NORA FRIMANN, City Attorney (93249)
ARDELL JOHNSON, Assistant City Attorney (95340)
ELISA TOLENTINO, Senior Deputy City Attorney (245962)
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for CITY OF SAN JOSE
and MAYOR LICCARDO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

SAN JOSE SPOTLIGHT and FIRST AMENDMENT COALITION,

Petitioners,

v.

CITY OF SAN JOSE and MAYOR SAMUEL THEODORE LICCARDO, individually and as an official for the City of San José

Respondents.

Case Number: 22CV394443

Exempt from Filing Fees –Gov. Code § 6103

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE AND DECLARATORY RELIEF

Date: April 13, 2023
Time: 1:30 p.m.
Dept.: 18
Judge: Hon. Thomas E. Kuhnle

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions **Page(s)**

California State Opinions

State Statutes

I. BACKGROUND

Petitioners made a total of five requests under the California Public Records Act ("PRA") (Gov. Code §§ 7920.000, et seq.) between December 2020 and July 2021:

1. San Jose Spotlight's request dated December 12, 2020, seeking emails and text messages between the San Jose City Council and Mayor Liccardo's Office and Bloom Energy during a three-month period. (Verified Writ Petition ["Petition"] ¶30, Ex. V, pp. 6-7.)
2. SJ Spotlight's request dated April 17, 2021, seeking emails and text messages between various City officials regarding Bloom Energy. (*Id*. ¶31, Ex. Y, pp. 7-8.)
3. SJ Spotlight's request dated June 24, 2021, seeking emails and text messages between Mayor Liccardo and his staff and Scott Largent from November 1, 2020, through June 24, 2021. (*Id*., ¶ 13, Ex. B, p. 5.)
4. First Amendment Coalition's request dated July 26, 2021, for emails from Mayor Liccardo's personal email account and communications with the Mayor from November 18, 2020, through July 26, 2021, that discussed City business. (*Id*. ¶24, Ex. L.)
5. SJ Spotlight's request dated July 30, 2021, seeking public records on Mayor Liccardo's personal gmail account from January 1, 2021, through July 30, 2021. (*Id*. ¶23.)

Notably, the two most recent requests seek <u>all</u> public records – without any limitation on subject matter or individuals involved – on Mayor Liccardo's personal email account over an eight-month period. The City produced over 8,900 pages of responsive documents, including text messages. (Declaration of Jim Reed in Support of Opposition to Petition for Writ of Mandate and Declaratory Relief ["Reed Decl."], ¶ 7, Ex. A.) While this action was pending, the City produced an additional 131 pages. In September 2022, the City provided a Log of Documents Withheld, which identified 327 documents withheld under PRA exemptions. Petitioners now seek to compel the production of those documents. On March 14, 2023, Respondents produced 36 of the documents sought by Petitioners. The balance of interests

no longer clearly weighs in favor of withholding these documents, given the passage of time since Respondents' responses to Petitioners' PRA requests.

II. LAW AND ARGUMENT

A. PETITIONERS HAVE NOT ESTABLISHED A VIOLATION OF THE PUBLIC RECORDS ACT

Petitioners claim violations of the PRA based on their allegations that the City and Mayor Liccardo failed to conduct an adequate search for documents responsive to Petitioners' requests and failed to produce responsive documents.

1. Petitioners Are Not Entitled to Documents that Do Not Relate to the Public's Business

The PRA allows only for the disclosure of public records, which are defined as writings "containing information relating to the conduct of the public's business." (Gov. Code § 7920.530(a).) Document number 29 is not a public record, as it relates only to a private personal matter. (Reed Decl. ¶ 9.) To the extent the Court wishes to confirm that the document does not relate to the public's business, Respondents request that the Court conduct an *in camera* review. (Gov Code § 7923.105(a).) Document number 187 also does not relate to the public's business, but has nevertheless been provided to Petitioners.

