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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSÉ SPOTLIGHT and FIRST AMENDMENT COALITION,

Petitioners,

v.

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

Respondents.

Case No. 22CV394443

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND DECLARATORY AND INJUNCTIVE RELIEF

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

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I. INTRODUCTION.

This action challenges the City's violations of the California Public Records Act ("PRA") by refusing to disclose communications of former Mayor Sam Liccardo. The litigation has already caused the City to disclose two significant tranches of records, one in September 2022 and one in March 2023. Nonetheless, the City continues to violate the PRA. It has never searched for missing records specifically identified by Petitioners, and it continues to withhold numerous records without justification. The City bears the burden to prove requested records are exempt from disclosure, and the Court must resolve any doubt in favor of disclosure. Govt. Code § 7922.000; *Essick v. County of Sonoma*, 81 Cal. App. 5th 941, 950 (2022). The Court should order immediate disclosure of every record for which the City has failed to carry its burden of proof. Govt. Code § 7923.110(a). In camera review cannot compensate for the City's failure to carry its burden. *American Civil Liberties Union of Northern California v. Superior Court*, 202 Cal. App. 4th 55, 87 (2011). However, if the Court does not order immediate disclosure of all disputed records, Petitioners request in camera review in the alternative. Govt. Code § 7923.105(a). In addition, the City has not demonstrated why it should not be subject to declaratory and injunctive relief requiring it to use or copy official devices on all communications about public business and to retain records for two years as required by Government Code section 34090(d) and the City's own records policy. The Court should therefore grant the Petition.

II. THE CITY UNLAWFULLY FAILED TO SEARCH FOR SPECIFIC PUBLIC RECORDS IDENTIFIED BY PETITIONERS BASED ON THE CITY'S OWN DISCLOSURES.

Under the PRA, "if an agency has reason to know that certain places may contain responsive documents, it is obligated" to search for them "barring an undue burden." *Community Youth Athletic Center v. City of National City*, 220 Cal. App. 4th 1385, 1425-1426 (2013). Petitioners repeatedly notified the City of specific missing records that could be found with minimal effort, yet the City never accounted for them.

The City undertook *no* search, much less a reasonable one, for six text messages to or from Liccardo that were identified by Petitioners based on records produced by the City itself. Verified Petition for Writ of Mandate ¶ 26 & Ex. N-S; 1/17/23 Price Decl. ¶ 5 & Ex. C-H. The City's

current evidence only discusses searching for emails, not text messages. Reed Decl. ¶ 4. The City previously stated, "If a PRA request involves communications of the Mayor … [t]he Mayor checks his cell phone for text messages." 9/26/22 Smith Decl. ¶ 6. That evidence speaks only to the City's procedure in general. It does not prove Liccardo in fact checked his cell phone. Only Liccardo can do so, because only he has personal knowledge of his own actions, Evid. Code § 702, and there is no declaration from Liccardo.

The City admitted other persons cannot testify about searching for Liccardo's text messages. 10/28/22 City's Opp. to Motion to Compel at 8:6-7 (naming staff members who could "address the search procedures used in response to the PRA requests at issue, other than as to the Mayor's text messages"). The City never produced testimony from Liccardo himself, the one person capable of stating whether he in fact checked his cell phone for text messages. The Court should therefore conclude the missing messages were unlawfully withheld.

III. THE CITY IS UNLAWFULLY WITHHOLDING A PUBLIC RECORD ABOUT LICCARDO'S APOLOGY FOR VIOLATING PUBLIC HEALTH RULES.

The City is unlawfully withholding Document 29, an email dated December 1, 2020, regarding "Draft statement Thanksgivingate." The City could not be more wrong that it "relates only to a private personal matter." Respondents' Opposition to Petition for Writ of Mandate ("Opp.") at 2:13-14. Document 29 is a classic public record because it is a communication about public business.

On December 1, 2020, Liccardo admitted he attended a Thanksgiving dinner that violated public health rules designed to reduce the spread of COVID-19. He issued a public statement on the City's website about the incident:

> I apologize for my decision to gather contrary to state rules, by attending this Thanksgiving meal with my family. I understand my obligation as a public official to provide exemplary compliance with the public health orders, and certainly not to ignore them. I commit to do better.

