

1 THOMAS M. BRUEN
ERIK A. REINERTSON
2 LAW OFFICES OF THOMAS M. BRUEN
A Professional Corporation
3 1990 N. California Boulevard, Suite 608
Walnut Creek, CA 94596
4 Telephone: (925) 295-3131
Facsimile: (925) 295-3132
5 Email: tbruen@tbsglaw.com
ereinertson@tbsglaw.com

6 Attorneys for Respondents
7 BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC. and
8 REPUBLIC SERVICES, INC.

9 BEFORE THE HEARING BOARD OF THE
10 SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

11 In the Matter of

12 SOUTH COAST AIR QUALITY
13 MANAGEMENT DISTRICT,

14 *Petitioner,*

15 vs.

16 BROWNING-FERRIS INDUSTRIES
17 OF CALIFORNIA, INC, a California
Corporation and wholly-owned subsidiary of
18 REPUBLIC SERVICES, INC., a California
Corporation, dba SUNSHINE CANYON
19 LANDFILL,

20 [Facility ID No. 49111]

21 *Respondent.*

CASE NO. 3448-14

RESPONDENTS' NOTICE OF MOTION
AND MOTION FOR CONTINUANCE
OF HEARING FOR ORDER OF
ABATEMENT

22
23 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

24 PLEASE TAKE NOTICE THAT on August 23, 2016, at 2:00 p.m., at the continued Pre-
25 Hearing Conference scheduled in this matter, or as soon thereafter as this matter may be heard,
26 Respondents Browning-Ferris Industries of California, Inc. ("BFIC") and Republic Services, Inc.
27 will move the Chairman of the Hearing Board of the South Coast Air Quality Management District
28

1 (“Hearing Board’) for an Order Continuing the hearing on the South Coast Air Quality Management
2 District’s (“District”) Petition for Order of Abatement (“POA”) pending:

- 3 (a) The final resolution of BFIC’s Petition for Writ of Mandate in *Browning-Ferris Industries of*
4 *California v. South Coast Air Quality Management District*, Superior Court of Los Angeles
5 County, Case Number BS163753 (“Public Records Case”) and any resultant appeals; and
6 (b) The District’s production of records to Respondents pursuant to: (1) Respondents’ Public
7 Records Act request of June 21, 2016; (2) Respondents’ Public Records Act request of July
8 20, 2016; and (3) Respondent’s Subpoena Duces Tecum sought concurrently herewith, plus a
9 reasonable period off time for Respondents’ counsel to review said records.

10 This Motion is made on the grounds that the records sought in the Public Records Case and
11 pursuant to Respondents’ two Public Records Act requests and in the proposed Subpoena Duces
12 Tecum sought concurrently herewith are essential to Respondent’s constitutional due process
13 interests in a fair hearing before the Hearing Board.

14 This Motion is based on the attached Declaration of Thomas M. Bruen in support of this
15 Motion, and Exhibit A through D attached hereto, the accompanying proposed Subpoena and
16 Subpoena Duces Tecum and the Declaration of Thomas M. Bruen in Support of the Issuance of the
17 Subpoena and Subpoena Duces Tecum, and any other papers filed in support of said motion and
18 oral argument of the parties.

19 DATED: August 19, 2016

LAW OFFICES OF THOMAS M. BRUEN,
A Professional Corporation

21
22 

23 Thomas M. Bruen
24 Attorneys for Respondents
25 BROWNING-FERRIS INDUSTRIES
26 OF CALIFORNIA, INC. and RESPUBLIC
27 SERVICES, INC.
28

1 **DECLARATION OF THOMAS M. BRUEN**

2 I, Thomas M. Bruen, declare:

3 1. Pursuant to the California Public Records Act, BFIC requested from the District all odor
4 complaints that it received regarding the Landfill. The District refused to disclose un-redacted
5 complaints of most complainants, citing its policy not to disclose the names and addresses of
6 persons who file complaints. BFIC filed a Petition for Writ of Mandate with the Los Angeles
7 County Superior Court to obtain the un-redacted complaint information. A true and correct copy of
8 BFIC's Petition is attached hereto as Exhibit A, the supporting Memorandum is attached as Exhibit
9 B and the supporting Declaration of Thomas M. Bruen is attached as Exhibit C.

10 2. On August 18, 2016, the Superior Court denied the Petition for Writ of Mandate. A true and
11 correct copy of the Court's Order is attached hereto as Exhibit D.

12 3. BFIC strongly disagrees with the Superior Court's order, and will be appealing the decision
13 to the Court of Appeal. Until a final decision has been made on appeal, and until the contested
14 material is turned over to Respondents, the hearing on the POA should not go forward because
15 Respondents need the requested complaint records in order to adequately prepare their defense, as
16 set forth more fully in Exhibits A, B and C hereto.

17 4. As detailed in my declaration in support of BFIC's motion for issuance of writ of mandate, a
18 true and correct copy of which is attached hereto as Exhibit C, it is vital to Respondents' ability to
19 put on their defense to obtain the identifying information contained in the complaints that the
20 District is using in its prosecution of the Landfill. Without being able to prove that a small number
21 of persons are organized to create an illusion of community wide discontent with the Landfill, BFIC
22 will be denied a fair hearing before the Hearing Board.

23 5. Furthermore, Respondents need the additional documents sought in their Public Records Act
24 requests of June 21, 2016 and July 20, 2016, which are copied verbatim in the proposed Subpoena
25 and Subpoena Duces Tecum filed concurrently herewith, to adequately prepare their defense. The
26 relevance of these proposed subpoenaed documents to Respondents' defense is set forth in the
27 Declaration of Thomas M. Bruen In Support of Issuance of Subpoena and Subpoena Duces Tecum
28 filed concurrently herewith.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of August, 2016 at Walnut Creek, California.


Thomas M. Bruen

Exhibit A

Petition

1 THOMAS M. BRUEN (SBN 63324)
ERIK A. REINERTSON (SBN 218031)
2 LAW OFFICES OF THOMAS M. BRUEN
A Professional Corporation
3 SCOTT W. GORDON (SBN 99716)
LAW OFFICES OF SCOTT W. GORDON
4 A Professional Corporation
1990 N. California Boulevard, Suite 608
5 Walnut Creek, CA 94596
Telephone: (925) 295-3131
6 Facsimile: (925) 295-3132
Email: tbruen@tbsglaw.com
7 ereinertson@tbsglaw.com
swgordon@tbsglaw.com

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

JUL 22 2016

Sherri R. Carter, Executive Officer/Clerk
By M. Soto, Deputy
Moses Soto

8 Attorneys for Petitioner BROWNING-FERRIS
9 INDUSTRIES OF CALIFORNIA, INC.

D-82
STROBEL

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES – CENTRAL DIVISION

12 BROWNING-FERRIS INDUSTRIES OF
13 CALIFORNIA, INC.,

Case No. **BS 163753**

14 Petitioner,

**VERIFIED PETITION FOR PEREMPTORY
WRIT OF MANDATE ORDERING
COMPLIANCE WITH THE CALIFORNIA
PUBLIC RECORDS ACT; REQUEST FOR
EXPEDITED BRIEFING SCHEDULE OR
IMMEDIATE STAY OF ADMINISTRATIVE
PROCEEDINGS IN THE ALTERNATIVE**

15 vs.

****IMMEDIATE RELIEF REQUESTED****

16 SOUTH COAST AIR QUALITY
17 MANAGEMENT DISTRICT, a special
district, and SOUTH COAST AIR QUALITY
18 MANAGEMENT DISTRICT HEARING
BOARD, an adjudicatory hearing board
19 established under Health and Safety Code
20 sections 40800, et seq.,

**CASE ENTITLED TO CALENDAR
PREFERENCE PURSUANT TO GOV. CODE
§ 6258**

21 Respondents.

[Gov. Code, §§ 6258, et seq.;
Code of Civ. Proc., §§ 1085, et seq.]

Dept.: _____
Hearing Date: TBD

22
23
24 **INTRODUCTION**

25 1. By this petition and pursuant to Government Code, section 6258 and Code of Civil
26 Procedure, sections 1085, et seq., Petitioner BROWNING-FERRIS INDUSTRIES OF
27 CALIFORNIA, INC. ("BFIC") seeks a writ of mandate to compel the disclosure of public records
28

1 requested by Petitioner and in the possession of Respondent SOUTH COAST AIR QUALITY
2 MANAGEMENT DISTRICT (“District”) pursuant to the California Public Records Act (“CPRA”).
3 Petitioner BFIC further seeks an expedited briefing and hearing schedule and/or other appropriate
4 injunctive relief as a result of Respondent District having filed a Petition for Order of Abatement
5 (“POA,” and attached hereto, excluding exhibits, as Exhibit C.) on July 12, 2016 before District’s
6 Hearing Board, an adjudicatory hearing body established pursuant to Health and Safety Code
7 sections 40800, et seq. Respondent District has now set Saturday, August 27, 2016 as the first
8 public hearing date in connection with its POA proceedings. The POA seeks an Order of Abatement
9 against Petitioner’s Sunshine Canyon Landfill (the “Landfill”), alleging that a “considerable number
10 of persons” have lodged over 3,000 complaints with the District about odors alleged to be from the
11 Landfill. (Ex. C, p. 3:6-9, 17-19.) The sought-for Order of Abatement would significantly limit
12 Petitioner’s vested rights to operate the Landfill and thereby cause irreparable injury to Petitioner.

13 2. By its Public Records Act request in this case, Petitioner BFIC seeks disclosure of the names
14 and addresses of the persons making the alleged 3,000 complaints to show that only a small number
15 of people are actually making the large majority of these complaints, and to show why these
16 individuals have ulterior motives for lodging odor complaints with the District (including long
17 standing opposition to the Landfill, and the goal of creating a large number of complaints to use as
18 “evidence” in a pending nuisance lawsuit against the Landfill). In the absence of either an expedited
19 hearing and briefing schedule in connection with a motion to issue the writ,¹ or a stay preventing the
20 Respondent District from commencing the POA hearing if the public records cannot be obtained by
21 August 27, 2016, BFIC will be irreparably prejudiced in its ability to mount a defense to the
22 District’s POA.

23 3. Petitioner BFIC has requested that Respondent District produce the following information
24 under the CPRA: complaint information, including the names and addresses of those persons
25 lodging complaints with the District regarding odors allegedly emanating from the Landfill.

26
27
28 ¹ Petitioner will or has filed an ex parte application seeking an expedited hearing on the motion for issuance of the writ of mandate.

1 4. In June of 2016, Petitioner submitted CPRA requests to Respondent District for public
2 records concerning odor complaints made by persons concerning the Sunshine Canyon Landfill.
3 (Exhibit A.) On July 20, 2016, Respondent refused (and continues to refuse) to release these
4 records, without redacting therefrom the names and addresses of the individuals making the
5 complaints. (Exhibit B.) On July 22, 2016, the District made a more formal response, claiming the
6 sought information was privileged under Evidence Code, section 1040, the “official information”
7 privilege. (Exhibit B.) By refusing to release these records in an unredacted format, Respondent
8 District has violated its legal duties under the CPRA and is denying Petitioner’s ability to be
9 confronted with the witnesses (the odor complainants) against it. Petitioner therefore asks this Court
10 for a writ of mandate to command the District to comply with the CPRA and produce unredacted
11 records of complaints, including the names and addresses of the complainants. Receipt of these
12 public records is essential in order for Petitioner BFIC to prepare its defense to Respondent
13 District’s POA and to obtain a fair hearing.

14 5. District alleges in its POA—and must prove—that a “considerable number of persons” have
15 been impacted by odors, thereby constituting a violation of District Rules. It is therefore essential
16 for Petitioner BFIC to obtain these public records of complaints in order to prepare its defense. The
17 complaint records, including the name, address of each complainant, are required in order for
18 Petitioner to demonstrate in its defense that the complaints are not from, as the District alleges, a
19 “considerable number of persons,” (Ex. C, p. 3:17-19,) but are in fact the product of an organized
20 small group of individuals who have ulterior motives to lodge the complaints. These individuals are
21 using a sophisticated phone tree and email/Google alert scheme, and are using these tools to
22 orchestrate a large number of odor complaint calls to the Respondent District for purposes of
23 seeking a determination that the Landfill is in violation of the District’s rules and regulations.

24 6. An expedited briefing schedule for this writ, or temporary stay of the District’s hearing
25 proceedings on the POA, is necessary in order to allow Petitioner BFIC time to review these key
26 records prior to Respondent District’s Hearing Board holding its public hearings and further
27 evidentiary hearings for the purpose of its POA.

28

1 **PARTIES**

2 7. Petitioner BFIC is the owner and operator of the Sunshine Canyon Landfill ("Landfill"),
3 located in a canyon in the hills near Sylmar, California, west of U.S. Interstate 5, and straddling the
4 border of the City of Los Angeles ("City") and the County of Los Angeles ("County"). The Landfill
5 performs a vital public service function, as it is the primary municipal (non-hazardous) refuse
6 disposal site for the City and most of County. The Landfill is a state-of-the-art facility, operated
7 consistent with the highest, environmentally protective industry standards and federal and state
8 landfill permits and regulations. The Landfill has been in operation since the 1950s. It is permitted
9 to receive up to 12,100 tons a day of municipal refuse for disposal by burial. By 2008, the Landfill
10 was permitted by the City of Los Angeles and the County of Los Angeles to consolidate its separate
11 landfill operations on both sides of the City/County boundary into a single landfill. The City and
12 County land use entitlements were approved, respectively, by the City Council and the County
13 Board of Supervisors, following several public hearings and lengthy environmental review
14 processes conducted by both the City and the County. The California Integrated Waste Management
15 Board ("CIWMB") also held public hearings and approved the consolidation of the City and County
16 landfills. In 2008, a joint City/County Sunshine Canyon Landfill Local Enforcement Agency
17 ("SCL-LEA") was certified by the CIWMB. The SCL-LEA issued a Solid Waste Facility Permit
18 ("SWFP") to the Landfill to operate the joint City/County landfill, and it was certified by the
19 CIWMB in 2008 to enforce the SWFP and California solid waste landfill regulations applicable to
20 the Landfill.

21 8. The District is a public agency within the meaning of Government Code, section 6252,
22 subdivisions (a) and (d).

23 9. The District is in possession of the public records sought by this Petition.

24 10. The South Coast Air Quality Management District Hearing Board is an adjudicatory hearing
25 board established under Health and Safety Code sections 40800, et seq. The Hearing Board is a
26 quasi-judicial panel authorized to hear certain cases. As state law requires, Hearing Board members
27 are appointed by, but act independently of, the SCAQMD Governing Board.

28

1
2 **JURISDICTION AND VENUE**

3 11. This court has jurisdiction under Government Code, sections 6258, 6259, Code of Civil
4 Procedure, sections 1060, and 1085, and Article VI, section 10 of the California Constitution.

5 12. Venue is proper in this Court: The records in question, or some portion of them, are situated
6 in the County of Los Angeles and City of Los Angeles. (Gov. Code, § 6259; Code Civ. of Proc. §
7 401 (1). Also, Respondent resides in, and the acts and omissions complained of herein occurred in,
8 Los Angeles County. (See Code of Civ. Pros., §§ 393, 394(a).)

9 **FACTS**

10 13. The present proceeding is borne from the decades long opposition by a small, well organized
11 and dedicated group of individuals who live near the Sunshine Canyon Landfill who are opposed to
12 its continued operation. Many of these individuals were active in opposing the Landfill's permits
13 issued by the City and County, and in the numerous litigation challenges to the environmental
14 impacts statements of the City and County that ultimately formed the basis for the issuance of the
15 Landfill's current land use entitlements.

16 14. In late 2009, the District began receiving an elevated number of odor complaints from local
17 residents, claiming the Sunshine Canyon Landfill was the source of these odors. The District
18 assigned an inspector to verify these odor complaints. The same inspector over several years—and
19 continuing to date—has issued numerous Notices of Violation (NOV) to the Landfill for violation
20 of District Rule 402. District Rule 402 prohibits air emissions from a source that cause annoyance to
21 any "considerable number of people." The inspector's practice is to issue an NOV under District
22 Rule 402 to the Landfill if there are six or more complaints in a 24-hour period and the inspector
23 can smell any odor at the complainant's residence—no matter how faint or fleeting the odor might
24 be—and if the inspector concludes the odor is from the Landfill.

25 15. Representatives of the District and BFIC have negotiated several stipulated abatement
26 orders, which were issued by the District's Hearing Board without opposition by BFIC. The first
27 such abatement order was issued in March of 2010. The most recent order was issued in December
28 of 2011 and expired on December 31, 2013. Pursuant to the agreed orders of abatement, BFIC spent
over \$25 million on improvements to its landfill gas collection system. This gas collection system

1 captures potentially odorous gas produced by the decomposition of waste buried in the Landfill and
2 conveys that gas via piping to flares and a renewable energy cogeneration plant that combusts the
3 gas, rendering it odorless. The Landfill has also deployed other measures such as misting systems
4 and “dust bosses” that spray odor neutralizers in the air, and has begun an alternative daily cover
5 pilot program under the supervision of the SCL-LEA to reduce odors at the Landfill “working face”
6 (an area of about one acre where the daily waste burial operation takes place). The Landfill also
7 follows an Odor Management Plan previously approved by the District.

