

1 Alan L. Geraci, Esq. SBN108324
2 **CARE Law Group PC**
3 817 W. San Marcos Blvd.
4 San Marcos, CA 92078
5 619-231-3131 telephone
6 760-650-3484 facsimile
7 alan@carelaw.net email

8 Attorneys for Plaintiffs Citizens Oversight Inc. and Raymond Lutz

9 **SUPERIOR COURT OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO—CENTRAL DIVISION**

11 CITIZENS OVERSIGHT INC., a Delaware) CASE NO: 37-2017-00027595-CU-MC-CTL
12 non-profit corporation; RAYMOND LUTZ,))
13 an individual,))
14))
15 Plaintiffs,))
16 vs.))
17))
18 MICHAEL VU, San Diego Registrar of))
19 Voters; COUNTY OF SAN DIEGO, a))
20 public entity; DOES 1-10,))
21))
22 Defendants.))
23))
24))
25))
26))
27))
28))
29))
30))
31))
32))
33))
34))
35))
36))
37))
38))
39))
40))
41))
42))
43))
44))
45))
46))
47))
48))
49))
50))
51))
52))
53))
54))
55))
56))
57))
58))
59))
60))
61))
62))
63))
64))
65))
66))
67))
68))
69))
70))
71))
72))
73))
74))
75))
76))
77))
78))
79))
80))
81))
82))
83))
84))
85))
86))
87))
88))
89))
90))
91))
92))
93))
94))
95))
96))
97))
98))
99))
100))

101 Plaintiffs CITIZENS OVERSIGHT INC. and RAYMOND LUTZ oppose
102 Defendants' demurrer and submit the following points and authorities therefor:

103 **I.**

104 **INTRODUCTION**

105 This matter follows Plaintiffs' a previous lawsuit in which Plaintiffs received a
106 judgment against Defendants declaring and mandating that Defendants comply with
107 Elections Code Section 15360.¹

108 ¹ Pursuant to California Evidence Code Section 450, *et seq*, judicial
109 notice is requested for the court to consider Case No. 37-2016-

1 This is an action for declaratory relief and mandamus to establish rights, duties and
2 obligations pursuant to the California Constitution Article 1, Section 3(b) and the California
3 Public Records Act as adopted by California voters in 2004 and codified by the Legislature
4 in California Government Code Section 6250, *et seq.* and for judicial remedies requiring the
5 San Diego County Registrar of Voters to allow inspection of the ballots from last years
6 Presidential Primary which occurred on June 7, 2016.

7 **II.**

8 **ALLEGATIONS IN PLAINTIFFS' COMPLAINT**

9 California Election Code Section 2300 is known as the Voter Bill of Rights, which
10 includes a provision that the public has both the right to observe the election process and to
11 report any suspected illegal or fraudulent activity to a local elections official or to the
12 Secretary of State. Although governmental agencies may be subjected to public review using
13 only the public records act, the elections departments are understood to allow a higher level
14 of scrutiny by the public and an expectation that the public will be observing and reporting
15 fraudulent activity. (Plaintiffs' Complaint for Declaratory Relief and Mandamus for
16 Violation of the Public Records Act (hereinafter "Plaintiffs' Complaint"), at paragraph 8.)

17 In the Presidential Primary, there were 1.52 million registered voters in San Diego
18 County. There were 775,930 ballots cast in 184 contests involving 468 candidates and 52
19 state and local propositions. (Plaintiffs' Complaint, at paragraph 9.)

20 California Elections Code Section 15209 requires the Registrar to store all ballots
21 following a federal election, such as the Presidential Primary, for 22 months. (Plaintiffs'
22 Complaint, at paragraph 10.)

23 California ballots do not contain any personally identifiable voter information on the
24 ballot itself. Therefore, there are no privacy rights that could be compromised by inspection
25 of the ballots. (Plaintiffs' Complaint, at paragraph 11.)

26 Between February 2, 2017, and February 17, 2017, Plaintiffs and Registrar engaged in
27

28 _____
00020273 and the judgment therein entered on January 10, 2017.

1 an email exchange wherein Plaintiffs requested, *inter alia*, view and review copies to the
2 ballots and Registrar declined to do so. (Plaintiffs' Complaint, at paragraph 12.)