3/29/23 Price Decl. ¶ 5 & Ex. D. The incident was covered in the press. *Id.* ¶¶ 2-4 & Ex. A-C.

Document 29 is a public record because it relates to Liccardo's violation of public health rules and thus contains "information relating to the conduct of the public's business." Govt. Code

§ 7920.530. Nothing is more the public's business than whether the mayor of a major city complied with public health rules during a raging pandemic and how he addressed his failure to do so. Because Liccardo spoke as a public official about a matter of public concern, the incident was not a private matter. If it were truly a private matter, Liccardo had no business involving city staff or posting the statement on the City's website.

The term "public record" must be construed broadly. Cal. Const., Art. I, § 3(b)(2); *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 617 (2017). Broadly construed, it includes an email about a mayor's public statement as a public official discussing and apologizing for his failure to follow the law. The relevant factors such as "the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment" all demonstrate that the email is a public record. *City of San Jose*, 2 Cal. 5th at 618. Any "discomfort or embarrassment" to Liccardo or anyone else that might result from disclosure is not a justification for withholding it. *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 331 (2007) ("*Local 21*").

Although the City's "privilege log" listed document 29 as "[d]eliberative process" or "draft," the City forfeited that argument by failing to "support it with reasoned argument and citations to authority." *Holden v. City of San Diego*, 43 Cal. App. 5th 404, 418 (2019). In any event, documents designed to explain or apologize for an action after the fact cannot qualify as "deliberative process" or "preliminary drafts." Petitioners' Opening Br. at 11-12.

IV. THE CITY IS UNLAWFULLY ASSERTING "DRAFT" AND "DELIBERATIVE PROCESS" EXEMPTIONS TO WITHHOLD PUBLIC RECORDS.

A. No Exemption Protects External Correspondence to a Mayor.

The City is unlawfully withholding documents 279 and 280, correspondence from Carl Guardino to Liccardo. The correspondence is not a "draft," Govt. Code § 7927.500, because it is the final version and no longer "subject to feedback and change."[1] Opp. at 6:20. In any event, the

[1] The privilege log asserts only "deliberative process" for the correspondence, as does the City's declaration. Reed Decl. ¶ 27. The City's brief lumps the correspondence with "drafts." Opp. at 9:6.

"draft" and "deliberative process" exemptions only protect internal agency communications. *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1342 (1991) (deliberative process rule protects "candid discussion within the agency"); *Citizens for a Better Environment v. Department of Food & Agriculture*, 171 Cal. App. 3d 704, 713 (1985) (drafts exemption "foster[s] robust discussion within the agency"). They cannot apply to correspondence from outsiders.

As the party with the burden to prove requested records are exempt from disclosure, the City bears the burden to prove each fact essential to its asserted exemptions. Evid. Code §§ 500, 550; *Sargent Fletcher, Inc. v. Able Corp*., 110 Cal. App. 4th 1658, 1667 (2003). The City submitted no declaration that Guardino was a city official or employee and did not prove that essential fact. Indeed, the City's own records show Guardino was a lobbyist with Bloom Energy. 1/17/23 Giwargis Decl. Ex. I; 3/29/23 Price Decl. Ex. E (lobbying disclosure report). The City also disclosed emails or letters from Guardino as "Executive Vice President" or "Executive Vice President, Global Government Affairs & Policy" for Bloom Energy. 3/29/23 Price Decl. Ex. F. The City did not object to the lobbying disclosure report as an exhibit to the Giwargis declaration, and the Court may take judicial notice of Guardino's status as a lobbyist employed by Bloom Energy. Evid. Code § 452(h); *Belen v. Ryan Seacrest Productions, LLC*, 65 Cal. App. 5th 1145, 1160 n.2 (2021) (taking judicial notice that individual was company executive based on statement filed with public agency). A lobbyist's correspondence to Liccardo cannot be exempt.

