



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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STATEMENT OF DECISION

COMMISSION ON JUDICIAL PERFORMANCE VS. ELAINE M. HOWLE ET AL

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION**

COMMISSION ON JUDICIAL
PERFORMANCE,

Petitioner/Plaintiff,

v.

ELAINE M. HOWLE, in her official capacity as
CALIFORNIA STATE AUDITOR, and the
CALIFORNIA STATE AUDITOR'S OFFICE,

Respondents/Defendants.

Case No. CPF-16-515308

**STATEMENT OF DECISION
GRANTING PETITION FOR WRIT OF
MANDATE OR, IN THE
ALTERNATIVE, COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

1 This matter came before the Court for trial on August 17, 2017 on Petitioner the
2 Commission on Judicial Performance’s Petition for Writ of Prohibitory Mandate, or in the
3 Alternative, Complaint for Declarative and Injunctive Relief. After the August 17, 2017 hearing,
4 this Court issued an Order Requesting Supplemental Briefing. This Court then held a second
5 hearing on November 3, 2017. The Court requested that both parties submit proposed statements
6 of decision by November 27, 2017. The matter was submitted on that date.

7 Being fully advised in the matter, and for the reasons set forth below, the Court grants the
8 Petition for Writ of Prohibitory Mandate, or in the Alternative, Complaint for Declarative and
9 Injunctive Relief in its entirety.¹

10 **FACTUAL BACKGROUND**

11 This matter was filed by Petitioner Commission on Judicial Performance (“Petitioner” or
12 “CJP”) against Respondents California State Auditor Elaine M. Howle and the California State
13 Auditor’s Office (collectively, “Respondents” or “Auditor”). The operative pleadings in this
14 matter are the Petition filed October 20, 2016 and Respondents’ Answer filed November 21,
15 2016. Pursuant to a schedule stipulated to by the parties, the parties filed pretrial briefs in June
16 and July 2017, and supplemental briefs as directed by the Court in September 2017.

17 **A. THE PARTIES**

18 **1. The Commission on Judicial Performance**

19 The CJP was created in 1960 by a legislatively referred constitutional amendment.
20 (California Proposition 10, Commission on Judicial Qualifications (Nov. 8, 1960).) The CJP was
21 established within the state’s judicial branch, and was the nation’s first permanent state judicial
22 disciplinary commission. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630,
23 637 [34 Cal.Rptr.2d 641, 882 P.2d 358]; Cal. Const., art. VI, § 8.) The CJP is vested with the
24 authority to retire, remove, censure or admonish a judge, and to disqualify a judge during the

25
26 ¹ The Court also grants the CJP’s Request for Judicial Notice, filed September 8, 2017, and
27 the Auditor’s Request for Judicial Notice, filed September 22, 2017. The Court previously
28 granted Amicus Judicial Watch, Inc.’s Application for Leave to File Brief in Support of
Respondents/Defendants Elaine M. Howle and the California State Auditor’s Office.

1 pendency of formal proceedings, subject to the review of the Supreme Court. (Cal. Const., art.
2 VI, § 18, subds. (b), (d).)

3 The CJP is constitutionally empowered to make rules for the investigation of judges and
4 for formal proceedings against judges. (Cal. Const. art. VI, § 18, subd. (i).) The CJP is authorized
5 by the California Constitution to “provide for the confidentiality of complaints to and
6 investigations by the commission,” provided only that, when the CJP commences formal
7 proceedings, the notice of charges, the answer, and all subsequent papers and proceedings are
8 open to the public for all formal proceedings. (Cal. Const. Art. VI, §§ 18, subds. (i)(1), (j).)

9 Pursuant to the authority granted to the CJP by the California Constitution, the CJP
10 adopted Rule 102, which provides, in relevant part, that “[e]xcept as provided in this rule, all
11 papers filed with and proceedings before the commission shall be confidential.” (Rules of Com.
12 on Jud. Performance, rule 102, subd. (a).) Rule 102 delineates specific and limited exceptions
13 where disclosure of confidential records to persons outside the CJP is permissible. (*Id.* at subds.
14 (b)-(q).)

15 **2. The California State Auditor**

16 The position and office of Auditor was created by legislation. (Gov. Code, § 8543, subd.
17 (a); Gov. Code, § 8543.2.) The duties of the Auditor include annual examination of financial
18 statements prepared by the state executive branch and statutorily mandated performance audits.
19 (Gov. Code, § 8543.1.) At the request of the Joint Legislative Audit Committee of the California
20 Legislature (“JLAC”), the Auditor is also authorized to conduct audits of state and local
21 governmental agencies and any other publicly created entities. (Gov. Code, § 8546.1, subd. (b).)

