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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF VENTURA**

12
13 JANE ROZANSKI, an individual,
14
15 Plaintiff/Petitioner,

16 v.

17 CAMARILLO HEALTH CARE DISTRICT, a
California Special District,
18
19 Defendant/Respondent.

20 GOLDEN RULE PUBLISHING, INC., a
California Corporation dba CAMARILLO
ACORN,
21
22 Real Party in Interest.

Case No. 56-2016-00489673-CU-WA-VTA
Hon. Rocky J. Baio, Dept. 20
Action Filed: December 2, 2016

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

Hearing:
Date: March 16, 2017
Time: 10:00 a.m.
Department: 20

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1 **I. PRELIMINARY STATEMENT**

2 Plaintiff/Petitioner Jane Rozanski (“Petitioner”) filed this writ of mandate action on
3 December 2, 2016 (the “Petition”), seeking a ruling from this Court barring Respondent Camarillo
4 Health Care District (“Respondent”) from turning over her personal, private communications with
5 attorney Ralph Ferguson (“Ferguson”) to a local newspaper, Real Party in Interest Golden Rule
6 Publishing, Inc. dba the Camarillo Acorn (“Requestor”) and others, pursuant to the California
7 Public Records Act (“CPRA”). Petitioner obtained a temporary restraining order, and then a
8 preliminary injunction, barring Respondent from producing the records.

9 Petitioner now seeks a final determination on the merits from this Court. The subject
10 voicemail messages and e-mails should not be produced by Respondent because they are (1) not
11 public records subject to the CPRA, (2) subject to an overriding privacy interest outweighing any
12 public interest in disclosure, and (3) attorney-client privileged.

13 In their Opposition briefs, Respondent and Requestor argue that Petitioner may not bring
14 this “reverse-CPRA” action. Requestor argues that “reverse-CPRA” actions are not permitted at
15 all, citing outdated case law and ignoring the express holding in *Marken v. Santa Monica-Malibu*
16 *Unified Sch. Dist.*, 202 Cal. App. 4th 1250 (2012) to the contrary. Respondent argues that,
17 although a “reverse-CPRA” action is permissible, Petitioner must establish that the production of
18 the records would be “otherwise prohibited by law,” an argument which is directly at odds with
19 the CPRA and the case law and would render as moot a multitude of cases deciding whether a
20 record is a “public record.” Contrary to the position of Respondent and Requestor, a reverse-
21 CPRA action is proper and any communications that do not constitute “public records,” or any
22 communications subject to one of the CPRA’s exceptions, may not be disclosed by Respondent.

23 Both Respondent and Requestor also argue that the communications are public records
24 subject to disclosure under the act. They advocate for an exceedingly broad definition of “public
25 record,” and argue that the communications are public because they are tangentially related to the
26 allegations of wrongdoing made by Respondent itself. However, California case law, including a
27 recent decision from the California Supreme Court, directly refutes the “public record” definition
28 asserted by Respondent and Requestor, and confirms the position advanced by Petitioner

1 throughout. Under this standard, there is no question that the vast bulk, if not all, of the
2 communications that Respondent would improperly disclose are, in fact, not public records subject
3 to disclosure under the CPRA because they clearly do not relate to the conduct of the public's
4 business.

5 Respondent and Requestor next argue that the disclosure of the communications is proper
6 because the "public interest" in publication of the communications outweighs any privacy interest
7 of Petitioner. They argue that Petitioner must have an "objectively reasonable expectation" that
8 the communications would be kept private from Respondent in order for her to now assert a
9 privacy interest in the communications. Both parties cite a slew of inapposite cases having
10 nothing to do with the CPRA and which deal largely with an employee's expectation of privacy
11 vis-à-vis his employer. That is not the issue here. The question is whether the public has a right
12 of access to the records that supersedes Petitioner's right to privacy. For those records, if any,
13 which the Court believes relate in some way to the public business, the balance of interests clearly
14 compels that they not be disclosed. Any public interest in disclosure is outweighed by Petitioner's
15 and Ferguson's privacy interests.

16 Lastly, Respondent and Requestor argue that the communications are not subject to the
17 attorney-client privilege. Respondent once again suggests that it has the right to waive the
18 privilege, but refuses to do so. Any records which the Court deems to be otherwise subject to
19 production under the CPRA – those which are "public records" and for which the public's right of
20 access outweighs Petitioner's right of privacy – necessarily implicate the privilege, as the
21 communications are between the public agency's CEO and its attorney. Such communications
22 must not be disclosed under the CPRA.

23 Petitioner therefore respectfully requests her Petition be granted, and the Court issue a writ
24 of mandate preventing the disclosure of her private communications to the public.

25 **II. CALIFORNIA LAW PERMITS "REVERSE-CPRA" ACTIONS**

26 **A. Requestor Misrepresents Case Law Interpreting The CPRA**

27 Requestor argues that Petitioner may not bring a "reverse-CPRA" action because neither
28 the CPRA itself, nor *Filarsky v. Superior Court*, 28 Cal. 4th 419 (2002), permits a "reverse-

1 CPRA” action. See Requestor Opp. at 6-9. In making this argument, Requestor completely
2 ignores the holding in *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250
3 (2012), repeatedly cited in briefing by Petitioner and Respondent, which establishes that a
4 “reverse-CPRA” action is permissible and that a “petition for writ of mandate is the appropriate
5 procedure to present the issue to the court.” *Marken*, 202 Cal. App. 4th at 1267.