The draft and deliberative process exemptions are patterned after Exemption 5 of the Freedom of Information Act, and the relevant federal decisions are instructive. *Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal. 4th 1065, 1076 (2006); *Times Mirror*, 53 Cal. 3d at 1340–41; *Cal. First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 170 (1998); *Citizens for a Better Environment*, 171 Cal. App. 3d at 712. For a document to qualify for Exemption 5, "its source must be a Government agency," *Dept. of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001), or "a consultant … hired by the agency to perform work in a capacity similar to that of an employee of the agency." *Rojas v. FAA*, 989 F.3d 666, 674-75 (9th Cir. 2021). The Guardino correspondence fails that condition, because Guardino was

not a City employee or consultant.[2] Instead, he was speaking in his own interest or that of his employer. Therefore, his correspondence cannot qualify as the City's internal draft or deliberative process. *See Klamath Water Users*, 532 U.S. at 12 (holding communications from tribes acting in their own interests could not qualify for Exemption 5).

The exemptions cannot protect "any document the Government would find it valuable to keep confidential" regardless of source. *Id.* Exemptions must be narrowly construed, Cal. Const., Art. I, § 3(b)(2); *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 166 (2013), and construed narrowly, the exemptions cannot cover the Guardino correspondence. To hold otherwise would endanger the PRA by allowing an agency to claim any correspondence is "deliberative process."

In addition, the Legislature chose to protect "correspondence of and to the Governor" but not correspondence to mayors. Govt. Code § 7928.000(a). The "Legislature knew how to create an exception" from disclosure "if it wished to do so," but it did not in this case. *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 11 Cal. 4th 342, 349 (1995). The choice was intentional, and the Court may not create an exemption the Legislature did not adopt. *Cornette v. Department of Transportation*, 26 Cal. 4th 63, 73-74 (2001); *cf. Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 298 (2007) ("Had the Legislature intended to prevent the disclosure of officers' identities as such, an obvious solution would have been to list 'name'" in the relevant statute.).

Even if the Guardino correspondence could qualify for an exemption, the conclusory assertion that its disclosure would "divulge Mayor Liccardo's deliberative process," Reed Decl. ¶ 27, is insufficient to justify withholding it. *Golden Door Properties, LLC v. Superior Court*, 53 Cal. App. 5th 733, 790–92 (2020). Also, the City cannot withhold the correspondence on the mere allegation that it contains "proprietary information," disclosure of which "would discourage other entities from seeking to collaborate with the City." Reed Decl. ¶ 27. The City forfeited any such argument by failing to brief it. *Holden*, 43 Cal. App. 5th at 418. In any event, the conclusory allegation of "proprietary information" cannot justify an exemption. Anyone seeking to

[2] The Court need not decide whether a consultant's communications are exempt under California law, because even assuming they are, Guardino is not a consultant for the City.

"collaborate" with the City is on notice of its disclosure obligations. The PRA does not allow an agency to withhold records on the mere allegation of a "chilling effect on obtaining information," because the public's interest is in "participating in local government," not "serving the privacy interests" of businesses seeking to tap the public fisc. *San Gabriel Tribune v. Superior Cour*t, 143 Cal. App. 3d 762, 777 (1983).

B. The City Has Not Carried Its Burden to Prove the Draft or Deliberative Process Exemptions Apply to Other Records.

The City has not justified its assertion of the draft or deliberative process exemptions beyond the Guardino correspondence, either. Initially, the City has not shown the alleged "drafts" are "not retained by a public agency in the ordinary course of business." Govt. Code § 7927.500. Notwithstanding its conclusory allegation to that effect, Reed Decl. ¶ 21, the City did not prove such records are in fact routinely discarded as a matter of both "policy and custom." *Citizens for a Better Environment*, 171 Cal. App. 3d at 714. The number of alleged drafts suggests "preliminary materials are not customarily discarded or have not in fact been discarded as is customary." *Id.*

In any event, for alleged drafts and deliberative process, the City must prove the public interest in withholding each record "clearly outweighs" the public interest in disclosing it. *Times Mirror*, 53 Cal. 3d at 1338; *Citizens for a Better Environment*, 171 Cal. App. 3d at 711-12. The City cannot do so by asserting disclosure would "mislead" or "confuse the public" or might "undermine the final decision" or staff morale or "result in a mistrust of public officials." Reed Decl. ¶¶ 20-21, 29. Nor does the City have an absolute right to control "the manner in which information is communicated to the public and to, or on behalf of, their constituents." Reed Decl. ¶ 21. It may write its own press releases, but it cannot defeat disclosure mandated by the PRA.

