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First Amendment Coalition
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF MARIN**

10
11 FIRST AMENDMENT COALITION,

No.

12 Plaintiff,

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

13 vs.

14 CITY OF NOVATO,

15 Respondent.
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Case No.
PETITION FOR WRIT OF MANDATE
UNDER THE CALIFORNIA PUBLIC
RECORDS ACT (Govt. Code section 6259)

1 **I. INTRODUCTION**

2 1. This Petition for Writ of Mandate under the California Public Records Act (Govt. Code
3 sections 6258 and 6259) seeks to shed light on the city of Novato's (hereafter "City's")
4 communications with consultants hired to prepare reports on a proposed 55- acre sports facility
5 on the land which once housed the Hamilton Air Base. The City has inexplicably refused to
6 disclose records reflecting its communications with the consultants, raising serious questions
7 about whether political influence has shaded or compromised the integrity and objectivity of the
8 consultants' work. The City's refusal to disclose such records cannot be justified under the
9 Public Records Act, which places a heavy burden upon agencies that attempt to withhold records.
10 For reasons set forth below and in the forthcoming Memorandum of Points and Authorities, this
11 Petition should be granted and the records should be ordered disclosed.

12 **II. FACTS AND PROCEDURAL HISTORY**

13 2. On June 7, 2016, Peter Scheer, the executive director of the petitioner, First Amendment
14 Coalition ("FAC"), a San Rafael-based non-profit organization dedicated to openness in
15 government, sent a Public Records Act ("PRA") request to the respondent city of Novato
16 ("City"), which is a local agency as defined in Government Code section 6252(a). The request
17 sought correspondence between the City and two consultants, Victus Advisors and the Sports
18 Management Group, who were hired to evaluate the economic and fiscal impact of a sports
19 complex proposed for the former site of the Hamilton air base. Attached as **Exhibit A** is a true
20 and correct copy of Mr. Scheer's request.

21 3. The City responded to the PRA request on June 16, 2016 by denying access to the records
22 sought, claiming that the public interest in non-disclosure of the records outweighed the interest
23 in disclosure, and asserting that the "deliberative process privilege" protected the records from
24 disclosure. Attached as **Exhibit B** is a true and correct copy of the City's response.

25 4. Mr. Scheer urged the City to reconsider its denial of the request in a June 16, 2016 email.
26 Mr. Scheer pointed out that the burden is on the city to justify non-disclosure and that the
27 "deliberative process privilege" is only conditional, with the burden on the city to justify non-
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1 disclosure. Attached as **Exhibit C** is a true and correct copy of Mr. Scheer's response.

2 5. The City has failed to reconsider its position and has continued to withhold the records
3 requested in petitioner's PRA request.

4 **REASONS FOR GRANTING PETITION**

5 6. Petitioner has no adequate remedy in the ordinary course of law, other than this petition,
6 to compel the release of the records sought in its PRA request.

7 7. Government Code section 6250 provides that access to information concerning the
8 conduct of the people's business is a fundamental and necessary right of every person in this
9 state. Likewise, article I, section 3(b)(1) of the California Constitution provides the public with a
10 right of access to the writings of public officials.

11 8. None of the exemptions from disclosure claimed by the City justify withholding the
12 records sought. The reports prepared by the consultants have been criticized, with one citizen
13 quoted in a *Marin Independent Journal* article as saying, "The studies read as an ad for a
14 commercial sports complex masquerading as a serious scholarly report." The public's interest in
15 seeing correspondence between the City and its consultants far outweighs any interest in hiding
16 such correspondence from the public.

17 **PRAYER**

18 WHEREFORE, petitioner prays as follows:


- 19 1. That the Court order respondent City of Novato to disclose forthwith all of the records
20 requested by petitioner FAC in its Public Records Act request;
- 21 2. Alternatively, that the Court order respondent City of Novato to show cause why the
22 records should not be disclosed;
- 23 3. Alternatively, that the Court order preparation of a list of withheld documents showing
24 the author, addressee, date of document, and a description of the document with
25 specificity and subject matter, which list shall be provided to petitioners and this Court,
26 and that the Court thereafter conduct an in camera review of withheld documents, and
27 thereafter order them disclosed;
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4. That the Court award to petitioner its reasonable attorney's fees and costs pursuant to Government Code section 6259(d); and
5. For such other and further relief as the Court may deem just and proper.

Dated: July 11, 2016

RAM, OLSON, CEREGHINO & KOPCZYNSKI LLP

By 
Karl Olson
Attorneys for Petitioner
FIRST AMENDMENT COALITION

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VERIFICATION

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

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

Executed in San Rafael, California on July 11, 2016.

