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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**
12 **UNLIMITED JURISDICTION**

13 COMMISSION ON JUDICIAL
14 PERFORMANCE,

15 Petitioner/Plaintiff,

16 v.

17 ELAINE M. HOWLE, in her official capacity as
18 CALIFORNIA STATE AUDITOR, and the
19 CALIFORNIA STATE AUDITOR'S OFFICE,

20 Respondents/Defendants.
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ELECTRONICALLY

FILED

*Superior Court of California,
County of San Francisco*

09/29/2017

Clerk of the Court

BY: ANNA TORRES

Deputy Clerk

Case No. CPF-16-515308

**CJP'S REPLY BRIEF IN RESPONSE TO
ORDER REQUESTING
SUPPLEMENTAL BRIEFING**

Exempt from Filing Fees Pursuant to
Government Code 6103

Further Hearing: November 3, 2017

Time: 10:00 a.m.

Dept: 504

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1 **I. THE PARTIES HAVE AGREED THERE IS NO BALANCING FOR THE COURT**
2 **TO PERFORM AND THAT REDACTION IS NOT AN APPROPRIATE**
3 **SOLUTION**

4 The Court’s August 24, 2017 Order asked two specific questions about what
5 “confidential” means. While continuing to disagree about the result the Court should reach, the
6 parties have actually answered the Court’s specific questions the same way.

7 First, the Court asked, “Does the designation of documents as ‘confidential’ mean that
8 the documents may never be produced to the Auditor or is there a balancing test that must be
9 undertaken before deciding whether some documents may be released?” Both parties have
10 agreed there is *no balancing* to be undertaken. The CJP’s view is that any balancing was
11 performed by the voters in enacting what is now Article VI section 18, subdivision (i)(1) of the
12 California Constitution and by the CJP in adopting Rule 102 pursuant to its constitutional
13 powers. (CJP Br. pp. 1-7.) The State Auditor’s view is that any balancing was done by the
14 Legislature in enacting Government Code section 8545.2. (Auditor Br. p. 12.) Thus, the dispute
15 remains the same as it was before: can the Legislature constitutionally regulate the
16 confidentiality of CJP records when article VI section 18, subdivision (i)(1) gives that power to
17 the CJP? Both parties agree the only possible answers are yes or no – there is no “maybe”
18 subject to balancing.

19 Second, the Court asked whether documents can “be released in a redacted or ‘de-
20 identified’ form . . . ?” Again, both parties agree, albeit for different reasons; redaction is not
21 legally available or appropriate. (CJP Br. pp. 7-9; Auditor Br. p. 13.)

22 **II. THE AUDITOR’S DEFINITION OF CONFIDENTIALITY IS BASELESS**

23 **A. CONFIDENTIALITY DOES NOT MERELY MEAN THE RECORDS CANNOT BE**
24 **RELEASED TO THE PUBLIC**

25 The Court of Appeal has held that nonpublic proceedings of the CJP are absolutely
26 confidential unless the CJP has provided an exception, and that a judge cannot even review CJP
27 materials in camera. “[T]he Commission’s rule 102 provides that, except as stated in that rule,
28 all nonpublic papers and proceedings are absolutely confidential. . . . [T]he superior court judge
presiding over the proceedings . . . has no more right to see the Commission’s records than does

1 any other member of the public.” (*Commission on Judicial Performance v. Superior Court*
2 (2007) 156 Cal.App.4th 617, 622, 625 [67 Cal.Rptr.3d 434].) Ignoring the court’s reasoning and
3 analysis, the State Auditor insists that the Court of Appeal’s clear ruling is “cryptic,” and then
4 engages in some word play before inventing the State Auditor’s own definition of “confidential”
5 that is completely antithetical to the Court of Appeal’s ruling.

6 The plain English meaning of “confidential” is “meant to be kept secret.” (See Black’s
7 Law Dict. (9th ed. 2009) p. 339 col. 2 [“**confidential**, *adj.* 1. (Of information) meant to be kept
8 secret”]; Webster’s Encycl. Unabridged Dict. (1989 ed.) p. 308 col. 1 [“spoken, written, acted on,
9 etc., in confidence; secret. . . . limited to persons authorized to use information, documents, etc.,
10 so classified”].) The Court’s specific questions make it clear the Court was not asking
11 whether confidential meant secret, but whether it was absolutely so or conditionally so.

12 *Commission on Judicial Performance v. Superior Court* makes it clear that the confidentiality of
13 non-public CJP records is absolute. (*Commission on Judicial Performance v. Superior Court*,
14 *supra*, 156 Cal.App.4th at p. 622.)

