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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA BUSINESS PROPERTIES, et al., Petitioners, **v.** **CALIFORNIA AIR RESOURCES BOARD,** Respondent.	Case No. 34-2009-80000232 **NOTICE OF ENTRY OF ORDER DISCHARGING ALTERNATIVE WRIT; JUDGMENT DENYING PETITION FOR WRIT OF MANDATE**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

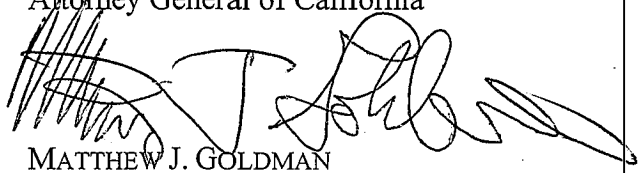
PLEASE TAKE NOTICE THAT on October 16, 2009, the Court in the above-entitled action entered the Order Discharging Alternative Writ; Judgment Denying Petition for Writ of Mandate (Judgment), a true and correct copy of which is attached hereto.

PLEASE ALSO TAKE NOTICE THAT the Judgment orders, "The sum of $350, which is the filing fee that Respondent California Air Resources Board, as a public agency, did not deposit with the Court pursuant to Government Code section 6103, but which is recoverable as costs as

provided in Government Code section 6103.5, shall be payable to the Court by Petitioners pursuant to this Judgment."

Dated: October 19, 2009

EDMUND G. BROWN JR.
Attorney General of California



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA BUSINESS PROPERTIES, et al.,

Petitioners,

v.

CALIFORNIA AIR RESOURCES BOARD,

Respondent.

Case No. 34-2009-80000232

[Proposed] ORDER DISCHARGING ALTERNATIVE WRIT; JUDGMENT DENYING PETITION FOR WRIT OF MANDATE

Hon. Patrick G. Marlette

This matter came regularly before the Court on September 18, 2009, for hearing. Scott A. Sommer and Martin Sul, of Pillsbury Winthrop Shaw Pittman LLP, appeared on behalf of Petitioners California Business Properties Association, et al. Deputy Attorney General Matthew J. Goldman appeared on behalf of Respondent California Air Resources Board. This matter having been fully briefed, the Court had issued its tentative ruling on September 17, 2009, and Petitioners' counsel requested oral argument. After having heard argument by counsel for the parties, the Court affirmed its tentative ruling as the final ruling of the Court, and directed counsel

for Respondent to prepare the order and judgment discharging the alternative writ and denying the petition for peremptory writ of mandate in accordance with the Court's ruling as follows:

This matter is set for hearing on the alternative writ of mandate in Department 19 on Friday, September 18, 2009. The following shall constitute the Court's tentative ruling on the issues related to the alternative writ. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the Clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the Clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

This matter involves the interpretation and application of the so-called "deliberative process" exemption to the disclosure, under the California Public Records Act ("PRA"), of documents generated by an administrative agency in connection with a pending rule-making proceeding.[1]

In 2006, the Legislature enacted Health and Safety Code section 38597, which provides: "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division."

Respondent Board thereafter began the process of developing a regulation to establish the fee schedule called for by the statute. On May 8, 2009, respondent concluded its initial internal deliberations regarding the content of the regulation, issued formal notice of its proposed regulation, and posted the staff report Initial Statement of Reasons on its Web site. The rule-making proceeding is still pending.

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[1] The following summary of the facts and procedural history of this matter is taken from the declarations submitted by the parties: the Declaration of Daniel J. Whitney submitted by respondent Board; and the Declaration of Tony Francois submitted by petitioners.

On February 13, 2009, petitioners made a broad request to respondent Board under the PRA for copies of all public records relating to the Board's stated intent to adopt an "AB 32 Administrative Fee Regulation" pursuant to Health and Safety Code section 38597. On May 28, 2009, petitioners made two additional PRA requests for documents related to the same subject matter, covering documents generated after February 13, 2009.

Although respondent Board produced some documents in response to the requests, it withheld many more on the ground of privilege, primarily the so-called "deliberative process" privilege.[2] According to the parties, the Board produced over 3,200 pages of records in response to the February 13 request, and withheld approximately 12,000 pages.[3] The Board later produced over 6,000 pages of records in response to the May 28 requests, and withheld over 36,000 pages.