6 Indeed, contrary to Requestor’s argument, the Court in *Filarisky* did not hold that a
7 “reverse-CPRA” action was impermissible – it expressly declined to rule on whether a “reverse-
8 CPRA” action was permitted. As stated in *Marken*, which discusses *Filarisky* at length, “The
9 *Filarisky* court specifically declined to address whether a similar, reverse-CPRA action could
10 proceed in California. (*Filarisky*, at p. 431 [“[w]e ... have no occasion in the present case to
11 determine whether a third party possesses the right to seek a judicial ruling precluding a public
12 agency from disclosing documents pursuant to the CPRA”].)” *Marken*, 202 Cal. App. 4th at 1265.
13 *Marken* took up this challenge, and held that such an action was in fact permissible and that the
14 proper procedural mechanism for challenging the disclosure of records under the CPRA was a writ
15 of mandate. *Marken*, 202 Cal. App. 4th at 1267.

16 Requestor’s improper citation to outdated case law is a blatant misrepresentation of the
17 state of the law on point. Conspicuously, Respondent does not make this argument, as it is
18 patently false. There can be no dispute, Requestor’s willful ignorance aside, that *Marken* permits
19 the type of action filed here and provides the procedure to be followed.¹ Requestor’s position –
20 which appears to be that a party has no remedy if a public agency decides to produce that party’s
21 private information – is nowhere to be found under California law or the law of any other state.

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26 ¹ Requestor also appears to argue that they are entitled to attorney’s fees if they are successful in
27 this action. This is also directly contradicted by *Marken*: “a requesting party who participates in a
28 reverse-CPRA lawsuit would not be entitled to the recovery of attorney fees, as would be the case
if the party had successfully litigated his or her right to access to documents against a public
agency (§ 6259, subd. (d))....” *Marken*, 202 Cal. App. 4th at 1268.

1 **B. A Writ Of Mandate Is The Proper Procedure**

2 Despite the clear holding of *Marken*, both Respondent and Requestor persist in arguing
3 that a writ of mandate is not the proper procedure for challenging a public agency’s intended
4 disclosure of records under the CPRA.

5 Requestor argues, as it did unsuccessfully in connection with the preliminary injunction,
6 that a writ of mandate is not available to Petitioner because Respondent’s decision to produce
7 records responsive to a CPRA Request is “discretionary,” not “mandatory.” *See* Requestor Opp.
8 at 9-11. This is an improper and clearly misleading reading of *Marken*, which specifically states
9 that “Mandamus may issue, however, to compel an official to both exercise his discretion (if he is
10 required by law to do so) and to exercise it under a proper interpretation of the applicable law.”
11 *Marken*, 202 Cal. App. 4th at 1266; *see also* Petitioner’s Opening Brief at 9-10. The fact that the
12 agency’s act is “discretionary” and not “mandatory” does not render it immune from scrutiny. The
13 agency must still exercise its “discretion” in releasing documents under a proper interpretation of
14 the CPRA and case law interpreting the CPRA. Here, the CPRA provides that only “public
15 records” are subject to CPRA requests. *See* Cal. Gov’t. Code § 6252. Respondent cannot simply
16 decide that all records, public and private, are subject to the request and produce them based on
17 that “discretionary” decision. Further, the CPRA bars the disclosure of certain types of records,
18 including those subject to privacy and attorney-client privilege objections. *See* Cal. Gov’t. Code
19 §§ 6254(c), 6255. Respondent cannot hide behind its “discretion” in producing improper records.
20 Requestor’s argument once again fails when faced with current case law on point.

21 Respondent argues that mandamus is only available if Rozanski can demonstrate that the
22 disclosure of the communications is “otherwise prohibited by law,” and further argues that the fact
23 that the communications are not public records does not render their disclosure “prohibited by
24 law.” *See* Respondent’s Opp. at 8-9. In essence, Respondent argues that it is permitted to release
25 even those records which do not relate in any way to the public’s business – like private
26 communications made by its employees – to the press, and that because such a disclosure is not
27 “prohibited by law,” no employee or former employee can contest the disclosure of the records.

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1 However, Respondent provides no support for this claim, citing only generally to *Marken*
2 and to a section of the CPRA which provides, “This section shall not prevent any agency from
3 opening its records *concerning the administration of the agency* to public inspection, unless
4 disclosure is otherwise prohibited by law.” Cal. Gov’t. Code § 6254(f) (emphasis added). The
5 section of the CPRA Respondent relies on contains an express acknowledgement that, in order for
6 an agency’s records to be open to public review, they must “concern[] the administration of the
7 agency.” No statute or case law states that private, non-public records created by public
8 employees can be released, leaving no recourse whatsoever to the employee whose private
9 communications have been handed to the press.

10 Respondent’s reading of the CPRA would also render as moot every case interpreting the
11 “public records” requirement of the CPRA. If every government record were a “public” one, there
12 would be no “public record” analysis in *San Gabriel, Sander, or Braun*, all of which are discussed
13 *infra* in Section III(A). Further, there would be no basis for courts to hold that records may not be
14 disclosed, entirely turning on their status as “public records.” For example, in *Bd. of Pilot*
15 *Comm’rs v. Superior Court*, 218 Cal. App. 4th 577 (2013) (“*Pilot Comm’rs*”), interested third
16 parties and the Board of Commissioners for the Bays of San Francisco together challenged the
17 superior court’s decision to release certain pilot logs kept by the Board. The only issue before the
18 Court of Appeal was whether the records were “public records” subject to disclosure under the
19 CPRA. “[T]he question is whether any evidence exists that the information is possessed and used
20 by the Port Agent in the performance of his official duties and is consequently a public record. We
21 find that there does not.” *Pilot Comm’rs*, 218 Cal. App. 4th at 596. There was no issue of
22 whether the disclosure of the records was “otherwise prohibited by law” – the fact that the records
23 were not “public records” was sufficient to prohibit their disclosure. *See also Coronado Police*
24 *Officers Assn. v. Carroll*, 106 Cal. App. 4th 1001, 1006-1012 (2003) (holding that a public
25 defender’s database of client files and public information was not a “public record”); *see also*
26 *Regents of Univ. of Cal. v. Superior Court*, 222 Cal. App. 4th 383, 399 (2013) (“Thus, unless the /

