CASE NO. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

CITY OF HUNTINGTON BEACH AND ROBIN ESTANISLAU, IN HER OFFICIAL CAPACITY AS HUNTINGTON BEACH CITY CLERK
Petitioners,

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF ORANGE
Respondent,

JOHN BRISCOE
Real Party in Interest.

Appeal from the Superior Court of California, County of Orange
Honorable Frederick Horn, Case No. 30-2017-00896258-CU-WM-CJC

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS PURSUANT TO GOVERNMENT CODE SECTION 6259 OF THE CALIFORNIA PUBLIC RECORDS ACT, WITH MEMORANDUM OF POINTS AND AUTHORITIES
[EXHIBITS FILED UNDER SEPARATE COVER]

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Petitioners City of Huntington Beach and Robin Estanislau, City Clerk, know of no entity or person that require disclosure under subsections (1) or (2) of Rule 8.208(e).

DATED: December 22, 2017

MICHAEL E. GATES, City Attorney

By: /s/
MICHAEL E. GATES
City Attorney
Attorney for Petitioners
CITY OF HUNTINGTON BEACH and
ROBIN ESTANISLAU, City Clerk

INTRODUCTION

The Respondent Superior Court erroneously granted real party-in-interest, John Briscoe's ("Briscoe"), First Amended Petition for Writ of Mandamus ("FAP"), which sought to compel the City's compliance with a California Public Records Act[1] ("CPRA") request ***that never existed***. To be clear, the Superior Court granted an FAP here ***that was not based on an actual CPRA request submitted to the City***. ***Hence, the City cannot be compelled to comply with a CPRA request that does not exist.***

Extraordinary Writ relief is sought by the City of Huntington Beach ("City") to prevent a flood of CPRA litigation against the City that the Superior Court ruling is very likely to cause. Moreover, Extraordinary Writ relief is sought by the City to prevent the imminent disclosure of possibly thousands of job applications submitted to the City that contain private, confidential information.

Briscoe submitted a CPRA request to the City on June 26, 2015 (his "Original CPRA Request") asking for the City to disclose *minimally redacted* job applications for various City Inspectors. In that Original CPRA Request, Briscoe requested, among other things, a "copy of his job application as originally submitted for HB City employment, and as submitted for his role as trash dump inspector if his trash dump inspector role is subsequent to his original hiring." (PE 11, p. 130.)

The City initially objected to Briscoe's request on the grounds that his Original CPRA Request called for the disclosure of employees' ***personnel files*** – which are considered confidential by the City, the applicants, and the CPRA. To be clear, Briscoe's Original CPRA Request sought the disclosure of personal information that falls under the "personnel file" exception of the CPRA pursuant to California Government Code Section 6254 subd. (c).

[1] California Public Records Act is codified at Government Code Sections 6250, *et. seq.*

Although Briscoe later admitted his request was invalid, he was initially unconvinced, filed a Petition for Writ of Mandamus; Complaint for Declaratory Relief ("Original Writ"), and sought Superior Court intervention to compel the City's compliance with his Original CPRA Request.

Briscoe's Original Writ claimed that the City erred in denying his overbroad and invasive Original CPRA Request. On the City's demurrer to the Original Writ, ***the Superior Court agreed with the City and sustained its demurrer because Briscoe's Original CPRA Request was non-CPRA compliant***.

As will be discussed, Briscoe then filed a First Amended Petition for Writ of Mandamus ("FAP"). Through that FAP and Pleadings, Briscoe changed his records request for City Inspector job applications. In fact, in his FAP, Briscoe sought information that was *different* from his Original CPRA Request – now seeking ***job applications with additional redactions, admitting his Original CPRA Request was overreaching and CPRA non-compliant***.

In his FAP, Briscoe's ***modified*** request for records appeared for the first time as requesting only: "the applicant's name, highest education, certificates and licenses, and skills along with portions of the applicant's work experience, resume and other attachments, and possibly whatever the applicant has included in the 'additional information' section." (PE 11, p. 113.) *This was substantially different than his Original CPRA Request.* Briscoe then wrote in his FAP: "***Petitioner has otherwise conceded that the remaining information from each job application should be redacted.***" (PE 11, p. 113.) Briscoe's admission that his Original CPRA Request is well-recorded and unambiguous.

Although Briscoe's recognition and change of course was reflected in his FAP, no new/modified CPRA request was ever submitted to the City – none. As such, the FAP that was before the Superior Court had no basis, to wit, there was no modified, subsequent CPRA request by Briscoe to support an FAP mandamus.

To date, the City has never received a modified CPRA request from Briscoe. And, his ***Original CPRA Request*** was deemed invalid by the Superior

Court. The Superior Court's order in this regard decided that Briscoe's Original CPRA Request was *invalid*, which made that Original CPRA Request and Briscoe's Original Writ moot for all pending purposes.

Assuming for the moment that Briscoe's new request for heavily redacted job applications through his FAP was a valid new CPRA, (which it was not,) ***the City has never had the opportunity to respond to that new, modified records request, nor has the City had the opportunity to agree to or deny that modified records request***. Therefore, any claim by the Superior Court or Briscoe that the City failed to comply with the modified CPRA Request (and a Writ of Mandamus should issue), is a claim that is not ripe for adjudication. There is no record of any denial or non-compliance by the City on Briscoe's modified records request contained in his FAP – none.

