**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| SACRAMENTO CITY TEACHERS ASSOCIATION, CTA/NEA,<br><br>Charging Party,<br><br>v.<br><br>SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. SA-CE-2882-E<br><br>PROPOSED DECISION<br>(September 24, 2019) |

Appearances: California Teachers Association, by Jacob F. Rukeyser, Attorney, for Sacramento City Teachers Association, CTA/NEA; Lozano Smith, by Mark W. Waterman, Attorney, for Sacramento City Unified School District.

Before Robin W. Wesley, Administrative Law Judge.

## INTRODUCTION

An exclusive representative alleges a public school employer failed to meet and negotiate in good faith in violation of the Educational Employment Relations Act (EERA)[1] when it failed to provide a draft of a report about the employer's special education program and communications pertaining to the draft report. The employer denies any violation of law.

## PROCEDURAL HISTORY

On May 18, 2017, the Sacramento City Teachers Association (SCTA or Association) filed an unfair practice charge against the Sacramento City Unified School District (District). The District filed a position statement in response to the charge on July 12.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

On July 20, 2018, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the District failed or refused to provide SCTA with requested information that is necessary and relevant to its representational duties. This conduct is alleged to have violated EERA section 3543.5, subdivisions (a), (b), and (c).

The District answered the complaint on August 9, 2018, admitting certain jurisdictional allegations, denying substantive allegations, and asserting affirmative defenses.

On September 18, 2018, the parties participated in an informal settlement conference, but the matter was not resolved.

A formal hearing was held on January 8, 2019. During the hearing, the parties entered into the record stipulations of fact and joint exhibits. The case was submitted for decision on March 15, after receipt of closing and reply briefs.

## FINDINGS OF FACT

SCTA is an exclusive representative, within the meaning of EERA section 3540.1, subdivision (e), of an appropriate unit of employees. The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k).

### SCTA Representation

SCTA represents a bargaining unit of about 2900 certificated District employees, including approximately 600 substitutes. The bargaining unit contains general education teachers, special education teachers, school nurses, psychologists, program specialists, librarians, counselors, and speech pathologists. Approximately 300 bargaining unit employees provide educational and support services to special education students.

SCTA and the District are parties to a collective bargaining agreement (CBA) that expired in June 2016. On October 10, the parties held their first bargaining session for a successor agreement. SCTA Executive Director John Borsos (Borsos) testified that special education matters were "at the forefront of our bargaining." He explained there has been a movement to have special education students included in general education classrooms. This has raised a range of issues for SCTA from training for general education teachers to staffing levels, class size and caseloads, resources, classroom management and discipline, medical services for special education students, and workplace safety. The expired CBA includes Appendix D, which sets forth working and learning conditions for teachers and students involved in special education student inclusion in regular education classes.[2]

Council Review

The Council of the Great City Schools (Council or CGCS) is a national organization comprised of 68 of the nation's largest urban public school systems, including the District. The Council's mission is to "promote the cause of urban schools and advocate for inner-city students." The organization provides a network for districts to exchange information on common problems "to deliver the best possible education for urban youth." The Council seeks to assist "urban education with programs to boost academic performance and narrow achievement gaps; improve professional development; and strengthen leadership, governance, and management."

At some point prior to November 2016, then-District Superintendent José Banda (Banda) requested that the Council review the District's special education program. Chief Academic Officer Dr. Iris Taylor (Taylor) oversees the District special education department.

[2] Components of Appendix D were incorporated into the new CBA, which was ratified by the parties in December 2017.

She testified that the purpose of the audit was to gain additional perspective from outside experts on District policies, practices, and procedures, and obtain recommendations for improvements. In-House Counsel Raoul Bozio (Bozio) stated the goal of the review was to better serve students by improving and delivering special education services in the most efficient and legally compliant manner. Director of Special Education Becky Bryant (Bryant) added there was also a concern with the number of special education legal claims and settlements, and Superintendent Banda was interested in learning whether the number of legal actions were excessive compared to other school districts.