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1 writing is related ‘to the conduct of the public's business’ *and* is ‘prepared, owned, used, or
2 retained by’ a public entity, it is not a public record under the CPRA, and its disclosure would not
3 be governed by the Act.”).

4 *Marken* clearly holds that a writ petition is the proper procedure for an interested third
5 party to bring a “reverse-CPRA” action. Petitioner followed the procedure laid out in *Marken*
6 exactly, and this issue is properly before this Court for resolution on a petition for writ of mandate.

7 **III. THE COMMUNICATIONS ARE NOT PUBLIC RECORDS AND THEREFORE**
8 **ARE NOT SUBJECT TO A CPRA REQUEST**

9 **A. *San Jose* Confirms The Limited Definition Of “Public Records”**

10 Both Respondent and Requestor argue that the communications are public records subject
11 to disclosure under the CPRA. Since Respondent and Requestor filed their briefs, however, the
12 California Supreme Court has issued an Opinion defining the term “public record” in an even
13 more limited fashion, supporting Petitioner’s interpretation of the term.

14 In *City of San Jose v. Superior Court*, 2017 Cal. LEXIS 1707, -- Cal. 5th --, (March 2,
15 2017) (“*San Jose*”), a private citizen made a CPRA request for communications “sent or received
16 on private electronic devices” used by City officials. The City disclosed only those
17 communications sent or received from City-owned electronic devices or email accounts, but
18 refused to disclose communications sent or received on employees’ privately owned devices or
19 personal email accounts. The issue before the Supreme Court was whether communications on
20 privately owned devices and email accounts were subject to a CPRA request. The Court held that
21 they were, but only if they were “public records.”²

22 In doing so, the Supreme Court restated the definition of “public records.” Citing the text
23 of the CPRA and *Braun v. City of Taft*, 154 Cal. App. 3d 332, 340 (1984), both cited by Petitioner

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25 ² Respondent cited the Court of Appeal Opinion in the *San Jose* case in its brief filed in
26 connection with the preliminary injunction, arguing that because the Court of Appeal held that
27 communications found on public employee’s privately held cell phones were not public records,
28 therefore all records found on a publicly-owned cell phone were necessarily public records. The
Supreme Court reversed the Court of Appeal on this point. *San Jose*, 2017 Cal. LEXIS 1707 at
*32.

1 in her Opening Brief, the Court reiterated that “not everything written by a public employee is
2 subject to review and disclosure.” *San Jose*, 2017 Cal. LEXIS 1707 at *10. “To qualify as
3 a public record, a writing must contain information relating to the conduct of the public’s
4 business. Generally, any record kept by an officer because it is necessary or convenient to the
5 discharge of his official duty is a public record.” *Id.* at *10-11 (internal citations and quotations
6 omitted).

7 The Court went on to provide some practical guidance:

8 Whether a writing is sufficiently related to public business will not always
9 be clear. For example, depending on the context, an email to a spouse
10 complaining “my coworker is an idiot” would likely not be a public record.
11 Conversely, an email to a superior reporting the coworker’s mismanagement
12 of an agency project might well be. Resolution of the question, particularly
13 when writings are kept in personal accounts, will often involve an
14 examination of several factors, including the content itself; the context in, or
15 purpose for which, it was written; the audience to whom it was directed; and
16 whether the writing was prepared by an employee acting or purporting to act
17 within the scope of his or her employment. Here, the City claimed all
18 communications in personal accounts are beyond the reach of CPRA. As a
19 result, the content of specific records is not before us. Any disputes over this
20 aspect of the “public records” definition await resolution in future
21 proceedings.

22 *Id.* at *11.

23 The Court clarified that the test is not simply what “interests” or “titillates” the public:

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

29 *Id.* at *12.

30 Lastly, the Court examined *Coronado Police Officers Assn. v. Carroll*, 106, Cal. App. 4th
31 1001 (2003), in which the Court of Appeal held information maintained by a public defender is
32 not necessarily a public record. The *San Jose* Court stated that “[d]ocuments reflecting policy

1 decisions” made by the public defenders might be “public records,” while documents related to the
2 “representation of individual clients” would not. *Id.* at *13.

3 Thus, it is not enough that the communications sought by Requestor “interest” the public,
4 or “titillate” them. Further, documents which contain “no more than incidental mentions of
5 agency business” are not public records. The question is whether the communication “relate[s] in
6 some substantive way to the conduct of the public's business.” *Id.* at *12.