3 On or about April 4, 2017, Plaintiffs, through legal counsel, demanded access to
4 inspect and copy the stored ballots of the Presidential Primary. (Plaintiffs' Complaint, at
5 paragraph 13.)

6 On or about April 11, 2017, Registrar, through legal counsel, declined Plaintiffs
7 request stating that the ballots are sealed pursuant to California Elections Code Sections
8 15370 and 17301(b) and that the Registrar is not permitted to open any ballots or permit any
9 ballots to be opened pursuant to California Elections Code Section 15307. (Plaintiffs'
10 Complaint, at paragraph 14.)

11 Plaintiffs have, therefore, exhausted any administrative remedy and the Registrar is
12 unwilling to reach a private compromise of this dispute. (Plaintiffs' Complaint, at paragraph
13 15.)

14 III.

15 LAW APPLICABLE TO DEMURRER

16 A complaint in a civil action serves a variety of functions, including framing and
17 limiting the issues and apprizing defendant of the basis upon which plaintiff is seeking
18 recovery. *Committee on Children's Television, Inc. v General Foods Corp.* (1983) 35 Cal.3d
19 197, 211 212. In serving this function, the complaint should set out ultimate facts
20 constituting the cause of action, not evidence by which plaintiff proposes to prove those
21 facts. *Id.* at 212. In fact, it is not the function of a demurrer to test the truth of Plaintiff's
22 allegations or the accuracy with which plaintiff describes defendant's conduct. A demurrer
23 tests only the legal sufficiency of the pleading, and the Court should not be concerned with
24 Plaintiff's ability to prove the allegations made. *Id.* at 213, 214.

25 A demurrer is concerned solely with allegations found in the complaint and not at all
26 with the final outcome. *Griffith v Department of Public Works* (1956) 141 Cal.App.2d 376
27 381. The test of a demurrer is not whether the allegations are likely to be proven, but
28 whether they preclude liability. *Garton v Title Insurance Co.* (1980) 106 Cal.App.3d 365

1 367. A plaintiff is required only to set forth essential facts of his case with reasonable
2 precision and with particularity sufficient to acquaint a defendant with the nature, source, and
3 extent of his cause of action. *Youngman v Nevada Irrigation District* (1969) 70 Cal.2d 240,
4 244 245.

5 **IV**

6 **PLAINTIFFS' COMPLAINT ALLEGES THAT**
7 **ELECTION BALLOTS ARE PUBLIC RECORDS**
8 **SUBJECT TO THE CALIFORNIA PUBLIC RECORDS ACT**

9 The California Public Records Act (CPRA) was enacted for the purpose of increasing
10 freedom of information by giving members of the public access to information in the
11 possession of public agencies. West's Ann.Cal.Gov.Code § 6250 *et seq.* The definition of
12 public records “includes any writing containing information relating to the conduct of the
13 public's business prepared, owned, used, or retained by any state or local agency regardless of
14 physical form or characteristics.” Gov. Code § 6252(e) There is, or there should be, no
15 dispute that electoral ballots are public records. If there is a dispute, this fact is properly
16 alleged.

17 As a public record, the ballots “are open to inspection at all times during the office hours
18 of the state or local agency and every person has a right to inspect any public record” and make
19 records available for copying, Gov. Code § 6252(a)(b). The custodian agency may not cause
20 delay in compliance with the CPRA. Gov. Code § 6252(d) Thus, the Registrar’s duty to
21 produce ballots as a public record is without any reasonable doubt.

22 **V**

23 **THERE IS NO SPECIFIC EXEMPTION UNDER CPRA**

24 Although there are several specific exemptions for some elections related to the
25 processing of elections, there is no specific exemption to allow withholding ballots under the
26 CPRA. All other exemptions relating to election records are due to voter information and the
27 need to respect the privacy of that information.

28 //

1 **1. The purpose of sealing the ballots is to preserve the evidence for 22**
2 **months not to deny inspection thereof.**

3 The Registrar suggests his office may not comply with CPRA because the ballots
4 have been sealed pursuant to Elections Code 15370 and 17301, and may only be opened in
5 compliance with those statutes. Accordingly, the Registrar states that the Public Records Act
6 does not apply to official records which are exempted or prohibited from disclosure by other
7 statutes. (Gov. Code § 6254(k); Evidence Code §1040.) The Registrar’s position falls short
8 of its legal requirements.

