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FILED

JUL 03 2023

Clerk of the Court
Superior Court of CA County of Santa Clara
BY C. Pham DEPUTY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

SAN JOSE SPOTLIGHT; FIRST
AMENDMENT COALITION,

Petitioners,

vs.

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

Respondents.

Case No. 22CV394443

**ORDER GRANTING WRIT OF
MANDATE**

Submitted Matter

This matter came on for hearing on April 13, 2023, at 1:30 p.m. in Department 18, the Honorable Thomas E. Kuhnle presiding. Petitioner San Jose Spotlight is represented by Karl Olson, Esq. Petitioner First Amendment Coalition is represented by David Loy, Esq., David E. Snyder, Esq., and Monica N. Price, Esq. Respondents City of San Jose ("San Jose") and Mayor Samuel Theodore Liccardo ("Liccardo") are represented by Elisa Tolentino, Esq. Before the Court is the Verified Petition for Writ of Mandate and Declaratory and Injunctive Relief Under the California Public Records Act (the "Petition"), which was filed on February 3, 2022. Having reviewed and considered the written submissions of the parties, and having listened carefully to the parties' arguments, the Court rules as follows:

1 **I. INTRODUCTION**

2 Petitioners seek Respondents’ compliance with requests made under the California
3 Public Records Act (“CPRA”). They argue that “Respondents are either not properly
4 preserving, or not properly producing – or both – emails and other records contained on non-
5 governmental devices and accounts, as required.” (Petition, ¶ 2.) In particular, Petitioners
6 contend that Respondents were aware of public records connected to Liccardo’s personal email
7 accounts and text messages, but such public records were not produced. Respondents deny any
8 failure to comply with the CPRA. Respondents argue a proper search for responsive records
9 was made, and that more than 8,900 pages of public records were produced. Respondents
10 argue that certain public records were withheld based on CPRA exemptions, which were
11 identified in their Log of Documents Withheld. (Memo. Ps & Auths. in Support of Pet. for
12 Writ of Mandate, Ex. A.)

13 Petitioners request an order requiring Respondents to provide all discoverable public
14 records responsive to their requests. Petitioners also request declaratory relief to ensure
15 Respondents fulfill their obligations under the CPRA to produce public records, particularly
16 those which are sent, received, or stored in personal accounts. Respondents argue that such
17 relief is unwarranted and is inconsistent with California law.

18 **II. BACKGROUND**

19 **A. Petitioners’ Requests for Public Records**

20 Petitioners served CPRA requests on Respondents on December 12, 2020, April 17,
21 2021, June 24, 2021, July 26, 2021, and July 30, 2021. Each request sought specific categories
22 of records, including: (1) email and text communications between San Jose officials and Bloom
23 Energy officials, including those “sent or received from personal devices and accounts”;
24 (2) email, text and Slack communications between San Jose officials and employees on the one
25 hand, and Bloom Energy officials on the other, including “emails/texts sent and received from
26 personal devices and accounts”; (3) communications between Liccardo and his staff on the one
27 hand, and Scott Largent on the other, including those sent or received “from personal devices
28 and accounts”; (4) communications from Liccardo that discuss or relate to San Jose and its

1 officials and employees “whether facilitated by email, social media, or any other personal
2 communications services”; and (5) public records sent or received on Liccardo’s personal gmail
3 account, including “any ‘deleted’ items that have not yet been permanently deleted from these
4 accounts.” The requests covered a period of approximately six to eight months before each was
5 made.

6 **B. Respondent’s Production of Public Records**

7 Petitioners’ requests focused on Liccardo’s private email and text messages. The
8 searches Respondents undertook are described in Henry Smith’s declaration. (Decl. of Henry
9 Smith in Support of City’s Log of Withheld Documents (“Smith Decl.”).)¹ Smith served as the
10 CPRA coordinator for the mayor’s office. (Smith Decl. at ¶¶ 2-4.) He states:

11 If a PRA request involves communications of the Mayor, Paul Pereira, Senior
12 Policy Advisor, checks the Mayor’s City email. Rhonda Hadnot, Chief Operating
13 Officer, checks the Mayor’s personal email. Rachel Davis, Chief
14 Communications Officer, checks the Mayor’s social media accounts. The Mayor
15 checks his cell phone for text messages.

16 (*Id.* ¶ 6.) Smith continues:

17 Once I have gathered all responsive documents from our team, I convert them into
18 PDFs and make preliminary redactions. I may consult with the City Attorney’s
19 Office. I then either turn the documents over to the PRA Manager in the City
20 Manager’s Office or respond to the requester directly with responsive documents.

21 (*Id.* ¶ 7.) Mr. Smith states he follows San Jose’s Public Records Policy and Protocol, which is
22 section 6.1.1 of San Jose Administrative Policy Manual, which was revised on May 15, 2019.

23 (*Id.* ¶¶ 5, 8; Exh. A.)

24 In response to the CPRA requests, Respondents produced more than 8,900 pages of
25 records. (Decl. of Jim Reed in Support of Respondents’ Opposition to Petition for Writ of
26 Mandate and Declaratory Relief (“Reed Decl.”) ¶ 7.) Respondents stated they produced 36
27 additional records in March 2023.

28 _____
¹ On its own motion the Court takes judicial notice of Mr. Smith’s declaration filed on September 27, 2022.

1 **C. Public Records that Were Withheld**

2 As noted above, Respondents prepared, and provided to Petitioners, a Log of Documents
3 Withheld. It lists 327 records² that Respondents withheld based on CPRA exemptions and the
4 attorney-client privilege. The Log of Documents Withheld lists the date of each record, the file
5 type, whether there is an attachment, the author and any recipients, the subject, and the basis for
6 withholding. Smith swore under penalty of perjury that the Log of Documents Withheld
7 “accurately reflects the information regarding the documents that have been withheld.” (Smith
8 Decl. ¶ 9.)