8 16. Starting in 2009, and continuing to date, the Landfill has utilized daily odor patrols in the
9 neighborhoods around the Landfill to determine if odors could be detected in the neighborhoods.
10 The odor patrols were also required during certain morning and evening hours by the District
11 Hearing Board’s December 2011 abatement order. That order mandated that the Landfill’s odor
12 patrol personnel should all be trained and equipped to use a measurement device called a “nasal
13 ranger,” which is commonly used by many states and local jurisdictions to determine the intensity
14 of odors and to determine whether odors may be strong enough to constitute a nuisance.

15 17. As a result of the Landfill’s odor control efforts, the Landfill’s neighborhood odor patrols
16 report that for the years 2013, 2014 and 2015, no odors whatsoever were detected from the Landfill
17 on 98.5% of the 46,381 odor readings taken at prescribed locations in all of the nearby
18 neighborhoods. The remaining 1.5% of the time, only faint or very faint odors were detected that
19 might potentially be attributable to the Landfill except for on four occasions. On these four
20 occasions odors were detected that could be attributed to the Landfill that were characterized as
21 “strong.” Moreover, none of these odor detections could be detected by odor patrol personnel using
22 the nasal ranger odor measurement device. The most odor sensitive odor setting on the nasal ranger
23 device is well below any threshold adopted by any regulatory agencies for the purposes of
24 determining whether an odor is strong enough odor to be classified as a nuisance.

25 18. Despite the Landfill’s improvements in controlling the potential for odors to leave the site,
26 in 2012, a class action lawsuit was filed against BFIC, alleging the Landfill was causing a public
27 nuisance. A core group of individuals including the six named plaintiffs in the class action were
28 continuing to call in complaints to the District despite the above-described improvements. The

1 District's inspector was encouraging residents to call in complaints to the District whenever they
2 smelled any odors they believed were associated with the Landfill. The District's inspector received
3 significant overtime pay for responding to odor complaints called in after his regular work hours.
4 The plaintiffs in the class action circulated emails to a larger "Google Group" encouraging residents
5 to call in odor complaints whenever one member of the group smelled any odors. One such email
6 stated that attorneys for the putative class were encouraging residents to call in odor complaints as
7 being helpful to the lawsuit. Some members of the class exchanged emails describing their potential
8 recovery from the class action as possibly being in the order of magnitude of several hundred
9 thousands of dollars per home.

10 19. Against this backdrop, counsel for BFIC in the class action, who are also counsel of record
11 for BFIC in this action, subpoenaed the unredacted complaint records of the District in the class
12 action case, specifically asking for the names and addresses of individuals who has called in odor
13 complaints. The District offered to produce its complaint records, but only if the District redacted
14 from the complaint records the names and addresses of the individuals who complained to the
15 District. BFIC filed a motion to compel the production of the District's complaint records heard
16 before Judge Kenneth Freeman, which was opposed by the District. The District argued that the
17 individual complainants were entitled to an expectation of privacy of their complaints, and thus
18 their names and addresses should not be revealed. BFIC argued that the records were public records
19 of the District, were not exempt from disclosure under the Public Records Act, and that where the
20 very complaints and their numbers were tendered as an issue in the class action complaint, BFIC's
21 right to present its defense in the class action lawsuit entitled it to the names and addresses of
22 complainants in order to establish several contentions of BFIC in the class action lawsuit regarding
23 the complaints.

24 20. That is, BFIC contended in the class action litigation that: (1) the names and addresses of
25 complainants would show that despite the overall total number of complaints received by the
26 District, the large majority of the complaints represented repeat calls (and often several calls in a
27 single day) from the same core group of dedicated longtime opponents to the Landfill; (2) that a
28 group known as the "Google Group" were using an email alert system and phone trees to encourage

1 its approximate 30 members to call in complaints at the same time as any one member claimed to
2 smell any odors, so the SCAQMD inspector would come out to the neighborhood to issue an NOV.
3 BFIC argued that if the public complaint records of the District were disclosed, showing the names
4 and address of the complainants, the information would bear out BFIC's defense contentions in the
5 class action lawsuit.

6 21. On March 5, 2014, the Honorable Kenneth Freeman, Superior Court judge in the class
7 action lawsuit, issued his ruling compelling production of the District's complaint records to allow
8 BFIC to prepare its defense in the class action case, requiring disclosure of the names and addresses
9 of each of the complainants. The Order included the use of an "opt out" procedure, thus balancing
10 the competing interests of the District in the purported confidentiality of complainants. A true and
11 correct copy of Judge Freeman's ruling on BFIC's motion to compel the production of the District
12 complaint records is attached hereto as Exhibit D.

13 22. The District filed a petition for review of Judge Freeman's ruling with the Second District
14 Court of Appeal, asking the Court of Appeal to overturn Judge Freeman's decision, and this
15 application was denied. A subsequent petition for review filed by the District with the State
16 Supreme Court was also denied.

17 23. Following the trial judges' decision in the class action lawsuit, and in accordance with Judge
18 Freeman's ruling, the District submitted a list of the names and addresses of all complainants up
19 through February 28, 2014 to a third party vendor who mailed notices to all people on the District's
20 complainant list, offering them the ability to opt out of the District's production of complaint
21 records to counsel for the parties in the class action case. Approximately nine percent (9%) of all
22 complainants elected not to have their names and addresses disclosed to counsel for the parties in
23 the class action lawsuit.

24 24. BFIC's review of the complaint records produced by the District bore out BFIC's contention
25 that a large majority of complaints submitted by individuals to the District were from a small group
26 of residents opposed to the Landfill who made repeated complaint calls to the District—most of
27 whom were members of email alerts and phone tree groups and/or were plaintiffs in the class action
28 lawsuit.

1 25. On May 27, 2016, counsel for BFIC was notified by counsel for the District that the District
2 was preparing to seek a new abatement order from the District Hearing Board. District counsel
3 advised counsel for BFIC that the District was considering proposing a prohibition on the Landfill
4 from receiving waste during its early morning permitted receiving hours (from 6 am to 9 am) as
5 well as an overall limitation on the Landfill receiving more than 6,000 tons per day—less than half
6 the Landfill’s permitted volume as permitted by the City, County, the SCL-LEA and CIWMB (now
7 CalRecycle). On or about June 8, 2016, counsel for Petitioner informally requested authorization
8 from counsel for the District to use the complaint records produced by the District in *Michaely* class
9 action case in the upcoming Hearing Board hearing, and also requested un-redacted complaint
10 records from March 1, 2014 to present since the prior date of the production was February 2014.
11 The Respondent District’s counsel replied “no” to each request. On June 20, 2016, Petitioner’s
12 counsel served a CPRA request to the District, attached as Exhibit A. The District initially issued a
13 vague preliminary response to Petitioner’s CPRA request, without specifying what if any records
14 would be produced, but on July 20, 2016, the District’s counsel notified counsel for Petitioner BFIC
15 via email that the District would not produce the requested un-redacted public records. A true and
16 correct copy of the email notification is attached as Exhibit B.

17 26. On July 12, 2016, the District filed its Petition For an Order of Abatement. The POA seeks
18 an order from the District’s Hearing Board to force (1) a reduction in the Landfill’s permitted hours
19 of operation and (2) a draconian reduction in permitted daily tonnage to be implemented following a
20 feasibility determination required by the proposed Order. (Ex. C., p. 6:2-7:15.) The POA alleges that
21 the “District has received over three thousand odor complaints beginning in October 2013 to
22 present” from the public and nearby elementary school staff, and that a “considerable number of
23 persons living in the community and elementary school staff and students near the Facility have
24 been forced to remain indoors”. The POA further alleges that the District has issued over 90 notices
25 of violation (NOVs) against BFIC’s Facility, which are based on some of these complaints. (Ex. C,
26 p. 3:20-22.)

27
28

1 **THE DISTRICT'S STATEMENTS TO THE PUBLIC ABOUT THE**
2 **CONFIDENTIALITY OF COMPLAINTS**

3 27. The District's Internet website contains instructions to the public on how to submit
4 complaints regarding air quality issues, including odors, to the District. The website states that
5 complaints may be made without submitting the complainant's name and address, but encourages
6 complainants to provide their contact information to help the District in verifying their complaints.
7 The website goes on to state that the District maintains as confidential the names, addresses and
8 telephone numbers of complainants, to the extent permitted by federal and state law. It goes on to
9 add that "Such information may only be released under very limited and unique circumstances, if
10 required under the California Public Records Act or if required under a subpoena or used in court
11 proceedings." (See, <http://www.aqmd.gov/contact/complaints/smoke-dust-odor>) The website also
12 contains a video, also published on YouTube.com, encouraging members of the public to call in air
13 quality complaints to the District, which states: "Don't worry we'll keep your information
14 confidential, unless it's needed for a legal hearing." ([https://www.youtube.com/watch?v=](https://www.youtube.com/watch?v=ZJyBZCOdIEM)
15 [ZJyBZCOdIEM](https://www.youtube.com/watch?v=ZJyBZCOdIEM) [at the 3:13 second mark].)

16 **THE CALIFORNIA PUBLIC RECORDS ACT**

17 28. The CPRA provides that any writings containing information relating to the conduct of the
18 public's business that is prepared, owned, used, or retained by any state or local agency, regardless
19 of physical form or characteristics, are open to inspection by any member of the public at all times
20 during the office hours of the state or local agency, and that every person has a right to inspect any
21 public record, except where such records are expressly exempted from disclosure in the Act. (Gov.
22 Code, § 56252 subd. (e), 6253 subd. (a).) All state and local agencies must make non-exempt public
23 records available to any person upon payment of fees covering direct costs of duplication, or a
24 statutory fee if applicable. (Gov. Code, § 56252, subd. (e) & 6253 subd. (b).)

25 29. Whenever it is made to appear by verified petition to the superior court of the county where
26 the records or some part thereof are situated that certain public records are being improperly
27 withheld from a member of the public, the court shall order the officer or person charged with
28 withholding the records to disclose the public record or show cause why he or she should not do so.

1 The court shall decide the case after examining the record in camera (if permitted by the Evidence
2 Code), papers filed by the parties and any oral argument and additional evidence as the court may
3 allow. (Gov. Code, § 6259, subd. (a).)

4 30. If the Court finds that the failure to disclose is not justified, it shall order the public official
5 to make the record public. (Gov. Code, § 6259, subd. (b).)

6 31. To ensure that access to the public's information is not delayed or obstructed, the Act
7 requires that "[t]he times for responsive pleadings and for hearings in these proceedings shall be set
8 by the judge of the court with the object of securing a decision as to these matters at the earliest
9 possible time." (Gov. Code, § 6258.)

10 32. The California Constitution provides an additional, independent right of access to
11 government records: "The people have the right of access to information concerning the conduct of
12 the people's business, and, therefore, the meetings of public bodies and the writings of public
13 officials and agencies shall be open to public scrutiny." (Cal. Const., Art. I § 3(b)(I).) This provision
14 was adopted by the voters in 2004 because, as the ballot argument supporting the measure put it,
15 when Californians asked questions of their government they increasingly found out "that answers
16 are hard to get." The constitutional provision is intended to reverse that trend.

17 33. In the present case, writings containing the names and addresses of individuals complaining
18 about odors allegedly coming from the Sunshine Canyon Landfill are not exempt from disclosure
19 under the Act.

20 34. Petitioner BFIC has no plain, speedy or adequate remedy at law to remedy the violations of
21 the CPRA as alleged herein.

22 35. In the absence of equitable relief from this Court, Petitioner will suffer irreparable harm in
23 that it will not be able to adequately defend and protect its highly valuable vested property rights in
24 the Landfill's permits and as a result may be placed in breach of its existing contracts with third
25 parties to use the Landfill, and may lose accounts for which there is no plain, speedy and adequate
26 remedy at law.

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIRST CAUSE OF ACTION
For Violation of the California Public Records Act &
Article I, § 3 of the California Constitution
(All Petitioners against all Respondents)

36. Petitioners incorporate herein by reference the allegations of paragraphs 1 through 35 above, as if set forth in full.

37. Respondents' refusal to release records and inadequate search for records violate the CPRA and Article I, § 3 of the California Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays as follows:

1. That the Court issue an order for an expedited briefing and hearing schedule, on whether the Court shall issue an Order directing Respondent District to provide Petitioner with all requested records except those records that the Court determines may lawfully be withheld pursuant to the Act;
2. That, if necessary, the Court issue a stay of the District Hearing Board's pending administrative adjudicatory proceeding seeking an Order of Abatement, to allow Petitioner BFIC to obtain and review the public records of complainant information in order to prepare and present a defense to the pending POA;
3. That Petitioner be awarded its attorneys' fees and costs; and
4. For such other and further relief as the Court deems proper and just.

DATED: July 22, 2016

LAW OFFICES OF THOMAS M. BRUEN,
A Professional Corporation
LAW OFFICES OF SCOTT W. GORDON,
A Professional Corporation



Scott W. Gordon
Attorneys for Petitioner
BROWNING-FERRIS INDUSTRIES OF
CALIFORNIA, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, Robert Sherman, declare as follows:

I am the General Manager of the Sunshine Canyon Landfill and of Petitioner Browning-Ferris Industries of California, Inc., which is the owner and operator of the Sunshine Canyon Landfill. I am authorized by said Petitioner to execute this verification on its behalf. I have read the foregoing Petition for Writ of Mandate and know its contents; and based on the information available to the Petitioner, I declare that the matters stated in the foregoing document are true and correct, except as to the matters that are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 22, 2016, at Sylmar, California.

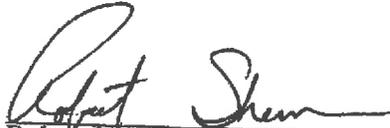

Robert Sherman

EXHIBIT A



**South Coast
Air Quality Management District**

21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 • www.aqmd.gov

Information Management
Public Records Unit

Direct Dial: (909) 396-3700
FAX: (909) 396-3330

PUBLIC RECORDS REQUEST FORM

CONTROL NO. PRU Office Use Only

Online access is available for certain public information about SCAQMD-regulated facilities through SCAQMD's search tool -FIND (Facility Information Detail). Go to the SCAQMD Website at <http://www3.aqmd.gov/webappl/fim/prog/search.aspx>.

The following types of records are immediately available on FIND:
Permits to Operate, Equipment Lists, Notices of Violation, Notices to Comply, and Emissions Summaries

Please read the Instructions for Requesting Records, and then fill out this form completely. You may include an attachment to the form, if necessary.

REQUESTOR INFORMATION

NAME: Thomas M. Bruen		DATE: June 21, 2016
COMPANY: Law Offices of Thomas M. Bruen		
MAILING ADDRESS: 1990 N. California Blvd., Suite 608		
CITY: Walnut Creek	STATE: CA	ZIP CODE: 94696
PHONE NUMBER: 925 295 3137	FAX NUMBER: 925 295 3132	
EMAIL ADDRESS: tbruen@tbsglaw.com		

REQUESTED RECORDS. Please be as specific as possible in describing the records you are seeking. The more specific you are, the easier it will be to determine if such records exist in District files. Please contact the Public Records Unit if you need assistance in identifying District records.

Please see attached letter.

TIME PERIOD OF RECORDS REQUESTED From: See attached letter To:

REQUESTED FACILITY INFORMATION (If Applicable).
Please limit one facility or site address per request form.

FACILITY NAME: Sunshine Canyon Landfill		
FACILITY ADDRESS: 14747 San Fernando Road		
CITY: Sylmar	STATE: CA	ZIP CODE: 91324
FACILITY I.D. NO. (if known): 49111	APPL. OR PERMIT NO. (if known):	

- 1 I wish to inspect the requested records, where applicable, or receive the requested records electronically at no charge. I do not want copies produced at this time.
- 1 I request that the SCAQMD contact me prior to copying the requested records if the cost exceeds \$20.00.
- I would like copies of the requested records and I hereby agree to reimburse the SCAQMD for the direct cost of duplication in accordance with Gov. Code Sec. 6253(b). See the Instructions page for direct costs of duplication.

THOMAS M. BRUEN
ERIK A. REINERTSON

LAW OFFICES OF
THOMAS M. BRUEN
A PROFESSIONAL CORPORATION
1990 NORTH CALIFORNIA BOULEVARD
SUITE 620
WALNUT CREEK, CALIFORNIA 94596

TELEPHONE: (925) 295-3137
FACSIMILE: (925) 295-3132
TBRUEN@TBSGLAW.COM

June 21, 2016

VIA FACSIMILE & EMAIL

Clerk
Public Records Unit
Information Management
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, California 91765-4178
Fax: (909) 396-3330
Email: PublicRecordsRequests@aqmd.gov

RE: Sunshine Canyon Landfill (Facility No. 49111).

Dear Clerk:

Our firm represents Browning-Ferris Industries of California, Inc., the owner and operator of the Sunshine Canyon Landfill. We are hereby requesting the following public records be produced to our firm for inspection and copying.

Pursuant to the California Public Records Act, Government Code section 6253(c), please notify us in writing within 10 days of today's date whether the SCAQMD will disclose the requested public records. Please note this information is needed for an upcoming hearing before the SCAQMD Hearing Board relating to a proposed abatement order directed at the Sunshine Canyon Landfill, which we are informed by District counsel may commence as soon as July 30, 2016.