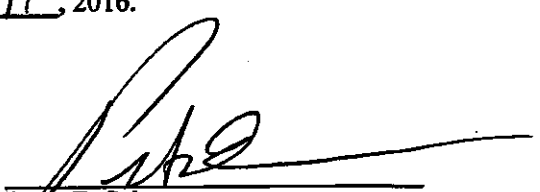

Peter E. Scheer

EXHIBIT A

From: pscheer@gmail.com [mailto:pscheer@gmail.com]
Sent: Tuesday, June 07, 2016 11:51 PM
To: Sheri Hartz <shartz@novato.org>
Cc: Alan Berson <alanberson@comcast.net>
Subject: PRA Request

Sheri Hartz
Novato City Clerk
922 Machin Avenue Novato, CA
shartz@novato.org
FAX 415/899-8213

This is a public records request pursuant to the Public Records Act, Gov. Code sec. 6250 et seq., and Article 1, sec. 3(b), of the California Constitution. It is submitted on behalf of the First Amendment Coalition (FAC), a nonprofit legal organization with offices in San Rafael, CA. We request:

****All written communications, whether by letter, fax, memo, email, text or other means, between the Novato City staff and Victus and between the city staff and Sports Management Group during the year preceding the posting on the city's website of Victus' and Sports Management Group's reports pertaining to the MSA Hamilton Fields project. ****

We are aware that you have recently denied a PRA request for the same records submitted by Alan Berson of Novato. We believe the exemptions cited in your May 13 letter, including especially the "deliberative process privilege," are not applicable to this request.

FAC, a legal organization which often litigates PRA matters, is submitting its own record request to 1) urge you to reconsider your previous denial, and 2) to establish legal standing for FAC in the event you choose to adhere to the previous denial.

If you would like to discuss this records request, please give me a

call. Also, I ask that you please obtain our advance consent to any copying costs, chargeable to FAC, that exceed \$75.

Thank you for your consideration of this request.

Sincerely,

Peter Scheer

Executive Director | First Amendment Coalition
pscheer@firstamendmentcoalition.org | [415.886.7081](tel:415.886.7081)
534 4th St. #B | San Rafael, CA 94901
www.firstamendmentcoalition.org

EXHIBIT B

From: Sheri Hartz <shartz@novato.org>
Date: Thu, Jun 16, 2016 at 11:46 AM
Subject: RE: PRA Request
To: Peter Scheer <pscheer@firstamendmentcoalition.org>
Cc: Jeff Walter <jwalter@walterpistole.com>, Cathy Capriola
<ccapriola@novato.org>

Dear Mr. Scheer:

I am in receipt of your June 7, 2016, email in which you request that you be provided certain City of Novato records under the California Public Records Act. Because your request is essentially identical with a request previously submitted to the City by Dr. Alan Berson -- a sameness which you acknowledge -- the City's response to your request is the same as its response to Dr. Berson's request. You have offered no explanation as to why you believe the City's response to Dr. Berson's request was unsupported by the law. A copy of the City's response to Dr. Berson's request is attached hereto and incorporated by this reference. In short, for the reasons specified in the attached letter, the City will not disclose the records you seek.

I consulted with the City Attorney and Interim City Manager in reviewing your request and preparing this response. I, as the City Clerk, am responsible for making determinations as to the disclosability of records sought to be examined under the CPRA.

Best regards,

Sheri Hartz, CMC
City Clerk

922 Machin Avenue

Novato, CA 94945
415 899-8900 phone
415 899-8213 fax
shartz@novato.org

EXHIBIT C

Thu, Jun 16, 2016 at 4:23 PM

Fr: Peter Scheer <pscheer@firstamendmentcoalition.org>

To: Sheri Hartz <shartz@novato.org>

Cc: Jeff Walter <jwalter@walterpistole.com>, Cathy Capriola <ccapriola@novato.org>, Karl Olson <kolson@rocklawcal.com>

Dear Ms. Hartz,

I am in receipt of your email of June 16 denying FAC's public record request. I am writing back to explain further why we believe your withholding of the requested records is erroneous.

The "deliberative process privilege," on which Novato relies, does not apply to the withheld records. First of all, it is not clear that the records even concern or reflect a "deliberative" process or substantive decision-making process of government. Not every decision or action by every government employee is "deliberative" within the meaning of the privilege.

Second, the deliberative process privilege is grounded in Gov Code section 6255. Thus, even records that are clearly deliberative, and otherwise fit within the purposes of the privilege, must be released unless the government can meet the test laid out in section 6255, which requires a weighing of the competing interests in secrecy and in public access.

As the Court of Appeal explained in *Marylander v. Superior Court* (2000) 81 Cal. App. 4th 1128, "Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence." See *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal. App. 4th 55,76.

For these and other reasons, we think you should reconsider your prior decision and, in response to our request, release the requested records.

Thank you.

Sincerely,

Peter Scheer

cc: Karl Olson

Peter Scheer | Executive Director | First Amendment Coalition
pscheer@firstamendmentcoalition.org | 415.886.7081
534 4th St. #B | San Rafael, CA 94901
www.firstamendmentcoalition.org