15 The State Auditor asserts that “confidential” simply means something that cannot be
16 “released ‘to a place visited by many persons and usually accessible to the public’” and that the
17 CJP’s constitutional power to make materials confidential does not apply where “a government
18 official performing her statutory duties” wants to review the files. No cases, dictionaries, or
19 other sources are cited construing “confidential” in this fashion.

20 The State Auditor puts quotes around its *argument* that “confidential files are files that
21 should be kept from the public, but not from other government officials seeking to fulfill their
22 statutory duties,” misleadingly implying that this language is a quote from *Mosk v. Superior*
23 *Court* (1979) 25 Cal.3d 474 [159 Cal.Rptr. 494] or *Commission on Judicial Performance v.*
24 *Superior Court*, *supra*, 156 Cal.App.4th 617. (Auditor Br. p. 11) Neither case says any such
25 thing. While it is true that *one of* the policies supporting confidentiality is concern about
26 publication of unfounded accusations, that is nowhere near the only reason why absolute
27 confidentiality is provided to CJP proceedings before formal charges are filed. (*See Mosk v.*
28 *Superior Court*, *supra*, 25 Cal.3d at pp. 491-92.) As discussed in the prior brief, the history of the

1 CJP and the legislative history of article VI section 18 shows that the CJP's records have
2 historically been unavailable to everyone outside of the CJP, subject to specific exceptions
3 developed over time. (CJP Br. pp. 3-7.)

4 Nor does the State Auditor's proposed definition make any sense. First, it is wholly
5 incompatible with *Commission on Judicial Performance v. Superior Court*. The judge there was
6 a government official seeking to fulfill his statutory duties. If "confidential" merely meant what
7 the State Auditor now claims, then an *in camera* review would have been permissible. An *in*
8 *camera* review, by definition, does not publish material "to the public or via any media." The
9 State Auditor's proposed narrow definition of confidential simply cannot be reconciled with the
10 holding in *Commission on Judicial Performance v. Superior Court*.¹

11 Second, the State Auditor's definition renders nugatory article VI section 18.5 of the
12 California Constitution, which authorizes release of confidential records to appointing
13 authorities. (Cal. Const., art. VI, § 18.5.) That provision is pointless if, as the State Auditor
14 claims, the records were available to those authorities anyway. "An interpretation that renders
15 related provisions nugatory must be avoided." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727,
16 735 [248 Cal.Rptr. 115, 755 P.2d 299].) The State Auditor ignores the clear legislative
17 understanding behind article VI section 18.5, discussed at pages 5-6 of the CJP's Brief, that
18 absent such express authorization "secret disciplinary actions cannot be disclosed to anyone
19 under the confidentiality rules established by the Judicial Council" and "[e]xisting law provides
20 for a level of confidentiality which disallows a judge's disciplinary record from being shared
21 with appointing authorities who are considering the judge for another position." (CJP RJN Exs. 3
22 & 4.) The Legislature's clear understanding that even the Governor or President cannot see

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25 ¹ The State Auditor claims that there was no statute at issue in *Commission on Judicial*
26 *Performance v. Superior Court*, but that is both wrong (see Evid. Code § 1040) and irrelevant.
27 The State Auditor's purported definition of confidentiality does not rest on whether a statute
28 gives the public official access. That question is not about what "confidential" means, but
returns to the central issue in this case: does the Legislature or the CJP get to decide which CJP
investigations and records are confidential?

1 confidential CJP records when deciding to elevate a judge without express authorization in the
2 Constitution or CJP rule certainly applies equally to the State Auditor.

3 Third, in a similar way, the State Auditor’s definition would make most of the exceptions
4 to Rule 102 irrelevant. Exceptions 102(g), (i), (j), (k), (l), (m), (n), and (p) would all be wholly
5 unnecessary under the State Auditor’s view because each of these exceptions involves disclosing
6 information to public officials performing their duties. Nor would exception 102(h) (“If a judge
7 or former judge requests or consents to release of commission records to a public entity, the
8 commission may release that judge’s records.”) make sense; under the State Auditor’s argument,
9 those public entities would have a right to see the records whether or not the judge consented.

10 Nor does any of the legislative history the State Auditor cites support its proposed
11 definition (which it admits is found nowhere therein). As the State Auditor’s own authorities
12 admit, the purpose of Proposition 190 was to “eliminate secrecy *in the commission’s formal*
13 *disciplinary proceedings . . .*” (*Recorder v. Comm’n on Judicial Performance* (1999) 72
14 Cal.App.4th 258, 274 [85 Cal.Rptr.2d 56], emphasis added.) The State Auditor emphasizes the
15 wrong part of this sentence, and repeatedly cites history supporting the public nature of formal
16 proceedings as if it somehow weakened the confidentiality of other investigations. But that is the
17 line the voters drew in Proposition 190: formal proceedings are public. The confidentiality of
18 other complaints and investigations is determined by the CJP. (Cal. Const., art. VI, § 18, subd.
19 (i)(1).) Indeed, the desire to eliminate “secrecy” in public proceedings clearly recognizes that
20 complaints and investigations are absolutely confidential.