By email dated June 8, 2016, we asked Senior Deputy District Counsel Nicholas Sanchez if the SCAQMD would produce to us complaint records for the time period from February 28, 2014 to the present. Furthermore, please note that the SCAQMD, pursuant to a Court Order in *Michaely v. Browning-Ferris Industries of California, Inc.*, Los Angeles Superior Court Case No. BC 497125, previously produced to us complaint records for the time period of January 1, 2008 to February 28, 2014. If District counsel agrees that we may use the complaint records previously produced to us in the *Michaely* lawsuit in the upcoming Hearing Board hearings relating to Sunshine Canyon, there will be no need to produce the records pursuant to

requests numbers 1 through 5 below.

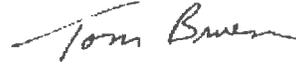
We are requesting the production of the following categories of public records:

1. All RECORDS (as used herein, the term "RECORDS" means "Writing" as that term is defined in California Evidence Code section 250, and includes printed and electronically stored information) constituting or referring to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.
2. All RECORDS containing the complainant names, addresses, phone numbers, time and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 February 28, 2014.
3. All recordings and transcriptions of recordings of phone calls received by the 1-800-CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.
4. All RECORDS of complaints reported to the SCAQMD online reporting system pertaining to the Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.
5. All affidavits and declarations containing or relating to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to February 28, 2014.
6. All RECORDS constituting or referring to odor complaints pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.
7. All RECORDS containing the complainant names, addresses, phone numbers, time and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.
8. All recordings and transcriptions of recordings of phone calls received by the 1-800-CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.
9. All RECORDS of complaints reported to the SCAQMD online reporting system pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.
10. All affidavits and declarations containing or relating to odor complaints pertaining to the Sunshine Canyon Landfill from February 28, 2014 to the present.

Clerk, Public Records Unit
June 21, 2016
Page 3

Please direct all communication regarding this request to the undersigned. We thank you in advance for your anticipated prompt cooperation in this matter.

Sincerely,



Thomas M. Bruen

cc. Nicholas Sanchez, Esq. (via email)
Karin Manwaring, Esq. (via email)
Client

EXHIBIT B

Subject: RE: Sunshine Canyon Landfill Pre-Hearing Conference
Date: Wednesday, July 20, 2016 at 10:47:49 AM Pacific Daylight Time
From: Nicholas Sanchez
To: Thomas Bruen, Bill Beck (LG)
CC: Karin Manwaring, Mary Reichert

Hi Tom,

Regarding the PRA request, I met with staff and have asked them to provide the materials for legal review so I may group the responses together (by year) on a rolling basis. To clarify I think everything is contained in the NOV reports. I will have a definite estimate on the turnaround by the end of the week as I am trying to verify everything is already in our electronic database, as opposed to things having to be scanned in.

The District's position is that you can cross examine any public witness that identifies themselves as having made a complaint. District staff also relayed they are trailed when responding to complaints. I understand your position that without identifying complainant information you are unable to adequately prepare your defense, however the District's position remains that the landfill has regularly been provided detailed monthly complaint reports to be able to independently investigate complainants and determine their identity.

We can discuss this further this week, I have availability tomorrow and Friday.

Thank you,
Nick

From: Thomas Bruen [mailto:tbruen@tbsglaw.com]
Sent: Wednesday, July 20, 2016 9:59 AM
To: Nicholas Sanchez <nsanchez@aqmd.gov>; Bill Beck (LG) <WBeck@LATHROPGAGE.COM>
Cc: Karin Manwaring <kmanwaring@aqmd.gov>; Mary Reichert <mreichert@aqmd.gov>
Subject: Re: Sunshine Canyon Landfill Pre-Hearing Conference

Nick, Thanks but I do not think that will give us enough time to prepare our defense or get the matter submitted. How are you going on a response on the PRA issue? Is the District considering reversing its position that it will not disclose complainant name and address information? As you know, receipt of this information will effect when we can be prepared to start the hearing.

Tom Bruen
Law Offices of Thomas M. Bruen, P.C.

1990 North California Blvd., Suite 608
Walnut Creek, California 94596
Direct Dial: (925) 295-3137
Cell: (925) 708-4149
Facsimile: (925) 295-3132
E-mail: tbruen@tbsglaw.com

This e-mail message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Thank you. Tom Bruen

From: Nicholas Sanchez <nsanchez@aqmd.gov>
Date: Wednesday, July 20, 2016 at 8:45 AM
To: Thomas Bruen <tbruen@tbsglaw.com>, Bill Beck <WBeck@LATHROPGAGE.COM>
Cc: "kmanwaring@aqmd.gov" <kmanwaring@aqmd.gov>, Mary Reichert <mreichert@aqmd.gov>
Subject: Sunshine Canyon Landfill Pre-Hearing Conference

Hi Tom,

We met with our Executive Officer late yesterday and I will be proposing the following hearing dates today. I will be requesting five (5) days of hearing, August 27 (a Saturday) in the community, August 30, 31, and September 1 at the District, and September 10 (a Saturday) in the community. I missed that September 3 was a holiday weekend, so that's why there's a delay in the schedule.

Thank you,

Nick

Nicholas A. Sanchez/Senior Deputy District Counsel
South Coast Air Quality Management District
phone/909.396.3400
fax/909.396.2961

Please consider the environment before printing this email.

CONFIDENTIALITY NOTICE: This email may contain material that is confidential, privileged or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by other recipients without express permission is prohibited. If you are not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, please contact the sender and delete all copies.



South Coast Air Quality Management District

21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 • www.aqmd.gov

OFFICE OF THE GENERAL COUNSEL
P.O. Box 4940
Diamond Bar, CA 91765-0940
909.396-3400 | Fax: 909.396.2961

July 22, 2016

Thomas M. Bruen, Esq.
Law Offices of Thomas M. Bruen.
1990 North California Boulevard, Suite 620
Walnut Creek, California 94596

Re: Public Records Act Request re Sunshine Canyon Landfill, Control No. 86437

Dear Mr. Bruen:

You are requesting in Public Records Act Request - Control No. 86437, that the District provide the un-redacted complaint records that were produced through the court order in *Yeshayahu Michaely, et al. v. Browning-Ferris Industries of California, et al.*, Los Angeles Superior Court, Case No. BC497125. I understand your request to specify that if the District agrees to provide those complaint records un-redacted for the time period from January 1, 2008 through February 28, 2014, you will waive your request to have the District provide complaint records from February 28, 2014 to June 21, 2016.

Your Public Records Act (PRA) request is for information from confidential investigations. The records identified below that will be provided in response to your PRA request are not being withheld by the District only because the disclosure of the information is not against the public interest, due to your representation of the parties in the pending Order for Abatement (OA) proceedings.

The complaint records produced through the court order: (1) were subject to a protective order; (2) were produced solely for the purpose of that litigation; (3) required your clients to demonstrate good cause prior to attempting to contact any of the complainants; and (4) required your clients and the plaintiffs in that case to provide an "opt-out" notice to the complainants prior to them being identified. The numerous privacy protections put in place by the judge in that case clearly signal that none of the complaint information is intended to be used for other purposes. For those reasons, the District will only produce the records from January 1, 2008 to June 21, 2016, with all complainant identifying information redacted, except as specified below.

Request Nos. 1, 2, 4 through 7, and 9 through 10

The District agrees to provide the names and addresses, if given, of individuals who testified at the numerous Sunshine Canyon Landfill (landfill) OA hearings; these individuals have already

Cleaning the air that we breathe...

made themselves public. The District will also provide the information submitted on “speaker cards” from the April 21, and June 9, 2016 landfill town hall meetings hosted by the District for individuals that did not withhold authorization to release their contact information. The Notice of Violation (NOV) reports issued to the landfill between January 1, 2008 to June 21, 2016 contain odor complaints, received telephonically or electronically by the District, alleging the landfill as the source. The NOV reports also contain the District inspectors’ investigative findings and may include signed forms collected from complainants. The District is in the process of searching its databases to identify any additional documents that may be similar to the information identified above, but not contained in an NOV report. The District will only provide un-redacted identifiable complainant information for individuals who have previously testified at an OA hearing against the landfill and/or submitted a “speaker card” at the April 21 or June 9, 2016 Sunshine Canyon Landfill town hall meeting and authorized the District to release their contact information through a Public Records Act request.

Request Nos. 3 and 8

The District does not keep recordings of phoned-in complaints received by its 1-800-CUT-SMOG phone line, any complaint information received on that phone line is transcribed and contained in the complaint reports that are maintained in the District’s database. The responses to Request Nos. 1, 2, 4 through 7, and 9 through 10, will include any complaint information received through the District’s 1-800-CUT-SMOG phone line, and will be responsive to the information requested in categories Nos. 3 and 8.

The District has a strong interest in maintaining the confidentiality of complainants regarding possible air quality violations. The identities of complainants are privileged information under Evidence Code (“EC”) § 1040 and it is the District’s position that the public interest in withholding such information outweighs the need for disclosure. Evid. Code §§ 1040(a), (b)(2). Pursuant to EC § 1040, “official information” is “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.” *Id.* at § 1040(a). The District may refuse to disclose official information if “[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” *Id.* at § 1040(b).

The District has a policy of not disclosing any identifying information about individuals who submit complaints to it, and thus all complaints submitted to the District are submitted in confidence. The public interest in preserving such confidentiality is clear: public exposure of their identities will discourage individuals from submitting complaints to regulatory and enforcement agencies, and thus will impede those agencies in performing their duties. *See City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1024 (6th Dist. 1999) (holding that there is a strong public interest in preserving the anonymity of complainants); *see also Evans v. Department of Transportation*, 446 F.2d 821, 823 (5th Cir. 1971) (“As a matter of common sense, the efforts of the [Federal Aviation] Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could

Thomas M. Bruen, Esq.
July 22, 2016
Page 3

not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of people.”).

The District has previously conveyed, in response to your earlier attempts to obtain this information, the District’s Sunshine Canyon Landfill Complaints Monthly Report provided to the landfill contains information to aid in investigating and identifying complainants without disclosing their identity. The landfill has a number of feasible options available to it that do not involve forcing the District to reveal confidential information. There are six (6) named plaintiffs in the class action lawsuit; the landfill has deposed and identified additional complainants through discovery in the lawsuit; the landfill shadows District inspectors while they conduct odor investigations in the community; and landfill staff attends community forums, including public hearings, where members of the public regularly identify themselves as having made odor complaints against the landfill. The landfill has all of the tools in the discovery toolbox at its disposal with respect to these individuals, including subpoenaing any or all of them through the District Hearing Board proceeding.

Sincerely,



NICHOLAS A. SANCHEZ
Senior Deputy District Counsel

cc: Cher Snyder, *Assistant DEO, Engineering & Compliance*

EXHIBIT C

1 OFFICE OF THE GENERAL COUNSEL
2 SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
3 NICHOLAS A. SANCHEZ, SBN 207998
4 Senior Deputy District Counsel
5 Email: nsanchez@aqmd.gov
6 KARIN C. MANWARING, SBN 228565
7 Senior Deputy District Counsel
8 Email: kmanwaring@aqmd.gov
9 MARY J. REICHERT, SBN 264280
10 Senior Deputy District Counsel
11 Email: mreichert@aqmd.gov
12 21865 Copley Drive
13 Diamond Bar, California 91765
14 TEL: 909.396.3400 • FAX: 909.396.2961

SOUTH COAST AQMD
CLERK OF THE BOARDS

16 JUL 12 P4:13

15 Attorneys for Petitioner
16 South Coast Air Quality Management District

17
18
19
20
21
22
23
24
25
26
27
28

**BEFORE THE HEARING BOARD OF THE
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

In the Matter of

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT,

Petitioner,

vs.

BROWNING-FERRIS INDUSTRIES OF
CALIFORNIA, INC., a California Corporation
and wholly-owned subsidiary of REPUBLIC
SERVICES, INC., a California Corporation,
dba SUNSHINE CANYON LANDFILL,

[Facility ID No. 49111]

Respondents.

CASE NO. ³⁴⁴⁸⁻¹⁴
~~5000-5~~

**PETITION FOR AN ORDER FOR
ABATEMENT**

Health and Safety Code § 41700 and
District Rule 402

Hearing Date: TBD
Time: 9:00 a.m.
Place: TBD

25 SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT (hereinafter referred to as
26 "District" or "Petitioner"), petitions the South Coast Air Quality Management District Hearing
27 Board to issue an Order for Abatement regarding Browning-Ferris Industries of California, Inc.
28 ("BFI"), a wholly-owned subsidiary of Republic Service, Inc. ("REPUBLIC"), both corporations

1 authorized to do business in the State of California (collectively hereinafter referred to as
2 "Respondents").

3 1. Petitioner is a body corporate and politic established and existing pursuant to Health
4 and Safety Code §40000, *et seq.* and §40400, *et seq.*, and is the sole and exclusive local agency
5 with the responsibility for comprehensive air pollution control in the South Coast Basin.

6 2. Respondent BFI, doing business as "Sunshine Canyon Landfill," owns and operates
7 a landfill/solid waste disposal site located at 14747 San Fernando Road, Sylmar, California 91342
8 (hereinafter referred to as "Sunshine Canyon Landfill" or the "Facility"), SCAQMD Facility ID
9 #49111, subject to the District's jurisdiction and District Rules.

10 3. District Rule 402 and California Health and Safety Code ("H&S Code") Section
11 41700 prohibit the discharge from any source whatsoever such quantities of air contaminants or
12 other material which cause injury, detriment, nuisance, or annoyance to any considerable number
13 of persons or to the public, or which endanger the comfort, repose, health or safety of any such
14 persons or the public, or which cause, or have a natural tendency to cause, injury or damage to
15 business or property.

16 4. Sunshine Canyon Landfill operates under a Solid Waste Facility Permit issued by
17 the California Department of Resources Recycling and Recovery ("CalRecycle") and handles
18 approximately a third of the daily waste of all of Los Angeles County. Sunshine Canyon Landfill
19 receives almost 9,000 tons of municipal solid waste per day.

20 5. The municipal solid waste disposed of in Sunshine Canyon Landfill generates
21 landfill gas consisting mainly of methane (50%) and carbon dioxide (50%). Landfill gas, unless
22 adequately collected, may escape from the landfill into the atmosphere.

23 6. Landfill gas collected from Sunshine Canyon Landfill is flared at multiple flare
24 stations. The flares at Sunshine Canyon Landfill are able to operate at a maximum combined total
25 flow rate of 18,000 standard cubic feet per minute (scfm). The collected landfill gas is also sold to
26 a third party who operates a gas-to-energy facility and produces electricity from combustion of
27 landfill gas in turbines.

28

1 7. The District alleges Respondents are insufficiently collecting the amount of landfill
2 gas currently generated at Sunshine Canyon Landfill, which can contribute to emissions of landfill
3 gas from the surface of the landfill and causes odors. The District further alleges Respondents are
4 failing to adequately treat fresh trash odors generated at the Facility, which can cause odor
5 emissions from the landfill during morning hours.

6 8. The District has received over three thousand odor complaints beginning in October
7 2013 through the present, from the public and elementary school staff working and living near
8 Sunshine Canyon Landfill alleging the Facility as the source of the odor. The District has traced
9 the odors back to Sunshine Canyon Landfill on numerous occasions.

10 9. The District alleges the odors are the result of insufficient gas collection, inadequate
11 treatment of incoming daily waste, and inadequate daily and intermediate cover procedures.

12 10. Pursuant to District Rule 1150.1(e)(3), Respondents must conduct instantaneous and
13 integrated monitoring of the landfill's surface. Monitoring conducted by Respondents
14 demonstrates that Respondents are not controlling surface emissions sufficiently at the Facility
15 based on the frequency of high surface emissions reported in Sunshine Canyon Landfill's District
16 Rule 1150.1 monitoring reports.

17 11. As a result of the odors emanating from Sunshine Canyon Landfill, a considerable
18 number of persons living in the community and elementary school staff and students near the
19 Facility have been forced to remain indoors.

20 12. From October 25, 2013, through present, the District has issued over ninety Notices
21 of Violation ("NOVs") against the Respondents for violating District Rule 402 and H&S Code
22 § 41700.

23 13. Respondents have implemented numerous odor control measures through several
24 previous Stipulated Order for Abatement proceedings with this Board. However, despite these
25 measures, Respondents have been unable to conduct operations at the Sunshine Canyon Landfill
26 without being in violation of state law and SCAQMD Rules and Regulations regarding odor
27 nuisance.

28

1 14. The City of Los Angeles City Council and the County of Los Angeles Board of
2 Supervisors designated the Sunshine Canyon Landfill Local Enforcement Agency (SCL-LEA) to
3 be the primary local agency that provides the regulatory permitting, enforcement, and operational
4 compliance oversight at Sunshine Canyon Landfill on behalf of the California Environmental
5 Protection Agency's Cal Recycle.¹

6 15. Numerous regulatory agencies, including the South Coast Air Quality Management
7 District, SCL-LEA, Los Angeles County Department of Public Works, City of Los Angeles Bureau
8 of Sanitation, the Los Angeles Regional Water Quality Control Board, the California Department
9 of Toxics Substances Control, and other state or local agencies, have jurisdiction over Respondents
10 and/or Respondents' affiliates' transfer stations.

11 16. Given the number of regulatory agencies involved and potential for events beyond
12 the control of Respondents, the SCAQMD recognizes that the necessity to modify this Order may
13 arise. In the event that a petition for modification of the requested Order is filed that asks this
14 Hearing Board to make a finding that delay in performance or non-performance of any requirement
15 of this Order was the result of a Force Majeure, the SCAQMD proposes the following definition:
16 Force Majeure includes any act of God, war, fire, earthquake, flood, or natural catastrophe; civil
17 disturbance, vandalism, sabotage, or terrorism; restraint by court order or public authority or
18 agency; or the inability, despite Respondents' demonstration that it exercised due diligence and
19 best efforts, to obtain a consent, permit or approval necessary for Respondents' performance of any
20 of the requirements of this Order. Force Majeure shall not include normal inclement weather,
21 economic hardship, or inability to pay.

