IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN ST. CROIX, ET AL.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent;

ALLEN GROSSMAN,

Real Party in Interest.

A140308

(San Francisco County
Super. Ct. No. CPR13513221)

BY THE COURT:[1]

ORDER TO SHOW CAUSE

Good cause appearing from the petition for writ of mandate and/or prohibition on file in this action, respondent superior court is ordered to show cause when the matter is ordered on calendar why the relief requested in the petition should not be granted.

The return to the petition shall be served and filed within thirty (30) days of the issuance of this order to show cause, unless real party in interest notifies the court in writing of its election to deem its previously filed opposition the return to the petition. The reply to the return shall be served and filed within fifteen (15) days of the filing of the return, unless petitioner notifies the court in writing of its election to deem its previously filed reply the reply to the return. (Cal. Rules of Court, rule 8.487(b).)

This order to show cause is to be served and filed on or before January 24, 2014. It shall be deemed served upon mailing by the clerk of this court of certified copies of this order to all parties to this proceeding and to respondent superior court.

[1] Before Dondero, Acting P.J., Banke, J., and Becton, J. * Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The justices will be familiar with the facts and issues, will have conferred among themselves on the case, and will not require oral argument. If oral argument is requested, the request must be served and filed on or before February 3, 2014. If no request for oral argument is filed on or before that date, the matter will be submitted at such time as the court approves the waiver and the time for filing all briefs and papers has expired. (California Rules of Court, rule 8.256(d)(1).) If oral argument is requested, the court will notify the parties of the exact date and time set for oral argument, which will occur before Division One of this court at the courtroom located on the fourth floor of the State Building, 350 McAllister Street, San Francisco, California.

Date: JAN 23 2014

DONDERO, J.
Acting P.J.

I, DIANA HERBERT, CLERK OF THE COURT OF APPEAL STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THE PRECEDING AND ANNEXED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

WITNESS MY HAND AND THE SEAL OF THE COURT THIS 23rd DAY OF January 2014

[redacted] CLERK

[redacted] DEPUTY

A140308

Andrew N. Shen
Office of the City Attorney
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102-4682

Effective March 17, 2014

NEW Local Rule Regarding Mandatory e-filing in the First District Court of Appeal

Civil Cases must be filed electronically starting on March 17, 2014. Criminal and Juvenile cases must be filed electronically starting on April 14, 2014. It is anticipated that registration for the mandatory e-filing will begin March 10, 2014 for the March 17, 2014 go-live date. Please consult our website for further updates on the registration process.

Free training for e-filers will be offered on January 31, 2014, in the Milton Marks Auditorium, 350 McAllister Street, San Francisco. A morning session (10:00 a.m.) and an afternoon session (1:30 p.m.) will be offered. Sign up for either of the free sessions by sending an e-mail to E-Filing.Course@jud.ca.gov. Please indicate the following information when signing up: 1) name and job tilte of those registering; 2) professional affiliation; and 3) first preference for time slot on January 31st. You will be notified if your first preference is not available.

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

1st Appellate District

Change court

Court data last updated: 11/22/2013 03:05 PM

Docket (Register of Actions)

St. Croix et al. v. Superior Court of the City and County of San Francisco
Division 1
Case Number A140308

Date	Description	Notes
11/22/2013	Exempt filing fee.	
11/22/2013	Filed petition for writ of:	Premptory Writ of Mandate and/or Prohibition Emergency Relief Requested
11/22/2013	Exhibits lodged.	1 Volume
11/22/2013	Request for judicial notice filed.	By petitioner
11/22/2013	Motion filed.	Motion for Stay Under California Government Code Section 6259(c)
11/22/2013	Order filed.	BY THE COURT: Petitioner's motion for stay pursuant to Government Code section 6259, subdivision (c), filed concurrently with the petition in the above-captioned matter, is hereby granted. The order entered by the superior court on October 29, 2013, in case number CPF-13-51322, ordering petitioner to deliver copies of 24 responsive documents to Real Party in Interest is hereby stayed pending resolution of this writ proceeding. The clerk of the court is directed to notify the superior court clerk by telephone of the imposition of this stay. All parties are by this letter placed on notice that the court may choose to act by issuing a peremptory writ in the first instance. (See Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171, 177-180.) Real party in interest shall serve and file opposition, if any, to the petition on or before December 23, 2013. (California Rules of Court, rule 8.487(b)(1)-(2).) The opposition shall include a Certificate of Interested Entities or Persons in compliance with Rule 8.488 of the California Rules of Court. Your opposition may be in letter form; however, please submit an original plus

		four copies of your letter brief. If you are not filing an opposition, please inform the court in writing. Counsel are required to list their State Bar numbers on all documents sent to the Court. All parties are directed to include citations and record references in the body of their briefs and not in footnotes. Please note California Rules of Court, rules 8.200(a)(5) & 8.25(b)(3) are not applicable to this proceeding. Petitioner may serve and file a reply by January 7, 2014. (California Rules of Court, rule 8.487(b)(3).)
11/22/2013	Note:	Faxed a copy of the stay order to Judge Ernest H. Goldsmith Notified the Superior Court by telephone regarding stay order

Click here to request automatic e-mail notifications about this case.

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION, Petitioners/Respondents, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent/Appellant.	Case No. _____ San Francisco County Superior Court No. CPF-13-513221 **EMERGENCY RELIEF REQUESTED**
ALLEN GROSSMAN, Real Party in Interest.	

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

The Honorable Ernest H. Goldsmith

DENNIS J. HERRERA, State Bar #139669
City Attorney
THERESE M. STEWART, State Bar #104930
Chief Deputy City Attorney
VINCE CHHABRIA, State Bar #208557
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Attorneys for Petitioners

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: November 22, 2013

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
VINCE CHHABRIA
Chief of Appellate Litigation
ANDREW SHEN
JOSHUA S. WHITE
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By: s/Andrew Shen
ANDREW SHEN

Printed Name: ANDREW SHEN
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State Bar #: 232499

Party Represented: Petitioners JOHN ST. CROIX, in his official capacity as Executive Director of the San Francisco Ethics Commission and SAN FRANCISCO ETHICS COMMISSION

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INTRODUCTION

Under the San Francisco Charter, the City Attorney is responsible for providing candid, confidential legal advice to the Mayor, the Board of Supervisors, and the City's various agencies and commissions. For over a century the City Attorney's Office has fulfilled these duties by advising its clients subject to the attorney-client privilege and attorney work product protection.

In 1999 the San Francisco voters enacted an ordinance that, among other things, purports to prevent the City Attorney's clients from asserting privilege with respect to certain issues. But it is beyond dispute that an ordinance cannot trump the provisions of a city charter, any more than a state statute can trump the California Constitution. If the voters wish to withdraw the attorney-client and attorney work product privileges from the City or its constituent agencies, they may only do so by amending the Charter.

Notwithstanding this, the Superior Court ordered the City to turn over written, privileged communications between the City Attorney's Office and one of its clients to a local resident. The only reason the Superior Court provided in its ruling was that the 1999 ordinance purports to eliminate the attorney-client and attorney work product privileges for those documents. Although the City's principal argument was that the 1999 ordinance is invalid because it conflicts with the Charter, the Superior Court ordered the City to disclose the documents without so much as considering this fundamental issue. The Superior Court insisted that the Charter argument was not before it, even though both sides agreed that it was, as reflected in the City's opposition brief, the other side's reply to the City's opposition and the dialogue at the hearing.

The Superior Court's refusal to consider the City's primary argument is inexplicable, and its decision to require the City to disclose privileged attorney-client communications is indefensible. The confidentiality of communications between attorney and client are to be jealously guarded, not blithely waived away. Under the expedited appeal process set forth by Government Code section 6259(c) for California Public Records Act matters, the Court should issue a writ ordering the Superior Court to set aside its ruling.

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION

A. Relief Requested

1. By this verified petition, John St. Croix, Executive Director of the San Francisco Ethics Commission, in his official capacity, and the San Francisco Ethics Commission (referred to collectively as "the City"), defendants/respondents in *Grossman v. St. Croix, et al.*, San Francisco Superior Court Case No. CGC-13-513221 ("the Action"), seek a peremptory writ of prohibition and/or mandate or other extraordinary writ compelling the Superior Court of San Francisco County (Honorable Ernest H. Goldsmith) to set aside its ruling granting a petition for a writ of mandate in favor of Real Party in Interest Allen Grossman and instead to deny Grossman's petition for a writ of mandate and other requested relief.

B. Jurisdiction and Timeliness

2. This Court has jurisdiction over this matter under California Rule of Court 8.486. The City has a beneficial interest in the outcome of this case, which challenges the Superior Court's issuance of a writ of mandate against the City. On October 29, 2013, the Superior Court filed and served its order.

3. California Government Code section 6259(c) provides an expedited appeal process for California Public Records Act disputes:

> In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days.

Pursuant to section 6259(c), the City filed its petition 24 days after the Superior Court served its order by mail. (*See State Department of Public Health v. Superior Court* (2013) 219 Cal.App.4th 966, 972 n.5 [under section 6259(c), 25-day deadline for writ petition when notice of ruling served by mail].)

4. In enacting section 6259(c), the Legislature intended to replace "review by direct appeal with review by extraordinary writ" in order "to expedite the process and thereby to make the appellate remedy more effective." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113.) And "[w]hen an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted." (*Id.* at 113-14.) Thus, under 6259(c), "an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner." (*Id.* at 114.)

C. Authenticity of Exhibits

5. All exhibits that accompany this petition are true and correct copies of original documents on file with Respondent Superior Court and the transcript of the hearing on Grossman's petition for a writ of mandate. The exhibits are incorporated herein by reference as though fully set forth in this petition. The City is also filing a Request for Judicial Notice in connection with this petition, and the documents attached thereto are incorporated herein by reference as though fully set forth in this petition.

D. The Parties

6. Petitioners are the Executive Director of the San Francisco Ethics Commission John St. Croix in his official capacity, and the San Francisco Ethics Commission. Petitioners were the named defendants/respondents in the Action.

7. Respondent is the Superior Court of the State of California for the County of San Francisco.

8. Real Party in Interest is Allen Grossman, plaintiff/petitioner in the Action.

E. The Proceedings Below and Supporting Documents Filed Herewith

9. On September 18, 2013, Grossman filed a verified petition for writ of mandate ("Petition"). A true and correct copy of the Petition is attached as Exhibit A to the City's Exhibits. As set forth in the Petition, on October 3, 2012, Grossman submitted a public records request, pursuant to the California Public Records Act and the San Francisco Sunshine Ordinance, to Petitioner St. Croix for (1) all drafts and versions of the Ethics Commission's regulations for enforcement of Sunshine Ordinance violations, and (2) all documents relating to the preparation and review of those regulations, *including any communications with the City Attorney's*

Office. (*See* Exhibits in Support of Petition ["Exh."] A at 6 [emphasis added].) On October 12, 2012, the Ethics Commission provided Grossman with 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) At that time, the Ethics Commission withheld additional documents responsive to Grossman's request, citing attorney-client privilege and attorney work-product as the bases for withholding. (*Id.* at 6, 22-23.)

10. On September 18, 2013, Grossman filed his Petition and a Memorandum of Points and Authorities in Support of his Petition, a true and correct copy of which is attached as Exhibit C. Grossman's primary argument was that the City could not withhold those privileged documents because under Sunshine Ordinance section 67.24(b)(1)(iii), "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning" state and local open meetings, public records, and ethics laws were subject to disclosure. (*Id.* at 14-15, Exh. C at 76-77.)

11. On October 9, 2013, the City filed its opposition, a true and correct copy of which is attached as Exhibit D. The City's opposition principally argued that the San Francisco Charter establishes that the attorney-client and attorney work product privileges apply to communications between the City Attorney's Office and City officials and departments, and that the Charter trumps the Sunshine Ordinance provision purporting to limit those protections. That argument was the subject of the first paragraph of the introduction to the City's brief, and appeared at pages five through nine of the discussion section. (Exh. D at 87, 91-95.) In support of its opposition, the City filed the Declaration of Andrew Shen, a true and correct copy of which is attached as Exhibit E; the declaration of John St. Croix, a true and correct copy of which is attached as Exhibit F; a

Request for Judicial Notice, a true and correct copy of which is attached as Exhibit G; and a Proof of Service, a true and correct copy of which is attached as Exhibit H.

12. The Declaration of Andrew Shen specified that the Ethics Commission had withheld 24 documents on the basis of attorney-client privilege and the attorney work product doctrine. (Exh. E at 104.) Of the 24 documents, 15 constituted requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations. (*Id.*) The nine remaining documents provided legal advice from the City Attorney's Office in response to those requests. (*Id.*) One of the nine documents is a May 6, 2010 memorandum to the Ethics Commission and the Ethics Commission's staff that analyzes the legal issues implicated by the proposed regulations. (*Id.*)

13. On October 15, 2013, Grossman filed his reply, a true and correct copy of which is attached as Exhibit I. In his reply, Grossman responded to the City's principal argument that the Charter prevailed over the Sunshine Ordinance. (Exh. I at 200-01.)

14. In his October 24, 2013 tentative ruling, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. A true and correct copy of the tentative ruling is attached as Exhibit J. The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (Exh. J at 203.) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication otherwise concerning the

CPRA or the Sunshine Ordinance are subject to disclosure," citing section 67.24(b)(1)(iii). (*Id.*)

15. The tentative ruling did not address the City's principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney's communications with its clients, and that Sunshine Ordinance section 67.24(b)(1)(iii) is invalid because it is in conflict with the Charter.

16. The matter came on for hearing on October 25, 2013, and the transcript is attached as Exhibit M. Tracking the opposition brief, counsel for the City began by stating, "the crux of the City's argument in this case with respect to Mr. Grossman's petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City's constituent officials and City departments." (Exh. M at 215 [Transcript at 2:15-19].) The City's counsel continued by arguing that "the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation" and is "invalid." (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City's principal argument in his tentative ruling because "the fact that 67.24(b) conflicts with the City charter is just not before me" and was "not on my table." (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a "charter amendment" rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

17. On October 29, 2013, Judge Goldsmith filed his order granting Grossman's petition for a writ of mandate, attached as Exhibit K. Judge Goldsmith's order reiterated his tentative ruling with one addition, at lines 17-18, stating: "Respondents' request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion." (Exh. K at 205.)

F. Basis for Relief By Writ

18. Government Code section 6259(c) provides an expedited appeal process for actions brought under the California Public Records Act: "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, . . . shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." Section 6259(c) "expressly authorizes a writ as the sole and exclusive means to challenge the trial court's ruling" in California Public Records Act cases. (*MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 263.) The legislative intent of this provision is to ensure that "the determination of the obligation to disclose records requested from a public agency be made expeditiously." (*Id.* at 265 [quotations and citation omitted].)

19. Charter section 6.102 imposes many duties on the City Attorney that require the provision of candid and confidential legal advice to City officials, including:

- "[r]epresent[ing] the City and County in legal proceedings";
- in certain circumstances, "[r]epresent[ing] an officer or official of the City and County";
- if "a cause of action exists in favor of the City and County, commenc[ing] legal proceedings";

- "[u]pon request, provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County";
- "[m]ak[ing] recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal"; and
- through a Claims Bureau, "investigat[ing], evaluat[ing] and settl[ing] for the several boards, commissions and departments all claims for money or damages."

(Exh. G at 183-84 [Charter § 6.102(1)-(5), (9)].) In establishing the City Attorney's Office and its duties, the voters necessarily intended that the Office carry out those tasks subject to the attorney-client and attorney work product privileges.

20. The Charter also provides that the City Attorney shall be subject to the "duties prescribed by state laws" for the office. (Request for Judicial Notice ("RJN"), Exh. B [Charter § 6.100].) State law imposes duties on the City Attorney – like all attorneys in California – to maintain the confidentiality of attorney-client communications, and to protect attorney-client privileged communications. (*See* Cal. Bus. & Prof. Code § 6068(e)(1); Cal. Evid. Code § 955; Cal. Rule of Prof. Cond. 3-100.)

21. The Charter, by setting forth the City Attorney's specific duties, also establishes that City officials and departments must have a City Attorney's Office that can carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney's Office would therefore conflict with the Charter. (*See Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, 695-97.)

22. For charter cities such as San Francisco, the charter is the City's "constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) An ordinance cannot trump an inconsistent provision of the Charter any more than a statute could overrule an inconsistent provision of the Constitution. (*See Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034.) Under Grossman's reasoning, city agencies would be prevented from receiving confidential written advice from the City Attorney on a wide array of issues. Grossman's argument, if accepted, could prompt further efforts, by *ordinance*, to prevent the City from invoking attorney-client privilege on every other subject on which the City Attorney provides legal advice pursuant to its Charter obligations.

23. The Superior Court's ruling has created uncertainty about the ability of the City Attorney's Office to provide confidential legal advice to its clients. Because the Office provides legal advice on a daily basis and needs to ensure that it is taking proper measures to protect the confidentiality of its advice, the City respectfully requests that the Court promptly adjudicate this matter. To prevent any irreparable harm resulting from the Superior Court's order, the City has also concurrently filed a motion for an immediate stay pursuant to Government Code section 6259(c).

G. Prayer

WHEREFORE, Petitioners pray that:

24. The City prays that this Court issue a peremptory writ of mandate and/or prohibition or other extraordinary writ directing the Superior Court to:

(1) set aside and vacate its order granting a writ of mandate, and to enter a new order denying Grossman's petition for a writ of mandate;

(2) order that the City recover its costs incurred; and

(3) grant other such relief as may be just and proper.

Dated: November 22, 2013

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
VINCE CHHABRIA
Chief of Appellate Litigation
ANDREW SHEN
JOSHUA S. WHITE
Deputy City Attorneys

By: s/Andrew Shen
ANDREW SHEN

Attorneys for Petitioners JOHN ST. CROIX, in his official capacity as Executive Director of the San Francisco Ethics Commission and SAN FRANCISCO ETHICS COMMISSION

VERIFICATION

I, Andrew Shen, declare as follows:

I am an attorney admitted to practice in the State of California. I was appointed to represent petitioners herein.

In my capacity as attorney for petitioners, I am making this verification on their behalf.

I wrote and have read and considered the foregoing Petition for Writ of Mandate/Prohibition and the Memorandum of Points and Authorities are within my knowledge, except as to those matters which are alleged therein on information and behalf and as to those matters, I believe them to be true.

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

Executed this 22nd day of November 2013, at San Francisco, California.

s/Andrew Shen
ANDREW SHEN

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. The San Francisco Charter Establishes The City Attorney's Office And Its Primary Duties.

The voters structured San Francisco's government through the Charter. The first modern Charter, adopted in 1932, was a ballot measure approved by the voters, and every Charter amendment proposed since then has been decided by the voters at the ballot box. (*See* Cal. Const. art. XI, § 3(a) [requiring voter approval of Charter amendments]; *see generally* Francis V. Keesling, San Francisco Charter of 1931 (1933).)

It is much more difficult for voters to amend the Charter than to enact an ordinance. This is not surprising, since the Charter is the City's foundational governing document. To place a Charter amendment on the ballot, the proponents of the measure must gather the signatures of ten percent of all of San Francisco's registered voters, or approximately 50,000 signatures. (*See* Cal. Elec. Code § 9255(b)(3).) An initiative ordinance requires far fewer signatures: a number equal to five percent of the votes cast for Mayor in the last mayoral election, presently about 9,700 signatures. (*See* RJN, Exh. E [Charter § 14.101].)

Through the Charter process, the voters decided from the very start that San Francisco should have an elected City Attorney charged with representing the City and its officials in legal matters. (*See* Exh. G at 183-85 [Charter § 6.102].) For decades, the elected City Attorney has played this role without any suggestion that the City Attorney's advice to its clients is not privileged.