9 **III. REQUESTS FOR JUDICIAL NOTICE**

10 **A. Petitioners’ Request**

11 Petitioners filed a request for judicial notice on March 29, 2023. First, under Evidence
12 Code section 452, subdivisions (c) and (h), they seek judicial notice “that at all times relevant to
13 this action, Carl Guardino was a lobbyist registered with the City of San Jose and employed by
14 Bloom Energy as its Executive Vice President for Global Government Affairs and Policy.”
15 Second, under Evidence Code section 452, subdivision (h), they seek judicial notice “that Kelly
16 Kline, Samuel Liccardo, Paul Pereira, Toni Taber, Mackenzie Messing, Leland Wilcox, and
17 Dave Sykes are not active members of the California State Bar or authorized to practice law in
18 California.” The Court grants these requests.

19 **B. Respondents’ Request**

20 Respondents filed a request for judicial notice on March 14, 2023. Under Evidence Code
21 section 452, subdivision (d)(1), they seek judicial notice of records showing three cases are
22 pending in this court, and one case is pending in the Sixth District Court of Appeal. The Court
23 grants this request.

24 **IV. OBJECTIONS TO EVIDENCE**

25 With their opening brief Petitioners filed declarations from: (1) Tran Nguyen, a Spotlight
26 reporter; (2) Ramona Giwargis, co-founder and CEO of Spotlight; (3) Karl Olson, Spotlight’s
27

28 ² The “Log of Documents Withheld” ends with the number 326. However, it includes records 93.1, 97.1 and 251.1,
and omits records 39 and 77.

1 outside counsel; (4) Monica Price, the First Amendment Coalition’s outside counsel; (5) Dr. Kurt
2 Wilson, Executive Director of the Western Riverside Council of Governments; (6) Thomas
3 Peele, a reporter currently employed by Edsource; and (7) Yesenia Amaro, a reporter employed
4 by The Fresno Bee. In these declarations, Petitioners set forth concerns about Respondents’
5 production of public records. With their reply brief Petitioners filed declarations from Jana
6 Kadah, a reporter for Spotlight, and new declarations from Monica Price and Ramona Giwargis.

7 Respondents objected to many of the statements made in the declarations filed with
8 Petitioners’ opening brief. Respondents argue the statements are speculative, argumentative,
9 irrelevant, conclusory, lack foundation, and constitute hearsay. Petitioners filed a lengthy
10 response. They argue that the statements “go[] to weight rather than admissibility.” To certain
11 evidence Petitioners’ responses include: (1) “relevant to illustrating the importance of public
12 disclosure and transparency in local government”; (2) “relevant to Petitioners’ claim for
13 prospective relief regarding use of private devices or accounts for public business”; (3) “courts
14 take notice of news articles to show information is of ‘significant public interest’ ”; and
15 (4) “courts may take judicial notice of facts and results of previous litigation.” Respondents did
16 not file objections to the reply declarations.

17 The Court has carefully reviewed the declarations submitted by Petitioners,
18 Respondents’ objections, and Petitioners’ responses. The Court agrees with Respondents that a
19 vast majority of the statements in Petitioners’ declarations are inadmissible and irrelevant.
20 Below the Court cites declarations filed by Petitioners only when the statements therein are
21 both admissible and relevant.

22 **V. THE PUBLIC RECORDS ACT**

23 **A. Disclosure of Public Records is Required by the Constitution**

24 The Constitution of the State of California, and the CPRA, require production of public
25 records. The California Constitution states, “The people have the right of access to information
26 concerning the conduct of the people’s business, and therefore the writings of public officials
27 and agencies shall be open to public scrutiny. . . . In order to ensure public access to the writings
28 of public officials and agencies . . . each local agency is hereby required to comply with the

1 California Public Records Act.” (Cal. Const, Art. I, § 3(b)(1), (7).) The Constitution also states
2 that any “statute, court rule, or other authority shall be broadly construed if it furthers the
3 people’s right of access, and narrowly construed if it limits the right of access.” (*Sierra Club v.*
4 *Superior Court* (2013) 57 Cal.4th 157, 166, quoting Cal. Const., Art. I, § 3(b)(2).)

5 **B. Definition a “Public Record”**

6 A public record is “any writing containing information relating to the conduct of the
7 public’s business prepared, owned, used, or retained by any state or local agency regardless of
8 physical form or characteristics.” (Gov’t Code § 7920.530, subd. (a).) The requirement that a
9 record relate to the conduct of the public’s business is broadly construed and rarely contested.
10 (See, e.g., *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 824-25; *San*
11 *Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774 [“This definition is intended
12 to cover every conceivable kind of record that is involved in the governmental process.”
13 (citations omitted)].) Indeed, “Generally, any ‘record . . . kept by an officer because it is
14 necessary or convenient to the discharge of his official duty . . . is a public record.’ ” (*City of San*
15 *Jose v. Superior Court* (2017) 2 Cal.5th 608, 618 (*City of San Jose*).)

16 **C. Exemptions**

17 The CPRA requires agencies to disclose public records on request except to the extent
18 records or portions thereof are expressly exempt from disclosure. (Gov’t Code §§ 7922.000,
19 7922.525, 7922.530, subd. (a); *City of San Jose, supra*, 2 Cal.5th at p. 616.) The California
20 Constitution requires exemptions to be narrowly construed. (Cal. Const., art. I, § 3, subd. (b)(2).)
21 Moreover, “Any reasonably segregable portion of a record shall be available for inspection by
22 any person requesting the record after deletion of the portions that are exempted by law.” (Gov’t
23 Code § 7922.525, subd. (b).) The exemptions on which Respondents rely to withhold records
24 are summarized below.