On November 15, 2016, the District authorized a purchase order with an attached "Scope of Work" to fund the expenses of the Council's Strategic Support Team assigned to conduct the review. The Council team members were: Dr. Judy Elliot, Sowmya Kumar, Sue Gamm (Gamm), Esq., Dr. Neil Guthrie, and Julie Wright Halbert (Halbert), Esq. The first four are current or former administrators from large school districts across the country. Gamm is an expert in special education and a recognized consulting attorney on the subject. Halbert has been the Council's legislative counsel for over 22 years, and is a national education legal and policy specialist with an emphasis on special education. The parties stipulated that neither Gamm nor Halbert is admitted to practice law in California, and neither provided legal representation to the District as part of the Council team assignment.

The Council team scheduled an onsite visit for November 16-18, 2016, to review the special education program, and conduct interviews and focus groups. The Council team provided the District with a list of different groups it wanted to meet with. Bryant scheduled the focus group meetings and invited administrators, legal counsel, general and special education teachers, special education staff and related service providers, community advisory

council members, and union representatives to attend. Bozio participated in the legal compliance group interview, also attended by Bryant and the District's outside counsel. Borsos attended the union focus group. He testified there was no mention at the meeting that the Council team was conducting its review at the request of the District's legal counsel.

Before and after the focus group meetings, the Council team contacted Taylor to request data and documents. Some requests were made by email, others were verbal requests.

After the November 2016 visit, the Council team reviewed numerous policy documents and reports, analyzed data, and developed initial recommendations. Halbert and Gamm began to prepare the Council's report. A 175-page final report was issued in or around late April 2017.

Before April 2017, Taylor requested to review a draft report to see what the recommendations were beginning to look like and assess the potential implications for District policy. Taylor understood the draft was confidential because it was a working draft. She shared it only with Bryant and District legal counsel, asking counsel to review it for policy and legal implications. The Council asked for corrections to names and titles, and sought comments on the draft. Bryant also reviewed the draft to make sure that data included in the report was accurate.

Taylor and Bryant had policymaking communications after reviewing the draft. Both considered their communications to be confidential. Each testified that if required to disclose their policy, deliberative, and decision-making communications, it would negatively impact their ability to explore ideas and have candid communications with others.

Request for Information

Negotiations between SCTA and the District were ongoing. At times, Taylor and Bryant attended bargaining sessions depending on the topics discussed. In March 2017, Borsos heard a reference to a Council draft report during a bargaining session or at a separate meeting with District representatives. SCTA wanted to see the draft report because the Council was going to make recommendations pertaining to special education that could impact bargaining unit employees.

On March 20, 2017, Borsos sent Bozio an email, stating in part:

> Under the provision of the California Public Records Act and/or the Education [sic] Employees Relations Act (EERA), the Association hereby requests the following information:
>
> 1. A copy of any report, in draft form or otherwise, based on the CGCS audit of the District's special education department;
>
> 2. Any correspondence, including emails (including those sent from a District employee's personal email account), between an employee of the District and any member of CGCS audit team related to the Special Education Audit, or among District administrative employees related to the CGCS Special Education audit.[3]
>
> 3. The notes of any District administrative staff representative related to any meeting between District staff and representatives of CGCS.

In a series of email communications extending through April 19, 2017, Bozio responded to Borsos, stating that the District was collecting non-privileged records in response to SCTA's request. In relation to other documents, including the draft report, Bozio referenced

[3] In its opening brief, SCTA stated it had abandoned its request for correspondence "among District administrative employees related to the Special Education Audit." SCTA wrote that it "does not now allege that the District's failure to respond to this specific component of its original information request constitutes bad faith bargaining." Based on this representation by SCTA, the request for these communications is deemed withdrawn and will not be considered.

the California Public Records Act (CPRA)[4] and asserted a number of privileges and exemptions, including attorney-client, attorney work product, deliberative process, and official information privileges. Bozio testified that because he was not familiar with the details of the draft report, he was attempting to be comprehensive if all or portions of the report were covered by the attorney-client privilege or other legal privileges. Bozio also informed Borsos that the final report would soon be available. Bozio did not ask Borsos why he sought the information or question Borsos about its necessity or relevance. Borsos responded by questioning the asserted privileges.