There are a number of things wrong with this Superior Court ruling. As a matter of public policy, members of the public should not be encouraged to submit unreasonable, overly broad, and invasive CPRA requests, then, when the records may not be produced, sue the public agency. Nor should members of the public be rewarded by the courts for, during the course of litigation, using a First Amended Petition for Writ of Mandamus as a vehicle to ***modify their original CPRA request therefore avoiding having to submit a modified CPRA request to the public agency.*** Allowing the Superior Court ruling to stand would require public agencies to litigate ever-changing requests.[2]

The Superior Court ruling in this case allows would-be plaintiffs to "move the goal posts" in the course of litigation and it incentivizes "gotcha" litigation,

[2] For example, a member of the public could request records clearly protected from disclosure such as the personnel file of a police officer. Then, when the request is denied by the public agency, the member of the public would be encouraged to sue for the records. According to this Superior Court's ruling, during litigation, the member of the public would be able to modify the CPRA request to ask for only some nominal information, such as a name of an officer. Plaintiff would then be entitled to attorneys' fees.

which would leave public agencies mired in legal battles over the public participation process. Public agencies, like the City of Huntington Beach, are fully committed to engaging in, and fulfilling, Constitutional "openness in government" State mandates. For cities like Huntington Beach to be punished by "gotcha" litigation for doing their level-best to fulfill their CPRA obligations while balancing privacy, privilege, and other considerations in making record productions is unjust, and not within either the spirit or the letter of the CPRA.

Likewise, the Superior Court is required to recognize and balance the privacy interest of individuals implicated by a CPRA request with the need to disclose information. Here, the Superior Court committed reversible error by failing to articulate any balancing regarding the need to disclose the employment applications versus the privacy interest of the City employees. The Superior Court erred by not balancing "the public interest in disclosure against the individual's interest in privacy." (*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 240.) The record is clear that the Superior Court failed to balance the public interest in disclosure against the employee's right to privacy. No evidence was ever presented to the Superior Court by Briscoe that he or any member of the public had any reason to review the confidential personnel records.

Finally, the City brings this matter to the Court of Appeal by way of Petition for Extraordinary Writ of Mandamus because review of CPRA orders by appeal is foreclosed by statute. (Government Code Section 6259(c).) Extraordinary Writ review is the City's exclusive means of appellate review. The City urges this Court of Appeal to issue a Writ ordering Respondent Superior Court to vacate its order in order to correct the wrong and injustice committed against the City and to protect against the broad disclosure of confidential personnel file material.[3]

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[3] On December 1, 2017, the Superior Court granted the City's *Ex Parte* Application to Stay its Order requiring disclosure of the application pending disposition of this Writ before the Court of Appeal. (PE 26, p. 628:8-10.)

PETITION

Petitioners allege:

A. The Parties.

1. Petitioners here are the City of Huntington Beach and Robin Estanislau, City Clerk (collectively, the "City"); they are the Respondents in Superior Court case *John Briscoe v. City of Huntington Beach, et al.*, Orange County Superior Court Case No. 30-2017-00896258. (PE 3, p. 22, ¶3.)[4]

2. Respondent here is the Superior Court exercising judicial functions in this case.

3. Real Party-in-Interest is John Briscoe ("Briscoe"), the Petitioner in the Superior Court case identified in paragraph 1 above. (PE 3, p. 22, ¶2.)

4. Briscoe filed his Petition for Writ of Mandamus; Declaratory Relief action to enforce his "right to receive public records" pursuant to Government Code Section 6250, the California Public Records Act. (PE 11, p. 107, ¶ 1.)

B. Jurisdiction and Timeliness of this Petition.

5. The CPRA establishes a special, expedited judicial process governing the public's right to inspect or receive copies of public records. "Any person" may request a judge to compel a public agency to disclose public records; the judge sets the relevant deadlines "with the object of securing a decision as to these matters at the earliest possible time." (Government Code Section 6258.) To buttress this expedited process, Section 6259(c) subjects a trial court's order to immediate review by the filing of a petition for an extraordinary writ with the Court of Appeal. This provision "unambiguously forecloses an appeal and instead

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[4] The Exhibits accompanying this Petition (Petitioners' Exhibits ("PE")) are true and correct copies of original documents filed with respondent court, except for Exhibit 2, which is a true and correct copy of the reporter's transcript of the November 16, 2017 hearing before the Honorable Frederick Horn. Citations to the Exhibits begins with the citation to the electronic bookmark (1, 2, 3, etc), followed by the page cite, and where available, the numbered paragraph (¶) or line cite on the cited page.

expressly authorizes a writ as the sole and exclusive means to challenge the trial court's ruling." (*MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 264.)

6. On November 16, 2017, the Superior Court heard Briscoe's First Amended Petition for Writ of Mandamus (Briscoe's second attempt at a Writ (the first one defeated by the City's demurrer, which was sustained). Prior to the hearing November 16th hearing, the Superior Court issued a Tentative Ruling. At the close of the hearing, the Superior Court adopted its Tentative Ruling. The Tentative Ruling was then attached to the Notice of Ruling granting Briscoe's First Amended Petition for Writ of Mandamus. (PE 1, p. 4-5.) The Superior Court granted the Writ of Mandamus and ordered the City to "disclose the public records they withheld from Petitioner with the following redactions: the applicant's address, phone numbers, email address, birth date, former names, driver's license, salary, preferences such as desired salary and preferred shifts, within 20 days." (PE 1, p. 4.)