21 “Confidential” does not mean open to any public official who is performing a statutory
22 duty. The plain meaning of “confidential” in this context is the one adopted by the Court of
23 Appeal and supported by the history of the CJP, an “absolute” restriction prohibiting review of
24 CJP files by anyone outside the CJP except as stated in exceptions to Rule 102. (*Commission on*
25 *Judicial Performance v. Superior Court, supra*, 156 Cal.App.4th at p. 622.)

1 **B. PROPOSITION 59 HAS NO BEARING ON THIS QUESTION**

2 The State Auditor also argues that article I section 3, subdivision (b) of the California
3 Constitution, commonly known as Proposition 59, somehow supports the State Auditor’s right to
4 review CJP confidential records. It does not.

5 Proposition 59 was enacted in 2004, not 1974 as the State Auditor claims.² (*City of San*
6 *Jose v. Superior Court* (2017) 2 Cal.5th 608, 615 [214 Cal.Rptr.3d 274, 389 P.3d 848].) It did
7 not exist in 1996 when Rule 102 was adopted. Proposition 59 also expressly leaves unchanged
8 all existing rules regarding confidentiality and all existing constitutional provisions. (Cal.
9 Const., art. I, § 3(b)(4), (5).) “Proposition 59 is simply a constitutionalization of the [California
10 Public Records Act].” (*Sutter’s Place Inc. v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382
11 [75 Cal.Rptr.3d 9].) It has nothing whatsoever to do with the question before the Court.

12 **C. THE COURT MAY NOT ADD TO THE EXCEPTIONS TO CJP RULE 102**

13 As discussed in the prior brief, by setting forth sixteen exceptions, Rule 102 clearly
14 indicates that there are no other exceptions. “Under the maxim of statutory construction,
15 *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply
16 additional exemptions unless there is a clear legislative intent to the contrary. The proper rule of
17 statutory construction is that the statement of limited exceptions excludes others, and therefore
18 the judiciary has no power to add additional exceptions; the enumeration of specific exceptions
19 precludes implying others.” (*S.V. v. Superior Court* (2017) 13 Cal.App.5th 1174, 1182 [221
20 Cal.Rptr.3d 298] [internal citations and quotations omitted]; *People v. Bloomfield* (2017) 13
21 Cal.App.5th 647, 652 [221 Cal.Rptr.3d 128].) The State Auditor simply ignores this rule.
22 Instead, the State Auditor nonsensically insists that confidentiality cannot be absolute if there are
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25 ² Article I section 3, subdivision (a) does *not* state “[t]he people have the right of access to
26 information concerning the conduct of the people’s business” as claimed by the State Auditor.
27 (Auditor Br. p. 6:16-17.) That is article I section 3, subdivision (b)(1) enacted in 2004 as part of
28 Proposition 59. Subdivision (a) states “The people have the right to instruct their representatives,
petition government for redress of grievances, and assemble freely to consult for the common
good.” (Cal. Const., art. I, § 3, subd. (a).) The rights of petition and assembly have nothing to do
with this case.

1 exceptions to it. The Court of Appeal has already answered that: “except as stated in that rule,
2 all nonpublic papers and proceedings are absolutely confidential.” (*Commission on Judicial*
3 *Performance v. Superior Court, supra*, 156 Cal.App.4th at p. 622, emphasis added.) The
4 presence of exceptions in no way suggests that confidentiality is not absolute where there is no
5 exception. It proves the opposite.

6 The State Auditor insists that the CJP has no ability to determine what to keep secret and
7 that “no legislative history or case law . . . supports this claim.” (Auditor Br. p. 11.) The plain
8 language of the Constitution provides that power. “The commission shall make rules for the
9 investigation of judges. The commission may provide for the confidentiality of complaints to and
10 investigations by the commission.” (Cal. Const., art. VI, § 18, subd. (i)(1).) The CJP’s exercise
11 of its power to provide for when records are, or are not, confidential does not in any way support
12 the State Auditor’s insistence that any government official seeking to fulfill a statutory duty can
13 view confidential CJP records.

