58 Cal.4th 300.....14

27

28 *Sunbelt Rentals, Inc. v. Victor*
43 F.Supp.3d 1026 (N.D. Cal. 2014).....10

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

TBG Insurance Services Corp. v. Superior Court (2002)
96 Cal.App.4th 443 9

CODES:

Code of Civil Procedure

 Section 1085(a) 5

Government Code

 Section 6252 15

 Section 6253(a) 5

 Section 6253(e) 5, 13-14

 Section 6254 5, 6

 Section 6254.5 5

 Section 6267 5

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

I. INTRODUCTION

Counsel for respondent Camarillo Health Care District (“CHCD”) and petitioner Jane Rozanski (“Rozanski”) have reviewed and organized the emails and voicemails in question. The emails and voicemails have been segregated into the following categories: (1) those emails and voicemails which Rozanski and CHCD agree contain express references or discussions to the business of the public; (2) those emails and voicemails which Rozanski and CHCD agree contain only express references or discussions concerning private matters; (3) those emails and voicemails which Rozanski and CHCD disagree as to whether they contain express references to private or public matters; and (4) those emails and voicemails which Rozanski contends contain express references to both public and private matters and, therefore, Rozanski asks the Court to redact the private matters therefrom.

The purpose of this brief is to set forth the position of CHCD with regard to the process and procedure by which the Court should analyze the question of whether CHCD should be judicially prohibited from disclosing the emails and voicemails in question. The Court’s tentative approach to resolving this matter implicates serious separation of powers issues. Indeed, Rozanski asks this Court to turn the Public Records Act (“PRA”) on its head from legislation that *requires* public agencies to disclose records into a statutory scheme that *prohibits* public agencies from disclosing records. This argument violates both the clear language and the plain meaning of the PRA and intrudes upon CHCD’s statutory discretion to determine which records to disclose to the public.

CHCD’s position can be summarized as follows:

- This Court may not prohibit CHCD from disclosing the emails and voicemails in question unless the Court concludes that such disclosure violates the law.
- The PRA does not prohibit the disclosure of the emails and voicemails; the PRA only prescribes rules requiring disclosure of records by public agencies. This Court, therefore, may not bar CHCD from disclosing the emails or voicemails in question on the grounds that such materials do not constitute “public records” under the PRA.
- There is no other applicable law that bars disclosure of the emails and voicemails. The only law cited by Rozanski is her constitutional right of privacy. Because Rozanski had no

1 objectively reasonable expectation of privacy in the voicemails and emails (as they were stored on
2 a CHCD cell phone, computer or server), Rozanski has no right of privacy with regard to the
3 voicemails and emails.

4 ● Even if the PRA is (erroneously) interpreted as barring a public agency from disclosing
5 a record that does not constitute a “public record,” all of the emails and voicemails in question are
6 “public records” under the PRA. The emails and voicemails that discuss only private matters
7 between Rozanski and Ralph Ferguson (“Ferguson”) are the public’s business as they reflect the
8 relationship between the head of a public agency and its outside counsel who received hundreds of
9 thousands of dollars in taxpayer funds. The public cannot understand the actions taken by
10 Rozanski and Ferguson without the complete context provided by the private emails and
11 voicemails.

12 CHCD respectfully submits that the task before the Court is not as onerous as it may
13 appear. Because Rozanski cannot establish a reasonable expectation of privacy in the emails and
14 voicemails, there is no need for the Court to review each individual email and voicemail. The task
15 becomes complicated only if the Court erroneously determines that CHCD is barred from
16 disclosing emails and voicemails that do not constitute “public records” under the PRA. CHCD
17 respectfully suggests that this Court follow the PRA and refuse to engage in an email by email,
18 voicemail by voicemail analysis of whether such materials are “public records.”

19 **II. THIS COURT MAY ONLY PROHIBIT CHCD FROM DISCLOSURE OF THE**
20 **EMAILS IF SUCH DISCLOSURE VIOLATES THE LAW.**

21 In *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal. App. 4th 1250
22 the Court of Appeal recognized the right of an individual to bring a so-called “reverse CPRA
23 action,” in which the individual seeks to prevent a government agency from disclosing records
24 pursuant to a PRA request. The Court of Appeal held that “mandamus should be available to
25 prevent a public agency from acting in an unlawful manner by releasing information the disclosure
26 of which is prohibited by law.” *Id.* at 1266 (emphasis added) (citing *County of Del Norte v. City of*
27 *Crescent City* (1999) 71 Cal. App. 4th 965, 973 [“A permanent injunction is an equitable remedy,
28 not a cause of action.... The remedy is available in a mandamus proceeding and is appropriate to

1 restrain action which, if carried out, would be unlawful.”)]. This Court, therefore, may prohibit
2 CHCD from disclosing the records only where the law forbids it.

