

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Voice of Orange County.Org vs. City of Westminster**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC
SERVICE****CASE NUMBER:**
30-2016-00875327-CU-WM-CJC

I certify that I am not a party to this cause. I certify that a true copy of the above dated has been placed for collection and mailing so as to cause it to be mailed in a sealed envelope with postage fully prepaid pursuant to standard court practice and addressed as indicated below. This certification occurred at Santa Ana, California on 11/29/17. Following standard court practice the mailing will occur at Santa Ana, California on 11/29/17.

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CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 11/29/2017

TIME: 11:08:00 AM

DEPT: C19

JUDICIAL OFFICER PRESIDING: Walter Schwarm

CLERK: Kimberley Gray

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2016-00875327-CU-WM-CJC** CASE INIT.DATE: 09/15/2016

CASE TITLE: **Voice of Orange County.Org vs. City of Westminster**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72707259

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 10/31/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, has filed its Memorandum of Intended Decision. See Memorandum of Intended Decision attached.

Memorandum of Intended Decision filed today. This matter will no longer be deemed submitted.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

NOV 29 2017

DAVID H. YAMASAKI, Clerk of the Court

BY: _____, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

VOICE OF ORANGE
COUNTY.ORG

Petitioner/Plaintiff,

v.

CITY OF WESTMINSTER,

Respondent/Defendant.

30-2016-00875327

MEMORANDUM OF INTENDED
DECISION

Hon. WALTER P. SCHWARM

Dept. C19

In this document, the Court announces its Memorandum of Intended Decision. The Memorandum of Intended Decision will be the Statement of Decision unless within ten (10) days either party files and serves a document that specifies controverted issues or makes proposals not covered in the Memorandum of Intended Decision as provided by California Rules of Court, Rule 3.1590(c)(4). This Memorandum of Intended Decision will address the principal controverted issues presented during the hearings regarding the Petition for Writ of Mandate (Code Civ. Proc., § 632.)

“A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citation.]” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) Further, “ [I]n rendering a statement of decision under Code of Civil Procedure

1 section 632, a trial court is required only to state ultimate rather than evidentiary facts; only
2 when it fails to make findings on a material issue which would fairly disclose the trial court's
3 determination would reversible error result.' ” (*Sperber v. Robinson* (1994) 26 Cal.App.4th
4 736, 745.)

5 STATEMENT OF CASE

6 On September 15, 2016, Petitioner filed a Verified First Petition for Writ of Mandate
7 and Declaratory Relief for Violations of the California Public Records Act (Petition). The
8 Petition sought a “declaratory judgment that the records requested by the Petitioner are
9 disclosable public record [sic] and the City violated the California Public Records Act by
10 refusing to produce the requested records.” (Petition, 10:14-16.) According to the Petition
11 Petitioner sought (1) “any government tort claim or threat of litigation by Kevin Baker;” (2)
12 “any communication from legal counsel for Kevin Baker or any other representative on his
13 behalf between June 2015 and April 22, 2016;” and (3) “[a]ll complaints against Margie Rice
14 from 1994 to present.” (Petition, ¶¶ 6, 7, and 13, and Exhibits A, B and G.) On October 17,
15 2016, Respondent filed its Verified Answer of Respondent City of Westminster to the
16 Verified Petition for Writ of Mandate and Declaratory Relief for Violations of the California
17 Public Records Act (Answer).

18 Petitioner seeks disclosure of the following records that Respondent identified as
19 responsive, but withheld, as to the above requests:

- 20 1. March 2, 2016 email from K. Beach to M. Harary;
- 21 2. March 4, 2016 email from M. Harary to K. Beach;
- 22 3. March 10, 2016 email from M Harary to E. Manfro re K. Beach;
- 23 4. Redacted March 22, 2016 email string from D. Wagner to I. Moisa forwarded by I.
24 Moisa to E. Manfro and M. Harary;
- 25 5. Redacted March 22, 2016 email string forwarded by E. Manfro to D. Jones, M.
26 Harary & B. Praet;
- 27 6. Redacted March 22, 2016 email string reply from B. Praet to E. Manfro and D.
28 Jones, cc M. Harary in response to # 5, above;
7. Redacted April 5, 2016 email from M. Harary to D. Wagner and I. Moisa;
8. April 5, 2016 email from D. Wagner to M. Harary in response to above;
9. Redacted April 7, 2016 email from D. Wagner to I. Moisa, forwarded by I Moisa to
E. Manfro and M. Harary;
10. List of resignation terms (undated)