The City's assertions betray a fundamental misunderstanding of open government principles. The people have a constitutional "right of access to information concerning the conduct of the people's business," Cal. Const. Art. I, § 3(b)(1), and "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Govt. Code § 7921.000. The government may not "decide what is good for the people to know and what is not good for them to know." Govt. Code § 54950. It is precisely to hold

"government accountable for its actions" that the PRA guarantees disclosure regardless of any "discomfort or embarrassment" that might result. *Local 21*, 42 Cal. 4th at 328, 331.

As Petitioners have explained, Opening Brief at 11-12, the City is unlawfully withholding records that concern the making of public statements, not the making of decisions:

- 8: "Draft press statement."
- 65: "Discussion re op-ed."
- 165-166: "Draft op ed re homeless funding."
- 179: "Op-ed on electricity rates."
- 180: "Edits to op-ed re electricity rates & PCIA."
- 181: "Op-ed on PCIA & SB 612."
- 182: "Draft op-ed re electricity rates & PCIA."
- 224: "Draft quote re Sharks."
- 228: "Revised talking points."
- 229: "Sharks talking points."
- 233: "Revised talking points."
- 234: "Edits to Sharks talking points."
- 235: "Talking points."
- 236: "Sharks talking points."
- 294: "Homeless funding op-ed."
- 298: "North San Jose talking points."
- 324-325: "Draft op ed re Resilience Corps."

The City cannot depend on boilerplate claims that disclosure "would discourage candid discussion," impede "thinking out loud," or "curtail public officials' ability to freely consider policy ideas" or "thoroughly and carefully consider policies." Reed Decl. ¶¶ 20, 25, 28, 30. These "broad conclusory claims" represent no more than "a policy statement about why the privilege in general is necessary," which "could apply to almost any decisionmaking process" and is thus insufficient to justify withholding specific public records. *Golden Door*, 53 Cal. App. 5th at 791.

Finally, even if the City proved any of the withheld records qualify as drafts or deliberative process, it does not address whether the records contain "severable factual information" that can be disclosed with any "recommendatory content" redacted. *Citizens for a Better Environment*, 171 Cal. App. 3d at 717. If there is any "reasonably segregable" portion of a public record that is not exempt, agencies must "use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions." *Los Angeles County Bd. of Supervisors v. Superior Court*, 2 Cal. 5th 282, 292 (2016). The City has not carried its burden to prove there are no portions of the records that can be disclosed.

V. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT COVER COMMUNICATIONS INVOLVING NO LAWYERS OR LEGAL ADVICE.

Petitioners dispute the assertion of attorney-client privilege for the following records:

- 76, 78: Email and attachment from Kelly Kline to Liccardo concerning "Draft memo re: additional vendor negotiation."
- 129: Email from Paul Pereira to Liccardo concerning "Straw purchase ordinance."
- 130: Email from Liccardo to Toni Taber, copied to Mackenzie Messing, Nora Frimann, Leland Wilcox, and Dave Sykes, concerning "Procedures for items on Rules agenda."

Except for Ms. Frimann, the City Attorney, these persons are not active members of the California Bar, 3/29/23 Price Decl. ¶ 7 & Ex. G, a fact of which the Court may take judicial notice. Evid. Code § 452(h); *In re White*, 121 Cal. App. 4th 1453, 1469 n.14 (2004).

The City has not proven the records are "communication[s] between client and lawyer" subject to attorney-client privilege. Evid. Code §§ 950, 954. The City offers no proof they "contain[] a discussion of legal advice or strategy of counsel." *Zurich American Ins. Co. v. Superior Court*, 155 Cal. App. 4th 1485, 1503 (2007). The privilege does not apply to "business advice" about negotiations. *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 735 (2009). The log does not claim attorney-client privilege for document 129, which is not covered by the City's assertion of privilege. Reed Decl. ¶ 12. The mere act of copying an attorney on document 130 does not make it privileged. *Zurich American*, 155 Cal. App. 4th at 1504.