3 The reason for this rule is simple. The separation of powers prohibits a court from
4 exercising the discretion that is otherwise afforded to a public agency. *See, e.g., Carmel Valley*
5 *Fire Protection District v. State of California* (2016) 25 Cal. 4th 287, 297-302. A court, therefore,
6 may not issue a writ of mandate to require an agency to exercise its discretion in a particular
7 manner. *See, e.g., California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal. App.
8 5th 150, 177. In other words, a court may only enjoin a public agency from engaging in certain
9 conduct where the agency has a legal duty to refrain from doing so. “Mandamus will lie to compel
10 a public official to perform an official act required by law. Mandamus will not lie to control an
11 exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner.
12 Mandamus may issue, however, to compel an official both to exercise his discretion (if he is
13 required by law to do so) and to exercise it under a proper interpretation of the applicable law.”
14 *Common Cause v. Board of Supervisors* (1989) 49 Cal. 3d 432, 442; *see also* Code of Civil
15 Procedure § 1085(a) (“A writ of mandate ‘may be issued by any court ... to compel the
16 performance of an act which the law specifically enjoins, as a duty resulting from an office, trust,
17 or station....”). This Court, therefore, may only issue the writ of mandamus if the District is
18 compelled by law not to disclose the emails and voicemails.

19 **III. THE PUBLIC RECORDS ACT DOES NOT BAR THE DISTRICT FROM**
20 **DISCLOSING THE EMAILS OR VOICEMAILS.**

21 Rozanski’s primary argument is that the PRA prohibits a public agency from disclosing
22 records to the public unless the records qualify as “public records.” In other words, Rozanski
23 contends that the PRA not only compels disclosure in some circumstances, but prohibits disclosure
24 in others. Rozanski argues that the emails and voicemails in question are not “public records” and,
25 therefore, CHCD is barred from disclosure under the PRA.

26 Rozanski is wrong. The PRA only requires disclosure by a public agency; it does not
27 prohibit disclosure. The PRA expressly sets minimum requirements that an agency must follow to
28 provide access to the public on request: “Public records are open to inspection at all times during

1 the office hours of the state or local agency and every person has a right to inspect any public
2 record, except as hereafter provided.” Government Code § 6253(a). There is no language in the
3 PRA (except for a handful of inapplicable provisions) that states that a government agency is
4 barred from disclosing any records.

5 In fact, the PRA expressly states that it is a floor – not a ceiling – with regard to the
6 disclosure of records by a public agency. Government Code § 6253(e) provides: “Except as
7 otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for
8 faster, more efficient, or greater access to records than prescribed by minimum standards set forth
9 in this chapter.”

10 While the PRA exempts certain records from disclosure, such exemptions (notwithstanding
11 some inapplicable sections) are permissive rather than mandatory.¹ Section 6254 – which sets
12 forth the exemptions – provides that “this chapter does not require disclosure of any of the
13 following [exempted] records.” The PRA does not require that an agency avail itself of these
14 exemptions: “Nothing in this section prevents any agency from opening its records concerning the
15 administration of the agency to public inspection, unless disclosure is otherwise prohibited by
16 law.” Government Code § 6254 (penultimate sentence).

17 Indeed, the PRA contemplates that an agency may choose to disclose records that are
18 exempt from disclosure. Government Code § 6254.5 provides that an agency waives any
19 applicable exemption if the agency discloses a record. In other words, an agency may not decide
20 to disclose records to some parties but not others. Once the record is disclosed, other members of
21 the public are entitled to the records. Such a rule would be unnecessary if an agency were barred
22 by the PRA from disclosure of “exempt” records.

23 Courts have confirmed that the PRA does not bar disclosure of records or compel an
24 agency to withhold documents pursuant to an available exemption. In *Marken*, the Court of
25 Appeal observed: “The Supreme Court in *Filarisky* ... explained that FOIA, the federal

26 _____
27 ¹ For example, the PRA provides that “all patron use records of any library ... shall remain
28 confidential and shall not be disclosed by a public agency.” Government Code § 6267. The
Legislature clearly understood how to mandate the non-disclosure of certain records under the
PRA.

1 counterpart of the CPRA, like the California legislation, expressly provides only for a cause of
2 action to compel disclosure, not an action to prohibit disclosure.” *Marken*, 202 Cal. App. 4th at
3 1264-65 (internal citations omitted) (emphasis added). The *Marken* court added that “the
4 exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow
5 nondisclosure but do not prohibit disclosure.” *Id.* at 405 (internal citations omitted) (emphasis
6 added).