14 The CJP’s interpretation of its constitutional authority, as set forth in Rule 102, “is
15 accorded considerable weight, and courts generally will not depart from such construction unless
16 it is clearly erroneous or unauthorized.” (*Adams v. Commission on Judicial Performance* (1994)
17 8 Cal.4th 630, 657-58 [34 Cal.Rptr.2d 641, 882 P.2d 358].) As the Court of Appeal has already
18 found, the only exceptions to confidentiality are those specified in CJP Rule 102. (*Commission*
19 *on Judicial Performance v. Superior Court, supra*, 156 Cal.App.4th at pp. 622-23.) No such
20 exception applies to the State Auditor.

21 **D. THE STATE AUDITOR’S CONSTITUTIONAL ARGUMENT REMAINS THREADBARE**

22 Coming full circle, the State Auditor repeats its argument that the Legislature has the
23 power to override the CJP’s confidentiality determinations despite article VI section 18,
24 subdivision (i)(1). As previously explained, the Constitution provides, in plain language, that the
25 CJP is the entity empowered to determine when complaints or investigations are confidential.
26 (Cal. Const., art. VI, § 18, subd. (i)(1).) By specifying that the CJP has that power, the
27 Constitution necessarily provides that the Legislature does not. “In the grants [of powers] and in
28 the regulation of the mode of exercise, there is an implied negative; an implication . . . that it is to

1 be exercised only in the prescribed mode” (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d
2 190, 196 [132 Cal.Rptr. 377, 553 P.2d 537] [citations omitted].) “Those matters which the
3 constitution specifically confides to a specified body or agency the legislature cannot directly or
4 indirectly take from [its] control.” (*State Board of Education v. Levit* (1959) 52 Cal.2d 441, 461
5 [343 P.2d 8] [internal marks and citations omitted].) “Powers, obligations, and rights bestowed
6 or declared by the Constitution may not be amended, modified, or derogated by statute, whether
7 that statute is adopted by the Legislature or the initiative method.” (*Fair Political Practices*
8 *Commission v. State Personnel Board* (1978) 77 Cal.App.3d 52, 56 [143 Cal.Rptr. 393],
9 overruled on other grounds in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 192
10 [172 Cal.Rptr. 487, 624 P.2d 1215].) The Auditor’s uninvited repetition of its prior constitutional
11 argument still fails to demonstrate that the Legislature has the power to override confidentiality
12 decisions made by the CJP pursuant to the California Constitution. “The California Constitution
13 is ‘the supreme law of our state’. . . , subject only to the supremacy of the United States
14 Constitution.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 250
15 [73 Cal.Rptr.3d 825] [citation omitted].) “Wherever statutes conflict with constitutional
16 provisions, the latter must prevail.” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, fn. 11
17 [268 Cal.Rptr. 753, 789 P.2d 934], quoting *People v. Navarro* (1972) 7 Cal.3d 248, 260 [102
18 Cal.Rptr. 137, 497 P.2d 481].)

19 **III. CONCLUSION**

20 The term “confidential” in Article VI section 18, subdivision (i) of the California
21 Constitution means absolutely confidential, not partially or qualifiedly so. Absent an express
22 exception in either the Constitution or CJP Rule 102, confidential records of complaints and
23 investigation may not be viewed by anyone outside of the CJP. There is no exception for the
24 State Auditor, and Government Code section 8545.2 cannot constitutionally create one. That
25 constitutional confidentiality cannot be balanced against anything by this Court or avoided by
26 redaction. Nor can the Legislature override it. For the reasons discussed above and previously,
27 the Court should grant the CJP’s requested writ of mandate.

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Dated: September 29, 2017

Respectfully submitted,

KERR & WAGSTAFFE LLP

By: 
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COMMISSION ON JUDICIAL PERFORMANCE

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PROOF OF SERVICE

I, Amy Shimizu, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 101 Mission Street, 18th Floor, San Francisco, California 94105-1727.

On September 29, 2017, I served the following document(s):

- **CJP'S REPLY BRIEF IN RESPONSE TO ORDER REQUESTING SUPPLEMENTAL BRIEFING**

on the parties listed below as follows:

Myron Moskovitz
James A. Ardaiz
Christopher Cottle
William D. Stein
Sherri S. Kaiser

MOSKOVITZ APPELLATE TEAM

90 Crocker Avenue
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- By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.
- By electronic service** by submitting a PDF to the File & ServeXpress program.
- By facsimile machine (FAX)** by personally transmitting a true copy thereof via an electronic facsimile machine.
- By personal service** by causing to be personally delivered a true copy thereof to the address(es) listed herein at the location listed herein.
- By Federal Express** or overnight courier.

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

Executed on September 29, 2017, at San Francisco, California.



AMY SHIMIZU