7 **B. The Communications Are Not “Public Records”**

8 Respondent and Requestor argue, in the absence of the Supreme Court’s instructive ruling
9 in *San Jose*, that Petitioner’s reliance on *People v. Olson*, 232 Cal. App. 2d 480 (1965) is
10 misplaced because it predates the CPRA, and that the true definition of “public record” is much
11 more expansive. *See* Respondent’s Opp. at 10- Requestor’s Opp. at 12. Both Parties completely
12 ignore the additional authorities cited by Petitioner in her Opening Brief, including, for example,
13 *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 774 (1983), decided long after the
14 CPRA was implemented, which in fact takes its definition of “public record” from the Assembly
15 Committee on Statewide Information Policy on the CPRA:

16 “This definition is intended to cover every conceivable kind of record that is
17 involved in the governmental process and will pertain to any new form of
18 record-keeping instrument as it is developed. Only purely personal
19 information unrelated to ‘the conduct of the public's business’ could be
20 considered exempt from this definition, i.e., the shopping list phoned from
home, the letter to a public officer from a friend which is totally void of
reference to governmental activities.” Assembly Committee on Statewide
Information Policy California Public Records Act of 1968. 1 Appendix to
Journal of Assembly 7, Reg. Sess. (1970).

21 *San Gabriel*, 143 Cal. App. 3d at 774; *see also Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 322
22 (2013) (also cited by Petitioner in her Opening Brief and citing the same Assembly Committee
23 definition of public records).³

24 _____
25 ³ *See also* Advisory Committee Commentary on Cal. Rules of Court, Rule 10.500 (“The
26 application of this rule [regulating public access to legislative records] is intended to reflect
27 existing case law under the California Public Records Act that exempts from the definition of
28 ‘public record’ certain types of personal records and information. The concept was first discussed
in the California Assembly and establishes that if personal correspondence and information are
‘unrelated to the conduct of the people's business’ they are therefore not public records. (San

1 As to *People v. Olson*, Respondent cites only to a single, Third Appellate District case for
2 the proposition that its definition of “public record” is outdated. See Respondent’s Opp. at 10.
3 However, a very similar definition as that cited by Petitioner under *People v. Olson* appears in *San*
4 *Gabriel*: “Any record required by law to be kept by an officer, or which he keeps as necessary or
5 convenient to the discharge of his official duty, is a public record. On the other hand, the mere fact
6 that a writing is in the custody of a public agency does not make it a public record.” *San Gabriel*,
7 143 Cal. App. 3d at 774 (citing *City Council v. Superior Court*, 204 Cal. App. 2d 68, 73 (1962)
8 (another case which predates the CPRA, and which itself is cited by *People v. Olson* for this
9 point); see also *Braun v. City of Taft*, 154 Cal. App. 3d 332, 340 (1984) (“The mere custody of a
10 writing by a public agency does not make it a public record, but if a record is kept by an officer
11 because it is necessary or convenient to the discharge of his official duty, it is a public record.”);
12 see also *Coronado Police Officers Assn. V. Carroll*, 106 Cal. App. 4th 1001, 1006 (2003).

13 And, regardless, the correct definition was articulated clearly in *San Jose*, mooting
14 Respondent’s and Requestor’s arguments entirely.

15 Given the ruling in *San Jose*, there can be no dispute that only those records which “relate
16 in some substantive way to the conduct of the public’s business” are public records. Not all
17 records kept by an agency or a public employee are “public records,” and personal information
18 like the email stating that a coworker is an “idiot,” the shopping list, or letter to a friend without
19 reference to governmental activities are not “public records” subject to disclosure under the
20 CPRA. It is not enough that the public would be interested or titillated by the communication, it
21 must have some actual, substantive relationship to the public’s business.

22 Respondent and Requestor also attempt to distinguish *Denver Pub. Co. v. Bd. Of Cty.*
23 *Comm’rs of Cty. Of Arapahoe*, 121 P.3d 190 (Colo. 2005) (“*Denver*”), on the basis that that

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25 *Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774, citing Assembly Committee
26 on Statewide Information Policy California Public Records Act of 1968, section B, page 9,
27 Appendix to Assembly Journal (1970 Reg. Sess.) Case law has further established that only
28 records necessary or convenient to the discharge of official duty, or kept as necessary or
convenient to the discharge of official duty, are public records for the purposes of the California
Public Records Act and its predecessors. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *City*
Council of Santa Monica v. Superior Court (1962) 204 Cal.App.2d 68.)”).

1 Colorado’s public records act is more limited than the CPRA (*see* Respondent’s Opp. at 11;
2 Requestor’s Opp. at 15) and that *Denver* did not deal with any allegation of wrongdoing (see
3 Requestor’s Opp. at 15). Both arguments fail. First, neither party provides any support for its
4 argument that the public records acts are substantively different. Colorado’s act specifically
5 excludes from the definition of public records correspondence “[w]ithout a demonstrable
6 connection to the exercise of functions required or authorized by law or administrative rule and
7 does not involve the receipt or expenditure of public funds.” Colo. Rev. Stat. Ann. § 24-72-202.
8 The CPRA similarly exempts from disclosure records that do not have a substantive relationship
9 to the public’s business. *San Jose*, 2017 Cal. LEXIS 1707 at *12; *see also* Cal. Gov’t. Code §
10 6252(e). Other than the fact that one defines the records included within the rule and one defines
11 the records *not* included, the substance is the same – a substantive connection or relation to the
12 public’s business or functions is required in order for the record to be “public.”

13 Second, Requestor’s argument that *Denver* did not deal with any wrongdoing on the part of
14 the individuals whose communications were sought is simply false. The communications at issue
15 were discovered during “an investigation of... allegations of constructive discharge, sexual
16 harassment/hostile work environment, violations of open meetings laws, violations of the
17 Campaign Practice Act, and misuse of County property and funds.” *Denver*, 121 P. 3d at 192.
18 The individuals who sent and received the messages were the ones accused of wrongdoing. *Id.*
19 Requestor once again misrepresents the case law.