22 17. On April 2, 2015, the SCL-LEA Board of Directors passed a motion directing the
23 SCL-LEA Program Manager, "upon completion of the review of both SCAQMD consultants'
24 reports, to provide the Board members with a report of the SCL-LEA recommendations along with
25 the technical backup, documentation and reasoning for those recommendations."

26
27
28 ¹ An LEA is an entity designated by the governing body of a county or city and is empowered to implement delegated California Environmental Protection Agency's Cal Recycle programs and locally designated activities.

1 18. In response to the direction provided by its governing board, the SCL-LEA
2 produced a report entitled "SUNSHINE CANYON LANDFILL LOCAL ENFORCEMENT
3 AGENCY COMPILATION OF POTENTIAL MITIGATION PRACTICES AND PROGRAMS,"
4 dated September 2015. (A true and correct copy of Section 3 of the report, titled "Sunshine
5 Canyon Landfill Local Enforcement Agency Compilation of Potential Mitigation Practices and
6 Programs" is attached hereto as Exhibit A.) The report in its entirety is available at
7 <http://docs.google.com/viewer?a=v&pid=sites&srcid=c2NsbGVhLm9yZ3xzY2xsZWZWF3ZWJzaXRlIGd4OjNlMmlyYjQ1ZWNmNjAxMDE>.
8

9 19. The two (2) reports prepared at the direction of the District by experts in the field of
10 trash odor and landfill gas collection, concluded that Sunshine Canyon Landfill required
11 improvements in: intermediate cover, daily cover, use of alternative daily cover, additional
12 baropneumatic field testing, enhance drainage of leachate, investigation of landfill gas migration
13 and surface leakage on sideslopes, and landfill gas quality monitoring. The District is relying on
14 these recommendations in the reports for the proposed conditions in this Order for Abatement.

15 20. Respondents are in violation and have been in violation of District Rule 402 and
16 H&S Code Section 41700 since October of 2013.

17 21. The District, by this petition, seeks an Order for Abatement to require Respondents
18 to cease violating District rules, or comply with such other relief as the Board deems appropriate.

19 22. The issuance of an Order for Abatement upon a fully noticed hearing would not
20 constitute a taking of property without due process of law.

21 23. This Order for Abatement is not intended to be nor does it act as a variance.
22 Respondents agree it does not need a variance from District rules.

23 24. The issuance of the prayed for Order for Abatement is not expected to result in the
24 closing or elimination of an otherwise lawful business, but if it does result in such closure or
25 elimination, it would not be without a corresponding benefit in reducing air contaminants.

26 25. It is the District's intention to file a proposed Findings and Decision a few days in
27 advance of the hearing.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WHEREFORE, the District prays for an Order for Abatement as follows:

1. That this Hearing Board issue an Order for Abatement requiring Respondents to take action to abate emissions from the Facility resulting in offensive odors, including:

a. Respondents shall within ten (10) business days of the issuance of this Order modify the operating hours at the landfill in order to minimize the impact of fresh trash odors resulting from the unloading/dumping of all trucks. The District, in consultation with other regulatory agencies, will work with Respondents' operations staff to evaluate the efficacy of this mitigation measure and determine whether there are significant impacts associated with this measure that cannot reasonably be avoided.

i. Respondents shall, upon commencement of modified operating hours, provide for independent third party odor monitoring at or near Van Gogh Charter School during the hours of 6:00 am through 10:00 am. Respondents shall require the Odor Monitors to take measures to prevent odor fatigue and to keep records. Such records shall include an odor ranking taken every twenty (20) minute that includes location, wind condition, and an odor assessment using a consistent scale.

ii. Respondents shall submit to the District, the SCL-LEA and the Los Angeles County Department of Public Works within ten (10) business days of the issuance of this Order, a Traffic Mitigation Program approved by the Los Angeles City Bureau of Street Lighting that establishes a program to address unnecessary truck trips and reduce queuing of trucks outside the Facility potentially resulting from the change in operational hours. The program shall address, at minimum, the following: (1) a schedule for regular landfill users (such as commercial and municipal haulers as well as transfer trucks/trailers) that minimizes queuing along San Fernando Boulevard and diversions to other landfills, and (2) and a plan to reserve landfill capacity for small commercial and private users.

1 b. Respondents shall submit to the Hearing Board and District, within thirty
2 (30) business days of the issuance of this Order, a report assessing the feasibility of
3 curtailing incoming daily tonnage. Respondents' analysis shall assess a reduction in
4 tonnage to a maximum daily limit of 6,000 tons per day and may consider a phased-in
5 approach to curtailing the daily tonnage. The District, in consultation with other
6 regulatory agencies, will work with Respondents' operations staff to evaluate the impact
7 of this curtailment to determine whether there are significant impacts that cannot
8 reasonably be mitigated.

9 i. Respondents shall appear before the Hearing Board at a status hearing
10 within forty-five (45) business from the issuance of this Order to
11 evaluate the feasibility of implementing curtailment of incoming daily
12 tonnage at the landfill.

13 ii. Respondents shall implement the curtailment of incoming daily
14 tonnage at the landfill within seven (7) business days following the
15 status hearing, unless otherwise ordered by the Hearing Board.

16 c. Respondents shall continue the use of an Alternative Daily Cover (ADC),
17 in lieu of using a nine inch daily compacted soil cover, throughout the duration of the
18 approved one-year pilot demonstration project that began in October 2015, in order to
19 promote horizontal permeability in the landfill mass for the purposes of improving
20 collection of landfill gas and improving the leachate collection system's ability to drain
21 properly.

22 i. Respondents shall provide to the District copies of all data provided to
23 the SCL-LEA generated as a result of the pilot demonstration project
24 and such other information as reasonably requested by the District.
25 Respondents shall also provide any analysis used to determine the
26 success or obstacles of the pilot demonstration project within ten (10)
27 business days of finalizing the information.

1 ii. Respondents shall submit to the District within ten (10) business days
2 of the conclusion of the pilot program, all reports generated from the
3 pilot program and evidence demonstrating that it has satisfied the Los
4 Angeles County Departments of Public Works and Regional Planning
5 requirements. Respondents shall also submit to the District within ten
6 (10) business days of the conclusion of the pilot program written
7 confirmation from the SCL-LEA that Respondents have duly
8 completed the pilot program.

9 d. Respondents shall implement the intermediate cover enhancement pilot
10 program as directed by the SCL-LEA.

11 i. Respondents shall provide District staff with copies of all reports on
12 the status and/or results of the program submitted by Respondents to
13 the SCL-LEA and such other information as reasonably requested by
14 the District.

15 e. Respondents shall conduct the intermediate cover program in a manner
16 consistent with Los Angeles County's Conditional Use Permit ("CUP"), section 44A, and
17 the landfill Implementation and Monitoring Plan, as pertains to application of temporary
18 hydroseed vegetation cover on any inactive slope or other landfill area projected to be
19 inactive for a period greater than 180 days.

20 f. Respondents shall submit monthly District Rule 1150.1 surface monitoring
21 results (instantaneous and integrated readings) to the District for the enhanced monitoring
22 grids that are involved in the SCL-LEA intermediate cover enhancement pilot program and
23 for the baseline comparative reference control grid (Grid L11) within fourteen (14) business
24 days after completion of the physical landfill monitoring activities. This condition does not
25 relieve Respondents from performing Quarterly District Rule 1150.1 surface emission
26 reports on the overall landfill.

27 g. Respondents shall submit to the District for review and approval, within
28 ninety (90) days of issuance of this order, a proposal for additional methods/procedures for

1 upgrading and improving the additional areas of the landfill that have intermediate landfill
2 cover, including appropriate methodologies, metrics, and protocols for evaluating the
3 performance.

4 i. Respondents' proposal shall consider and evaluate, at a minimum, the
5 following options (or combination of options): increased thickness of
6 intermediate cover, use of lower permeability intermediate/final cover
7 materials, utilization of higher durability plastic intermediate cover film
8 material, higher compaction to increase density of the intermediate
9 cover, use of cured/mature compost to improve vegetative growth (and
10 potential biofilter affect), use of less steep intermediate slopes or other
11 methods to provide for better compaction of the side slopes, use of
12 alternative spray on sealants, (formulated for increased durability, wet
13 weather, and odor control) to reduce permeability of existing
14 intermediate covered areas, and utilization of ClosureTurf® (or product
15 equivalent designed for intermediate cover usage).

16 h. Respondents shall expand the application of the SCL-LEA/District approved
17 intermediate cover upgrades to additional SCL-LEA designated District Rule 1150.1
18 surface emissions monitoring grids if the data or other performance metrics demonstrate
19 cover performance improvements (as determined by the District and the SCL-LEA).

20 i. Respondents shall expeditiously dewater wells being impacted by liquids.

21 i. Respondents shall provide monthly reports to the District and the SCL
22 LEA on all landfill gas collection wells which have more than 30% of
23 their overall length or more than 30% of their perforated area below
24 grade filled with leachate or water. Respondents shall provide a graphic
25 map showing the location of each liquid "impacted well" every other
26 month. For the monthly reports, Respondents shall provide a description
27 of the remedial measure(s) taken to address the landfill gas collection
28 wells that are impacted by liquids.

1 ii. Respondents shall, within sixty (60) days of the issuance of this order,
2 provide proposed methodologies and monitoring procedures to the
3 District that determine the level of dewatering within each impacted
4 well. Methods may include the measurement of the gas flow at each
5 landfill gas collection well impacted by liquids.

6 j. Respondents shall submit to the District for review and approval (which will
7 be conducted in consultation with other regulatory agencies) within ninety (90) days of
8 issuance of this Order, a plan to evaluate and perform integrity tests on the landfill's
9 existing gas collection wells. Upon approval of the plan by the District, Respondents shall
10 correct any well identified as ineffective or inefficient or impacted for any reason, within
11 fourteen (14) days of such identification. The plan shall require at a minimum that no
12 ineffective and inefficient well remain impacted for more than thirty (30) days without
13 being decommissioned and/or replaced.

14 k. Respondents shall submit to the District for review and approval (which will
15 be conducted in consultation with other regulatory agencies), within sixty (60) days of the
16 issuance of this Order, a proposal for additional best management practices to supplement
17 Respondents' existing practices intended control and treat the fresh trash odors (the
18 "Revised Best Management Practices Plan").

19 i. Such proposal shall consider and evaluate, at a minimum, the following
20 options: use of trash truck and transfer trailer unloading practices that
21 minimize creation of odors, use of additional misting fan units (Dust
22 Boss or equivalent) to treat odors onsite, use of alternative working faces
23 located in more advantageous locations for early morning loading,
24 consideration of special procedures (e.g., immediate covering/burying of
25 odorous loads at the working face) and other practices to mitigate fresh
26 trash odors.

27 ii. Such proposal shall also consider, for use during the initial three hours of
28 the opening of the landfill at a minimum, applications of Odor-Shell®

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(or equivalent product) designed for odor control for odorous loads identified during unloading and on exposed portions of the working face.

iii. Such proposal shall also consider and evaluate options to control, treat, and minimize the impact of the odors that leave the site, including a methodology to identify meteorological conditions before the start of operations to determine best procedures/practices taken to minimize odor transport into the neighborhood. The proposal shall also consider the utilization of innovative technologies such as dry (waterless) vapor-phase (gas) for treatment of fresh trash and landfill gas odors, which can be employed along potential odor pathways.

iv. Such proposal shall also consider and evaluate utilization, for use during the initial three hours at a minimum of the opening of the landfill, of backpack sprayer and/or other portable spray system (with odor neutralizer or equivalent product) for directed use on identified odorous loads during unloading.

v. Such proposal shall also consider and evaluate utilization of stockpiled "odor buffering/adsorbing material" (e.g., compost, ground greenwaste, soil) at the working face. Respondents' evaluation shall also consider and analyze the potential for enhancing adsorbent material with odor adsorbents or other odor neutralizers to increase effectiveness.

vi. Respondents shall, within ten (10) business days of receiving written approval from the District, implement the Revised Best Management Practices Plan. If a "conditional approval" is granted, Respondents shall implement those conditionally approved elements of the plan.

I. Respondents shall submit to the District for its review and approval (which will be conducted in consultation with other regulatory agencies), within thirty (30) days of Respondents' receipt of the SCL-LEA findings and recommendations of programs for best management practices for odor mitigation at transfer stations, an updated Odorous Load

1 Management Plan (the "Revised Odorous Load Management Plan"). This plan shall
2 identify additional measures to supplement Respondents' existing best management
3 practices to reduce odors at the source, at transfer stations owned and/or operated by
4 Respondents, and at the Facility. The plan shall also consider periodic site assessments of
5 each transfer station that sends waste to the Facility for additional measures intended to
6 abate odors.

7 i. Respondents shall, within ten (10) business days of receiving written
8 approval from the District, implement the Revised Odorous Load
9 Management Plan. If a "conditional approval" is granted, Respondents
10 shall implement those conditionally approved elements of the plan.

11 m. Respondents shall submit to the District, within ninety (90) days of the
12 issuance of this Order, an assessment on the feasibility of installing physical barriers and or
13 dust/odor containment structures. The assessment shall include an estimated timetable for
14 improvements at the entrance road, including consideration of a large physical visual berm
15 lined with trees along the final realigned access road along with other physical barriers (or
16 containment systems) that can serve as a physical barrier to mitigate odors (e.g., controlled
17 air movement, creating additional air turbulence or dispersion along odor travel pathways,
18 additional odor adsorption).

19 n. Respondents shall immediately contact the District (via email at
20 nsanchez@aqmd.gov), should the District's review of any of Respondents' submissions
21 required hereunder cause the District to conclude in writing that additional measures are
22 necessary at the landfill to control odors and Respondents are unable to agree to such
23 measures. Such notice shall describe the reasons for the infeasibility of the provisions or
24 other concerns with the provision. Respondents shall endeavor to resolve the infeasibility
25 with the Executive Officer of his designee. If the feasibility of the provision cannot be
26 resolved, Respondents shall petition the Hearing Board for further proceedings. Such
27 proceeding shall be limited to a hearing on the imposition of the measure(s) described in the
28 notice to the District as infeasible or otherwise problematic.

1 2. Any notices, reports, or other information required by this Order shall be provided
2 to the District via email (Attn: Laki Tisopulos, ltisopulos@aqmd.gov).

3 3. Respondents shall submit a timely petition to modify this Order if Respondents
4 anticipates it is unable to meet any increment of progress ordered herein, or may otherwise not
5 comply with the terms of this Order. Respondents shall notify the District via email (Attn:
6 Nicholas Sanchez, nsanchez@aqmd.gov) upon learning of any such anticipated delay or need to
7 request changes in conditions or the final compliance deadline.

8 4. For such other and further relief that this Board deems just and proper.

9 Dated: July 12, 2016

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
OFFICE OF THE DISTRICT COUNSEL
Nicholas A. Sanchez, Senior Deputy District Counsel

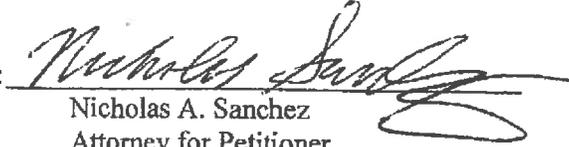
10
11
12
13 By: 
14 Nicholas A. Sanchez
15 Attorney for Petitioner
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT D

MICHAELY V. BROWNING-FERRIS INDUSTRIES

Case No.: BC497125

Hearing Date: 3/5/14

Department 310

MAR 05 2014

Robert R. Carter, Executive Officer/Clerk
By [Signature] Deputy
Rosanne Arriaga

MOTION TO COMPEL PRODUCTION OF BUSINESS RECORDS BY SOUTH
COAST AIR DISTRICT

Final Order
~~TENTATIVE~~

Grant motion to compel, subject to a protective order that: 1) limits the use of the complainants' contact information solely for purposes of the instant litigation; 2) requires Plaintiffs or Defendant BFIC to demonstrate good cause prior to an attempt to contact one or more of the complainants; and 3) requires Plaintiffs and Defendant to provide an "opt-out" notice, pursuant to *Belaire- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554, prior to any contact with a given complainant.

DISCUSSION

In the instant motion, Defendant BFIC seeks to compel non-party Southern California Air Quality Management District ("the District") to produce the following records:

1. All RECORDS (as used herein, the term "RECORDS" means "Writing" as that term is defined in California Evidence Code section 250, and includes printed and electronically stored information) constituting or referring to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
2. All RECORDS containing the complainant names, addresses, phone numbers, time and/or date of complaint, and/or contents of written or verbal complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
3. All recordings and transcriptions of recordings of phone calls received by the 1-800-CUT-SMOG phone line pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
4. All RECORDS of complaints reported to the SCAQMD online reporting system pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.
7. All affidavits and declarations containing or relating to odor complaints pertaining to the Sunshine Canyon Landfill from January 1, 2008 to the present.

The District has objected to production of any documents containing the names, addresses, or contact information pursuant to the “official information” privilege under Evidence Code §1040.