25 **1. Personnel Files**

26 The CPRA allows withholding of “Personnel, medical, or similar files, the disclosure of
27 which would constitute an unwarranted invasion of personal privacy.” (Gov’t Code §
28 7927.700). “When enacting CPRA, the Legislature was mindful of the right to privacy

1 (§ 7921.000) and set out multiple exemptions designed to protect that right. Similarly, while the
2 Constitution provides for public access, it does not supersede or modify existing privacy rights.”
3 (*City of San Jose, supra*, 2 Cal.5th at pp. 615-16, citations omitted.) “This exemption was
4 “developed to protect intimate details of personal and family life, not business judgments and
5 relationships.” (*Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th
6 1041, 1045.) A similar protection for closed session materials is afforded under Government
7 Code section 54957, subdivision (b).

8 2. Pending Litigation

9 Public records concerning pending litigation that are not protected by the attorney-client
10 privilege or the attorney work-product doctrine are exempt from disclosure “until the pending
11 litigation has been finally adjudicated or otherwise settled.” (Gov’t Code § 7927.200(a).) When
12 determining whether the exemption applies, courts consider the primary purpose of the
13 document. (*Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1421 [“The construction we
14 give to ‘pending litigation’ focuses on the purpose of the documents. . . .”].) In particular, courts
15 look for a document that a public entity “reasonably has an interest in keeping to itself until the
16 litigation is finalized.” (*Id.* at pp. 1421-22.)

17 3. Drafts

18 Under certain circumstances the CPRA exempts “preliminary drafts, notes, or
19 interagency or intra-agency memoranda that are not retained by the public agency in the ordinary
20 course of business, if the public interest in withholding those records clearly outweighs the
21 public interest in disclosure.” (Gov’t Code § 7927.500.) “A draft is, by definition, a preliminary
22 version of a piece of writing subject to feedback and change.” (*United States Fish & Wildlife*
23 *Service v. Sierra Club, Inc.* (2021) 141 S.Ct. 777, 786 (*FWS*).)³ “The purpose of the exemption
24 is to provide a measure of agency privacy for written discourse concerning matters pending
25 administrative action.” (*Citizens for a Better Environment v. Department of Food & Agriculture*
26

27
28 ³ Because the CPRA is modeled after the federal Freedom of Information Act (“FOIA”) and serves the same
purpose, federal decisions under the FOIA are often relied upon to construe the CPRA. (See, e.g., *Times Mirror Co.*
v. Superior Court (1991) 53 Cal.3d 1325, 1338.)

1 (1985) 171 Cal.App.3d 704, 712.) Simply identifying a record as a “draft” falls short of proving
2 it is exempt from production. Additional facts are needed to make the determinations required
3 under Government Code section 7927.500.

4 4. The “Catch-All” Exemption

5 The CPRA has a “catch-all” provision. Government Code section 7922.000 states that
6 “[a]n agency shall justify withholding any record by demonstrating that the record in question is
7 exempt under express provisions of this division, or that on the facts of the particular case the
8 public interest served by not disclosing the record clearly outweighs the public interest served by
9 disclosure of the record.” In conducting this balancing, “the public interest served by not
10 disclosing the record” must “clearly outweigh the public interest served by disclosure of the
11 record.” (Gov’t Code § 7922.000.) “This provision contemplates a case-by-case balancing
12 process, with the burden of proof on the proponent of nondisclosure to demonstrate a *clear*
13 *overbalance* on the side of confidentiality.” (*Michaelis, Montanari & Johnson v. Superior Court*
14 (2006) 38 Cal.4th 1065, 1071 [emphasis added].)

15 The catch-all exemption can include records reflecting the “deliberative process.” (*Times*
16 *Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.) The California Supreme Court has
17 stated that “protecting the pre-decisional deliberative process gives the chief executive the
18 freedom ‘to think out loud,’ which enables him [or her] to test ideas and debate policy and
19 personalities uninhibited by the danger that his [or her] tentative but rejected thoughts will
20 become subjects of public discussion.” (*Id.* at p. 1341.) The U.S. Supreme Court has affirmed
21 the deliberative process privilege, stating it “shields from disclosure ‘documents reflecting
22 advisory opinions, recommendations and deliberations comprising part of a process by which
23 governmental decisions and policies are formulated.’ ” (*FWS, supra*, 141 S.Ct. at p. 785.)

24 The deliberative process privilege “distinguishes between pre-decisional, deliberative
25 documents, which are exempt from disclosure, and documents reflecting a final agency decision
26 and the reasons supporting it, which are not.” (*FWS, supra*, 141 S.Ct. at p. 785-786.) In other
27 words, “the agency relying on deliberative process privilege must show that the decision is both
28 (1) pre-decisional and (2) deliberative.” (*American Civil Liberties Union of Northern California*

1 v. *Superior Court* (2011) 202 Cal.App.4th 55, 76 (*ACLU*.) For the same reasons as set forth for
2 “drafts,” simply identifying a record as reflecting “deliberative processes” falls short of proving
3 it is exempt from production.

4 **5. Attorney-Client Communications**

5 Records protected by the attorney-client privilege are exempt from disclosure. (Gov’t
6 Code § 7927.705.) This privilege is “absolute and disclosure may not be ordered, without regard
7 to relevance, necessity or any particular circumstances peculiar to the case.” (*Costco Wholesale*
8 *Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732, citation omitted (*Costco*.) Unlike “pending
9 litigation” records, documents protected by the attorney-client privilege or attorney work-product
10 doctrine remain exempt from disclosure even after the litigation is resolved.