The final report was issued about one month after SCTA's information request, on or about April 20, 2017. The report included recommendations on subjects covered in CBA Appendix D, and other special education instructional practices, training, and staffing ratios. SCTA received a copy of the final report.

## ISSUE

Did the District unlawfully fail or refuse to provide the draft report and written communications pertaining to the special education audit?

## CONCLUSIONS OF LAW

An exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty to represent bargaining unit employees. (*Stockton Unified School District* (1980) PERB Decision No. 143; *Sacramento City Unified School District* (2018) PERB Decision No. 2597.) The terms "necessary" and "relevant" are interchangeable, and an exclusive representative meets its burden by showing that it has requested information that is either relevant or necessary to its representation obligations. (*Contra Costa Community*

[4] The CPRA is codified at Government Code section 6250 et seq.

*College District* (2019) PERB Decision No. 2652; *Sacramento City Unified School District, supra*, PERB Decision No. 2597.) PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H; *Chula Vista City School District* (1990) PERB Decision No. 834.)

Certain information requested by an exclusive representative is presumed to be relevant. Information pertaining to mandatory subjects of bargaining is "so intrinsic to the core of the employer-employee relationship that it is presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information." (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 17-18; *Contra Costa Community College District, supra*, PERB Decision No. 2652; *Santa Monica Community College District* (2012) PERB Decision No. 2303.) An employer has the duty to provide, upon request, relevant information related to collective bargaining and administration of the contract, including grievance processing. (*Petaluma City Elementary School District/Joint Union High School District, supra*, PERB Decision No. 2485; *Chula Vista City School District, supra*, PERB Decision No. 834; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1184.)

Relevant Information

SCTA represents certificated employees working in the District's special education program. The Council was requested to review the special education program and make recommendations on related District policies, practices, and procedures.

At the time of the audit, the parties were engaged in negotiations for a successor agreement. Borsos testified that special education matters were "at the forefront of our bargaining." The District's special education inclusionary practices raised a number of concerns for SCTA, including training for general education teachers, staffing levels, class size and caseloads, resources, classroom management and discipline, medical services for special education students, and workplace safety. Many of these concerns implicate subjects within the scope of representation. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 [mandatory training]; EERA § 543.2, subd. (a)(1) ["class size"]; *Sonoma County Office of Education* (1997) PERB Decision No. 1225 [class size]; *Davis Joint Unified School District* (1984) PERB Decision No. 393 [caseload]; EERA § 3543.2, subd. (a)(1) ["safety conditions of employment"]; *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S [workplace safety].)

The exclusive representative is entitled to the information it needs "to understand and intelligently discuss the issues raised in bargaining." (*Petaluma City Elementary School District/Joint Union High School District, supra*, PERB Decision No. 2485, citing *Town of Paradise* (2007) PERB Decision No. 1906-M, adopted proposed decision, p. 5.) The Council's final report examined matters addressed in the parties' CBA, including Appendix D, which covered special education matters. The draft report presumably covered many of the same issues. The record also shows that the Council requested data and documents pertaining to the special education program. At the time, the parties were negotiating over special education topics. Because the report included information and recommendations pertaining to many subjects within the scope of representation, it was relevant to SCTA's ongoing bargaining

obligations. Therefore, the requested information was necessary and relevant to SCTA's duty to represent its members.

District's Defenses

The duty to provide information depends on the circumstances of the case, "though generally it requires the same diligence and thoroughness as is exercised in other business affairs of importance." (*Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485, p. 19.) Once relevant information has been requested, the employer must either supply the information, or timely and adequately explain its reasons for not complying with the request. (*Id.*) The employer bears the burden of proof as to any defense, limitation, or condition it asserts. (*Id.*; *Sacramento City Unified School District*, *supra*, PERB Decision No. 2597.) The failure to provide relevant information, for which no defense applies, is a per se violation of the duty to negotiate in good faith. (*Petaluma City Elementary School District/Joint Union High School District*, *supra*, PERB Decision No. 2485.)