- 1 11. Eleven page document titled "Attachement to Government Tort Claim" marked
2 "Confidential [Draft]" February 4, 2016;
- 3 12. Redacted April 19, 2016 email from D. Wagner to R. Jones, forwarded to B. Praet
4 and CC E. Manfro;
- 5 13. Redacted April 19-21, 2016 email exchange between D. Wagner, R. Jones, and B.
6 Praet, cc multiple persons; and
- 7 14. Unsigned 1 page document titled "Claim Against City" with 14 page "Attachment
8 to Government Tort Claim", attached to No. 12. (7-18-17 Aviles Decl., ¶ 2 and
9 Exhibit T.)¹

10 On October 4, 2017, Respondent amended its disclosure of responsive records by "de-
11 identif[ying]" Item nos. 2, 3, and 7 as being responsive to Petitioner's requests.

12 On October 27, 2017, the parties filed a Joint Statement of the Parties that requested
13 the court to address the following issues:

- 14 1. Whether or not the City was justified in withholding or otherwise not releasing
15 [Item nos. 4, 5, 6, 8, 9, 11, 12, 13, and 14] or redacted portions thereof on the basis
16 of Evidence Code, sections 1119, et seq. and/or Evidence Code sections 950 et
17 seq.?
- 18 2. Whether or not the City was justified in withholding or otherwise not releasing
19 [Item nos. 7 and 10] or redacted portions thereof, either on the basis that they were
20 not responsive to the PRA requests and/or Government Code sections 6254(c), (k),
21 & 6255; Evidence Code section 1040?
- 22 3. Whether or not the City was justified in withholding or otherwise not releasing the
23 [Item nos. 1, 2, and 3] pursuant to Government Code, either on the basis that they
24 were not responsive to the PRA requests and/or sections 6254(c), k, & 6255;
25 Evidence Code, section 1040?

26 LEGAL BACKGROUND

27 Government Code section 6250 states, "In enacting this chapter, the Legislature,
28 mindful of the right of individuals to privacy, finds and declares that access to information

¹ Pursuant to Government Code section 6259, subdivision (a), and *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1183, fn. 5, the court conducted an in camera reviews of the withheld documents on August 29, 2017, August 31, 2017, and October 31, 2017. In this Memorandum of Intended Decision, the court is relying on its notes from its review of the documents during the in camera hearings. If a party believes that it is necessary for the court to conduct a further in camera review of the documents, the party can make that request by way of an objection to the court's Memorandum of Intended Decision.

1 concerning the conduct of the people's business is a fundamental and necessary right of every
2 person in this state." "The people have the right of access to information concerning the
3 conduct of the people's business, and, therefore, . . . the writings of public officials and agencies
4 shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

5 Government Code section 6253, subdivision (b), provides, "Except with respect to
6 public records exempt from disclosure by express provisions of law, each state or local agency,
7 upon a request for a copy of records that reasonably describes an identifiable record or records,
8 shall make the records promptly available to any person upon payment of fees covering direct
9 costs of duplication, or a statutory fee if applicable."

10 "Despite the strong legislative policy favoring access, the public's right to disclosure of
11 public records is not absolute. In California, the Act includes two exceptions to the general
12 policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant
13 to section 6254; and (2) the catchall exception of section 6255, which allows a government
14 agency to withhold records if it can demonstrate that, on the facts of a particular case, the public
15 interest served by withholding the records clearly outweighs the public interest served by
16 disclosure. But unless exempted, all public records may be examined by any member of the
17 public, often the press, but conceivably any person with not greater interest than idle curiosity."
18 (*American Civil Liberties Union of Northern Cal. v. Superior Court (ACLU)* (2011) 202
19 Cal.App.4th 55, 67; internal citations and internal quotation marks omitted.)