“‘Official information’ subject to the §1040(b) privilege means information acquired *in confidence* by a public employee in the course of his or her official duty *and* not open, or officially disclosed, to the public *before* the privilege is asserted.” California Practice Guide, Civil Trials and Evidence, ¶8:2391 (The Rutter Group 2013) (citing Evidence Code §1040(a); *Marylander v. Sup.Ct. (Office of Statewide Health Planning & Develop.* (2000) 81 Cal.App.4th 1119, 1125) (emphasis in original). The following conditions must be satisfied: 1) the privileges must be claimed by *a person authorized by the public entity* to do so (Ev. Code §§1040(b), 1041(a); and disclosure of the information or informant identity must be *either* (i) *forbidden* by act of Congress or a California statute; or (ii) *against the public interest* “because there is a necessity for preserving (its) confidentiality...that outweighs the necessity for disclosure in the interest of justice.” Ev. Code §§ 1040(b)(1) & (2), 1041 (a)(1) & (2); *Department of Motor Vehicles v. Sup. Ct. (People)* (2002) 100 Cal.App.4th 363, 377; *Pierce County, Wash. v. Guillen* (2003) 537 U.S. 129, 145-146.

The public entity must satisfy the threshold burden of showing that the information was acquired in confidence. California Practice Guide, Civil Trials and Evidence, ¶8:2408.5 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning & Develop.)*, *supra*, 81 Cal.App.4th at 1128-1129.¹

“The court must then weigh the conflicting interests and may sustain the privilege only if “there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice.” If necessary to enable it to rule on the privilege claim after the requisite prima facie showing is made, the court may hold an *in camera* hearing to review the allegedly privileged information.” California Practice Guide, Civil Trials and Evidence, ¶8:2411.5 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning, supra*, (2000) 81 Cal.App.4th 1119, 1126-1129). In balancing the conflicting interests, the court must consider the consequences to the litigant of nondisclosure and the consequences to the public of disclosure.” *Id.* (citing *Marylander, supra*, 81 Cal.App.4th at 1129).

The consequences of nondisclosure to the litigant include issues concerning the importance of the information to the fair presentation of the litigant’s case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of obtaining the information by such other means. California Practice

¹ If necessary to enable it to rule on the privilege claim after the requisite prima facie showing is made, the court may hold an *in camera* hearing to review the allegedly privileged information. California Practice Guide, Civil Trials and Evidence, ¶8:2409 (The Rutter Group 2013) (citing *Marylander v. Sup. Ct. (Office of Statewide Health Planning & Develop.)*, *supra*, 81 Cal.App.4th at 1129; *People v. Sup. Ct. (Barrett)* (2000) 80 Cal.App.4th 1305, 1317; and *Suarez v. Office of Administrative Hearings (Bennett)* (2004) 123 Cal.App.4th 1191, 1193-1194. Here, the Court need not hold an *in camera* hearing to review the information (the issue is simply whether the contact information should be disclosed), and indeed, the parties have not asked for such a hearing.

Guide, Civil Trials and Evidence, ¶8:2411.6 (The Rutter Group 2013) (citing *Marylander, supra*, 81 Cal.App.4th at 1129). The consequences of disclosure to the public include matters relating to public processes and procedures. California Practice Guide, Civil Trials and Evidence, ¶8:2411.7 (The Rutter Group 2013) (citing *Marylander* at 1129).

The District is a public entity, and has claimed the public information privilege with respect to any identifying information (addresses, phone numbers, identities, and other contact information) of persons who have complained about the Sunshine Canyon Landfill. As the party seeking disclosure, Defendant BFIC has satisfied its initial *prima facie* showing of a “plausible justification” for the information. The information being sought by BFIC is, at the very least, relevant with respect to class discovery (including the issue of numerosity). As Defendant notes, ¶19 of the Complaint alleges that “[i]n the last several years, [the District] has received in excess of 1,000 complaints from residents concerning the noxious odors emitted from Defendant’s landfill.” [Complaint, ¶19; Declaration of Thomas Bruen, ¶2.] Currently, there are six (6) class representatives who have complained about the landfill whose identities and contact information are known. Defendant contends that the 1,000 complaint number ‘was created by a relatively small number of individuals, many of whom use instant communication tools such as Google email alerts and phone trees to generate multiple complaint calls to the AQMD hotline at the same time, sometimes repeatedly on the same day, to create the false impression that a great many people are complaining about landfill odors and to induce the Air District to issue NOVs.’ [Bruen Decl., ¶3.] The discovery of the identities of the complainants may demonstrate whether there was a “phone tree” or an “email tree.”

The burden shifts to the District to show that the contact information was acquired in confidence. The District has met its burden. Nicholas Sanchez, Senior Deputy District Counsel with the District, states that it is the district’s policy to keep the identifying information of complainants confidential. [Declaration of Nicholas Sanchez, ¶6.] Mr. Sanchez also notes that this policy is posted on the District’s website. [*Id.*] The District has consistently asserted the official information privilege when the Landfill has requested complainant names and addresses. [Sanchez Decl., ¶14.]

Defendant BFIC notes that the District’s website states in applicable part:

Do I have to identify myself when I call AQMD to report an air quality complaint?

AQMD staff encourages people to provide their contact information when reporting air quality complaints about businesses, factories and other stationary sources. This information helps us request or verify complaint details with you if needed, and to inform you of the status of complaint investigation activities. AQMD maintains complainant personal information, such as name, address and telephone number, as confidential, to the extent allowed by state and federal law. *Such information may only be released under very limited and unique circumstances, if required by*

the California Public Records Act or if requested under a subpoena or used in court proceedings. [Bruen Decl., ¶12 (emphasis added).]

However, the fact that the District's website states that the complainant's information may be subject to subpoena in litigation does not detract from the confidential nature of the contact information. Complainants still have a *reasonable* expectation (not an "absolute" expectation) of confidentiality. Accordingly, the District has satisfactorily demonstrated that the contact information was obtained in confidence.

Since both sides have satisfied their initial burdens pursuant to the test referenced above, the Court must balance the interests in keeping the identities of the complainants confidential against the necessity of disclosure "in the interest of justice." Here, the consequences of nondisclosure of the names, addresses, and telephone numbers of the complainants may very well have an impact on BFIC's rights to class discovery. Defendant BFIC's theory is that there is an organized effort by some individuals to simultaneously report odor complaints for the purpose of creating "evidence" that the landfill's odor abatement efforts have been unsuccessful, and to seek issuance of additional NOV's (Notices of Violation) to the landfill. The identities of the complainants would shed light on whether these complaint numbers are really just driven up by a select few residents in the area. It also would provide a basis for Defendant BFIC to contest numerosity.

The ability to precisely locate where complaints are coming from would be relevant to determining to what extent odors are widespread or found only in discrete pockets in some neighborhoods near the landfill. This would also aid in the commonality analysis.

On the other hand, the District does have a very strong interest in maintaining the confidentiality of complaints regarding air quality violations. Mr. Sanchez notes that the purpose behind the District's confidentiality policy is to encourage individuals to report potential air quality problems to the district. [Sanchez Decl., ¶8.] Sanchez also states that because of the District's limited resources, reports from residents are an important source of information for the District. [*Id.*] These reports steer the District's inspectors toward potential violations, and this assists the District in enforcing its rules more efficiently. [*Id.*] Mr. Sanchez's opinion that individuals might not make such reports if they thought their identities would be disclosed to the public for fear of harassment or other retaliation by the facility of which they complained would *theoretically* stand as a basis for maintaining confidentiality.

Ultimately, however, the balance tips in favor of disclosure, under very specified circumstances. Critically, the proposed protective order does *not*, at the current time, give Defendant BFIC any right to unilaterally contact any of the complainants. The proposed protective order, to the contrary, would prohibit Defendant BFIC, Plaintiffs, and their respective counsel from using the District's information to contact the complainants. The protective order would, in other words, make certain that the contact information would be only for purposes of the litigation. Contact information would not

Plaintiffs and Defendant BFIC. Any such "opt-out" notice procedure, must notify the putative class members that their information would be used solely for purposes of the litigation, and would not be disclosed to any outside sources. Such a provision is a useful addition to the protective order, and provides another layer of protection for the putative class members.

For these reasons, in balancing the respective interests, the balance falls in favor of disclosure. However, the disclosure to BFIC, to Plaintiffs, and their counsel will have to be under specified conditions. The parties are not to use the information for purposes other than the litigation, and may not disclose the complainants' contact information to any third parties. Further, the complainants may not be contacted by either Plaintiffs or Defendant BFIC, absent a further showing demonstrating a specific need to contact one or more complainants. It is appropriate to include a further provision in the protective order, requiring Plaintiffs and Defendant BFIC to provide an "opt-out" notice (under a procedure similar to that in *Belair- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554). This notice gives the complainants the right to "opt-out" of being contacted by any party or their counsel.

VI. Conclusion

For the foregoing reasons, the motion to compel is granted, subject to a protective order that: 1) limits the use of the complainants' contact information solely for purposes of the instant litigation; 2) requires Plaintiffs or Defendant BFIC to demonstrate good cause prior to an attempt to contact one or more of the complainants; and 3) requires Plaintiffs and Defendant to provide an "opt-out" notice, pursuant to *Belair- West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App. 4th 554, prior to any contact with a given complainant.

Exhibit B

Memorandum of Points and Authorities

1 THOMAS M. BRUEN (SBN 63324)
2 ERIK A. REINERTSON (SBN 218031)
3 LAW OFFICES OF THOMAS M. BRUEN
4 A Professional Corporation
5 SCOTT W. GORDON (SBN 99716)
6 LAW OFFICES OF SCOTT W. GORDON
7 A Professional Corporation
8 1990 N. California Boulevard, Suite 608
9 Walnut Creek, CA 94596
10 Telephone: (925) 295-3131
11 Facsimile: (925) 295-3132
12 Email: tbruen@tbsglaw.com
13 ereinertson@tbsglaw.com
14 swgordon@tbsglaw.com

15 Attorneys for Petitioner BROWNING-FERRIS
16 INDUSTRIES OF CALIFORNIA, INC.

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF LOS ANGELES – CENTRAL DIVISION**

19 BROWNING-FERRIS INDUSTRIES OF
20 CALIFORNIA, INC.

21 Petitioner,

22 vs.

23 SOUTH COAST AIR QUALITY
24 MANAGEMENT DISTRICT, a special
25 district, and SOUTH COAST AIR QUALITY
26 MANAGEMENT DISTRICT HEARING
27 BOARD, an adjudicatory hearing board
28 established under Health and Safety Code
sections 40800, et seq.,

Respondent.

Case No. BS163753.
Hon. Mary S. Strobel, Dept. 82

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONER'S MOTION FOR ISSUANCE
OF WRIT OF MANDATE ORDERING
COMPLIANCE WITH THE CALIFORNIA
PUBLIC RECORDS ACT THEREOF;
REQUEST FOR EXPEDITED BRIEFING
SCHEDULE OR IMMEDIATE STAY OF
ADMINISTRATIVE PROCEEDINGS IN
THE ALTERNATIVE;**

[Gov. Code, §§ 6258;
Code of Civ. Proc., §§ 1085, et seq.]

Date: ~~TBD~~ 8/18/2016
Time: TBD 1:30 PM
Dept.: 82

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles
JUL 28 2016
Sherri R. Carter, Executive Officer/Clerk
By Barbara Hall, Deputy

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND..... 2

 A. The Landfill..... 2

 B. The Previous Court Order Compelling Disclosure of Requested Information..... 3

 C. The District’s Petition for Order of Abatement 4

 D. The Current CPRA Request..... 5

III. DISCUSSION..... 5

 A. CPRA Standard of Review 5

 B. The Requested Business Records are Vital to BFIC’s Due Process Interests. 6

 C. The District’s Denial of the Access to the Complainants’ Identifying Information Violates
 the CPRA 8

 1. *The Sought Information Is Not Confidential.* 8

 2. *The Interests Of Justice Outweigh Any Hypothetical Benefit Of Non-Disclosure.* 9

IV. CONCLUSION 12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

Filarsky v. Superior Court (2001) 28 Cal.4th 419, 426..... 7
City of San Jose v. Superior Court (1999) 74 Cal.App.4th 1008 12
Marylander v. Superior Court (2000) 81 Cal.App.4th 1119, 1125 10
Evans v. Department of Transportation (5th Cir. 1971) 446 F.2d. 821 12, 13
Michaely, et al. v. Browning Ferris Industries of California, Inc., (Los Angeles County Superior Court, Case No. BC497125) passim

Statues

Government Code, § 6254..... 3
Government Code, § 6258..... 6
Government Code, § 6259..... 7
Evidence Code, § 1040..... 3, 4, 6, 9, 10, 13
Health and Safety Code, § 41700 5, 7

Rules

SCAQMD Rule 402..... 5, 6, 7

1 **I. INTRODUCTION**

2 Respondent SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT (“District”) has
3 refused to provide full public access to odor complaints reported to the District by persons
4 concerning the Sunshine Canyon Landfill, a municipal landfill operated by Petitioner BROWNING
5 FERRIS OF CALIFORNIA, INC. (“BFIC”). The District is using the complaints as a cudgel in its
6 pending prosecution of an administrative action against the Landfill, in which it seeks to strip BFIC
7 of its vested property rights by reducing the Landfill’s permitted operating hours and maximum
8 daily tonnage. While using the complaints as the primary basis for its enforcement action, the
9 District nonetheless refuses to turn over the potentially exculpatory evidence contained in the
10 complaints, (that is, the names and addresses of the complainants,) evidence that is essential to
11 BFIC’s ability to defend itself. The District alleges that the complained of odors annoy a
12 “considerable number of people,” and thus constitute a violation of District rules for which the
13 District’s Hearing Board may curtail the Landfill’s hours of operation and daily receipts of waste.
14 But rather than being transparent about the identity and number of persons making these
15 complaints, the District refuses to disclose the identifying information—such as the complainants’
16 names and addresses—information necessary for BFIC to prove that indeed, only a small group of
17 organized opponents create the vast majority of the repetitive complaints.

18 It is essential to BFIC’s ability to provide a defense to the District’s accusations to be able to
19 demonstrate, based on complainants’ identity and addresses, the fact that the odor complaints come
20 from a small clique of people who are using phone trees, email groups, and Google alert
21 communications to create an illusion of community-wide discontent. The District’s failure to
22 disclose this potentially exculpatory evidence is patently unfair and denies BFIC basic due process
23 protections in the administrative proceeding. Denying access to these public records is not only a
24 violation of the California Public Records Act (“CPRA”), but a denial of BFIC’s constitutional due
25 process rights and its inherent right to confront its accusers. The District’s Petition for Order of
26 Abatement (“POA”) pending before the Respondent SOUTH COAST AIR QUALITY
27 MANAGEMENT DISTRICT HEARING BOARD (“District Hearing Board”) is currently
28

1 scheduled for August 27, 2016, and therefore BFIC requests immediate access to the unredacted
2 odor complaints.

3 The District is refusing to release the names and addresses of complainants using the same
4 excuse it used the last time BFIC had to resort to court action to gain access to this same category of
5 non-confidential information: the “official information” privilege under Evidence Code, section
6 1040 (incorporated into the CPRA at Government Code, section 6254, subdivision (k).) (See,
7 Petition for Writ of Mandate (“Pet.”) filed in this Action, Exhibit B thereto [Letter from District
8 Counsel to BFIC counsel, dated July 22, 2016].) The District’s last attempt to suppress the names
9 and addresses of complainants was unavailing: In 2013, in connection with a nuisance class action
10 filed against BFIC concerning the Landfill, BFIC subpoenaed the odor complaints, including
11 identifying information of the complainant’s names and addresses contained in the complaints
12 themselves. The District, as it does so again here, objected to the disclosure of names and addresses
13 on the grounds that the information was provided to it in confidence. In ruling in favor of BFIC’s
14 motion to compel, the Superior Court judge in the class action lawsuit, the Honorable Kenneth
15 Freeman, ruled that, subject to an opt-out notice procedure, the “interests of justice” weighed in
16 favor of disclosure of the identifying information to BFIC. (The Final Order on the Motion to
17 Compel is attached to the Petition for Writ of Mandate as Ex. D.) BFIC has informed the District
18 that it is willing to consider a similar opt out procedure this time, to no avail.

19 The District’s decision to deny BFIC access to the complainants’ identifying information is
20 legally baseless and contrary to BFIC’s due process right to a fair hearing. For the reasons set forth
21 herein, this Court should tell the District, once again, that it cannot base a case against the Landfill
22 on the accusations of an anonymous cadre of complainants with unknown motivations, and issue a
23 writ of mandate requiring the District to comply with its obligations under the CPRA.

24 **II. FACTUAL BACKGROUND**

25 **A. The Landfill**

26 The Sunshine Landfill performs a vital public service function, as it is the primary municipal
27 refuse disposal site for the City of Los Angeles and most of Los Angeles County. The Landfill is a
28 state-of-the-art facility, operated consistent with the highest, environmentally protective industry

1 standards and federal and state landfill permits and regulations. The Landfill has been in operation
2 since the 1950s. Pursuant to a County Conditional Use Permit and City Q conditions (together, the
3 “Use Permit,”) Sunshine Canyon Landfill has the vested right to operate at certain stated hours, and
4 with a stated maximum daily tonnage limit. It is permitted to receive up to 12,100 tons a day of
5 municipal refuse for disposal by burial, and permitted to operate from 6 AM to 6 PM every day.