In support of its information request, SCTA requested documents pursuant to both the CPRA and EERA. In response, the District referenced the CPRA and asserted a number of legal privileges. The Board has considered the CPRA in relation to union information requests, finding that unions have broader rights to information than those rights provided by the CPRA. In *Sacramento City Unified School District*, *supra*, PERB Decision No. 2597, p. 10, the Board explained:

> The CPRA provides rights to all members of the public, including unions. In contrast, labor relations statutes provide only the bargaining parties – employers and unions – with a right to request information and documents from one another.

The Board continued:

> It is settled that an employer, as part of its duty to fully answer a union's request or else timely and adequately explain a valid defense to disclosure, may not rely upon a CPRA exemption in place of a defense recognized under PERB precedent. [Citations omitted.]

(*Id.*, p. 10.)

In *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, p. 5, the Board similarly held that "PERB has rejected CPRA provisions as standing alone as a defense to a request for information." The District therefore may not rely upon CPRA exemptions from disclosure of public agency information unless the defense is recognized under PERB precedent. (*Sacramento City Unified School District, supra*, PERB Decision No. 2597.)

PERB has long followed state and federal court decisions in limiting otherwise lawful demands for information. (*Modesto City Schools and High School District* (1985) PERB Decision No. 479; *Los Rios Community College District* (1988) PERB Decision No. 670.) The Board has recognized a number of exemptions from disclosure of information to unions including confidentiality (*Modesto City Schools and High School District, supra*, PERB Decision No. 479; *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, 318-319.); constitutional right of personal privacy (*Los Rios Community College District, supra*, PERB Decision No. 670; *State of California (Department of Consumer Affairs), supra*, PERB Decision No. 1711-S; *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, 925.); and statutory privileges (*Santa Monica Community College District, supra*, PERB Decision No. 2303.). In *Community Learning Center Schools, Inc.*

(2017) PERB Order No. Ad-448, p. 7, the Board held that privileges apply to unfair practice cases. (Citing PERB Regulation 32176.)[5]

The District contends the requested information is confidential as covered by a number of privileges, and therefore exempt from disclosure.

I. Deliberative Process Privilege

In *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338 (*Times Mirror*), the California Supreme Court recognized the statutory deliberative process privilege,[6] modeled after Exemption 5 of the Freedom of Information Act.[7] The privilege is based on "the policy of protecting the decision-making processes of government agencies." (*Id.*, p. 1340.) The Court explained that "frank discussions of legal or policy matters might be inhibited if subjected to public scrutiny." (*Id.*, p. 1340.)

> To prevent injury to the quality of executive decisions, the courts have been particularly vigilant to protect communications to the decisionmaker before the decision is made. Accordingly, the . . . 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.

(*Id.*, p. 1341.)

> There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making

[5] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[6] Gov. Code § 6255, subd. (a).

[7] 5 U.S.C. § 552

> process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds."

(*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 170 (*California First Amendment Coalition*), citing *Jordan v. United Stated Dept. of Justice* (D.C. Cir. 1978) 591 F.2d 753, 772-773.)

In *Times Mirror, supra*, 53 Cal.3d 1325, 1342, the Supreme Court emphasized:

> 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.

In some circumstances, "the disclosure of even purely factual material may so expose the deliberative process that it must be deemed exempted." (*Id.*, p. 1341.)

Once information is found to be deliberative, a balancing test is applied to determine whether on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. (*Id.*, p. 1344; *California First Amendment Coalition, supra*, 67 Cal.App.4th 159, 167.)

1. Draft Report

The District contends the draft report is privileged because it is predecisional and deliberative. In *Lahr v. National Transportation Safety Board* (9th Cir. 2009) 569 F.3d 964, records were requested pertaining to the investigation of an airliner crash. The court found a draft report to be predecisional and deliberative because it exposed the thought processes, analysis, and preliminary conclusions of the agency's analysts.