7 The *Marken* court recognized the right of a third party to bring an action for mandamus
8 where the disclosure of records pursuant to a public records request violated the law.
9 “[M]andamus should be available to prevent a public agency from acting in an unlawful manner by
10 releasing information the disclosure of which is prohibited by law.” *Id.* at 408. But *Marken* makes
11 clear that the “law” which prohibits disclosure is not the PRA. In that case, the petitioner argued
12 that the disclosure of the records violated his constitutional right of privacy, not the PRA. *Id.* at
13 1271 (“Marken contends disclosure ... would ‘constitute an unwarranted invasion of personal
14 privacy’ in violation of his state constitutional right to privacy and, as a result, not only are those
15 documents exempt from mandatory disclosure under section 6254, subdivision (c), but also their
16 disclosure is ‘otherwise prohibited by law’ justifying preliminary (and, ultimately, permanent)
17 injunctive relief in this reverse-CPRA lawsuit.”). In other words, *Marken* referred to the PRA only
18 to ask whether the agency was obligated to disclose the records under the PRA, not whether the
19 agency is barred under the PRA from disclosing the records.

20 The *Marken* court concluded that the privacy exemption under section 6254 was not
21 available and, therefore, disclosure by the agency under the PRA was required. “[T]he exemption
22 from mandatory disclosure in section 6254, subdivision (c), is inapplicable; and release of the
23 investigation report and disciplinary record . . . is required under the CPRA.” *Id.* at 416-417.
24 Thus, the *Marken* court did not even get to the question as to whether the agency was barred from
25 disclosure; it ruled that the agency had no choice but to disclose the records. The *Marken* court
26 never addressed whether the disclosure of the records was “otherwise prohibited by law.”²

27 _____
28 ² In evaluating the privacy exemption under the PRA, the *Marken* court followed well-established
precedent regarding whether an agency may decide to withhold documents from disclosure based

1 There is no case law to support the assertion that a court may bar an agency from disclosing
2 material because the records in question do not constitute “public records” under the PRA. In
3 addition to *Marken*, Rozanski relies heavily on *Board Of Pilot Commissioners v. Superior Court*
4 (2013) 218 Cal. App. 4th 577. *Board of Pilot Commissioners* has no bearing on this issue. In that
5 case, the agency that was the subject of the request opposed disclosure of the requested material.
6 In other words, the Court of Appeal in *Board of Pilot Commissioners* did not bar the disclosure of
7 any records, but simply held that the records requested were not required to be produced under the
8 PRA. To be certain, a public agency is not required to disclose materials that are not “public
9 records,” but an agency may disclose such records unless “otherwise prohibited by law.”

10 In this instance, CHCD has decided that it has a duty under the PRA to disclose the
11 requested material. Even if CHCD is wrong, the PRA gives CHCD the right to make this decision.
12 This Court may only bar disclosure if such disclosure is “otherwise prohibited by law.” This Court
13 may not bar disclosure simply because the Court disagrees with CHCD’s decision that the records
14 requested are public records under the PRA and therefore subject to disclosure. To do so would
15 violate the separation of powers and insert the Court’s judgment over a decision that is statutorily
16 vested in the agency.

17 To permit third parties to challenge agency decisions to disclose records because such
18 records are not “public records” invites the very sort of challenges this Court has experienced and
19 imposes on the judiciary a duty that it is ill-equipped to fulfill. Every decision by an agency to
20 disclose records could be subject to challenge on the grounds that the records in question are not
21 “public records.” But third parties do not have a legally protected interest to prohibit disclosure of
22 records that are not “public” under the PRA (although they may have privacy interests). Indeed,
23 there may be legitimate reasons why a public agency would choose to disclose records in its
24 possession that do not meet the definition of “public records” under the PRA. There is no statutory
25
26

27
28 on the privacy exemption. *See, e.g., BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742,
756-57.

1 or public policy basis to empower the judiciary to a wield veto power over such decisions on the
2 basis that the PRA does not require the agency to disclose.

3 The PRA is a red herring. If CHCD had decided to disclose the emails and voicemails
4 without any request by the Acorn or the Star, there would be no reason to even discuss the PRA. It
5 would have no application. There is no discernable reason to treat this issue differently simply
6 because CHCD decided to disclose these materials in response to requests made by the press. If
7 anything, the fact that CHCD is responding to requests under the PRA only favors disclosure.

8 Under *Marken*, third parties have the right to seek mandamus where disclosure would
9 violate such person’s constitutional right of privacy. But the question of whether disclosure
10 violates the right of privacy does not turn on whether the material is a “public record” under the
11 PRA or not. Instead, the Court must analyze the issue through the well-settled principles of
12 constitutional privacy rights.