22 Government Code section 8545.2 provides that the Auditor has access to, and the right to
23 reproduce, any and all records of a state agency including confidential records. (Gov. Code, §
24 8545.2, subd. (a).) This statutory right of access purports to apply “[n]otwithstanding any other
25 provision of law.” (*Ibid.*)

26 **B. THE AUDIT REQUEST AT ISSUE**

27 On August 10, 2016, the JLAC authorized an audit of the CJP. (Declaration of Victoria
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1 Henley in Support of Petitioner’s Opening Brief, filed June 29, 2017 “Henley Decl.” Exhibit A.)
2 The goal of the audit is to “examine the policies and practices for handling and resolving
3 complaints against judges by the Commission on Judicial Performance (commission).” (*Ibid.*)
4 The analysis of the audit prepared by the Auditor lists 18 specific and one catch-all area of
5 inquiry. (*Ibid.*)

6 After the JLAC’s authorization, the CJP and the Auditor met to discuss the requested
7 audit. (Henley Decl. ¶ 3.) The CJP sought to cooperate with the Auditor and make all records
8 available except those records designated confidential pursuant to CJP Rule 102. The CJP’s
9 position is that the CJP may not give the Auditor access to the CJP’s confidential files, pursuant
10 to Article VI section 18 subdivision (i) of the California Constitution and CJP Rule 102. The
11 Auditor counters that it has statutory authority to view all records pursuant to Government Code
12 section 8545.2.

13 The CJP also objected that certain topics included in the audit infringe upon the
14 discretionary exercise of the CJP’s core constitutional duties, violating the separation of powers
15 doctrine. (Henley Decl. ¶ 3.) Specifically, the CJP objected to Topics 2, 5, and 12 of the audit.
16 (Henley Decl. ¶ 4.) Topic 2, seeks to determine whether the CJP is “taking an appropriate and
17 reasonable course of action for the complaints it reviews and for determining the disposition of
18 each complaint.” (Henley Decl. Ex. A.) Topic 5 seeks to “[a]ssess the commission’s process for
19 evaluating the credibility of evidence, witnesses, and statements.” (*Ibid.*) Topic 12 states,
20 “[d]uring the most recent five year period . . . evaluate the outcomes of a selection of cases and
21 the discipline imposed by the commission, including cases that resulted in private discipline.”
22 (*Ibid.*) The CJP contends that Topics 2, 5, and 12 violate the separation of powers doctrine by
23 seeking to evaluate the decision-making of the CJP in specific cases and the exercise of its core
24 function. The Auditor contends those topics do not infringe on the CJP’s discretionary functions.

25 The CJP has consistently agreed to submit to an audit on the other topics to the extent
26 they do not require review of material made confidential by CJP Rule 102, including evaluation
27 of the CJP’s finances, workload statistics, and processes. (Henley Decl. ¶ 4.) However, the
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1 Auditor declined to continue with the audit on those undisputed topics. (Henley Decl. ¶ 5.)

2 **C. THE PETITION FOR WRIT OF MANDATE**

3 On October 20, 2016, the CJP filed the instant Petition. The CJP requests that this Court
4 grant its petition for writ of mandate, and enter declaratory and injunctive relief: (1) compelling
5 the Auditor to refrain from seeking to access the CJP’s confidential records; (2) declaring that
6 the Auditor is prohibited from seeking the CJP’s records made confidential pursuant to the
7 California Constitution and CJP Rule 102; (3) compelling the Auditor to refrain from auditing
8 the exercise of the CJP’s core functions; (4) declaring that the Auditor is prohibited from
9 auditing the exercise of the CJP’s core functions; and (5) declaring that the Auditor is prohibited
10 from charging the CJP for the cost of the audit. The Auditor opposes the Petition.

11 **MANDAMUS AND DECLARATORY RELIEF**

12 A traditional writ of mandate lies “to compel the performance of an act which the law
13 specially enjoins, as a duty resulting from an office, trust, or station” (Code Civ. Proc.,
14 § 1085, subd. (a).) “Two basic requirements are essential to the issuance of the writ: (1) A clear,
15 present and usually ministerial duty upon the part of the respondent; and (2) a clear present and
16 beneficial right in the petitioner to the performance of that duty.” (*Steelgard Inc. v. Jannsen*
17 (1985) 171 Cal.App.3d 79, 83 [217 Cal.Rptr. 152] [internal citations omitted].) An official’s
18 affirmative obligation to perform encompasses a corollary obligation not to perform the duty in
19 violation of the law. Thus, the unlawful exercise of a ministerial duty can be restrained and
20 courts label the writ restraining such unlawful performance “prohibitory mandate.” (*Planned*
21 *Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-263 [226 Cal.Rptr. 361].)
22 Prohibitory mandamus may be used either where an “official’s conduct is in violation of a
23 statutory ministerial duty,” or “where the performance of a statutory ministerial duty would
24 violate the Constitution.” (*Id.* at p. 263.)