11 “The burden of showing preliminary facts necessary to support the privilege lies with the
12 party claiming it,” i.e., a communication made in the course of an attorney-client relationship.

13 (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 123-124.)

14 “Once that party establishes facts necessary to support a prima facie claim of privilege, the
15 communication is presumed to have been made in confidence and the opponent of the claim of
16 privilege has the burden of proof to establish the communication was not confidential or that the
17 privilege does not for other reasons apply.” (*Costco, supra*, 47 Cal.4th at p. 733; see also Evid.
18 Code § 917.)

19 **D. Waiver by Voluntary Disclosure**

20 If an agency discloses a public record that is exempt from the CPRA to a member of the
21 public, “this disclosure shall constitute a waiver of” the CPRA exemptions. (Gov’t Code
22 § 7921.505, subd. (b).) Disclosure by any “member, agent, officer, or employee of the agency”
23 is sufficient to effect the waiver. (*Id.* § 7921.505, subd. (a).)

24 **E. Identification of Withheld Records**

25 A party responding to a CPRA request “must describe each document or portion thereof
26 withheld, and for each withholding it must discuss the consequences of disclosing the sought-
27 after information. Conclusory or boilerplate assertions that merely recite statutory standards are
28 not sufficient.” (*ACLU, supra*, at p. 83.) [internal quotations and citations omitted]; *Citizens for*

1 *Open Government v. Lodi* (2012) 205 Cal.App.4th 296, 307.) An agency cannot carry its burden
2 with “speculative, self-serving opinions designed to preclude the dissemination of information to
3 which the public is entitled.” (*California State University, Fresno Association, Inc. v. Superior*
4 *Court*, (2001) 90 Cal.App.4th 810, 835.)

5 **VI. CITY OF SAN JOSE V. SUPERIOR COURT**

6 In *City of San Jose v. Superior Court*, the California Supreme Court addressed CPRA
7 issues that are similar to those raised in this action, and thus it warrants a careful review. The
8 Court held that “a city employee’s writings about public business are not excluded from the
9 CPRA simply because they have been sent, received, or stored in a personal account.” (*City of*
10 *San Jose, supra*, 2 Cal.5th at p. 629.) In reaching this holding, the Court discussed how to
11 determine if personal electronic communications are public records, how to handle records with
12 information subject to privacy protections, and how searches for electronic communications
13 should be conducted.

14 **A. Personal Electronic Communications Can Be Public Records**

15 The Supreme Court stated that “the ease and immediacy of electronic communication has
16 encouraged a commonplace tendency to share fleeting thoughts and random bits of information,
17 with varying degrees of import, often to broad audiences. As a result, the line between an
18 official communication and an electronic aside is now sometimes blurred.” (*City of San Jose,*
19 *supra*, 2 Cal.5th at p. 618.) In determining whether a personal text or email is a public record
20 thus requires careful review, including “an examination of several factors, including the content
21 itself; the context in, or purpose for which, it was written; the audience to whom it was directed;
22 and whether the writing was prepared by an employee acting or purporting to act within the
23 scope of his or her employment.” (*Id.*) The Court stated there is an “intricacy of determining
24 whether a writing is related to public business. (*Id.* at p. 619.)

25 The Supreme Court stated “that to qualify as a public record under CPRA, at a
26 minimum, a writing must relate in some substantive way to the conduct of the public’s business.
27 This standard, though broad, is not so elastic as to include every piece of information the public
28 may find interesting. Communications that are primarily personal, containing no more than

1 incidental mentions of agency business, generally will not constitute public records. For
2 example, the public might be titillated to learn that not all agency workers enjoy the company of
3 their colleagues or hold them in high regard. However, an employee’s electronic musings about
4 a colleague’s personal shortcomings will often fall far short of being a ‘writing containing
5 information relating to the conduct of the public’s business.’ ” (*City of San Jose, supra*, 2
6 Cal.5th at pp. 618-619.)

7 **B. Privacy Issues**

8 The Supreme Court stated that “CPRA and the Constitution strike a careful balance
9 between public access and personal privacy.” (*City of San Jose, supra*, 2 Cal.5th at p. 616.) It
10 stated that “public access to information must sometimes yield to personal privacy interests” and
11 that “while the Constitution provides for public access, it does not supersede or modify existing
12 privacy rights.” (*Id.*) In part because of privacy rights, the Court stated that agencies can
13 “develop their own internal policies for conducting searches” and that an agency may
14 “reasonably rely on these employees to search *their own* personal files, accounts, and devices for
15 responsive material.” (*Id.* at pp. 627-628, emphasis in original.) The Court concluded, “We do
16 not hold that any particular search method is required or necessarily adequate. We mention these
17 alternatives to offer guidance on remand and to explain why privacy concerns do not require
18 categorical exclusion of documents in personal accounts from CPRA’s ‘public records’
19 definition. If [San Jose] maintains the burden of obtaining records from personal accounts is too
20 onerous, it will have an opportunity to so establish in future proceedings.” (*Id.* at p. 629,
21 citations omitted.)