The Charter lists some of the City Attorney's primary duties. Many of these Charter-mandated duties require that the City Attorney's Office provide candid and confidential legal advice to its clients, in litigation and

non-litigation contexts. Under the Charter, the City Attorney is required to "[r]epresent the City and County in legal proceedings with respect to which it has an interest." (*Id.* at 183 [Charter § 6.102(1)].) In certain circumstances, the City Attorney must also represent individual City officers and officials in litigation. (*Id.* at 184 [Charter § 6.102(2)].) When "a cause of action exists in favor of the City and County," the City Attorney may also "commence legal proceedings." (*Id.* [Charter § 6.102(3)].) The City Attorney is also the legal advisor to the City as a whole, providing oral and written legal advice to the Mayor and Board of Supervisors as well as City officers, department heads, boards and commissions.[1] (*Id.* [Charter § 6.102(4)].) The City Attorney must "[m]ake recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal." (*Id.* [Charter § 6.102(5)].) The City Attorney must also review and approve as to form "bonds, contracts and, prior to enactment, all ordinances" as well as "examine and approve title to all real property to be acquired by the City and County." (*Id.* [Charter § 6.102(6)].) The Charter also requires the City Attorney to establish a Claims Bureau "to investigate, evaluate and settle for the several boards, commissions and departments all claims for money or damages." (*Id.* [Charter § 6.102(9)].)

In addition to these Charter-imposed duties, the City Attorney is responsible for the City's other legal affairs, such as drafting proposed legislation (in addition to approving such legislation as to form), reviewing

[1] The voters have also specifically designated the City Attorney as the legal advisor for certain City bodies. (*See* RJN, Exhs. C-D, F-G [Charter §§ 8A.100 (Municipal Transportation Agency); 13.104.5 (Elections Commission and Department of Elections); 15.102 (Ethics Commission); B3.585 (Port Commission)].)

and drafting regulations, and advising City officials, boards, commissions and departments on all aspects of their operations. (*See* Exh. E at 103.) The City Attorney's role is substantively broad as well. The City Attorney advises and represents the City and its constituent bodies and officials on an array of subjects, including transportation, energy and telecommunications, public utilities, public health, environment and land use, contracts, construction, real estate and finance, law enforcement, health and safety code enforcement, child and family services, ethics and campaign finance, elections, labor and employment, taxation and litigation of all kinds. (*Id.*)

In its role as legal counsel to City departments and officials, the City Attorney provides written advice to City employees and officers, either through formal memoranda or more informal means such as e-mails. (*Id.*) The City Attorney's Office generally provides its advice confidentially. (*Id.*) Communicating with clients in confidence is important because it encourages clients to confide in the City Attorney and provide all information that may be critical to the City Attorney's ability to give thorough and accurate advice. (*Id.*)

B. The San Francisco Sunshine Ordinance, And The 1999 Amendments Concerning Attorney-Client Communications.

In 1993, the San Francisco Board of Supervisors enacted the first version of San Francisco's Sunshine Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.1-67.2].) The Sunshine Ordinance establishes the City's obligations to provide public access to meetings of City officials and to respond to requests for public records concerning the City's business, in addition to the requirements set forth by state law. The 1993 version of the

Sunshine Ordinance did not address the confidentiality of attorney-client communications. (*See* Exh. G at 155, 176.)

In 1999, a group of San Francisco voters prepared and advocated for amendments to the Sunshine Ordinance. (*See id.* at 155.) Because the 1999 amendments were a ballot measure, the City Attorney's Office did not draft any of its provisions. (*See* Cal. Gov. Code § 54964 [prohibiting local agencies from using public resources to support a ballot measure campaign].) Nor did the Office approve the 1999 amendments as to form.[2] The proponents of the measure gathered signatures from registered San Francisco voters to place these amendments before the voters, and the measure appeared on the ballot for the November 2, 1999 municipal election. (*See* Exh. G at 155.) The voters approved it. Section 67.24(b)(1)(iii) of the Sunshine Ordinance now provides that "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning" state and local public meeting, public records, and ethics laws are subject to disclosure. (*See id.* at 176.)

C. Grossman's Public Records Request To The Ethics Commission For Privileged Materials, And The Documents Withheld.

The San Francisco Ethics Commission ("Ethics Commission") is a five-member body that oversees the City's campaign finance, lobbying, conflicts of interest, and governmental ethics laws. (RJN, Exhs. F, H [Charter §§ 15.100, C3.699-10].) The Ethics Commission's Executive Director, John St. Croix, and his staff carry out the department's day-to-day work. (*See id.*, Exh. F [Charter § 15.101].)

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[2] Approval "as to form" means that the legislation is in the proper format and that the substance of the proposal is not patently unconstitutional or otherwise clearly illegal.

The Sunshine Ordinance designates the Ethics Commission as one of the bodies with authority to enforce that Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.34, 67.35(d)].) However, the Sunshine Ordinance does not specify the procedures that govern the Ethics Commission's adjudication or enforcement of complaints alleging Sunshine Ordinance violations. After a multi-year process, at its September 14, 2012 meeting the Ethics Commission first considered the adoption of final regulations for its handling of complaints alleging violations of the Sunshine Ordinance.[3] (*See* Exh. F at 107.)

On October 3, 2012, Grossman submitted a public records request under the California Public Records Act and the Sunshine Ordinance for documents relating to the Ethics Commission's Sunshine Ordinance regulations. (*See* Exh. A at 6, 19-20.) His request sought all drafts of the regulations, a September 14, 2012 staff report regarding the regulations, and all documents relating to "the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulation and Staff Report, including, without limitation, emails, memoranda, notes, letters or other correspondence or communications to or from" the City Attorney's Office. (*Id.*)

On October 12, 2012, the Ethics Commission responded to Grossman's request, producing 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) As explained in its response, the Ethics Commission withheld other documents in their entirety based on attorney-

[3] The Ethics Commission concluded its review of the proposed regulations and adopted them at its November 26, 2012 meeting. (*See* Exh. F at 107.)

client privilege and work product, citing Evidence Code sections 952 and 954 and Code of Civil Procedure section 2018.030. (*Id.* at 22-23.)

On September 18, 2013, Grossman filed his petition for writ of mandate in the Superior Court. (*Id.* at 1-56.) In the course of litigating this matter, the City Attorney's Office specified that the Ethics Commission has withheld 24 documents subject to attorney-client privilege and attorney work product protection. (Exh. E at 104.)

D. The Superior Court's Ruling On Grossman's Petition For A Writ Of Mandate.

Superior Court Judge Ernest H. Goldsmith issued his tentative ruling on October 24, 2013. In it, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. (Exh. J at 203.) The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (*Id.*) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication other wise concerning the CPRA or the Sunshine Ordinance are subject to disclosure," citing section 67.24(b)(1)(iii). (*Id.*)

The tentative ruling did not address the City's principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney's communications with its clients, and that section 67.24(b)(1)(iii) is invalid because it conflicts with the Charter. (*See id.*) This argument was the subject of the first paragraph of the introduction to the City's brief, and appeared in the discussion section at pages five through nine. (Exh. D at 87, 91-95.)

At the hearing, counsel for the City began by stating, "the crux of the City's argument in this case with respect to Mr. Grossman's petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City's constituent officials and City departments." (Exh. M at 215 [Transcript at 2:15-19].) The City's counsel continued, "the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation" and is "invalid." (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City's principal argument in his tentative ruling because "the fact that 67.24(b) conflicts with the City charter is just not before me" and was "not on my table." (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a "charter amendment" rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

On October 29, 2013, Judge Goldsmith issued his order granting Grossman's petition for a writ of mandate. Substantively, the order reiterated the tentative ruling with one addition, at lines 17-18, stating: "Respondents' request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion." (Exh. K at 205.)[4]

[4]The idea that the City requested the Court to "strike" a portion of the Sunshine Ordinance is not precisely accurate. The City, as respondent, argued that the Court should not grant the writ seeking to require production of privileged documents because the provision of the Ordinance purporting to abrogate the privilege is trumped by the Charter.

II. ARGUMENT

A. Through The San Francisco Charter, The Voters Established That The Attorney-Client Privilege And Attorney Work Product Applies To The City Attorney's Office's Communications With Its Clients.

For charter cities such as San Francisco, the charter is the "local constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) A charter city "may not act in conflict with its charter," and "[a]ny act that is violative of or not in compliance with the charter is void." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.) Only the voters may adopt a charter for their city, and only the voters may make further amendments to a charter. (Cal. Const. art. XI, § 3(a).) San Francisco voters have exercised this charter power to establish the City Attorney's Office and its responsibilities to protect client confidences, including attorney-client privileged communications and attorney work product.

To interpret a city charter, courts should "construe the charter in the same manner as . . . a statute." (*Domar Electric,* 9 Cal.4th at 171.) The court's "sole objective is to ascertain and effectuate legislative intent." (*Id.* at 172.) To determine the voters' intent, courts should "look first to the language of the charter, giving effect to its plain meaning." (*Id.*) In examining the charter's language, "each sentence must be read not in isolation but in light of the statutory scheme." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In creating the City Attorney's Office through the Charter, San Francisco voters intended that the City Attorney would be able to provide confidential legal advice to City departments and officials. The key language is in Charter sections 6.102 and 6.100. Section 6.102 lists the

duties of the City Attorney, and under section 6.100 the City Attorney must carry out those duties subject to the professional obligations that apply to all California attorneys. The duties that the voters imposed on the City Attorney's Office in section 6.102 necessarily evince an intent that the attorney-client privilege and attorney work product apply to the Office's legal advice. Further, in enacting Charter section 6.100, the voters provided that the City Attorney was subject to the duties "prescribed by state law" for that office. The applicable duties include the duty of the public lawyers to protect client confidences and privileged legal advice.

1. In establishing the City Attorney's specific duties, the voters necessarily intended that the City Attorney's advice to clients would be confidential and privileged.

In interpreting statutes, courts have recognized that "whatever is necessarily implied in a statute is as much part of it as that which is expressed." (*Johnston v. Baker* (1914) 167 Cal. 260, 264; *cf. Trimont Land Co. v. Truckee Sanitary Dist.* (1983) 145 Cal.App.3d 330, 349 [courts should not presume that lawmakers "intend[] to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"].) Court have applied this rule of necessary implication to city charters. (*See Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [interpreting charter as necessarily implying that certain probationary employees have right to notice and hearing prior to termination].) Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice.

In a similar context, the California Supreme Court held that statutes regarding the representation of clients in welfare benefits proceedings necessarily included basic confidentiality protections. In *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766, the Court considered whether Welfare and Institutions Code section 10950 created a confidentiality privilege for applicants where lay persons, rather than lawyers, represented them in their efforts to obtain welfare benefits. Section 10950 provides that applicants for welfare benefits may appear through an "authorized representative" who may be either an attorney or a layperson. (*Id.* at 770.) The Supreme Court held that in enacting section 10950 – even though it did not explicitly discuss any privileges – the Legislature necessarily intended to protect confidentiality: "Suffice it to say that the considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons." (*Id.* at 771.) Section 10950 necessarily implied "a guarantee of confidentiality in its extension of the right of representation." (*Id.* at 772.)

The same analysis applies more strongly here, because unlike lay persons' communications, attorneys' communications with clients pertaining to legal advice have been treated as confidential under the attorney-client privilege, which was recognized as far back as the reign of Elizabeth I. (*See* E. Imwinkelried, The New Wigmore: Evidentiary Privileges § 2.2 (Aspen Pub.); *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380 ["The attorney-client privilege has a venerable pedigree that can be traced back 400 years."].) "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system," and the privilege that applies to those communication is a "hallmark of our jurisprudence." (*People v. SpeeDee Oil Change Systems,*

Inc. (1999) 20 Cal.4th 1135, 1146.) "The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) The attorney-client privilege allows clients to share all relevant facts with their counsel, and counsel to be equally frank in providing clients with legal advice. "[B]y encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation." (*Id.*; *see also Hunt v. Blackburn* (1888) 128 U.S. 464, 470 ["The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."].)

In the proceeding below, Grossman argued that attorney-client privilege is unnecessary for public law offices, and cited California Government Code section 54956.9(b) (the Brown Act) as support for that proposition. (Exh. I at 195-96.) But section 54956.9 *explicitly* abrogates attorney-client privilege, and does so only for communications that take place in public meetings, with certain exceptions.[5] And except for this express abrogation, attorney-client communications remain privileged, by default. Therefore, section 54956.9(b) only supports the City's position

[5] Government Code section 54956.9(b) provides: "For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter."

that absent an express abrogation in the Charter, the privilege necessarily applies to the City Attorney's Charter-conferred duties.

Indeed, the California Supreme Court rejected an argument similar to Grossman's in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363. There, a member of the public demanded disclosure of a memorandum provided by the city attorney to city council members in connection with a public meeting concerning approval of a parcel map. The petitioner contended that section 54956.9 abrogated the privilege not only as to public meetings but also for written communications pertaining to such meetings. The Court of Appeal had agreed with the petitioner, reasoning that absent pending litigation, for which there was an exception, the privilege wasn't necessary because "the public is not the adversary of the public agency and there is no need for secrecy between them." (*Id.* at 369.)

The California Supreme Court reversed, rejecting that argument. It held that the abrogation of the privilege contained section 54956.9 was expressly "for the purpose of the *open meeting* requirements of the Brown Act," whereas "written matter sent from attorney to governmental client is regulated by the *Public Records Act* and not this section." (*Id.* at 377 [emphases in original].) The Court declined to interpret the section as repealing the attorney-client privilege "by implication." (*Id.* at 378-79.) The Court also observed that while "[o]pen government is a constructive value in our democratic society," the attorney-client privilege is "vital to the effective administration of justice." (*Id.* at 380.) Moreover, it affirmed that local government "needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements." (5 Cal. 4th

at 380; *see also Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [similar considerations apply to attorney work product doctrine].) Thus, open meeting laws notwithstanding,

> [t]here is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. . . . Several California decisions recognize that the attorney-client privilege is as vital to public as to private clients.

(*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54, mod. & affd. *Roberts*, 5 Cal.4th at 380.)

Thus, the attorney-client privilege and attorney work product protection are presumed to be an integral part of the City Attorney's functions as prescribed in the Charter. To take but one practical example, the Charter requires the City Attorney's Office to make recommendations to the Board of Supervisors about settlement or dismissal of pending litigation. (Exh. G at 184 [Charter § 6.102(5)].) This would be an impossible task if the City Attorney could not provide such recommendations in confidence. By providing the Board of Supervisors with its view of the strengths and weaknesses of the City's position, the best and worst facts revealed through discovery and its analysis of the relevant case law, the City Attorney would be providing the same information to the City's adversary, who could then use it against the City in the same or similar litigation. To read the Charter as not incorporating the privilege would require the Court to assume that the voters "intended that the only sound advice the [City Attorney] could give was, 'Don't talk to me.'" (*Welfare Rights Org., supra*, 33 Cal.3d at 771 n.3.)

2. In the Charter, the voters additionally provided that the City Attorney's Office is subject to the duties of confidentiality imposed by state law.

Section 6.100 provides that the City Attorney is subject to the "duties prescribed by state laws." (*See* RJN, Exh. B.) The State Bar Act requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Cal. Bus. & Prof. Code § 6068(e)(1).) The Rules of Professional Conduct similarly prohibit an attorney from revealing confidential client information without the client's informed consent. (Cal. Rule of Prof. Cond. 3-100.) The confidential information subject to these duties includes all "matters communicated in confidence by the client" including, but not limited to, communications "protected by the attorney-client privilege" and "matters protected by the work product doctrine." (*See* Cal. Rule of Prof. Cond. 3-100, note 2; *see also* Cal. State Bar Formal Opn. 2003-161 ["The attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege."].) In addition, California Evidence Code section 955 provides that an attorney "who received or made a communication subject to the attorney-client privilege 'shall claim the privilege whenever he is present when the communication is sought to be disclosed.'" (*See, e.g., People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.)

It is well-established that public sector attorneys are subject to the provisions of the State Bar Act and "[a]ll members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct." (*See* Cal. State Bar Formal Opn. 2001-156.) These state law duties apply to all public lawyers in California. (*See, e.g., City and County of San Francisco v. Cobra*

Solutions, Inc. (2006) 38 Cal.4th 839, 846 [duty of confidentiality applies to San Francisco City Attorney]; *Santa Clara County Counsel Attys. Assoc. v. Woodside* (1994) 7 Cal.4th 525, 545-48 [applying Rules of Professional Conduct to county counsel]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156-57 [California Attorney General is "bound by the rules that control the conduct of other attorneys in the state," such as duty of confidentiality]; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 32-33 [analyzing county counsel's purported conflict of interest under the Rules of Professional Conduct].)

In enacting Charter section 6.100, the voters incorporated compliance with the State Bar Act, the Rules of Professional Conduct, and relevant provisions of the California Evidence Code into the City Attorney's Office's duties. By referencing these state law duties, the voters intended that the City Attorney's Office's communications to and from its clients would be privileged and confidential.

B. As An Ordinance, The Local Sunshine Law Cannot Limit The Confidentiality And Privilege Afforded By The Charter To Attorney-Client Communications.

For Charter cities, "a charter bears the same relationship to ordinances that the state Constitution does to statutes." (*Citizens for Responsible Behavior*, 1 Cal.App.4th at 1034.) As a statute cannot amend a constitution, "an ordinance cannot alter or limit the provisions of a city charter." (*Id.*) For this reason, the San Francisco Charter preempts any conflicting local ordinance. Consequently, the Charter's establishment of attorney-client privilege and attorney work product trumps section 67.24(b)(1)(iii) which invalidly purports to make such communications subject to public disclosure. Because the Charter imports attorney-client

and work product privileges, only a Charter amendment could eliminate the ability of the either the City Attorney or his City and County clients from invoking those privileges.

In providing its legal advice regarding the draft regulations at issue in this case, the City Attorney's Office was performing one of its Charter duties subject to the attorney-client privilege and work product protection. Through the deputies assigned to the Ethics Commission, the Office was "[u]pon request, provid[ing] advice or written opinion" to a City department. (Exh. G at 184 [Charter § 6.102(4)].) In seeking that advice, the Ethics Commission was exercising its right under the Charter to request such advice. Grossman's insistence that he is entitled to these communications, relying on section 67.24(b)(1)(iii), contravenes Charter sections 6.102 and 6.100 and the confidentiality that the voters intended to protect for communications requesting and providing legal advice.

In the proceedings below, Grossman virtually ignored the City's argument that Sunshine Ordinance section 67.24(b)(1)(iii) is void because it conflicts with the Charter, dedicating one paragraph to the issue at the very end of his reply brief. In that paragraph, Grossman argued that: (i) the California Public Records Act authorizes local governments to provide for even more generous disclosure of public records than state law contemplates; and therefore (ii) section 67.24(b)(1)(iii) may permissibly conflict with the City Charter. (*See* Exh. I at 200.) This is a non-sequitur. Although it is true that local governments are *authorized* to adopt public records laws that are more generous with respect to disclosure than the Public Records Act itself, that does not mean cities are authorized to contradict their charters by mere ordinance. If a city charter prevents a city

from accomplishing something authorized by state law, the answer is to amend the charter, not to enact an ordinance that violates the charter.

C. The Disputed Provision Of The Sunshine Ordinance Would Impermissibly Interfere With The City Attorney's Charter-Mandated Duties.

The confidentiality of attorney-client communications is not the only right conferred by the Charter upon the City Attorney's clients. The Charter, by setting forth the City Attorney's duties, necessarily assumes that City officials and departments will have a City Attorney's Office that can effectively carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney's Office would therefore conflict with the Charter. The provision of the Sunshine Ordinance invoked by Grossman is invalid for this independent reason as well.

In *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, the Court of Appeal considered whether a budget resolution adopted by the San Bernardino city council impermissibly violated the city charter by eliminating funding for the only two investigator positions in its city attorney's office. San Bernardino's charter established a city attorney's office and prescribed a duty on the part of the office to conduct investigations. (*Id.* at 686.) The petitioner argued that the proposed removal of that personnel would prevent the city attorney's office from carrying out its charter-mandated duty to perform investigations. (*Id.* at 687.) The Court of Appeal agreed and held that the city council could not impair the city attorney's charter duties through a budget ordinance. (*Id.* at 695-97.) Only the voters could change the city attorney's duties by amending the city's charter.

The same analysis applies here, because the abrogation of the privilege significantly impedes the City Attorney's functions. If a proposed ethics ordinance presents significant legal issues, the City Attorney's Office will provide its advice regarding the legal risks in a confidential memorandum. The City Attorney's Office could not do this absent the privilege, because the memorandum would give a roadmap to a prospective plaintiff to challenge the legality of the ethics legislation. If Grossman's argument were correct, the City Attorney's Office could not provide the 11-member Board of Supervisors with a legal memorandum addressing the potential legal issues and risks presented by a proposed ordinance – thus interfering with its Charter-mandated duty to provide such advice. (*See* Exh. G at 184 [Charter § 6.102(4)].) In such a circumstance, the City Attorney could not provide candid or thorough legal advice, possibly frustrating the efforts of the Board of Supervisors to address an ethics issue facing the City and to explore alternate vehicles to achieve its policy objectives.

