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6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **COUNTY OF SACRAMENTO**

8 EYE ON SACRAMENTO, FIRST
AMENDMENT COALITION,

9 Petitioners,

10 v.

11 CITY OF SACRAMENTO,

12 Respondent.
13

No.

**PETITION FOR WRIT OF MANDATE
UNDER THE CALIFORNIA PUBLIC
RECORDS ACT (Government Code
section 6259)**

14
15 **I. INTRODUCTION**

16 1. This Petition for Writ of Mandate under the California Public Records Act (Govt.
17 Code §§ 6258 and 6259) seeks to shed light on the decision made by the respondent Sacramento
18 City Council to ignore the redistricting recommendations of its own citizens committee, and to
19 adopt what the *Sacramento Bee* referred to as **A**fatally flawed@ district lines of its own. The *Bee*
20 blasted the council for **A**approving self-serving election districts that ignore its own citizens
21 advisory committee,” in what the newspaper called a “pathetically obvious political power play
22 that looms as another black eye for this council.” Two non-profit groups, petitioners Eye on
23 Sacramento and First Amendment Coalition, followed the *Bee* editorial with Public Records Act
24 (“PRA”) requests for all communications between City Council members relating to redistricting
25 or reapportionment of Sacramento City Council districts between April 1, 2011 and August 31,
26 2011. The City responded by withholding an unspecified number of records, claiming (without
27 any elaboration at all on the date or nature of the records) that they were subject to the
28 **Adeliberative process exemption@** from the Public Records Act. The city completely ignored one

1 of Eye on Sacramento’s PRA requests.

2 2. The public has an overwhelming interest in knowing why the City Council, in
3 adopting new district boundary lines, ignored the boundary lines of its own citizens committee.
4 The Public Records Act (Govt. Code section 6250) provides that access to public records is a
5 A fundamental and necessary right of every person in this state,@ and the Ralph M. Brown Act
6 requires that a legislative body=s actions be taken openly, stating, AThe people, in delegating
7 authority, do not give their public servants the right to decide what is good for the people to know
8 and what is not good for them to know. The people insist on remaining informed so that they
9 may retain control over the instruments they have created.@ (Govt. Code section 54950.)

10 3. The records requested here are likely to reveal whether or not the City Council
11 engaged in an illegal seriatim meeting designed to evade the Brown Act, and whether B as the
12 *Bee* and a citizens committee believe B the City Council members purposely disregarded the
13 Citizens Committee boundaries and the principles of Aone man one vote@ simply to preserve safe
14 lines for themselves. There is an overwhelming public interest in disclosure of the records sought
15 here, and no interest B other than what the *Bee* called a “power play” by council members B in
16 non-disclosure. This Petition should be granted.

17 **II. FACTS AND PROCEDURAL HISTORY**

18 4. The City Council created a Citizens Committee to recommend new council
19 districts after the 2010 decennial census. The Citizens Committee, over the course of more than
20 two months, spent many hours looking at 37 plans submitted by the public, holding public
21 hearings and listening to interest groups. Ultimately, it recommended four plans.

22 5. The City Council ignored its own committee, instead adopting a plan put forth by
23 council members Steve Cohn and Sandy Sheedy at a July 26 meeting. The council=s districts
24 have a population deviation of 11.9 percent, according to the *Sacramento Bee*, which, in an
25 August 9 editorial (attached hereto as Exhibit A), criticized the council’s “lack of transparency.”

26 6. Petitioner “Eye on Sacrament,” a non-profit and non-partisan organization,
27 concerned by the City Council=s disregard of its own Citizens Committee, sent a Public Records
28 Act request to the city on August 24, 2011. Eye on Sacramento requested all written and

1 electronic communications between two or more members of the City Council on the subject of
2 redistricting or reapportionment of City Council Districts. See Exhibit D attached hereto. The
3 City initially responded on September 2, 2011 by saying, “Records, if any, which meet your
4 request, will be made available for you to inspect or obtain copies after IT finishes its search.”
5 (*Ibid.*) Almost seven weeks later (long after the statutory deadline for responses to Public
6 Records Act requests set forth in Government Code section 6253), the City produced a few
7 records but withheld others with the cryptic comment, “Records subject to the deliberative
8 process exemption are not included.” (October 20, 2011 letter, Exhibit E attached hereto.) Eye
9 on Sacramento’s public records coordinator, Rick Stevenson, made a followup request on
10 October 26, 2011 for “all written and electronic communications between staff of two or more
11 City Council members and also staff of one City Council member with another City Council
12 member on the subject of reapportionment or redistricting of Sacramento City Council districts.”
13 See Exhibit F attached hereto. Three months later, Mr. Stevenson has not yet received any
14 response to that request, nor have any records been produced in response to it. Stevenson Decl.
15 filed herewith paragraph 2.