The parties quickly disagreed, and continue to disagree, on whether respondent Board properly withheld so many records.

In earlier proceedings in this matter, the Court entered an order directing respondent Board to prepare a privilege log of all records withheld from disclosure, and further directed the parties to meet and confer after preparation of the privilege log in an effort to resolve their dispute with regard to as many of the records as possible. On July 17, 2009, the Court issued an alternative writ directing respondent Board "...to make a full and complete determination of the Public Records Act Requests submitted by Petitioners to CARB...and to produce all documents in the possession of CARB responsive to the Requests...immediately upon receipt of this writ, but in no event later than September 18, 2009, or, IN THE ALTERNATIVE, to show cause before this Court on September 18, 2009 at 9:00 a.m., why you have not done so."

The order directing issuance of the alternative writ also directed the parties to file briefing on the issues raised by the petition (which the Court has read and considered), and further

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[2] According to the Whitney Declaration, respondent Board withheld a total of 3,199 documents (14,631 pages) under the deliberative process privilege; 1,108 documents (7,018 pages) under the attorney-client privilege; and 1,065 documents (21,335 pages) as drafts.

[3] The parties differ on the exact page count, but the precise numbers are not important for the purpose of this discussion.

contemplated the possibility that the Court would conduct an in camera review of documents respondent Board withheld from disclosure, pursuant to the PRA (specifically, Government Code section 6259).

As the result of the meet and confer process, petitioners have focused their inquiry on records related to the calculation of the "direct costs" of respondent Board's regulatory program for greenhouse gas emissions. Petitioners wish to obtain disclosure of records in the Board's possession that document the Board's calculation of such items as staffing costs (expressed in terms of "person years"), equipment costs and contract costs associated with its greenhouse gas emissions regulatory program.

The significance of this information, from petitioners' point of view (a point of view that is not disputed by respondent Board), is that the AB 32 charges were enacted as fees (rather than taxes) under Article XIIIA, Section 4 of the California Constitution, and therefore, in the aggregate, cannot exceed the reasonable cost of operating the regulatory program they are designed to support. (See, *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866, 873.) Petitioners seek documentation regarding costs in order to evaluate and test the Board's calculation and estimate of such costs as set forth in the proposed regulation and the supporting Initial Statement of Reasons. Indeed, petitioners argue that they need the records because the cost numbers respondent Board has released to date are not entirely supported by the documentation currently available to the public or to petitioners.

As an example of the types of documents petitioners are seeking, they offer a copy of an internal Board e-mail message they received during the earlier rounds of document production. The e-mail, from Edie Chang of the Board to the Board's Division Chiefs, dated April 30, 2008, asks the Division Chiefs to prepare spreadsheets for fiscal years 2007-2008 and 2008-2009 that will show the percent of time each staff person in his or her division worked on the Board's climate change program in the appropriate fiscal year, and to identify the programs in which they worked.[4]

[4] See, Declaration of Tony Francois, Exhibit C.

Petitioners state that the spreadsheets prepared in response to this e-mail have not been disclosed by the Board, and contend that they should be, along with many other documents they contend have been withheld improperly. As stated in their briefing: "CARB should be ordered to produce all documents responsive to the Edie Chang memo that contain the spreadsheets and other information on staff hours (PYs), as well as all other documents containing facts, financial information, numbers, and estimates related to the proposed fee regulation, the nexus between the proposed action and the regulated activity, and all other documents properly requested by [petitioners]."[5]

In his declaration submitted on behalf of petitioners, Mr. Francois states that he has reviewed the privilege logs produced by respondent Board and has "...identified approximately 4,500 pages of records that appear to have some relationship to calculations of staff resources, equipment costs, contract costs, or are otherwise related to the cost-basis of the proposed AB 32 fee regulation."[6] At the same time, Mr. Francois states that his estimate of the number of relevant records "...does not in any way indicate that the identified records are the exclusive records containing the sought after information. Because the privilege index prepared by CARB contains such vague and inadequate descriptions, it is quite possible that there are many more records that relate to calculations of staff resources, equipment costs, contract costs, or are otherwise related to the cost-basis of the proposed AB 32 fee regulation."[7]

Thus, from the briefing and the declarations submitted by the parties, it is apparent to the Court that a minimum of approximately 4,500 pages of records, and potentially as many as 48,000 pages, are in dispute between the parties, and would need to be reviewed on an in camera basis if the Court concludes that such review is necessary to resolve the issues presented by this proceeding.