Similarly, if Grossman's position were correct, the City Attorney could not effectively defend City boards and officials in litigation about ethics, open meeting or public records matters, since the City Attorney's communications with the officials or bodies whose conduct was claimed to violate those laws would be open to the City's opponents in the litigation. Nor could the City Attorney effectively carry out his duty to advise City officials and boards about those laws since the possibility of receiving advice that a city actor's course of conduct entailed some legal risk – advice that an adversary would be entitled to review –would discourage officials from ever seeking such advice in the first instance. Of course, the City Attorney could refrain from ever putting such advice in writing, but this

would be unworkable, since advice about ethics, public records, and open meetings laws can be complicated and fact-dependent.

Lastly, if voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advises City officials? If, for example, a group of residents disagreed with the City Attorney's defense of cases against City police officers, Grossman's argument would seem to allow them to legislate that the City Attorney must turn over its work product and advice on such litigation to the City's adversaries. But police officers are entitled to an effective defense – something that cannot happen without the attorney-client privilege. And overall, under the Charter, the City Attorney's clients are entitled to confidentiality. The idea that this confidentiality could be totally obliterated by ordinance makes no sense.

III. CONCLUSION

In the Charter, the voters established the City Attorney as an elected office, enumerated the primary duties of the Office, and in listing those duties, necessarily intended that attorney-client privilege and attorney work product applied to the Office's communications with its clients. While the voters later adopted amendments to the Sunshine Ordinance, including section 67.24(b)(1)(iii), such an initiative ordinance must yield to the

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Charter. The Superior Court failed to heed this legal truism and its order granting the petition for a writ of mandate should therefore be reversed.

Dated: November 22, 2013

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VINCE CHHABRIA
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,304 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 22, 2013.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On November 22, 2013, I served the following document(s):

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

on the following persons at the locations specified:

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Judge Ernest H. Goldsmith
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[original and three copies]
[via hand delivery]

California Supreme Court
[Submitted Electronically Through the Court Of Appeal E-Submission]

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed November 22, 2013, at San Francisco, California.

s/Pamela Cheeseborough
Pamela Cheeseborough

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Case No. A140308

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

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

Petitioners and Respondents,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO,

~~*Respondent and Appellant,*~~

ALLEN GROSSMAN,

Real Party in Interest.

Appeal from the Superior Court of San Francisco,
Case No. CPF13513221
The Honorable Ernest H. Goldsmith

OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION One	Court of Appeal Case Number: A140308
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michael Ng (237915); Jasmine Singh (260318) Kerr & Wagstaffe LLP 100 Spear Street, 18th Floor San Francisco, California, 94105 TELEPHONE NO.: 415-371-8500 FAX NO (Optional): 415-371-0500 E-MAIL ADDRESS (Optional): mng@kerrwagstaffe.com; singh@kerwrwagstaffe.com ATTORNEY FOR (Name): Real Party in Interest, Allen Grossman	Superior Court Case Number: CPF13513221
APPELLANT/PETITIONER: John St. Croix et.al. RESPONDENT/REAL PARTY IN INTEREST: Superior Court of San Francisco	FOR COURT USE ONLY
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Real Party in Interest, Allen Grossman

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 23, 2013

Michael K. Ng.
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

The dispute here arises out of a proper public records request by Real Party in Interest Allen Grossman ("Grossman") to the San Francisco Ethics Commission and its Executive Director (collectively, "Petitioners") pursuant to the California Public Records Act, Government Code sections 6250 *et seq.* (the "CPRA") and the San Francisco Sunshine Ordinance, San Francisco Administrative Code sections 67.1 *et seq.* (the "Sunshine Ordinance"). The requested records relate to the Ethics Commission's drafting of proposed regulations governing the handling of Sunshine Ordinance Task Force referrals and direct complaints filed with the Ethics Commission under the Sunshine Ordinance.

The CPRA permits a locality to "adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]" (Gov. Code, § 6253, subd. (e).) The Sunshine Ordinance, adopted by an overwhelming majority of San Francisco voters in 1999, does exactly that, by providing greater access to San Francisco's public records and meetings. Of pertinence here, the Sunshine Ordinance provides that "[n]otwithstanding a department's legal discretion to withhold certain information under the California Public Records Act," upon request a San Francisco agency must produce "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records

Act ... any San Francisco governmental ethics code, or this Ordinance [*i.e.*, the Sunshine Ordinance]." (San Francisco Admin. Code, § 67.24, subd. (b)(1).) (See Request for Judicial Notice in Support of Opposition to Petition for Peremptory Writ of Mandate ("RJN"), Ex. 1.)

Though all records requested by Grossman fall within the scope of that section, Petitioners refused to produce certain responsive communications with the San Francisco City Attorney's Office, invoking the CPRA's exemption for attorney-client privilege and attorney work product. Petitioners argue that Sunshine Ordinance section 67.24(b) is invalid because it conflicts with the general appointment in the Charter of San Francisco City and County ("City Charter") of the City Attorney as counsel for San Francisco agencies and officers. In essence, Petitioners contend that merely by naming an attorney for the city, the City Charter implicitly requires that all communications with that attorney must be confidential, notwithstanding the voters' specific mandate to the contrary.

That novel invalidation theory fails both legally and as a matter of basic logic. There is no conflict between the *general* naming of the City Attorney as counsel and a *specific* requirement that certain communications with the City Attorney remain publicly accessible. Not all communications between an attorney and his or her client are confidential—those that were never confidential in the first place are not protected by privilege. That an attorney has an obligation to protect confidential communications with a

client does not shield expressly public communications with the attorney from public access laws. Petitioners would have the Court impose a rule that having appointed the City Attorney to act for their public officials, the voters of San Francisco cannot require that certain communications between the attorney and those officials be public. There is no legal basis for that claim. Public attorneys often provide advice in public forums, including meetings that state law mandate be open, and there is nothing inherent to the provision of legal advice that *requires* that it can only be administered confidentially.

In light of California's constitutional mandate that laws be construed in favor of the public's right of access, the Court should not take the extreme step of invalidating this important provision of the Sunshine Ordinance, especially in these circumstances where Petitioners have not and cannot show that disclosure would undermine the attorney-client relationship. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

II. FACTUAL BACKGROUND

A. THE PARTIES

Grossman is a longtime San Francisco resident and an advocate for open government. For many years, he has worked with other open government advocates to push for full implementation of the Sunshine

Ordinance and greater access to public records in San Francisco. The Ethics Commission is organized under Article XV of the City Charter and is a local agency within the meaning of Government Code section 6252(b) of the CPRA. The Ethics Commission consists of five members, who appoint an Executive Director, who serves as the Commission's chief executive. (City Charter, §§ 15.100, 15.101.) (See RJN, Ex. 2.) Petitioner John St. Croix ("St. Croix") is, and at all relevant times has been, the Ethics Commission's Executive Director.

B. THE SUNSHINE ORDINANCE AND ETHICS COMMISSION REGULATIONS

Pursuant to CPRA Government Code section 6253(e), the voters of San Francisco adopted the Sunshine Ordinance in November 1999; it took effect in January 2000. Among other things, the Sunshine Ordinance enhances San Franciscans' rights of access to public records and public meetings. It also established the Sunshine Ordinance Task Force to implement and carry out certain aspects of the law and the CPRA.

In addition to its substantive provisions, the Sunshine Ordinance sets out the process for enforcement of that law within San Francisco government. The Ethics Commission plays a critical role in that enforcement regime. For example, the Sunshine Ordinance specifically authorizes persons to enforce that law by instituting proceedings "before the Ethics Commission if enforcement action is not taken by a city or state

official 40 days after a complaint is filed." (San Francisco Admin. Code, § 67.35, subd. (d)) (See RJN, Ex. 1.) It also instructs that "[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission." (*Id.* at § 67.34.)

Further, because the Sunshine Ordinance Task Force has no independent enforcement power, the Sunshine Ordinance provides that the Sunshine Ordinance Task Force "shall make referrals to a municipal office with enforcement power under this ordinance ... whenever it concludes that any person has violated any provisions of this ordinance or the Acts." (San Francisco Admin. Code, § 67.30, subd. (c).) (See RJN, Ex. 1.) The Ethics Commission is the only such office, and is specifically given the power to enforce willful violations of the Sunshine Ordinance. (*Id.* § 67.35, subd. (d).) (See *Id.*) In addition, the 1996 voter-adopted City Charter authorizes the Ethics Commission to adopt "rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records." (City Charter, § 15.102.) (See RJN, Ex. 2.)

Despite that important voter-mandated role, the Ethics Commission has failed to enforce the Sunshine Ordinance. Since 2004, when the Sunshine Ordinance Task Force first referred a failure by a City

respondent to comply with its order to disclose public records, it has referred some 39 such cases to the Ethics Commission for enforcement. In each instance, the Ethics Commission declined to enforce the Order and dismissed the case. Grossman and other Sunshine Ordinance advocates have long criticized that lack of action by the Ethics Commission, as has a San Francisco civil grand jury in its 2010-2011 report, "San Francisco's Ethics Commission: The Sleeping Watch Dog."[1]

A major point of contention was the Ethics Commission's reliance on inapposite regulations in its investigation and enforcement of Sunshine Ordinance referrals. From 2000, when the Sunshine Ordinance became effective, until January 2013, the Ethics Commission had not adopted any specific regulations setting out the procedures for enforcement of Sunshine Ordinance violations. Instead, the Ethics Commission took the position that previously adopted regulations ("Ethics Commission Regulations for Investigations and Enforcement Proceedings") governing other types of investigations should also be applied to Sunshine Ordinance referrals. Those regulations, however, were adopted under a Charter provision for Ethics Commission investigations and enforcements "relating to campaign finance, lobbying, conflicts of interest and governmental ethics." (City

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[1] Available online at http://www.sfcourts.org/Modules/ShowDocument.aspx?documentid=2860.

Charter, § 15.102; Appendix C, § C3.699-13.) (See RJN, Ex.2.) Grossman and others argued to the Ethics Commission that those regulations did not govern its Sunshine Ordinance enforcement actions, and that the Ethics Commission needed new separate regulations tailored to the investigation and enforcement of Sunshine Ordinance actions.

In 2009, the Ethics Commission recognized the need for Sunshine Ordinance-specific regulations, and its staff began the process of drafting separate regulations governing (a) the enforcement of Sunshine Ordinance Task Force referrals of its Orders and (b) complaints filed directly with the Ethics Commission regarding willful violations of the Sunshine Ordinance. The development of those regulations extended over three years and, in the end, new regulations were not put in place until January 2013. The first drafts of the new regulations proposed by the Ethics Commission's staff merely would have modified the existing Ethics Commission Regulations for Investigations and Enforcement Proceedings to accommodate Sunshine Ordinance matters. Later, when it became evident that modification would not be workable, the Ethics Commission took a different approach and its staff began drafting stand-alone regulations, which, in their final form, were called "Ethics Commission Regulations for Violations of the Sunshine Ordinance."

For most of that long process, the Ethics Commission staff shared drafts of the new regulations with the Sunshine Ordinance Task Force,

which provided comment and suggestions prior to or in connection with consideration of the draft by the Ethics Commission itself. There were also three joint meetings between the Ethics Commission and members of the Sunshine Ordinance Task Force Committee with responsibility for reviewing the proposed regulations. That collaboration provided the Ethics Commission access to the expertise of the Sunshine Ordinance Task Force, and allowed the Sunshine Ordinance Task Force input into the implementation of the Ethics Commission's important role in enforcement of its referrals.

In late 2012, for unknown reasons, that changed. On September 14, 2012, without prior notice to the Sunshine Ordinance Task Force or its members, the Ethics Commission published notice that its staff had submitted another revised draft of the proposed regulations for consideration at the Ethics Commission's September 24, 2012 meeting. The lack of prior notice deprived the Sunshine Ordinance Task Force of the opportunity to provide input to the Ethics Commission or its staff. Moreover, because the Sunshine Ordinance Task Force did not have a scheduled meeting before the Ethics Commission was set to consider the proposed regulations, it was prevented from taking official action to review or comment on them.

Grossman and other advocates appeared at the Ethics Commission's September 24, 2012 meeting and objected to the Sunshine Ordinance Task

Force's exclusion from the process, without avail.

C. GROSSMAN'S RECORD REQUEST

In an effort to seek further information about the Ethics Commission's proposed draft for its September 2012 meeting and its failure to provide that draft to the Sunshine Ordinance Task Force for review, on October 3, 2012, Grossman submitted to St. Croix, in his capacity as Executive Director of the Ethics Commission, a public records request pursuant to the CPRA and Sunshine Ordinance seeking copies of certain public records relating to the Ethics Commission's draft regulations. Specifically, Grossman requested:

> [C]opies of any and all public records ... in the custody or control of, maintained by or available to you, the Ethics Commission (Commission), any staff member or any Commissioner in connection with or with reference to:
>
> (1) All prior drafts and final versions of (a) the September 14, 2012 draft of the Ethics Commission's regulations governing the handling of complaints related to alleged violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force ("Draft Amendments") and (b) the September 14, 2012 staff report ("Staff Report") referred to in the [September 14, 2012] Commission Notice [and]
>
> (2) the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulations and Staff Report ....

(Exhibits in Support of Petition for Writ of Mandate and for Prohibition ("Petition Exhibits"), p. 19.)

On October 12, 2012, the Ethics Commission responded to Grossman's request and produced 123 electronic files, six of which were partially redacted. However, it informed Grossman that additional records were being withheld:

> We are withholding other documents in their entirety, pursuant to California Government Code section 6254(k); California Evidence Code sections 952, 954; and California Code of Civil Procedure section 2018.030.

(Petition Exhibits, pp. 22-23.) The withheld public records were not identified in any way, including by category, and included no information about the number of records withheld. The statutory sections cited in the Ethics Commission's letter define the attorney-client privilege (Evid. Code, §§ 952, 954), and the attorney work product protection (Code Civ. Proc., § 2018.030). The CPRA provision cited, Government Code section 6254(k), is not a privilege or exemption in itself but incorporates into the CPRA exceptions privileges, such as the above two, set out elsewhere in state or federal law.

On October 21, 2012, Grossman responded by letter challenging the Ethics Commission's blanket assertion of privilege in support of its refusal to produce the withheld records. (Petition Exhibits, pp. 25-28.) Having received no response, he sent a follow-up email on November 1, 2012 requesting attention to his previous inquiry. (*Id.*, p. 30.) On November 2, 2012, St. Croix answered Grossman's email, stating that all responsive

documents had been produced: "You have already received all documents responsive to your request." (*Id.*, p. 32.)

D. GROSSMAN'S COMPLAINT AND THE SUNSHINE ORDINANCE TASK FORCE ORDER

Faced with St. Croix's refusal to produce the requested public records, or to provide the required written justification for his assertion of privilege, Grossman filed a complaint against St. Croix with the Sunshine Ordinance Task Force on November 19, 2012. (Petition Exhibits, pp. 34-48.)

St. Croix responded to the Complaint by letter dated December 6, 2012. (Petition Exhibits, pp. 50-53.) In that response, St. Croix again claimed the attorney-client privilege and attorney work product protection, and asserted that his bare citation to the code sections setting out those privileges was sufficient to satisfy compliance with the Sunshine Ordinance's requirements for a written justification for any withholding. The Sunshine Ordinance Task Force conducted a hearing on the complaint at its June 5, 2013 public meeting, at which both Grossman and St. Croix appeared, spoke, and responded to questions from Task Force members. St. Croix testified that he did not know the number of records withheld, that he did not personally review them, and that he could not testify regarding which of those claimed exemptions would apply to any or which withheld record.

In a written Order of Determination dated June 24, 2013, the Sunshine Ordinance Task Force held that St. Croix violated Sections 67.21 (b) and 67.24(b)(1) of the Sunshine Ordinance by improperly withholding records subject to disclosure, and ordered him to produce them to Grossman. (Petition Exhibits, pp. 55-56.) St. Croix did not comply with that order. (*Id.*, p. 9, line 20.)

On November 21, 2013, the Sunshine Ordinance Task Force referred Mr. St. Croix's non-compliance with its June 24, 2013 Order to the Ethics Commission. To date, the Ethics Commission has not acted on it. (See RJN, Ex. 5 [Agendas and minutes from Ethics Commission meetings from June 24, 2013 through present].)

During the pendency of this dispute, at its November 2012 meeting, the Ethics Commission adopted the Ethics Commission Regulations for Violations of the Sunshine Ordinance. The regulations took effect January 25, 2013.

E. THE SUPERIOR COURT'S ORDER

On September 18, 2013, Grossman filed a verified petition for a writ of mandate ("Petition") in the Superior Court below seeking an order compelling Petitioners to produce the public records he had requested nearly a year earlier. (Petition Exhibits, p. 1.) Petitioners filed a written opposition, in which they admitted that four documents were improperly withheld. (*Id.*, p. 104, ¶ 6.) Petitioners' opposition also specified, for the

first time, that 24 documents had been withheld on the basis of attorney-client privilege and the attorney work product doctrine, consisting of 15 requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations, and nine documents allegedly including legal advice from the City Attorney's Office in response. (*Id.*, p. 104 ¶ 7.)

The matter came before the Superior Court for hearing on October 25, 2013. On October 29, 2013, the court issued the order requested by Grossman, requiring Petitioners to produce the requested documents. (Petition Exhibits, pp. 204-206.) Petitioners did not produce the records. On November 22, 2013, the City filed this Petition for Peremptory Writ of Mandate and/or Prohibition under California Government Code section 6259(c), along with a Motion to Stay under California Government Code section 6259(c).

III. ARGUMENT

A. PETITIONERS IMPROPERLY ASSERT THIS WRIT

This writ is ostensibly filed on behalf of the Ethics Commission and its Executive Director. The Ethics Commission has not, however, authorized this proceeding, and public records indicate that it may not even be aware it was filed. (See RJN, Ex. 5.) For that reason alone, the Petition is void and should not be considered.

To bring this Petition, Petitioners were required to follow proper procedure laid out by the Brown Act. The decision to file this Petition is an "action taken" under the Brown Act because it is "a collective commitment...of a legislative body to make a positive...decision." (Gov. Code, § 54952.6.) Before taking such an "action" the Ethics Commission is required to comply with Section 54954.2(a) of the Act, which requires, among other things (1) posting an agenda at least 72 hours before the meeting containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in a closed session, and (2) that no action or discussion shall be undertaken on any item not appearing on the posted agenda. Should the action involve litigation and should the legislative body have a need to hold a closed session to discuss that litigation, it must first announce that closed session and identify the litigation to be discussed. (Gov. Code, § 54956.9.) The Ethics Commission's bylaws specifically require that it abide by this provision. (*See* Article I, Section 3 ["The Commission shall comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance...the Ralph M. Brown Act..."].) (See RJN, Ex. 3.)

None of the required steps were taken. While the writ is taken in the name of the Ethics Commission, the Ethics Commission did not actually bring it. Because the Ethics Commission has never authorized this Petition

or taken the action necessary to initiate and maintain it, the Court ought to deny it outright.

B. CALIFORNIA LAW PROVIDES FOR BROAD PUBLIC ACCESS TO GOVERNMENT RECORDS

The California Constitution enshrines a broad right of public access to government records:

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(Cal. Const., art. I, § 3.) In the CPRA, the Legislature called public access to government records a "fundamental and necessary right":

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

(Gov. Code, § 6250.) Therefore, the CPRA provides that "every person has a right to inspect any public record." (Gov. Code, § 6253.)

"Public records" are broadly defined to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (d).) Section 6253(b) of the CPRA requires disclosure of non-exempt public records upon request:

> Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov. Code, § 6253(b).)