7. This Court of Appeal has jurisdiction over this matter pursuant to Government Code Section 6259(c), which provides that a Superior Court's order granting access to documents under the CPRA is "immediately reviewable by petition to the Court of Appeal for the issuance of an extraordinary writ." This action was filed in Orange County Superior Court as a Petition for Writ of Mandamus to enforce Brisocoe's Original CPRA Request for job applications. (PE 3 p. 21,¶ 2; ¶ p. 22, ¶10; p. 32.)

8. The statutory right of the City to file a Petition for Extraordinary with the Court of Appeal is in lieu of an appeal, but trial court orders "shall be reviewable on their merits" through the Writ process. (*Times Mirror Co. v. Super. Ct.* (1991) 53 Cal.3d 1325, 1336.) The California Supreme Court has made clear that in CPRA cases, "when writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally

sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85,113-14.)

9. The City's Petition to the Court of Appeal is timely. Government Code Section 6259(c), provides that a Petition must be filed 20 days after service of the Superior Court's written order or within an additional 20 days if the Superior Court finds good cause allows. Briscoe served the Notice of Ruling on City electronically on November 16, 2017. (PE 1, p. 1-6.) On December 1, 2017, pursuant to City's *Ex Parte* Application, Superior Court found good cause existed to increase the time period for filing a Petition with this Court of Appeal, extending the deadline to and including December 26, 2017. (PE 26 p. 628 5-7) Further, the Superior Court stayed its November 16, 2017 Order requiring production of the job applications is stayed "until the Court of Appeal acts upon the City's Petition for Writ of Mandamus." (PE 26, p. 628: 8-10.)

C. Briscoe's Original CPRA Request for Job Applications

10. On June 26, 2015, Briscoe submitted four CPRA requests ("Original CPRA Request") to the City broadly seeking documents regarding the Republic Services Solid Waste Facility located in Huntington Beach (the "Republic Facility"). (PE 23, p. 493, ¶ 2.) Briscoe has a longstanding feud with Republic whereby he accuses the company and the City of colluding to (among other things) create a river of trash. (PE 18, p. 286-287 ¶ 6-8.)

11. Among other things, Briscoe sought inspection reports and complaints regarding the Republic Facility. (PE 23, p. 493, ¶ 3; p. 501-02.) The City Attorney responded by making approximately 2,000 pages of responsive documents available to Briscoe for copy and retrieval, which would be produced upon Briscoe paying the copying fee. (PE 23, p. 493, ¶ 4-5; p. 505-508.) To the City's best knowledge, Briscoe never followed-up and obtained copies of or viewed these materials. (PE 23, p. 493; ¶ 4-5.)

12. As part of his Original CPRA Request, Briscoe sought the job applications of the City employees who had inspected the Republic Facility. (PE 23, p. 493 ¶ 3; p. 498; also PE 11, p. 130.) Importantly, Briscoe knew by the language of his own request that his Original CPRA Request was for confidential personnel records but still specifically ordered that the records be produced with only limited information redacted. Briscoe's Original CPRA Request insisted the City disclose the entire job application, except as follows:

> "I will allow and permit you to redact the street address (but city-of residence [sic]), zip code, phone numbers, and social security number, (c) there is no explicit statutory protection of email addresses in public employment, only phone numbers are protected from public disclosure." [Emphasis added.] (PE 23, p. 498.)

13. The City refused this request for job applications on August 5, 2015, and on August 6, 2015, on multiple grounds, including that the CPRA at Government Code Section 6254(c) specifically exempts from disclosure "personnel and similar files." (PE 23, p. 494, ¶ 6, 8; and at p. 510, p. 515-516.)

14. Briscoe did not respond to the City's response letter for approximately sixteen (16) months, until he retained an attorney. On December 5, 2016, Briscoe's attorney, Chad Morgan, questioned the City's 16-month old CPRA response, complaining that the City also did not provide job descriptions of the inspectors, or their employee training and certification records when it refused to produce the job applications. (PE 23, p. 494 ¶ 9; 512-13.)

15. Importantly, the scope of the Original CPRA Request, specifically, the scope of the redactions Briscoe would accept, remained unchanged. In response, on December 15, 2016, the City produced the job descriptions and their training records, but again confirmed it would not produce the job applications on the ground that they were exempt from disclosure under the CPRA. (PE 23, p. 494-495 ¶ 10; 515-516.)

16. According to Briscoe's attorney, Chad Morgan, prior to filing suit, he was prepared to consider accepting substantially redacted job applications in order to resolve any dispute. (PE 19, p. 350.) ***But importantly, Mr. Morgan kept his offer to himself, and never told the City***. (PE 23, p. 495, ¶ 11.)

17. During trial, the City objected to Briscoe's claim that he would accept substantially redacted employment applications as inadmissible speculation. (PE 23, p. 407, Objection No. 1.) However, the Superior Court never ruled on this or any of the City's other objections. (See, Notice of Ruling; PE 1, p. 4-5; Court Transcript, PE 2, p. 8-16.)

D. Briscoe's *NEW* Request that The City Disclose Confidential Personnel Files.

18. On January 9, 2017, Briscoe filed his original Petition for Writ of Mandamus ("Original Writ"), at which time he alleged that "Petitioner [Briscoe] requested public records from Respondent [the City] and Respondent failed to provide the records Petitioner Requested." (PE 3, p. 26:25-26.) As a result, a "Writ of Mandamus is specifically authorized as a remedy for PRA violations." (PE 3, p. 26:27.)

19. The City demurred to Briscoe's Original Writ on February 14, 2017. (PE 4, p. 47-55.) Notably, the Superior Court ***agreed with the City*** on its objections and complaints about Briscoe's Original CPRA Request and the Superior Court sustained the City's demurrer on March 30, 2027. (PE 9, p. 102-03.)