22 **C. Searches for Public Records**

23 The Supreme Court addressed the requirements that apply if an agency is delegating the
24 search process to employees. It stated, “Federal courts applying FOIA have approved of
25 individual employees conducting their own searches and segregating public records from
26 personal records, so long as the employees have been properly trained in how to distinguish
27 between the two. (See *Ethyl Corp. v. U.S. Environmental Protection Agency* (4th Cir. 1994) 25
28 F.3d 1241, 1247.) A federal employee who withholds a document identified as potentially

1 responsive may submit an affidavit providing the agency, and a reviewing court, ‘with a
2 sufficient factual basis upon which to determine whether contested items were “agency records”
3 or personal materials.’ (*Grand Central Partnership, Inc. v. Cuomo* (2d Cir. 1999) 166 F.3d 473,
4 481).” (*City of San Jose, supra*, 2 Cal.5th at p. 628.)

5 One of the cases cited by the Supreme Court, *Grand Central Partnership*, states,
6 “Without more information as to how the notes at issue (or similar notes in the past) were
7 actually used or intended to be used, we are reluctant to conclude . . . that these notes are not
8 ‘agency records.’ ” (*Grand Central Partnership, Inc., supra*, 166 F.3d at p. 481.) Another case
9 cited by the Court states, “In demonstrating the adequacy of its search, however, an agency may
10 not rest on an affidavit that simply avers that the search was conducted in a manner ‘consistent
11 with customary practice and established procedure.’ Rather, the affidavit must be reasonably
12 detailed, ‘setting forth the search terms and the type of search performed, and averring that all
13 files likely to contain responsive materials (if such records exist) were searched’ so as to give the
14 requesting party an opportunity to challenge the adequacy of the search.” (*Ethyl Corp. v. U.S.*
15 *Environmental Protection Agency* (4th Cir. 1994) 25 F.3d 1241, 1246-1247.)

16 VII. ADEQUACY OF THE SEARCH FOR RESPONSIVE RECORDS

17 A threshold issue in any CPRA case is whether an agency has identified or disclosed all
18 requested records that “can be located with reasonable effort.” (*California First Amendment*
19 *Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.) Agencies do not need to
20 “undertake extraordinarily extensive or intrusive searches.” (*City of San Jose, supra*, 2 Cal.5th at
21 p. 627.) They can “develop their own internal policies for conducting searches” and may
22 “reasonably rely on these employees to search their own personal files, accounts, and devices for
23 responsive material. (*City of San Jose, supra*, 2 Cal.5th at p. 627-628.)

24 Smith describes the procedures used to identify records “specific to, or involving, the
25 Mayor’s Office” that may be responsive to CPRA requests. He states he was “involved in
26 gathering and reviewing documents, emails, and other items in response to [Respondents’]
27 CPRA requests” and “provided the responsive documents to the requestors.” Smith also states
28

1 he has “received annual training from the City’s Open Government Manager” regarding the
2 CPRA and San Jose’s Public Records Policy and Protocol.

3 The Court is satisfied that San Jose has conducted a reasonable search of its own files,
4 along with emails sent to or received from San Jose email accounts. The Court is also satisfied
5 that Liccardo’s social media was properly reviewed, and those records were produced.

6 *City of San Jose*, however, describes a much more complicated set of rules for reviewing
7 and producing emails and text messages from personal accounts.

8 First, a case cited favorably by the Supreme Court states, “In demonstrating the adequacy
9 of its search [] an agency may not rest on an affidavit that simply avers that the search was
10 conducted in a manner ‘consistent with customary practice and established procedure.’ Rather,
11 the affidavit must be reasonably detailed, ‘setting forth the search terms and the type of search
12 performed, and averring that all files likely to contain responsive materials (if such records exist)
13 were searched’ so as to give the requesting party an opportunity to challenge the adequacy of the
14 search.” (*Ethyl Corp. v. U.S. Environmental Protection Agency* (4th Cir. 1994) 25 F.3d 1241,
15 1246-1247.)

16 Second, *City of San Jose* makes clear that it is very challenging to distinguish public
17 records from personal information. That task requires “an examination of several factors,
18 including the content itself; the context in, or purpose for which, it was written; the audience to
19 whom it was directed; and whether the writing was prepared by an employee acting or
20 purporting to act within the scope of his or her employment.” (*City of San Jose*, 2 Cal.5th at p.
21 618.) It stated there is an “intricacy of determining whether a writing is related to public
22 business. (*Id.* at p. 619.) To address this concern, *City of San Jose* stated that officials and
23 employees must be “properly trained” in distinguishing public records from personal records,
24 including the application of the multi-factor test in its Policy and Protocol. (*Id.* at p. 628, citing
25 *Ethyl Corp. v. U.S. Environmental Protection Agency*, *supra*, 25 F.3d at p. 1247.)

26 Respondents have not furnished evidence of how searches through emails and text
27 messages from Liccardo’s personal accounts were conducted. All we have now is Smith’s
28 statements that Rhonda Hadnot “checks the Mayor’s personal email” and “the Mayor checks his

1 cell phone for text messages.” We also do not know how Hadnot and Liccardo have been trained
2 to complete the difficult task of separating public records from private communications using the
3 multi-factor test in *City of San Jose* and applying the statutory and Constitutional presumptions
4 and other nuances of the law required for CPRA compliance.

5 Therefore, to allow the Court to assess whether an adequate search of Liccardo’s emails
6 and text messages on his private accounts was conducted, the Court orders Liccardo and Hadnot
7 to submit declarations describing in detail (1) the procedures they used for searching Liccardo’s
8 private email and text message accounts, and (2) the training they have received on separating
9 public records and private communications under the guidelines set forth in *City of San Jose*.

10 **VIII. EVALUATION OF THE WITHHELD RECORDS**

11 The CPRA requires production of public records. It is construed in favor of disclosure.
12 A party seeking to withhold records has the burden of proving there is a valid reason for a record
13 to be withheld, and it may waive its right to withhold a record if it wishes.