20 *Denver* actually holds that, even when the individuals involved are accused of wrongdoing
21 *including sexual harassment*, their personal correspondence of an intimate nature is not the
22 public’s business. Records must “address the performance of their public functions” to fall within
23 the public records act. *Denver*, 121 P. 3d at 205. Here, both Respondent and Requestor argue that
24 the correspondence *became* relevant to the public’s business when the allegations of wrongdoing
25 arose (regardless of the fact that such allegations are unproven and arose only through
26 Respondent’s own actions). *See* Respondent’s Opp. at 12-13; Requestor’s Opp. at 13-15. They
27 argue that every single record is “public” because it will “illuminate the relationship” between
28 Petitioner and Ferguson and “corroborate” the claims made by Respondent against Petitioner.

1 They cite no case law in support of this alternative test for disclosure under the CPRA. In fact,
2 *Denver* holds the opposite. Despite the allegations against the individuals, the court held, “[t]he
3 only discernable purpose of disclosing the content of these messages is to shed light on the extent
4 of Baker and Sales’ fluency with sexually-explicit terminology and to satisfy the prurient interests
5 of the press and the public.” *Denver*, 121 P.3d at 203. The messages which contained no
6 discussion of the public’s business were withheld, even though they “shed light” on the
7 relationship between the individuals, and the messages containing mixed public and private
8 business were redacted. *Id.* at 204-205.⁴

9 Respondent and Requestor urge the Court to create a new standard for disclosure under the
10 CPRA – one of tangential relevance to an allegation of wrongdoing *made by the party who seeks*
11 *to disclose the records*. This is simply not the standard under the CPRA, and should not be
12 applied here. The only records which may be disclosed under the CPRA are those which
13 substantively relate to the public’s business, not those which satisfy the interest of the press in
14 selling salacious stories or Respondent’s interest in tarnishing the reputation of its former
15 employee. The fact that one or more of the parties to a communication may be alleged to have
16 been engaged in wrongdoing does not change the fundamental nature of the communication as
17 either a public record within the meaning of the CPRA or not.

18 ///

19 ⁴ Requestor cites to *Cowles Publ'g Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 144 Idaho 259
20 (2007). However, the Idaho public records act is more broadly defined than the CPRA. *Cowles*,
21 114 Idaho at 263 (“[A] record may be a public record if it is a writing that (1) contains information
22 relating to the conduct or administration of the public's business, *and* (2) was prepared, owned,
23 used or retained by a governmental agency. However, our legislature has broadly defined public
24 records; other records and writings may qualify even if they do not meet this definition.” (internal
25 citations omitted)). Requestor also cites *Pulaski Cty v. Ark. Democrat-Gazette, Inc.*, 371 Ark.
26 217, S.W.3d 465 (2007). That case actually held that the public employee did not have a privacy
27 interest in the records, not that they were “public records.” In fact, a previous case in the same
28 litigation, *Pulaski Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435 (2007), held that the
communications at issue were “public records.” However, Arkansas has a very different
definition of “public records: “Public records’ means [a] writing... that constitute[s] a record of
the performance or lack of performance of official functions that are or should be carried out by a
public official.... All records maintained in public offices or by public employees within the scope
of their employment shall be presumed to be public records.” *Pulaski*, 370 Ark. at 439. California
law does not contain such a presumption that all records are automatically “public records.”

1 It is not enough for a communication to “reveal the relationship” between two individuals.
2 Otherwise, every email which contained something as innocuous as a lunch plan or a birthday
3 message would be a public record under the theory that it shed some light on the relationship
4 between the parties. This is especially the case when the relationship itself came under public
5 scrutiny because of the actions of Respondent in making such allegations public, without proof or
6 support.

7 Respondent takes the example of an email in which a public official thanks a vendor for a
8 personal gift of \$100,000, thereby accepting a bribe and violating the law. *See* Respondent’s Opp.
9 at 11. Respondent argues that, under Petitioner’s logic, such an email would not be a “public
10 record.” However, Respondent uses the wrong example. That email is an actual example of
11 wrongdoing, and does little to “illuminate” the relationship between the parties. The more apt
12 example would be an email exchange between a public official and a vendor confirming a plan to
13 have lunch or confirming an upcoming call. This email would serve to “illuminate” the
14 relationship between the parties, as it shows that they have lunch together or have calls. It may
15 even show that they are friends, family members, or in a romantic relationship. However, it does
16 nothing to establish whether or not the government official was offered or accepted a bribe.

17 Here, the vast majority of the voicemails and emails are wholly personal and private
18 communications which are plainly unrelated to the conduct of the public’s business on their face.
19 They are “totally void of reference to governmental activities.” *San Gabriel Tribune, supra*, 143
20 Cal. App. 3d at 774. They are akin to the examples in *San Jose* in that, though they may “interest”
21 or “titillate” the public, they are not “public records” because they do not substantively relate to
22 the public’s business. A mere incidental mention or relationship to a public issue is not sufficient.
23 As such, the messages do not constitute “public records” and are not subject to disclosure under
24 the CPRA.⁵

25 _____
26 ⁵ Requestor also attempts to make an argument as to the substance of the communications at issue,
27 and why they are not “public records.” *See* Requestor’s Opp. at 12-14. This argument necessarily
28 fails, because Requestor does not have access to the communications, and therefore cannot
interpret them.