13 **IV. ROZANSKI HAS NO RIGHT OF PRIVACY WITH REGARD TO**
14 **THE EMAILS AND VOICEMAILS.**

15 The only ground on which this Court may bar CHCD from disclosing the emails and
16 voicemails is Rozanski’s constitutional right of privacy. In *International Federation of*
17 *Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th
18 319, 329–30, the California Supreme Court provided the analytical framework for evaluating the
19 right of privacy in connection with government disclosure of records. In that case, several
20 newspapers made requests for information concerning the names, job titles, and salaries for all
21 employees of the City of Oakland earning more than \$100,000 per year. The City refused to
22 disclose the records, claiming that such documents were exempt from disclosure under the PRA.
23 The newspapers filed an action to compel disclosure under the PRA. Two unions representing City
24 employees intervened and argued that the requests by the newspapers invaded the constitutional
25 right of privacy of their members and, therefore, the City was barred from disclosing the records.

26 The California Supreme Court held that the right of privacy is invaded only where the
27 person establishes (1) a legally protected privacy interest, (2) a reasonable expectation of privacy
28 under the circumstances, and (3) a serious invasion of the privacy interest. *Id.* at 388. In addition,

1 an “[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if
2 the invasion is justified by a competing interest.” *Id.* at 339. In addition to deciding that the
3 privacy exemption under the PRA did not apply, the Court concluded that the employees had no
4 reasonable expectation of privacy with regard to their salary information. *Id.* at 339-341. The
5 Court therefore required disclosure of the requested material.

6 Rozanski had no reasonable expectation of privacy with regard to the emails and
7 voicemails. Rozanski argues that she never intended to disclose her communications with
8 Ferguson to the public. Such a belief is self-evident from many of the emails and voicemails. But
9 the question is not whether Rozanski personally believed that her emails and voicemails were
10 subject to disclosure, but whether she had an objectively reasonable expectation of privacy in the
11 voicemails and emails. *Id.* at 330-331.

12 The answer to that question is clearly no. The recordings were maintained on a cell phone
13 that belongs to the District. The email is contained on the District’s laptop and server. The District
14 has an express policy allowing it to examine any electronic devices, including cell phones and
15 laptops, at any time. Rozanski, as the Chief Executive Officer of the District, knew of this policy.
16 The cell phone and laptop are no longer in her possession.

17 Moreover, Rozanski caused the voicemails to be present on the cell phone and the emails to
18 be present on the server. Even though she was aware of the District policy, she decided to carry on
19 her communications with Ferguson on District-owned devices, to allow his voicemails and emails
20 to be stored on them, and to neglect to delete the voicemails when she retired and turned in the
21 phone. She cannot claim an *objectively* reasonable expectation of privacy in the face of her
22 conduct. There is no privacy interest to balance against the public interest in disclosure.

23 The opinion in *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal. App. 4th
24 443 is on point. In that case, the Court of Appeal held that an employee (Zieminski) had no
25 reasonable expectation of privacy in personal materials he stored on a home computer provided to
26 him by his employer (TBG). TBG had advised Zieminski of its policy allowing it to inspect the
27 computer at any time. The Court of Appeal ruled:
28

1 As can be seen, Zieminski knew that TBG would monitor the files
2 and messages stored on the computers he used at the office and at
3 home. He had the opportunity to consent to TBG's policy or not,
4 and had the opportunity to limit his use of his home computer to
5 purely business matters. To state the obvious, no one compelled
6 Zieminski or his wife or children to use the home computer for his
7 personal use. With all the information he needed to make an
8 intelligent decision, Zieminski agreed to TBG's policy *and* chose to
9 use his computer for personal matters. By any reasonable standard,
10 Zieminski fully and voluntarily relinquished his privacy rights in the
11 information he stored on his home computer, and he will not now be
12 heard to say that he nevertheless had a reasonable expectation of
13 privacy.

14 *Id.* at 453. The Court further discounted Zieminski's claims that it was accepted and understood
15 that employees could use their home computers for personal use. *Id.*; *see also Sunbelt Rentals, Inc.*
16 *v. Victor*, 43 F.Supp.3d 1026 (N.D. Cal. 2014) ("even if [the employee] **subjectively** harbored an
17 expectation of privacy in his text messages, such expectation cannot be characterized as **objectively**
18 reasonable, since it was [the employee's] conduct that directly caused the transmission of his text
19 messages to [the employer] in the first instance.").