14 Respondents submitted the declarations of Henry Smith, Jim Reed, and Vera Todorov.
15 This is the only evidence on which the Court can rely in determining whether Respondents can
16 withhold the 327 records identified in the Log of Documents Withheld. As noted above,
17 “Conclusory or boilerplate assertions that merely recite statutory standards are not sufficient.”
18 (*ACLU, supra*, 202 Cal.App.4th at p. 83; *Citizens for Open Government v. Lodi, supra*, 205
19 Cal.App.4th at p. 307.)

20 **A. Pending Litigation**

21 Paragraphs 13 through 18 of Reed’s declaration lists records he asserts may be withheld
22 because they concern pending litigation. (Gov’t Code § 7927.200(a).) As noted above, the
23 Court has taken judicial notice that there are four pending cases involving San Jose. Because of
24 the pending litigation, the Court finds the following records may be withheld: 6-7, 13-16, 37, 44-
25 45, 50-51, 56-57, 67-68, 75, 122, 124, and 251.

26 **B. Personnel Records**

27 Paragraph 9 of Reed’s declaration states that record 29 is a draft that relates to a private
28 personal matter that “does not contain any mention of, or reference to, City business.” This

1 record may be withheld. Paragraphs 10 and 11 of Reed's declaration state that records 69-73
2 relate to personnel matters regarding an applicant for City Manager, and that record 300 is an
3 internal communication related to a personnel matter regarding the appointment of the Police
4 Chief. The Court finds these records may be withheld. In addition, records 101-104 are
5 identified as closed session materials and may be withheld. (Gov't Code § 54957, subd. (b).)

6 Records 1, 52, 118, 173, and 268 are identified as unprivileged personnel records.
7 Respondents have not submitted evidence to support this contention. These records must be
8 produced.

9 C. Records Reflecting Deliberative Processes and Drafts

10 Paragraphs 22-34 of Reed's declaration lists records he asserts may be withheld because
11 they reflect deliberative processes or are drafts concerning development in north San Jose,
12 pending land use decisions, energy issues, San Jose policies and budget, and the Big Cities
13 Mayors Coalition.

14 1. North San Jose

15 Paragraph 22 of Reed's declaration states that records 26, 298, and 303 relate to
16 development in north San Jose. They are identified as "drafts" that are subject to the
17 "deliberative process privilege." Reed reports "[a] settlement was recently reached in [the north
18 San Jose] matter, and disclosure of these documents would threaten the agreement or at least
19 undermine it." He also states that disclosure would "divulge the City's position with respect to
20 long-standing disputes and negotiations with other jurisdictions." The bases for withholding
21 these records are "deliberative process privilege," "draft," or both.

22 To the extent records 26, 298 and 303 reflect or convey "a settlement" "recently
23 reached," they must be produced. (*ACLU, supra*, 202 Cal.App.4th at 76 ["the agency relying on
24 deliberative process privilege must show that the decision is both (1) pre-decisional and
25 (2) deliberative."].) However, if the records reflect both a final settlement and deliberative
26 process, the pre-decisional deliberative aspects of those documents may be redacted. (Gov't
27 Code § 7922.525, subd. (b) ["Any reasonably segregable portion of a record shall be available
28

1 for inspection by any person requesting the record after deletion of the portions that are
2 exempted by law.”].)

3 **2. Pending Land Use Decisions**

4 Paragraphs 23, 24 and 25 of Reed’s declaration state that records 146-147, 224, 228-229,
5 233-236, and 239-240 relate to land use decisions in connection with the Downtown West
6 project, which San Jose approved on May 21, 2021. The bases for withholding these records are
7 “deliberative process privilege,” “draft,” or both. Based on the information in the Log of
8 Documents Withheld, and Reed’s statements, the Court finds these records may be withheld.

9 Records 59, 62-64, 80-81, 84-85, 142, 170, 276, 311-323, 326 were identified as
10 concerning land use decisions. Respondents submitted no evidence to support that contention.
11 These records must be produced.

12 **3. Energy Issues**

13 Paragraphs 26 of Reed’s declaration states that records 65, and 178-182 relate to energy
14 issues, including clean energy legislation and a microgrid strategy. The bases for withholding
15 these records are “deliberative process privilege,” “draft,” or both. Based on the information in
16 the Log of Documents Withheld, and Reed’s statements, the Court finds these records may be
17 withheld.

18 Paragraph 27 of Reed’s declaration states that records 279 and 280 “divulge Mayor
19 Liccardo’s deliberative process related to the microgrid policy” and “contain a microgrid
20 provider’s proprietary information.” Records 279 and 280 were received from Mr. Guardino,
21 and thus any claim of exemption is waived. (Gov’t Code § 7921.505, subd. (b).) If proprietary
22 information is set forth in records 279 and 280, Respondents must provide the Court with a
23 confidentiality agreement between the microgrid provider and San Jose and/or Liccardo that
24 protects the proprietary information. Absent such an agreement, the microgrid provider has
25 waived any claim to its proprietary information and both records must be produced without
26 redactions. Record 287 was received from Mr. Guardino, and thus any claim of exemption is
27 waived.
28

1 **4. San Jose Policies and Budget**

2 Paragraphs 28, 29 and 30 of Reed’s declaration state that records 165-166, 191-192, 243-
3 244, 295-296, and 301 relate to San Jose public policies regarding homelessness, an art display,
4 and public safety issues. The bases for withholding these records are “deliberative process
5 privilege,” “draft,” or both. These records may be withheld. There is no evidence showing records
6 17 and 36 are subject to an exemption, so they must be produced.