2. A Reasonable Search Was Conducted to Locate Responsive Documents

A public agency is required to conduct a reasonable search to locate documents responsive to a PRA request. (*ACLU v. Superior Court* (2011) 202 Cal.App.4th 55, 85.) An agency need not "undertake extraordinarily extensive or intrusive searches, however." (*City of San Jose v. Superior Court* ["*City of San Jose*"] (2017) 2 Cal.5th 608, 627, citing *ACLU v. Deukmeijian* (1982) 32 Cal.3d 440, 453.) The PRA does not set forth any specific requirement or particular procedure with respect to a public entity's search for responsive documents. When a PRA request seeks public records held in government employees' personal accounts, the government agency is not required to undertake the search of those personal accounts. Rather than require employees to surrender their personal electronic devices or account

passwords, "[t]he agency may . . . reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material." (*City of San Jose*, *supra*, 2 Cal.5th at 628.)

This is exactly what the City did in this case. Under the City's Public Records Policy and Protocol: "Records include any recorded and retained documents or communications regarding official City business sent or received by a City official or employee via personal devices not owned by the City or connected to a City computer network." (Smith Decl., Ex. A [Public Records Policy and Protocol, 6.1.1, p. 1].) "All City officials and employees have an obligation to make a reasonable effort to locate records responsive to a Public Records Act request. This includes conducting search of work and personal accounts and devices." (Id., p. 5.)

Henry Smith served as the PRA coordinator for the Mayor's Office and applied Policy 6.1.1 when responding to PRA requests. (Declaration of Henry Smith in Support of City's Log of Withheld Documents ["Smith Decl."], at ¶¶ 5-6.) Rhonda Hadnot, Chief Operating Officer, checked the Mayor's personal email for communications responsive to the requests at issue in this case. (Smith Decl. ¶ 6, 8.) Mayor Liccardo checked his cell phone for text messages. (Id.)

Accordingly, the evidence does not support Petitioners' claims that Respondents performed an inadequate search in response to their PRA requests. Petitioners should be denied any relief with respect to those claims.

3. <u>Documents Were Properly Withheld</u>

a. Personnel

Documents related to personnel matters are exempt from disclosure. (Gov. Code. § 7920.210.) Document numbers 1, 52, 118, 173, 268, and 300 discuss personnel matters, including the qualifications of candidates for City employment. As indicated by the City's Log of Documents Withheld, document numbers 1, 52, 118, and 173 are internal communications about personnel matters, in particular, applicants for positions in the Mayor's Office. Document numbers 69-73 are documents related to personnel matters, in

particular, an applicant for City Manager. (Reed Decl. ¶ 10.) Document number 300 relates to the appointment of the Police Chief. Although the subject line of the email suggests that it is a post-decision "announcement" related to the appointment, the communication reflects the mayor's pre-appointment deliberations. (Id. ¶ 11.) Disclosure of these materials would amount to an unwarranted invasion of the personal privacy of the candidates for employment and appointment. Accordingly, they were properly withheld.

b. Closed Session

The Brown Act (Gov. Code §§ 54950, et seq.) generally requires public entities to conduct the public's business openly. However, it allows for a public entity's legislative body (e.g., the City Council) may meet privately in "closed sessions" under limited circumstances. One such circumstance is to discuss salaries, compensation, and benefits of the public entity's employees. (Gov. Code § 54957.6.) As reflected in the City's Log of Documents Withheld, document numbers 99-104 relate to employee compensation matters considered by the City Council in Closed Session. Document numbers 115-117 relate to employee benefits considered by the City Council in Closed Session. They also contain medical information about certain employees, including their injuries and treatment. (Gov. Code § 7920.210.) The disclosure of this information would cause an undue invasion of these employees' privacy. Because document numbers 99-104 and 115-117 reflect matters discussed in closed session, they were properly withheld in response to Petitioners' PRA requests.

c. Attorney-Client Communications

Records protected by the attorney-client privilege are exempt from disclosure under the PRA. (Gov. Code § 7927.705 [PRA exempts from disclosure documents that are exempted from disclosure pursuant to federal or state law, including provisions of the Evidence Code].) Evidence Code sections 950, *et seq*., codify the attorney-client privilege. This privilege is "'absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732, citation omitted.) Document numbers 53, 61, 74, 76, 78, 82-83,

126-130, 135, 150-151, 169, 259, and 293 consist of privileged attorney-client communications. (Reed Decl. ¶ 12; Declaration of Vera Todorov in Support of Respondents' Opposition to Writ Petition ["Todorov Decl."] ¶ 3; see also Log of Documents Withheld.) These communications are absolutely privileged.