20 In *Holmes v. Petrovich Development Co.* (2011) 191 Cal. App. 1047, the Court of Appeal
21 held that an employee did not have any reasonable expectation of privacy in emails she sent to her
22 personal attorney on her workplace computer. As a result, the Court held that the emails were not
23 privileged. *Id.* at 1069-72. Although the employee acknowledged that her employer had a written
24 policy advising her that it could inspect her computer at any time, the employer never actually
25 searched employee computers. *Id.* The employee therefore argued that she had a reasonable
26 expectation that the employer would not read her personal email. *Id.* The Court of Appeal rejected
27 this argument: "Just as it is unreasonable to say a person has a legitimate expectation that he or she
28 can exceed with absolute impunity a posted speed limit on a lonely public roadway simply because
the roadway is seldom patrolled, it was unreasonable for Holmes to believe that her personal e-mail
sent by company computer was private simply because, to her knowledge, the company had never
enforced its computer monitoring policy." *Id.* at 1071.

Rozanski first argues that the cases cited above are not CPRA cases. In her reply brief, she
asserts: "There is no requirement that Petitioner had an absolute, objective expectation that

1 Respondent would be unable to access her communications. That is not the test found in the
2 CPRA or in case law analyzing it.” Reply Brief at 15:13-14. As demonstrated above, the PRA
3 does not bar the disclosure of records on the grounds that disclosure would violate a party’s right
4 of privacy. The PRA only gives the agency the discretion to withhold documents from disclosure
5 on such grounds. “[T]he exemptions from disclosure provided by section 6254 are permissive, not
6 mandatory: They allow nondisclosure but do not prohibit disclosure.” *Marken*, 202 Cal. App. 4th
7 at 405 (internal citations omitted) (emphasis added).

8 Rozanski’s argument belies the weakness in her claim that the voicemails and emails are
9 protected by her constitutional right of privacy. These cases directly specify what Rozanski must
10 prove to demonstrate that she has a constitutional right of privacy under the California constitution.
11 For Rozanski to blithely dismiss them because “none are CPRA cases” proves the point – she has
12 no reasonable expectation of privacy in the emails and voicemails and, therefore, no constitutional
13 right of privacy.

14 Rozanski next argues that – even if her emails and voicemails were properly reviewed by
15 the District – she had a reasonable expectation that such communications would not be disclosed to
16 the public. Rozanski argues that the District’s policy “does not state that any communication sent
17 or received on a Respondent-issued cell phone or laptop would automatically become a public
18 record subject to disclosure under the CPRA, or that such communications would be turned over to
19 the press as soon as the employee’s relationship with Respondent soured.” Opening Brief at 22.

20 This argument is – quite frankly – strange. Rozanski was well aware of the District’s
21 obligations under the CPRA. As set forth in detail above, a public agency is *required* to disclose
22 public records on request. A CPRA request therefore mandates that the agency conduct a search
23 for and review of records – including emails and voicemails – under its control. If a voicemail or
24 email qualifies as a public record, the District has no choice but to disclose the record on request.
25 District employees are instructed on the District’s obligations under the CPRA. Rozanski, as Chief
26 Executive Officer of the District, handled numerous public record requests. Rozanski cannot
27 credibly argue that she was unaware of the risk that the District would review and produce her
28 emails or voicemails in response to CPRA requests.

1 Rozanski’s argument is also circular. She claims that the emails and voicemails should not
2 be disclosed to the public because she did not have an expectation that they would be disclosed.
3 Under this scenario, an employee of a public agency can bar the agency from disclosure of a record
4 simply by arguing that she did not intend for a record to be made public. A public official who
5 forgets to delete an email evidencing bribery, therefore, can avoid public disclosure of the email by
6 stating: “Ooops. I did not mean for you to see that.” That is clearly not what the right of privacy
7 contemplates. Rozanski’s subjective intentions are irrelevant to whether she had an objectively
8 reasonable expectation of privacy in the voicemails and emails.

9 Even if Rozanski were able to demonstrate a reasonable expectation of privacy in the
10 voicemails and emails, disclosure would not violate her constitutional right of privacy because
11 there is an overriding public interest. *See International Federation of Professional and Technical*
12 *Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th at 339. The public has the right to
13 know whether Rozanski was carrying on a secret affair with Ferguson at the same time the District
14 was paying Ferguson hundreds of thousands of dollars. This issue goes to the core of transparency
15 in government. “Because of their public responsibilities, government officials and candidates for
16 such office have almost always been considered the paradigm case of ‘public figures’ who should
17 be subjected to the most thorough scrutiny. In choosing those who are to govern them, the public
18 must, of course, be afforded the opportunity of learning about any facet of a candidate’s life that
19 may relate to his fitness for office.” *Kapellas v. Kofman* (1969) 1 Cal. 3d 20, 36–37. The public
20 has “a strong interest in knowing how government officials conduct public business, particularly
21 when allegations of malfeasance by public officers are raised.” *BRV, Inc. v. Superior Court* (2006)
22 143 Cal. App. 4th 742, 746.