In *Trustees of the California State University* (2004) PERB Decision No. 1591-H, a report on merit pay practices was prepared for the university by an outside consultant. PERB held deliberative process privilege did not prevent release of the consultant's report.

In the present case, the report was prepared by an outside organization based on a review of the District's special education policies, practices, and procedures. The District requested the audit to gain the perspective of outside experts on its special education program. The final report contains analysis and recommendations for improving the District's special education program, but the report was written by Council team members and contains the analysis and thought process of the Council team.

The same must be true of the draft report. Taylor requested a draft report to see what the recommendations were beginning to look like and assess the implications for District policy. The Council asked Taylor and Bryant to provide corrections and comments, and Bryant reviewed the data for accuracy. There is no evidence, however, that District staff participated in writing the draft report. Had the draft report been prepared solely by or jointly with District staff it may well have contained predecisional and deliberative analysis, and preliminary conclusions that could have exposed the District's thought process and decision-making, thereby discouraging candid discussion and creative debate. (*Times Mirror*, *supra*, 53 Cal.3d 1325, 1341.)

The draft report is a product of the Council, not District policymakers, and is therefore not covered by the predeliberative process privilege. There is no need to balance competing interests where the draft report is not found to be predecisional and deliberative under the deliberative process privilege.

2. District – Council Correspondence

SCTA requested correspondence between the District and the Council related to the special education audit. Taylor testified that the District provided data and policy documents requested by the Council. Before and after the Council team's November 2016 visit, the Council made its requests for data verbally and by email. After Taylor requested to see a draft report, the Council asked the District to provide corrections to names and titles, and sought comments on the draft. Bryant reviewed the draft to make sure the data included in the report was accurate.

In *Lahr v. National Transportation Safety Board*, *supra*, 569 F.3d 964, the court reviewed a second draft report that was also at issue. The court found that the draft report contained preliminary analysis and conclusions, and determined the analyst's evaluations to be deliberative. The court concluded, however, that the raw data included in the report was not deliberative information and ordered its release.

There is evidence that the District provided data and other policy documents which the Council reviewed as part of its analysis. There is no indication that these District communications, providing only data and policy documents, contain predecisional and deliberative thought process information. The email communications containing solely data and policy documents are therefore not covered by the privilege.

Substantive comments between the District and the Council, however, would likely reveal the District's deliberative thought process, including any discussion of the recommendations' impact on bargaining strategy and proposals. The courts have been clear that exposure of ideas, reflections, thoughts, and suggestions acquired in confidence infringe on the deliberative thought process, diminishing candid debate and harming the integrity of the

decision-making process. In *Labor and Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 30 (*Labor and Workforce Development Agency*), the court held that in the absence of confidentiality, the Agency's ability to have "candid discussions with stakeholders would be greatly diminished, and the quality of its decisionmaking would be reduced." Thus, these email communications are found to be predecisional and deliberative.

Release of these communications must balance the public interest in disclosure against the public interest in nondisclosure. (*Times Mirror*, *supra*, 53 Cal.3d 1325, 1344; *California First Amendment Coalition*, *supra*, 67 Cal.App.4th 159, 167.) In balancing these interests, the weight falls to nondisclosure. The final report was issued approximately one month after SCTA requested a copy of the draft. With access to the draft report, SCTA could evaluate any changes between the draft and final report. The advantage this provides negates the need to expose the District's thought process as it evaluated and commented on the draft report. Accordingly, communications between the District and the Council containing comments on the draft report are covered by the predeliberative process privilege.

3. Meeting Notes

There is no evidence of any notes taken during the focus group meetings. If the Council team members took notes, they are not writings of the District and are therefore outside the reach of SCTA. If the District took notes at the focus meetings they may expose the District's deliberative thought process for the reasons discussed above. Notes that simply reflect the comments made by teachers, staff, community members, and union representatives cannot be found to reflect District policymakers' deliberations. The release of any notes taken in meetings with District administrators, however, would discourage candid discussion of

policies and practices.[8] Protecting the predecisional deliberative process allows District administrators "to test ideas and debate policy and personalities uninhibited by the danger that his [or her] tentative but rejected thoughts will become subjects of public discussion." (*Labor and Workforce Development Agency, supra,* 19 Cal.App.5th 12, 27.)