25 As the entity whose records are subject to the disputed audit, as well as the entity tasked
26 by the Constitution with providing for the confidentiality of the records at issue, the CJP has a
27 “special interest to be served or some particular right to be preserved or protected over and above
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1 the interest held in common with the public at large.” (*Associated Builders & Contractors, Inc. v.*
2 *San Francisco Airports Comm’n* (1999) 21 Cal.4th 352, 361-362 [87 Cal.Rptr.2d 654, 981 P.2d
3 499] [citation omitted].) The CJP thus has sufficient beneficial interest in prohibiting
4 Respondents from accessing the CJP’s confidential records and in prohibiting Respondents from
5 interfering with the CJP’s core functions. (*See Comm’n on Judicial Performance v. Superior*
6 *Court* (2007) 156 Cal.App.4th 617 [67 Cal.Rptr.3d 434] [granting the CJP writ of mandate relief
7 from an order directing the CJP to produce information that was confidential pursuant to CJP
8 Rule 102].)

9 The Auditor’s right, or lack thereof, to view the disputed confidential documents, as well
10 as the right to conduct an audit on the three disputed topics, are also proper subjects of an action
11 for declaratory relief. (*See Glendale City Employees’ Assn., Inc. v. City of Glendale* (1975) 15
12 Cal.3d 328 [124 Cal.Rptr.513, 540 P.2d 609].) Further, the interpretation of statutes is a proper
13 matter for declaratory relief. (*Ibid.*) “[T]hat an action in declaratory relief lies . . . does not
14 prevent the use of mandate.” (*Id.* at p. 343 fn. 20.) The CJP has clearly established a controversy
15 sufficient to justify declaratory relief. (*Walker v. Los Angeles County*, 55 Cal.2d 626, 636 [361
16 P.2d 247, 12 Cal.Rptr. 671] [“Declaratory relief must be granted when the facts justifying that
17 course are sufficiently alleged . . .”].)

18 No party has questioned the Court’s jurisdiction or authority to issue a writ of mandate or
19 declaratory relief concerning the matters presented in this action (while disputing the merits of
20 those matters).

21 **ANALYSIS**

22 **A. CJP RULE 102 PROHIBITS THE AUDITOR FROM REVIEWING THE CJP’S**
23 **CONFIDENTIAL RECORDS AND CANNOT BE OVERRIDDEN BY THE**
24 **LEGISLATURE**

25 The primary dispute presented is whether the Auditor’s authority under Government
26 Code section 8545.2 overrides the confidentiality provided by Article VI section 18 subdivision
27 (i) of the California Constitution and CJP Rule 102. The Court concludes that it does not. First,
28 CJP Rule 102 prohibits release of these records outside of the CJP and provides no exception for

1 release to the Auditor. Second, the legislative history of Article VI section 18 reflects the voters'
2 intent to allow the CJP to decide which of its records that do not constitute formal proceedings
3 are absolutely confidential. Third, due to the clear conflict between the Auditor statute and the
4 constitutional provision governing the CJP, Government Code section 8545.2 cannot
5 constitutionally override the CJP's exercise of its constitutional authority in CJP Rule 102.

6 **1. CJP Rule 102 provides no exception for the Auditor to access the**
7 **CJP's confidential files**

8 Article VI section 18, subdivision (i)(1) of the California Constitution provides that,
9 "[t]he commission shall make rules for the investigation of judges. The commission may provide
10 for the confidentiality of complaints to and investigations by the commission." (Cal. Const., art.
11 VI, § 18, subd. (i)(1).) The CJP exercised this constitutional authority when it enacted Rule 102.
12 CJP Rule 102 provides for absolute confidentiality subject to enumerated exceptions: "Except as
13 provided in this rule, all papers filed with and proceedings before the commission shall be
14 confidential." (Rules of Com. on Jud. Performance, rule 102, subds. (a), (b)-(q).) "The
15 Commission's rule 102 provides that, except as stated in that rule, all nonpublic papers and
16 proceedings are absolutely confidential." (*Comm'n on Judicial Performance v. Superior Court*,
17 *supra*, 156 Cal.App.4th at p. 722 [hereinafter "*Comm'n on Judicial Performance*"].)

18 CJP Rule 102 contains no exception for the Auditor. Based on the plain language of Rule
19 102 and the holding of *Comm'n on Judicial Performance*, the Court finds that records made
20 confidential pursuant to CJP Rule 102 cannot be viewed or copied by, or provided to, anyone
21 outside of the CJP, except as explicitly stated in an exception to that Rule. Because there is no
22 exception to CJP Rule 102 for the Auditor, the Auditor is not permitted to access the CJP's
23 confidential documents.

24 The Court's reading of CJP Rule 102 is supported by established rules of statutory
25 construction. "The proper rule of statutory construction is that the statement of limited
26 exceptions excludes others, and therefore the judiciary has no power to add additional
27 exceptions; the enumeration of specific exceptions precludes implying others." (*S.V. v. Superior*
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1 Court (2017) 13 Cal.App.5th 1174, 1182 [221 Cal.Rptr.3d 298] [internal citations and quotations
2 omitted].) Given the clear enumeration of exceptions to Rule 102, no additional exceptions can
3 be implied. Further, the CJP’s interpretation of its own constitutional authority, as set forth in
4 Rule 102, “is accorded considerable weight, and courts generally will not depart from such
5 construction unless it is clearly erroneous or unauthorized.” (*Adams v. Commission on Judicial*
6 *Performance, supra*, 8 Cal.4th at pp. 657-658 [34 Cal.Rptr.2d 641, 882 P.2d 358] [internal
7 citation omitted].)