20. Briscoe then filed a First Amended Petition for Writ of Mandamus ("FAP") on April 19, 2017, which contained a completely revised records request of the City (although he never actually submitted a revised CPRA request to the City. (PE 11, p. 107-64.)

21. In his FAP, ***for the first time Briscoe pleads that the he no longer seeks the complete job applications he insisted almost two years earlier in his***

Original CPRA Request to the City. (PE 11, p. 130.) Instead, Briscoe alleged in his FAP that "[b]ased on the blank application, examples of information that should be disclosed include the applicant's name, highest education, certificates and licenses, and skills along with portions of the applicant's work experience, resume and other attachments, and possibly whatever the applicant included in the 'additional information' section. Portions of the applicant's work experience and "additional information" should be evaluated on a case-by-case basis, and the non-exempt segregable portions of the applicant's resume and other attachments should be disclosed in a manner consistent with the exempt/non-exempt information on the application." (PE 11, p. 114, ¶ 45.)

22. ***Briscoe never communicated this new and completely different request to the City via a CPRA request***. Nowhere in Briscoe's First Amended Petition for Writ of Mandamus does he allege that he communicated a new and different CPRA request to the City. (PE 11.) Likewise, nowhere in Briscoe's Declaration submitted in support of his Opening Brief seeking issuance of the Writ of Mandamus, nor in the Declaration of his attorney, Mr. Morgan, do either declare that this new and completely different request CPRA request was communicated to the City. (PE 18, 19.)

23. The City again demurred, this time to the FAP. In error, that demurrer was overruled by the Superior Court. The City answered the FAP on July 3, 2017. (PE 16, p. 204-264.)

E. The Superior Court Grants Briscoe's Petition – Ordering the City to Broadly Disclose Confidential Personnel Files.

24. Briscoe filed his Opening Brief in support of his FAP on September 5, 2017 (PE 17), along with the supporting Declarations of Petitioner Briscoe and his attorney, Mr. Morgan. (PE 18, 19.)

25. On September 5, 2017, the City filed its Opposition Brief (PE 20), along with the supporting Declarations of its Human Resources Director, Michelle

Warren (PE 23, p. 413-452), its attorneys, Mr. Field and Ohl (PE 23, p. 453-491, 492-552), and the Declarations of 8 of the employees whose job applications were at issue. (PE 23, p. 553-581). Each of them testified that there job duties were not assigned solely or primarily to the Republic Facility. The employees include a Building Inspector working for the City since 2002, who inspected the foundation of the building Republic is constructing (PE 23, p. 555, ¶ 4), a Code Enforcement Officer who received an odor complaints which was referred to the responsible agency, the State Air Quality Management District (PE 23, p. 558, ¶ 4), and an Environmental Specialist who annually inspects the Facility to ensure it is following best management practices to avoid discharge of pollutants into storm drains. (PE 23, 562, ¶ 4.)

26. All of them testified that they understood when they applied for their jobs that their employment applications would be kept confidential, and that they object to the disclosure of their applications as a violation of their right to privacy. (PE 23, 555, ¶ 5-7; 558, ¶ 5-7; 562, ¶ 5-7; 566, ¶ 4-6; 569, ¶ 4-6; 572, ¶ 5-7: 576, ¶ 5-7; and, 580, ¶ 5-7.) Each of them testified that there job duties were not assigned solely or primarily to the Republic Facility. The employees include a Building Inspector working for the City since 2002, who inspected the foundation of the building Republic is constructing (PE 23, p. 555, ¶ 4), a Code Enforcement Officer who received an odor complaints which was referred to the responsible agency, the State Air Quality Management District (PE 23, p. 558, ¶ 4), and an Environmental Specialist who annually inspects the Facility to ensure it is following best management practices to avoid discharge of pollutants into storm drains. (PE 23, 562, ¶ 4.) All of them testified that they understood when they applied for their jobs that their employment applications would be kept confidential, and that they object to the disclosure of their applications as a violation of their right to privacy. (PE 23, p. 555, ¶ 5-7; p. 558, ¶ 5-7; p. 562, ¶ 5-7; p. 566, ¶ 4-6; p. 569, ¶ 4-6; p. 572, ¶ 5-7: p. 576, ¶ 5-7; and, p. 580, ¶ 5-7.)

27. The City also filed Objections to the Declarations of Briscoe, and his attorney Mr. Morgan. (PE 21, 22.) In particular, the City objected to the proposal in the Morgan Declaration that the City produce portions of the job application. (PE 11, p. 114, ¶ 45.) The City objected that these communications with the City during the course of the litigation were inadmissible under Evidence Code Section 1152 to prove that the City is liable for violating the CPRA. (PE 22, p. 407-08, Objection 2.)

28. The Superior Court heard argument on November 16, 2017, and adopted its Tentative Ruling as the order of the Court. (PE 2, p. 16:10-12.) At no time did the Superior Court rule upon the City's Objections to the Briscoe and Morgan Declarations.

29. The same day, Briscoe filed a Notice of Ruling with the Tentative Ruling attached to it. (PE 1, p. 1-6.) The Tentative Ruling starts:

> "The Amended Petition for Writ of Mandamus filed by Petitioner John Briscoe is granted. It is hereby ordered that (1) Respondents, City of Huntington Beach and Robin Estanislau, in her official capacity as Huntington Beach City Clerk, disclose the public records they withheld from Petitioner with the following redactions: the applicant's address, phone numbers, email address, birth date, former names, driver's license, salary, preferences such as desired salary and preferred shifts, within 20 days." (PE 1, p. 4.)