20 Government Code section 6254, states in pertinent part, "Except as provided in Sections
21 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following: [¶] (c)
22 Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted
23 invasion of personal privacy. . . . [¶] (k) Records, the disclosure of which is exempted or
24 prohibited pursuant to federal or state law, including, but not limited to, provisions of the
25 Evidence Code relating to privilege."

26 Government Code section 6255, subdivision (a), provides, "The agency shall justify
27 withholding any record by demonstrating that the record in question is exempt under express
28 provisions of this chapter or that on the facts of the particular case the public interest served by

1 not disclosing the record clearly outweighs the public interest served by disclosure of the
2 record.”

3
4 Evidence Code section 1119, subdivision (b), states, “No writing, as defined in Section
5 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a
6 mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall
7 not be compelled, in any arbitration, administrative adjudication, civil action, or other
8 noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.”

9 Evidence Code section 1120, subdivision (a), provides, “Evidence otherwise admissible
10 or subject to discovery outside of a mediation or a mediation consultation shall not be or
11 become inadmissible or protected from disclosure solely by reason of its introduction or use in
12 a mediation or a mediation consultation.” *Eisendrath v. Superior Court. (Rogers)* (2003) 109
13 Cal.App.4th 351, 364, explains, “In our view, Rogers’s contention is incorrect, and rests on a
14 misapprehension of the scope of mediation confidentiality. Statutory exceptions aside, sections
15 1119 and 1121, by their plain language, render confidential any communications between
16 mediation participants before the end of mediation that occur *outside* the mediator’s presence,
17 provided that these communications are materially related to the mediation. Thus, all such
18 conversations cited in Eisendrath’s motion to correct the spousal support agreement are
19 confidential, and may not be admitted into evidence unless suitable express waivers are
20 executed.” (Italics in original.) *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 128, states,
21 “The obvious purpose of the expanded language is to ensure that the statutory protection
22 extends beyond discussions carried out directly between the opposing parties to the dispute, or
23 with the mediator, during the mediation proceedings themselves. All oral or written
24 communications are covered, if they are made ‘for the purpose of’ or ‘pursuant to’ a mediation.
25 (§ 1119, subds. (a), (b).) It follows that, absent an express statutory exception, all discussions
26 conducted in preparation for a mediation, as well as all mediation-related communications that
27 take place during the mediation itself, are protected from disclosure. Plainly, such
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1 communications include those between a mediation disputant and his or her own counsel, even
2 if these do not occur in the presence of the mediator or other disputants.” (Footnote 7 omitted.)

3 Evidence Code section 1125, subdivision (a), states, “For purposes of confidentiality
4 under this chapter, a mediation ends when any one of the following conditions is satisfied: [¶]

5 (1) The parties execute a written settlement agreement that fully resolves the dispute. . . . [¶]

6 (5) For 10 calendar days, there is no communication between the mediator and any of the parties
7 to the mediation relating to the dispute. The mediator and the parties may shorten or extend
8 this time by agreement.”

9 *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 155, explains, “The Courts of
10 Appeal also strictly construe the mediation confidentiality statutes, even when the equities in
11 the case suggest contrary results.” “Our Supreme Court has broadly applied the mediation
12 confidentiality statutes and all but categorically prohibited judicially crafted exceptions, even
13 in situations where justice seems to call for a different result. [Citation.]” (*Lappe v. Superior*
14 *Court* (2014) 232 Cal.App.4th 774, 783.) *Foxgate Homeowners’ Association, Inc. v. Bramalea*
15 *California, Inc.* (2001) 26 Cal.4th 1, 15, provides, “To carry out the purpose of encouraging
16 mediation by ensuring confidentiality, the statutory scheme, which includes sections 703.5,
17 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation
18 absent an express statutory exception.” (Footnote 12 omitted.)