8 California courts have rejected other attempts to breach the confidentiality of CJP records
9 and proceedings. In *Mosk v. Superior Court* (1979) 25 Cal.3d 474 [601 P.2d 1030], the Supreme
10 Court held that a Rule of Court allowing investigative hearings to be open to the public was
11 unconstitutional because it conflicted with the then-applicable constitutional provision for
12 confidentiality of investigations. (*Id.* at p. 499.) In *Comm’n on Judicial Performance, supra*, 156
13 Cal.App.4th 617, the Court held that the discovery statutes and *Pitchess* procedure cannot be
14 used to obtain confidential CJP records, even for an *in camera* review, because CJP Rule 102 did
15 not provide any such exception. (*Id.* at pp. 622-25.) The court noted that “the superior court
16 judge presiding over the proceedings in which the Commission’s confidential records are
17 requested has no more right to see the Commission’s records than does any other member of the
18 public.” (*Id.* at p. 625.) The conclusion in *Comm’n on Judicial Performance* applies with equal
19 force to the Auditor’s access to similar records.

20 The Auditor argues that the designation of documents as “confidential” means only that
21 those documents are not to be “published” to the public at-large. The Auditor insists that it will
22 not release any confidential records to the public. The Auditor also contends that the CJP’s
23 confidential files should not be kept from government officials seeking to fulfill their statutory
24 duties. No apposite case law is cited for this proposed definition of “confidential,” and it is
25 inconsistent with the Court of Appeal’s analysis in *Comm’n on Judicial Performance, supra*, 156
26 Cal.App.4th 617. The Auditor also fails to reconcile its argument with the detailed exceptions set
27 forth in CJP Rule 102, many of which would be unnecessary if the Auditor were correct (as
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1 would article VI section 18.5 of the California Constitution). “An interpretation that renders
2 related provisions nugatory must be avoided.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727,
3 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

4 CJP Rule 102 is an exercise of the CJP’s constitutional authority under article VI section
5 18, subdivision (i)(1). The rule contains no exception for the Auditor. Under a clear reading of
6 CJP Rule 102 and case law interpreting it, providing the CJP’s confidential documents to the
7 Auditor would violate CJP Rule 102.

8 **2. Relevant legislative history demonstrates that the confidentiality of**
9 **nonpublic CJP records is absolute**

10 The Court’s holding is supported by the legislative history underlying the CJP’s
11 confidential records and proceedings. This history confirms that confidentiality of CJP records is
12 absolute except where the voters or the CJP have made explicit exceptions.

13 The CJP was created in 1960 by Proposition 10, which established the “Commission on
14 Judicial Qualifications,” a nine-member body comprised of five judges, two lawyers and two
15 citizens to investigate allegations of judicial misconduct. (Former art. VI, §§ 1, subds. (a)-(b), 10,
16 subd. (b), added by initiative, Gen. Elec. (Nov. 8, 1960), commonly known as Proposition 10.)
17 Proposition 10 specified that commission proceedings would be confidential until a
18 recommendation was made by the commission to the Supreme Court for removal of the judge
19 from office. (*Id.*; *Adams v. Commission on Judicial Performance*, *supra*, 8 Cal.4th at pp. 637-
20 38.) In 1966, Proposition 1a modified article VI section 18 to authorize the Judicial Council to
21 “make rules implementing this section and providing for confidentiality of proceedings.”
22 (Former art. VI, § 18, subd. (e), added by initiative, Gen. Elec. (Nov. 8, 1966), commonly known
23 as Prop. 1a.)

24 In 1974, the Supreme Court rejected a judge’s assertion that he had a right to an open
25 hearing, recognizing that “[t]his State has adopted a constitutional policy that proceedings before
26 the Commission shall be confidential.” (*McCartney v. Commission on Judicial Qualifications*
27 (1974) 12 Cal.3d 512, 520 [116 Cal.Rptr. 260, 526 P.2d 268].)

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1 In 1976, the voters approved Proposition 7, which renamed the Commission on Judicial
2 Qualifications as the Commission on Judicial Performance. This Constitutional amendment also
3 permitted the CJP to privately admonish judges of any improper conduct or failure to perform
4 their duties, subject to review of the Supreme Court. (Former art. VI, § 18, subd. (c), added by
5 initiative, Gen. Elec. (Nov. 2, 1976), commonly known as Prop. 7.)

6 In 1988, voters approved Proposition 92, which created several of the exceptions to
7 confidentiality that are now in CJP Rule 102. (Former art. VI, § 18, subds. (f) & (g), added by
8 initiative, Gen. Elec. (Nov. 8, 1988), commonly known as Prop. 92.) The arguments in favor of
9 Proposition 92 informed voters that it would “open disciplinary proceedings against judges in a
10 limited but reasonable way . . . It simply allows an accused judge or the commission to open
11 proceedings subsequent to formal charges in appropriate cases.” (CJP’s Request for Judicial
12 Notice filed September 8, 2017, “CJP RJN” Ex. 1 at p. 58.)