30. ***The Superior Court appears to have erroneously transmuted information contained in Briscoe's FAP into a CPRA***. Briscoe stated that "***Petitioner seeks disclosure of the following information for each applicant***: 'name, highest education, certificates and licenses, and skills along with portions of the applicant's work experience, resume and other attachments, and possibly whatever the applicant has included in the "additional information" section. Nonexempt segregable portions of the applicant's resume and other attachments should be evaluated on a case-by-case basis. . ." (PE 1, p. 5.) The Superior Court added that it "will review the information if necessary and may appoint a referee

for such purpose." (PE 1, p.5.) ***By doing this, the Superior Court ruled on the wrong records request***.

31. Finally, the Superior Court concluded that:

> "The court has considered the applicants' concerns and those of City and has concluded that they are unfounded, given that ***Petitioner has limited the information sought,*** such that it is focused upon each applicant's qualifications for the position sought, their educational background, their work experience, the position sought, licensing, if any, the highest level of education reached and skills which are relevant to the position sought. No information of a personal nature independent of the job requirements is sought." [Emphasis added.] (PE 1, p. 5.)

32. Although tentative rulings may be issued on Petitions for Writs of Mandamus (CRC 3.1103(a)), prevailing party Briscoe never prepared a proposed court order, Peremptory Writ of Mandamus or Judgment, contrary to California Rule of Court 3.3112, nor did Superior Court issue any order or judgment.

F. The City's Need For Extraordinary Writ Relief.

33. *Review by appeal foreclosed by statute.* The Legislature's purpose in replacing the usual, often lengthy, appeal process with writ review was to provide for *speedier* appellate review, not *less* appellate review. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112; *Times-Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336.) Accordingly, when, as here, writ review is the exclusive means of appellate review, "an appellate court may not deny an apparently meritorious writ petition" that is "timely presented" and "procedurally sufficient" merely because "the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters." (*Powers, supra,* 10 Cal.4th at p. 114.)

34. *Imminent disclosure of privileged documents.* As the City demonstrates below, the job applications that Superior Court ordered disclosed are subject to right of privacy under the California Constitution, and exempt from disclosure under Government Code Sections 6254(c), and 6255.

PRAYER

WHEREFORE, Petitioners City of Huntington Beach and Robin Estanislau, City Clerk, pray that this Court of Appeal:

1. Issue an Extraordinary Writ of Mandamus directing the Superior Court to vacate its November 16, 2017 Decision, which directs the City to disclose the requested job applications;

2. Award the City costs in this proceeding; and

3. Grant the City any other and further relief that the Court of Appeal may deem appropriate and just.

DATED: December 22, 2017

MICHAEL E. GATES, City Attorney

By: /s/
MICHAEL E. GATES
City Attorney
Attorney for Petitioners
CITY OF HUNTINGTON BEACH and
ROBIN ESTANISLAU, City Clerk

VERIFICATION

I, MICHAEL E. GATES, declare as follows:

1. I am attorney admitted to practice before all courts in this State.

2. As counsel for Petitioners City of Huntington Beach and Robin Estanislau, City Clerk, I have reviewed the records and files that are the basis of this Petition for Extraordinary Writ of Mandamus. I make this declaration because I am more familiar with the particular facts, including the state of the record, than are my clients. I have reviewed and am familiar with the record and the files that are the basis of this Petition. This Petition's allegations are true and correct. I have read the foregoing Petition and know the facts set forth therein to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This Verification was executed on December 26, 2017 in Huntington Beach, California.

DATED: December 22, 2017 MICHAEL E. GATES, City Attorney

By: /s/
MICHAEL E. GATES
City Attorney
Attorney for Petitioners
CITY OF HUNTINGTON BEACH and
ROBIN ESTANISLAU, City Clerk

MEMORANDUM OF POINTS AND AUTHORITIES

I. BRISCOE'S PETITION TO THE SUPERIOR COURT WAS INVALID BECAUSE BRISCOE NO LONGER SEEKS THE DOCUMENTS HE ORIGINALLY REQUESTED.

A. Briscoe Did Not Submit a Valid CPRA Request to the City Such that the Superior Court Had Jurisdiction to Review This Matter.

A Writ of Mandamus is proper to correct the Superior Court's erroneous ruling and application of the California Public Records Act ("CPRA"). Simply put, the Superior Court incorrectly ruled on a public records request that **does not exist**. As the City argued, to obtain public records, a person must submit a request that reasonably describes identifiable records. (Government Code Section 6253(b).)

A CPRA request must be focused, specific, and clear enough so that the agency can decipher which records are being sought. (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165.) Once identified, the agency must determine what exemptions apply. (*Id.*, at 481.) In addition, the City may require that prior to disclosure, the requestor pay a fee for the cost of copying. (California Government Code Section 6253.)