16 7. After Eye on Sacramento complained about this lack of transparency to petitioner
17 First Amendment Coalition (“FAC”), a non-profit open government group, FAC sent its own
18 Public Records Act request dated November 4, 2011 to the City of Sacramento. FAC requested
19 the following records: “For the period April 1, 2011 through August 31, 2011, all
20 communications, including email or other electronic communications, between two or more
21 members of the Sacramento City Council, relating to redistricting or reapportionment of
22 Sacramento City Council districts.” (Exhibit B hereto.)

23 8. The City responded by producing only a handful of records, but by withholding an
24 unspecified number of records pursuant to what it termed the **Adeliberative** process exemption.[@]
25 (Exhibit C hereto.) Although FAC requested that the City state how many records were being
26 withheld and provide a basic identification of each record (Exhibit B at 1), the City did not
27 inform FAC of how many records were being withheld or identify them in any way whatsoever.
28 (Exhibit C.)

1 REASONS FOR GRANTING WRIT

2 III. FAC AND EYE ON SACRAMENTO ARE ENTITLED TO THE INFORMATION
3 THEY SEEK UNDER THE PUBLIC RECORDS ACT

4 A. Public Records Act’s Mandate of Openness.

5 Petitioners have a constitutional right of access to information concerning the conduct of
6 the people’s business, and a right of access to the writings of public officials, under article I,
7 section 3(b)(1) of the California Constitution. Likewise, the Public Records Act provides that
8 “access to information concerning the conduct of the people’s business is a fundamental and
9 necessary right of every person in this state.” (Govt. Code section 6250.)

10 Government Code section 6258 provides, “Any person may institute proceedings
11 for...writ of mandate...to enforce his or her right to inspect or to receive a copy of any public
12 record or class of public records.” Petitioners have no plain, speedy and adequate remedy in the
13 ordinary course of law, in that unless this court orders respondent City to discharge its statutory
14 duty to release the records requested, petitioners will be denied their constitutional and statutory
15 right of access to public records.

16 The California Supreme Court, in its seminal decision on the Public Records Act, has
17 stated, “Openness in government is essential to the functioning of a democracy. ‘Implicit in the
18 democratic process is the notion that government should be accountable for its actions. In order
19 to verify accountability, individuals must have access to government files. Such access permits
20 checks against the arbitrary exercise of official power and secrecy in the political process.’”

21 *International Federation of Professional and Technical Engineers Local 21 v. Superior Court*
22 (2007) 42 Cal. 4th 319, 328-29. This Petition is made necessary precisely because of
23 respondent’s “secrecy.” Access to the records sought by petitioners here is essential so that it,
24 and the public, can assess the City Council’s attempted justification for the boundary lines it
25 drew.

26 The PRA was enacted in 1968 Ato safeguard the accountability of government to the
27 public, for secrecy is antithetical to a democratic system of >government of the people, by the
28 people [and] for the people.=@ (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d

1 762, 772.) The PRA was enacted against a background of legislative impatience [sic] with
2 secrecy in government The Legislature had long been attempting to formulate a
3 workable means of minimizing secrecy in government. (Ibid.; see *CBS, Inc. v. Block* (1986)
4 42 Cal.3d 646, 651.) These same principles are enshrined in article I, section 3(b) of the
5 California Constitution, which was placed in the Constitution when voters passed Proposition 59
6 (with an 83 percent majority) in 2004. Article I, section 3(b) gives the public a constitutional
7 right to public records and open meetings: article I, section 3(b)(1) provides: “The people have
8 the right of access to information concerning the conduct of the people’s business, and,
9 therefore, the meetings of public bodies and the writings of public officials shall be open to
10 public scrutiny.” As the Third District Court of Appeal explained in *BRV v. Superior Court*
11 (2006) 143 Cal. App. 4th 742, 746, “Californians have a constitutional right to access the records
12 of their public agencies. They have a strong interest in knowing how government officials
13 conduct public business, particularly when allegations of malfeasance by public officers are
14 raised.”