In balancing the competing public interests, the administrator focus meeting is clearly a setting where ideas and suggestions would be explored by District policymakers. The release of notes summarizing those discussions would surely inhibit "creative debate and candid consideration of alternatives." (*California First Amendment Coalition, supra,* 67 Cal.App.4th 159, 170.) The Council's final report is the basis for the District's possible policy change considerations, not the notes of administrators' comments reflecting a free-flow of ideas. Thus, on balance, the public interest in nondisclosure clearly prevails.

Accordingly, if notes were taken during the focus group meetings, notes that simply reflect the comments made by District teachers, staff, community members, and union representatives must be released. Notes reflecting District administrators' comments, thoughts, suggestions, and ideas are covered by the deliberative process privilege.

II. Official Information Privilege

The District also contends that the draft report is legally protected as confidential under the official information privilege.

Evidence Code section 1040, subdivision (b), provides that a "public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information" if (1) the disclosure is forbidden by state or federal law, or (2) "[d]isclosure of the information is against the public interest because there is a necessity for

[8] Any notes reflecting comments made during the meeting held with the District's legal counsel are discussed *post.*

preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."

Under the official information privilege, a balancing test is applied to information acquired in confidence. In *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126 (*Marylander*), the court explained,

> If the public entity satisfies the threshold burden of showing that the information was acquired in confidence, the statute requires the court next to *weigh* the interests and to sustain the privilege only if "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."

(Citing Evid. Code § 1040, subd. (b)(2).)

Prior to completion of the Council's final report, Taylor requested to review a draft report to begin assessing any implications for District special education policies. She testified that she understood the draft was confidential because it was a working draft. Taylor shared it only with Bryant and District legal counsel, asking counsel to review the draft for policy and legal implications. Thus, the District has demonstrated that the draft report was "acquired in confidence."

After finding the information was acquired in confidence, the interests must be balanced "to determine whether the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice." (*Marylander, supra*, 81 Cal.App.4th 1119, 1129.)

Here, the final report was issued and made public approximately one month after SCTA requested the draft. The draft most certainly contains much of the same information reported in the final report. The report was intended to become public and its recommendations evaluated to determine whether District policies and practices should be revised. There was no

intent to "preserve the confidentiality" of the report information. Because the information was to become public and utilized to consider and debate District policies, the interests weigh in support of release of the draft report. Thus, the official information privilege does not apply to the draft report.

III. Attorney-Client Privilege and Attorney Work Product Doctrine

The District asserts the draft report is confidential under both the attorney-client privilege and attorney work product doctrine. The District contends that Taylor, authorized to seek legal services and advice on behalf of the District, requested that Council attorney Halbert, a national education legal specialist, provide the draft. Taylor understood the draft was confidential and gave it to the District's legal counsel to obtain advice on the legal implications arising from the draft.

1. Attorney-Client Privilege

The attorney-client privilege allows a client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code § 954.) "The fundamental purpose of the privilege 'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding legal matters.' " (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1032 (*City of Petaluma*), citing *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco Wholesale Corp.*).) The protection applies to legal advice regardless of whether litigation is contemplated. (*Community Learning Center Schools, Inc., supra*, PERB Order No. Ad-448, citing *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119-120 (*Wellpoint Health Networks, Inc.*).)

A party claiming the privilege must establish the existence of an attorney-client relationship, and that a communication is made in the course of the attorney-client relationship. (*City of Petaluma, supra*, 248 Cal.App.4th 1023, 1032.) "For purposes of the attorney-client privilege, 'client' is defined in relevant part as 'a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal *service or advice* from him in his professional capacity . . .' ". (*City of Petaluma, supra*, 248 Cal.App.4th 1023, 1032, citing Evid. Code § 951, original italics.) The Court explained,

> In assessing whether a communication is privileged, the initial focus of the inquiry is on the "dominant purpose *of the relationship*" between attorney and client and not on the purpose served by the individual communication.