C. AS AUTHORIZED BY THE CPRA, THE VOTERS OF SAN FRANCISCO ELECTED TO BROADEN ACCESS TO PUBLIC RECORDS

Though the CPRA provides for certain exemptions to disclosure, the California Constitution mandates that any such limitation be narrowly construed, in favor of public access:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander v. State Bar of California* (Dec. 19, 2013, S194951) __ Cal.4th __ [2013 WL 6670717, *7] [affirming mandate that exemptions to public disclosure be construed narrowly].) Courts have called those narrow statutory exceptions to that complete right of access "islands of privacy upon the broad seas of

enforced disclosure." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653 [117 Cal.Rptr. 106].)

Binding on municipalities and local agencies, the CPRA's right of access operates as a floor, not a ceiling—the law expressly authorizes any local government to "adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]" (Gov. Code, § 6253, subd. (e).) The provision at issue here, Sunshine Ordinance section 67.24(b)(1)(iii), is one that provides "greater access." As expressly authorized by the CPRA, the San Francisco voters opted to shrink one of the islands of privacy by precluding San Francisco agencies from invoking certain statutory exceptions for public records falling within certain narrowly defined subject areas, namely, the laws governing ethics and public access. Through the Sunshine Ordinance, the voters of San Francisco provided "enhanced rights of public access to information and records" with respect to "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any

San Francisco governmental ethics code, or [the Sunshine] Ordinance." (San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii)) (See RJN, Ex. 1.)[2]

D. THERE IS NO CONFLICT BETWEEN THE CITY CHARTER AND THE SUNSHINE ORDINANCE

Petitioners concede that the records requested by Grossman fall within the scope of Sunshine Ordinance section 67.24(b)(1)(iii). They argue, however, that the provision is invalid because it conflicts with the City Charter sections 6.100 and 6.102. (Petition at p. 28.) There is no such conflict.

City Charter section 6.100 merely designates the City Attorney as counsel and provides that he or she will have "such additional powers and duties prescribed by state laws for their respective office." (See RJN, Ex. 2.) Section 6.102 sets out certain duties for the City Attorney, including

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[2] The Sunshine Ordinance also empowers the Sunshine Ordinance Task Force to determine when there has been a violation of the Ordinance. (San Francisco Admin. Code, § 67.21, subd. (e).) (See RJN, Ex. 2.) Pursuant to that authority, the Sunshine Ordinance Task Force June 24, 2013 Order of Determination finding a violation of Sunshine Ordinance sections 67.21(b) and 67.24(b)(1), and ordering St. Croix to produce the requested records should be given deference. To do otherwise would undermine the complaint, hearing and referral process of the Sunshine Ordinance, which was intended to give requesting parties an efficient process for resolution of public records complaints. Deference is particularly warranted here, where Petitioners did not raise the defenses on which they now rely until after Grossman filed a mandamus action in the Superior Court. Toleration of such sandbagging would encourage dragged-out litigation and further encumber the judicial system.

"provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County." (See RJN, Ex. 2.) Section 67.24(b)(1)(iii) requires that certain categories of public records—those relating to public records laws themselves—be publicly accessible. (See RJN, Ex. 1.) The two laws can be read in perfect harmony. The City Attorney may carry out his or her duties, but when communicating or providing advice about public records laws, must do so in a manner that is publicly accessible manner.

The City Charter is silent with respect to the confidentiality of communications with the City Attorney. None of its provisions mandate that such communications take place within the boundaries of attorney-client privilege. Petitioners would have the Court read into that silence a blanket requirement that all such communications are confidential, and in doing so *create* a conflict with the express provisions of the Sunshine Ordinance, which was adopted by the same electorate a few years later. The Court should not strain to find a conflict where none exists; to the contrary, it should strive for interpretations of statutes that *avoid* conflict and do not render laws invalid. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 297 [110 Cal.Rptr.2d 203] ["It is our duty when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between

different statutory provisions, even if the provisions appear in different codes" (citations omitted)].)[3]

Not only would such a construction bring the two municipal provisions into conflict, it would *narrow* Petitioners' obligation to allow public access to records. The California Constitution, obviously superior to any local law, expressly requires that "[a] statute...shall be broadly construed if it furthers people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander, supra*, __ Cal.4th __ [2013 WL 6670717, *7].)

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[3] Because there is no conflict, *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161 [36 Cal.Rptr.2d 521] is inapposite. In that case, the court examined whether a city charter precluded the city from implementing a program requiring bidders to engage in certain conduct as part of the competitive bid process where the charter contained no provision expressly allowing this program. In determining whether the implementation of the program conflicted with the charter, the court first "construe[d] the charter in the same manner as [it] would a statute...to ascertain and effectuate legislative intent....look[ing] first to the language of the charter, giv[ing] effect to its plain meaning..." (*Id.* at 171-172.) The court explained that since the charter did not expressly authorize or forbid the city from adopting the program, "the validity...must be ascertained with reference to the purpose" of the program." (*Id.* at 173.) The court found that there was no conflict because the program was compatible with the charter's provisions regarding bidding. Here, the purpose of the Sunshine Ordinance is not incompatible with the Charter's designation of privilege. Nothing in the Charter indicates that *all* communications between the City Attorney and his or her clients are necessarily privileged. Reading the Charter to contain such an implication does not give effect to its plain meaning.

E. THERE IS NO CONFLICT BECAUSE ATTORNEY-CLIENT COMMUNICATIONS ARE NOT NECESSARILY CONFIDENTIAL

Petitioners' argument rests on the mistaken premise that *all* communications with an attorney are *necessarily* confidential. They contend, "Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice." (Petition at p. 21.) However, it is plain that communications with attorneys, including advice and requests for advice, are very often non-confidential.

That is particularly true for public sector lawyers, who are subject to mandates that *require* them to provide certain types of advice in settings that must be accessible to the public. For example, this state's Brown Act mandates that meetings of local legislative and other bodies be conducted in the open, including any communications with counsel not related to pending litigation. (Gov. Code, § 54956.9.) Even when the purpose of a local legislative body's communications is "to confer with, or receive advice from ... legal counsel," the body's sessions must remain public, and may go into closed session only if "open session concerning those matters would prejudice the disposition of the local agency in the litigation." (*Id.*) In other words, the Brown Act mandates that *most* attorney-client communications with a local legislative body take place in *open* session.

When the advice being sought or provided by the attorney does not concern pending litigation, that attorney-client communication must be in public. (See, e.g., *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 [214 Cal.Rptr. 561] [no exemption where "purpose of the communications with the attorney is a *legislative* commitment"].)[4]

By enacting the Brown Act, the California Legislature made clear that it believes that the relationship between a municipal body and its attorney does not *require* confidentiality, and that advice outside of the context of pending litigation must be carried out in full view of the public. Petitioners quote from various cases extolling the virtue of confidentiality in the attorney-client relationship, but those statements do not add up to a requirement that an attorney can perform his or her duties only in secret.[5]

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[4] The provision is sometimes referred to as a legislative abrogation of the attorney-client privileges. (*Shapiro v. Bd. of Directors of Ctr. City Dev. Corp.* (2005) 134 Cal.App.4th 170, 174 [35 Cal.Rptr.3d 826].)

[5] Academic studies agree that an attorney's representation of a public entity client can be fulfilled in an environment where the attorney-client privilege has been limited or altogether eliminated. The author of the leading treatise on the attorney-client privilege wrote, "Under the logic of open meetings, sunshine, and freedom of information acts, seven states" have abolished the attorney-client privilege altogether. (Paul R. Rice, *The Government's Attorney-Client Privilege: Should It Have One?*, Pub. Couns. Newsletter, (Md. St. B. Ass'n, Baltimore, MD), http://www.acprivilege.com/articles/acgov.md.htm [cited in Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys* (2007) 20 Geo. J. Legal Ethics 163, 183].) He notes,

In San Francisco—like other California cities—the City Attorney routinely provides advice to the Board of Supervisors, the Ethics Commission, and other city boards, in open session. Other states have gone further, with some eliminating the privilege entirely. (See, e.g., *Arkansas Highway and Transp. Dept. v. Hope Brick Works, Inc.* (1988) 294 Ark. 490, 495 [744 S.W.2d 711, 714] [explaining that attorney-client privilege is not an exemption to the state's Freedom of Information Act].)

Further, the case law cited by Petitioners suggesting that an attorney-client exemption exists is inapposite. They argue that *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 [20 Cal.Rptr.2d 330, 853 P.2d 496] stands for the proposition that written matter sent from an attorney to a government client is regulated by the Public Records Act and not the section of the Brown Act abrogating the privilege. The court in *Roberts* said "[w]e see nothing in the legislative history of the amendment suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it intended to bring written communications from counsel to governing body within the scope of the Brown Act's open meeting requirements." (*Id.* at 377.) That logic does not extend to the specific provision in the Sunshine Ordinance that *is*

"Significantly, there have so far been no reported adverse consequences from this action." (*Id.*)

intended to bring written communications from counsel to governing body within the scope of open meeting requirements. In addition, the case is distinguishable on its facts. In *Roberts*, the court addressed whether the City of Palmdale needed to make public a letter from City Council regarding a parcel map application. The Supreme Court specifically addressed the issue of whether the letter would only be privileged where there is pending litigation. Here, no such argument is made. Grossman does not contend that a privilege cannot exist outside of pending litigation. Instead, the argument is that valid local laws provide that "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act...any San Francisco governmental ethics code or this Ordinance [i.e. the Sunshine Ordinance]" must be produced. (San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii).) (See RJN, Ex. 1.) In other words, the records at issue here are not privileged from the outset, regardless of whether there is pending litigation.

F. A LAWYER'S OBLIGATION TO MAINTAIN CONFIDENCES DOES NOT CONVERT NON-CONFIDENTIAL COMMUNICATIONS TO CONFIDENTIAL ONES

Petitioners' flawed position is not rescued by their assertion that "Section 6.100 provides that the City Attorney is subject to the 'duties prescribed by state laws.'" (See RJN, Exh. 2.) The State Bar Act requires an attorney '[t]o maintain inviolate the confidence, and at every peril to

himself or herself to preserve the secrets, of his or her client.' (Cal. Bus. & Prof. Code, § 6068, subd. (e)(1).)" (Petition at p. 26.)

Petitioners also contend that Sunshine Ordinance section 67.24 (b)(1)(iii) makes it impossible for the City Attorney to carry out his obligations under Business and Professions Code section 6068(e)(1), which requires an attorney to protect a client's "confidence" and to "preserve the secrets[] of his or her client," and Rule of Professional Conduct 3-100 which similarly prohibits disclosure of client confidences. The logic is backward: what an attorney is required to do says nothing about whether his client is under an obligation to produce information. Those provisions governing an attorney's duty of confidentiality have no bearing on the principal's duties, and even with respect to the attorney, do not apply to communications that were not confidential in the first place. The City Attorney would not run afoul of his confidentiality obligations by disclosing advice provided to a local board in open session. Similarly here, he does not risk a violation governing only "secrets" and "confidence[s]" when the communications were, by operation of law, publicly accessible and therefore never confidential in the first place.[6]

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[6] The same is true with regard to Petitioners' argument that the City Attorney is subject to duties of confidentiality imposed by the Rules of Professional Conduct. (See Petition at pp. 22-23.) The argument is not relevant here because neither state law nor the Rules mandate that all communications are privileged or, even more specifically, that the

The arguments made by Petitioners here have been rejected by other courts addressing similar claims. For example, in *Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough* (1985) 395 Mass. 629, 633–34 [481 N.E.2d 1128, 1131] the Massachusetts Supreme Judicial Council (the Commonwealth's highest court) ruled that a municipal board could not invoke the attorney-client privilege to create an exception to the state's open meeting law: "We view § 23B as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." (*Id.* at 1131.) The Court expressly held that the law did not require attorneys to violate their ethical duties because the "attorney-client privilege is the client's privilege to waive," meaning that if "a client chooses to waive the privilege of confidentiality, the attorney is under no further ethical obligation to keep the communications secret." (*Ibid.*)

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

Petitioners' contention that Section 67.24 (b)(1)(iii) prevents the City Attorney from carrying out his duties as attorney for the City and its agencies is a gross exaggeration. The section merely provides that communications on certain subject matters, namely those *pertaining to*

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communications at issue here are privileged. They do not create a privilege where one does not otherwise exist.

open government laws, remain accessible to the public. It is not a reorganization of the relationship between the City Attorney and his clients, nor is openness fundamentally incompatible with the attorney-client privilege.[7]

The City Attorney's own "Good Government Guide" recognizes that

> [L]egal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a public records request. Accordingly, the practice of the City Attorney's Office is to inform any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

(See RJN, Ex. 4. at pp.22-23 (emphasis added).)

Petitioner relies on the rule that what is implied in a statute or a city charter is as "much a part of it as that which is expressed" (Petition at p. 21) to force an implied blanket of confidentiality over all attorney communications and to construct incompatibility between open government

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[7] San Francisco Administrative Code section 67.24 contains other provisions precluding San Francisco agencies from asserting CPRA exemptions that have not been challenged by the City. For example, Section 67.24(c) allows disclosure of a broad range of personnel information, and Section 67.24(h) precludes assertion of the deliberative process privilege, and Section 67.24(g) precludes reliance on the CPRA's "catch-all" provision. To Grossman's awareness, none of the above have been attacked. (See RJN, Ex. 1.)

laws and confidentiality. (See Petition at p. 21 (citing *Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86] and *Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615]).) Neither case cited by Petitioner suggests that the Court here ought to find that voters intended for every communication with or all advice from the City Attorney to be confidential. That finding goes far beyond the implied findings in *Johnston* and *Currieri*. In *Johnston*, the court indicated that a statute authorizing the court in its discretion to dismiss an action two years after an answer was filed necessarily implied that a court could order dismissal at any time prior to the expiration of two years as well. In *Currieri*, the city charter provided that the probation period for a city employee would not exceed one year before the employee's appointment becomes permanent, "carry[ing] with [it] the necessary implication that the probationary employee, although he may be discharged summarily at any time during the probationary year, thereafter automatically attains a permanent status." (*Currieri*, *supra*, at p. 1001.) This is nothing like the broad implication of mandatory confidentiality that the Petitioner suggests here. Where the implication in *Johnston* and *Currieri* logically flows from the language and intent of the statutes, broadening privilege to apply to every attorney communication and every piece of attorney advice is not as natural a reading. To the contrary, it would be a gross expansion of the privilege doctrine and would undermine its structure by shifting the burden for proving confidentiality.

Petitioner also cites *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 [190 Cal.Rptr. 919, 661 P.2d] for the contention that representation of clients in welfare proceedings necessarily includes confidentiality protections, even where a client's representative may not be an attorney. There, the court found that the attorney-client privilege was implied by the statute allowing for hearings under the aid to families with dependent children statute. In other words, the privilege was contextual and grounded in a specific need. That is unlike Petitioner's argument here that all communications between the City Attorney and his clients are necessarily privileged, regardless of the context or circumstances.

Petitioner then cites cases extolling the virtue of protecting confidentiality as a justification for upholding the alleged privilege in this case. (See Petition at pp. 22-23 (citing *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1207 [40 Cal.Rptr.2d 456, 892 P.2d 1199]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 32 L.Ed. 488]).) This is an exercise in shadowboxing; Grossman does not dispute that confidentiality is a key component of our legal system, that it is a public policy concern and that it allows frank and open communication between a client and his or her attorney. None of those virtues of confidentiality, however, require that *every* communication between a client and his or her attorney be

confidential. Nor do those virtues mandate a finding that the communications at issue here must be privileged.

Petitioners also cite *Roberts, supra*, 5 Cal.4th at p. 380, *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [159 Cal.Rptr.3d 789] and *Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54 [62 Cal.Rptr. 819] for the argument that local governments, like private citizens, need to confidentially confer with their lawyers, even despite open meeting laws. As discussed at, *supra* page 23, *Roberts* is distinguishable because it specifically addressed privilege in the context of pending litigation, which has no application here. *Citizens for Ceres*, which held that a statute calling for the collection of privileged documents "does not mean agencies must disregard all privileges when assembling CEQA administrative records" is ultimately unhelpful to Petitioners because the court went on to say that courts "are required to go cautiously when interpreting statutes that might either expand or limit privileges, for we are forbidden to create privileges or establish exceptions to privileges through case-by-case decision making." (*Citizens for Ceres, supra,* at p. 912.) Here, Petitioner is expressly asking the Court to create a privilege where it otherwise does not necessarily exist. The court in *Citizens for Ceres* said that "if the Legislature had intended to abrogate all privileges for purposes of compiling CEQA administrative records, it would have said so clearly." (*Id.* at p. 913.) What was muddy in that case

is crystal clear in this one: the San Francisco Sunshine Ordinance specifically exempts from privilege the communications that are at issue.

Finally, Petitioners' reliance on *Sacramento Newspaper Guild* is misplaced, namely because Petitioners do here exactly what the court there warned against there: "Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash." (*Sacramento Newspaper Guild*, *supra*, 255 Cal.App.2d at p. 58.)

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

The premise that the City Attorney cannot carry out his duties if his client may be under an obligation to make those communications public is simply wrong, and wholly incompatible with the California Legislature's judgment in the Brown Act context that an attorney's advice to local bodies *should* be carried out in public. The subject matter of Grossman's request epitomizes the type of advice that does not depend on confidentiality. He sought drafts and final versions of the Ethics Commission's regulations governing the handling of Sunshine Ordinance matters, the associated staff

report, and records relating to the "preparation, review, revision and distribution" of the drafts and staff report. The drafting of procedural regulations is akin to a legislative function—different members of the public may have different views about what the procedures should look like, but the process is fundamentally non-adversarial. No unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions. Notably, at the most recent Ethics Commission meeting, the Deputy City Attorney provided legal advice in open session on further proposed changes to the Sunshine Ordinance regulations at issue.

Petitioners argue that "the abrogation of the privilege significantly impedes the City Attorney's function." (Petition at p. 30.) Petitioners recite a parade of horribles that might ensue if litigation adversaries could attack the attorney-client privilege through Sunshine Act or CPRA requests. Whatever justification might be found for limiting disclosure in the context of active litigation, those admittedly trickier circumstances are not found here. The drafting of regulations is a process that should be open, and the provision of candid, honest, well-reasoned and complete legal advice in connection with that process is not impeded by disclosure. There is no reason to believe the questions to the City Attorney or his answers would be any different regardless of whether communications were public or private. The Court need not reach the issue of whether a litigation

exception should be read into the law, and need only apply the law as written.

Petitioners cite *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684 [52 Cal.Rptr.2d 161], a case where the court held that a city council could not impair the city attorney's charter duties through a budget ordinance and that only voters could change the city attorney's duties by amending the city's charter, to argue that the San Francisco City Charter controls in this case. Here, however, the Sunshine Ordinance did not constitute a change to the city attorney's *duties*. It merely requires that a certain category of documents be made available for public review, taking those documents out of the potential realm of privilege. That does not conflict with any duty set out in the City Charter, as the Charter does not require or mandate that all communications between an attorney and client be privileged and confidential in the first place.

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

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

Whatever difficulty a municipal lawyer might have in ascertaining who holds the power to waive the City's privilege dissolves when the voters speak through the ballot box. The California Constitution states: "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The San Francisco City Charter grants plenary legislative power through direct action by the voters, providing that "the voters of the City and County shall have the power to enact initiatives and the power to nullify acts or measure involving legislative matters by referendum." (City Charter, §14.100.) (See RJN, Ex.2.) The Sunshine Ordinance was a valid and proper exercise of that authority.

In addition, as discussed above, local enactments like Sunshine Ordinance section 67.24 (b)(1)(iii) are expressly authorized by the CPRA. (Gov. Code, § 6253, subd. (e).) It is beyond cavil that state law supersedes local law. (*Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303, 705 P.2d 876] [("If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."].) Whatever the hierarchical relationship between a general provision of the City Charter and a detailed, specific enactment by the voters directly, the fact that the pertinent section here was authorized by express state law renders the debate of no significance.