6 **B. The Previous Court Order Compelling Disclosure of Requested Information**

7 In *Michaely, et al. v. Browning Ferris Industries of California, Inc.*, (Los Angeles
8 County Superior Court, Case No. BC497125), a nuisance class action brought in the name of
9 class members located within a three-mile radius of the Landfill, the complaint alleged that the
10 District has received in excess of 1,000 odor complaints. BFIC subpoenaed the complaints
11 from the District. The District objected, offering to produce complaint records, but redacting the
12 names and addresses of all complainants but for the six named plaintiffs. (Declaration of Thomas
13 M. Bruen, filed concurrently herewith [“Bruen Decl.”] at ¶ 13.) The District, as it does here,
14 asserted the “official information” privilege in Evidence Code, section 1040(b), and claimed the
15 information was received confidentially, and that retaining that confidentiality was more important
16 than the “interests of justice” that would be served by disclosure of the information. (*Ibid.*) The
17 District claimed the complaints were confidential even though its own website had a written
18 disclaimer that stated that the complainants’ contact information would be disclosed upon a
19 subpoena or Public Records Act request. Additionally, a video published by the District on
20 YouTube informed complainants that their information might be disclosed “in a legal hearing.” (*Id.*,
21 at ¶ 11.)

22 Following BFIC’s motion to compel, the court granted full access to the un-redacted
23 complaints, subject to an opt-out procedure whereby complainants could decide to keep their name
24 and address information confidential. Following notice of the opt out procedure to complainants in
25 which only 9% of the complainants opted out of disclosure, 91% of the complaints were disclosed
26 to BFIC in un-redacted form. (*Id.*, at ¶ 16.)

1 **C. The District’s Petition for Order of Abatement**

2 The POA alleges that BFIC is in violation of Health and Safety Code, section 41700 and
3 District Rule 402. (Petition for Writ of Abatement, Ex. C., p. 5:15-16. Section 41700 and Rule 402
4 both prohibit air emissions that annoy a “considerable number of people.” The District is using the
5 violations as the basis of its request that the District Hearing Board issue an order cutting the
6 Landfill’s hours and slashing its maximum daily tonnage. In effect, the District wants to strip BFIC
7 of its vested property right based on allegations that a “considerable number of people” are annoyed
8 by odors from the Landfill. It is therefore critical to BFIC’s defense and protection of its valuable
9 permit rights to be able to examine how the District arrived at its conclusion that a “considerable
10 number of people” have been annoyed by the Landfill. (Bruen Decl., ¶ 2.)

11 In response to an increase in odor complaints in late 2009, the District assigned a single
12 inspector to verify odor complaints, Larry Israel. Then, as now, when the District receives an odor
13 complaint, Mr. Israel visits the complainant to confirm the odor. The complaint is “confirmed” if
14 Mr. Israel can smell *any* odor at the complainant’s residence—no matter how faint or fleeting the
15 odor might be-- and if in his opinion, the odor is from the Landfill. Mr. Israel’s practice is to issue a
16 Notice of Violation (NOV) under District Rule 402 to the Landfill if there are six or more
17 confirmed complaints in a 24-hour period. In theory, this means that if a small group of people, far
18 less than a “considerable number,” all complain over a 24-hour period, and Mr. Israel can smell
19 even the faintest whiff of an odor, he will issue an NOV. (Bruen Decl., ¶ 6.)

20 On July 12, 2016, after the Landfill received numerous NOVs based on the process
21 described above, the District filed the POA. The POA seeks to severely limit the operation of the
22 Landfill, limiting its hours and maximum and reducing the Landfill’s permitted daily tonnage, in
23 contravention of the Landfill’s vested rights.

24 In summary, the District’s POA seeking to strip BFIC of its vested property rights is
25 premised on an alleged violation of Rule 402; the Rule 402 violation is based on the issuance of
26 NOVs; and in turn, the issuance of the NOVs are based solely on odor complaints—odor
27 complaints from an unknown number of people. The only way to determine whether these past odor
28 complaints could possibly constitute a violation of Rule 402, (i.e., that a “considerable number of

1 people” made them,) is to examine the identifying information in the complainants—the exact
2 information that the District seeks to conceal.

3 **D. The Current CPRA Request**

4 On June 21, 2016, BFIC submitted a CPRA request to the District’s clerk for all written,
5 recorded, or transcribed records referring to or constituting odor complaints pertaining to the
6 Landfill, including oral, telephonic, and online complaints, as well as all affidavits or declarations
7 relating to odor complaints from January 1, 2008 to June 21, 2016. (Pet. at Ex. A.) This request
8 updates BFIC’s request in the *Michaely* case, where the information disclosed was limited to use in
9 that case and predated February 28, 2014, updating the date range of the request through June 21,
10 2016. (Pet. at Ex. D.)

11 The District’s counsel has indicated, in an email to BFIC’s counsel sent on July 20, 2016,
12 and a letter dated July 22, 2016, that the District will not disclose identifying information contained
13 in the complaints. (Pet. at Ex. B.) The District’s counsel has also indicated it will refuse to allow the
14 unredacted complaint information disclosed in the class action lawsuit to be used before the Hearing
15 Board. (Bruen Decl., at ¶ 9.) .

16 **III. DISCUSSION**

17 **A. CPRA Standard of Review**

18 If the person requesting access to public records is not satisfied with the public agency’s
19 response, the requestor may seek a judicial determination of the agency’s obligation to disclose the
20 records requested. “Any person may institute proceedings for injunctive or declarative relief or writ
21 of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive
22 a copy of any public record or class of public records under [the CPRA].” (Gov. Code, §
23 6258). “After a person commences such a proceeding, the court must set the times for responsive
24 pleadings and for hearings ‘with the object of securing a decision ... at the earliest possible time.’ (§
25 6258.) If it appears from the plaintiff’s verified petition that certain public records are being
26 improperly withheld from a member of the public,’ the court must order the individual withholding
27 the records to disclose them or to show cause why he or she should not do so. (§ 6259, subd.
28 (a).)” (*Filarsky v. Superior Court* (2001) 28 Cal.4th 419, 426.) A member of the public who

1 prevails in an action to compel disclosure of public records is entitled to recover reasonable attorney
2 fees, as well as costs. (§ 6259, subd. (d).)

3 **B. The Requested Business Records are Vital to BFIC's Due Process Interests.**

4 The POA alleges that the District has received over three thousand odor complaints from
5 October 2013 through the present, from the public and elementary school staff working and living
6 near the Landfill, alleging the Landfill as the source of the odor, and that the District has traced the
7 odors back to the Landfill "on numerous occasions." (Pet. at Ex. C, p. 3:6-9.) It goes on that as a
8 result of alleged Landfill odors, "a considerable number of persons living in the community and
9 elementary school staff and students near [the Landfill] have been forced to remain inside." (*Id.*, at
10 p. 3:17-19.) The POA alleges that it has issued over 90 NOVs for odor issues. (*Id.* at p. 3:20-22.)
11 The Petition alleges that the Landfill is in violation Rule 402 and Health and Safety Code, section
12 41700, which prohibits odors that causes "annoyance to any considerable number of persons." (*Id.*
13 at p. 5:15-16.) Therefore, the POA places at issue the number of complaints received by the District
14 from different individuals, the addresses where these complainants reside, the nature of the
15 complaints made by these individuals, the District's investigation and confirmation of odor
16 complaints and the District's issuance of NOVs concerning these complaints. Unquestionably the
17 names and addresses of persons making these odor complaints are centrally relevant to the District's
18 burden of persuasion in prosecuting the POA.

19 BFIC has evidence that there has been an organized effort by some individuals to
20 simultaneously report odor complaints to the District for the purpose of creating "evidence"
21 that the Landfill's odor abatement efforts have been unsuccessful and to seek issuance of
22 additional NOVs to the Landfill. This evidence indicates this group of individuals regularly
23 contacts each other by phone and email to request the others to call in odor complaints to the
24 District as soon as they receive the notification by phone or email, and regardless of any odors
25 attributable to the Landfill. (Bruen Decl., ¶ 3.) There is also evidence that some individuals
26 have repeatedly called in complaints to the District on the same day—which may be inferred as
27 being done for the purpose of driving up the total complaint numbers—which are publically
28 reported by the District each month. (*Ibid.*)

1 And BFIC *knows* that, from the un-redacted complaints the District received from
2 January 2009 through February of 2014, that only a small fragment of the community made
3 any complaints to the District up to February of 2014: *the top 20 complainant addresses are*
4 *responsible for 70.20% of the complaints* over a five-year period, or 3,465 of them. (Bruen
5 Decl., at ¶ 5.) The numbers show that indeed, a small, organized cadre of complainants are
6 generating the complaints.

7 Thus, BFIC has cause to believe the District's publication of the total number of odor
8 complaints for the Landfill received by the District creates the false impression, relied on by
9 the District in its POA, that a "considerable number" of people are affected by alleged odors
10 from the Landfill, when in reality, there are only small number of vocal protestors opposing the
11 Landfill. (*Ibid.*)

12 It cannot be emphasized enough that BFIC could only conduct this analysis because the
13 court in the *Michaely* case ordered the District to turn over un-redacted complaints. BFIC now
14 needs the complainant identifying information from February 14, 2014 to the present, and needs the
15 ability to use the identifying information contained in the 2009 through 2014 complaints produced
16 in the *Michaely* case in this action¹, to be able to disprove the allegation that a "considerable"
17 number of people object to the alleged odors from the Landfill.

18 Additionally, the hearing on the POA is currently scheduled for August 27, 2016. It will
19 include public testimony where members of the public are allowed to testify regarding the Landfill.
20 BFIC is permitted to cross-examine the public. It is therefore vital that BFIC obtain the complainant
21 information prior to that date, with enough time to review and analyze the information so that BFIC
22 can effectively cross examine public members who testify against the Landfill.

23 There is no other source for this information that the District, as the District is the sole
24 repository for odor complaints regarding the Landfill.

25
26
27 _____
28 ¹ Judge Freeman's ruling in the class action motion to compel limited the use of the unredacted compliant information to the class action lawsuit. (Pet. at Ex. D.)

1 submitting complaints that they may do so anonymously, but that *if they choose to disclose their*
2 *contact information to the District, this information may be disclosed in response to: (a) records*
3 *requests pursuant to the California Public Records Act; and (b) litigation subpoenas.* (Bruen Decl.

4 ¶ 11.) The Air District's online video that describes the process for registering odor complaints
5 notifies individuals that their names and addresses may be disclosed in connection with "legal
6 hearings." (*Ibid.*)

7 While the court in the class action hearing ruled that a complainant had a reasonable
8 expectation of privacy despite the District's disclaimer of privacy, BFIC both respectfully disagrees,
9 and asserts that even if that was the case back then, the opt-out procedure undertaken by the District
10 to notify complainants that their information was going to be released to BFIC dispels any
11 remaining doubt that odor complaints are not confidential.

12 Individuals choosing to leave their names, phone numbers and addresses with the District
13 have understood their contact information may be disclosed pursuant to a Public Records Act
14 request, or in response to litigation subpoenas, and nevertheless they choose to provide their names
15 and addresses to the District with this understanding. They have therefore consented to the limited
16 disclosure of this information in response to a CPRA request.

17 Furthermore, since the *Michaely* court's ruling, the District has undertaken the opt-out
18 procedure mandated by that court. Every complainant received a mailed notice asking them if they
19 did not want their name disclosed to BFIC. At the very least, for the complainants who did not opt
20 out following the 2014 opt out procedure, they had no expectation of confidentiality when they later
21 made new complaints after February 2014. It should be noted that the District's website, as of the
22 day of this writing, still contains the exact same disclosure it did in 2014. The fact that only 9% of
23 complainants objected to the disclosure of their identities is also very strong evidence that there was
24 no expectation of privacy.

25 2. *The Interests Of Justice Outweigh Any Hypothetical Benefit Of Non-*
26 *Disclosure.*

27 As to the second prong, assuming arguendo that the information is somehow considered
28 confidential, BFIC's interests in justice clearly outweigh the public benefit of non-disclosure. In

1 2014, the District argued that there would be a “chilling effect”—that people will be discouraged
2 from filing complaints if they knew that their identifying information may be disclosed, and that the
3 complaint, absent the complainant’s identifying information, is good enough to satisfy BFIC’s
4 interest in justice. While concern over the chilling effect of disclosure rings hollow in the face of the
5 warnings on its own website and on Youtube.com stating that identifying information may be
6 disclosed, and the vast majority of complainants’ election not to opt out of disclosure in 2014, it
7 also misidentifies BFIC’s need for the disclosure of the information: it is not simply the substance
8 of the complaint that is important to the truth seeking goal for the parties to this litigation, it is the
9 identity and address of the complaining persons that is relevant here. As explained above, BFIC
10 requires identifying information to determine if the complaints are emanating from a small number
11 of organized persons, or are widespread and ubiquitous, as claimed by the District in its POA.
12 Because the District failed to properly weigh the benefits of not disclosing the information with the
13 true benefits of disclosing the identifying information, it has improperly invoked the official
14 information privilege.

15 Regarding the so-called “chilling effect” disclosure would create, the District can no longer
16 argue this point in good faith. Following the disclosure of 91% of the complainants’ identities in the
17 *Michaely* case in 2014, there has been no discernable drop off in complaints received by the
18 District: According to the POA, the District alleges that it has received 3000 complaints since
19 October of 2013 to the present. (Pet. at Ex. C, p. 3:6-9.)

20 In the *Michaely* motion to compel proceedings, the District relied on in the *City of San Jose*
21 *v. Superior Court* (1999) 74 Cal.App.4th 1008 and *Evans v. Department of Transportation* (5th Cir.
22 1971) 446 F.2d. 821 to support its position that disclosure was not warranted. Neither of these cases
23 were, or are, applicable. In *San Jose*, a newspaper requested, pursuant to the CPRA, that the City
24 disclose the identifying information of persons making airport noise complaints. The court blocked
25 the disclosure because it found the complainants had a significant privacy interest, and that the
26 benefit of the disclosure was outweighed by the complainant’s privacy concerns. The case is
27 distinguishable for several reasons.

28

1 First, San Jose did not eliminate the complainants' expectation of confidentiality by warning
2 the complainants that their information would be turned over in the event of a public records request
3 or subpoena. The City made no representation at all regarding the confidentiality of the
4 complainants. (*Id.*, at 1012.) Here, obviously, the District provided detailed disclaimers disposing of
5 the complainant's expectation of privacy.

6 Second, there was evidence that the publication of complainants' names and addresses in a
7 newspaper would expose them to harassment from local pilots associations, as had happened in the
8 past. Here, the District does not claim that complainants would suffer harassment, but only that
9 there would be a "chilling effect." As shown above, the chilling effect has been exposed as a false
10 hypothetical, divorced from the reality of the situation.

11 Finally, the court concluded there would not be significant public benefit from the disclosure
12 of the contact information of complainants, because the newspaper's expressed interest in *City of*
13 *San Jose* was focused on whether San Jose was keeping track of airport noise complaints, not who
14 exactly was complaining, or where they lived. Here, the names and addresses of complainants to the
15 District are directly relevant to whether a 'considerable number of people have been annoyed by
16 alleged odor emissions.

17 The other case cited by the District is equally not pertinent. In *Evans v. Department of*
18 *Transportation* (5th Cir. 1971) 446 F.2d. 821, a two page Fifth Circuit federal decision that does not
19 address the "official information privilege" contained in Evidence Code section 1040, the Federal
20 Aviation Agency expressly assured a complainant that the complainant's communications regarding
21 the mental stability of a commercial pilot would be kept confidential. The privilege at issue was an
22 unqualified privilege under the Federal Aviation Program. The FAA had promised the complainant
23 without any reservation that his identity would be maintained as confidential.

24 There, the court weighed the benefit of disclosure, which was satiating the pilot's curiosity
25 ten years after the incident, with the FAA's goal of protecting the safety of millions of the general
26 public who use airline transportation and who must depend upon the FAA, by investigation and
27 otherwise, to foster that safety. This is a much different calculus than the one facing the Court here.
28 Also, the District here, unlike the FAA in *Evans*, did not promise that the identifying information

1 would be kept confidential. In fact, the District did the opposite, warning complainants that the
2 information would be released if subject to a records request or subpoena. Disclosure here would
3 benefit the public as it would allow the fair and efficient administration of justice in this proceeding.

4 **IV. CONCLUSION**

5 The requested information is clearly relevant to the District's burden of proof in prosecuting
6 the POA and BFIC's ability to provide a defense to it. Because the requested information is not
7 confidential, and because the due process interests and public benefits of its disclosure outweighs
8 non-existent privacy concerns, the official information privilege is inapplicable. As such, the Court
9 should issue a Writ of Mandate and order that the District to disclose all public records identifying
10 information of persons lodging odor complaints regarding the Landfill.