23 Rozanski minimizes – grotesquely – the public’s interest in the nature of the relationship
24 between her and Ferguson. She calls the requests a “witch hunt” and argues that their purpose is to
25 “publicly shame” her. Rozanski argues that the Acorn and the Star are interested in the emails and
26 voicemails because of allegations of sex. If Ferguson had not been paid over \$400,000 in taxpayer
27 funds over a three year period – when prior legal expenses of the District were a small fraction of
28 this amount – Rozanski might have a point. But those are the facts. Neither the Star nor the Acorn

1 is interested in Rozanski's extramarital activities for prurient reasons. As the head of a public
2 agency, Rozanski was a steward of public funds. And the public has a right to know whether she
3 was carrying on an undisclosed affair with the recipient of a considerable amount of public funds.

4 Rozanski does not cite to a single California case that supports her argument that any
5 privacy interests she may have in the emails and voicemails outweighs the public's right to know.
6 In each of the California cases cited by Rozanski that address the balancing test of privacy versus
7 disclosure, the Court of Appeal ordered disclosure of the records. *See, e.g., Braun v. City of Taft*
8 (1984) 154 Cal. App. 3d 332 (holding that documents were subject to disclosure); *Caldecott v.*
9 *Superior Court* (2015) 243 Cal. App. 4th 212 (holding that public interests outweighed privacy
10 rights); *BRV, Inc.*, 143 Cal. App. 4th 742 (ordering disclosure of records; "[Californians] have a
11 strong interest in knowing how government officials conduct public business, particularly when
12 allegations of malfeasance by public officials are raised.").

13 Because Rozanski's privacy rights will not be infringed by disclosure of the emails and
14 voicemails, the Court may not bar CHCD from releasing the records in response to the PRA
15 requests by the Acorn and the Star.

16 **V. EVEN IF THE COURT CONCLUDES THAT THE PRA MAY BAR DISCLOSURE OF**
17 **RECORDS, THE EMAILS AND VOICEMAILS ARE PUBLIC RECORDS UNDER THE**
18 **PRA AND MUST BE DISCLOSED.**

19 Recognizing that her constitutional argument is weak, Rozanski hangs her hat on the
20 argument that the voicemails and emails are not "public records" under the PRA and, therefore,
21 CHCD is barred from disclosing them. As set forth above, the PRA does not bar disclosure of the
22 voicemails and emails. If this Court concludes that a public agency may not disclose records
23 unless the PRA requires disclosure, the Court must nevertheless deny the petition. The emails and
24 voicemails are "public records" under the PRA. And no exemption is available to CHCD to refuse
25 the requests by the Acorn and the Star to disclose the records.

26 The emails and the voicemails are public records. A "public record" is "any writing
27 containing information relating to the conduct of the public's business prepared, owned, used, or
28 retained by any state or local agency regardless of physical form or characteristics." Govt. Code §

1 6252(e). In other words, a public record is (1) a writing; (2) containing information relating to the
2 conduct of the public’s business; and (3) retained by a public agency is a public record subject to
3 disclosure.

4 The dispute centers on the third prong. Rozanski argues that the voicemails and emails are
5 not related to the conduct of the public’s business. She contends that the voicemails and emails are
6 purely personal in nature, and therefore, not subject to disclosure. In making this argument,
7 Rozanski relies on an unreasonably narrow construction of the PRA. She contends that if a
8 voicemail or email does not expressly discuss the public’s business in the communication, the
9 voicemail or email does not relate to the public’s business.

10 Rozanski is wrong. First, she relies on a case – *People v. Olson* (1965) 232 Cal. App. 2d
11 480, 486 – that predates the passage of the PRA in 1968. In *Olson*, the Court relied on a prior
12 statute and defined a public record as a record “made by a public officer in pursuance of a duty, the
13 immediate purpose of which is to disseminate information to the public, or to serve as a memorial
14 of official transactions for public reference.” *Id.* This narrow definition of a public record did not
15 survive the passage of the CPRA. *See, e.g., Cook v. Craig* (1976) 55 Cal. App. 3d 773, 781
16 (rejecting the contention that *Olson* definition controls the PRA). As the California Supreme Court
17 noted, the definition of a public record under the PRA “is intended to cover every conceivable kind
18 of record that is involved in the governmental process.” *Sander v. State Bar of Cal.* (2013) 58 Cal.
19 4th 300, 322 (internal citations omitted).