19 Based on the briefing from the parties, it does not appear that there is any authority
20 directly addressing the application of Evidence Code section 1119 to prevent disclosure of a
21 public record through Government Code section 6254, subdivision (k). Government Code
22 section 6254, subdivision (k), exempts public records from disclosure if disclosure “is . . .
23 prohibited pursuant to federal or state law, including, but not limited to, provisions of the
24 Evidence Code relating to privilege.” Although Evidence Code section 1119 may not be a
25 privilege, it is a state law that prevents the disclosure of communications made pursuant to a
26 mediation. Thus, it appears that Government Code section 6254, subdivision (k), exempts from
27 disclosure public records that are subject to Evidence Code section 1119. It also appears that
28 interpreting Evidence Code section 1119 as “rule of evidence,” rather than as confidentiality

1 provision would be contrary to the reason for the existence of the privilege which is to ensure
2 confidentiality to promote a candid exchange in mediation. (*Rojas v. Superior Court* (2004)
3 33 Cal.4th 407, 415-416.)

4 Evidence Code section 1115 states, in relevant part, “For purposes of this chapter: [¶]
5 (a) ‘Mediation’ means a process in which a neutral person or persons facilitate communication
6 between the disputants to assist them in reaching a mutually acceptable agreement. . . . [¶] (c)
7 ‘Mediation consultation’ means a communication between a person and a mediator for the
8 purpose of initiating, considering, or reconvening a mediation or retaining the mediator.”

9 RELEVANT EVIDENCE BASED ON DECLARATIONS

10 Here, the parties agree that the mediation sessions occurred on January 19, 2016,
11 February 8, 2016, and March 18, 2016. (8-22-17 Jones Decl., ¶ 4.) On February 10, 2016,
12 Dennis E. Wagner, Kevin Baker’s attorney, “sent a copy of an attachment, entitled ‘Attachment
13 to Governmental Tort Claim’ to the mediator.” (8-7-17 Wagner Decl., ¶ 5.) Wagner explained
14 he “marked this draft as ‘confidential’ and gave it to the mediator with the expectation that it
15 would be shared with the representatives of the City but would remain confidential for the
16 mediation.” (8-7-17 Wagner Decl., ¶ 5.) Mr. Wagner stated, “. . . [O]nce mediation was
17 completed, there were a series of delays by the City. I assumed that because the City was not
18 responding in an appropriate fashion, that the City did not want to proceed with a settlement.
19 Therefore, I provided the Claim Form and Attachment to Governmental Tort Claim directly to
20 the City Attorney, Richard Jones, on April 19, 2016, which was unsigned. This claim and
21 attachment were not provided to the City ‘in the course of mediation’, as was the prior
22 attachment, and did not contain a watermark that it was ‘Confidential.’” (8-7-17 Wagner Decl.,
23 ¶ 7.)

24 The declaration of Richard Jones states that he is the appointed City Attorney for the
25 City of Westminster. (8-22-17 Jones Decl., ¶ 2.) Mr. Jones indicates he was present for the
26 January 19, 2016, February 8, 2016, and March 18, 2016 mediation sessions. (8-22-17 Jones
27 Decl., ¶ 4.) Mr. Jones states, “Upon receipt of Wagner’s April 19th email containing the
28

1 unsigned claim form and attachment, I forwarded it to mediator Bruce Praet with the
2 attachment. Communication via email ensued between Mr. Praet, myself and Mr. Wagner
3 regarding the Baker matter and settlement thereof over the next several days. The settlement
4 agreements that resolved Mr. Baker's matter were ultimately signed by all parties
5 approximately one month later." (8-22-17 Jones Decl., ¶ 4.)

6 PRELIMINARY ISSUE

7 The primary issue is the date when the mediation ended. Petitioner contends that the
8 meditation had ended no later than April 19, 2017 because there were no communications
9 between any of the parties and the mediator in the 10 calendar days preceding April 19, 2017.
10 (Petitioner Voice of OC's Supplemental Brief in Support of Petition for Writ of Mandate; 1:7-
11 12.) Respondent asserts that the execution of the settlement agreement ended the mediation
12 because the parties' actions showed an implied agreement to extend the 10 day period under
13 Evidence Code section 1125, subdivision (a)(5).