13 In 1994, the voters again amended the Constitution with Proposition 190, giving the CJP
14 the power to decide whether, and the extent to which, complaints and investigations are
15 confidential. Proposition 190 mandated open hearings in all cases involving formal charges (Cal.
16 Const., art. VI, § 18, subd. (j).) The amendment also conferred the authority for censure and
17 removal determinations upon the CJP (rather than the Supreme Court), in addition to private or
18 public admonishment of judges. (Cal. Const., art. VI, § 18, subd. (d).) The amendment also
19 transferred the power to promulgate rules governing the CJP from the Judicial Council to the
20 CJP and stated the CJP “shall make rules for the investigation of judges” and “may provide for
21 the confidentiality of complaints to and investigations by the commission.” (Cal. Const., art. VI,
22 § 18, subd. (i)(1).)

23 The legislative history of Proposition 190 makes it clear that the voters changed the
24 confidentiality rules to make *only* proceedings on formal charges public. That is where the voters
25 drew the line. They maintained absolute confidentiality for other proceedings and documents,
26 subject to the CJP’s rulemaking discretion.

1 Proposition 190 also adopted article VI section 18.5, which was based on language drawn
2 from Senate Constitutional Amendment 37. Section 18.5 expressly authorizes the CJP to provide
3 confidential records to judicial appointing authorities. Its history shows the Legislature’s
4 understanding that the confidentiality provided by CJP rules is absolute and would prohibit such
5 disclosure absent a constitutional amendment.

6 The relevant legislative bill analysis concerning what became section 18.5 reflects the
7 Legislature’s understanding that the confidentiality of CJP records is absolute. “Although public
8 disciplinary measures can be taken, most disciplinary actions are of a secret nature. These secret
9 disciplinary actions cannot be disclosed to anyone under the confidentiality rules established by
10 the Judicial Council.” (CJP RJN Ex. 3) “Existing law provides for a level of confidentiality
11 which disallows a judge’s disciplinary record from being shared with appointing authorities who
12 are considering the judge for another position.” (CJP RJN Ex. 4.) The Legislature concluded that
13 the Governor, the President of the United States, and the Commission on Judicial Appointments
14 needed to have information on confidential CJP proceedings in order to make wise appointment
15 decisions about those judges. (CJP RJN Ex. 5 [“The author suggests that the need for this
16 legislation is self-evident. If Commission discipline activity is predominately private, appointing
17 authorities must have access to such information before momentous and uninformed decisions
18 are made.”].) The Legislature thus understood that even the Governor or President cannot see
19 confidential CJP records when deciding to elevate a judge without express authorization in the
20 Constitution or CJP rule. This conclusion also applies to the Auditor.

21 The legislative history behind Article VI section 18 is consistent with the CJP’s position
22 that its confidential records and proceedings are absolutely confidential, subject only to explicit
23 exceptions in the California Constitution or CJP Rule 102. This Court thus concludes that CJP
24 Rule 102 is constitutionally authorized and prohibits release of the CJP’s confidential records to
25 the Auditor.

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1 **3. Government Code section 8545.2 is unconstitutional as applied to the**
2 **CJP’s confidential records and proceedings**

3 Because CJP Rule 102 prohibits providing the CJP’s confidential files to the Auditor, the
4 Court must analyze whether Government Code section 8545.2 overrides CJP Rule 102. The
5 Court concludes that the Auditor’s statutory right to review confidential agency records under
6 section 8545.2 is unconstitutional as applied to the CJP’s confidential records because it conflicts
7 with CJP Rule 102.

8 The Court’s ruling is based on the fundamental hierarchy between the Constitution and
9 state statutes. “The California Constitution is ‘the supreme law of our state’ ..., subject only to
10 the supremacy of the United States Constitution.” (*California Logistics, Inc. v. State of*
11 *California* (2008) 161 Cal.App.4th 242, 250 [73 Cal.Rptr.3d 825] [citation omitted].) “Wherever
12 statutes conflict with constitutional provisions, the latter must prevail.” (*Delaney v. Superior*
13 *Court* (1990) 50 Cal.3d 785, 800, fn. 11 [268 Cal.Rptr. 753, 789 P.2d 934] [quoting *People v.*
14 *Navarro* (1972) 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481]]; *Citizens Assn. of Sunset*
15 *Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1189
16 [147 Cal.Rptr.3d 696] [“Constitutions trump conflicting statutes.”].)

17 It is a “well-known principle of constitutional construction” that “[t]hose matters which
18 the constitution specifically confides to a specified body or agency the legislature cannot directly
19 or indirectly take from [its] control.” (*State Board of Education v. Levit* (1959) 52 Cal.2d 441,
20 461 [343 P.2d 8] [internal marks and citations omitted].) “Powers, obligations, and rights
21 bestowed or declared by the Constitution may not be amended, modified, or derogated by statute,
22 whether that statute is adopted by the Legislature or the initiative method.” (*Fair Political*
23 *Practices Com. v. State Personnel Bd.* (1978) 77 Cal.App.3d 52, 56 [143 Cal.Rptr. 393],
24 overruled on other grounds in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 192
25 [172 Cal.Rptr. 487]; *People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407, 412-413 [62
26 Cal.Rptr.2d 721], *as modified* (May 9, 1997) [“[A]ny legislative regulation must not
27 ‘substantially impair’ an express provision of the California Constitution.”].)