VI. THE PENDING LITIGATION EXEMPTION PROTECTS ONLY RECORDS SPECIFICALLY PREPARED FOR USE IN LITIGATION.

The "pending litigation" exemption, Govt. Code § 7927.200(a), applies "only if the document *was specifically prepared for use in litigation*" as its "dominant purpose." *County of Los Angeles v. Superior Court*, 211 Cal. App. 4th 57, 64-65 (2012). An agency cannot merely assert "the records in question *relate* to pending litigation and, indeed, would not have existed but for the pending litigation." *Id.* at 67; *see City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1419 & n.9 (1995) (holding "internal affairs report" did not qualify for pending litigation exemption because its dominant purpose was to address "intradepartmental concerns" and it was not "prepared with the intention of using it in litigation," even though city attorney "monitored" investigation "because he expected litigation to result" from underlying incident).

The City asserts merely the disputed records are "related to an ordinance," "project," or other "City actions that are now the subject of litigation"; were "made in anticipation of litigation"; or "would not have been created absent the lawsuit." Reed Decl. ¶¶ 14, 16-18. That is not enough. The City did not prove the disputed records were prepared for *use* in litigation, nor did it claim they are attorney work product or subject to attorney-client privilege. Opp. at 4-6; Reed Decl. ¶¶ 12-18; *see also Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1422 n.5 (1998) (discussing difference between "pending litigation" exemption and work product or privilege).

The privilege log reveals that "the dominant purpose for preparing the documents was not for use in litigation," *County of Los Angeles*, 211 Cal. App. 4th at 67, but was instead discussion of policy or public relations issues:

- 6-7: "Draft field data research" and "Draft notes re gun harm research."
- 13-14: "Gun harm reduction strategy" and "Draft gun harm reduction strategy."
- 15-16: "Draft gun harm research" and "Draft gun harm reduction strategy."
- 44-45: "Draft Council memo re recycling and garbage rates" and "Draft Council memo re residential recycling and garbage rates."
- 50-51: "Boston Properties notes" and "Boston Properties Almaden Blvd Notes."
- 67-68: "CNN op-ed edits" and "Draft op-ed with edits."
- 75: "Draft gun harm reduction memo."
- 122: "Draft re societal, governmental costs."
- 124: "Gun liability insurance."
- 251: "Draft notes for City Council Study Session - updates on SB 1383, residential recycling contamination, & residential recycling and garbage rates."

The assertion that disclosure would "undermine the City's ability to defend itself" in litigation cannot justify withholding records. Reed Decl. ¶ 13. The PRA guarantees transparency, not defenses to litigation. *See Fairley*, 66 Cal. App. 4th at 1422 ("[T]he whole purpose of the CPRA is to shed public light on the activities of our governmental entities, and it is a small price to pay to require disclosure of public records even to a litigant opposing the government."). Although documents 37 and 56-57 may be exempt as "settlement communications," *Board of Trustees v. Superior Court*, 132 Cal. App. 4th 889, 899 (2005), the disputed records should be disclosed. The City cannot withhold them based on conclusory assertions that they might disclose "strategy and thought process" or "deliberative process." Reed Decl. ¶¶ 15-18. The City forfeited any such argument by failing to brief it, *Holden*, 43 Cal. App. 5th at 418, and conclusory assertions cannot justify the deliberative process exemption. *Golden Door*, 53 Cal. App. 5th at 790–92.

VII. THE CITY CANNOT WITHHOLD A RECORD ABOUT A JOB SEARCH THAT REVEALS NO INFORMATION ABOUT SPECIFIC CANDIDATES.

The City is wrongly withholding document 268, an email about "[d]raft questions for Planning Director selection." There is no evidence this document discusses "qualifications" of any specific candidate, Opp. at 3:25, and the City did not prove disclosure "would constitute an unwarranted invasion of personal privacy" of any individual. Govt. Code § 7927.700.