14 Petitioner appears to agree that the last mediation related communication between the
15 parties was on April 7, 2017 since Petitioner notes, "There are no communications between the
16 parties listed after April 7." (Petitioner Voice of OC's Supplemental Brief in Support of
17 Petition for Writ of Mandate; 3:10.) Further, Mr. Wagner's declaration does not provide a date
18 identifying the end of the mediation, but references April 19, 2016 as the date he submitted the
19 unsigned Claim Form and Attachment to Governmental Tort Claim to Mr. Jones. (8-7-17
20 Wagner Decl., ¶ 7.) Based on Mr. Wagner's declaration, a reasonable inference is that the
21 mediation had ended by April 19, 2017 because there were no communications between the
22 mediator and any of the parties for 10 calendar days preceding April 19, 2017. Thus, the last
23 mediation related communication was on April 7, 2016 (Item no. 7).

24 ISSUES

25 Respondent asserts that the above documents are exempt from disclosure under the
26 California Public Records Act (CPRA) pursuant to the authority listed in the Joint Statement
27 of the Parties filed on October 27, 2017.

1 Using the above rules, and based on the court's in camera review, the court makes the
2 following findings at to each record in dispute:

3 **Item no. 1—March 2, 2016 email from K. Beach to M. Harary**

4 The court finds that Item no. 1 is not responsive to Petitioner's CPRA request because
5 it is not a record that is a "government tort claim or threat of litigation by Kevin Baker," a
6 "communication from legal counsel for Kevin Baker or any other representative on his behalf
7 between June 2015 and April 22, 2016," and a "complaint[] against Margie Rice from 1994 to
8 present."

9 **Item no. 2—March 4, 2016 email from M. Harary to K. Beach**

10 The court finds that Item no. 2 is not responsive to Petitioner's CPRA request because
11 it is not a record that is a "government tort claim or threat of litigation by Kevin Baker," a
12 "communication from legal counsel for Kevin Baker or any other representative on his behalf
13 between June 2015 and April 22, 2016," and a "complaint[] against Margie Rice from 1994 to
14 present."

15 **Item no. 3—March 10, 2016 email from M Harary to E. Manfro re K. Beach**

16 The court finds that Item no. 3 is not responsive to Petitioner's CPRA request because
17 it is not a record that is a "government tort claim or threat of litigation by Kevin Baker," a
18 "communication from legal counsel for Kevin Baker or any other representative on his behalf
19 between June 2015 and April 22, 2016," and a "complaint[] against Margie Rice from 1994 to
20 present."

21 **Item no. 4—Redacted March 22, 2016 email string from D. Wagner to I. Moisa
22 forwarded by I. Moisa to E. Manfro and M. Harary**

23 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
24 through Government Code section 6254, subdivision (k), protects Item no. 4 from disclosure
25 last March 18, 2016 mediation session. Further, these communications are materially related
26 to the mediation within the meaning of *Eisendrath v. Superior Court (Rogers)* (2003) 109
27 Cal.App.4th 351, 364 and *Cassel v. Superior Court* (201) 51 Cal.4th 113, 128.

28 **Item no. 5—Redacted March 22, 2016 email string forwarded by E. Manfro to
D. Jones, M. Harary & B. Praet**

1 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
2 through Government Code section 6254, subdivision (k), protects Item no. 5 from disclosure
3 under the CPRA. The mediation had not ended because 10 days had not elapsed since the
4 March 18, 2016 mediation session. Further, these communications are materially related to
5 the mediation within the meaning of *Eisendrath v. Superior Court (Rogers)* (2003) 109
6 Cal.App.4th 351, 364 and *Cassel v. Superior Court* (201) 51 Cal.4th 113, 128.