9 The sections cited by the Registrar are related to access by elections officials, and do
10 not apply to say that the records are not public records or that the public may not have access
11 to review them under the CPRA. It would be counter intuitive to believe that once the
12 Registrar has complied with the requirement of “sealing” under Elections Code 15370 and
13 17301, that such sealing becomes a prophylactic to a public CPRA demand. In fact, the
14 purpose of Election Code 17301 is to preserve the evidence and create a chain of custody that
15 guards against alteration of the ballots. If the Registrar simply requires a court order to
16 unseal the ballots for inspection under CPRA, then this action shall act as the vehicle for that
17 purpose. Because of the fundamental disagreement as what Plaintiffs believe is a clear
18 requirement under the CPRA and the Registrar’s desire to hide behind its sealed document
19 requirement, the parties need this Court’s declaration of rights, duties and obligations to
20 guide future requests and to prevent wasted court resources on repeated attempts to inspect
21 public records such as ballots.

22 **2. Any claimed privilege under Evidence Code section 1040 for “official**
23 **information” would act as an affirmative defense to be proven by the**
24 **Registrar.**

25 Evidence Code section 1040 provides in pertinent part:

- 26 (a) As used in this section, 'official information' means
27 information acquired in confidence by a public employee in the
28 course of his or her duty and not open, or officially disclosed, to
the public prior to the time the claim of privilege is made.
(b) A public entity has a privilege to refuse to disclose official
information, and to prevent another from disclosing official

1 information, if the privilege is claimed by a person authorized
2 by the public entity to do so and:

- 3 (1) Disclosure is forbidden by an act of the Congress of
4 the United States or a statute of this state;
5 (2) Disclosure of the information is against the public
6 interest because there is a necessity for preserving the
7 confidentiality of the information that outweighs the
8 necessity for disclosure in the interest of justice In
9 determining whether disclosure of the information is
10 against the public interest, the interest of the public entity
11 as a party in the outcome of the proceeding may not be
12 considered."

13 The "official information" privilege in Evidence Code section 1040, subdivision
14 (b)(2), is expressly conditional, not absolute. If the Registrar satisfies the threshold burden of
15 showing that the information was acquired in confidence, the statute requires the court next
16 to weigh the interests and to sustain the privilege only if "there is a necessity for preserving
17 the confidentiality of the information that outweighs the necessity for disclosure in the
18 interest of justice." (*Shepherd v. Superior Court* (1976) 17 Cal. 3d 107, 123-125; *PSC*
19 *Geothermal Services Co. v. Superior Court* (1994) 25 Cal. App. 4th 1697, 1714; *Rubin v.*
20 *City of Los Angeles* (1987) 190 Cal. App. 3d 560, 585-587; *CBS, Inc. v. Block* (1986) 42 Cal.
21 3d 646, 656.) Should the Registrar claim this privilege, such a claim would be subject to the
22 ordinary burden of proof and factual evidence.

23 Here, the ballots contain no traceable identification information including names,
24 addresses, signatures or other personal markings. The ballots are simple dot coded papers
25 showing voter intent. The ballots are tabulated by a central tabulation device which simply
26 counts the markings and tallies the results. Time, place and manner restrictions can guard
27 against any unjust intrusion to the Registrar's usual business and is not burdensome in scope.
28 Any balancing of interests as required for this privilege, if asserted, will favor the inspection
of the ballots by the public.

VI.

CONCLUSION

Voted ballots, which are not traceable to the individual voter, are public records
subject to disclosure under the CPRA. Either the Secretary of State, in his role as the Chief

1 Elections Officer through the authority vested in that office or the Registrar as the local
2 elections official responding to a CPRA request for voted ballots, may supervise or issue
3 directions for the review of the ballots in order to protect their physical integrity and the
4 security of the voted ballots.

5 Insofar as the Defendants' demurrer only tests the sufficiency of the allegations, the
6 Court should overrule the demurrer and order Defendants to answer in as required under the
7 California Code of Civil Procedure. It is likely that there are no factual disputes in this
8 matter and that the ultimate issues of the case may be again before the Court in a motion for
9 judgment or summary judgment.

10
11 Dated: September 26, 2017

Alan L. Geraci

12 By: Alan L. Geraci, Esq. of CARE Law
13 Group PC, Attorneys for Plaintiffs Citizens
14 Oversight Inc. and Raymond Lutz