11 DATED: July 27, 2016

LAW OFFICES OF THOMAS M. BRUEN,
A Professional Corporation
LAW OFFICES OF SCOTT W. GORDON,
A Professional Corporation

14 
15 _____
16 Scott W. Gordon
17 Attorneys for Petitioner
18 BROWNING-FERRIS INDUSTRIES OF
19 CALIFORNIA, INC.
20
21
22
23
24
25
26
27
28

Exhibit C

Declaration of Thomas M. Bruen

1 THOMAS M. BRUEN (SBN 63324)
ERIK A. REINERTSON (SBN 218031)
2 LAW OFFICES OF THOMAS M. BRUEN
A Professional Corporation
3 SCOTT W. GORDON (SBN 99716)
LAW OFFICES OF SCOTT W. GORDON
4 A Professional Corporation
1990 N. California Boulevard, Suite 608
5 Walnut Creek, CA 94596
Telephone: (925) 295-3131
6 Facsimile: (925) 295-3132
Email: tbruen@tbsglaw.com
7 ereinertson@tbsglaw.com
swgordon@tbsglaw.com
8

9 Attorneys for Petitioner BROWNING-FERRIS
INDUSTRIES OF CALIFORNIA, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES – CENTRAL DIVISION

12 BROWNING-FERRIS INDUSTRIES OF
CALIFORNIA, INC.

13 Petitioner,

14 vs.

15 SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT, a special
16 district, and SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT HEARING
17 BOARD, an adjudicatory hearing board
established under Health and Safety Code
18 sections 40800, et seq.,

19 Respondent.
20
21
22
23
24
25
26
27
28

Case No. BS163753
Hon. Mary S. Strobel, Dept. 82

**DECLARATION OF THOMAS M. BRUEN
IN SUPPORT OF PETITIONER'S
MOTION FOR ISSUANCE OF WRIT OF
MANDATE ORDERING COMPLIANCE
WITH THE CALIFORNIA PUBLIC
RECORDS ACT ; NOTICE OF REQUEST
AND REQUEST FOR JUDICIAL NOTICE**

[Gov. Code, §§ 6258;
Code of Civ. Proc., §§ 1085, et seq.]

Date: TBD 8/18/2016
Time: TBD 1:30 PM
Dept.: 82

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles
JUL 28 2016
Sherri R. Carter, Executive Officer/Clerk
By Barbara Hall, Deputy

1 Thomas M. Bruen declares:

2 1. I am an attorney licensed to practice law in the State of California. I am one of the
3 attorneys of record for Petitioner Browning-Ferris Industries of California, Inc. (“BFIC”) in
4 this action and for Respondent BFIC in connection with the Petition for Order of Abatement
5 regarding BFIC’s Sunshine Canyon Landfill (“Landfill”) now pending before the South Coast
6 Air Quality Management District (“District”) Hearing Board. I have personal knowledge of the
7 facts stated in this declaration, except for those facts stated on information and belief.

8 **Petitioner’s Need For The District’s Un-redacted Complaint Records**

9 2. On July 12, 2016, the District filed a Petition for an Order of Abatement (“POA”)
10 before the District Hearing Board. A true and correct copy of the POA is attached to the
11 Petition for Writ of Mandate as Exhibit C. The POA seeks an order from the District’s Hearing
12 Board to require (1) a reduction in the Landfill’s permitted hours of operation and (2) a very
13 substantial reduction in the maximum amount of waste tonnage that can be received each day at the
14 Landfill—the latter to be implemented following a feasibility determination requested by the
15 proposed Order. The POA alleges the District has received over 3,000 complaints regarding odors
16 from the Landfill since October of 2013. (POA, p. 3:6-9.) The POA alleges at page 3, lines 17-19,
17 that a “considerable number of persons living in the community and elementary school staff and
18 students near the Facility have been forced to remain indoors.” The POA alleges that the District
19 has issued 90 Notices of Violation (“NOVs”) to the Landfill for allegedly violating Health and
20 Safety Code, section 41700 and District Rule 402; and alleges that BFIC has been in violation of
21 District Rule 402 and Health and Safety Code, section 41700 since October of 2013. (POA, p. 3:20-
22 22; 5: 15-16.)

23 3. BFIC contends that there are no odor emissions from the Landfill that cause injury,
24 detriment, nuisance, or annoyance to any considerable number of persons or to the public. Each
25 month the District publishes the total number of phone calls made to the District’s 1-800-CUT-
26 SMOG hotline and complaints registered online regarding the Landfill, without subtracting repeat
27 calls or complaints from the same person or the same address, even if made on the same day. BFIC
28 maintains that the 3,000 complaints referenced in the POA were lodged with the District by a

1 relatively small number of individuals and households, many of whom use instant communication
2 tools such as Google email alerts and phone trees to generate multiple complaints to the District
3 hotline at the same time, sometimes repeatedly on the same day, to create the false impression that a
4 great many people in the local Granada Hills community (a community of over 51,000 people and
5 almost 17,000 homes) are complaining about landfill odors.

6 4. In 2012, a purported class action lawsuit was filed in Los Angeles Superior Court entitled
7 *Michaely v. Browning-Ferris Industries of California, Inc.*, Los Angeles Superior Court case no.
8 BC497125 (Hon. Kenneth Freeman, presiding). I am one of the counsel of record for BFIC in that
9 lawsuit. A large amount of deposition testimony taken in that case has confirmed that a core group
10 of about 20 to 30 individuals communicate by email and phone to ensure that large numbers of
11 simultaneous odor complaints are called into the District. There is also evidence that some
12 individuals have repeatedly called in complaints to the District on the same day—which may be
13 inferred is being done for the purpose of driving up the total complaint numbers—which are
14 publically reported by the District each month. Further, BFIC maintains that the people who do
15 complain to the District reside in a small 3 to 4 block area near the landfill and an oil well field
16 extraction facility, which is located between the Landfill and this neighborhood. Evidence obtained
17 in the class action lawsuit shows that this core group of 20-30 individual complainants are either
18 long time opponents of the continued operation of the Landfill (who opposed the Landfill before
19 any odor issues were being alleged) and/or individuals participating in the class action lawsuit.

20 5. In the class action case, BFIC subpoenaed the District's complaint records regarding the
21 Sunshine Canyon Landfill, including the complainants' name and address information. Following a
22 successful motion to compel, BFIC received 91% of the complaints made to the District up to
23 February, 2014, in an un-redacted format. (A true and correct copy of Judge Kenneth Freeman's
24 Ruling on BFIC's motion is attached to the Petition for Writ of Mandate in this action as Exhibit D.)
25 An analysis of these complaint records shows that a majority of the odor complaints were being
26 filed by a very small number of individuals who are from a very small number of addresses that are
27 situated near the Landfill, and many of which are named Plaintiffs in the class action lawsuit. For
28 example, *twenty addresses were responsible for 70.20% of the complaints analyzed over a 5-year*

1 *period. This compares to the overall total of homes in the Granada Hills community of 16,799*
2 *homes.*

3 6. The District uses a “community odor standard” to determine whether to issue a Notice of
4 Violation (“NOV”) to an alleged source of odors. NOVs will be issued if six or more odor
5 complaints are received in a single day and “confirmed” by the District inspector. “Confirmation”
6 of an odor complaint involves the following steps: (a) the inspector will go to the complainant’s
7 address, (b) ascertain whether the inspector can smell any odor whatsoever, no matter how faint or
8 fleeting, and (c) if an odor is smelled by the inspector, the inspector then goes to the alleged source
9 to see if the inspector can smell the same odor. If all these things occur, the complaint is considered
10 “confirmed.” If six or more complaints are received on a single day and confirmed, an NOV is
11 issued by the District regardless of the strength of the odor or its duration. Therefore, the NOV
12 process is heavily driven by the receipt of multiple complaints on a given day. If the process of
13 lodging odor complaints with the District is being manipulated by a small group of persons with
14 ulterior motives, such as closing the landfill or obtaining a monetary recovery in the class action
15 litigation, then this is relevant to the weight, if any, that should be given to the fact that NOVs have
16 been issued by the District to the landfill.

17 7. The disclosure of complaint records for the years 2014 to present is also necessary to
18 analyze the existence and extent of the impact of what BFIC is informed and believes is a change in
19 the District’s rules for receiving odor complaints about the Landfill. That is, BFIC is informed and
20 believes that in the last year, the District began allowing parents dropping of their children to attend
21 school at the Van Gogh Elementary school, which is located near the Landfill, to register odor
22 complaints even though they were allegedly exposed to Landfill odors for only a few minutes while
23 dropping off their children. BFIC is informed and believes that previously the District would only
24 receive odor complaints from individuals who were complaining about odors from their place of
25 permanent residence or work.

26 **Petitioner’s CPRA Request And The District’s Refusal To Produce Un-redacted Records**

27 8. On or about June 21, 2016, the undersigned, as BFIC’s counsel, served the District with
28 a Public Records Act Request, a true and correct copy of which is attached to the Petition for

1 Writ of Mandate as Exhibit A. In general, the request seeks the District's records of odor
2 complaints concerning the Landfill, the notes of the District's field inspector in responding to
3 such complaints, records concerning the issuance by the District of Notices of Violation to the
4 landfill, records of the District's analysis of odor complaints concerning the Landfill, and
5 records of communications between District personnel and members of the public concerning
6 the Landfill.

7 9. On June 10, 2016, I had asked District counsel Nicholas Sanchez via email: "Will the
8 SCAQMD consider releasing complaint information (names and addresses) from February 2014 to
9 date in the same format as we previously obtained in the *Michaely* case, without having to go thru
10 the class notification process again? Or even if we do?" Subsequently, I spoke with Mr. Sanchez to
11 ask if the District would also allow BFIC to use the un-redacted complaint data produced to BFIC
12 in the *Michaely* case pursuant to Judge Freeman's order (which limited the use of these un-
13 redacted complaint records to the class action lawsuit). Mr. Sanchez informed me that the
14 District would not agree to either request, based on the District's policy not to release the
15 names and addresses of people making complaints to the District. Following this conversation,
16 I prepared a Public Records Act Request, which I then sent to the District and its counsel, a
17 true and correct copy of which is attached to the Petition as Exhibit A.

18 10. On July 20, 2016, counsel for the District Mr. Sanchez sent me an email further
19 confirming the District would not turn over complainants' name and address information. A
20 true and correct copy of this email is attached to the Petition for Writ of Mandate as Exhibit B.
21 On July 22, 2016, the District sent a formal objection to disclosure of the names and addresses
22 of individuals who provided their names and addresses to the District at the time they
23 registered odor complaints regarding the Landfill. A true and correct copy of the District's
24 letter objecting the CPRA request is attached to the Petition for Writ of Mandate as Exhibit B.

25 **The District Advises Complainants Their Names and Addresses May Be Disclosed**

26 11. The District's website contains instructions to the public on how to submit complaints
27 to the District regarding odors and other air quality issues. These statements indicate that
28 complaints may be submitted without providing the District with the name and address of the

1 complainant. Moreover, the District's website informs the public that their names and
2 addresses, if provided, will be kept confidential *unless needed for a legal proceeding*. The
3 following is stated on the District's website regarding complaints made to the District, at:
4 http://www.aqmd.gov/complain/reporting_aq_problems.html.

5 You can help District protect public health in the South Coast Air Basin by calling 1-
6 800-CUT SMOG® (1-800-288-7664) to report your observations of smoking
7 vehicles as well as excessive odors, smoke, dust, or other air contaminants. You can
8 also report air quality complaints (except smoking vehicles) on-line.
9 * * *

10 **Do I have to identify myself when I call District to report an air quality
11 complaint?**

12 District staff encourages people to provide their contact information when reporting
13 air quality complaints about businesses, factories and other stationary sources. This
14 information helps us request or verify complaint details with you if needed, and to
15 inform you of the status of complaint investigation activities. *District maintains
16 complainant personal information, such as name, address and telephone number, as
17 confidential, to the extent allowed by state and federal law. Such information may
18 only be released under very limited and unique circumstances, if required by the
19 California Public Records Act or if requested under a subpoena or used in court
20 proceedings.* (Emphasis added.)

21 The District has a video at the above link and on YouTube on how to make air
22 quality complaints to the District. The District spokesman in the video, after describing the
23 types of information the District would like to receive by way of a complaint, states: "And
24 finally, we ask for your name, address and telephone number. That way we can contact you if
25 we need more information or just to let you know what we find out. Don't worry we'll keep
26 your information confidential, *unless it's needed for a legal hearing.*" (Video at 3:03-3:22;
27 emphasis added.)

28 12. Finally, the District's online complaint reporting system provides an online form for
submitting air quality complaints. The form indicates that the complainant's name and address are
not required. (See, <http://www3.aqmd.gov/webappl/complaintsystemonline/NewComplaint.aspx>.)

BFIC's Motion To Compel Disclosure of Complaint Records in the *Michaely* case

13. As part of the *Michaely* case, BFIC subpoenaed the same records as it is seeking in the
current CPRA request, although the CPRA request at issue here also asks for records generated after

1 the date of production of complaint records in the *Michaely* case (February 28, 2014) to the present.
2 In response to BFIC's subpoena to the District for complaint records in the *Michaely v. BFIC* case,
3 the District refused to produce records without redacting the names and addresses of the complaints
4 from all such records, using the same legal justification as it uses here, the "official information"
5 privilege.

6 14. Following the District's refusal to produce the identifying information of complainants in
7 *Michaely*, BFIC filed a motion to compel production. On March 5, 2014, the Honorable Kenneth
8 Freeman, Superior Court judge in the class action lawsuit, issued his ruling compelling production
9 of the District's complaint records to allow BFIC to prepare its defense in the class action case,
10 requiring disclosure of the names and addresses of each of the complainants. The Order included
11 the use of an "opt out" procedure, thus balancing the competing interests of the District in the
12 purported confidentiality of complainants. A true and correct copy of Judge Freeman's ruling on
13 BFIC's motion to compel the production of the District complaint records is attached the Petition
14 for Writ of Mandate as Exhibit D. Judge Freeman ruled, among other things, that the use of the
15 names and addresses of complainants records were limited to the class action lawsuit.

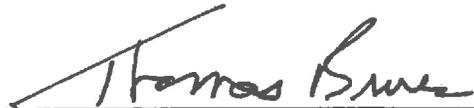
16 15. The District filed a petition for review of Judge Freeman's ruling with the Second District
17 Court of Appeal, asking the Court of Appeal to overturn Judge Freeman's decision, and this
18 application was denied. A subsequent petition for review filed by the District with the State
19 Supreme Court was also denied.

20 16. Following Judge Freeman's decision in the class action lawsuit, and in accordance with
21 Judge Freeman's ruling, the District submitted a list of the names and addresses of all complainants
22 to a third party vendor who mailed notices to all people on the District's complainant list, offering
23 them the ability to opt out of the District's production of complaint records to counsel for the parties
24 in the class action case. Approximately nine percent (9%) of all complainants elected not to have
25 their names and addresses disclosed to counsel for the parties in the class action lawsuit.

26 17. Because of the disclosure of the identifying information of the complaints, BFIC was able to
27 conduct the analysis outlined in paragraph 5 above. Without such disclosure, BFIC would be
28 without this compelling evidence. This current writ and motion is needed to obtain disclosure of

1 odor complaints regarding the Landfill through June 21, 2016, and also to allow the previously
2 disclosed information to be used outside of the *Michaely* case.

3 I declare under penalty of perjury under the laws of the State of California the foregoing
4 is true and correct. Executed this 27th day of July, 2016, at Walnut Creek, California.

5
6 
7 _____
8 Thomas M. Bruen

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit D

Court Order

#10

Browning-Ferris Industries of California, Inc.,

Judge Mary Strobel
Hearing: August 18, 2016

v.

South Coast Air Quality Management District,

BS163753

Tentative Decision on Petition for Writ of Mandate

Petitioner Browning-Ferris Industries of California, Inc. ("Petitioner") seeks a writ of mandate compelling Respondent South Coast Air Quality Management District ("Respondent") to disclose public records identifying the names and addresses of persons that lodged odor complaints regarding the Sunshine Canyon Landfill operated by Petitioner.

Statement of the Case

The Sunshine Canyon Landfill

Petitioner is the owner and operator of the Sunshine Canyon Landfill (the "Landfill"), located in a canyon in the hills near Sylmar, CA. The Landfill is the primary, non-hazardous municipal refuse disposal site for the City of Los Angeles and most of the County of Los Angeles. The Landfill has been in operation since the 1950s. It is permitted to receive up to 12,100 tons per day of municipal refuse for disposal by burial. (Pet. ¶ 7.)

Prior Court Order Compelling Disclosure of Unredacted Odor Complaints

In 2012, a class action nuisance lawsuit was filed against Petitioner in Los Angeles Superior Court entitled *Michaely v. Browning-Ferris Industries of California, Inc.* The class action complaint alleged that Respondent had received in excess of 1,000 odor complaints from residents related to the Landfill. Petitioner subpoenaed Respondent's complaint records regarding the Landfill for the period January 1, 2008 through February 2014, including the complainants' names and addresses. In a motion to compel responses, Petitioner argued that the complaint information was relevant to class discovery, including the issue of numerosity, because Petitioner believed that the 1,000 odor complaints were created by a relatively small number of individuals that used instant communication tools to create the false impression that numerous persons

were complaining about landfill odors to Respondent. (See Bruen Decl. ¶¶ 4-5; Pet. Exh. D.)

The trial court, Judge Kenneth Freeman, determined that Respondent had made an initial showing that the odor complaints were made in confidence. After weighing the conflicting interests for and against maintaining confidentiality of the records, Judge Freeman granted Petitioner's motion to compel. Judge Freeman granted the motion subject to a protective order that: (1) limited use of the complainants' contact information solely for purposes of that litigation; (2) required Petitioner to show good cause prior to an attempt to contact one or more of the complainants; and (3) required Petitioner to provide an "opt-out" notice pursuant to *Belair-West Landscape, Inc. v. Sup. Ct.* (2007) 149 Cal.App.4th 554 prior to any contact with a complainant. (Bruen Decl. ¶ 5; Pet. Exh. D.)