7 **Item no. 6—Redacted March 22, 2016 email string reply from B. Praet to E. Manfro**
8 **and D. Jones, cc M. Harary in response to #5 above**

9 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
10 through Government Code section 6254, subdivision (k), protects Item no. 6 from disclosure
11 under the CPRA. The mediation had not ended because 10 days had not elapsed since the
12 March 18, 2016 mediation session. Further, these communications are materially related to
13 the mediation within the meaning of *Eisendrath v. Superior Court (Rogers)* (2003) 109
14 Cal.App.4th 351, 364 and *Cassel v. Superior Court* (201) 51 Cal.4th 113, 128.

15 **Item no. 7—Redacted April 5, 2016 email from M. Harary to D. Wagner and I. Moisa**

16 The court finds that Item no. 7 is not responsive to Petitioner’s CPRA request because
17 it is not a record that is a “government tort claim or threat of litigation by Kevin Baker,” a
18 “communication from legal counsel for Kevin Baker or any other representative on his behalf
19 between June 2015 and April 22, 2016,” and a “complaint[] against Margie Rice from 1994 to
20 present.”

21 **Item no. 8—April 5, 2016 email from D. Wagner to M. Harary in response to above**

22 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
23 through Government Code section 6254, subdivision (k), protects Item no. 8 from disclosure
24 under the CPRA. As stated above, Petitioner appears to agree that the last mediation related
25 communication between the parties was on April 7, 2017. Further, the court finds that these
26 communications are materially related to the mediation within the meaning of *Eisendrath v.*
27
28

1 *Superior Court (Rogers)* (2003) 109 Cal.App.4th 351, 364 and *Cassel v. Superior Court* (201)
2 51 Cal.4th 113, 128.

3 **Item no. 9—Redacted April 7, 2016 email from D. Wagner to I. Moisa, forwarded by I**
4 **Moisa to E. Manfro and M. Harary**

5 The parties agree that Item no. 9 is duplicative as to Item no. 4. Therefore, the court
6 finds that Item no. 9 is protected from disclosure for the same reasons as it used in finding
7 that Item no. 4 is protected from disclosure.

8 **Item no. 10—List of resignation terms (undated)**

9 The court finds that Item no. 10 is not responsive to Petitioner’s CPRA request because
10 it is not a record that is a “government tort claim or threat of litigation by Kevin Baker,” a
11 “communication from legal counsel for Kevin Baker or any other representative on his behalf
12 between June 2015 and April 22, 2016,” and a “complaint[] against Margie Rice from 1994 to
13 present.”

14 **Item no. 11—Eleven page document titled “Attachement to Government Tort Claim”**
15 **marked “Confidential [Draft]” February 4, 2016**

16 The parties agree that the mediation sessions occurred on January 19, 2016, February 8,
17 2016, and March 18, 2016. (8-22-17 Jones Decl., ¶ 4.) On February 10, 2016, Dennis E.
18 Wagner, Kevin Baker’s attorney, “sent a copy of an attachment, entitled ‘Attachment to
19 Governmental Tort Claim’ to the mediator.” (8-7-17 Wagner Decl., ¶ 5.) Wagner explained
20 he “marked this draft as ‘confidential’ and gave it to the mediator with the expectation that it
21 would be shared with the representatives of the City but would remain confidential for the
22 mediation.” (8-7-17 Wagner Decl., ¶ 5.) Mr. Wagner stated, “. . . [O]nce mediation was
23 completed, there were a series of delays by the City. I assumed that because the City was not
24 responding in an appropriate fashion, that the City did not want to proceed with a settlement.
25 Therefore, I provided the Claim Form and Attachment to Governmental Tort Claim directly to
26 the City Attorney, Richard Jones, on April 19, 2016, which was unsigned. This claim and
27 attachment were not provided to the City ‘in the course of mediation’, as was the prior
28

1 attachment, and did not contain a watermark that it was ‘Confidential.’” (8-7-17 Wagner Decl.,
2 ¶ 7.)