1 **C. Ownership Of The Electronic Devices Is Not Determinative**

2 Requestor, but not Respondent, argues that the ownership of the cell phone and laptop is
3 determinative, citing *League of California Cities v. Superior Court*, 241 Cal. App 4th 976 (2015).
4 *See* Requestor’s Opp. at 14-15. In *League of California Cities*, the public employee received
5 work-related emails on his personal email account, and forwarded them to his work email account.
6 The court considered this “strong evidence” that the email were public records, because it showed
7 presumptive knowledge on the employee’s part that the emails were public records. *League of*
8 *California Cities*, 241 Cal. App 4th at 987-88.

9 Here, the opposite occurred. Petitioner exchanged emails on her Respondent-owned
10 devices, then deleted them. *See* Supplemental Declaration of Jane Rozanski in Support of
11 Petitioner’s Opening Brief (“Rozanski Supp. Decl.”) at ¶¶ 4-5; *see also* Declaration of Kara
12 Ralston in Opposition to Writ of Mandate (“Ralston Decl.”) at ¶ 12. As to the voicemails, she was
13 not even aware that they remained on the cell phone. *See* Declaration of Jane Rozanski in Support
14 of Petitioner’s Opening Brief (“Rozanski Decl.”) at ¶ 13. It is not as if Petitioner was aware that
15 the emails and voicemails remained on her electronic devices, ready and waiting for a CPRA
16 Request. In fact, the District listened to Petitioner’s voicemails and recovered her deleted emails
17 well before any CPRA Request, for their own use in connection with their claims against
18 Petitioner. *See* Ralston Decl. at ¶¶ 11-12.

19 If the individual’s handling of the emails in *League of California Cities* is evidence of their
20 status as a public record, than Petitioner’s is as well. Petitioner never intended anyone else to see
21 the emails or hear the voicemails, and deleted them with the understanding that they could not be
22 recovered. Respondent took action in discovering and listening to Petitioner’s voicemails and
23 recovering her deleted emails, and then publicized those actions. The conduct which led to the
24 CPRA Request was Respondent’s, not Petitioner’s. Her conduct is evidence that the
25 communications were not work-related, but were instead private communications distinct from her
26 role as a public employee.

27 ///

28 ///

1 **IV. DISCLOSURE OF THE VOICEMAILS WOULD BE AN UNWARRANTED**
2 **INVASION OF PETITIONER’S PERSONAL PRIVACY**

3 Respondent and Requestor next argue that, if any of the communications are deemed to be
4 “public records,” they should be disclosed because Petitioner does not have any “substantial
5 privacy interest” in the communications, and there is a public interest in the disclosure of the
6 records. Both Respondent and Requestor argue that Petitioner has no “substantial privacy
7 interest” in the communications because she did not have an “objective” reasonable expectation of
8 privacy in her communications, citing cases which appear to hold that, where an employee uses an
9 employer-owned electronic device, the employee has no reasonable expectation of privacy in his
10 communications *as to the employer*. See Respondent’s Opp. at 13-21; *see also* Requestor’s Opp.
11 at 16-19. The cases cited are entirely inapposite, as they are not CPRA cases and do not deal with
12 disclosure to third parties. Both parties attempt to read additional requirements into the CPRA
13 which are not present, including that Petitioner must have an “objective” expectation of privacy
14 vis-à-vis Respondent in order to assert a privacy interest under the CPRA. This is simply not the
15 case.

16 Requestor cites *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1 (1994) and *TBG Ins.*
17 *Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443 (2002) for the proposition that Petitioner
18 must have had an “objectively reasonable expectation of privacy” vis-à-vis her employer,
19 Respondent, in order to assert any privacy interest in the communications. See Requestor’s Opp.
20 at 17-18. Neither is a CPRA case. *Hill* dealt with college athletes’ challenge to the NCAA’s drug
21 testing program and the athletes’ privacy interest in their bodily functions and activities. *TBG*
22 dealt with an employer’s allegation of an employee’s misuse of a work computer and the
23 employee’s privacy interest in the information on the work computer vis-à-vis his employer. Both
24 cases dealt with the production of records between two contracting parties, not the release of
25 records by one party to the press under the CPRA.

26 Respondent cites to *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997)
27 for the same proposition. See Respondent’s Opp. at 14. *Lungren* dealt with parental consent for
28 abortion and the privacy interest of an individual’s reproductive information vis-à-vis her parents,

1 not the CPRA. Respondent then cites *Sunbelt Rentals, Inc. v. Victor*, 43 F.Supp.3d 1026 (2014),
2 in which an employee sued his private employer under anti-wiretapping laws for impermissibly
3 reviewing his cell phone. See Respondent's Opp. at 15. Again, *Sunbelt* deals with an employer's
4 right to review its employee's records, not the employer's right to produce those records to the
5 press. Respondent also cites to *TBG* which, as explained above, is inapposite. *Id.* at 15-16.
6 Lastly, Respondent cites to *Holmes v. Petrovich Development Co., LLC*, 191 Cal. App. 4th 1047
7 (2011), in which a private employee waived her attorney-client privilege by using her work email
8 to communicate with her attorney and loudly conversing with her attorney in her employer's
9 conference room. *Id.* at 16. *Holmes* is another employer-employee case, not a CPRA case.

10 None of the cited cases are CPRA cases.⁶ These cases are inapposite and, once again,
11 Respondent and Requestor seek to impose a significantly higher standard on Petitioner than that
12 found in the CPRA. There is no requirement that Petitioner had an absolute, objective expectation
13 that Respondent would be unable to access her communications. That is not the test found in the
14 CPRA or in case law analyzing it.