7 Respondents have not presented evidence for withholding records 60, 79, 137-139, 154,
8 193, 194, and 212, which apparently concern San Jose’s budget. These records must be
9 produced.

10 **5. The California Big Cities Mayors Coalition**

11 Paragraph 31 of the Reed declaration states that records “33-35, 46-49, 87-98 (including
12 93.1 and 97.1), 155-156, 200-204, 219-220, and 294 are draft records and communications
13 *between* Mayor Liccardo and the California Big City Mayors Coalition. There is no evidence
14 that the Big Cities Mayors Coalition is a government agency that has agreed to treat the disclosed
15 material as confidential. (Gov’t Code § 7921.505, subd. (c)(5).) Therefore, any CPRA
16 exemption is waived, and those records must be produced.

17 **D. Attorney-Client Communications**

18 Paragraph 12 of the Reed declaration states that “[a]ll documents identified as having
19 been withheld pursuant to the attorney-client privilege consists of communications from the
20 Mayor or his staff requesting legal advice from the City Attorney or her staff and/or
21 communications containing the City Attorney’s or her staff’s legal advice and opinions.” The
22 declaration of Vera Todorov, the Senior Deputy City Attorney with the Office of the San Jose
23 City Attorney, also lays a foundation that records 82 and 83 are privileged. Finally, Henry Smith
24 swore under penalty of perjury that the Log of Documents Withheld “accurately reflects the
25 information regarding the documents that have been withheld.” (Smith Decl. ¶ 9.)

26 The Court has reviewed the Log of Documents Withheld and has identified the following
27 records as privileged: 53, 54, 61, 74, 76, 78, 82, 83, 99-100, 107-117, 119, 127, 128, 130, 135,
28 150, 151, 169, 259, 290, and 293. (Reed Decl. ¶ 12.) These records may be withheld.

1 **E. Records for Which No Evidence Was Submitted**

2 Respondents have the burden of proving, through competent evidence, that a CPRA
3 exemption applies to a particular record. “Conclusory or boilerplate assertions that merely recite
4 statutory standards are not sufficient.” (*ACLU, supra*, at p. 83.) The Court is unable to find any
5 evidence supporting exemptions for any of the following records. They must therefore be
6 produced: 2-5, 8-12, 18-25, 27-28, 30-32, 38-43, 55, 58, 66, 77, 86, 105-106, 120, 121, 123,
7 125-126, 129, 131-134, 136, 140-141, 143-145, 148-149, 152-153, 157-164, 167-168, 171-172,
8 174-177, 183-190, 195-199, 205-211, 213-218, 221-223, 225-227, 230-232, 237-238, 241-242,
9 245-250, 251.1, 252-258, 260-267, 269-275, 277-278, 281-286, 288-289, 291-292, 297, 299,
10 302, 304-310, and 324-325.

11 **IX. REQUEST FOR DECLARATORY RELIEF**

12 On page 16 of their opening brief, Petitioners request declaratory relief. Code of Civil
13 Procedure section 1060 provides that any person who desires a declaration of his or her rights or
14 duties with respect to another may bring an action. The declaration may be either affirmative or
15 negative in form and effect, and the declaration shall have the force of a final judgment.

16 “Declaratory relief operates prospectively, serving to set controversies at rest before obligations
17 are repudiated, rights are invaded, or wrongs are committed. Thus, the remedy is to be used to
18 advance preventive justice, to declare rather than execute rights.” (*Kirkwood v. California State*
19 *Automobile Association Inter-Insurance Bureau* (2011) 193 Cal.App.4th 49, 59.)

20 Petitioners request two declarations.

21 The first declaration concerns Petitioners’ contentions that Respondents have failed to
22 comply with the CPRA with respect to emails and text messages sent or received on private
23 devices or accounts. The Court must defer consideration of this request until after it reviews the
24 declarations that will be filed by Hadnot and Liccardo.

25 The second declaration concerns the application of Government Code section 34090. On
26 page 18 of their opening brief, Petitioners request the Court “grant declaratory relief ordering
27 that San Jose officials ‘use or copy’ government accounts to conduct public business, and not
28 delete them before two years have expired, as required by Government Code section 34090(d).”

1 Government Code section 34090, subdivision (d), states that “the head of a city
2 department may destroy any city record, document, instrument, book, or paper, under the
3 department head’s charge, without making a copy thereof, after the same is no longer required
4 . . .” but “[t]his section does not authorize the destruction of . . . [r]ecords less than two years
5 old.” In other words, Petitioners are seeking a declaration that San Jose must maintain “any city
6 record, document, instrument, book, or paper, under the department head’s charge” for two
7 years.

8 Government Code section 34090 applies to a “head of a city department.” In an earlier
9 filing in this case, of which the Court takes judicial notice under Evidence Code section 452,
10 subdivision (d), Petitioners stated that Liccardo was not the head of a city department. (Memo.
11 of Ps & Auth. in Support of Motion to Compel Deposition of Mayor Samuel T. Liccardo, at pp.
12 12 (filed 10/17/22) [“the Mayor is not an ‘agency head’ or ‘top governmental executive’ for
13 purposes of that rule.”].) Government Code section 34090, subdivision (d), therefore does not
14 apply to Liccardo or future mayors of San Jose. With respect to San Jose’s actual “heads of
15 departments,” Petitioners have not provided sufficient evidence of an actual controversy.
16 (*Metropolitan Water District of Southern California v. Winograd* (2018) 24 Cal.App.5th 881,
17 892-893 [“An actual controversy that is currently active is required for declaratory relief to be
18 issued.”].)