Again, privilege is the wrong frame for this analysis because the voters' directive here is not to the *attorney*, but to the city officials who

work for and on behalf of the voters. It may be that the City Attorney is bound not to disclose privileged information, and to act zealously on behalf of his clients, but that says nothing about whether those clients may choose to give up their right to confidentiality. The voters' plenary legislative authority includes the power to compel their own officials to waive privilege.[8]

Petitioners' arguments to the contrary do not survive scrutiny. They ask, "[I]f voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advices City officials?" (Petition at p. 31.) They contend that the Sunshine Ordinance might be construed to allow an adversary to access litigation strategy, or to undermine the obligation of the City to provide a defense to individual police officers. (*Id.*) But this Court need not address the boundaries of extreme situations raised only hypothetically here. Petitioners suggest that this is a slippery slope, but it is not. There may be circumstances where the right of public access conflicts

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[8] Any distinction between attorney work product and attorney-client privilege makes no difference here. As a preliminary factual matter, some of the documents at issue are *requests* for advice *to* the Deputy City Attorney, so they cannot be work product. Second, Petitioners overstate the law by suggesting that a client may not disclose communications with their attorney that happen to contain work product without the attorneys' consent. The law is clear that "an attorney's work product belongs absolutely to the client." (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879].)

with other individual rights in other situations, but those issues are not raised here, and remain, if anything, a question for another day.

Finally, Petitioners place great weight on the alleged differences between the process for instituting an amendment to the City Charter and passing an ordinance. Though there are some procedural differences for placing the matter on the ballot, the fact remains that simple majority voter approval is required for both. The Sunshine Ordinance was passed by a majority of the San Francisco voters, whose express will would be undone by the action (taken on the ostensible authority) of their own elected officials here. The Court should strive to give effect to their will here, not strain to read words into statutory silence to find a conflict that it must then resolve.

IV. CONCLUSION

For the foregoing reasons, the Court should not invalidate a key provision of the Sunshine Ordinance allowing for the disclosure of documents requested by Grossman. That is especially true in these circumstances, where Petitioners fail to show that disclosure would undermine the attorney-client relationship. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

DATED: December 23, 2013

KERR & WAGSTAFFE LLP

By: _____
MICHAEL NG
Attorneys for Allen Grossman

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule of Court 8.204(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 8,361 words.

DATED: December 23, 2013

KERR & WAGSTAFFE LLP

MICHAEL NG
Attorneys for Allen Grossman

PROOF OF SERVICE

I, Sarah Guzman, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, 18th Floor, San Francisco, California 94105.

On December 23, 2013, I served the following document(s):

OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]

on the parties listed below as follows:

Dennis J. Herrera
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Andrew Shen
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Appeals Division
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San Francisco, CA 94102

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

☒ **By electronic submission** by submitting a text searchable Portable Document Format ("PDF") via the Court of Appeal online form to the Supreme Court of California pursuant to CRC 8.212(c).

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

Executed on December 23, 2013, at San Francisco, California.

Sarah Guzman

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION, Petitioners/Respondents, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent/Appellant.	Case No. A140308 San Francisco County Superior Court No. CPF-13-513221
ALLEN GROSSMAN, Real Party in Interest.	

REPLY TO OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

The Honorable Ernest H. Goldsmith

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INTRODUCTION

Although Grossman's arguments are difficult to unwrap, he appears to advocate for either of the following two approaches:

First, he appears to ask the Court to assume that the voters who approved the Charter provisions involving the City Attorney did not care whether the City Attorney's communications with clients would be confidential, and therefore never intended to incorporate the state-law privileges that protect communications between lawyer and client, even though these privileges apply to every other attorney-client relationship in California. But it is impossible to ascribe to the voters a belief that these protections were unimportant to the relationship between San Francisco's policymakers and their lawyers. Consider just a few of the many policy measures enacted in San Francisco in recent years: the groundbreaking Healthy San Francisco program, major new gun control initiatives, legislation limiting tobacco sales, and a ban on the use of plastic bags in grocery stores. The City Attorney provides legal advice when San Francisco policymakers consider such proposals, and disclosure of that advice would obviously be of great advantage to prospective litigation opponents – opponents who were lying in wait to sue the City in each of these instances. It is inconceivable that the voters, when adopting the Charter, intended to allow the important strategic communications between their representatives and the City Attorney to remain unprotected. But that is the assumption the Court would have to adopt if it accepted Grossman's argument that a mere ordinance can bar assertion of the attorney-client privilege or attorney work product protection.

Second, perhaps recognizing how legally and logically troublesome the above conclusion would be, Grossman at times appears to assume that

the Charter was meant to incorporate the state-law confidentiality protections for some types of communications but not others, requiring a case-by-case determination of whether the Charter protects a particular type of communication from disclosure. This assumption underlies Grossman's suggestion that the Court could hold that communications between the City Attorney and his clients about litigation-related matters remain protected from disclosure, while communications about policy matters do not. But the Charter's text contains no hint of such a distinction, which would in any event fly in the face of state law, which protects written communications by attorneys regardless of whether litigation is implicated (and regardless of whether the attorney is in the public or private sector). Furthermore, as a practical matter it would be impossible for a court to guess where the voters intended to draw the line between what should and should not be protected. Indeed, this case provides a perfect illustration of the hazard. Grossman casually assumes a bright line between "litigation" and "legislation," and further assumes this case falls on the legislative side. But this case involves the adoption of regulations that Grossman, a local Sunshine activist who had previously sued the City over Sunshine matters, contended in writing on several occasions were illegal. That is the definition of litigation risk. Therefore, if anything, this dispute underscores why the voters necessarily intended that the entire relationship between the City Attorney's Office and its clients (not just some unspecified part of it) be subject to state-law confidentiality protections.

In contrast to the two approaches apparently advocated by Grossman, the City's proposed construction of the Charter makes sense from both a legal and logical standpoint. Of course the voters intended, when they established the City Attorney in the Charter, that his

communications with his clients would be subject to the same state-law confidentiality protections that inhere in every other attorney-client relationship in California. Of course they intended, when they specified that the City Attorney is subject to state law, that this would be the law governing the attorney-client relationship. To be sure, this means that some communications not protected by state law will be public (such as oral advice an attorney provides at a formal legislative meeting). But written communications between lawyer and client are always protected under state law, and that protection applies here. The voters are certainly entitled to change their minds about the nature of the relationship between the City Attorney and his clients, either generally or with regard to some particular type of communication. But if so, they must amend the Charter, because the Charter establishes that relationship. A mere ordinance purporting to accomplish this goal is invalid.

BACKGROUND

A handful of Grossman's factual assertions require brief clarification.

First, Grossman asserts that the Ethics Commission previously shared drafts of its regulations with the Sunshine Ordinance Task Force ("Task Force"), but then stopped doing so for "unknown reasons." (Opposition ["Opp."] at 8.) He seeks to leave an impression that the Ethics Commission sought to slip something past the Task Force for nefarious reasons, but nothing could be further from the truth. When the Ethics Commission previously shared its draft regulations with the Task Force, the Task Force took nearly a year to provide a response. (Exhibits in Support of Petition ["Exh."] F at 107.) The next time around, Executive Director St. Croix, having already received input from the Task Force, determined it

would neither be useful nor efficient to submit another draft to the Task Force to await another round of comments. (*Id.*) Moreover, when the Ethics Commission was ready to proceed with its draft regulations in the Fall of 2012, the Task Force was not regularly meeting. (*Id.*) After meeting in July 2012, the Task Force did not meet again until November 2012. (*Id.*) The process by which the Ethics Commission adopted its Sunshine Ordinance regulations was wholly above board, and Grossman's suggestion to the contrary is meritless.

Second, with respect to Executive Director St. Croix's decision to respond to Grossman's document request by withholding privileged material, Grossman asserts that the Task Force "ordered" St. Croix to produce those documents, and that St. Croix "did not comply" with that order. (Opp. at 12.) However, the Task Force is a purely advisory body, as Grossman elsewhere concedes. (*See* Request for Judicial Notice in Support of Opposition, Exh. 1 at 5 [S.F. Admin. Code § 67.30(c)]; Opp. at 5.) It has no authority to "order" the Executive Director of the Ethics Commission to take any action, let alone disclose privileged attorney-client communications to a member of the public.[1]

Third, Grossman repeatedly asserts, without any support or explanation, that the Commission's consideration of the regulations at issue in this case had no litigation implications. For example, Grossman argues that "[n]o unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions." (Opp. at 32.) This is simply untrue. As is often the case when a policymaking body

[1] For this reason, Grossman's fleeting suggestion in a footnote that the Task Force's "order" is entitled to deference lacks merit. (*See* Opp. at 18 n.2.) Non-binding advisory opinions are not entitled to deference. (*See Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470 n.4.)

considers legislation or regulations, here there was real litigation risk. After all, Grossman previously sued the Ethics Commission on a public records matter, and more recently had submitted several memoranda to the Ethics Commission asserting that its proposed regulations were unlawful under the Sunshine Ordinance. (Supplemental Request for Judicial Notice ["Supp. RJN"], Exhs. A-D.)[2] Under these circumstances, any sensible lawyer would recognize litigation risk, and communicate with his clients accordingly.

ARGUMENT

I. THE PETITION IS NOT PROCEDURALLY DEFECTIVE.

Grossman claims this petition is improper because the Ethics Commission did not meet publicly to authorize it. (Opp. at 13-15.) But the Ethics Commission is not required to approve the filing of an appeal or writ petition challenging a Superior Court order, especially where it played no role in responding to Grossman's public records request in the first place. Executive Director St. Croix (with the assistance of his staff) is responsible for the Ethics Commission's responses to public records requests. For this reason, Grossman directed his records request to St. Croix, and his subsequent Task Force complaint only named St. Croix as a respondent. (Exh. A at 19-20, 35-38.) And generally, as the Executive Director, St. Croix is in charge of the administration of the Ethics Commission. (*See* Request for Judicial Notice in Support of Petition ["RJN"], Exh. F at 2 [Charter § 15.101]; Supp. RJN, Exh. E [S.F. Admin. Code § 2A.30].) Such

[2] Indeed, Grossman ghostwrote a memoranda that the Task Force submitted to the Ethics Commission under its name. (Supp. RJN Exh. D.) The fact that the Task Force is allowing private citizens to ghostwrite memoranda for it underscores the emptiness of Grossman's suggestion that the Task Force is entitled to deference.

administrative responsibility includes making litigation decisions with the City Attorney regarding cases involving the Ethics Commission.

In support of his argument, Grossman cites the Brown Act and its definition of "action taken." (*See* Opp. at 14.) But the Brown Act sets forth procedures to be followed *if* a legislative body takes action; it does not interfere with decisions about *whether* a legislative body must take action as opposed to allowing decisions to be made at the staff level. (*See, e.g.*, Cal. Gov. Code § 54952.2(b)(1) [majority of commission members may not meet outside of public's view]; *id.* § 54954.2(a)(1) [commission must post meeting agendas at least 72 hours prior to meeting].) In other words, nothing in the Brown Act (or the definition of "action") governs the division of responsibilities between the commissioners themselves and the Executive Director. It only provides that when the commissioners collectively take action, certain procedures must be followed. The commissioners were not required to take collective action here, so Grossman's procedural argument is inapt.

II. THE SUNSHINE ORDINANCE PROVISION CONFLICTS WITH THE CHARTER.

A. The City Does Not Argue For An "Expansion" Of The Privilege.

Grossman seeks to create the impression that the City is asking the Court to undertake an "expansion" of the privilege doctrine. (*See* Opp. at 28.) This is not correct. The City is not asking the Court to hold that documents not otherwise considered privileged should now all of a sudden be deemed privileged. These are documents that by any definition fall within the state-law definition of attorney-client privilege (and for some, also the attorney work product protection). Contrary to Grossman's assertions, privilege presumptively covers "every piece of attorney advice,"

provided to a client. (*See* Cal. Evid. Code § 952.) It is Grossman who is attempting to create the impression that certain documents protected by the privilege actually are not.

In connection with this effort, Grossman again relies heavily on the Brown Act. But the Brown Act is about public meetings, while this case is about documents. (*Compare* Cal. Gov. Code §§ 54950, 54953 [Brown Act requires open meetings] *with* Cal. Gov. Code §§ 6252-53 [Public Records Act concerns writings].) Indeed, under the Brown Act, even documents circulated in *conjunction* with a public meeting remain privileged if they reflect attorney-client communications. (*See Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 ["Despite the broad policy of the act to ensure that local governing bodies deliberate in public, the [Brown Act] itself incorporates the attorney-client privilege as to written materials distributed for discussion at a public meeting."] [citations omitted]; Cal. Gov. Code §§ 54956.9(f), 54957.5(a) [incorporating Public Record Act exemptions].) The City's decision to withhold the requested documents is consistent with this existing understanding of the privilege; it is Grossman who seeks to shrink the concept.

Furthermore, documents of this kind are subject to state-law confidentiality protections regardless of whether the communications are made by a private lawyer or a public lawyer, and regardless of whether the documents implicate litigation. The *Roberts* decision establishes this unequivocally. Grossman argues that "*Roberts* is distinguishable because it specifically addressed privilege in the context of pending litigation, which has no application here." (Opp. at 30.) But this characterization of *Roberts* is outright false. In reality, the *Roberts* court rejected Grossman's very

assertion, making clear the privilege applies regardless of whether litigation is involved:

> . . . appellant's argument that public policy is best served by limiting the attorney-client privilege to situations in which there is litigation pending is inconsistent with the decision of the Legislature in enacting the Public Records Act to afford public entities the attorney-client privilege as to writings to the extent authorized by the Evidence Code.

(*Id.* at 380.) In short, the Brown Act does not limit confidentiality for written communications of public lawyers; it exists in concert with the Public Records Act and incorporates the same confidentiality protections for writings by public lawyers as exist under state law for writings by private lawyers:

> The balance between the competing interests in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act. . . . although the Brown Act limits the attorney-client privilege in the context of local governing body meetings, it does not purport to abrogate the privilege as to written legal advice transmitted from counsel to members of the local governing body.

(*Id.* at 381.)

Grossman misrepresents *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95 in a similar manner. He cites it for the proposition that all attorney-client communications regarding legislation are not confidential. (*See* Opp. at 22.) But again, *Stockton Newspapers* only addressed the Brown Act and oral communications between an attorney and public officials, not written documents. As discussed, state-law confidentiality protections apply to written legal advice in policy-making and other non-litigation contexts.[3]

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[3] Grossman alludes to "academic studies" finding that government attorneys can ably advise their clients without attorney-client privilege. (*See* Opp. at 22 n.5.) But in support, he merely cites a state bar association newsletter that claims seven states have eliminated government attorney-client privilege without identifying any of those seven states or providing

B. The Charter Cannot Be "Harmonized" With The Sunshine Ordinance Provision.

Grossman's primary argument appears to be that the Court should construe the "general" language of the Charter narrowly to avoid a conflict with the more "specific" Sunshine Ordinance, citing *People v. Kennedy* (2001) 91 Cal.App.4th 288, 297. (*See* Opp. at 19-20.) But in *Kennedy*, the court examined two provisions of equal dignity (that is, two state statutory provisions) and harmonized them to avoid a conflict, as courts often do. This case, in contrast, presents the question of whether an ordinance conflicts with a charter. Thus, far more applicable are cases in which courts consider whether an inferior provision conflicts with a superior one.

For example, *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048 involved a Sunshine Ordinance provision that required disclosure of law enforcement records for investigations that had been closed. The court examined whether this provision violated state law, which provided that local legislatures may not "obstruct" a district attorney's investigatory or prosecutorial functions. (*Id.* at 1056-59 [citing Cal. Gov. Code § 25303].) The court *did not* inquire whether it should narrowly construe the superior state law provision to avoid a conflict. Instead, the *Rivero* court held that this provision of the Sunshine Ordinance (even though its language was specific and narrow) conflicted with the state statute (even though its language was general), because the state statute necessarily included protection of the closed files. (*Id.* at 1058-59.) The same approach is called for here. The Charter necessarily incorporates state-law

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any citations to state laws. (*See* Supp. RJN, Exh. F.) Regardless, in California, it is clear that the attorney-client privilege and attorney work product apply equally to the public sector and the private sector. (*See, e.g., Roberts*, 5 Cal.4th at 380-81; 70 Ops. Cal. Atty. Gen. 28, 1987 WL 247230 at *8-9 (Jan. 30, 1987).)

confidentiality protections into the relationship between the City Attorney's Office and its clients. The Court should not strain to interpret the Charter in a manner contrary to this purpose simply to salvage an inferior provision that would otherwise conflict. This is especially true here, where courts should adhere to "a liberal construction in favor of the exercise of the privilege." (*Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 344.)

The folly of Grossman's insistence that the Court should construe the Charter narrowly to avoid a conflict with a mere ordinance is undermined by any number of real-life, modern-day examples. The Equal Protection and Due Process Clauses of the U.S. Constitution merely contain "general" language, but surely Grossman would not argue that they should be construed "narrowly" to avoid conflict with the more "specific" Defense of Marriage Act, which refused federal recognition of state-sanctioned marriages by same-sex couples. (*See United States v. Windsor*, 570 U.S. __, 133 S.Ct. 2675 (Jun. 26, 2013).) The Fourth Amendment uses only general language, protecting against unreasonable searches or seizures, but presumably Grossman would not argue that this provision must be construed "narrowly" to avoid a conflict with a more "specific" federal statute authorizing the National Security Agency to eavesdrop on American citizens without a warrant. The fact that the Board of Supervisors' power under the San Francisco Charter to dispose of land for "public purposes" is not explicitly set forth (but only included as part of its general residual powers) does not mean the voters by mere ordinance may enact "specific" restrictions regarding the sale of land for such purposes. (*See City and County of San Francisco v. Patterson* (1988) 292 Cal.App.3d 95, 103). The point is that these more specific inferior enactments undermine the fundamental *purposes* of the superior general provisions, and therefore they

are invalid regardless of whether the general provisions could be construed, in the abstract, as not speaking to the question at hand.

Grossman also cites the City Attorney's Office's discussion of the Sunshine Ordinance provision in its Good Government Guide, as if to suggest that the Office has somehow conceded its consistency with the Charter. (*See* Opp. at 27.) That is wrong. The Guide merely warns clients of the existence of this provision, stating that certain legal advice may be subject to disclosure because of it. Any good lawyer would warn his clients of this possibility given the presence of the provision, but that is very different from conceding that the provision is valid.[4]

Finally, on a related note, Grossman persists in his argument that the Charter's protections can be abrogated by ordinance because state law, namely the Public Records Act, allows local governments to adopt laws that favor disclosure more than state law. (Opp. at 34.) This makes no sense. To be sure, the Public Records Act authorizes broader local disclosure laws, but those local laws must nonetheless be enacted lawfully. Nowhere does the Public Records Act seek to turn black-letter law upside down by allowing a local ordinance to trump a city charter. If San Francisco voters wish to exercise their authority under the Public Records Act to provide for more generous disclosure than contemplated by state law

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[4] Grossman further cites California Constitution article 1, section 3(b)(2) as supporting his position that the Charter cannot be interpreted to incorporate state-law protections of attorney-client privilege and attorney work product. (*See* Opp. at 15, 16, 20.) Assuming this provision even applied to local measures, nothing in the provision, or any case law examining its language, suggests that this section narrows the attorney-client privilege or attorney work product protection. In fact, this constitutional provision made no change to pre-existing law regarding public records. (*See BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750.)

or the City's Charter, they certainly may do so, but they must do so by amending the Charter.

C. The *Welfare Rights* Decision Compels A Conclusion That The Charter Protects The Privilege.

In its opening brief, the City relied heavily on the California Supreme Court's decision in *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 for the proposition that the privilege is necessarily implied in the charter provisions establishing the City Attorney's relationship with his clients. In response, Grossman simply sticks his head in the sand, making a fleeting reference to *Welfare Rights* on page 29 of his brief. But *Welfare Rights* demonstrates with clarity why the City Attorney's duties set forth by Charter section 6.102 necessarily include the privilege.

In *Welfare Rights*, the Court held that laypeople's communications with their welfare-applicant clients were necessarily intended to be privileged, even though the statute authorizing laypeople to represent applicants did not expressly mention confidentiality or privilege. Here, the substantially less controversial issue is whether a charter provision establishing the City Attorney's relationship with his clients necessarily intended to incorporate the state-law privilege and work product protections that inhere in every other attorney-client relationship in California. To interpret the City Attorney's duties as set forth by the Charter as not incorporating the privilege would require the Court to assume that the voters "intended that the only sound advice the [City Attorney] could give was, 'Don't talk to me.'" (*Welfare Rights Org.*, 33 Cal.3d at 771 n.3.)