15 This is not simply a matter of analyzing whether Respondent has a right to access the
16 emails and voicemails. Rather, the issue before the Court is whether the public has a right to the
17 records that supersedes Petitioner's right to privacy, enshrined in the California Constitution and
18 the CPRA itself:

19 [A] court determining whether personnel records should be disclosed first
20 must determine whether disclosure of the information would compromise
21 substantial privacy interests; if privacy interests in given information are *de*
minimis disclosure would not amount to a clearly unwarranted invasion of
personal privacy.

22 ///

23 ⁶ The single CPRA case, cited only briefly in passing by both parties, is *International Federation*
24 *of Professional and Technical Engineers v. Superior Court*, 42 Cal. 4th 319 (2007) ("*International*
25 *Federation*"). See Respondent's Opp. at 14; Requestor's Opp. at 16. In *International Federation*,
26 the court held that there was a strong public interest in disclosing salary information for public
employees, and because the employees had not put forth any argument or evidence that there
27 would be an adverse consequence to the police officers if the information were to be made public.
International Federation, 42 Cal. 4th at 338-39. Here, Petitioner has set forth a significant
28 adverse result if the information were to be made public, particularly to her reputation in the
community.

1 Second, the court must determine whether the potential harm to privacy
2 interests from disclosure outweighs the public interest in disclosure. In
3 weighing the competing interests, we must determine the extent to which
disclosure of the requested item of information will shed light on the public
agency's performance of its duty.

4 *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 755 (2006) (internal citations and quotations
5 omitted). Several courts have held that, where the records sought implicate significant privacy
6 interests, including romantic relationships, the records should not be disclosed. *Id*; *see also*
7 *Caldecott v. Superior Court*, 243 Cal. App. 4th 212 (2015); *see also Kentucky Bd. of Examiners of*
8 *Psychologists & Div. of Occupations & Professions, Dep't for Admin. v. Courier-Journal &*
9 *Louisville Times Co.*, 826 S.W.2d 324, 328–29 (Ky. 1992) (records which contained allegations of
10 sexual misbehavior between a psychologist and a client were private and not subject to disclosure
11 under Kentucky's version of the CPRA); *see also Denver, supra*, 121 P.3d 190.

12 Here, Petitioner has a very significant privacy interest in the communications. The
13 voicemails and emails contain highly personal and private information. There can be no dispute
14 that the communications were intended only for Petitioner and Ferguson, and that neither
15 Petitioner nor Ferguson ever anticipated that any third party would read or listed to the
16 communications, much less that they would be turned over to the press. Disclosure of these
17 communications would constitute an unwarranted invasion of Petitioner's right to privacy.

18 In comparison, neither party can set forth *any* public interest in disclosure other than the
19 airing of dirty laundry. Respondent asserts, as it did in prior briefing, that the public interest is
20 that the communications will "shed light" on the relationship between Rozanski and Ferguson.
21 *See* Respondent's Opp. at 20. Requestor argues that the communications will "inform the public
22 about the District's handling of taxpayer money." Requestor Opp. at 21.⁷

23 These arguments betray the real impetus behind Respondent's and Requestor's actions – to
24 attempt to publicly confirm an alleged romantic relationship. There can be no credible argument
25 that Requestor would be as aggressive in pursuing these records if there were no allegation of a
26 romantic relationship. It was Respondent's repeated use of phrases like "romantic relationship"

27 ⁷ Requestor also argues that Petitioner herself must establish a "public interest in nondisclosure."
28 This is simply not the standard *See BRV*, 143 Cal. App. 4th at 755.

1 and “secret romantic relationship” that piqued Requestor’s interest in the first place. This is
2 clearly demonstrated by the fact that Requestor requested the voicemails showing the alleged
3 romantic relationship, not just those which allegedly demonstrate wrongdoing by Petitioner or
4 Ferguson. This case was never about confirming allegations of wrongdoing or “misuse of public
5 funds” – from the beginning the goal was to publicly shame Petitioner by printing her private
6 correspondence in the newspaper for her friends and family members to read.

7 Such witch-hunts by local papers looking to publish salacious material will only seek to
8 “discourage public service” and “create an arena of gossip and scandal.” *Denver, supra*, 121 P. 3d
9 at 205. Respondent blithely promises that the records of its other employees are safe from
10 scrutiny “so long as the employee does not mix his or her personal life with the public’s business.”
11 *See* Respondent’s Opp. at 19. But Respondent’s position is that every communication with an
12 outside vendor “illuminates” the nature of the relationship between the employee and that vendor,
13 thereby making it the “public’s business” if there is even a small question as to the vendor’s bills,
14 even by the Respondent itself. Under the Respondent’s standard, Respondent itself controls what
15 is the public’s business, and may disclose its own employees’ communications at any time.

16 Luckily for Respondent’s current employees, this is not the standard under the CPRA.
17 Disclosure is prohibited when “the potential harm to privacy interests from disclosure outweighs
18 the public interest in disclosure.” *BRV*, 143 Cal. App. 4th at 755. Here, the enormous potential
19 harm to Petitioner far outweighs the public interest in confirming an alleged affair with only
20 tangential relevance to an entirely unsubstantiated accusation of wrongdoing.

21 **V. THE DISCLOSURE OF THE COMMUNICATIONS WOULD VIOLATE THE**
22 **ATTORNEY-CLIENT PRIVILEGE**

23 In arguing that the disclosure of the communications would not violate the attorney-client
24 privilege, Respondent makes the astounding argument that none of the communications, even
25 those which Respondent states “expressly deal with the District’s business,” are subject to the
26 privilege. *See* Respondent’s Opp. at 21. Respondent wants to have it both ways. On the one
27 hand, it argues that the communications are “public records” and that there is a public interest in
28 disclosing the records because they show the conduct of the public’s business. On the other, it

1 argues that the records are non-privileged because these “public” communications which “conduct
2 the public’s business” between the CEO and the attorney for the District are somehow not related
3 to the attorney’s representation of Respondent.