The primary focus of the dispute between the parties, and the issue that essentially is dispositive here, is whether the documents that respondent Board has withheld from petitioners

[5] See, Petitioners' Brief for Hearing on In Camera Inspection, p. 19:4-8.
[6] See, Declaration of Tony Francois, p. 16:13-18.
[7] See, Declaration of Tony Francois, p. 16:19-24.

are legitimately exempt from disclosure under the Public Records Act under the so-called "deliberative process" privilege.

The general principles applicable to the deliberative process privilege are found in the PRA and in case law interpreting and applying the PRA.

In addition to providing exemptions from disclosure for a number of specific categories of documents, the PRA provides a more general exemption in Government Code section 6255(a): "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or 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."

California appellate court decisions interpreting and applying the PRA have described this as a "catchall exemption", under which the court must engage in a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure (i.e., respondent Board) to demonstrate a clear overbalance on the side of confidentiality. (See, *Michaelis, Montamari & Johnson v. Superior Court* (2006) 38 Cal. 4th 1065, 1071.) As an exemption from the normal rule of disclosure under the PRA, this provision must be narrowly construed. (See, *Citizens for a Better Environment v. Dept. of Food and Agriculture* (1985) 171 Cal. App. 3rd 704, 711.)

California appellate court decisions have found that Section 6255(a) embodies the deliberative process privilege by protecting materials from disclosure which reflect the deliberative or decision-making processes of a governmental agency. In analyzing whether agency records are protected by this privilege, the critical question is whether disclosure of the records would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its functions. (See, *Wilson v. Superior Court* (1996) 51 Cal. App. 4th 1136, 1142.)

The deliberative process privilege recognizes that agency decision-making can be impaired, or "chilled", by exposure to public scrutiny, on the basis that agency decision-makers require a free flow of information and candid opinions before making a final determination, and that "...those who expect public dissemination of their remarks may well temper candor with a

concern for appearance...". (See, *California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, 171, 174.)

In applying the deliberative process privilege to the facts of a particular case, the courts have typically made a distinction between records containing purely factual matters, which may be subject to disclosure, and records that contain opinion, analysis or recommendations, which are considered to be truly deliberative and thus not subject to disclosure. At the same time, courts have acknowledged that this distinction sometimes may be misleading, and have declined to apply it in a mechanical manner. Thus, even material that may be characterized as purely factual may be exempt from disclosure where disclosure would expose the deliberative process by revealing what information the decision-maker considered to be significant. (See, *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3rd 1325, 1342: "Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is actually related to the process by which policies are formulated, or inextricably intertwined with policy-making processes.")

Also, as a general matter courts have drawn a distinction between records of pre-decisional communications, which are subject to the deliberative process privilege, and communications made after the decision and designed to explain it, which are not. (See, *Wilson v. Superior Court, supra*, 51 Cal. App. 4th at 1142.)

Recognizing that exempt and non-exempt material may be found within the same record, the PRA, in Government Code section 6253(a), provides that: "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the records after deletion of the portions that are exempted by law." Segregation of exempt from non-exempt material is not possible, however, where the two are "inextricably intertwined". (See, *State Board of Equalization v. Superior Court* (1992) 10 Cal. App. 4th 1177, 1187.)

Even where the court concludes that records sought to be disclosed through a PRA request implicate the deliberative process, it still must engage in the weighing process to determine whether the interest in non-disclosure "clearly outweighs" the public interest in disclosure, as provided in Government Code section 6255. (See, *Times Mirror Co. v. Superior Court, supra*, 53 Cal. 3rd at 1344.) In this weighing process, the public interest in disclosure is not to be

discounted. As one court stated: "If the records sought pertain to the conduct of the people's business, there is a public interest in disclosure. The weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated...". (See, *Citizens for a Better Environment v. Dept. of Food and Agriculture, supra,* 171 Cal. App. 3rd at 715.)

In this case, respondent Board contends that the records it has not disclosed, as listed in the privilege logs, are protected by the deliberative process privilege, either because such records reflect pre-decisional deliberating with reference to specific facts, numbers and estimates of direct costs of its regulatory program, or because the records contain numbers, facts and/or estimates of such costs in a manner that is inextricably intertwined with its predecisional deliberations. Petitioners, on the other hand, argue that some of the records, at least, must contain purely factual information that may be segregated from non-disclosable deliberative material.