VIII. DECLARATORY AND INJUNCTIVE RELIEF ARE APPROPRIATE.

The City's argument that Petitioners are not entitled to injunctive or declaratory relief because former Mayor Liccardo's destruction of public records has already occurred and he is no longer in office, Opp. at 11, collides with the language and policy of the PRA and relevant case law. Govt. Code § 7923.000 (guaranteeing right to seek "injunctive or declaratory relief or writ of mandate" enforcing "right to inspect or receive a copy of any public record or class of public records"); *Filarsky v. Superior Court,* 28 Cal. 4th 419, 426 (2002) (noting statute "contemplates a declaratory relief proceeding"); *Cmty. Youth Athletic Ctr.*, 220 Cal. App. 4th at 1430, 1447 (stating "declaratory relief finding that there had been violations of the PRA was justified" and explaining that PRA requester prevailed because it "sought and obtained declaratory relief that there had been PRA violations"). Thus, the City's argument that there is no remedy for what it tacitly concedes is Liccardo's "misconduct," Opp. at 11:17, in destroying his texts relating to public business is flatly contrary to the PRA's language.[3]

The City's argument is also antithetical to the PRA's purpose, which is to ensure "openness in government" and to provide "checks against the arbitrary exercise of official power and secrecy in the political process." Local 21, 42 Cal. 4th at 328-29. Liccardo's apparent destruction of texts and the City's suggestion that nothing can be done because it has already

[3] The City doesn't exactly admit that Liccardo destroyed texts, but none of its declarants deny it, and Liccardo himself does not come forth with a declaration in the face of Petitioners' Opening Brief, which explained that Liccardo communicated almost exclusively by text, he was the only person in charge of searching for his texts, and the City did not produce any of his texts. Thus, this case falls squarely within the maxim that when it is within a party's power to produce stronger evidence and the party does not do so, an inference can be drawn against the party. Judicial Council of California Civil Jury Instructions 203 (2022).

happened would turn the PRA on its head and send a message that rather than "openness in government is essential to the functioning of a democracy," *Local 21*, 42 Cal. 4th at 328, "destruction of records is essential to the functioning of a bureaucracy," as Mayor Liccardo seems to believe. That is not, and should not be, the law. It would give officials like Liccardo a "get out of jail free" card when they destroy public records in violation of Government Code sections 6200 and 34090(d).[4]

The City's argument that injunctive and declaratory relief is not available would render the PRA toothless. "[P]ublic access makes it possible for members of the public 'to expose corruption, incompetence, inefficiency, prejudice and favoritism.'" *Local 21*, 42 Cal. 4th at 333. If a public official can delete or destroy records and leave office and thereby prevent members of the public from learning about what he or she did, then a public official could text a campaign contributor, "your bill is on the agenda tomorrow, a $200k check might pass it," and prevent the public from finding out about the corrupt exchange simply by deleting the record. That isn't, and shouldn't be, the law. As our unanimous Supreme Court explained in *City of San Jose*, 2 Cal. 5th at 625, if public officials could evade the PRA simply by using a "personal account" to communicate (or, as in Liccardo's case, deleting his texts), "government officials could hide their most sensitive, and potentially damning, discussions in such accounts."[5]

The courts have been generous in granting declaratory and injunctive relief under the PRA based upon something other than withholding specific records. For example, in *Community Youth Athletic Center* the Court of Appeal affirmed the granting of declaratory relief that there had been a violation of the Public Records Act. "Even though the City was not found to be intentionally obstructionist, neither was it sufficiently proactive or diligent in making a reasonable effort to identify and locate the raw crime data. The trial court was justified in concluding the City failed to meet its disclosure duties under the PRA." *Cmty. Youth Athletic Center*, 220 Cal. App. 4th at 1430. The Court of Appeal added that the City had an obligation to "facilitate a reasonable effort

[4] Government Code section 34090(d) is referenced in the League of California Cities guide to the Public Records Act, which cites section 34090(d) as stating, "Local agencies generally must retain public records for a minimum of two years." 1/17/23 Olson Decl. ¶ 6 & Ex. D.

[5] *City of San Jose* itself was a declaratory relief case. 2 Cal. 5th at 615.

to locate and release the information." *Id.* A requirement that City officials use or copy a government device when communicating on public business, and not delete records before two years elapse, is entirely consistent with *Community Youth Athletic Center* and with the statutory requirement that agencies assist requesters in obtaining access to records. Govt. Code § 7922.600.