Records containing attorney work product are also exempt from disclosure under the PRA. (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 64.) "The attorney work product doctrine absolutely protects writings that contain an 'attorney's impressions, conclusions, opinions, or legal research or theories.'" (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 992., citing Code Civ. Proc. § 2018.030(a).) Document 83 consists of attorney work product that was transmitted to Mayor Liccardo and his staff, together with legal advice provided by Senior Deputy City Attorney. (Todorov Decl. ¶ 4.)

d. Pending Litigation

The PRA exempts from disclosure "records pertaining to pending litigation to which the public agency is a party, until the pending litigation has been finally adjudicated or otherwise settled." (Gov. Code § 7927.200(a).) When determining whether the exemption applies to a particular document, courts consider the primary purpose of the document. (*Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1421 ["The construction we give to 'pending litigation' … focuses on the purpose of the documents…"].) For example, billing records are not considered subject to this exemption, as they are not created for use in litigation but for normal recordkeeping purposes. (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67 [billing records not subject to exemption because they were not created for use in litigation but for normal record keeping purposes].) In particular, courts look for a document that a public entity "reasonably has an interest in keeping to itself until the litigation is finalized." (*Fairley*, *supra*, 66 Cal.App.4th at 1421-22.)

The purpose of the Section 7927.200 exemption is to protect a public entity's interests during the course of litigation. For example, in *Board of Trustees of California State University v. Superior Court* 2005) 132 Cal.App.4th 889, the Court of Appeal held that a media outlet was not entitled to communications between the Board's attorneys and opposing counsel

because disclosure "would chill the parties' ability in many cases to settle the action before trial. Such a result runs contrary to the strong public policy of this state favoring settlement of actions." (*Id*. at 899-900.) Thus, courts have held that the Section 7927.200 exemption applies to documents that the parties to litigation did not intend to be revealed outside the litigation and to documents that if produced during the course of litigation, "could hamper the parties' efforts to effectively represent their parties' interests." (*Id*.)

In the present case, document numbers 6-7, 13-16, 37, 44-45, 50-51, 56-57, 75, 122, 124, and 251 were withheld because they pertain to five lawsuits against the City, all of which remain pending. The documents were created or produced in anticipation of, or as a result of, those lawsuits. (Reed Decl. ¶¶ 13-18.) They were not intended to be disclosed outside of the individuals to whom they were exchanged. (Id. ¶ 13.) Their disclosure would undermine the City's ability to defend itself in pending litigation or compromise the City's position. (See, *id*.) Accordingly, these documents were properly withheld under Section 7927.200.

e. Deliberative Process and Drafts

The PRA includes an explicit exemption for drafts, in particular, "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." (Gov. Code § 7927.500.) "Predecisional" documents are protected under this privilege, such as draft documents: "A draft is, by definition, a preliminary version of a piece of writing subject to feedback and change." (*United States Fish & Wildlife Service v. Sierra Club, Inc*., *supra*, 141 S.Ct. at 786.)

Courts have also recognized that documents reflecting officials' deliberative process are properly withheld under the "public interest" exemption in Section 7922.000. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.) The U.S. Supreme Court, California Supreme Court, and other courts have discussed the significant practical public policy reasons for exempting items protected by the deliberative process privilege from disclosure. Courts recognize the reality that the development good public policy is promoted when ideas and approaches – including bad ones – can be freely shared confidentially. They

consequently exempt documents protected by the deliberative process privilege from disclosure.