At this stage of the proceedings, the Court has not viewed, or had access to, the vast majority of the documents respondent Board has withheld from disclosure. Respondent Board has provided the Court with a sampling of documents falling within the scope of petitioners' PRA requests.[8] From a review of those documents, it is evident that a significant number of the records that have been withheld most likely consist of documents such as internal memoranda and e-mails that are truly deliberative in that they reflect proposals, discussion and debate regarding the ultimate form of the fee regulation or the manner in which agency personnel and other costs should be allocated to programs within the scope of the regulation. It is further evident that a significant number of the records involve questions and requests for information needed in developing the regulation, and thus are also deliberative. At the same time, it is evident that some documents that have been withheld contain factual matter regarding the costs of respondent Board's regulatory program. In certain cases, that factual matter is set forth within a message or memorandum (where it may or may not be easily segregable from other matter)[9] , and in other

[8] Copies of those documents are attached to the Declaration of Daniel J. Whitney as Exhibits 4-20. Petitioners received a copy of the Whitney Declaration without those exhibits attached. Respondent Board submitted the Whitney Declaration to the Court under seal so that the exhibits could be examined by the Court on an in camera basis.

[9] See, e.g., Exhibit 19 (an e-mail that arguably contains factual information regarding the number of staffing PYs associated with climate change work, but also briefly discusses how those (continued...)

cases, factual information is set forth in a chart or table attached to a message or memorandum (where it may be more easily segregable)[10] .

From the materials it has reviewed so far, and without having conducted an in camera review of the withheld records, the Court is able to reach the following factual conclusions regarding the withheld records:

1. All of the records respondent Board has withheld from disclosure relate to the pre-decisional phase of a pending rule-making proceeding, in that the proposed regulation has not yet been adopted in its final form, and is subject to change, and thus further deliberation, until such final adoption occurs.

2. All of the records respondent Board has withheld from disclosure are deliberative in the sense that they relate to respondent Board's process of determining the form of the proposed regulation. This conclusion applies to all records related to the pending rule-making proceeding, whether respondent Board has designated them in its privilege logs as subject to the deliberative process privilege, the attorney-client privilege, or as draft documents.

3. An unknown number of the records respondent Board has withheld from disclosure probably contain factual information of the type petitioners seek through their PRA requests. It may or may not be practical to segregate such factual information from purely deliberative material in individual records.

4. Some portion of such factual information contained in the records most likely is in a sense deliberative because it involves efforts to estimate matters that are inherently imprecise and not capable of immediate objective determination and thus subject to the exercise of judgment and discretion, such as the allocation of staff time and other cost factors to certain tasks out of many that a governmental agency may perform.

(...continued)
PYs should be accounted for in tracking costs).

[10] See, e.g., Exhibit 8, an e-mail message with an attached chart of "Air Resources Board Climate Change Staffing Resources". (For unknown reasons, this chart contains a heading "Attorney-Client Confidential Work Product".)

Based on these factual conclusions, the Court finds that the records respondent Board has withheld from disclosure, including factual information contained therein, fall within the scope of the deliberative process privilege as embodied in Government Code section 6255(a).

Having made that finding, the Court must address the issue of whether respondent Board has demonstrated that, on the facts of this particular case, the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the records.

Here, respondent Board has demonstrated that there is a significant public interest that would be served by not disclosing the records in question, namely, the interest in protecting the deliberative process from the "chilling" effect of public disclosure. This interest is entitled to additional weight in this case on the ground that the deliberative process is not yet complete, in that the rule-making proceeding to which the withheld records relate is still pending and the final form of the regulation has not yet been determined. This interest applies both to purely deliberative matter and to factual matter that is deliberative in the sense that it involves the application of judgment and discretion to matters that are imprecise and not capable of immediate objective determination.

On the other hand, it is also clear that there is a significant public interest weighing in favor of disclosure of at least those records that contain purely factual, as opposed to deliberative, matter. That interest arises out of the principle, cited above, that there is a public interest in disclosure where the records sought pertain to the people's business, and that the weight of that interest is proportionate to the gravity of the governmental task to be illuminated. (See, *Citizens for a Better Environment v. Dept. of Food and Agriculture, supra*, 171 Cal. App. 3rd at 715.) Here, the records petitioners seek pertain to a governmental task of significant gravity: the development of a regulation imposing fees on greenhouse gas emissions to generate funds to support governmental activities related to climate change issues. Given the legal standards applicable to such fees, as cited above, the public has a significant interest in monitoring the development of the fee regulation in order to insure that the fees, as finally enacted, meet those standards.