Briscoe's Original CPRA Request sought job applications for the City "dump inspectors" who had been to the Republic Facility. Briscoe was emphatic that he would accept limited redactions from the job applications:

> "Provide a copy of his job application as originally submitted for HB City employment, and as submitted for his role as trash dump inspector if his trash dump inspector role is subsequent to his original hiring. NOTE: (a) **job applications for municipal employment are not employee confidential documents.** The application was submitted in an open field of competing job applicants under a merit system of employment; the original submission was not confidential. It is not legal to classify an employment application as employee confidential subsequent to employment as this would make the entire hiring process impossible

> to vet for fair merit hiring practices. (b) **I will allow and permit you to redact the street address (but city-of-residence [sic]), zip code, phone numbers, and social security number,** (c) there is no explicit statutory protection of email addresses in public employment, only phone numbers are protected from public disclosure." (PE 11, p. 130.) (Emphasis Added)

As discussed, the City denied this request citing to the personnel exemption in the CPRA. On January 9, 2017, Briscoe filed his Original Petition for Writ of Mandamus; Complaint for Declaratory Relief ("Original Writ"), at which time he sought to compel (a) disclosure of the Original CPRA Request and/or (b) submission of the records to the Superior Court for an *in camera* review if necessary." (PE 3, p. 27:1-3.) The City demurred to the Original Petition. (PE 4, p. 47-55.) The Demurrer was sustained on March 30, 2027. (PE 9, p. 102-03.)

Briscoe then filed a First Amended Petition for Writ of Mandamus ("FAP"), where he changed his mind and now only sought portions of the job applications. (PE 11, p. 113, ¶ 43.) Specifically, through his FAP, Briscoe now requested that the City produce:

> "the applicant's name, highest education, certificates and licenses, and skills along with portions of the applicant's work experience, resume and other attachments, and possibly whatever the applicant has included in the 'additional information' section. Portions of the applicant's resume and other attachments should be evaluated on a case-by-case basis and the non-exempt segregable portions of the applicant's resume and other attachments should be disclosed in a manner consistent with the exempt/non-exempt information on the application." (PE 11, p. 114, ¶ 45.)

The Superior Court granted this FAP request based on an erroneous belief that the request for information contained in the FAP equates to a CPRA. The Superior Courts Tentative Decision (PE 1, p.5.) and the transcript from the oral argument before the Superior Court makes clear that the Court believes Briscoe submitted a new CPRA request through his FAP. The Superior Court granted this request based on an erroneous belief that the request for information contained in

the FAP equates to a PRA. At the hearing on the Writ, the Court itself acknowledges that "they are seeking something different based on the amended petition." (PE 2, p. 10: 3-4.) However, to be valid, this new CPRA request must comply with the procedural requirements of Government Code Section 6253(b) and first be submitted to the City.

Because Briscoe did not actually submit a new CPRA request to the City, he many not sue on this new request, because he has not established the predicate for the suit since "public records are being improperly withheld from a member of the public." (Gov't § 6259(a).) The only item the City rejected was Briscoe's original request which is now moot. Because Briscoe did not submit a new CPRA to the City following the procedural requirements of Government Code Section 6253 subd. (b), Briscoe's new records request for further redacted documents is not valid CPRA request.

B. The FAP is Moot or Otherwise Not Ripe for Adjudication.

"A case is considered moot when the question addressed [in the case] was at one time a live issue . . . but has been deprived of life because of events [or circumstances] occurring after the judicial process was initiated." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559.) In other words, courts may only "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. [Citation.]" (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

Here, Briscoe's Original CPRA Request sought a copy of the job application for each City employee who inspected the Republic Facility. Briscoe insisted on the City disclosing essentially the entire application with specifically identified, limited redactions. (PE 11, 111, ¶27, and Ex. A, p. 130.) The City refused this request in August of 2015. (PE 11,111, ¶28, and Ex. B p. 132.)

Briscoe then filed an FAP whereby he admitted his Original CPRA Request was beyond the scope of the CPRA, and so then through his FAP he sought different, more heavily redacted job applications. Indeed, the FAP allows the documents to essentially be redacted in their entirety, except for the employee's name. (PE 11, p. 115: 22.) Because throughout the course of litigation Briscoe deviated from his Original CPRA Request, which was the basis of his Petition to the Superior Court, and the Superior Court ruled against Briscoe on demurrer of the Original Writ, it follows that the Original CPRA Request is moot.

Assuming *arguendo* for the moment that Briscoe's FAP was a viable CPRA Request, which it was not, the City has never denied this records request, and therefore there is nothing to litigate at this point. The case is not ripe for adjudication if there is any interpretation of the record that the modified records request in the FAP constitutes a CPRA-compliant request. As the Courts have consistently held, "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." (*Pacific Legal Foundation v. California Coastal Com.*, (1982) 33 Cal. 3d 158.)

Briscoe's Original CPRA Request states plainly that that "job applications for municipal employment are not employee confidential documents." (FAP, Ex. A.) Now, in his FAP Briscoe requests only that: the applicant's address, phone numbers, email address, birth date, former names, driver's license and other "personal information," "preferences" such as desired salary and preferred shifts, and depending on the circumstances, portions of the applicant's prior work history, resume, and "additional information." When the applications are compared to the job descriptions, it is clear that none of this information relates to the position's minimum qualifications. (FAP, 13:9-14.)

Briscoe kept "moving the goal post" with new requests though means of litigation to continue to try and narrow his Original CPRA Request, allowing him to avoid compliance with Government Code Section 6253, subdivision (b). In order for a new lawsuit to become "ripe" in this regard, Briscoe must have submitted a new CPRA request to the City, and allow the City to consider the request and act accordingly. Instead, Briscoe improperly used the Superior Court without following the CPRA procedural requirements. Briscoe, through the Superior Court, sought less and less job application information in hopes of not only "trying his hand" at coming into CPRA compliance at some point, but also, now with the assistance of his attorney, obtaining bits of information to justify an award of attorney's fees. This strategy was improper and a blatant abuse of the Superior Court to frame a public records request while collecting attorney's fees. In addition, by admitting the job applications should be redacted except for the employee's name and education, Briscoe has submitted a new records request, for which he has not exhausted his administrative remedy.

