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Via Email – Hard Copy to Follow

December 4, 2015

Thomas P. Infusino, Esq.
P.O. Box 792
Pine Grove, CA 95665
tomi@volcano.net

Re: Your Public Records Act (PRA) Request dated November 24, 2015 to Peter Maurer, Planning Director

Dear Mr. Infusino:

This office represents the County of Calaveras in all civil matters. We have received the above referenced request and this letter constitutes the County's formal response. We note your request is 17 pages long and contains legal argument for the most part. You specifically request:

> "…a copy of the Mintier-Harnish General Plan or plans delivered to the County sometime between December 2010 and February of 2011."

The County legally cannot comply for the following reasons:

1. The unedited document is no longer in existence.

2. Even if it was in existence, it would be exempt from production under Government Code §6254(a) as a preliminary draft.

3. Even if there existed no preliminary draft exemption, the document would be exempt under Government Code §6255 because the interest in non-production would far outweigh the interest in production.

A. The preliminary draft has long been superseded by extensive editing, culminating in the December 2014 release of the General Plan (GP) Update.

Government Code §6252 provides in relevant part:

> *"As used in this chapter...(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or* ***retained*** *by any state or local agency regardless of physical form or characteristics."*

Documents not retained by an agency fall outside the ambit of the PRA. The GP document you seek arrived from the vendor incomplete and required extensive editing, including deletion and augmentation over time, including substantial attorney-work product communications and revisions. Business and Professions Code §§6068 and 6012; Evidence Code §954; Code of Civil Procedure §2018; Government Code §§6254(k) and 6276.04; *Rumac v. Bottomley* (1983) 143 Cal.App.3rd 810,815. Final edits are reflected in the 2014 release of the GP Update. The Planning Department did not retain the original draft from Mintier-Harnish after editing pursuant to Planning Department Policy. Therefore, the document is no longer in existence and the County cannot comply with your request.

Any other sub-part of the original draft previously provided to the public by County staff is inapposite and has no bearing on the specific PRA request at issue here.

B. The document sought would have been exempt from production under Government Code §6254(a).

Government Code §6254 (a) exempts from production:

> *"Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure".*

You are correct that documents normally retained, or which have been retained, in the ordinary course of business are subject to public review. (Gov. Code §6254 (a).) But that is true only "[I]f preliminary materials are not customarily discarded or have not in fact been discarded as is customary …." *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 714.) The County does not customarily retain preliminary drafts. Furthermore, disclosure of this document would be contrary to the public interest as discussed below.

C. The public interest in non-disclosure of this document clearly outweighs the public interest in its disclosure.

Government Code §6255(a) provides:

> *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.*

As stated by the Third District Court of Appeal in *Humane Society v Superior Court* (2013) 214 Cal.App.4th 1233, 1268 in discussing the catchall exemption of Government Code §6255:

> *As the court put it in County of Santa Clara and City of San Jose, "the issue is 'whether disclosure would contribute significantly to public understanding of government activities.' " (County of Santa Clara, supra, 170 Cal.App.4th at p. 1324, 89 Cal.Rptr.3d 374, quoting City of San Jose, supra, 74 Cal.App.4th at p.*

> *1018, 88 Cal.Rptr.2d 552.) Thus, in assigning weight to the general public interest in disclosure, courts should look to the "nature of the information" and how disclosure of that information contributes to the public's understanding of government.*

The GP draft you seek is a pre-CEQA document. In CEQA cases the record of proceedings shall include, but is not limited to, "[a]ny other written materials relevant to the... public agency's compliance with [CEQA] or to its decision on the merits of the project...." *See*, Public Resources Code §21167.6, subd. (e)(10); *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 714. Disclosure of the original Mintier-Harnish document would have resulted in a complete misunderstanding of the draft GP released in December 2014 because the document you seek bore almost no resemblance to the draft circulated to the public, i.e., on the facts of this particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." *See*, *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1419-1420.

In *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, the Court placed an emphasis on not jeopardizing the decision making process of the policy maker, stating:

> *[T]he ... courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not." (NLRB v. Sears, Roebuck & Co., supra, 421 U.S. at pp. 151-152 [44 L.Ed.2d at p. 48].) ... The key question in every case is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (Dudman Communications v. Dept. of Air Force, supra, 815 F.2d at p. 1568.) 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" (Jordan v. United States Dept. of Justice (D.C. Cir. 1978) 591 F.2d 753, 774 [192 App.D.C. 144]) or "inextricably intertwined" with "policy-making processes." (Ryan v. Department of Justice, supra, 617 F.2d at p. 790; Soucie v. David (D.C. Cir.* 1971) 448 F.2d 1067, 1078 [145 App.D.C. 144].)

Accordingly, the public interest in withholding disclosure of the original, incomplete, uncirculated and unedited version of the GP would have been considerable had it been retained.

Release to the public of an unvetted preliminary draft of a County's General Plan Update would have a significant chilling effect on the ability of County staff to draw up a complex, politically charged document that requires a tremendous amount of staff collaboration, brainstorming, frank discussion, debate, and both legal and administrative analysis prior to releasing the final version for public comment and legislative vetting. Forcing this deliberative process into the public arena before a final product emerges would paralyze this effort, as members of the public concerned about the final product would almost certainly seek to pre-emptively influence the drafting process. Weaknesses and errors in the draft would be aired publicly even before they are recognized and

corrected by staff. Instead of simply emerging with a final draft document for public consideration and comment, the County's deliberative process—its editing choices, its strategy, its legal analysis, and its efforts to render the document adequate and defensible—would itself be subject to dissection and scrutiny. Furthermore, instead of just two documents for the public to compare and contrast—the old General Plan and the new Draft General Plan—there would now be a third document thrown into the mix: the Pre-Draft General Plan Update. This would greatly add to the confusion of what is already a highly complex process.

As in *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, where disclosure of pre-selection data would reveal specific, confidential details of the competing proposals, thereby potentially impairing the agency's selection processes, here the public and elected officials would have before them partially inapposite and, to a certain extent, inaccurate data if the entire Mintier-Harnish General Plan was available for release and comparison with the current draft GP. Side by side comparison would have created confusion and compromised the decision making process to arrive at a final GP, adding "undesirable pressures, political and otherwise, to the process." Ibid at 1075. Moreover, "the public will have an opportunity to weigh in" before public officials commit to a final GP Update and "time remains for public input before the Board's final [decision] is made." Ibid at 1072-1073.

The fact that money was paid to a consultant to assist the County in developing its pre-release draft, and the fact that the County chose to reject significant parts of the consultant's work, does not provide adequate counterbalance to the harm that would befall the deliberative process—and hence the public interest itself--if the disclosure were required. The desire of the requester to pan for "nuggets of wisdom" in the Pre-Draft document is clearly outweighed by the need to protect the sanctity of the deliberative process and attorney-client privilege. You assume—without any evidentiary basis—that the County cannot be expected to disclose in good faith any feasible mitigation measures required under CEQA unless its Pre-Draft documents are exposed. Your stated desire to scan for these "nuggets" in a pre-Draft is precisely why the Legislature saw fit to protect preliminary drafts against disclosure.

Failing to release the Mintier Harnish Pre-Draft will in no way prejudice or in any way diminish your ability or the ability of the public at large to participate in the General Plan Update adoption process, including but not limited to the adoption of mitigation measures under CEQA.
For the reasons stated above, the County legally cannot comply with your request.

Very truly yours,

DAVID E. SIRIAS
Assistant County Counsel

DES/pea

cc: Planning *(via email)*
Board of Supervisors *(via email)*