Having weighed these competing interests in light of the principle that exemptions from disclosure under the PRA must be narrowly construed, the Court finds that, under the particular circumstances of this case, the public interest that would be served by non-disclosure significantly outweighs the public interest that would be served by disclosure, i.e., there is a clear overbalance in favor of non-disclosure.

In reaching this conclusion, the Court has considered it to be particularly significant that the PRA requests at issue here relate to a pending rule-making proceeding in which respondent Board is already required by law to prepare statement of reasons and an administrative record in support of the proposed (and final) regulation that contains the factual information on which the regulation is based. (See, e.g., Government Code sections 11346.2, 11346.5(b), 11347.3.) Respondent Board is thus already under a legal obligation to make public, through the rule-making proceeding itself, all of the facts that support its action.[11]

This factor renders the public interest in favor of disclosure of factual, pre-decisional information related to the deliberative process of less weight than it might be in a case that did not relate to a formal rule-making process.

Although none of the California appellate cases cited by the parties involve PRA requests in the context found in this case, at least one federal appellate case does, and is persuasive authority here.[12]

Lead Industries Association, Inc. v. Occupational Safety and Health Administration (2nd Cir., 1979) 610 F. 2nd 70, was a Freedom of Information Act ("FOIA") case involving a request for agency records to be used in prosecuting a petition in another Circuit to review a rule promulgated by a federal agency with regard to lead exposure standards. In that case, the court found that disclosure of certain agency records under the FOIA was not compelled, at least in part

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[11] In this case, given the legal standards applicable to fees, any failure by the Board to provide facts in the rule-making record to support its action presumably would make the regulation vulnerable to legal challenge.

[12] Because the California PRA is modeled on the federal Freedom of Information Act, the legislative history and judicial construction of the federal act "...serve to illuminate the interpretation of its California counterpart." (See, *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3rd 1325, 1329.)

because the following factors were present: the documents at issue were developed in order to assist the agency in a rule-making proceeding instituted to comply with statutory requirements; the rule was required by law to be supported by substantial evidence in the record considered as a whole; the agency was required by law to publish a statement of reasons when adopting the rule; and the documents being sought embodied assistance to the agency decision-maker not only as to what standard to adopt, but also what reasons to rely on.

As discussed above, this case involves many of the same factors, which suggests that the public interest in favor of disclosure, even of factual information, is entitled to less weight.

The Lead Industries case also suggests that disclosure of factual information that might be segregable from deliberative matter also should not be disclosed where the documents that are subject to a disclosure request relate to a rule-making proceeding. Discussing the District Court's order compelling disclosure of certain segments of documents in the agency's files relating to the lead exposure standards, the Court stated:

"It was improper to compel disclosure of these segments. [I]nstead of merely combing the documents for 'purely factual' tidbits, the court should have considered the segments in the context of the whole document and that document's relation to the administrative process which generated it. [Citations omitted.] If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so. It might indeed facilitate LIA's attack on the standards if it could know in just what respects the Assistant Secretary departed from the staff reports she had before her. But such disclosure of the internal workings of the agency is exactly what the law forbids." (See, *Lead Industries Association, Inc. v. Occupational Safety and Health Administration, supra*, 610 F. 2nd at 86.)

The court's reasoning applies equally to this case. Petitioners seek factual information regarding respondent Board's estimation and allocation of cost factors to the activities the fee will cover; as they put it, they need such information to "check the math". Given that this case involves a formal rule-making proceeding, such factual information either is already (or will be)

on the public record of that proceeding (and thus need not be disclosed), or is not, in which case its omission may reveal an agency deliberative process by showing what information the agency chose not to rely on after being invited to do so (and thus the information should not be disclosed).[13]

Two final factors indicating that the public interest in favor of disclosure of the withheld records is entitled to a lesser weight in this case are the highly burdensome nature of the task that would face either respondent Board or the Court if it should be decided that the very large record in this case should be examined in detail for segregable factual material, and the relatively small likelihood that any really useful and segregable material would be discovered through that process that is not already available through the rule-making process.