15 Here, petitioners seek access to information of vital importance to Sacramento residents
16 about how the City Council drew district boundary lines. “In this way, [petitioner is] acting as a
17 guardian for the public.” (*San Gabriel, supra*, 143 Cal. App. 3d at 774.) The public has a right
18 to know how the council adopted district lines. Only a vigilant public can hold public officials
19 accountable. While the City might prefer less scrutiny rather than more, the Public Records Act
20 and the constitutional right of access to public records (Cal. Const., art. I, section 3(b)) place the
21 public’s interest over the preferences of public officials. As the Court of Appeal recently held:
22 “The constitutional protections of free speech, press, and, in this state, access to public agency
23 records to observe the conduct of public business are not forfeited by the risk of injury to official
24 reputation.” (*BRV v. Superior Court, supra*, 143 Cal. App. 4th at 759.)

25 **B. Broad Definition of Public Records. Exceptions Are Construed Narrowly,**
26 **The Burden Is on Public Agencies to Justify Non-Disclosure.**

27 The PRA defines the term “public record” very broadly: “Public records” includes
28 any writing containing information relating to the conduct of the people’s business prepared,

1 owned, used, or retained by any state or local agency regardless of physical form or
2 characteristics.@ (Government Code ' 6252(e).) The Attorney General has defined Apublic
3 record@ even more broadly: the definition of public record Ais intended to cover every
4 conceivable kind of record that is involved in the governmental process and will pertain to any
5 new form of record-keeping instrument as it is developed. Only purely personal information
6 unrelated to >the conduct of the public=s business=@ is exempt from the definition of Apublic
7 record,@ such as Athe shopping list phoned from home, the letter to a public officer from a friend
8 which is totally void of reference to governmental activities.=@ (*San Gabriel, supra*, 143 Cal.
9 App. 3d at 774.)

10 At the outset, we observe that an agency seeking to withhold records has “the burden of
11 demonstrating a need for non-disclosure.” (*IFPTE, supra*, 42 Cal.4th at 337; *CBS, supra*, 42
12 Cal.3d at 651-52, 656; *New York Times Co. v. Superior Court* (1990) 218 Cal. App. 3d 1579,
13 1584; *Braun v. City of Taft* (1984) 154 Cal. App. 3d 332, 345.) Exemptions from disclosure Aare
14 construed narrowly to ensure maximum disclosure of the conduct of governmental operations.@
15 (*New York Times, supra*, 218 Cal. App. 3d at 1585; *San Gabriel Tribune, supra*, 143 Cal. App.
16 3d at 772-73.)

17 Article I, section 3(b)(2) of the California Constitution B added by the adoption of
18 Proposition 59 in 2004 B gives the above cases constitutional stature. It requires that a statute or
19 other authority Ashall be broadly construed if it furthers the people=s right of access, and
20 narrowly construed if it limits the right of access.@ These bedrock rules of construction guide the
21 way here.

22 **C. The Exemption Claimed by the City Is Misplaced and Does Not Bar**
23 **Disclosure of the Records Sought. The City Cannot Meet Its Burden Under**
24 **Government Code Section 6255 of Showing that the Interest in Non-**
Disclosure “Clearly Outweighs” the Interest in Disclosure.

25 The City has claimed the “deliberative process privilege” as grounds for withholding an
26 unspecified number of records responsive to petitioner’s Public Records Act request.¹ An

27
28 ¹ The City has not listed, in any sort of log, the number of records withheld or the dates,
types, authors, and addresses of the records withheld. This Court can and should order the
preparation by respondent of a list of the documents which are sought. *State Bd. of Equalization*

1 examination of the exemption claimed by the City reveals that it cannot meet its burden of
2 justifying non-disclosure.

3 Government Code section 6255(a) states: "The agency shall justify withholding any
4 record by demonstrating that the record in question is exempt under express provisions of this
5 chapter or that on the facts of the particular case the public interest served by not disclosing the
6 record clearly outweighs the public interest served by disclosure of the record."

7 1. Case Law Disfavors Invocations of Section 6255

8 The courts have consistently taken a dim view of invocations of section 6255. (*See, e.g.,*
9 *CBS, supra*, 42 Cal.3d at 652-55 [Supreme Court orders names of concealed weapons licensees
10 released, rejecting reliance upon section 6255 exemption].) For example, the Third District Court
11 of Appeal in *BRV, supra*, recently held that a report which investigated potential misconduct by a
12 school district superintendent who got a sweetheart deal when he resigned should be made
13 public. The Court explained: "The public's interest in judging how the elected board treated
14 this situation far outweighed the Board's or Morris's interest in keeping the matter quiet.
15 Because of Morris's position of authority as a public official and the public nature of the
16 allegations, the public's interest in disclosure outweighed Morris's interest in preventing
17 disclosure of the Davis report." (*BRV, supra*, 143 Cal. App. 4th at 759.)