"When remedies before an administrative forum are available, a party must in general exhaust them before seeking judicial relief." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.) The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., Courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked Courts should decline to intervene in an administrative dispute unless absolutely necessary)." (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080.)

Only now, with his FAP, Briscoe has conceded that even "portions of the applicant's prior work history, resume, and 'additional information'" need not be disclosed from the applications. Briscoe has effectively submitted a new request for public records, which the City should be permitted consider before the Superior Court has jurisdiction to review.

As discussed, in effect, Briscoe now seeks in litigation different public records than those requested before he filed this Action on February 2017. By never giving the City the opportunity to act on his latest request, Briscoe failed to exhaust his administrative remedies and/or caused his case to become moot. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609.)

It follows that because the Original CPRA Request is moot, Briscoe is required to file a new public records request identifying the new information he alleges he wants in his First Amended Petition.

II. THE JOB APPLICATIONS ARE EXEMPT FROM DISCLOSURE UNDER THE CPRA AND THE CALIFORNIA CONSTITUTION

A. Because Public Employees Have A Constitutionally Protected Privacy Interest In Their Personnel Files, Good Cause Must Be Shown Before Job Applications Are Disclosed.

"Californians have a constitutional right to access the records of their public agencies. They have a strong interest in knowing how government officials conduct public business, particularly when allegations of malfeasance by public officers are raised." (*BRV, Inc. v. Superior Court* (2006)143 Cal.App.4th 742, 746.) At the same time, in enacting the CPRA, the Legislature began by noting that it was "mindful of the right of individuals to privacy." (Government Code Section 6250.) Consistent with this privacy concern, Government Code Section 6254 provides a lengthy list of records exempt from disclosure under the CPRA, including "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Government Code Section 6254(c).) This exemption reflects the principle that "[p]ublic employees have a legally protected interest in their personnel files." (*BRV*, 143 Cal. App 4th at 756.)

Further, the right of privacy is embedded in Article I, Section 1 of the California Constitution, which provides that "pursuing and obtaining . . . privacy" is among our "inalienable rights." Consequently "[o]ne does not lose his [or her] right to privacy upon accepting public employment." (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818, relying upon *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 100.) As a result, protecting privacy is a hallmark of the CPRA. Government Code Section 6254 sets forth the principal exemptions from the CPRA; subdivision (c) exempts "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Further, the CPRA's so-called "catchall exception," at Section 6255(a) exempts any records not otherwise subject to an express exemption where the public agency can demonstrate "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The CPRA was modeled after the Federal Freedom of Information Act ("FOIA"), and FOIA case law is applicable to the PRA. (*BRV*, 143 Cal.App.4th at 756.) In *United States Dep't of State v. Wash. Post Co.* (1982) 456 U.S. 595, 602, the Supreme Court defined a "personnel" file as not limited to "a narrow class of files containing only a discrete kind of personal information," but included any type of government records "on an individual which can be identified as applying to that individual," including both school and job records. In *BRV*, the Court held that this principle applies equally to the CPRA. (143 Cal.App.4th at 756-57.)

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B. The Superior Court Erred By Failing To Balance The City's Employees' Right Of Privacy Against The Public's Lack Of Interest In Nondisclosure Of The Employment Applications.

As the Court commented in *Los Angeles Unified School Dist. v. Superior Court* ("*LAUSD*") (2014) 228 Cal.App.4th 222, 240, "just because a member of the public has an interest in something does not necessarily make that interest one of public concern." Here, Superior Court erred by failing to "determine whether the potential harm to privacy interests from disclosure outweighs the public interest in disclosure." (*BRV*, 143 Cal.App.4th 742, 755 *Versaci, supra*, 127 Cal.App.4th at p. 818.) During proceedings before the Respondent Court, Briscoe failed to identify any public interest served by disclosure. Briscoe speculated in his Opening Brief that the existence of an employee job application "supports inferences that the City collected applications from other applicants," but that if there is no application, then there must have been a "backroom arrangement." (PE 17, p.281:18-24.) Further, seeing an application would allow Briscoe to determine if the City hired a person with only a high school diploma, where a Master's Degree was required. (POE 17, p. 281:25 -282:2.)

However, Briscoe's rationale supporting "public interest" in disclosure is based upon nothing other than his speculative fear of corruption between the City and Republic. CPRA case law consistently insists that disclosure of personnel records is appropriate only where "complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well founded." (*Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045.) This principle is particularly true with high-ranking public officials, such as a school superintendent. (*BRV*, 143 Cal. App. 4th at 757.)

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When balancing disclosure against privacy, the Superior Court must consider if disclosure of the applications "would shed light on an agency's performance of its statutory duties" (*LAUSD*, 228 Cal.App.4th at 241, citation omitted), and if so the "the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." (*Id.*, at 242.) Finally, once the public interest is identified, the Superior Court must consider the "public interest served by nondisclosure of the records" against the public interest "served by disclosure of the records." (*Id.*, 228 Cal.App.4th at 243.).