According to Petitioner's counsel, who represented Petitioner in the class action lawsuit, Petitioner received 91 % of the complaints made to Respondent up to February 2014 in unredacted format. An analysis of these complaint records showed that 20 addresses were responsible for 70.20 % of the complaints analyzed over a five-year period. (Bruen Decl. ¶ 5.)

Petition for Order of Abatement

On July 12, 2016, Respondent filed a Petition for an Order of Abatement (the "POA") before Respondent's Hearing Board, which seeks (1) a reduction in the Landfill's permitted hours of operation; and (2) a reduction in the maximum amount of waste tonnage that can be received each day at the Landfill. (Bruen Decl. ¶ 2; Pet. Exh. C at pp. 6-7.) The POA alleges, *inter alia*, that Respondent has received more than 3,000 odor complaints from October 2013 through July 2016 regarding the Landfill, and that Respondent has traced odors back to the Landfill on numerous occasions. (Pet. Exh. C at ¶ 8.)

The POA alleges that the Landfill is in violation of District Rule 402 and Health & Safety Code section 41700, and that Respondent has issued more than 90 Notices of Violations ("NOVs") against Petitioner for those violations since October 2013. (Pet. Exh. C at ¶ 12.) Rule 402 and section 41700 prohibit the discharge from any source such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public. (Sanchez Decl. ¶ 12, Exh. D.)

Petitioner's CPRA Request

On June 21 and July 6, 2016, Petitioner submitted CPRA requests to Respondent seeking all unredacted odor complaints pertaining to the Landfill from

January 1, 2008 to the present. Petitioner also asked whether Respondent would allow Petitioner to use unredacted complaint records produced in the *Michaely* class action in upcoming administrative hearings related to the Landfill. On July 22, 2016, Respondent replied to Petitioner's CPRA request, stating that the request seeks information from confidential investigations and that Respondent would only produce redacted complaints, except for certain complainants who had made their identities public. Respondent indicated that it would produce names and addresses only for individuals who testified at Order for Abatement hearings for the Landfill; the information submitted on "speaker cards" from April 21 and June 9, 2016 Landfill town hall meetings for individuals that did not withhold authorization to release their contact information; and the names and addresses of the six named plaintiffs in the class action lawsuit. (Pet. Exh. A, B; Bruen Decl. ¶¶ 8-10; Sanchez Decl. ¶¶ 4-6, Exh. A.)

Procedural History

On July 22, 2016, Petitioner filed a verified petition for writ of mandate compelling compliance with the California Public Records Act ("CPRA"). On July 28, 2016, the court granted Petitioner's ex parte application for an expedited briefing schedule. The court set the hearing on the petition for August 18, 2016 at 1:30 pm. The court has received the opening brief, opposition, and reply.

Summary of Applicable Law

Pursuant to the CPRA (Gov. Code § 6250, et seq.), individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) To facilitate the public's access to this information, the CPRA mandates, in part, that:

[E]ach state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available . . ." (Gov. Code § 6253(b).)

The CPRA defines "public records" submit to its provisions as follows:

(e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. (Gov. Code § 6252(e).)

While the CPRA provides express exemptions to its disclosure requirements, these exemptions must be narrowly construed and the agency bears the burden of showing that a specific exemption applies. (*Sacramento County Employees' Retirement System v. Superior Court* (2013) 195 Cal.App.4th 440, 453.)

The CPRA exempts certain categories of documents from disclosure by a public agency. Relevant here, "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law..." are exempted from disclosure. (Gov. Code § 6254(k).)

Government Code section 6255 is a "catch-all" exemption that allows a public agency to withhold records if the agency demonstrates that, on the facts of its case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 68.)

Analysis

Respondent asserts that the unredacted complaint records are exempt from disclosure pursuant to the catch-all exemption of Government Code section 6255, and pursuant to the official information privilege codified in Evidence Code section 1040 and made applicable to the CPRA through section 6254(k). (See Pet. Exh. B; Oppo. 4-11.) Respondent has the initial burden of showing that these exemptions apply.

Catch-All Exemption

Section 6255 "allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure." (*City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1017.) "The burden of proof is on the proponent of nondisclosure, who must demonstrate a 'clear overbalance' on the side of confidentiality." (*Id.* at 1018.) "The purpose of the requesting party in seeking disclosure cannot be considered. [Citations.] This is because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general." (*Ibid.*)

Confidentiality of Complainants' Names and Addresses

Petitioner argues that the requested information is not confidential because persons lodging odor complaints on Respondent's website have no reasonable expectation that their names and addresses will not be disclosed pursuant to the CPRA. Petitioner also argues that persons that did not opt out following the 2014 opt-out

procedure in the *Michaely* class action had no expectation of privacy when they made new complaints after February 2014. (Opening Brief (OB) 8-9; Reply 3, 7.)

Judge Freeman found, on similar evidence, that Respondent obtained complainants' names and addresses in confidence. Judge Freeman also granted the motion to compel pursuant to a protective order that required an opt-out *Belaire* notice before Petitioner could contact any complainant. (Pet. Exh. D.) In its July 6, 2016 CPRA correspondence, Petitioner indicated that it would be willing to consider a similar *Belaire* notice for odor complaints lodged with Respondent after February 2014. (Sanchez Decl. Exh. A.) While Petitioner may be willing to submit to a *Belaire* notice, that procedure is not applicable to documents produced pursuant to a CPRA request. Instead, the court must analyze whether the records are exempt from disclosure under the pertinent test.

In opposition, Nicholas Sanchez, Senior Deputy District Counsel with Respondent, states that it is the district's policy to keep the identifying information of complainants confidential. He notes that this policy is posted on Respondent's website. (Sanchez Decl. ¶ 7, Exh. B.) Sanchez indicates that Respondent receives more than 6,000 complaints regarding air quality violations per year. (Id. ¶ 8.) Respondent consistently asserts the official information privilege when Petitioner has requested complainant names and addresses. (Id. ¶ 14, Exh. E.)

The confidentiality policy on Respondent's website states in pertinent part:

Do I have to identify myself when I call SCAQMD to report an air quality complaint?

SCAQMD staff encourages people to provide their contact information when reporting air quality complaints about businesses, factories and other stationary sources. This information helps us request or verify complaint details with you if needed, and to inform you of the status of complaint investigation activities. *SCAQMD maintains complainant personal information, such as name, address and telephone number, as confidential, to the extent allowed by state and federal law. Such information may only be released under very limited and unique circumstances, if required by the California Public Records Act or if requested under a subpoena or used in court proceedings.* (Sanchez Decl. Exh. B [emphasis added].)

Here, this policy informs complainants that Respondent will maintain their personal information as confidential to the extent permitted by law. The fact that the policy states that the complainants' information "may" be released under "very limited" circumstances if "required" by the CPRA does not detract from the confidential nature of the information. Complainants still have a reasonable expectation of confidentiality; an

absolute expectation of confidentiality is not required for Respondent to invoke section 6255.

The court finds unpersuasive Petitioner's argument that persons that did not respond to the opt-out notice in the *Michaely* case waived any expectation of confidentiality for a separate CPRA request. Judge Freeman granted the motion to compel subject to a protective order that limited use of the complainants' contact information solely for purposes of that litigation. (Bruen Decl. ¶ 5; Pet. Exh. D.) A complainant's decision not to respond to an opt-out notice in a separate class action, where use of the information was limited to that class action, is not persuasive evidence that the complainant did not have a reasonable expectation of confidentiality with respect to disclosures outside of that litigation. Significantly, disclosure of the complainants' personal information in response to a CPRA request would make that information available to the public as a whole, not solely to the defendant in a class action subject to a protective order. (*City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1017 ["[O]nce a public record is disclosed to the requesting party, it must be made available for inspection by the public in general."].)

Based on the foregoing, Respondent has shown a confidentiality interest in the complainants' personal information. The court therefore analyzes the balancing test required by section 6255.

Weighing of Public Interests in Disclosure and Nondisclosure

"When it comes to disclosing a person's identity under CPRA, the public interest which must be weighed is the interest in whether such disclosure 'would contribute significantly to public understanding of government activities' and serve the legislative purpose of 'shed[ding] light on an agency's performance of its statutory duties.' Where disclosure of names and addresses would not serve this purpose, denial of the request for disclosure has been upheld." (*Los Angeles Unified School District v. Sup. Ct.* (2014) 228 Cal.App.4th 222, 241.)

"The motive of the particular requester in seeking public records is irrelevant (§ 6257.5), and the CPRA does not differentiate among those who seek access to them. [Citation.] Moreover, the purpose for which the requested records are to be used is likewise irrelevant.... Thus, in assigning *weight* to the public interest in disclosure, courts must look not only to the nature of the information requested, but also how directly the disclosure of that information contributes to the public's understanding of government." (*Los Angeles Unified School District, supra* at 242.)

The public interest in disclosure of unredacted complaints in this case is similar to that analyzed in *City of San José v. Sup. Ct.* (1999) 74 Cal.App.4th 1008. In *City of San Jose*, the Court of Appeal held that the City did not have to disclose, in response to

a newspaper's CPRA request, the names, addresses, and telephone numbers of persons who complained about municipal airport noise. The court recognized the newspaper's argument that it is in the public interest for the newspaper to be able to contact the complainants individually to confirm that their complaints were properly recorded and reported by City as required by its state noise variance for the airport. (Id. at 1023.) The court nevertheless concluded that the public interest in disclosure of personal information was minimal because the City had made available all information it had concerning airport noise complaints, except for the contact information of the complainants. (Id. at 1025.)

Similarly here, Respondent makes public a monthly complaint report which provides information about odor complaints against the Landfill, including the date, time, address block number, and complaint description. (Sanchez Decl. ¶ 16, Exh. F.) As in *City of San Jose*, the complaint information disclosed by Respondent appears to be extensive and sufficient to allow the public to investigate whether or not Respondent has accurately recorded and reported odor complaints about Landfill.¹ Anyone may directly contact complainants who have made their identities public. Anyone may also identify from Respondent's monthly complaint reports those address blocks from which complaints originate, and may canvass those neighborhoods for complainants who are willing to be interviewed. (See *City of San Jose*, *supra* at 1025.)

Therefore, as in *City of San Jose*, the most salient public interest in disclosure – to ensure Respondent accurately reports complaints – is minimal because Respondent makes public detailed information about odor complaints. Here, also, Respondent has offered to make available the names and addresses, if given, of individuals who testified at the numerous Landfill Abatement Order Petition hearings; the information submitted on speaker cards from the April 21, and June 9, 2016 Landfill town hall meetings hosted by the District for individuals that did not withhold authorization to release their contact information; and the names and address of the six named plaintiffs in the class action lawsuit. (Oppo. p. 4)

Petitioner argues that its due process rights in the POA administrative proceedings weigh for disclosure of the unredacted complaints. The POA alleges, *inter alia*, that Respondent has received more than 3,000 odor complaints from October 2013 through July 2016 regarding the Landfill and that the Landfill is in violation of District Rule 402. (Pet. Exh. C at ¶¶ 8, 12.) Rule 402 prohibits the discharge from any source such quantities of air contaminants or other material which cause injury, detriment,

¹ The parties do not brief the court on the specific statute or regulations that require Respondent to record and report this information, but it appears undisputed that Respondent performs this record keeping as part of its official duties. (See Sanchez Decl. ¶ 16.)

nuisance, or annoyance to any considerable number of persons or to the public. (Sanchez Decl. ¶ 12, Exh. D.) Petitioner contends that there is reason to believe that the 3,000 odor complaints were created by a relatively small number of individuals. (Bruen Decl. ¶¶ 3-5.) Petitioner contends that the POA therefore places at issue the number of complaints received by Respondent from different individuals.

Section 6255 and the interpreting case law do not discuss the due process rights of the defendant in an administrative proceeding in the analysis of the public interest of disclosure. The court however perceives that in addition to ensuring that public agencies accurately report complaints, the public has some interest in ensuring that Respondents process changes to permit conditions according to law. As further discussed below, however, the question of whether Petitioner's particular due process rights are upheld is primarily a matter to be addressed in the administrative proceedings and any post-administrative hearing judicial relief sought.

To the extent Petitioner's due rights are considered in the 6255 balancing test, that interest in disclosure is not strong. As Petitioner concedes, Respondent has the burden of proof and burden of persuasion in the POA proceedings. Petitioner acknowledges it will have the opportunity to cross-examine members of the public who testify against the Landfill. (OB 6-7.) Petitioner has not claimed it has been unable to locate or interview those complainants for which it has already received contact information. Petitioner does not dispute that it can subpoena in the POA proceedings those individuals Petitioner has identified as using a "phone or email tree" to generate odor complaints. (See Health & Safety Code § 40840.) Petitioner could also canvass the areas in which odor complaints are most concentrated. While Petitioner argues that this type of investigation would be hard work (see Reply 6), it does not show that the POA proceedings would be insufficient for Petitioner to address the charges made by Respondent.

In reply, Petitioner asserts that it needs the identities of the complainants because Respondent "rests its entire [POA] case on citizen complaints." (Reply 9.) While this court does not decide or take a position on any legal issues to be raised in the POA case, for purposes of the public interest in disclosure, Petitioner appears to overstate its need for the identities of all complainants in response to a CPRA request separate from the POA proceedings. Respondent submits evidence that it has a Public Nuisance Investigation Policy, which provides a detailed protocol for its staff to follow before issuing NOV's for public nuisance. That process includes an inspection by a District Inspector, who must personally identify that a public odor nuisance exists. (Sanchez Decl. ¶¶ 10-11, Exh. C; see Bruen Decl. ¶¶ 6-7 [discussing odor inspection process].) Thus, it appears Respondent's POA case does not depend solely on the sheer number of odor complaints, as an NOV is not issued without an investigation of the odor complaints. Moreover, while POA alleges that Respondent has received more than 3,000 odor complaints since October 2013, it does not allege that all 3,000

complaints were made by separate individuals. Petitioner also presumably could question Respondents' witnesses regarding whether the complaints were primarily generated by the same citizens. Petitioner fails to show persuasively that it is unable to address the POA charges within the framework of the POA proceedings.

Balanced against this minor public interest in disclosure, the court finds the public interest in keeping confidential the names and addresses of citizens who have made odor complaint strongly overbalances the public interest in disclosure. In *City of San Jose*, the court recognized that "it may be fairly inferred, on the basis of human experience, that it is likely that public disclosure of airport complainants' names, addresses and telephone numbers will have a chilling effect on the number of complaints made." (*City of San Jose, supra* at 1024.) Here, while there is no clear evidence that Petitioner or other interested parties have or would harass complainants, there is a fair inference that disclosure of private contact information pursuant to the CPRA would have a chilling effect on the number of complaints made.

Based on the foregoing, there is a compelling public interest of nondisclosure in this case based on the complainants' reasonable expectation of confidentiality in making odor complaints about Landfill, and because of the chilling effect that CPRA disclosure could have on Respondent's ability to carry out its monitoring and enforcement duties with respect to Landfill. While the public interest in ensuring fair enforcement of the laws at the administrative hearing deserves some weight, Petitioner has not shown this concern will not otherwise be adequately addressed at the administrative level. Accordingly, Respondent has satisfied its burden of showing that there is a clear overbalance on the side of confidentiality for the unredacted odor complaints at issue.

Official Information Privilege and Government Code Section 6254(k)

Government Code section 6254(k) exempts record that are exempted pursuant to federal or state law, including the official information privilege set forth Evidence Code section 1040. Because Respondent has satisfied its burden to establish that the section 6255 exemption applies, it need not establish the exemption under section 6254(k) as well. Nevertheless, the analysis is similar and supports denying the petition.

Evidence Code section 1040 provides in pertinent part:

- (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
- (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

....[11]

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

“The official information privilege in Evidence Code section 1040, subdivision (b)(2), is expressly conditional, not absolute. 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.’” (*Marylander v. Sup. Ct.* (2000) 81 Cal.App.4th 1119, 1126.)

Here, as discussed above, Respondent has shown that the odor complaints were received in confidence. The court must thus consider whether that interest outweighs the necessity for disclosure “in the interests of justice.” Unlike the section 6255 analysis, the balancing under section 1040 would appear to include “consideration of the consequences to the litigant,” at least where the official information privilege is invoked in civil discovery. (See *Marylander v. Sup. Ct.* (2000) 81 Cal.App.4th 1119, 1129.) As discussed above, the court has considered Petitioner’s due process rights. Petitioner has not shown that these due process rights will invariably be violated during the administrative process absent disclosure of the names and addresses sought.

Petitioner has already been given the names and addresses of a number of complainants, and has compiled statistical information on the ratio of complainants to complaints at least through the date of disclosure in the class action. Petitioner has not shown it will be unable to present this information to the hearing board. It is premature and speculative to conclude that the hearing board will rely in any decision on merely the number of complaints made and not on testimony from the agency establishing violations affecting a “considerable number” of persons. Petitioner has not persuasively addressed the subpoena rights and other due process protections it has in the POA proceedings. Petitioner retains post-hearing rights to address any due process violations in connection with the administrative proceeding. Accordingly, Respondent has shown that the interest in preserving the confidentiality of the information outweighs the necessity for disclosure in the interests of justice. Respondents have properly withheld the unredacted odor complaints at issue pursuant to section 6254(k) and the official information privilege.

Conclusion

The petition is denied.