18 A California Supreme Court decision which originated from this Court exemplifies that
19 Court's historic rejection of section 6255 as a ground for non-disclosure and its rejection of
20 speculative arguments against disclosure of public records. In *Commission on Peace Officers*
21 *Standards and Training v. Superior Court* (APOST) 42 Cal. 4th 278, 302, the state agency
22 argued that if peace officers' names were disclosed, their safety would be endangered. The
23 Supreme Court (upholding this court's decision) rejected this contention, holding, "The safety
24 of peace officers and their families is most certainly a legitimate concern, but the Commission's
25 contention that peace officers in general would be threatened by the release of the information in
26 question is purely speculative. >A mere assertion of possible endangerment is insufficient to

27 _____
28 *v. Superior Court* (1992) 10 Cal. App. 4th 1177, 1193 [providing such a list is consistent with
the language and spirit of the Public Records Act].

1 justify non-disclosure.@ (*Id.* at 302.)²

2 **2. Speculation Does Not Defeat Disclosure.**

3 If the officer safety concerns proffered in *POST* are insufficient to justify non-disclosure
4 **B** and the Supreme Court held that they did not justify non-disclosure **B** then surely the
5 speculative concerns about “deliberative process” raised by the City do not justify non-disclosure
6 here. The City’s argument against non-disclosure here **B** similar to that raised by many agencies
7 who might be embarrassed by revelation of flaws in their reasoning **B** simply does not pass
8 muster.

9 The Supreme Court in *International Federation of Professional and Technical Engineers*
10 *Local 21 v. Superior Court* (2007) 42 Cal. 4th 319 **B** a companion case to *POST* **B** likewise
11 rejected the argument that disclosure of public employees= salaries would endanger them. (*Id.* at
12 338 [no evidence of adverse consequences from past disclosure of salaries].

13 Three different Courts of Appeal this year have likewise rejected arguments against non-
14 disclosure based upon section 6255 in the context of public employee pensions. In *Sacramento*
15 *County Employee Retirement System v. Superior Court* (2011) 195 Cal. App. 4th 440 (**ASCERS@**)
16 the Third District Court of Appeal rejected the public agency=s invocation of the **A**catchall
17 exemption” of section 6255. (*Id.* at 467-69.) The Court quoted the Supreme Court=s decision in
18 *IFPTE* and its reference to the **A**strong public interest in knowing how the government spends its
19 money.@ (*Id.* at 468-69.) The Court also quoted the Supreme Court=s statement that **A**public
20 access makes it possible for members of the public to expose corruption, incompetence,
21 inefficiency, prejudice and favoritism.@ (*Id.* at 469, internal quotation marks omitted.) Finally,
22 the Court noted that **A**speculative threats@ cannot be considered in weighing the public interest in
23 non-disclosure, and that a mere **A**>assertion of possible endangerment does not **A**clearly
24 outweigh@ the public interest in access.=@ (*Id.* at 471.)

25 The Third District Court of Appeal=s rejection of the “catchall exemption” as a ground
26 _____

27 ² The Court distinguished its earlier decision in *Times Mirror v. Superior Court* (1991) 53
28 Cal. 3d 1325, 1346 where a declaration of the Governor=s security director supported the
conclusion that release of his schedule would present a potential security threat. (*POST*, 42 Cal.
4th at 302.)

1 for non-disclosure in *SCERS* -- even when the safety interests of elderly retirees were invoked **B**
2 was echoed in two other Court of Appeal decisions this year. In *San Diego County Employees*
3 *Retirement Association v. Superior Court* (2011) 196 Cal. App. 4th 1228, 1244, the Court of
4 Appeal observed that the public has **Aa** legitimate interest in knowing how pensions are
5 calculated. The [Public Records] Act=s core purpose is to prevent secrecy in government and
6 contribute significantly to the public understanding of government activities.@ (*Id.* at 1244.) The
7 Court rejected declarations asserting that criminals would prey on the elderly if their names and
8 pension amounts were released. (*Id.* at 1245.) The Court also noted that there was no **Ae**evidence
9 of any actual adverse consequences from previous disclosures.@ (*Id.* at 1246.) Finally, in
10 *Sonoma County Employees Retirement Association v. Superior Court* (2011) 198 Cal. App. 4th
11 986, yet another Court of Appeal (the First District) rejected yet another assertion that retirees
12 would be endangered by disclosure of their names and pension amounts: **AWe** find SCERA=s
13 claim that releasing information to the public about pension benefits will expose its retirees to
14 annoyance and abuse too speculative to outweigh the public=s interest in securing information
15 about how public money is spent.@ (*Id.* at 1006.)