4 The communications must necessarily fall into one of two categories – private (and
5 therefore not public records and/or subject to a privacy interest preventing their disclosure), or
6 work related (and therefore subject to the attorney-client privilege). To the extent that any
7 communication is found to be a public record not subject to Petitioner’s privacy interests, it is
8 necessarily related to Respondent’s business and the purpose for which Ferguson was retained.
9 See Petitioner’s Opening Brief at 22-23. Further, the communications need not contain an express
10 statement providing legal advice. The attorney-client privilege applies to discussions of billing
11 information. “To the extent that billing information is conveyed ‘for the purpose of legal
12 representation’ — perhaps to inform the client of the nature or amount of work occurring in
13 connection with a pending legal issue — such information lies in the heartland of the attorney-
14 client privilege.” *Los Angeles County Board of Supervisors v. Superior Court*, 2 Cal. 5th 282, 297
15 (2016); see also Petitioner’s Opening Brief at 23.⁸

16 Notably, Respondent again refuses to actually waive the attorney-client privilege, instead
17 opting to argue that it does not apply here. See Respondent’s Opp. at 21-22. Thus, if the Court
18 determines that any of the communications are in fact privileged, they may not be disclosed
19 pursuant to the CPRA, because the privilege has not been waived.

20 ///

21 ///

22 ⁸ Requestor also argues that the communications are not privileged because they fall under the
23 crime-fraud exception to the privilege. However, to assert this exception, Requestor must actually
24 establish a prima facie case that fraud occurred. “To trigger the crime-fraud exception, a party
25 must make a prima facie showing that the communication at issue furthered a crime or fraud. A
26 prima facie case is one which will suffice for proof of a particular fact unless contradicted and
27 overcome by other evidence. In other words, evidence from which reasonable inferences can be
28 drawn to establish the fact asserted, i.e., the fraud.” *Freedom Tr. v. Chubb Grp. of Ins. Cos.*, 38 F.
Supp. 2d 1170, 1171 (C.D. Cal. 1999) (interpreting California law) (internal citations and
quotations omitted). Respondent’s claims of wrongdoing are nothing more than unsubstantiated
allegations, and Requestor has no evidence whatsoever that a crime or fraud occurred.
Requestor’s argument is entirely misplaced.

1 **VI. IF THE COURT DETERMINES THAT ANY RECORD MUST BE RELEASED,**
2 **THE COURT SHOULD ALSO ORDER REDACTION OF ANY PERSONAL AND**
3 **PRIVATE INFORMATION**

4 To the extent any communications are held by the Court to be subject to disclosure, any
5 such communications should be redacted of any private and personal information contained
6 therein. It is likely that any such communication contains a mixture of both personal and public
7 information, and that the Court's determination was based on the public information, not the
8 private information. In such a case, in order to protect Petitioner's privacy and limit the disclosure
9 to only that information which is truly the public's business, Petitioner requests that the Court
10 order partial redaction of any communications produced.

11 This issue arose in *San Jose*, where the City argued that the privacy interests of its
12 employees would be jeopardized by requiring it to search private email accounts. The Court held,
13 "[a]ny personal information not related to the conduct of public business, or material falling under
14 a statutory exemption, can be redacted from public records that are produced or presented for
15 review." *San Jose*, 2017 Cal. LEXIS 1607 at *26. The court in *Denver* also ordered redactions,
16 "to exclude from disclosure those communications within the messages that do not address the
17 performance of public functions." *Denver*, 121 P. 3d at 205.

18 Requiring disclosure of the entire e-mail message under the circumstances
19 would contravene the General Assembly's intent to protect such
20 communications and make what is otherwise a private communication a
21 public communication simply because it was sent in the same message. In
22 reaching such a conclusion, not only would we discourage public service,
23 we would create an arena of gossip and scandal instead of facilitating a
24 forum of open and frank discussion about issues concerning public officials
25 and the citizenry they serve.

26 *Id.*

27 It would frustrate the purpose of the CPRA for private information to be disclosed to the
28 press and the public simply because it was incidental to a communication which contained some
29 public information. To the extent that the Court orders any communication to be disclosed, the
30 Court should also order the redaction of that communication to protect any private, non-public
31 information from public view.

32 ///

1 **VII. CONCLUSION**

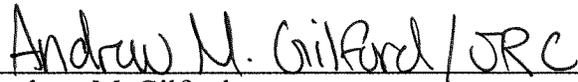
2 As discussed herein, there is no question that the vast bulk, if not all, of the
3 communications at issue are not “public records” under the CPRA. For those records, if any,
4 which the Court believes substantively relate in some way to the public’s business, any public
5 interest in disclosure is clearly outweighed by Petitioner’s and Ferguson’s privacy interests, and
6 any communications which implicate attorney-client privilege must not be disclosed. Finally, to
7 the extent any communications are held by the Court to be subject to disclosure, any such
8 communications should be redacted of any private and personal information contained within
9 those communications.

10 For the foregoing reasons, Petitioner respectfully requests issuance of a writ of mandate
11 directing Respondent not to disclose the communications subject to Requestor’s CPRA Requests.

12
13 DATED: March 3, 2017

Respectfully Submitted,

14 ANDREW M. GILFORD
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