Similarly, in *Galbiso v. Orosi Public Utility Dist*., 167 Cal. App. 4th 1063 (2008), the Court of Appeal found a violation of the PRA when an agency required a requester to leave the premises: "OPUD's practice of making Galbiso leave the premises when she sought public records effectively barred any inspection of records." *Id.* at 1088. Here, Liccardo's practice of deleting public records from his private phone effectively barred any inspection of documents and violated the PRA. Petitioners are thus entitled to declaratory relief that Liccardo violated the PRA by not copying government devices with his texting on his private phone and by deleting records, and to injunctive relief preventing city officials from disposing of records until two years have elapsed.

None of the City's cases say anything different, nor are they even PRA cases. *See City of Cotati v. Cashman,* 29 Cal. 4th 69, 71-72, 80 (2002) (holding City's action for declaratory relief over constitutionality was not subject to anti-SLAPP motion); *SJJC Aviation Servs., LLC v. City of San Jose,* 12 Cal. App. 5th 1043, 1061-62 (2017) (challenge to city's decision to award a lease and operating agreement to a different bidder); *Wilson & Wilson v. City Council of Redwood City*, 191 Cal. App. 4th 1559, 1563, 1575, 1582-84 (2011) (involving challenge to approval and construction of a retail-cinema redevelopment project); *County of San Diego v. State of California*, 164 Cal. App. 4th 580, 605-08 (2008) (action to compel the state to reimburse funds for certain state-mandated services, where state did not actually dispute the amount of the claims to be reimbursed); *Shamsian v. Dep't of Conservation*, 136 Cal. App. 4th 621, 626, 632, 642 (2006) (petition to compel the department to provide beverage container redemption opportunities); *Scripps Health v. Marin*, 72 Cal. App. 4th 324, 327, 336 (1999) (hospital's pursuit of a permanent injunction against alleged violence and threats); *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 573-74 (1995) (action by renters against a corporation's reporting of information on residential renters); *City Council of City of Santa Barbara v. Superior Court*, 179 Cal. App. 2d

389, 391-92, 396 (1960) (petition by city councilmembers to compel the city to raise residential garbage rates). The City's cases are thus inapposite and easily distinguishable from this PRA case.

The City's argument, Opp. at 12:18:22, that there's nothing to worry about because people running for City Council last year said they supported a "use or copy a government device and don't destroy records" policy also falls flat. A campaign promise or an answer to a questionnaire when someone is running for election is not the same as an action: one can take judicial notice, Evid. Code § 452(g), that not every candidate for public office always keeps all of their promises and does what they said they were going to do. Indeed, the City's full-throated defense of what Liccardo did in the past and offering of a declaration from the same official (Jim Reed) who preached "good email hygiene," 1/17/23 Giwargis Decl. ¶ 15, is a tacit admission that there is an "imminent threat of a future violation" and that injunctive and declaratory relief should be granted here to "avoid potential future harm," Opp. at 12:25-26, which results when public officials use their "private" electronic devices without copying a government device, and do not save their communications for two years. The declarations submitted with Petitioners' Opening Brief about the statewide use of "private" phones to conduct public business without copying government severs also evidences that there is a live controversy in need of resolution (as does the City's and Liccardo's prior use of "private" phones without copying government servers which gave rise to the Supreme Court's *City of San Jose* decision). Indeed, as the Ramona Giwargis and Jana Kadah Reply Declarations explain, the **current** members of the City Council are texting on "private" devices without copying government accounts, even though they committed not to do so when they were running for office last year. *See* 3/29/23 Giwargis and Kadah Reply Declarations filed herewith. Thus, the conduct of which petitioners complained, Opp. at 12:24, **is** still taking place and should be enjoined.