In this case, Briscoe offered no evidence showing how the public would benefit from disclosure of the job applications he seeks. By way of Declaration, Briscoe testified that while he believes the City only hires persons who meet the minimum qualifications for the job, he has "concerns that the City might not have done this with respect to the Republic dump inspectors." (PE 18, p. 287, ¶ 10.) However, Briscoe offered no admissible evidence supporting these claims, only his speculative "concern" that the City hired employees without obtaining job applications. (*Id.*) Given that Mr. Briscoe offered no facts supporting his "concern," the Superior Court should have sustained the City's separately filed objections to his Declaration. (PE 21, p. 398-405.)

Moreover, both as a matter of City policy and practice, Briscoe's fears were imaginary. First, the City's longstanding Administrative Regulations for hiring employees provide that the Human Resources Director is required to certify that job applicants meet the minimum standards for appointment. (PE 23, p. 415, ¶ 7, and City Personnel Rules 4.2, 10.1, and 10.5 at p. 421-23.) Second, as a matter of routine practice, the City verifies school degrees and references to ensure minimum qualifications are met. (PE 23, p. 416, ¶ 10.) Finally, the City confirmed that it had obtained employment applications from all the employees who inspected the Republic Facility. (PE 23, p. 419, ¶ 24.)

Second, under the California Integrated Waste Management Act of 1989, the County of Orange, not the City of Huntington Beach, is the responsible regulatory agency for the Republic Facility. (Public Resources Code Sections 40400, 43200, *see, Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1127.) In fact, Briscoe is well aware of this fact, since he sued the County of Orange over the job applications of its solid waste disposal inspectors. (PE 23, p. 454, ¶2-4.)

In this case, Briscoe failed to identify a substantial complaint of wrongdoing, but instead, offered a baseless complaint that he "is concerned about Republic's interference in the [hiring] process." (PE 17, p. 281:18-19.) Because such a meritless "concern" cannot override the right of privacy to one's own personnel file, no further analysis is required. It follows that this Court of Appeal direct that judgment be entered in favor of the City and that disclosure of the job applications be denied.

C. The City Has An Obligation To Protect Its Employees' Privacy Interest In Their Personnel Files, Including Job Applications.

The Superior Court also erred when it ignored the holding in *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 330, and failed to take into account that where "well-established social norms" provide that employer personnel files, including job applications, are confidential, they may not be disclosed absent extraordinary circumstances.

Through the Declaration of Michelle Warren, the City introduced substantial, undisputed evidence that it is the well-established norm among all employers—both in the public and private sectors— to maintain the confidentiality of personnel files, including job applications. (PE 23, p. 414, ¶6.) In order to identify the best qualified candidates, employers require that applicants are candid in their applications. However, some candidates not only will not be

honest, but also may not even apply for the job unless they are confident that the City will maintain the confidentiality of their application. (PE 23, p. 417, ¶ 15.)

Here, Briscoe admitted that he wants the applications to embarrass employees, such as claiming their school was a "diploma mill." (PE 17, p 279: 19-22.) Preventing such behavior is exactly why the applications must not be disclosed, and judgment be entered in favor of the City of Huntington Beach.

D. Where The Records Sought Are Exempt From The CPRA, The City Has No Obligation To Assist Briscoe In Preparing His Records.

Briscoe contended that if a portion of the job applications are exempt from disclosure, then the non-exempt portions must be disclosed. To be precise, Briscoe relied upon Government Section 6253(a), which provides that "[a]ny reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." In interpreting this provision, the California Supreme Court has held that there is no duty to provide a "segregable portion" where nonexempt materials are "inextricably intertwined with exempt materials." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453, fn. 13, citing *Northern Cal. Police Practices Project* v. *Craig* (1979) 90 Cal.App.3d 116, 124, with approval.)

Such is the case here. The job applications are entirely private because they concern the affairs of a single applicant, and in no way disclose any governmental activities.

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CONCLUSION

For the reasons stated above, the City respectfully requests that this Court of Appeal issue an Extraordinary Writ of Mandamus, or other appropriate relief, directing the Superior Court to set aside its November 16, 2017 Order, and dismiss Briscoe's Action as moot. Alternatively, the City further requests that this Court of Appeal hold the employment applications sought by Briscoe are exempt from disclosure.

DATED: December 22, 2017

MICHAEL E. GATES, City Attorney

By: /s/
MICHAEL E. GATES
City Attorney
Attorney for Petitioners
CITY OF HUNTINGTON BEACH and
ROBIN ESTANISLAU, City Clerk

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Petition for Extraordinary Writ of Mandamus is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block, and this certificate, it contains 8118 words.

DATED: December 22, 2017 MICHAEL E. GATES, City Attorney

By: /s/
MICHAEL E. GATES
City Attorney
Attorney for Petitioners
CITY OF HUNTINGTON BEACH and
ROBIN ESTANISLAU, City Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2000 Main Street, Huntington Beach, CA 92648.

On December 22, 2017, I electronically filed the foregoing **PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS PURSUANT TO GOVERNMENT CODE SECTION 6259 OF THE CALIFORNIA PUBLIC RECORDS ACT, WITH MEMORANDUM OF POINTS AND AUTHORITIES [EXHIBITS FILED UNDER SEPARATE COVER]** with the Clerk of the Fourth District Court of Appeals by using the TrueFiling system and electronically served the following parties via TrueFiling:

Chad D. Morgan, Esq.
LAW OFFICE OF CHAD D. MORGAN
1101 California Ave., Ste. 100
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Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

I placed a true copy thereof in a sealed envelope to be deposited in the mail at Huntington Beach, California to:

Clerk of the Court
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

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

Executed on December 22, 2017, in Huntington Beach, California.

/s/
CHRISTINA LEONHARD