In *Times Mirror Co. v. Superior Court* (1991) 63 Cal.3d 1325, the Court noted that "protecting the predecisional deliberative process gives the chief executive 'the freedom 'to think out loud,' which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion." (*Id*. at 1341.) The California Supreme Court explained:

> The key question in every case is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." [citation] Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is "actually...related to the process by which policies are formulated" [citation] or "inextricably intertwined" with "policy-making processes."

(*Id.* at 1342, citations omitted.) Indeed:

> Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent.

(*Id*. at 1343.) It continued: "The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it." (*Id*. at 1345.)

The U.S. Supreme Court recently affirmed that the deliberative process privilege "shields from disclosure 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[1] (*United States Fish & Wildlife Service v. Sierra Club, Inc*. (2021) 141

[1] Because the PRA is modeled on the federal Freedom of Information Act, "[f]ederal statutes and cases implementing or interpreting the federal Freedom of Information Act (FOIA) are instructive because the California Act is modeled on the FOIA." (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1076.)

S.Ct. 777, 785.) It "is rooted in 'the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.'" (*Id*.)

i. North San Jose

Document numbers 26, 298, and 303 reveal Mayor Liccardo's thought process about development in North San Jose, which has been the center of an ongoing dispute with other agencies in the area, including the City of Santa Clara. (Reed Decl. ¶ 22.) After years of disputes and negotiations, a settlement was recently reached in December 2022. Disclosure of the mayor's deliberative process during the negotiation of the settlement would divulge the City's position on the negotiated issues and undermine the settlement. (Id.)

ii. Land Use Decisions

As noted by the Log of Documents Withheld, document numbers 59, 62-64, 80-81, 84-85, 142, 170, 276, 311-323, and 326 relate to the rezoning of the San Jose Flea Market site, which was considered by the City Council at City Council meetings on June 22 and June 29, 2021. Document numbers 146-147, 224, 228-229, 233-236, 239-240 are correspondence and drafts that divulge the mayor's deliberative process with respect to a land use project that was pending Council approval at the time, namely the Downtown West (Google) project. (Reed Decl. ¶¶ 23-25.) Prior to project approval, the City engaged in significant public outreach and extended negotiations with stakeholders. Those efforts, and the City's decision to approve the project, would be undermined if the mayor's deliberative process was divulged. (See, id. ¶ 23.) Disclosure of these documents would discourage an official from fully and candidly considering land use matters that are of significant public concern.

iii. Budget

Document numbers 60, 79, 137-139, 154, 193, 194, and 212 are discussions and drafts related to budget proposals, which were created prior to the adoption of the City's budget or fiscal year 2021-2022. The budget process requires significant negotiating and

compromising. Disclosing the mayor's thought process relative to the budget setting process would undermine the City Council's ultimate decisions about funding and could potentially result in discontent and second-guessing of the budget. The public interest in withholding these documents clearly outweighs the public interest in their disclosure.

iv. Policy Considerations

Document numbers 65, 178-182, 279, and 280 consist of drafts and correspondence that divulge the mayor's thought process with respect to energy-related issues, in particular, clean energy, climate change, and a potential microgrid policy. (Reed Decl. ¶¶ 26-27.) As indicated on the City's Log of Documents Withheld, document numbers 17, 36, 165-166, and 191-192 are drafts and documents that reveal the mayor's honest and thorough consideration of potential policies that the City might pursue to address homelessness. (See id. ¶¶ 20, 28.) Document numbers 243-244 and 295-296 are draft letters related to an art display that was removed. (Id. ¶ 29.) Document number 301 is a draft statement about policing that reveals Mayor Liccardo's consideration of public safety policies. (Id. ¶ 30.) Disclosure of documents such as these would undermine public decisionmakers' ability to vet ideas and consider policies in a thoughtful and complete manner. It would confuse the public to disclose a draft that may contain information that differs in any regard from what is ultimately made known to the public. These documents were appropriately withheld.