16 These two Supreme Court decisions and three Court of Appeal decisions **B** each noting
17 the strong public interest in how public money is spent, and each rejecting speculative assertions
18 of harm from disclosure **B** control here. The City’s reference to “deliberative process” fails to
19 meet its burden. There is a very strong public interest in disclosure, and no significant interest in
20 withholding the documents. The City’s argument fails.

21 The Court of Appeal’s reasoning in *BRV*, *supra*, and the other cases cited above, is fully
22 applicable here. The public has an overwhelming interest in seeing how and why the Council
23 decided to ignore the citizens’ boundaries and adopt its own lines.

24 The point is that the public has a right to see for itself how its government has acted,
25 especially when it comes to a critical issue like reapportionment.³ As the Court of Appeal
26 explained in *BRV*: **A**The report exonerated [the school superintendent] of all serious allegations
27

28 ³ At the state level, voters were unhappy enough about the way legislators drew district lines that they turned the job over to an independent commission.

1 of misconduct except those relating to outbursts of anger. In this circumstance, the public=s
2 interest in understanding why Morris was exonerated and how the District treated the accusations
3 outweighs Morris=s interest in keeping the allegations confidential.@ (*BRV, supra*, 143 Cal.
4 App. 4th at 758.)

5 The Court of Appeal used the same type of reasoning in rejecting a public agency=s
6 reliance upon the Acatch-all@ exemption of section 6255 in *California State University Fresno v.*
7 *Superior Court* (2001) 90 Cal. App. 4th 810, 833. In that case, the Court ordered the disclosure
8 of the names of licensees for luxury suites in a new arena on the Fresno State campus, holding:
9 AThe public should be able to determine whether the purchase price for luxury accommodations
10 in the arena is a fair and reasonable return on its contribution to the project. In other words,
11 disclosure allows the public to discern whether its resources have been spent for the benefit of the
12 community at large or only a limited few. The public should also be able to determine whether
13 any favoritism or advantage has been afforded certain individuals or entities in connection with
14 the license agreements, and whether any discriminatory treatment exists. Determinations
15 pertaining to the public=s business cannot be made without disclosure of the identities of the
16 licensees and the license agreements.@ (90 Cal. App. 4th at 833.)

17 Our Supreme Court has also explained the importance of public disclosure in guarding
18 against secrecy, improprieties or favoritism. As the Court said in *NBC Subsidiary v. Superior*
19 *Court* (1999) 20 Cal.4th 1178, 1208 fn. 25, quoting a prior case on the subject of access to court
20 records, A>[i]n either the civil or criminal courtroom, secrecy insulates the participants, masking
21 impropriety, obscuring incompetence, and concealing corruption.=@ Likewise, the Supreme
22 Court explained in *CBS, supra*, 42 Cal.3d at 656, that without releasing the names of concealed
23 weapons licensees, Athere will be no method by which the public can ascertain whether the law
24 is being properly applied or carried out in an evenhanded manner.@

25 The City may argue that disclosure of records may compromise council members'
26 "deliberative process." This claim, however, is mere speculation. In the words of the *California*
27 *State University Fresno*, court: AThe unsupported statements constitute nothing more than
28 speculative, self-serving opinions designed to preclude the dissemination of information to which

1 the public is entitled.@ (90 Cal. App. 4th at 834; *see CBS*, 42 Cal.3d at 652 [rejecting
2 Aconjectural@ argument against disclosure].)

3 The City’s likely argument that disclosure will chill the flow of information is, at bottom,
4 purely speculative. As both the Supreme Court and the Court of Appeal have explained,
5 speculation is not enough to defeat disclosure. AA mere assertion of possible endangerment does
6 not >clearly outweigh= the public interest in access to these records.@ (*CBS, supra*, 42 Cal.3d at
7 652, quoted in *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 613.) The City can
8 present “nothing other than speculation” about an alleged chilling effect upon its ability to
9 “engage in candid policy discussions,” and that is Ainsufficient@ to defeat disclosure. (*Connell*,
10 *supra*, 56 Cal. App. 4th at 613.)