19 For these reasons, Petitioners’ request for declaratory relief based on Government Code
20 section 34090 is denied.

21 **X. REQUEST FOR INJUNCTIVE RELIEF**

22 While the Petition seeks an injunction as relief, nowhere in their opening brief do
23 Petitioners address this issue. New legal theories and forms of relief cannot be first requested in
24 a reply brief. This rule exists so that a party opposing relief will have a full and fair opportunity
25 to respond and will not be unfairly surprised. Because Petitioners did not address injunctive
26 relief in their opening brief, this request for relief is denied.

1 **XI. REQUEST FOR ATTORNEYS' FEES AND COSTS**

2 Petitioners seek an award of attorneys' fees and costs under Government Code section
3 7923.115, subdivision (a) ["If the requester prevails in litigation filed pursuant to this chapter,
4 the court shall award court costs and reasonable attorney's fees to the requester. The costs and
5 fees shall be paid by the public agency and shall not become a personal liability of the public
6 official involved."] They also seek an award of attorneys' fees and costs Code of Civil
7 Procedure section 1021.5 ["a court may award attorneys' fees to a successful party against one or
8 more opposing parties in any action which has resulted in the enforcement of an important right
9 affecting the public interest."] The Court will address attorneys' fees and costs after a timely
10 motion is filed.

11 **XII. DISPOSITION**

12 The Court **ORDERS** San Jose to produce the public records identified in Exhibit A,
13 which is attached hereto, within 30 days of service of this Order.

14 The Court **ORDERS** Liccardo and Hadnot to file declarations within 30 days of service
15 of this Order describing in detail (1) the procedures they used for searching Liccardo's private
16 email and text message accounts, and (2) the training they have received on separating public
17 records and private communications under the guidelines set forth in *City of San Jose*.

18 The Court **DENIES** Petitioners' request for declaratory relief.

19 The Court **DENIES** Petitioners' request for injunctive relief.

20 A further case management conference is now set on **August 23, 2023, at 9:00 a.m.** to
21 discuss compliance with this Order.

22
23 Dated: July 3, 2023

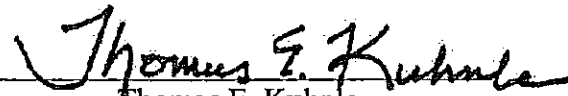
24 
25 Thomas E. Kuhnle
26 Judge of the Superior Court
27
28

EXHIBIT A

Records that May be Withheld:

Pending Litigation: 6-7, 13-16, 37, 44-45, 50-51, 56-57, 67-68, 75, 122, 124, and 251.

Personnel Records: 29, 69-73, 101-104, and 300.

Pending Land Use Decisions: 146-147, 224, 228-229, 233-236, and 239-240.

Energy Issues: 65 and 178-182.

San Jose's Policies and Budget: 165-166, 191-192, 243-244, 295-296, and 301.

Attorney-Client Privilege: 53, 54, 61, 74, 76, 78, 82, 83, 99-100, 107-117, 119, 127, 128, 130, 135, 150, 151, 169, 259, 290, and 293.

Records that Must be Produced

Personnel Records: 1, 52, 118, 173, and 268.

North San Jose: 26, 298, and 303, but only to the extent they reflect, at least in part, final settlements. If they do, pre-decisional deliberative aspects of these records may be redacted.

Pending Land Use Decisions: 59, 62-64, 80-81, 84-85, 142, 170, 276, 311-323, and 326.

Energy Issues: Record 287 must be produced. If records 279 and 280 contain proprietary information, San Jose must file and serve a declaration authenticating a confidentiality agreement between Mr. Liccardo and Mr. Guardino that protects that information, and produce

1 records 279 and 280 with the proprietary information redacted. If a declaration is not filed,
2 unredacted copies of records 279 and 280 must be produced.

3
4 San Jose's Policies and Budget: 17, 36, 60, 79, 137-139, 154, 193, 194 and 212.

5
6 Big Cities Mayors Coalition: 33-35, 46-49, 87-98 (including 93.1 and 97.1), 155-156, 200-204,
7 219-220, and 294.

8
9 Other Records Not Identified in the Reed or Todorov Declarations and Not Subject to the

10 Attorney-Client Privilege: 2-5, 8-12, 18-25, 27-28, 30-32, 38-43, 55, 58, 66, 77, 86, 105-106,
11 120, 121, 123, 125-126, 129, 131-134, 136, 140-141, 143-145, 148-149, 152-153, 157-164, 167-
12 168, 171-172, 174-177, 183-190, 195-199, 205-211, 213-218, 221-223, 225-227, 230-232, 237-
13 238, 241-242, 245-250, 251.1, 252-258, 260-267, 269-275, 277-278, 281-286, 288-289, 291-292,
14 297, 299, 302, 304-310, and 324-325.



**SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SANTA CLARA
 DOWNTOWN COURTHOUSE
 191 NORTH FIRST STREET
 SAN JOSE, CALIFORNIA 95113
 CIVIL DIVISION**

FILED

JUL 03 2023

Clerk of the Court
 Superior Court of CA County of Santa Clara
 BY C. Pham DEPUTY

RE: **SAN JOSE SPOTLIGHT et al vs CITY OF SAN JOSE et al**
 Case Number: **22CV394443**

PROOF OF SERVICE

ORDER GRANTING WRIT OF MANDATE (DECISION ON SUBMITTED MATTER) was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on July 03, 2023. CLERK OF THE COURT, by Catherine Pham, Deputy.

cc: Karl Olson 100 PINE STREET, SUITE 350 San Francisco, CA 94111
 Ardell B. Johnson Office of the City Attorney 200 E. Santa Clara St, 16th Fl. San Jose, CA 95113-1905