v. Big City Mayors

Documents withheld from production include correspondence and draft documents exchanged between Mayor Liccardo and mayors from the 13 largest cities in the state, who comprise the California Big City Mayors Coalition ("BCM"). The coalition exists to enable mayors from across the state to collaborate on policy decisions and matters of statewide concern. (Reed Decl. ¶ 31.) They often collaborate, with the goal of reaching a consensus on difficult and sensitive political issues. Integral to the BCM's mission is the ability to exchange views candidly and "think out loud." (Id. ¶ 32.) The coalition's purpose is to build consensus and effectively and efficiently advocate as a group to effectuate policy that best serves the people of the state. Document numbers 33-35, 46-49, 87-98, 155-156, 200-20, 219-220, and

294 divulge not only Mayor Liccardo's deliberative process, but also those of other mayors. Disclosure of these documents would undermine the very purpose of the BCM, which is to form a consensus on issues of statewide concern and provide input to state and federal legislators.

The same public interest analysis applies to the BCM's draft work product. Notably, the draft exemption applies with respect to "**interagency** or intra-agency memoranda." (Gov. Code § 7927.500, emphasis added.) Because of the public interest in collaboration among elected officials throughout the state, the public interest in withholding the documents clearly outweighs the interest in their disclosure.

B. THE COURT SHOULD DENY PETITIONERS INJUNCTIVE AND DECLARATORY RELIEF

Petitioners ask the Court for the following declaratory and injunctive relief:

- A declaration that Respondents failed to conduct an adequate search and violated the PRA and San Jose Municipal Code Chapter 12.21 (Petition, Prayer for Relief, ¶8);
- A declaration that records sought are public records as defined by the PRA (id., at ¶6);
- An order prohibiting the City from allowing employees to use only non-government accounts (id., at ¶9);
- A declaration that if responsive records were deleted, Respondents violated the PRA and Government Code section 34090 (id., at ¶ 10); and
- An order prohibiting Respondents from deleting records less than two years old (id., at ¶10).

As described above, Petitioners are not entitled to relief with respect to their claims that Respondents failed to conduct a reasonable search and violated the PRA. (See, *supra*, II(A)(2).) Additionally, Petitioners have not made any argument related to Chapter 12.21 of the San Jose Municipal Code, nor have they explained why they are entitled to any relief under the Municipal Code. Petitioners should be denied the declaration and order they request in their eighth prayer for relief.

1. Declaratory Relief is Not Available Because There is No Actual and Present Controversy

In order for a cause of action for declaratory relief to lie, an actual and present controversy must exist. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582 ["To qualify for declaratory relief, [a party] would have to demonstrate . . . an actual controversy involving justiciable questions relating to [the party's] rights or obligations. . ."].)

Petitioners' sixth prayer for relief seeks a declaration that the records at issue are public records. (Petition, Prayer for Relief, ¶ 6.) With the exception of document numbers 29 and 187, Respondents agree that the records at issue in this action are public records as defined by the PRA. (See, *supra*, §II(A)(1).) There is no actual controversy with respect to these documents.

Petitioners do not make any allegation or provide any evidence that any current City employee has either improperly deleted public records or used exclusively non-City accounts to conduct public business. They make allegations only about Mayor Liccardo, who is no longer a City official. Thus, no actual controversy exists, and declaratory relief is not available.

2. Injunctive Relief and Declaratory Relief Cannot Redress Past Alleged Misconduct

As a matter of law, injunctive relief is not available to address alleged past wrongs. Courts will decline to impose an injunction where the party seeks relief for past conduct. (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332 [". . . injunctive relief lies only to prevent threatened injury and has no application to wrongs that have been completed."].) For example, in *Cisneros v. U.D. Registry, Inc*. (1995) 39 Cal.App.4th 548, a company ("UDR") had reported possible unlawful detainer actions. Plaintiffs sought an injunction preventing UDR from reporting these possible actions ("possibles"). The trial court refused to grant injunctive relief because UDR had discontinued its practice of reporting possibles. (*Id*. at 574.) The Court of Appeal affirmed. It explained: "'A change in circumstances, rendering injunctive relief moot or unnecessary, justified the denial of an injunction.'" (*Id*., citation omitted.) It continued: "'[a]n injunction should not be granted as punishment for past acts. . .