1 Here, Article VI section 18, subdivision (i)(1) of the California Constitution expressly
2 bestows on the CJP the power to determine the rules for confidentiality of the CJP's non-public
3 records. The CJP did so, enacting Rule 102, which renders all such records confidential and
4 contains no exception for the State Auditor, though other exceptions are provided. (Rules of
5 Com. on Jud. Performance, rule 102, subds. (b)-(q).) Government Code section 8545.2 cannot
6 override the constitutional grant of power in Article VI section 18 or its exercise in Rule 102.

7 The Auditor argues that the Legislature has the power to "address" the confidentiality of
8 the CJP's records because article VI section 18 subdivision (i) does not provide the CJP with
9 "sole" or "exclusive" authority to make rules for confidentiality. This argument ignores the plain
10 fact that Government Code section 8545.2 and CJP Rule 102 directly conflict and one must
11 control over the other. The relevant Constitutional analysis does not turn on whether the
12 Constitution says "sole," but on whether the legislation directly or indirectly modifies or
13 derogates a power the constitution confers specifically in another body. (*State Board of*
14 *Education v. Levit, supra*, 52 Cal.2d at p. 461; *Fair Political Practices Com. v. State Personnel*
15 *Bd, supra*, 77 Cal.App.3d at p. 56.) Where, as here, there is a clear conflict, the Legislative
16 enactment must give way.

17 The Auditor also argued that the Legislature was the entity that created the CJP as well as
18 its powers concerning confidentiality. That is not correct. Although the various Propositions
19 amending the Constitution discussed above were referred to the voters by the Legislature, it is
20 the electorate, not the Legislature, that has the power to change the state Constitution. (Cal.
21 Const. art. XVIII, §§ 1, 4.)

22 The CJP's constitutional right to control the confidentiality of its documents is consistent
23 with the law in other states. As the United States Supreme Court noted in *Landmark*
24 *Communications, Inc. v. Virginia* (1978) 435 U.S. 829, 834-835 [98 S.Ct. 1535, 56 L.Ed.2d 1],
25 as of 1987, the majority of states, the District of Columbia, and Puerto Rico, have established by
26 constitution, statute, or court rule, some type of judicial inquiry and disciplinary procedures, and
27 all of these jurisdictions, except Puerto Rico, provided for the confidentiality of judicial
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1 disciplinary proceedings. Currently, all 50 states have disciplinary procedures with varying
2 degrees of confidentiality. (CYNTHIA GRAY, *How Judicial Conduct Commissions Work*, 28 JUST.
3 SYS. J. 405, 405 (2007)).

4 Courts in other states have also held that the constitutional or statutory authority of
5 similar entities to the CJP to make their records confidential preserves the agencies' independent
6 function and cannot be overridden by other branches of government. (See *Garner v. Cherberg*
7 (1988) 111 Wash.2d 811, 812-814 [765 P.2d 1284] [cited with approval in *Comm'n on Judicial*
8 *Performance, supra*, 156 Cal.App.4th at p. 625] [holding that the legislative committee could not
9 use a subpoena to force disclosure of records of Commission on Judicial Conduct that would
10 cause violation of Commission rules of confidentiality]; *Forbes v. Earle* (Fla. 1974) 298 So.2d 1,
11 2-5; *Stern v. Morgenthau* (1984) 62 N.Y.2d 331, 333-336 [476 N.Y.S.2d 810, 465 N.E.2d 349].)

12 Finally, the Auditor presents a series of policy arguments as to why the Auditor "should"
13 be able to access the records at issue or "needs" to access those records. These arguments,
14 regardless of their merit or popularity, have no bearing on the *legal* questions presented. As the
15 Court of Appeal noted in *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316
16 [226 Cal.Rptr. 640], "[i]t is well to be clear at the outset what this case is and is not about . . .
17 [T]he issue before this court is one of law, not policy." (*Id.* at p. 322.) This Court's holding is
18 based on which party's (the CJP or the Auditor) position "is constitutional, not whether it is
19 necessary or wise." (*Ibid.*)

20 Ultimately, this action is about a clear conflict between the CJP's constitutional authority
21 under Article VI section 18, subdivision (i) to make its complaints and investigations
22 confidential and the Auditor's general statutory right of access to confidential files under
23 Government Code section 8545.2. The Court finds that Government Code section 8545.2 cannot
24 constitutionally override CJP Rule 102, and thus that the Auditor has no legal right to access the
25 CJP's confidential records.