11 The attempt by the City to defeat disclosure confuses the interest of public officials with
12 the interests of the public they serve. Public officials have a Asignificantly reduced expectation
13 of privacy in the matters of [his] public employment.@ (*BRV, supra*, 143 Cal. App. 4th at 758.)
14 The constitutional right to observe public agency records here far outweighs any interest in non-
15 disclosure. (*BRV*, 143 Cal. App. 4th at 759.)⁴ As the Court held in *San Gabriel*, 143 Cal. App.
16 3d at 778, the concern about a Achilling effect on obtaining information in similar future
17 transactions . . . misstates what the public=s interest is as serving the privacy interests of [those
18 resisting disclosure] rather than in serving the public=s interest in participating in local
19 government.@

20 3. “Deliberative Process” Does Not Defeat Disclosure.

21 The City Council raises the A deliberative process@ privilege and cites *Times Mirror Co.*
22 *v. Superior Court* (1991) 53 Cal.3d 1325, but both that alleged privilege and that decision are
23 conditional, are limited and are undermined by the enactment of article I, section 3(b) of the
24 California Constitution in 2004. In *Times Mirror, supra*, a 4-3 majority of the California
25 Supreme Court concluded, Aon the present record,@ that a newspaper=s request for five years of
26

27 ⁴ The Third District in *BRV* made those observations in the context of a small-town
28 school superintendent in Dunsmuir. Those comments ring even more true here when the records
of a large city are involved.

1 the Governor's calendars should be denied based upon section 6255. The Court cautioned,
2 however: **A**lest there be any misunderstanding, however, we caution that our holding does not
3 render inviolate the Governor's calendars and schedules or other records of the Governor's
4 office. There may be cases where the public interest in certain specific information contained in
5 one or more of the Governor's calendars is more compelling, the specific request more focused,
6 and the extent of the requested disclosure more limited; then, the court might properly conclude
7 that the public interest in non-disclosure does not clearly outweigh the public interest in
8 disclosure, whatever the incidental impact on the deliberative process. Plainly, that is not the
9 case here. (53 Cal.3d at 1345-46, emphasis added.) The request here is far more narrowly
10 focused -- a few months' records on one subject -- and *Times Mirror* is therefore easily
11 distinguishable.⁵

12 **a. Proposition 59 Weakens Deliberative Process Assertion.**

13 Public agencies' excessive reliance upon *Times Mirror* was a primary driving factor
14 behind the passage of Proposition 59 in 2004 and its enactment of article I, section 3(b) of the
15 California Constitution. (Peter E. Scheer Declaration filed herewith & 3.) The ballot argument in
16 support of Proposition 59 took direct aim at the **A**deliberative process privilege⁵ by saying that
17 the constitutional amendment **A**will ensure that public agencies, officials, and courts broadly
18 apply laws that promote public knowledge. It will compel them to narrowly apply laws that limit
19 openness in government **B** including discretionary privileges and exemptions that are routinely
20 invoked even when there is no need for secrecy. It will create a high hurdle for restrictions on
21 your right to information, requiring a clear demonstration of the need for any new limitation. It
22 will permit the courts to limit or eliminate laws that don't clear that hurdle. *It will allow the*
23 *public to see and understand the deliberative process through which decisions are made. . . .*⁵
24 (Declaration of Peter E. Scheer served and filed herewith, & 3 and Exhibit A, emphasis added.)

25 The ballot argument in favor of Proposition 59 **B** and its explicit statement that the
26 constitutional amendment **A**will allow the public to see and understand the deliberative process

27 _____
28 ⁵ As noted above, the Supreme Court in *POST* distinguished *Times Mirror* on the ground
that the latter decision involved security threats. (*POST*, 42 Cal. 4th at 302.)

1 *through which decisions are made* **B** is an important interpretive aid here. Both the Supreme
2 Court and the Courts of Appeal have taken judicial notice of ballot pamphlets, summaries and
3 arguments, and statements of the vote. (*Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 906
4 [legislative analysis in ballot pamphlet]; *Jahr v. Casebeer* (1999) 70 Cal. App. 4th 1250, 1255-
5 56, 1259 [ballot pamphlet].) Accordingly, judicial notice should be taken of the Statement of the
6 Vote on Proposition 59, the Analysis by the Legislative Analyst of Proposition 59, and the ballot
7 arguments pro and con, all of which are attached collectively as Exhibit A to the accompanying
8 Declaration of Peter E. Scheer.