20 Rozanski next relies on the Supreme Court’s recent decision in *City of San Jose v. Superior*
21 *Court* (2017) 2 Cal. 5th 608. In that case, the Court held that materials maintained on privately-
22 owned devices and email accounts that relate to the public’s business are subject to disclosure
23 under the PRA. The Court addressed the concern that its ruling could require public employees to
24 disclose emails on their private accounts and devices that may also be personal in nature:

25 Whether a writing is sufficiently related to public business will not
26 always be clear. For example, depending on the context, an email to
27 a spouse complaining “my coworker is an idiot” would likely not be
28 a public record. Conversely, an email to a superior reporting the
29 coworker's mismanagement of an agency project might well be.
30 Resolution of the question, **particularly when writings are kept in**

1 **personal accounts**, will often involve an examination of several
2 factors, including the content itself; the context in, or purpose for
3 which, it was written; the audience to whom it was directed; and
4 whether the writing was prepared by an employee acting or
5 purporting to act within the scope of his or her employment. Here,
6 the City claimed all communications in personal accounts are beyond
7 the reach of CPRA. As a result, the content of specific records is not
8 before us. Any disputes over this aspect of the “public records”
9 definition await resolution in future proceedings.

10 We clarify, however, that to qualify as a public record under CPRA,
11 at a minimum, a writing must relate in some substantive way to the
12 conduct of the public's business. This standard, though broad, is not
13 so elastic as to include every piece of information the public may
14 find interesting. Communications that are primarily personal,
15 containing no more than incidental mentions of agency business,
16 generally will not constitute public records. For example, the public
17 might be titillated to learn that not all agency workers enjoy the
18 company of their colleagues, or hold them in high regard. However,
19 an employee's electronic musings about a colleague's personal
20 shortcomings will often fall far short of being a “writing containing
21 information relating to the conduct of the public's business.” (§ 6252,
22 subd. (e).)

23 *Id.* at 618–19 (emphasis added). *City of San Jose* is not helpful to Rozanski's position. The Court
24 makes clear that the determination of whether a document is a public record turns not only on the
25 content of the material, but also its context. When the context of the emails and voicemails is
26 considered, all of them “relate in some substantive way to the conduct of the public's business.”

27 Rozanski and CHCD have divided the voicemails into four categories. First, the parties
28 have identified those emails and voicemails in which Rozanski and Ferguson discuss personal
29 matters. Second, the parties have identified those emails in which Rozanski and Ferguson discuss
30 public business. Third, Rozanski has identified those emails and voicemails that – while they
31 discuss public business – should be redacted. Finally, Rozanski and Ferguson have identified those
32 emails and voicemails on which they do not agree as to whether they discuss personal or public
33 business.

34 While the content of the first category of voicemails and emails may be personal, such
35 emails and voicemails nevertheless constitute public records under the PRA. Whether or not
36 Rozanski had an undisclosed romantic relationship with Ferguson is directly related to (1) the

1 reasons why Rozanski hired Ferguson as CHCD’s general counsel, (2) her scrutiny (or lack
2 thereof) of his fee invoices, (3) Ferguson’s role as the general counsel of CHCD while – at the
3 same time – he was engaged in an affair with Rozanski, and (4) Rozanski’s response to the Board
4 of Directors inquiries into Ferguson’s billings in 2014 and 2015. In fact, the relationship between
5 Ferguson and Rozanski is the string that ties all of these issues together. One simply cannot
6 understand the nature of the concerns regarding Ferguson and Rozanski without information
7 concerning their relationship.

8 The District acknowledges that the CPRA does not compel disclosure of “purely personal”
9 materials in the possession of a public agency. Had Rozanski not decided to hire Ferguson as
10 District counsel, the first category of emails and the voicemails would not qualify as public
11 records. But Rozanski did hire Ferguson and paid him hundreds of thousands of dollars of public
12 funds. A public official cannot reasonably complain of an invasion of privacy when the official is
13 responsible for injecting her personal life into the public sphere.

14 The conclusion that the “personal” voicemails and emails are public records is bolstered by
15 Rozanski’s continued denial of any romantic relationship with Ferguson. One cannot credibly
16 argue that a secret romantic relationship between the head of a public agency and a vendor of that
17 agency who has received hundreds of thousands of dollars does not relate to the public’s business.
18 In light of Rozanski’s continued denial of that relationship, the only means by which the public can
19 verify her denial is to review the voicemails and emails. Without such disclosure, the public will
20 remain in the dark and left to blindly assess the competing allegations of the District and Rozanski.

21 The second category of emails and voicemails – those that expressly discuss the public’s
22 business – plainly relates to the public’s business. There is no reason why the Court should not
23 immediately permit CHCD to disclose such materials to the Acorn and the Star.