3 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
4 through Government Code section 6254, subdivision (k), protect Item no. 11 from disclosure.
5 The court recognizes that *Poway Unified School District v. Superior Court (Copley Press)*
6 1998) 62 Cal.App.4th 1496, 1499 found that a claim form submitted by a minor to the school
7 district was not exempt from disclosure under the CPRA. *Copley Press*, however, did not
8 address the application of Evidence Code section 1119 through Government Code section
9 6254, subdivision (k) to the claim form at issue in that case. (*Ibid.*)

10 Here, Mr. Wagner’s declaration clearly states he provided the “Attachment to
11 Governmental Tort Claim” to the mediator and the City “in the course of mediation” on
12 February 10, 2016. (8-7-17 Wagner Decl., ¶ ¶ 5 and 7.) Based on Mr. Wagner’s declaration,
13 the court finds that the February 10 attachment was prepared “for the purpose of, in the course
14 of, or pursuant to, a mediation.” (Evid. Code, § 1119, subd. (b).) Thus, the Evidence Code
15 section 1119, subdivisions (a) and (b), through Government Code section 6254, subdivision (k)
16 protect Item no. 11 from disclosure.

17 **Item no. 12—Redacted April 19, 2016 email from D. Wagner to R. Jones, forwarded to
18 B. Praet and CC E. Manfro**

19 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
20 through Government Code section 6254, subdivision (k), protect Item no. 12, in part, from
21 disclosure.

22 Evidence Code section 1125 defines the ending of a mediation upon the occurrence of
23 *any* of the events listed under Evidence Code section 1125, subdivision (a) (Italics added.).
24 Here, the parties agree that more than 10 calendar days elapsed as to a communication
25 between a party and the mediator. From April 7, 2016 to April 19, 2016, there was no
26 communication between a party and the mediator.

27 Respondent contends that there was an agreement, by conduct, that extended the time
28 period for the ending of the mediation. (Respondent City of Westminster’s Opposing

1 Supplemental Brief in Support of Petition for Writ of Mandate; 2:6-3:22.) Although the court
2 acknowledges that it appears that Evidence Code section 1125, subdivision (a)(5) does not
3 require a written or oral agreement, the evidence is insufficient to show that there was an
4 implied agreement between the mediator and the parties to extend the end date for the
5 mediation. Mr. Wagner states, “. . . [O]nce mediation was completed, there were a series of
6 delays by the City. I assumed that because the City was not responding in an appropriate
7 fashion, that the City did not want to proceed with a settlement. Therefore, I provided the
8 Claim Form and Attachment to Governmental Tort Claim directly to the City Attorney,
9 Richard Jones.” (8-7-17 Wagner Decl., ¶ 7.) Mr. Jones declaration does not assert that the
10 parties had agreed to extend the end date for the mediation. (8-22-17 Jones Decl., ¶ 7.) Thus,
11 the court finds that the mediation had ended by April 19, 2017 because there was “no
12 communication between the mediator and any of the parties to the mediation relating to the
13 dispute” within the 10 days preceding April 19, 2016. (Evid. Code, § 1125, subd. (a)(5).)
14 Further, the court finds that Respondent has not sufficiently demonstrated that there was an
15 agreement to extend the end date for the mediation. (Evid. Code, § 1125, subd. (a)(5).)
16 Therefore, the court finds that Evidence Code section 1119 does not protect the initial email
17 from Mr. Wagner to Mr. Jones contained in Item no. 12.

18 As to the remainder of Item no. 12 that consists of the forwarding of Mr. Wagner’s
19 email, the court construes the forwarding of this email as a mediation consultation as
20 provided by Evidence Code section 1115, subdivision (c), because it was forwarded to the
21 mediator, Bruce Praet. The forwarding of this email to Mr. Praet was “a communication
22 between a person and a mediator for the purpose of initiating, considering, or reconvening a
23 mediation” (Evid. Code, § 1115, subd. (c).) Therefore, the court finds that Evidence
24 Code section 1119, through Government Code section 6254, subdivision (k), protects the
25 remainder of Item no. 12 from disclosure.