Grossman tries to brush this aside by asserting that in *Welfare Rights* "the privilege was contextual and grounded in a specific need." (Opp. at 29.) It is not entirely clear what Grossman means by this, because the

privilege exists regardless of context and does not turn on the subject matter of the advice. (*See Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557 ["the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case"].) To the extent Grossman suggests that only *some* types of otherwise-privileged communications by the City Attorney should be deemed protected by the Charter, certainly *Welfare Rights* provides no support for that. The Court did not hold that some confidential communications between the layperson and the client are privileged. It held that any communications that fall within the representation are privileged, pure and simple.

Grossman's apparent fallback attempt to argue that the Charter confers confidentiality on only some types of communications by the City Attorney not only lacks support in the Charter itself or in *Welfare Rights*; it makes no common sense. Grossman appears to propose a distinction between matters that could involve litigation and matters of mere policymaking, ascribing to those who enacted the Charter an intent to protect the privilege for the former but not the latter. (*See* Opp. at 32.) But the line between these two is indistinct to say the least. In this very case, Grossman – someone who has relentlessly criticized and previously sued the Ethics Commission – submitted at least three memoranda to the Commission challenging the validity of its proposed regulations. (Supp. RJN, Exhs. B-D.) Indeed, he ghostwrote one of these memoranda for the Task Force. (*Id.*, Exh. D.) The memoranda argued that the proposed regulations conflicted with the Sunshine Ordinance, the Charter, and state law. (*See id.*) In a context like this, the clients have every reason to believe

that their communications with their lawyers could be used against them in litigation.

But ultimately Grossman's parsing misses the point, because the attorney-client privilege "applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." (*Roberts*, 5 Cal.4th at 371.) Attorney work product protection is also "not limited to materials prepared in anticipation of litigation."[5] (70 Ops. Cal. Atty. Gen., 1987 WL 247230 at *5.) Therefore, Grossman's apparent argument that the Charter could be interpreted to protect litigation-related communications but not policy-related communications has no basis in law, in addition to reflecting an ignorance of the fact that governmental policymaking, particularly on cutting-edge issues, often results in litigation.

In sum, *Welfare Rights* provides no basis for distinguishing between different types of attorney-client communications or considering their "context." Rather, *Welfare Rights* compels the conclusion that the Charter incorporates state-law confidentiality protections, rendering the contrary provision of the Sunshine Ordinance invalid.

D. The Charter's Explicit Requirement That The City Attorney Comply With State Law Also Establishes The Confidentiality Of Attorney-Client Communications.

As discussed in the Opening Brief, the Charter, in addition to generally establishing the relationship between the City Attorney's Office and its clients, specifies that the City Attorney's conduct is governed by

[5] Incidentally, Grossman misleadingly states that attorney work product belongs to the client, not to the attorney. (*See* Opp. at 35 n.8 [citing *Kallen v. Delug* (1984) 157 Cal.App.3d 940].) *Kallen* addresses an attorney's duty to return client files at the end of an engagement, *see id.* at 950, not the "attorney work product" addressed by the Code of Civil Procedure. The attorney – not the client – is the "exclusive holder" of the attorney work product protection. (*See, e.g., Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 279.)

state law. (*See* RJN, Exh. B [Charter § 6.100].) This protects client confidentiality as well, because under state law, the State Bar Act and the Rules of Professional Conduct govern the attorney-client relationship.

In response, Grossman argues that the applicability of these state laws and rules do not matter, because they "do not apply to communications that were not confidential in the first place." (Opp. at 25.) It is unclear what Grossman means by this. If he means that the communications at issue in this case are not the kinds of communications normally protected by state law, he is clearly wrong, as discussed in Subsection A.

Perhaps Grossman instead means to argue that the communications at issue here were "not confidential in the first place" because of the existence of the Sunshine provision. But that obviously begs the question presented by this case, because the voters cannot take away something by ordinance that they gave in the Charter. (*See Patterson*, 202 Cal.App.3d at 103 [because the Charter vested all residual powers in the Board of Supervisors, including by necessary implication the power to sell city land for a public purpose, the voters were precluded from adopting a mere ordinance limiting the circumstances in which city land could be sold].)

For the same reason, Grossman's half-hearted argument that the voters "waived" the privilege when they enacted the Sunshine Ordinance provision misses the mark. The City agrees with Grossman that the Sunshine Ordinance is best understood not as a "waiver" but as an attempt to bar assertion of the privilege in the future by the City Attorney's clients. But whether the Sunshine provision is considered a "waiver" or a "bar," the point is that voters, through Charter section 6.100 as well as the other provisions discussed herein and in the opening brief, established that the

relationship between the City Attorney's Office and its clients is protected by state-law privilege and work product doctrines. If the voters wish to change or "waive" that, they must do so by amending the Charter.

CONCLUSION

The Court should grant the petition for writ of mandate.

Dated: January 14, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,485 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 14, 2014.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On January 14, 2014, I served the following document(s):

REPLY TO OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

on the following persons at the locations specified:

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[original and three copies]
[via hand delivery]

California Supreme Court
[Submitted Electronically Through the Court Of Appeal E-Submission]

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached** or ☐ **will be filed separately with the court.**

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed January 14, 2014, at San Francisco, California.

s/Pamela Cheeseborough
Pamela Cheeseborough

Case No. A140308

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

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

Petitioners and Respondents,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent and Appellant,

ALLEN GROSSMAN,

Real Party in Interest.

Appeal from the Superior Court of San Francisco,
Case No. CPF13513221
The Honorable Ernest H. Goldsmith

SUPPLEMENTAL OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]

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I. INTRODUCTION

Pursuant to the Court's Order to Show Cause dated January 23, 2014, Real Party in Interest Allen Grossman ("Grossman") respectfully submits this brief in response to the petition by San Francisco Ethics Commission (the "Ethics Commission") and its Executive Director, John St. Croix ("St. Croix," collectively with the Ethics Commission, "Petitioners").[1]

The dispute here arises out of a proper public records request by Grossman to St. Croix, as custodian of public records for the Ethics Commission, pursuant to the California Public Records Act (Government Code sections 6250 *et seq.*, hereinafter, the "CPRA") and the San Francisco Sunshine Ordinance (San Francisco Administrative Code sections 67.1 *et seq.*, hereinafter, the "Sunshine Ordinance"). The requested records relate to the Ethics Commission's drafting of proposed regulations governing the handling of Sunshine Ordinance Task Force referrals and direct complaints filed with the Ethics Commission under the Sunshine Ordinance.

The CPRA permits a locality to "adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]" (Gov. Code, § 6253,

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[1] For the convenience of the Court, this brief incorporates background and argument from Grossman's previously filed opposition, which this brief is intended to supersede.

subd. (e).) The Sunshine Ordinance, adopted by an overwhelming majority of San Francisco voters in 1999, does exactly that, by providing greater access to San Francisco's public records and meetings. Of pertinence here, the Sunshine Ordinance provides that "[n]otwithstanding a department's legal discretion to withhold certain information under the California Public Records Act," upon request a San Francisco agency must produce "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act ... any San Francisco governmental ethics code, or this Ordinance [*i.e.*, the Sunshine Ordinance]." (San Francisco Admin. Code, § 67.24, subd. (b)(1).) (See Request for Judicial Notice in Support of Supplemental Opposition to Petition for Peremptory Writ of Mandate ("Supp. RJN"), Ex. 1.) It is undisputed that the records requested by Grossman fall within the scope of section 67.24(b)(1)(iii).

In violation of those provisions, Petitioners refused to produce all of the requested documents. In particular, they refused to produce responsive communications with the San Francisco City Attorney's Office, citing the CPRA's provision exempting attorney-client privilege and attorney work product from the provisions of that statute. They were not entitled to withhold on those bases. The Sunshine Act is absolutely clear: a San Francisco agency *must* produce records falling within the categories specified in section 67.24(b)(1) *even if* the agency otherwise would have

"legal discretion" to withhold them. Thus, even if a city agency might otherwise have the right to withhold attorney-client communications or attorney work product, the Sunshine Ordinance prohibits non-disclosure on those bases when the records sought are advice concerning the Ethics Code or the Sunshine Ordinance itself.

Petitioners do not dispute that on its face, section 67.24(b)(1)(iii) compels the production of the public records in dispute. Instead—though they are a city agency and official—they challenge the validity of section 67.24(b)(1)(iii). They contend that because the Charter of San Francisco City and County ("City Charter") appoints the City Attorney as counsel for San Francisco agencies and officials, any municipal law limiting the confidentiality of otherwise-privileged communications between the City Attorney and city agencies and officials is necessarily invalid. The City Charter says nothing of the sort, and is completely silent as to the attorney-client privilege. It certainly places no limitations on the city voters' power to broaden public access to public records, a power expressly vested in municipalities by the CPRA.

Petitioners' position rests on the erroneous notion that the City Charter's appointment of the City Attorney, and its mandate that the City Attorney carry out his or her duties in conformance with the professional obligations applicable to all California attorneys, are fundamentally irreconcilable with the Sunshine Ordinance's requirement that advice on

certain narrowly defined topics remain publicly accessible. That novel invalidation theory fails both legally and as a matter of basic logic. Not all communications between an attorney and his or her client are confidential; those that were never confidential in the first place are not protected by privilege. An attorney may have an obligation to protect confidential communications with a client, but that does not transmute non-confidential communications into privileged ones. Government attorneys in this state are regularly called on to provide advice to their clients in public; doing so does not violate those attorneys' duty of confidentiality. Petitioners' foundational premise that the City Attorney cannot fulfill his duties while conforming with section 67.24(b)(1)(iii) is simply wrong.

Especially in light of California's constitutional mandate (itself established by the state's voters by Proposition 59) that laws be construed in favor of the public's right of access, the Court should not take the extreme step of invalidating this important provision of the Sunshine Ordinance. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

II. FACTUAL BACKGROUND

A. THE PARTIES

Grossman is a longtime San Francisco resident and an advocate for open government. For many years, he has worked with other open

government advocates to push for full implementation of the Sunshine Ordinance and greater access to public records in San Francisco. The Ethics Commission is organized under Article XV of the City Charter and is a local agency within the meaning of Government Code section 6252(b) of the CPRA. The Ethics Commission consists of five members, who appoint an Executive Director, who serves as the Commission's chief executive. (City Charter, §§ 15.100, 15.101.) (See Supp. RJN, Ex. 2.) Petitioner John St. Croix ("St. Croix") is, and at all relevant times has been, the Ethics Commission's Executive Director.

B. THE SUNSHINE ORDINANCE AND ETHICS COMMISSION REGULATIONS

Pursuant to CPRA Government Code section 6253(e), the voters of San Francisco initiated and adopted the Sunshine Ordinance in November 1999; it took effect in January 2000. Among other things, the Sunshine Ordinance enhances San Franciscans' rights of access to public records and public meetings. It also established the Sunshine Ordinance Task Force to implement and carry out certain aspects of the law and the CPRA.

In addition to its substantive provisions, the Sunshine Ordinance sets out the process for enforcement of that law within San Francisco government. The Ethics Commission plays a critical role in that enforcement regime. For example, the Sunshine Ordinance specifically authorizes persons to enforce that law by instituting proceedings "before

the Ethics Commission if enforcement action is not taken by a city or state official 40 days after a complaint is filed." (San Francisco Admin. Code, § 67.35, subd. (d)) (See Supp. RJN, Ex. 1.) It also instructs that "[c]omplaints involving allegations of willful violations of this ordinance, the Brown Act or the Public Records Act by elected officials or department heads of the City and County of San Francisco shall be handled by the Ethics Commission." (*Id.* at § 67.34.)

Further, because the Sunshine Ordinance Task Force has no independent enforcement power, the Sunshine Ordinance provides that the Sunshine Ordinance Task Force "shall make referrals to a municipal office with enforcement power under this ordinance ... whenever it concludes that any person has violated any provisions of this ordinance or the Acts." (San Francisco Admin. Code, § 67.30, subd. (c).) (See Supp. RJN, Ex. 1.) The Ethics Commission is the only such office, and is specifically given the power to enforce willful violations of the Sunshine Ordinance. (*Id.* § 67.35, subd. (d).) (See *Id.*) In addition, the 1996 voter-adopted City Charter authorizes the Ethics Commission to adopt "rules and regulations relating to carrying out the purposes and provisions of ordinances regarding open meetings and public records." (City Charter, § 15.102.) (See Supp. RJN, Ex. 2.)

Despite that important voter-mandated role, the Ethics Commission has failed to enforce the Sunshine Ordinance. Since 2004, when the

Sunshine Ordinance Task Force first referred a failure by a City respondent to comply with its order to disclose public records, it has referred almost 40 such cases to the Ethics Commission for enforcement. In each instance, the Ethics Commission declined to enforce the Order and dismissed the case. Grossman and other Sunshine Ordinance advocates have long criticized that lack of action by the Ethics Commission, as has a San Francisco civil grand jury in its 2010-2011 report, "San Francisco's Ethics Commission: The Sleeping Watch Dog."[2]

A major point of contention was the Ethics Commission's reliance on inapposite regulations in its investigation and enforcement of Sunshine Ordinance referrals. From 2000, when the Sunshine Ordinance became effective, until January 2013, the Ethics Commission had not adopted any specific regulations setting out the procedures for enforcement of Sunshine Ordinance violations. Instead, the Ethics Commission took the position that previously adopted regulations ("Ethics Commission Regulations for Investigations and Enforcement Proceedings") governing other types of investigations should also be applied to Sunshine Ordinance referrals. Those regulations, however, were adopted under a City Charter provision for Ethics Commission investigations and enforcements "relating to

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[2] Available online at http://www.sfcourts.org/Modules/ShowDocument.aspx?documentid=2860.

campaign finance, lobbying, conflicts of interest and governmental ethics." (City Charter, § 15.102; Appendix C, § C3.699-13.) (See Supp. RJN, Ex.2.) Grossman and others argued to the Ethics Commission that those regulations did not govern its Sunshine Ordinance enforcement actions, and that the Ethics Commission needed new separate regulations tailored to the investigation and enforcement of Sunshine Ordinance actions.

In 2009, the Ethics Commission recognized the need for Sunshine Ordinance-specific regulations, and its staff began the process of drafting separate regulations governing (a) the enforcement of Sunshine Ordinance Task Force referrals of its Orders and (b) complaints filed directly with the Ethics Commission regarding willful violations of the Sunshine Ordinance. The development of those regulations extended over three years and, in the end, new regulations were not put in place until January 2013. The first drafts of the new regulations proposed by the Ethics Commission's staff merely would have modified the existing Ethics Commission Regulations for Investigations and Enforcement Proceedings to accommodate Sunshine Ordinance matters. Later, when it became evident that modification would not be workable, the Ethics Commission took a different approach and its staff began drafting stand-alone regulations, which, in their final form, were called "Ethics Commission Regulations for Violations of the Sunshine Ordinance."

For most of that long process, the Ethics Commission staff shared

drafts of the new regulations with the Sunshine Ordinance Task Force, which provided comments and suggestions prior to or in connection with consideration of the draft by the Ethics Commission itself. There were also three joint meetings between the Ethics Commission and members of the Sunshine Ordinance Task Force Committee with responsibility for reviewing the proposed regulations. That collaboration provided the Ethics Commission access to the expertise of the Sunshine Ordinance Task Force, and allowed the Sunshine Ordinance Task Force input into the implementation of the Ethics Commission's important role in enforcement of its referrals.

In late 2012, for unknown reasons, that changed. On September 14, 2012, without prior notice to the Sunshine Ordinance Task Force or its members, the Ethics Commission published notice that its staff had submitted another revised draft of the proposed regulations for consideration at the Ethics Commission's September 24, 2012 meeting. The lack of prior notice deprived the Sunshine Ordinance Task Force of the opportunity to provide input to the Ethics Commission or its staff. Moreover, because the Sunshine Ordinance Task Force did not have a scheduled meeting before the Ethics Commission was set to consider the proposed regulations, it was prevented from taking official action to review or comment on them.

Grossman and other advocates appeared at the Ethics Commission's

September 24, 2012 meeting and objected to the Sunshine Ordinance Task Force's exclusion from the process, without avail.

C. GROSSMAN'S RECORD REQUEST

In an effort to seek further information about the Ethics Commission's proposed draft for its September 2012 meeting and its failure to provide that draft to the Sunshine Ordinance Task Force for review, on October 3, 2012, Grossman submitted to St. Croix, in his capacity as Executive Director of the Ethics Commission, a public records request pursuant to the CPRA and Sunshine Ordinance seeking copies of certain public records relating to the Ethics Commission's draft regulations. Specifically, Grossman requested:

> [C]opies of any and all public records ... in the custody or control of, maintained by or available to you, the Ethics Commission (Commission), any staff member or any Commissioner in connection with or with reference to:
>
> (1) All prior drafts and final versions of (a) the September 14, 2012 draft of the Ethics Commission's regulations governing the handling of complaints related to alleged violations of the Sunshine Ordinance and referrals from the Sunshine Ordinance Task Force ("Draft Amendments") and (b) the September 14, 2012 staff report ("Staff Report") referred to in the [September 14, 2012] Commission Notice [and]
>
> (2) the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulations and Staff Report ....

(Exhibits in Support of Petition for Writ of Mandate and for Prohibition

("Petition Exhibits"), p. 19.)

On October 12, 2012, the Ethics Commission responded to Grossman's request and produced 123 electronic files, six of which were partially redacted. However, it informed Grossman that additional records were being withheld:

> We are withholding other documents in their entirety, pursuant to California Government Code section 6254(k); California Evidence Code sections 952, 954; and California Code of Civil Procedure section 2018.030.

(Petition Exhibits, pp. 22-23.) The withheld public records were not identified in any way, including by category, and the response included no information about the number of records withheld. The statutory sections cited in the Ethics Commission's letter define the attorney-client privilege (Evid. Code, §§ 952, 954), and the attorney work product protection (Code Civ. Proc., § 2018.030). The CPRA provision cited, Government Code section 6254(k), is not a privilege or exemption in itself but incorporates into the CPRA exceptions privileges, such as the above two, set out elsewhere in state or federal law.

On October 21, 2012, Grossman responded by letter challenging the Ethics Commission's blanket assertion of privilege in support of its refusal to produce the withheld records. (Petition Exhibits, pp. 25-28.) Having received no response, he sent a follow-up email on November 1, 2012 requesting attention to his previous inquiry. (*Id.*, p. 30.) On November 2,

2012, St. Croix answered Grossman's email, stating that all responsive documents had been produced: "You have already received all documents responsive to your request." (*Id.*, p. 32.)

D. GROSSMAN'S COMPLAINT AND THE SUNSHINE ORDINANCE TASK FORCE ORDER

Faced with St. Croix's refusal to produce the requested public records, or to provide the required written justification for his assertion of privilege, Grossman filed a complaint against St. Croix with the Sunshine Ordinance Task Force on November 19, 2012. (Petition Exhibits, pp. 34-48.)

St. Croix responded to the Complaint by letter dated December 6, 2012. (Petition Exhibits, pp. 50-53.) In that response, St. Croix again claimed the attorney-client privilege and attorney work product exemptions, and asserted that his bare citation to the code sections setting out those privileges was sufficient to satisfy compliance with the Sunshine Ordinance's requirements for a written justification for any withholding. The Sunshine Ordinance Task Force conducted a hearing on the complaint at its June 5, 2013 public meeting, at which both Grossman and St. Croix appeared, spoke, and responded to questions from Task Force members. St. Croix testified that he did not know the number of records withheld, that he did not personally review them, and that he could not testify regarding which of those claimed exemptions would apply to any or which

withheld record.

In a written Order of Determination dated June 24, 2013, the Sunshine Ordinance Task Force held that St. Croix violated Sections 67.21 (b) and 67.24(b)(1) of the Sunshine Ordinance by improperly withholding records subject to disclosure, and ordered him to produce them to Grossman. (Petition Exhibits, pp. 55-56.) St. Croix did not comply with that order. (*Id.*, p. 9, line 20.)

On November 21, 2013, the Sunshine Ordinance Task Force referred Mr. St. Croix's non-compliance with its June 24, 2013 Order to the Ethics Commission. To date, the Ethics Commission has not acted on it. (See Supp. RJN, Ex. 3 [Agendas and minutes from Ethics Commission meetings from June 24, 2013 through present].)