.'" (*Id*., citation omitted.) Further, "[i]njunctive relief can be denied where the defendant voluntarily discontinues the wrongful conduct." (*Id*., cation omitted.)

Similarly, it is well established that declaratory relief is only available to address current wrongs, or those that are threatened to occur in the immediate future, and not to address past wrongs. In *SJJC Aviation Services v. City of San Jose* (2017) 12 Cal.App.5th 1043, the Court of Appeal affirmed the trial court ruling sustaining demurrer to a declaratory relief cause of action. It did so on the ground that the plaintiff was "in reality complaining of past acts" and declaratory relief is intended to work prospectively. (*Id*., at 1062.) (Accord *County of San Diego v. State* (2008) 164 Cal.App.4th 580, 606 ["'declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs'"].)

Thus, both injunctive relief and declaratory relief are forward looking, and neither is available to redress past wrongs. The only City official alleged to have potentially deleted records in violation of Government Code section 34090(d) is Mayor Liccardo. And the only City official alleged to have used a private account without copying a government account, is Mayor Liccardo. But Mayor Liccardo's term as mayor has lapsed and he is no longer a City official or employee. There is no allegation, much less any evidence, that any current City official has improperly deleted a public record.

Nor is there any allegation that any particular City official uses or will use a personal account to conduct City business, or that such use has resulted in a violation of the PRA. Indeed, Petitioners argue that the City's current mayor and officials have committed to using or copying a government account when communicating about public business. (Opening Brief, at 19:1-7.) According to Petitioners, the court order they seek "would simply require San Jose officials to do something they have committed to do." (Opening Brief, at 19:6-7.) Thus, they apparently concede that the conduct about which they complain is no longer taking place and that there is no imminent threat of a future violation. Petitioners' requests for declaratory and injunctive relief aims to punish past conduct, rather than avoid any potential future harm. The Court should deny Petitioners' requests.

/ / /

3. Court Should Abstain from Setting City Policy

Petitioners ask the Court to prohibit the City from allowing its employees to use non-government accounts (Petition, Prayer for Relief, ¶ 9), or to compel the City to implement a policy requiring its employees who use a private phone or account to copy their government account when communicating about public business (Opening Brief, at 18:4-7). Courts abstain from interfering in matters of local policy. It is well established that courts do not interfere to require legislation. "The commanding of specific legislative action is beyond the power of the courts for it would violate the principle of division of powers of the three governmental departments." (*City Council of Santa Barbara v. Superior Court* (1960) 179 Cal.App.3d 389, 394-95 [writ relief not available to compel city to raise garbage rates because determination of rates was a legislative function, set by the city in a local ordinance].) Nor do courts interfere in policy determinations that are best left to administrative bodies. (See, e.g., *Shamisan v. Dept of Conservation* (2006) 136 Cal.App.4th 621, 642 [plaintiff who complained that defendants failed to provide convenient and economical beverage container redemption opportunities, was not entitled to equitable relief because relief sought "would interfere with the department's administration of [state law] and regulation of beverage container recycling…"].)

In *City of San Jose*, the California Supreme Court made it clear that any policies, like the one Petitioners urge, would be determined and implemented by agencies. While the Court considered federal policies requiring federal employees to use or copy their official accounts when conducting public business, it expressly declined to impose any such requirement in California. Instead, the Supreme Court left it to local agencies to determine appropriate policies to "reduce the likelihood of public records being held in employees' public accounts." (*City of San Jose*, *supra*, 2 Cal.5th at 628.) It acknowledged that "[a]gencies are in the best position to implement policies that fulfill their obligations under public records laws yet also preserve the privacy rights of their employees." (*Id*., citing *Nissen v. Pierce County* (Wash. 2015) 357 P.3d 45, 58, internal quotations omitted.) As the Supreme Court demonstrated, implementation of policies giving public employees direction with respect to public records is a

matter for their employers, not the judiciary, to determine. The Court here should likewise decline to require the City to implement the policies requested by Petitioners.