(*City of Petaluma, supra*, 248 Cal.App.4th 1023, 1032, citing *Costco Wholesale Corp., supra*, 47 Cal.4th 725, 739-740; original italics.)

Simply utilizing an attorney does not establish the attorney-client privilege. "For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice." (*Costco Wholesale Corp., supra*, 47 Cal.4th 725, 735; *Montebello Rose Co. v. Agricultural Labor Relations Board* (1981) 119 Cal.App.3d 1 (*Montebello Rose*) [no privilege where attorney serves as labor negotiator].) The dominant purpose of the particular communication with the attorney must be to retain or secure legal service or advice. (*Wellpoint Health Networks, Inc., supra*, 59 Cal.App.4th 110, 122, citing *Montebello Rose Co., supra*, 119 Cal.App.3d 1, 32.)

It is undisputed that the District made a request to the Council to review its special education program, and that Council team members Halbert and Gamm are attorneys. The parties stipulated that Halbert and Gamm are not admitted to practice in California and did not provide legal representation to the District as part of the Council review. There is no evidence

the District specifically sought legal advice or representation from Council attorneys or even knew the Council team would include attorneys. The "Scope of Work" directing the parameters of the Council's review does not mention legal services, advice, or representation. The District did not request the Council to investigate for the purpose of assisting the District in developing legal advice or strategy. Rather, the District retained the Council to conduct an audit of its special education program to obtain an objective, third-party perspective from outside experts on its special education policies and practices.

The District has not established that the "dominant purpose" for which it requested a review by the Council was to obtain legal services or advice. (*City of Petaluma*, *supra*, 248 Cal.App.4th 1023, 1032; *Costco Wholesale Corp.*, *supra*, 47 Cal.4th 725, 735.) The District, therefore, has not established an attorney-client relationship with the Council, Halbert, or Gamm.

Taylor testified that she provided the draft to the District's legal counsel, asking counsel to review it for policy and legal implications. The draft report does not become privileged, however, merely by providing it to the District's counsel. "A client cannot protect unprivileged information from discovery by transmitting it to an attorney." (*Costco Wholesale Corp.*, *supra*, 47 Cal.4th 725, 735.) Thus, the attorney-client privilege does not protect the draft report.

2. Attorney Work Product Doctrine

The attorney work product doctrine protects from disclosure a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc. § 2018.030.) The doctrine serves the policy goals of providing attorneys with the privacy necessary to prepare cases for trial, allowing for the investigation of favorable and unfavorable

aspects of those cases, and prevents opposing counsel from taking unfair advantage of their adversary's efforts. (Code Civ. Proc. § 2018.020; *Santa Monica Community College District, supra*, PERB Decision No. 2303, adopted proposed decision, p. 8; *City of Petaluma, supra*, 248 Cal.App.4th 1023, 1033.) The attorney work product doctrine arises from the attorney-client privilege and "applies to documents related to legal work performed for a client." (*Watt Industries, Inc. v. Superior Court* (1981) 115 Cal.App.3d 802, 805; *Wellpoint Health Networks, Inc., supra*, 59 Cal.App.4th 110, 122; *City of Petaluma, supra*, 248 Cal.App.4th 1023, 1033.)

As previously determined, because there was no attorney-client relationship between the Council, Halbert, or Gamm and the District, the draft report is not protected by the attorney work product doctrine.

Also at issue are possible District notes taken during the focus group meeting attended by the District's counsel. First, an established attorney-client relationship exists between the District, In-House Counsel Bozio, and the District's outside counsel that preceded the request for the Council to conduct the audit. Bozio and the District's outside counsel attended the meeting with Bryant, the District client representative. Bozio testified that the District's legal compliance with special education requirements was an issue to be considered in the audit. The attorney work product doctrine was enacted for just this purpose, to protect from discovery any writings reflecting impressions and conclusions, and allowing an attorney to investigate and evaluate favorable and unfavorable facts. Here, the District's legal compliance with special education provisions was evaluated in part through discussions with District counsel. Accordingly, any notes from the legal compliance focus group meeting are privileged as attorney work product.

## REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), provides:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It is found that the District failed to meet and negotiate in good faith in violation of EERA section 3543.5, subdivision (c), when it failed to provide necessary and relevant information requested by SCTA. By the same conduct, the District interfered with the rights of employees to be represented by SCTA in violation of EERA section 3543.5, subdivision (a), and denied SCTA the right to represent bargaining unit employees in their employment relations with the District in violation of EERA section 3543.5, subdivision (b). It is appropriate to order the District to cease and desist from such conduct.

In cases involving a failure to provide necessary and relevant information, an employer is typically ordered to provide the requested information upon the charging party's request. (*Trustees of the California State University*, *supra*, PERB Decision No. 613-H, adopted proposed decision, p. 22.) The District is ordered to provide, upon SCTA's request, the Council's draft report, correspondence between the District and the Council that contains solely data and policy documents,[9] and any notes taken by District representatives that reflect only the comments made in the focus group meetings by teachers, staff, community members, and union representatives. All other requested information is excluded from production.

[9] If any of the data or policy documents contain confidential information, i.e., student names, social security numbers, etc., the parties must negotiate an appropriate redaction of the confidential information. (*Sacramento City Unified School District*, *supra*, PERB Decision No. 2597, p. 12.)

It is also appropriate to direct the District to post a notice incorporating the terms of this order at all locations where notices to bargaining unit employees are customarily posted. In addition to the physical posting requirement, the notice shall be posted by electronic means customarily used by the District to regularly communicate with bargaining unit employees. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) Posting such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is required to cease and desist from such activity, and will comply with the order. It effectuates the purposes of EERA that employees are informed of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by failing to provide requested information that is necessary and relevant to the Sacramento City Teachers Association's (SCTA) right to represent bargaining unit employees. The District is ordered to provide, upon SCTA's request, the draft report prepared by the Council of the Great City Schools (Council), correspondence between the District and the Council that contains solely data and policy documents, and any notes taken by District representatives that reflect only the comments made in the focus group meetings by teachers, staff, community members, and union representatives.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to provide necessary and relevant information upon request of SCTA.

2. Interfering with the right of bargaining unit employees to be represented by their employee organization.

3. Denying SCTA the right to represent bargaining unit employees in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Upon request of SCTA, provide a copy of the Council's draft report, correspondence between the District and the Council that contains solely data and policy documents, and any notes taken by District representatives that reflect only the comments made in focus group meetings by teachers, staff, community members, and union representatives.

2. Within 10 workdays of the service of a final decision in this matter, post at all District locations where notices to employees in the certificated bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the District to regularly communicate with employees in the bargaining unit. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.

Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SCTA.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-9425
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a), and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet, or received by

electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091, and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

**NOTICE TO EMPLOYEES**
**POSTED BY ORDER OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**
**An Agency of the State of California**

After a hearing in Unfair Practice Case No. SA-CE-2882-E, *Sacramento City Teachers Association v. Sacramento City Unified School District*, in which all parties had the right to participate, it has been found that the Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by failing to provide certain information requested by the Sacramento City Teachers Association (SCTA) that is necessary and relevant to its representation of bargaining unit employees.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to provide necessary and relevant information upon request of SCTA.

2. Interfering with the right of bargaining unit employees to be represented by their employee organization.

3. Denying SCTA the right to represent bargaining unit employees in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

Upon request of SCTA, provide a copy of the draft report prepared by the Council of the Great City Schools (Council); correspondence between the District and the Council that contains solely data and policy documents; and any notes taken by District representatives that reflect only the comments made in the focus group meetings by teachers, staff, community members, and union representatives.

Dated: _____ Sacramento City Unified School District

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.