1 **B. THREE OF THE TOPICS REQUESTED IN THE AUDIT ALSO VIOLATE THE**
2 **SEPARATION OF POWERS DOCTRINE**

3 As an additional ground for granting its petition, the CJP argues that three of the topics in
4 the Auditor’s requested audit, Topics 2, 5, and 12, violate the separation of powers doctrine by
5 infringing on the CJP’s core function. The Court notes that the type of second-guessing of the
6 CJP’s discretionary decisions required by these topics is likely not possible without reviewing
7 confidential records that the Auditor has no right to access. The Court will, however, analyze the
8 separation of powers issue presented as an alternative basis for its decision. The Court concludes
9 that Topics 2, 5, and 12 would violate the separation of powers doctrine and grants the CJP’s
10 petition on this issue.²

11 The California Constitution divides power among three branches of state government: the
12 Legislative branch, the Executive branch, and the Judicial branch. (*Perez v. Richard Roe I*
13 (2006) 146 Cal.App.4th 171, 176 [52 Cal.Rptr.3d 762], *as modified* (Jan. 26, 2007).) Although
14 there is a certain overlap and interdependence among the three branches, each is constitutionally
15 vested with “core” or “essential” functions that the others may not perform. (*Ibid.*) Protection of
16 those core functions is guarded by the separation of powers doctrine and is embodied in a
17 constitutional provision, which states that one branch of state government may not exercise the
18 powers belonging to another branch. (*Id.* at pp. 176-177; Cal. Const., art. III, § 3.) This does not
19 mean that the activities of one branch are entirely immune from regulation or oversight by
20 another. (*People v. Bunn* (2002) 27 Cal.4th 1, 16 [115 Cal.Rptr.2d 192, 37 P.3d 380].) “As long
21 as such enactments do not ‘defeat or materially impair’ the constitutional functions of the courts,
22 a ‘reasonable’ degree of regulation is allowed.” (*Ibid.*) “Nevertheless, the separation of powers
23 doctrine prohibits the Legislature ‘from arrogating to itself core functions of the executive or
24 judicial branch.’” (*Ibid.* [citation omitted]; see also *People v. Superior Court (Mudge)*, *supra*, 54

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27 ² For the same reasons, the Court also grants Petitioner’s Fourth Cause of Action,
28 requesting a declaratory judgment that the Auditor is prohibited from auditing the exercise of the
CJP’s core functions by re-evaluating or second-guessing decisions made in specific instances.

1 Cal.App.4th at pp. 412-413 [“[A]ny legislative regulation must not ‘substantially impair’ an
2 express provision of the California Constitution.”.] The Legislature thus may not use its powers
3 to “defeat or materially impair” the exercise of its fellow branches’ constitutional functions, nor
4 “intrude upon a core zone” of another branch’s authority. (*Howard Jarvis Taxpayers Assn. v.*
5 *Padilla* (2016) 62 Cal.4th 486, 499 [196 Cal.Rptr.3d 732, 363 P.3d 628], *reh’g denied* (Feb. 24,
6 2016).) Nor may the Legislature’s investigative power “be used to trench upon matters falling
7 outside the legislative purview.” (*Ibid.*) Accordingly, the Court’s second task is to analyze
8 whether Topics 2, 5, and 12 “intrude upon” the CJP’s core authority.

9 Topic 2 assesses whether the CJP “is taking an appropriate and reasonable course of
10 action for the complaints it reviews and for determining the disposition of each complaint.”
11 While this appears to directly question the CJP’s discretionary decision-making, which would
12 interfere with the CJP’s core function, the State Auditor confirmed under oath that her office will
13 not “engage in reweighing evidence or second-guessing the propriety of CJP’s determinations
14 based on the facts presented to it. The weighing of evidence and the making of determinations
15 based on such evidence falls squarely within CJP’s exercise of discretion.” (Declaration of Cal.
16 State Auditor Elaine M. Howle in Support of Opposition to CJP’s Petition for Writ of Mandate,
17 filed June 12, 2017 “Howle Decl.” ¶ 74(a).) Given the Auditor’s concession that the Auditor
18 cannot second-guess the CJP’s decision making, the Court grants the CJP’s petition with respect
19 to Topic 2 to the extent that topic calls for such an analysis.

20 Second, Topic 5 calls for an assessment of “the commission’s process for evaluating the
21 credibility of evidence, witnesses, and statements made.” This topic again appears to involve the
22 Auditor’s attempt to evaluate how the CJP decides which witnesses and evidence to believe.
23 However, again, the Auditor appears to agree that it will not “engage in evaluating whether CJP
24 made correct or incorrect determinations in particular cases, as that would be beyond the scope
25 of the audit.” (Howle Decl. ¶ 74(b).) Because of the Auditor’s concession, the Court grants the
26 CJP’s petition with respect to Topic 5.