26 The court does not find that Evidence Code section 950, as applied through
27 Government Code section 6254, subdivision (k), protects any part of Item no. 12 from
28 disclosure.

1 **Item no. 13—Redacted April 19-21, 2016 email exchange between D. Wagner, R. Jones,**
2 **and B. Praet, cc multiple persons**

3 The court finds that Evidence Code section 1119, subdivisions (a) and (b) as applied
4 through Government Code section 6254, subdivision (k), protect Item no. 13, in part, from
5 disclosure. To the extent that Item no. 13 contains the initial April 19, 2016 email from Mr.
6 Wagner to Mr. Jones as stated in the court’s discussion as to Item no. 12, the court finds that
7 Evidence Code section 1119 does not protect this initial email from disclosure.

8 As to the remainder of the emails is Item no. 13, the court construes these as a
9 mediation consultation as provided by Evidence Code section 1115, subdivision (c), because
10 they include Mr. Praet. These emails involving Mr. Praet are communications “between a
11 person and a mediator for the purpose of initiating, considering, or reconvening a mediation .
12 . . .” (Evid. Code, § 1115, subd. (c).) Therefore, the court finds that Evidence Code section
13 1119, through Government Code section 6254, subdivision (k), protects the remainder of
14 Item no. 13 from disclosure.

15 The court does not find that Evidence Code section 950, as applied through
16 Government Code section 6254, subdivision (k), protects any part of Item no. 13 from
17 disclosure.

18 **Item no. 14—Unsigned 1 page document titled “Claim Against City” with 14 page**
19 **“Attachment to Government Tort Claim”, attached to No. 12. (7-18-17 Aviles Decl., ¶ 2**
20 **and Exhibit T.)**

21 The court finds that Evidence Code sections 1119 and 950, as applied through
22 Government section 6254, subdivision (k), do not protect Item no. 14 from disclosure.
23 According to Mr. Wagner, he provided Item no. 14 to Mr. Jones on April 19, 2016. The court
24 finds that the mediation had ended before the disclosure of Item no. 14 for the same reasons it
25 found that the mediation had ended for a portion of Item no. 12. Specifically, the the
26 mediation had ended by April 19, 2017 because there was “no communication between the
27 mediator and any of the parties to the mediation relating to the dispute” within the 10 days
28 preceding April 19, 2016. (Evid. Code, § 1125, subd. (a)(5).) Further, the court finds that
Respondent has not sufficiently demonstrated that there was an agreement to extend the end

1 date for the mediation. (Evid. Code, § 1125, subd. (a)(5).) Therefore, the court finds that
2 Evidence Code section 1119 does not protect Item no. 14 from disclosure.

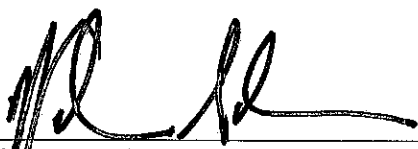
3 **CONCLUSION**

4 In summary, the court finds as follows:

- 5 1. Item nos. 1, 2, 3, 7, and 10 are exempt from disclosure as explained above.
6 2. Item nos. 4, 5, 6, and 8 are exempt from disclosure as explained above.
7 3. Item no. 9 is exempt from disclosure for the same reasons as Item no. 4 because it
8 is duplicative of Item no. 4.
9 4. Item no. 11 is exempt from disclosure as explained above.
10 5. Item nos. 12 and 13 are exempt from disclosure, in part, as explained above.
11 6. Item no. 14 is not exempt from disclosure as explained above.

12
13 Therefore, the court grants Petitioner's Writ of Mandate, in part, and denies
14 Petitioner's Writ of Mandate, in part. Petitioner's Writ of Mandate is granted as to Item nos.
15 12 and 13, in part, and 14 as discussed above. Petitioner's Writ of Mandate is denied as to
16 Item nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.
17

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19 Dated: November 29, 2017

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24 _____
25 Walter P. Schwarm
26 Judge of the Superior Court
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