24 In the third category of voicemails and emails, Rozanski concedes that these materials
25 expressly discuss the public’s business but asks this Court to redact those emails and voicemails to
26 remove any reference to the personal nature of her relationship with Ferguson. The Court should
27 reject this effort to sanitize these emails and voicemails. As argued above, the relationship
28 between Rozanski and Ferguson is directly germane to the public’s business. To redact those

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

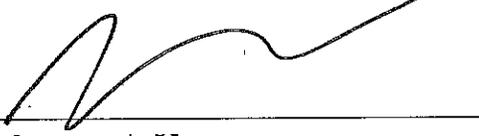
emails and voicemails would give the false impression that Rozanski was working with Ferguson on a purely professional level. The public should not be deceived.

VI. CONCLUSION

This Court need not engage in the pointless exercise of deciding whether each voicemail or email is a “public record” under the PRA. The only proper basis on which the Court may bar CHCD from disclosure of the emails and voicemails is Rozanski’s constitutional right of privacy. But the case law is clear – she has no right of privacy in the voicemails and emails. Rozanski’s petition should be denied.

Date: April 17, 2017

FERGUSON CASE ORR PATERSON LLP

By: 
MICHAEL A. VELTHOEN
Attorneys for Respondent Camarillo
Health Care District

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA:

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 1050 South Kimball Road, Ventura, California 93004.

On April 17, 2017, I served the original a true copy of the foregoing document described as **RESPONDENT CAMARILLO HEALTH CARE DISTRICT'S SUPPLEMENTAL BRIEF REGARDING DISCLOSURE OF VOICEMAILS AND EMAILS**, which is related to the action styled *CHCD adv. Jane Rozanski*, Ventura Superior Court Case No. 56-2016-00489673-CU-WA-VTA, on the person or persons listed on the attached Service List as follows:

BY MAIL: I enclosed the above-described document in (an) envelope(s) with postage thereon fully pre-paid and addressed as set forth on the attached Service List. I am readily familiar with FERGUSON CASE ORR PATERSON LLP's practice of collection and processing correspondence for mail with the U.S. Postal Service. Pursuant to that practice, I placed the above-described envelope into the Firm's designated receptacle, of which the contents are to be deposited with the U.S. Postal Service on that same day at Ventura, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated herein.

BY EXPRESS MAIL: I enclosed the above-described document in (an) envelope(s) with Express Mail postage fully pre-paid and addressed as set forth on the attached Service List. I placed the above-described envelope into a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail.

BY OVERNIGHT DELIVERY: I enclosed the above-described document in (an) envelope(s) of a type designated by the express service carrier for overnight delivery with delivery fees fully pre-paid or provided for and addressed as set forth on the attached Service List. I placed the above-described envelope into a box or other facility regularly maintained by the express service carrier/ delivered the above-described envelope to an authorized courier or driver authorized by the express service carrier to receive documents.

BY PERSONAL SERVICE: I personally delivered the above-described document to _____, a party to this action; an attorney for _____, who is a party to this action, by leaving the document at the attorney's office in an envelope clearly labeled to identify the attorney being served with _____, a receptionist or a person having charge of the office; at _____ a.m. p.m. on _____, at _____.

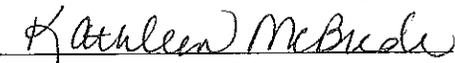
BY FACSIMILE TRANSMISSION: I caused the above-described document to be transmitted via facsimile from (805) 659-6818 to each facsimile number listed on the attached Service List at _____ a.m. p.m. on the date set forth above. Each fax transmission was reported as complete and without error, and each transmission report attached hereto was properly issued by the sending fax machine.

COURTESY COPY BY ELECTRONIC TRANSMISSION: I served a true copy of the document electronically in Portable Document Format (PDF) by transmitting it from kmcbride@fcoplaw.com to the electronic service address(es) (emails), as indicated on the attached Service List at see below a.m. p.m. on the date set forth above.

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

(Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on APRIL 17, 2017, at Ventura, California.


Kathleen McBride

FERGUSON CASE ORR PATERSON LLP
1050 South Kimball Road
Ventura, California 93004
2801 Townsgate Road, Suite 215
Westlake Village, California 91361

SERVICE LIST

Andrew M. Gilford
Jessica R. Corpuz
Weintraub Tobin
10250 Constellation Blvd., Suite 2900
Los Angeles, CA 90067
(310) 858-7888
agilford@weintraub.com
jcorpuz@weintraub.com
Attorneys for Defendant Jane Rozanski

Katie Townsend, Esq.
Reporters Committee for Freedom of the Press
1156 15th Street NW, Suite 1250
Washington, DC 20005
Telephone: (202) 795-9303
Email: ktownsend@rcfp.org
Attorney for Real Party in Interest, Camarillo Acorn