During the pendency of this dispute, at its November 2012 meeting, the Ethics Commission adopted the Ethics Commission Regulations for Violations of the Sunshine Ordinance. The regulations took effect January 25, 2013.

E. THE SUPERIOR COURT'S ORDER

On September 18, 2013, Grossman filed a verified petition for a writ of mandate ("Petition") in the Superior Court below seeking an order compelling Petitioners to produce the public records he had requested nearly a year earlier. (Petition Exhibits, p. 1.) Petitioners filed a written opposition, in which they admitted that four documents were improperly

withheld. (*Id.*, p. 104, ¶ 6.) Petitioners' opposition also specified, for the first time, that 24 documents had been withheld on the basis of attorney-client privilege and the attorney work product doctrine, consisting of 15 requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations, and nine documents allegedly including legal advice from the City Attorney's Office in response. (*Id.*, p. 104 ¶ 7.)

The matter came before the Superior Court for hearing on October 25, 2013. On October 29, 2013, the court issued the order requested by Grossman, requiring Petitioners to produce the requested documents. (Petition Exhibits, pp. 204-206.) Petitioners did not produce the records. On November 22, 2013, the City filed this Petition for Peremptory Writ of Mandate and/or Prohibition under California Government Code section 6259(c), along with a Motion to Stay under California Government Code section 6259(c).

III. ARGUMENT

A. CALIFORNIA LAW PROVIDES FOR BROAD PUBLIC ACCESS TO GOVERNMENT RECORDS

The California Constitution enshrines a broad right of public access to government records:

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open

to public scrutiny.

(Cal. Const., art. I, § 3.) In the CPRA, the Legislature called public access to government records a "fundamental and necessary right":

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

(Gov. Code, § 6250.) Therefore, the CPRA provides that "every person has a right to inspect any public record." (Gov. Code, § 6253.)

"Public records" are broadly defined to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (d).) Section 6253(b) of the CPRA requires disclosure of non-exempt public records upon request:

> Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov. Code, § 6253(b).)

B. AS AUTHORIZED BY THE CPRA, THE VOTERS OF SAN FRANCISCO ELECTED TO BROADEN ACCESS TO PUBLIC RECORDS

Though the CPRA provides for certain exemptions to disclosure, the California Constitution mandates that any such limitation be construed narrowly, in favor of public access:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 312-13 [reaffirming mandate that exemptions to public disclosure be construed narrowly].) Courts have called those narrow statutory exceptions to that complete right of access "islands of privacy upon the broad seas of enforced disclosure." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653 [117 Cal.Rptr. 106].)

Binding on municipalities and local agencies, the CPRA's right of access operates as a floor, not a ceiling—the law expressly authorizes any local government to "adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set out in [the CPRA.]" (Gov. Code, § 6253, subd. (e).) The

provision at issue here, Sunshine Ordinance section 67.24(b)(1)(iii), is one that provides "greater access." As expressly authorized by the CPRA, the San Francisco voters opted to shrink one of the islands of privacy by precluding San Francisco agencies from invoking certain statutory exceptions for public records falling within certain narrowly defined subject areas, namely, the laws governing ethics and public access. Through the Sunshine Ordinance, the voters of San Francisco provided "enhanced rights of public access to information and records" with respect to "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act, any San Francisco governmental ethics code, or [the Sunshine] Ordinance." (San Francisco Admin. Code, § 67.24, subd. (b)(1)(iii)) (See Supp. RJN, Ex. 1.)[3]

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[3] The Sunshine Ordinance also empowers the Sunshine Ordinance Task Force to determine when there has been a violation of the Ordinance, and to issue orders requiring compliance. (San Francisco Admin. Code, § 67.21, subd. (e).) (See Supp. RJN, Ex. 2.) Pursuant to that authority as a quasi-judicial body, the Sunshine Ordinance Task Force June 24, 2013 Order of Determination finding a violation of Sunshine Ordinance sections 67.21(b) and 67.24(b)(1), and ordering St. Croix to produce the requested records should be given deference. To do otherwise would undermine the complaint, hearing and referral process of the Sunshine Ordinance, which was intended to give requesting parties an efficient process for resolution of public records complaints. Deference is particularly warranted here, where Petitioners did not raise the defenses on which they now rely until after Grossman filed a mandamus action in the Superior Court. Toleration of

C. THERE IS NO CONFLICT BETWEEN THE CITY CHARTER AND THE SUNSHINE ORDINANCE

Petitioners concede that the records requested by Grossman fall within the scope of Sunshine Ordinance section 67.24(b)(1)(iii). They argue, however, that the provision is invalid because it conflicts with the City Charter sections 6.100 and 6.102. (Petition at p. 28.) There is no conflict.

City Charter section 6.100 merely designates the City Attorney as counsel and provides that he or she will have "such additional powers and duties prescribed by state laws for their respective office." (See Supp. RJN, Ex. 2.) Section 6.102 sets out certain duties for the City Attorney, including "provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County." (See Supp. RJN, Ex. 2.) Section 67.24(b)(1)(iii) requires that certain categories of public records—those relating to public records laws

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such sandbagging would encourage dragged-out litigation and further encumber the judicial system. Petitioners call the Task Force merely "advisory," but the Sunshine Ordinance clearly empowers the Task Force to "order" production of public records, providing that enforcement of the order must be undertaken by the district attorney or an agency with independent enforcement power. (San Francisco Admin. Code, § 67.21, subd. (e).) (See Supp. RJN, Ex. 1.) The section cited by Petitioners describes the Task Force's *separate* responsibility for providing advice to city agencies on Sunshine Ordinance Matters. (San Francisco Admin. Code § 67.30, subd. (c).) (See Supp. RJN, Ex. 1.)

themselves—be publicly accessible. (See Supp. RJN, Ex. 1.) The two laws can be read in perfect harmony. The City Attorney may carry out his or her duties, but when communicating or providing advice about public records laws, must do so in a manner that is publicly accessible manner.

The City Charter is silent with respect to the confidentiality of communications with the City Attorney, and nowhere mentions the attorney-client privilege. None of its provisions mandate that communications with the City Attorney take place within the boundaries of privilege. Petitioners would have the Court read into that silence a blanket requirement that all such communications are confidential, and in doing so *create* a conflict with the express provisions of the Sunshine Ordinance, which was adopted by the same electorate a few years later.[4] The Court should not strain to find a conflict where none exists; to the contrary, it

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[4] The Charter specifically contemplates otherwise by including a "Right to Know" provision. City Charter section 2.108 provides that "The Board of Supervisors shall adopt and maintain a Sunshine Ordinance to liberally provide for the public's access to their governmental meetings, documents and records." (See Supp. RJN, Ex. 2.) The Sunshine Ordinance, originally adopted in 1993, was amended in 1999 by the voters, via Proposition G to provide access to documents and records, as recognized by the City Charter. The Voter Information Pamphlet for the proposition specifically stated that adoption of the amendment would mean that the "City Attorney could not give confidential advice to City officers or employees on matters concerning government ethics, public records and open meeting laws." (See City and County of San Francisco Voter Information Pamphlet and Sample Ballot (11/2/99) <http://sfpl.org/pdf/main/gic/elections/November2_1999short.pdf [as of March 7, 2014].)

should strive for interpretations of statutes that *avoid* conflict and do not render laws invalid. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 297 [110 Cal.Rptr.2d 203] ["It is our duty when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between different statutory provisions, even if the provisions appear in different codes" (citations omitted)].)[5]

Not only would such a construction bring the two municipal provisions into conflict, it would *narrow* Petitioners' obligation to allow public access to records. The California Constitution, obviously superior to any local law, expressly requires that "[a] statute...shall be broadly

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[5] Because there is no conflict, *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161 [36 Cal.Rptr.2d 521] is inapposite. In that case, the court examined whether a city charter precluded the city from implementing a program requiring bidders to engage in certain conduct as part of the competitive bid process where the charter contained no provision expressly allowing this program. In determining whether the implementation of the program conflicted with the charter, the court first "construe[d] the charter in the same manner as [it] would a statute...to ascertain and effectuate legislative intent....look[ing] first to the language of the charter, giv[ing] effect to its plain meaning..." (*Id.* at 171-172.) The court explained that since the charter did not expressly authorize or forbid the city from adopting the program, "the validity...must be ascertained with reference to the purpose" of the program." (*Id.* at 173.) The court found that there was no conflict because the program was compatible with the charter's provisions regarding bidding. Here, the purpose of the Sunshine Ordinance is not incompatible with the Charter's designation of privilege. Nothing in the Charter indicates that *all* communications between the City Attorney and his or her clients are necessarily privileged. In fact, it provides otherwise by recognizing the purpose of the Sunshine Ordinance. (See, supra, note 4.) Reading the Charter to contain such an implication does not give effect to its plain meaning.

construed if it furthers people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2); see also *Sander*, *supra*, 58 Cal.4th at 312-13.)[6]

D. THERE IS NO CONFLICT BECAUSE ATTORNEY-CLIENT COMMUNICATIONS ARE NOT NECESSARILY CONFIDENTIAL

Petitioners' argument rests on the mistaken premise that *all* communications with an attorney are *necessarily* confidential. They contend, "Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice." (Petition at p. 21.) However, it is plain that communications with attorneys, including advice and requests for advice, are very often non-confidential.

That is particularly apparent for public sector lawyers, who are subject to mandates that *require* them to provide certain types of advice in settings that must be accessible to the public. For example, this state's Brown Act mandates that meetings of local legislative and other bodies be conducted in the open, including any communications with counsel not

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[6] Moreover, the Sunshine Ordinance specifically requires a narrow reading of the City Charter. (See San Francisco Admin. Code § 67.1 ["Only in rare and unusual circumstances does the public benefit from allowing the business of government to be conducted in secret, and those circumstances should be carefully and narrowly defined to prevent public officials from abusing their authority."].) (See Supp. RJN, Ex. 1.)

related to pending litigation. (Gov. Code, § 54956.9.) Even when the purpose of a local legislative body's communications is "to confer with, or receive advice from ... legal counsel," the body's sessions may go into closed session only if "open session concerning those matters would prejudice the disposition of the local agency in the litigation." (*Id.*) In other words, the Brown Act mandates that *most* attorney-client communications with a local legislative body take place in *open* session. When the advice being sought or provided by the attorney does not concern pending litigation, that attorney-client communication must be in public. (See, e.g., *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 [214 Cal.Rptr. 561] [no exemption where "purpose of the communications with the attorney is a *legislative* commitment"].)[7]

Petitioners misconstrue the significance of Grossman's reference to the above provisions of the Brown Act. This case is not about the boundaries of the Brown Act, nor the distinction it draws between communications relating to pending litigation and other advice. The point of Grossman's reference to the above provisions is to demonstrate that confidentiality of attorney-client communications is not fundamentally

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[7] The provision is sometimes referred to as a legislative abrogation of the attorney-client privileges. (*Shapiro v. Bd. of Directors of Ctr. City Dev. Corp.* (2005) 134 Cal.App.4th 170, 174 [35 Cal.Rptr.3d 826].)

necessary to the provision of legal advice, and illustrative of the fact that California attorneys have decades of experience providing effective legal advice to clients in circumstances where the law requires that the advice remain publicly accessible. In San Francisco, the City Attorney routinely provides advice to the Board of Supervisors, the Ethics Commission, and other city boards in open session, as do lawyers representing every other California municipality. The Brown Act's public meeting requirements also demonstrate that the California Legislature, which is the sole source of the state's attorney-client privilege and attorney work product protection, shares the view that the effective provision of legal advice to a municipal body does not *require* confidentiality.

The practical compatibility of the attorney-client relationship and open access for the public is further illustrated by the fact that other states have gone much further in eliminating privilege for public entities. In *Neu v. Miami Herald Pub Co.* (Fla. 1985) 462 So.2d 821, 823, for example, the Florida Supreme Court held that the state's Sunshine Law mandated access to a meeting between a city council and the city attorney for the purpose of discussing the settlement of pending litigation in which the city was a party. It expressly rejected the contention that the statutory provision providing for the confidentiality of attorney-client communications mandated a different result, holding that "[t]he Sunshine Law explicitly provides for public meetings; communications at such public meetings are not

confidential and no attorney/client privilege can arise therefrom." (*Id.* at 824.) (See also *City of North Miami v. Miami Herald Pub. Co.* (Fla. 1985) 468 So.2d 218, 219) [no exemption under Florida's Public Records Act for access to an attorney's written advice]; *Arkansas Highway and Transp. Dept. v. Hope Brick Works, Inc.* (1988) 294 Ark. 490, 495 [744 S.W.2d 711, 714] [explaining that attorney-client privilege is not an exemption to the Arkansas's Freedom of Information Act].)[8]

E. A LAWYER'S OBLIGATION TO MAINTAIN CONFIDENCES DOES NOT CONVERT NON-CONFIDENTIAL COMMUNICATIONS TO CONFIDENTIAL ONES

Petitioners erroneously attempt to bootstrap the City Charter's general statement that the City Attorney is "subject to the 'duties prescribed by state laws'" (Petition at 26) into a mandate that trumps the Sunshine Ordinance. It does not.

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[8] Academic studies agree that an attorney's representation of a public entity client can be fulfilled in an environment where the attorney-client privilege has been limited or altogether eliminated. The author of the leading treatise on the attorney-client privilege wrote, "Under the logic of open meetings, sunshine, and freedom of information acts, seven states" have abolished the attorney-client privilege altogether. (Paul R. Rice, *The Government's Attorney-Client Privilege: Should It Have One?*, Pub. Couns. Newsletter, (Md. St. B. Ass'n, Baltimore, MD), http://www.acprivilege.com/articles/acgov.md.htm [cited in Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys* (2007) 20 Geo. J. Legal Ethics 163, 183].) He notes, "Significantly, there have so far been no reported adverse consequences from this action." (*Id.*)

Petitioners cite the State Bar Act, which requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client," (Cal. Bus. & Prof. Code, § 6068, subd. (e)(1)); Rule of Professional Conduct 3-100 [prohibiting disclosure of client confidences].) But neither section answers the antecedent question of whether information is confidential in the first place. Because Sunshine Ordinance section 67.24(b) requires that advice on the specified topics be publicly accessible, that advice is never confidential from the outset. A lawyer cannot maintain in confidence information that is not confidential, and is under no obligation to do so. The Court should reject Petitioners' invitation to over-read a requirement to keep confidences into an expansion of privilege to cover non-confidential information.[9]

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[9] The City Attorney's own "Good Government Guide" recognizes:

> [L]egal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a public records request. Accordingly, the practice of the City Attorney's Office is to inform any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

(See Request for Judicial Notice in Support of Opposition to Petition for Peremptory Writ of Mandate, filed 12/23/13 ("RJN"), Ex. 4. at pp.22-23.)

In addition, Petitioner's logic is backward. Petitioners are not lawyers, they are clients; Grossman's requests were not to the City Attorney, but to a city agency and official. What an attorney is or is not required to do says nothing about his or her client's separate legal obligation to produce information. Statutory or regulatory provisions governing an attorney's duty of confidentiality have no bearing on the principal's duties. The arguments made by Petitioners here have been rejected by other courts addressing similar claims. For example, in *Dist. Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough* (1985) 395 Mass. 629, 633–34 [481 N.E.2d 1128, 1131] the Massachusetts Supreme Judicial Council (the Commonwealth's highest court) ruled that a municipal board could not invoke the attorney-client privilege to create an exception to the state's open meeting law: "We view § 23B as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." (*Id.* at 1131.) The Court expressly held that the law did not require attorneys to violate their ethical duties because the "attorney-client privilege is the client's privilege to waive," meaning that if "a client

chooses to waive the privilege of confidentiality, the attorney is under no further ethical obligation to keep the communications secret." (*Ibid.*)[10]

F. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT THE SUNSHINE ORDINANCE IMPERMISSIBLY INTERFERES WITH THE CITY ATTORNEY'S DUTIES

Petitioners further contend that Section 67.24 (b)(1)(iii) is at odds with the City Charter because it prevents the City Attorney from carrying out his duties as attorney for the City and its agencies. Those "interference" arguments are grossly exaggerated, and wholly unfounded. Section 67.24 (b)(1)(iii) merely provides that communications on certain

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[10] Petitioners over-read the cases they cite in support of the proposition that the Court should infer from the City Charter the voters' intent to require that all communications between the San Francisco officials and the City Attorney remain confidential. (See Petition at p. 21 (citing *Johnston v. Baker* (1914) 167 Cal. 260, 264 [139 P. 86] and *Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615]).) In *Johnston*, the court indicated that a statute authorizing the court in its discretion to dismiss an action two years after an answer was filed necessarily implied that a court could order dismissal at any time prior to the expiration of two years as well. In *Currieri*, the city charter provided that the probation period for a city employee would not exceed one year before the employee's appointment becomes permanent, "carry[ing] with [it] the necessary implication that the probationary employee, although he may be discharged summarily at any time during the probationary year, thereafter automatically attains a permanent status." (*Currieri, supra*, at p. 1001.) In both *Johnston* and *Currieri* inferences drawn flowed logically from the statutes. Here, in contrast, an unwritten mandate that all attorney-client communications remain confidential cannot be logically deduced from the mere appointment of the City Attorney. Of course, when the voters actually spoke they did so directly and clearly in the form of the express words of the Sunshine Ordinance.

subject matters, namely those pertaining to open government laws, remain accessible to the public. It is not a reorganization of the relationship between the City Attorney and his clients, nor is openness fundamentally incompatible with the attorney-client privilege.[11]

Absolutely nothing in the factual record supports Petitioners' bare assertion that section 67.24 (b)(1)(iii) would impermissibly interfere with the carrying out of the City Attorney's duties. In the trial court Petitioners offered no evidence that would show that a minimal requirement that limited categories of communications remain publicly accessible would *actually* prevent the City Attorney from carrying out his duties, and as a result can point to no facts in the record to support their position.

Instead, Petitioners rely on quotations from cases extolling the virtue of confidentiality in the attorney-client relationship. (See Petition at pp. 22-23 (citing *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [86 Cal.Rptr.2d 816, 980 P.2d 371]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1207 [40 Cal.Rptr.2d 456,

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[11] San Francisco Administrative Code section 67.24 contains other provisions precluding San Francisco agencies from asserting CPRA exemptions that have not been challenged by the City. For example, Section 67.24(c) allows disclosure of a broad range of personnel information, Section 67.24(h) precludes assertion of the deliberative process privilege, and Section 67.24(g) precludes reliance on the CPRA's "catch-all" provision. (See Supp. RJN, Ex. 1.) To Grossman's awareness, those provisions have not been attacked.

892 P.2d 1199]; *Hunt v. Blackburn* (1888) 128 U.S. 464, 470 [9 S.Ct. 125, 32 L.Ed. 488]).) Precedent acknowledging the value of confidentiality in the attorney-client relationship does not, however, provide a basis for defeating the lines drawn by the voters establishing which of their elected officials' communications should and should not remain confidential. *Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51 [62 Cal.Rptr. 819] warns against exactly that overextension, holding that while government officials had an interest in being able to communicate confidentially with attorneys, that should not be construed to allow a broad (and limitless) assertion of privilege to defeat specific mandates that public information remain available to the public:

> Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash.

(*Sacramento Newspaper Guild, supra*, 255 Cal.App.2d at p. 58.) The fact that confidentiality can play an important role in the effective provision of legal representation is not disputed, but also insufficient to support the broad proposition that confidentiality is an essential prerequisite to legal representation. Whatever the virtues of confidentiality in the attorney-

client relationship, there is no overarching mandate that *every* communication between a client and his or her attorney be confidential.

G. PETITIONERS' INAPPOSITE CASES DO NOT SUPPORT THEIR POSITION

Petitioners place heavy reliance on *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 [20 Cal.Rptr.2d 330, 853 P.2d 496], erroneously arguing that in that case "the California Supreme Court rejected an argument similar to Grossman's." (Petition at p. 24.) The *Roberts* Court never considered the issues raised here, and the case has no bearing on these facts. In *Roberts*, the Supreme Court considered plaintiff's contention that the Brown Act's open meeting provision, which expressly abrogated attorney-client privilege for oral communications, also mandated production of written communications pursuant to a CPRA request. Rejecting that position, the Court stated: "We see nothing in the legislative history of the amendment suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it intended to bring written communications from counsel to governing body within the scope of the Brown Act's open meeting requirements." (*Roberts, supra*, at 377.) The Court declined to find abrogation by implication or to narrow the privilege on its own authority.