27 Third, Topic 12 states that the Auditor will “evaluate the outcomes of a selection of cases
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1 and the discipline imposed by the Commission including cases that resulted in private
2 discipline.” Instead of taking a consistent position with respect to Topics 2 and 5, both of which
3 are similar to Topic 12, the Auditor claims Topic 12 is not auditing whether the CJP was “just,
4 fair, or meritorious,” but only whether the CJP’s outcome is “consistent with the Commission’s
5 own procedures and goals.” (Howle Decl. ¶ 74(c).) To evaluate whether the outcome of a case is
6 consistent with the CJP’s “goals” strikes at the core of the CJP’s discretionary function. At the
7 first hearing, the Court asked the Auditor to explain how Topic 12 was not “second guessing” the
8 CJP’s decisions and interfering with the CJP’s core function. Counsel responded that these topics
9 were not set in stone, but did not provide a satisfactory response to the Court’s query. Because
10 the Court finds that Topic 12 is similar to Topics 2 and 5, the Court grants the CJP’s petition
11 with respect to Topic 12.

12 **C. THE AUDITOR HAS NO AUTHORITY TO CHARGE THE CJP FOR THE COST OF**
13 **THE AUDIT**

14 Finally, the CJP sought a declaratory judgment from this Court that the State Auditor is
15 prohibited from charging the CJP for the cost of the audit. The Auditor conceded in its
16 opposition that it has no legal authority to do so. “[T]he Auditor has no authority to impose costs
17 on any agency it audits . . .” (Respondents’ Opposition to CJP’s Petition for Writ of Mandate,
18 filed June 12, 2017, at p. 38.) Thus, this Court grants the requested, undisputed, declaratory
19 relief.

20 **CONCLUSION**

21 Based on the foregoing, the instant Petition for Writ of Mandate, or in the Alternative,
22 Complaint for Declarative and Injunctive Relief is GRANTED. IT IS HEREBY ORDERED
23 THAT:

- 24 1. The Court finds and declares that the State Auditor has no legal authority to
25 review any document in the possession of the CJP made confidential by CJP Rule 102;
- 26 2. The Court finds and declares that Government Code section 8545.2 violates
27 Article VI section 18, subdivision (i)(1) of the California Constitution to the extent it purports to
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1 override CJP Rule 102;

2 3. The Court shall issue a Peremptory Writ of Mandate prohibiting the State Auditor
3 and its agents from seeking any records from the CJP which are confidential pursuant to CJP
4 Rule 102;

5 4. The Court finds and declares that the CJP and its agents have no legal obligation
6 to provide any materials to the State Auditor which are confidential under CJP Rule 102;

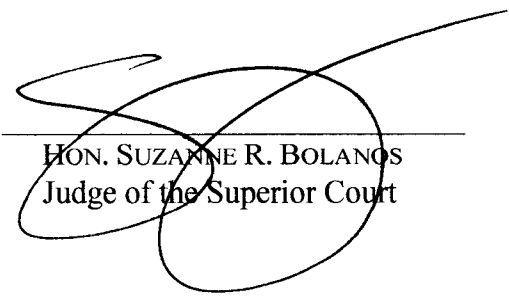
7 5. The Court finds and declares that the State Auditor may not lawfully conduct
8 audit topics 2, 5, or 12 to the extent such topics involve “reweighing evidence or second-
9 guessing the propriety of CJP’s determinations based on the facts presented to it.”

10 6. The Court shall issue a Peremptory Writ of Mandate prohibiting the State Auditor
11 and its agents from conducting any inquiry into audit topics 2, 5, or 12 to the extent such inquiry
12 involves reweighing evidence or second-guessing the propriety of CJP’s determinations based on
13 the facts presented to it; and

14 7. The Court finds and declares that the State Auditor has no legal authority to
15 charge the CJP for the cost of any audit it conducts of the CJP.

16 IT IS SO ORDERED.

17
18 Dated: 12/19, 2017



HON. SUZANNE R. BOLANOS
Judge of the Superior Court

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

COMMISSION ON JUDICIAL
PERFORMANCE,

Petitioner/Plaintiff,

vs.

ELAINE M. HOWLE, in her official capacity as
CALIFORNIA STATE AUDITOR, and the
CALIFORNIA STATE AUDITOR'S OFFICE,

Respondent/Defendant.

Case No.: CPF-16-515308

CERTIFICATE OF MAILING
[CCP 1013a(4)]

I, Linda Fong, a deputy clerk of the Superior Court of California, County of
San Francisco, certify that I am not a party to the within action.

On December 19, 2017, I served the attached **STATEMENT OF DECISION GRANTING
PETITION FOR WRIT OF MANDATE OR, IN THE ALTERNATIVE, COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**, by placing a copy thereof in a sealed envelope,
addressed as follows:

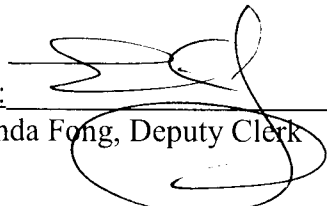
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101 Mission Street, 18th Floor
San Francisco, CA 94105

Myron Moskowitz, Esq.
Sherri S. Kaiser, Esq.
William D. Stein, Esq.
MOSKOVITZ APPELATE TEAM
90 Crocker Avenue
Piedmont, CA 94611

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street,
San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid
postage, and mailing on that date following standard court practices.

Dated: DEC 19 2017

T. MICHAEL YUEN, Clerk

by: 
Linda Fong, Deputy Clerk