4. Petitioners Have Not Established a Violation of Government Code Section 34090

Petitioners request a finding that if Respondents have deleted records responsive to their PRA requests, then they violated the PRA and Government Code section 34090(d). Petitioners also request an order prohibiting Respondents from deleting records less than two years old. (Petition, Prayer for Relief ¶ 10.)

As an initial matter, not all records need to be maintained for a two-year period. There are statutory provisions that allow for a shorter retention period for certain records. (See, e.g., Gov Code §§ 34090.6 [destruction of routine video recordings after 100 days].)

Further, it appears that Petitioners confuse the retention requirements of Government Code 34090 with the disclosure requirements set forth in the PRA. There is no statutory definition for the term "records" as it is used in Government Code section 34090 et seq. The Attorney General has opined that the definition of "records" under the Government Code is "a thing which constitutes **an objective lasting indication** of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept; or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference." (64 Ops.Cal.Atty.Gen. 317, 324 (1981), emphasis added.) Thus, "records" under the retention requirements of Section 34090 are limited to materials that either memorialize, with some degree of permanence, a particular event or information. They do not include transitory communications or drafts that neither assist a public official in the performance of their duties, nor preserve any information for future reference.

"Public records" under the PRA are defined more broadly as "includ[ing] 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." (Gov. Code § 7920.530(a).) Thus, "public records" under the PRA potentially include materials that are not a lasting memorialization of any information or event. This could include fleeting thoughts that, in the past, would likely have been exchanged during a live conversation, such as a meeting or phone conversation. It could also capture drafts and working documents that are useful only until a final product is completed.

While Petitioners suggest that Mayor Liccardo may have deleted text messages, they provide no admissible evidence in support of that allegation. Even if the Court were to consider the evidence offered by Petitioners, it is unclear whether any text message consisted of the kind of lasting records subject to the retention requirements of Section 34090. Because Petitioners have not established that any violation of Section 34090 occurred, the relief they request is not proper.

Further, requiring the City to retain, for a two-year period, all "public records" would be inconsistent with the law. Section 34090 sets forth retention requirements for "records," which are defined more narrowly than "public records" under the PRA. The PRA provides no retention requirements for "public records." Broadening Section 34090's retention requirements to capture not only **an "objective lasting indication[s]** of a writing, event or other information" but also any writing "relating to the conduct of the public's business" is not supported by Section 34090 or by the PRA.

III. CONCLUSION

The City respectfully requests that the Court deny the Petition in its entirety.

Respectfully submitted,

Dated: March 14, 2023

NORA FRIMANN, City Attorney

By: */s/ Elisa T. Tolentino*
ELISA T. TOLENTINO
Chief Deputy City Attorney

Attorneys for Respondents

PROOF OF SERVICE

CASE NAME:

CASE NO.: 22CV394443

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On March 14, 2023, I caused to be served the within:

CITY OF SAN JOSE'S OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF MANDATE AND DECLARATORY RELIEF UNDER THE PUBLIC RECORDS ACT

☒ by ELECTRONIC SERVICE listed below, transmitted using the One Legal Process Service electronic filing system. The document(s) listed above was/were electronically served to the electronic address(s) below:

Addressed as follows:

Karl Olson
Aaron Field
Cannata O'Toole Fickes & Olson LLP
100 Pine Street, Suite 350
San Francisco, CA 94111
Telephone: 415.409.8900
Facsimile: 415.409.8904
Email: kolson@cofolaw.com
afield@cofolaw.com
kgelera@cofolaw.com

Attorneys for Petitioner San Jose Spotlight

David E. Snyder
Monica N. Price
First Amendment Coalition
534 4th Street, Suite B
San Rafael, CA 94901-3334
Telephone: 415.460.5060
Email: dsnyder@firstamendmentcoalition.org
mprice@firstamendmentcoalition.org

Attorneys for Petitioner First Amendment Coalition

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 14, 2023, at San Jose, California.

V. Burrow