Neither the holding of the case nor its reasoning apply here. *Roberts* clarifies that the Brown Act does not limit the CPRA's exemption for

written communications covered by the attorney-client privilege. The scope of disclosure mandated by the CPRA is not directly at issue here, but rather the scope of disclosure required by the Sunshine Ordinance—again, a local law enacted pursuant to the CPRA's provision allowing an expansion of rights to public records. The Sunshine Ordinance recognizes that it broadens access, and expressly states that the types of records at issue must be produced "*[n]otwithstanding* a department's legal discretion to withhold certain information under the California Public Records Act." (San Francisco Admin. Code, § 67.24 (emphasis added).) (See Supp. RJN, Ex. 1.) Thus, while *Roberts* may provide that the records at issue here need not be produced under the CPRA, the Sunshine Ordinance directly states that they must be.

Similarly, *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766 [190 Cal.Rptr. 919, 661 P.2d] answers a question not asked here. In that case, the Supreme Court held that clients in welfare proceedings were entitled to privilege even though their representatives were not attorneys. Petitioners argue that because the Court found that the establishment of the relationship implied the creation of a privilege, that the appointment of the City Attorney to act for San Francisco agencies must necessarily include a mandate that communications between them be privileged. But there is no question that the relationship between a municipal attorney and a client agency or official is of the type that may give rise to privilege. The issue

here is not whether attorney-client communications are entitled to privileged generally, but whether they are *always* or *necessarily* confidential. *Welfare Rights* provides no guidance to answering that question.

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

The premise that the City Attorney cannot carry out his duties if his client may be under an obligation to make those communications public is simply wrong, and wholly incompatible with the California Legislature's judgment in the Brown Act context that an attorney's advice to local bodies *should* be carried out in public. The subject matter of Grossman's request epitomizes the type of advice that does not depend on confidentiality. He sought drafts and final versions of the Ethics Commission's regulations governing the handling of Sunshine Ordinance matters, the associated staff report, and records relating to the "preparation, review, revision and distribution" of the drafts and staff report. The drafting of procedural regulations is akin to a legislative function—different members of the public may have different views about what the procedures should look like, but the process is fundamentally non-adversarial. No unfair advantage would be conferred by giving the public an insight into the City Attorney's views on different versions. Notably, at the most recent Ethics Commission meeting, the Deputy City Attorney provided legal advice in

open session on further proposed changes to the Sunshine Ordinance regulations at issue.

Petitioners argue that "the abrogation of the privilege significantly impedes the City Attorney's function." (Petition at p. 30.) Petitioners recite a parade of horribles that might ensue if litigation adversaries could attack the attorney-client privilege through Sunshine Act or CPRA requests. Whatever justification might be found for limiting disclosure in the context of active litigation, those admittedly trickier circumstances are not found here. The drafting of regulations is a process that should be open, and the provision of candid, honest, well-reasoned and complete legal advice in connection with that process is not impeded by disclosure. There is no reason to believe the questions to the City Attorney or his answers would be any different regardless of whether communications were public or private. The Court need not reach the issue of whether a litigation exception should be read into the law, and need only apply the law as written.[12]

Petitioners cite *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684 [52 Cal.Rptr.2d 161], a case where

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[12] Petitioners erroneously contend that Grossman is advocating that the Court draw a distinction between communications relating to active litigation and those that are not. To the contrary, he is arguing that the Court need not address a potential exemption based on facts not before it.

the court held that a city council could not impair the city attorney's charter duties through a budget ordinance and that only voters could change the city attorney's duties by amending the city's charter, to argue that the San Francisco City Charter controls in this case. Here, however, the Sunshine Ordinance did not constitute a change to the city attorney's *duties*. It merely requires that a certain category of documents be made available for public review, taking those documents out of the potential realm of privilege. That does not conflict with any duty set out in the City Charter, as the Charter does not require or mandate that all communications between an attorney and client be privileged and confidential in the first place.

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

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

Whatever difficulty a municipal lawyer might have in ascertaining who holds the power to waive the City's privilege dissolves when the voters speak through the ballot box. The California Constitution states: "All political power is inherent in the people." (Cal. Const., art. II, § 1.) The San Francisco City Charter grants plenary legislative power through

direct action by the voters, providing that "the voters of the City and County shall have the power to enact initiatives and the power to nullify acts or measure involving legislative matters by referendum." (City Charter, §14.100.) (See Supp. RJN, Ex. 2.) The Sunshine Ordinance was a valid and proper exercise of that authority.

In addition, as discussed above, local enactments like Sunshine Ordinance section 67.24 (b)(1)(iii) are expressly authorized by the CPRA. (Gov. Code, § 6253, subd. (e).) It is indisputable that state law supersedes local law. (*Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303, 705 P.2d 876] [("If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."].) Whatever the hierarchical relationship between a general provision of the City Charter and a detailed, specific enactment by the voters directly, the fact that the pertinent section here was authorized by express state law renders the debate of no significance.

Again, privilege is the wrong frame for this analysis because the voters' directive here is not to the *attorney*, but to the city officials who work for and on behalf of the voters. It may be that the City Attorney is bound not to disclose privileged information, and to act zealously on behalf of his clients, but that says nothing about whether those clients may choose to give up their right to confidentiality. The voters' plenary legislative

authority includes the power to compel their own officials to waive privilege.[13]

Petitioners' arguments to the contrary do not survive scrutiny. They ask, "[I]f voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advices City officials?" (Petition at p. 31.) They contend that the Sunshine Ordinance might be construed to allow an adversary to access litigation strategy, or to undermine the obligation of the City to provide a defense to individual police officers. (*Id.*) But this Court need not address the boundaries of extreme situations raised only hypothetically here. Petitioners suggest that this is a slippery slope, but it is not. There may be circumstances where the right of public access conflicts with other individual rights in other situations, but those issues are not raised here, and remain, if anything, a question for another day.[14]

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[13] Any distinction between attorney work product and attorney-client privilege makes no difference here. As a preliminary factual matter, some of the documents at issue are *requests* for advice *to* the Deputy City Attorney, so they cannot be work product. Second, these requests were to clients, not to the attorneys. Petitioners overstate the law by suggesting that clients may not disclose advice received from their attorney that happens to contain work product without the attorneys' consent. The law is clear that "an attorney's work product belongs absolutely to the client." (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879].)

[14] If anything, it is Petitioners' position that creates far-reaching implications. If Petitioners' position is sustained, and there is a finding of privilege here, that would effectively eliminate the Ethics' Commissions

Finally, Petitioners place great weight on the alleged differences between the process for instituting an amendment to the City Charter and the voters initiating and adopting an ordinance or other law. Though there are some procedural differences for placing the matter on the ballot, the fact remains that simple majority voter approval is required for both. The Sunshine Ordinance was passed by a majority of the San Francisco voters, whose express will would be undone by the action (taken on the ostensible authority) of their own elected officials here. The Court should strive to give effect to their will here, not strain to read words into statutory silence to find a conflict that it must then resolve.

J. PETITIONERS IMPROPERLY ASSERT THIS WRIT

This writ purports to be filed on behalf of the Ethics Commission and its Executive Director. The Ethics Commission has not, however, authorized this proceeding, and public records indicate that it may not even be aware it was filed. (See Supp. RJN, Ex. 3.) For that reason alone, the Petition is void and should not be considered.

To bring this Petition, Petitioners were required to follow proper procedure laid out by the Brown Act. The decision to file this Petition is an

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jurisdiction, under section 67.34(d), to enforce an action for enforcement or penalties under the Sunshine Ordinance, putting the Ethics Commission in violation of its own bylaws (which require that any change to the bylaws by done through written proposed amendments, under Article XII).

"action taken" under the Brown Act because it is "a collective commitment...of a legislative body to make a positive...decision." (Gov. Code, § 54952.6.) Before taking such an "action" the Ethics Commission is required to comply with Section 54954.2(a) of the Act, which requires, among other things (1) posting an agenda at least 72 hours before the meeting containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in a closed session, and (2) that no action or discussion shall be undertaken on any item not appearing on the posted agenda. Should the action involve litigation and should the legislative body have a need to hold a closed session to discuss that litigation, it must first announce that closed session and identify the litigation to be discussed. (Gov. Code, § 54956.9.) The Ethics Commission's bylaws specifically require that it abide by this provision. (*See* Article I, Section 3 ["The Commission shall comply with all applicable laws, including, but not limited to, the San Francisco Charter, San Francisco Sunshine Ordinance...the Ralph M. Brown Act..."].) (See RJN, Ex. 3.)

None of the required steps were taken. While the writ is taken in the name of the Ethics Commission, the Ethics Commission did not actually bring it. Because the Ethics Commission has never authorized this Petition or taken the action necessary to initiate and maintain it, the Court ought to deny it outright.

IV. CONCLUSION

For the foregoing reasons, the Court should not invalidate a key provision of the Sunshine Ordinance allowing for the disclosure of documents requested by Grossman. Grossman respectfully requests that this Petition be denied and that Petitioners be compelled to make the requested public records immediately available.

DATED: March 7, 2013

KERR & WAGSTAFFE LLP

By: _____
MICHAEL G.
Attorneys for Allen Grossman

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule of Court 8.204(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 9,068 words.

DATED: March 7, 2014

KERR & WAGSTAFFE LLP

JASMINE K. SINGH
Attorneys for Allen Grossman

PROOF OF SERVICE

I, Brandilynn Thomas, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, 18th Floor, San Francisco, California 94105.

On March 7, 2014, I served the following document(s):

SUPPLEMENTAL OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(C)]

on the parties listed below as follows:

Dennis J. Herrera
City Attorney
Andrew Shen
Joshua S. White
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Pl.
City Hall, Room 234
San Francisco, CA 94102

San Francisco County Superior Court
Appeals Division
400 McAllister Street
San Francisco, CA 94102

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

☒ **By electronic submission** by submitting a text searchable Portable Document Format ("PDF") via the Court of Appeal online form to the Supreme Court of California pursuant to CRC 8.212(c).

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

Executed on March 7, 2014, at San Francisco, California.

Brandilynn Thomas

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION, Petitioners/Respondents, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent/Appellant.	Case No. A140308 San Francisco County Superior Court No. CPF-13-513221
ALLEN GROSSMAN, Real Party in Interest.	

SUPPLEMENTAL REPLY TO SUPPLEMENTAL OPPOSITION TO PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

The Honorable Ernest H. Goldsmith

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Grossman's supplemental opposition fails to respond to many of the arguments in the City's previously filed Petition and Reply. Accordingly, the City relies primarily on those briefs. A few short points bear emphasis here:

1. The Charter is not "silent" on attorney-client privilege.

Section 6.100 requires the City Attorney to carry out his duties of representing and advising the City and its officials subject to "powers and duties prescribed by state laws for [his office]," including the paramount duty of confidentiality. Section 6.100 thus expressly confers on the City Attorney the duty to protect confidential information subject to the attorney-client privilege (Evid. Code §§ 954, 955) and work product doctrine (Code Civ. Proc. §§ 2018.020, 2018.030). (*See* Petition at 26-27; *see also People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 640 [city attorney is "public officer invested with all the rights and privileges and subjected to all of the limitations and restrictions imposed by the Constitution and laws of this state and considerations of public policy"]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157 [public attorney subject to same Rules of Professional Conduct as applied to all other attorneys].) And regardless, the Charter necessarily implies the privilege, because a municipality "needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel." (*Roberts v. Palmdale* (1993) 5 Cal.4th 363, 380; *see also* Petition 23-25.) That which is necessarily implied is "as much a part of [the Charter] as that which is expressed." (Petition at 21 [quoting *Johnson v. Baker* (1914) 167 Cal. 260, 264].) Thus, Grossman's assertion that "[t]he City Charter is silent" as to the privilege (Supplemental Opposition ["Supp. Opp."] at 3, 19) is both wrong and irrelevant.

2. The Charter trumps initiative ordinances.

Grossman suggests that because they are adopted by a majority of voters, voter-enacted initiative ordinances are the same as voter-enacted Charter amendments and are thus on equal footing with the Charter. This false premise underlies Grossman's arguments that the Charter should be construed to avoid a conflict with the Sunshine Ordinance (Supp. Opp. at 19) and that the voters may choose, by ordinance, to decide that certain attorney-client communications are not confidential. (*Id.* at 25, 29, 34-37.)

Grossman again ignores the San Francisco Charter, which provides that the City "may make . . . all ordinances . . . in respect to municipal affairs, *subject . . . to the restrictions and limitations provided in this Charter.*" (Petitioners' Request for Judicial Notice in Support of Supplemental Reply, Exh. A [S.F. Charter § 1.101; emphasis added].) Thus, all ordinances – whether adopted by the Board of Supervisors *or* by the voters – are subordinate to the Charter. The Charter is the City's "constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) To the extent there is a conflict, an initiative ordinance must give way to the Charter. (*See, e.g., City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102.) The Charter and state law distinguish initiative ordinances from Charter amendments (*see* S.F. Charter § 1.101; Petition at 13), and Grossman's arguments premised on his refusal to acknowledge the difference must necessarily be rejected. (Reply at 9-12, 15-16.)

3. Sunshine Ordinance section 67.24(b)(1)(iii) unavoidably conflicts with the Charter.

Grossman asserts that the Sunshine Ordinance does not conflict with the Charter because the Court can construe the Charter narrowly as not

requiring that all attorney-client communications be confidential. (*See, e.g.*, Supp. Opp. at 19.) Indeed, Grossman goes so far as to argue that "the Sunshine Ordinance specifically requires a narrow reading of the City Charter." (*Id.* at 21 n.6.) In a similar vein, Grossman implies that the Charter should be read as incorporating the attorney-client privilege only where the privilege is shown to be "fundamentally necessary to the provision of legal advice." (*Id.* at 22-23.)

These arguments make no sense. (*See* Reply at 9-10.) Statutes and ordinances are construed, when possible, to avoid conflicts with the Constitution or Charter. Grossman cites no authority for the proposition that courts should narrowly construe the Charter to avoid a conflict with the Sunshine Ordinance, and *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048 is to the contrary. (*See* Reply at 9-10.)

Nor can the Court rewrite the Charter, in the manner Grossman suggests, to limit the City's assertion of the attorney-client privilege to situations in which the City can prove that the privilege is "fundamentally necessary." Such an interpretation would require the Court to read language into the Charter limiting the privilege that is nowhere to be found. It also would undermine the Charter's guarantee of adequate legal advice and representation for San Francisco and its officials. If each time a city official or the City Attorney asserted the privilege, he had to first prove the particular communication was necessary to the functioning of the attorney-client relationship, that would impose an onerous burden and likely require him to reveal much or all of the content of the privileged communication, destroying the confidentiality that the privilege seeks to preserve. Moreover, the courts would become embroiled in endless Sunshine Ordinance litigation claiming that particular communications were

unnecessary to an effective attorney-client relationship. The associated burden and expense would deter City officials from asserting the privilege, discourage candor between the City and its counsel, and ultimately deprive the City of the effective advice and representation that Charter sections 6.100 and 6.102 were intended to provide. (*See* Petition at 22-25.)

Grossman's proffered interpretation also reverses the law governing privilege. Recognizing that to require case-by-case justifications for assertions of privilege would undermine the purposes for the privilege, the Legislature created a presumption that communications are privileged if a party claims they were made in confidence to or from an attorney. It also imposed the burden on the party seeking access – not the party asserting the privilege – to prove otherwise. (Evid. Code § 917(a) and Comment, Assembly Comm. on Judiciary; *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557).

In short, Grossman's suggested interpretation of the Charter lacks any language in the Charter to support it and defies common sense. Either the Charter incorporates the privilege or it does not. There is no basis for reading it to allow the privilege to be asserted only in particular instances when it is proven "necessary" or critical to the attorney-client relationship.[1]

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[1] Grossman's invocation of Charter section 2.108 does not change this analysis. (*See* Supp. Opp. at 19 n.4.) Section 2.108 requires the Board to "maintain" a Sunshine Ordinance – it does not require that the Ordinance disrupt or dismantle the attorney-client privilege. Grossman similarly argues that Government Code section 6253(e) authorizes the Sunshine Ordinance and its purported invasion of attorney-client privilege. (*See* Supp. Opp. 1-2, 16-17.) But "[i]f the Legislature had intended to restrict a privilege of this importance, it would likely declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork . . . ." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207.) Nothing in section 6253(e) purports to abrogate the attorney-client privilege, and no court has found otherwise.

4. Confidentiality is important for communications regarding campaign finance, ethics, and open government laws.

Grossman blithely states that there is no reason to believe that the disclosure of the records at issue here would interfere with the City Attorney's role. (*See* Supp. Opp. at 32-33.) This argument is a red herring because, as set forth above, there is no basis for parsing between particular documents or categories of documents in determining whether the privilege exists; under the Charter, the privilege applies to all confidential attorney-client communications.

But even if that were not the law, and some showing of necessity were required before the Charter could override an ordinance purporting to carve out certain communications from the privilege, Grossman is factually wrong in arguing that there is no necessity for the categories purportedly excepted in the Sunshine Ordinance: "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning the California Public Records Act, the Ralph M. Brown Act, the Political Reform Act,[2] any San Francisco Governmental Ethics Code, or this Ordinance." (S.F. Admin. Code § 67.24(b)(1)(iii).)

This very case demonstrates the point, since the City Attorney's advice to the Ethics Commission about the legal risks relating to its regulations could provide a roadmap to Grossman, who presents a known

[2] The Political Reform Act, Cal. Gov. Code §§ 81000 et seq., addresses conflicts of interest in government decision-making, disclosures regarding government officials' financial interests, and reporting of campaign contributions and expenditures. Needless to say, this law presents many complicated issues and has been the subject of constitutional challenges. The ability to provide and receive confidential advice concerning the Act is critical to both City officials who endeavor to comply with it and to City officials charged with enforcing it.

litigation threat. (*See* Reply at 4-5, 13-14.) More generally, finding that the privilege did not exist with respect to the City Attorney's communications with the Ethics Commission would threaten that agency's mission to pursue ethics violations. The Charter requires the Ethics Commission to conduct investigations into alleged violations of campaign finance, lobbying, conflicts of interest and governmental ethics laws. (*See* Real Party in Interest's Request for Judicial Notice in Support of Supplemental Opposition, Exh. 2 at 6-7 [S.F. Charter § C3.699-13(a)].) If Grossman were to prevail here, the City Attorney could not advise the Ethics Commission regarding these investigations without compromising them; the targets of the investigations could employ a Sunshine Ordinance request to obtain access to the City Attorney's advice to the Ethics Commission's staff about the legal strengths and weaknesses of an enforcement matter in the midst of the investigation. The City Attorney's Office could therefore not fully advise and assist the Ethics Commission in its enforcement role.

5. The Charter confers the privilege on the City and its officials and governs their obligations with respect to disclosure of information.

Grossman also argues that Charter sections 6.100 and 6.102 have no bearing here because the privilege belongs to the client and not the attorney. (*See* Supp. Opp. at 26 ["What an attorney is or is not required to do says nothing about his or her client's separate legal obligation to produce information."]) Grossman is wrong. His argument assumes that the Charter sections providing for an elected City Attorney and setting forth the attorney's qualifications and duties are entirely separate and independent of the rights and obligations of the City itself. That makes no sense. The existence of a City Attorney with the duty to advise and represent the City

and its constituent agencies and officials is an important right that sections 6.100 and 6.102 confer on the City, with the ultimate aim of producing a more effective government. The Charter's incorporation of the state law of attorney-client privilege is designed not to create some special benefit for the City Attorney or some duty on him independent of the City. Rather, the privilege is incorporated for the benefit of the City, to provide *it* with the "freedom to confer with its lawyers confidentially in order to obtain adequate advice." (*Roberts*, 5 Cal.4th at 380.) Thus, it is the City that the Charter entitles to assert the privilege, and the City's obligations in regard to confidentiality of attorney-client advice are in no sense "separate" from the Charter provisions creating the attorney-client relationship. The Charter establishes that relationship, and only a Charter amendment could alter it.

The Court should grant the writ and direct the Superior Court to set aside its order granting a writ of mandate and to enter a new order denying Grossman's writ.

Dated: April 1, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,012 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 1, 2014.

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