The City next argues, Opp. at 13, that courts are powerless to do anything about email retention or use of private electronic devices. It is wrong again. The line of dicta in *City of San Jose v. Superior Court,* 2 Cal. 5th at 628, cited by the City is followed immediately in the same paragraph by the statement, "[f]or example, agencies might require that employees use or copy their government accounts for all communications touching on public business" and the sentence,

"[f]ederal agency employees must follow such procedure to ensure compliance with analogous FOIA requests." *Id.*

The City's argument that the Court should defer to City policies, Opp. at 13:23-24, also ignores the fact that the City *already has* a policy requiring that records be retained for two years, which references Government Code section 34090(d). *City Administrative Policy Manual*, Section 6.1.1 "Public Records Policy and Protocol" at 14 (9/26/22 Smith Decl. Ex. A). Thus, Petitioners' request for an order that the City retain records for two years is entirely consistent with a policy the City already has. *See id.* ("Social media content should be retained in accordance with City retention schedules **or the minimum two-year period as required under the California Government Code**." [emphasis added]). The relief requested by Petitioners would, in effect, simply require the City to abide by its own policy. The City's position here is thus belied by its own policy within its Administrative Policy Manual.[6]

The Supreme Court most certainly did not say that an agency's policy is the last word and that courts have no power to decide whether an agency policy complies with the PRA. Rather, the Supreme Court explained, "We do not hold that any particular search method is required or necessarily adequate. We mention these alternatives to offer guidance on remand and to explain why privacy concerns do not require categorical exclusion of documents in personal accounts from CPRA's 'public records' definition. If the City maintains the burden of obtaining records from personal accounts is too onerous, it will have an opportunity to so establish in future proceedings." *City of San Jose*, 2 Cal. 5th at 629.[7]

[6] The City's argument that there has not been a violation of Government Code section 34090 and that the two-year retention requirement somehow doesn't apply to the types of texts and emails at issue here, Opp. at 14:3, is similarly incorrect. The statute cited by the City (Section 34090.6) is a specific exception to Section 34090 involving video and audio recordings, not texts or emails, and it does not somehow negate the basic two-year retention requirement. The City's reference to a 1981 Attorney General opinion, 64 Ops. Cal. Atty. Gen. 317 (1981), is also unwarranted, as that again pertained to recordings (of city council meetings) and is advisory (not binding). Furthermore, the City's position is undermined by Section 6.1.1. of its own policy manual, which emphasizes the "minimum two-year period" for public records retention (including social media content, which certainly does not only encompass "objective lasting indication[s]").

[7] On remand in the *San Jose* case, the City did not attempt to make such a showing.

The Supreme Court's conclusion in the *San Jose* case was simple, and very much the opposite of what the City argued there (and argues to this Court in this case now): "Consistent with the Legislature's purpose in enacting CPRA, and our constitutional mandate to interpret the Act broadly in favor of public access, we hold that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account." *Id.* at 629 (citation omitted).

This Court can and should order San Jose employees (or at the very least, council members and the Mayor) to "use or copy their government accounts for all communications touching on public business," in the words of the Supreme Court in *City of San Jose*, 2 Cal. 5th at 628. Alternatively, the Court can enjoin San Jose's employees (or at the very least, council members and the Mayor, who rely on their private devices to communicate and text more often than line employees) from communicating about public business on "private" devices unless they copy a government device, thus minimizing the danger that texts about public business will disappear as they did with Liccardo. The Court can also enjoin the City (or at the very least, council members and the Mayor) from deleting records which are less than two years old – something that would be entirely consistent with the policy the City already has. As Mayor Liccardo's practices demonstrate, such a requirement and practice is the only way to ensure compliance with the PRA and preservation of records.

IX. CONCLUSION

For the foregoing reasons, the Court should grant the Petition, order disclosure of all disputed records, and require City officials to use or copy an official device on all public business communications and retain all such communications for at least two years.

Dated: March 28, 2023 FIRST AMENDMENT COALITION

By _____

DAVID LOY
Attorneys for Petitioner FIRST AMENDMENT COALITION

Dated: March 28, 2023

CANNATA O'TOOLE & OLSON LLP

By 

KARL OLSON
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MARIN

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Marin, State of California. My business address is 534 4th Street, Suite B, San Rafael, CA 94901-3334.

On March 29, 2023, I served true copies of the following document(s) described as **PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND DECLARATORY AND INJUNCTIVE RELIEF** on the interested parties in this action as follows:

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☒ **BY ELECTRONIC SERVICE**: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

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

Executed on March 29, 2023, at East Palo Alto, California.

Robin P. Regnier