9 The case of *Recorder v. Commission on Judicial Performance* (1999) 72 Cal. App. 4th
10 258, 269 is on point and persuasive here. In that case, the Court construed Proposition 190 from
11 the 1994 ballot, which enacted article VI, section 18(j) of the California Constitution for the
12 purpose of providing greater openness in the proceedings of the California Commission on
13 Judicial Performance. The Court observed: **A**>Where a provision in the Constitution is
14 ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and
15 objective of the drafters of the provision and the people by whose vote it was adopted.=
16 [Citations.] >The argument submitted to the electors in support of a proposed constitutional
17 amendment is not controlling but may be resorted to as an aid in determining the intention of the
18 framers and the electorate. New provisions of the Constitution must be considered with reference
19 to the situation intended to be remedied or provided for.@

20 Here, as in *Recorder*, this Court confronts a constitutional provision which resulted from
21 a ballot initiative explicitly aimed at greater openness. This Court can and should take judicial
22 notice of Proposition 59 ballot arguments and analysis **B** in which its proponents called
23 Proposition 59 the **A**Sunshine Amendment@ **B** in construing Proposition 59 and in considering
24 the attempt by respondent to broadly apply an exemption which the framers of Proposition 59
25 intended to narrowly limit or overrule.

26 The City's reliance upon the **A**deliberative process@ privilege is further undermined by
27 the actions of the Governor's office= at the time of Proposition 59's adoption. Following the
28 voters' overwhelming approval of Proposition 59, the First Amendment Coalition and the Capitol

1 press corps requested Governor Schwarzenegger's appointment calendars **B** the very records at
2 issue in the *Times Mirror* case. (Scheer Decl. **&** 4.) Implicitly recognizing that Proposition 59
3 had overruled, undermined or narrowed *Times Mirror* and any reliance upon **A**deliberative
4 process[@] to shield calendars, the Governor's office announced that it would release the
5 Governor's daily calendars. (November 17, 2004 letter from then-Legal Affairs Secretary Peter
6 Siggins to Peter Scheer, et al., attached as Exhibit B to Scheer Decl.)⁶ *Thus, the very records at*
7 *issue in the Times Mirror case* **B** *official calendars* **B** have been released by top state officials,
8 which undercuts the City's likely reliance upon that decision. Any attempt in this case to apply
9 broadly the deliberative process privilege must fail.⁷

10 **b. "Deliberative Process" Not Absolute, Still Requires Balancing**
11 **Test With Burden on the City. Laws Limiting Access Must Be**
12 **Narrowly Construed.**

12 Even before Proposition 59, the Courts had made very clear that the deliberative process
13 privilege was not absolute, but had to be weighed under Government Code section 6255. **A**>Not
14 every disclosure which hampers the deliberative process implicates the deliberative process
15 privilege. Only if the public interest in non-disclosure clearly outweighs the public interest in
16 disclosure does the deliberative process privilege spring into existence.^{=@} (*Marylander v.*
17 *Superior Court* (2000) 81 Cal. App. 4th 1119, 1128, citation omitted.) A narrow construction of
18 **A**deliberative process[@] **B** if it survives Proposition 59 at all **B** is also mandated by article I,
19 section 3(b)(2) of the California Constitution, which requires **A**narrow[@] construction of laws and
20 other authorities limiting access, and **A**broad[@] construction of laws furthering the people=s right
21 of access to information.

22 Accordingly, the ultimate question here, as the Supreme Court has recognized, is simply
23 whether the public interest in non-disclosure clearly outweighs the public interest in disclosure.
24 (*CBS*, 42 Cal.3d at 656 [section 6255 balancing test requires rejection of all exemptions claimed].
25 Given the public importance of **A**know[ing] what the government is doing, why it is doing it, and
26

27 ⁶ Mr. Siggins is now a Justice of the First District Court of Appeal.

28 ⁷ The City's reliance upon **A**deliberative process[@] is dangerous because it does not
explain precisely what records are being withheld in reliance upon that supposed exemption.

1 how (Ballot Argument supporting Proposition 59, Ex. A to Scheer Declaration), and the
2 Aconstitutional right to know what the government is doing created by Proposition 59 (*Id.*), the
3 interest in disclosure far outweighs any interest in non-disclosure. The City cannot meet the
4 heavy burden which rests upon it of showing that the speculative interest in non-disclosure
5 Aclearly outweighs the palpable interest in disclosure. This Petition should be granted.

