FIRST AMENDMENT COALITION

August 17, 2020

Gregory G. Diaz
City Attorney
City of Ventura
500 Poli Street, Room 213
Ventura, CA 93001
gdiaz@cityofventura.ca.gov

Sent via Email

Dear Mr. Diaz,

This letter is on behalf of the First Amendment Coalition ("FAC") to request access to records in possession or control of the City of Ventura ("City") for the purposes of inspection and copying pursuant to the California Public Records Act, California Government Code § 6250 *et seq.* ("CPRA" or the "Act"), Article I, § 3(b) of the California Constitution.

As used herein, "Record" includes but is not limited to "Public Records" and "Writings" as those terms are defined in Government Code § 6252.

FAC requests the following Records for inspection and copying:

1. The City's contract with Mustang Marketing for public relations and communications services in connection with *Santa Barbara Channelkeeper v. State Water Resources Control Board and City of San Buenaventura*, Los Angeles County Superior Court, Case No. 19STCP01176 ("Contract"). The contract was amended on May 18, 2020.
2. All communications referring or relating to the Contract.

If any portion of the Records requested is exempt from disclosure by express provisions of law, Government Code § 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. In addition, if you believe that any express provision of law exists to exempt from disclosure all or a portion of the Records requested by FAC, you must notify FAC in writing of the reasons for the determination not later than 10 days from your receipt of this request. *See* Cal. Gov't Code §§ 6253(c), 6255(b).

Government Code §§ 6253(d) and 6255(b) require that any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing and must set forth the names and titles or positions of each person responsible for the denial. Furthermore, Government Code § 6253(d) prohibits the use of the 10-day period, or any provision of the CPRA or any other law "to delay access for purposes of inspecting public records."

In responding to this request, please keep in mind that Article 1, § 3(b)(2) of the California Constitution expressly requires you to broadly construe all provisions that further the public's right of access and to apply any limitations on access as narrowly as possible.

We understand that you denied an August 2, 2020 public records request from *Ventura County Reporter* journalist Kimberly Rivers, who also sought disclosure of the Contract described in FAC's Records request above, among other Records. However, the grounds for nondisclosure cited in your August 11, 2020 letter – that the Records sought are "related to expert billings in this pending litigation" and "exempt from disclosure because they pertain to pending litigation, reflect attorney-client privilege and work product, include preliminary drafts and are otherwise not disclosable at this time" – are invalid. Nondisclosure of the Contract and related communications would controvert both the CPRA and the California Constitution.

The Contract is not a privileged attorney-client communication. In *Behunin v. Superior Court*, 9 Cal. App. 5th 833, 848–49 (2017), an attorney's communications with a public relations consultant retained to create a website to induce a settlement with the opposing party were not privileged because disclosure of the communications to the consultant was not reasonably necessary for the attorney's representation of the client.

The case for disclosure is even stronger and more obvious here than in *Behuin*. Although it could under *Behuin*, FAC does not seek *all* the City's communications with Mustang Marketing – just the Contract and related communications. The Contract is not a client confidence that the City disclosed to Mustang Marketing in order to effectively advise the City in litigation, and the law prevents the City from making a colorable argument to that effect. *See* Evid. Code § 912(d), Senate Committee on Judiciary Comment (explaining that the exception to the waiver of attorney-client privilege found in subdivision (d) "is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer…was consulted"). But "[a] media campaign is not a litigation strategy." 9 Cal. App. 5th at 849 (internal quotations and citations omitted). While "[s]ome attorneys may feel it is desirable at times to conduct a media campaign," such a desire "does not transform their coordination of a campaign into legal advice." *Id.*

Like attorney-client privilege, the other reasons you cite for nondisclosure have no merit as to the Contract. First, the work product doctrine does not apply where, as here, the attorney is acting merely as a business agent for the client. *See Watt Industries, Inc. v. Superior Court,* 115 Cal. App. 3d 802, 171. Here, the Contract is merely an agreement for professional services entered into by the City and a marketing agency, not attorney work product.

Neither does the Contract pertain to pending litigation. *See* Gov't Code § 6245(b). The pending litigation exemption applies *only* if the document was "specifically prepared for use in the litigation." *County of Los Angeles v. Superior Court (Axelrad)*, 82 Cal. App. 4th 819, 830 (2000); *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1420 (1995). Here, the Contract was prepared in pursuit of public relations and marketing services, not for use in the litigation.

Finally, the Contract is not a "preliminary draft" but rather a final document approved by the City Council. *See* Gov't Code § 6245(a).

Because no exemptions apply, the City must disclose the Records FAC seeks under the Act and the California Constitution.

Thank you for your prompt attention to this matter. Please contact me, pursuant to Government Code § 6253.1 if you have any questions or concerns regarding this request.

Sincerely,

/s/ Sherene Tagharobi

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