As noted above, petitioners have suggested that at least 4,500 pages of records should be reviewed for factual material, and that the search may need to extend to the entire record of 48,000 pages. Reviewing this volume of records to determine whether nuggets of factual material are to be found therein obviously will be a very time-consuming and burdensome task, whoever is required to perform it.

Once again, the *Lead Industries* case provides persuasive authority that the PRA does not require such an effort in this case. The federal court stated: "...if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, it is not 'reasonably segregable,' under the final clause of §552(b) [of the FOIA]." (See, *Lead Industries Association, Inc. v. Occupational Safety and Health Administration, supra*, 610 F. 2nd at 87.)

Similar reasoning applies here. From its inspection of the exhibits offered by respondent Board, the Court finds it to be likely that the proportion of arguably nonexempt factual material in this case is relatively small, as compared to purely deliberative material, and that such factual

[13] Of course, it is also theoretically possible that factual information to support a particular cost allocation will not appear on the rule-making record because it does not exist, and the agency's determination is unsupported by any evidence. That is not a problem that can be remedied through the PRA.

material is so interspersed with exempt material that separation of such factual material, either by respondent Board under the Court's order (with eventual "policing" of this task by the Court), or by the Court in the first instance through in camera inspection, would impose an inordinate burden given the size of the record at issue here. On that basis, the Court concludes that any factual material found in the withheld records is still protected from disclosure under the PRA because, although not exempt, it is not "reasonably segregable" under Government Code section 6253(a).[14] This conclusion applies to all records withheld by respondent Board regardless of the basis on which they were withheld, i.e., deliberative process privilege, attorney-client privilege, or as draft documents.

Petitioners have requested that the Court conduct an in camera review of the withheld documents before ruling on the PRA claim. An in camera review of the documents is not compelled by Government Code section 6259(a) where such review is not necessary to the court's decision. (See, *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3rd 1325, 1347, fn. 15.) Viewing this matter in its proper context in relation to a pending rule-making proceeding, in which respondent Board is already under the legal obligation to reveal the factual support for its proposed action, taking into account the fact that an in camera review of the volume of records involved here would impose a great burden on the Court, also taking into account the small likelihood of finding any great proportion of reasonably segregable factual material, and finally, taking into account the reality that even reasonably segregable factual material in a rule-making proceeding of this kind is, in a real sense, deliberative, the Court finds that an in camera review of the withheld records, or any portion thereof, is not necessary to the resolution of the issues before the Court.

Based on the foregoing, the Court finds that respondent Board has not failed to comply with petitioners' PRA requests, and that further proceedings to enforce compliance are not necessary. The alternative writ is therefore discharged. Because this ruling disposes of the issues raised by

[14] That is to say, that even if factual material in some individual records may be segregated from deliberative material, the difficulty and burden of locating those individual records in the mass of pages at issue here is such as to make the task of segregation unreasonable under the circumstances.

the petition, and a peremptory writ will not issue to require respondent Board to comply with petitioners' PRA requests, the petition for writ of mandate is denied.

IT IS ORDERED THAT:

1 The alternative writ of mandate issued by the Court on July 17, 2009 is DISCHARGED;

2 The petition for peremptory writ of mandate is DENIED;

3 The sum of $350, which is the filing fee that Respondent California Air Resources Board, as a public agency, did not deposit with the Court pursuant to Government Code section 6103, but which is recoverable as costs as provided in Government Code section 6103.5, shall be payable to the Court by Petitioners pursuant to this Judgment; and

4 Judgment is entered accordingly.

Dated: September __, 2009 OCT 16 2009

PATRICK MARLETTE

Hon. Patrick G. Marlette
JUDGE OF THE SUPERIOR COURT

Approved as to form:

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: _____
Scott A. Sommer
Attorneys for Petitioners and Plaintiffs
CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, et al.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Calif. Business Properties Assn., et al. v. Calif. Air Resources Board***
Case No.: **34-2009-80000232**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 19, 2009, I served the attached **NOTICE OF ENTRY OF ORDER DISCHARGING ALTERNATIVE WRIT; JUDGMENT DENYING PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Scott A. Sommer
Pillsbury Winthrop Shaw Pittman LLP
P.O. Box 7880
San Francisco, CA 94120-7880

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 19, 2009, at Sacramento, California.

Elvira C. Loa
Declarant

E. C. Loa
Signature

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