6 **IV. THE COURT CAN CONDUCT AN *IN CAMERA* REVIEW, IF NECESSARY, TO**
7 **RESOLVE ANY CLAIMS OF EXEMPTION BY THE CITY.**

8 Government Code section 6259 provides that when it appears that public records are
9 being improperly withheld from a member of the public, Athe court shall order the officer or
10 person charged with withholding the records to disclose the public record or show cause why he
11 or she should not do so. The court shall decide the case after examining the record in camera, if
12 permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and
13 any oral argument and additional evidence as the court may allow.@

14 Here, the City has been unhelpful about the nature and extent of the records it has
15 withheld. It has simply claimed an exemption and stated that it will not produce records. Thus, it
16 is apparent that a large quantity of documents are being withheld but the City has not identified
17 the documents or the exemption claimed to apply to each document.

18 As stated above, the burden rests upon the City, regardless of the exemption claimed, to
19 justify non-disclosure, and it has not demonstrated the requisite “>clear overbalance’ on the side
20 of confidentiality.@ (*California State University Fresno, supra*, 90 Cal. App. 4th at 831.) The
21 Court therefore can and should order the withheld records produced without an *in camera* review.
22 The Court can also, however, under section 6259, conduct an *in camera* review of the withheld
23 documents, to see for itself that the claimed exemption does not apply, before producing them.
24 (*See, e.g., BRV v. Superior Court, supra*, 143 Cal. App. 4th at 759 [Court reviewed the report in
25 question and determined that Athe public=s interest in understanding why Morris was exonerated
26 and how the District treated the accusations outweighs Morris=s interest in keeping the
27 allegations confidential@]; *Braun, supra*, 154 Cal. App. 3d at 341 [Ait is unlikely that the
28 Legislature intended an all or nothing approach@ to disclosure].

1 **V. THE CITY SHOULD BE REQUIRED TO PREPARE A LOG OF WITHHELD**
2 **DOCUMENTS.**

3 The City should be required to prepare a “privilege log” of documents withheld which it
4 claims are exempt, and this court should, if it does not grant the Petition outright, conduct an *in*
5 *camera* review of such withheld documents to verify whether the city’s claimed exemptions
6 apply and justify nondisclosure. In *State Board of Equalization v. Superior Court* (1992) 10 Cal.
7 App. 4th 1177, 1193, the Court of Appeal held that it was proper for a court to order preparation
8 of such a list of withheld documents. The court held that preparation of an index of 2,100
9 documents by the agency withholding them “does not involve an unreasonable amount of effort”
10 (*id.* at 1192), and that, “Providing such a list is consistent with the language and spirit of the
11 Public Records Act.” (*Id.* at 1193.) The Court should order the City to prepare such a log.

12 **PRAYER**

13 WHEREFORE, petitioners pray as follows:

- 14 1. That the Court order respondent City of Sacramento to disclose forthwith all of the
15 records requested by petitioners in their Public Records Act requests, which are attached as
16 Exhibits B, D and F to this Petition;
- 17 2. Alternatively, that the Court order respondent to show cause why the records
18 should not be produced;
- 19 3. Alternatively, that the Court order preparation of a list of withheld documents
20 showing the author, addressee, date of document, and a description of the document with
21 specificity and subject matter, which list shall be provided to petitioners and the Court, and that
22 the Court thereafter conduct an *in camera* review of withheld documents and thereafter order
23 them disclosed;
- 24 4. That the Court award reasonable attorney’s fees and costs to petitioners pursuant
25 to Government Code section 6259(d); and
- 26 5. For such other and further relief as the Court may deem just and proper.

27 Dated: February 3, 2012

RAM, OLSON, CEREGHINO &
KOPCZYNSKI LLP

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By: _____
Karl Olson
Attorneys for Petitioners

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VERIFICATION

I, Peter E. Scheer, am the executive director of the First Amendment Coalition, petitioner in this action. I have read the foregoing Petition for Writ of Mandate under the California Public Records Act. The matters stated therein are true and correct, except as to matters stated therein on information and belief and as to them I believe them to be true.

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

Executed in San Rafael, California on January _____, 2012.

Peter E. Scheer

1 **VERIFICATION**

2

3 I, Rick Stevenson, am the Public Records Request Coordinator with Eye on Sacramento,
4 petitioner in this action. I have read the foregoing Petition for Writ of Mandate under the
5 California Public Records Act. The matters stated therein are true and correct, except as to
6 matters stated therein on information and belief and as to them I believe them to be true.

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

9 Executed in Sacramento, California on January _____, 2012.

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12 _____
Rick Stevenson

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