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(ENDORSED)  
**FILED**  
AUG 29 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

**AMENDMENT TO ORDER  
GRANTING WRIT OF MANDATE**

*Submitted Matter*

On February 3, 2022, Petitioners filed a Verified Petition for Writ of Mandate and Declaratory and Injunctive Relief Under the California Public Records Act. A merits hearing was held on April 13, 2023. An Order Granting Writ of Mandate (the “Writ Order”) was filed on July 3, 2023. It set a compliance hearing on August 23, 2023.

Petitioners have consistently argued that Respondents’ searches for records have failed to comply with the California Public Records Act (“CPRA”). The Writ Order required Respondent Samuel Liccardo, and Respondent City of San Jose (“City”), to each file a declaration “describing in detail (1) the procedures they used for searching Liccardo’s private email and text message accounts, and (2) the training they received on separating public records and private

1 communications under the guidelines set forth in *City of San Jose*.” Both Liccardo and Rhonda  
2 Hadnot, the Chief Operations Officer for the Office of the Mayor, filed declarations on August 2,  
3 2023. This Amendment to the Writ Order evaluates the adequacy of the required searches.

4 **I. CALIFORNIA PUBLIC RECORDS ACT REQUIREMENTS**

5 The Writ Order explained why Liccardo and Rhonda Hadnot were ordered to submit  
6 declarations that address their CPRA searches and training:

7 Respondents have not furnished evidence of how searches through emails and text  
8 messages from Liccardo’s personal accounts were conducted. All we have now is  
9 Smith’s statements that Rhonda Hadnot “checks the Mayor’s personal email” and  
10 “the Mayor checks his cell phone for text messages.” We also do not know how  
11 Hadnot and Liccardo have been trained to complete the difficult task of separating  
12 public records from private communications using the multi-factor test in *City of  
13 San Jose* and applying the statutory and Constitutional presumptions and other  
14 nuances of the law required for CPRA compliance.

15 **A. Petitioners’ Requests**

16 For context, Petitioners served CPRA requests on Respondents on December 12, 2020,  
17 April 17, 2021, June 24, 2021, July 26, 2021, and July 30, 2021. The CPRA requests that are  
18 most relevant here sought (1) communications from Liccardo that discuss or relate to San Jose  
19 and its officials and employees “whether facilitated by email, social media, or any other  
20 personal communications services,” and (2) public records sent or received on Liccardo’s  
21 personal gmail account, including “any ‘deleted’ items that have not yet been permanently  
22 deleted from these accounts.”

23 **B. Standards for Conducting a Records Search**

24 The requirements for CPRA searches are well known. Public agencies must prove they  
25 conducted an adequate search in response to a CPRA request with the same kind of  
26 “ ‘detailed justification’ ordinarily required to withhold information.” (*Community Youth  
27 Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1425, quoting *American  
28 Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 85 (*ACLU*).)  
“Conclusory or boilerplate assertions that merely recite statutory standards are not sufficient.”

1 (*ACLU, supra*, 202 Cal.App.4th at p. 83.)<sup>1</sup> An employee who withholds records identified as  
2 potentially responsive “may submit an affidavit providing the agency, and a reviewing court,  
3 ‘with a sufficient factual basis upon which to determine whether contested items were “agency  
4 records” or personal materials’ [Citation].” (*City of San Jose. v. Superior Court* (2017) 2  
5 Cal.5th 608, 628 (*City of San Jose*).

6 Elaborating on these requirements, *Ethyl Corp. v. U.S. Environmental Protection*  
7 *Agency* (4th Cir. 1994) 25 F.3d 1241, 1246-47 (*Ethyl*), states:

8 In demonstrating the adequacy of its search, however, an agency may not rest on  
9 an affidavit that simply avers that the search was conducted in a manner  
10 “consistent with customary practice and established procedure.” Rather, the  
11 affidavit must be reasonably detailed, “setting forth the search terms and the type  
12 of search performed, and averring that all files likely to contain responsive  
13 materials (if such records exist) were searched” so as to give the requesting party  
14 an opportunity to challenge the adequacy of the search.

### 12 C. The Need for Training

13 The Writ Order required Liccardo and Hadnot to set forth in detail “the training they  
14 have received on separating public records and private communications under the guidelines  
15 set forth in *City of San Jose*.” “Federal courts applying FOIA have approved of individual  
16 employees conducting their own searches and segregating public records from personal  
17 records, so long as the employees have been *properly trained* in how to distinguish between  
18 the two.” (*City of San Jose, supra*, 5 Cal.5th at p. 628, emphasis added, citing *Ethyl, supra*,  
19 25 F.3d at p. 1247.)

20 It is challenging to distinguish public records from personal information. The task  
21 requires “an examination of several factors, including the content itself; the context in, or  
22 purpose for which, it was written; the audience to whom it was directed; and whether the  
23 writing was prepared by an employee acting or purporting to act within the scope of his or her  
24 employment.” (*City of San Jose, supra*, 2 Cal.5th at p. 618.) Indeed, there is an “intricacy of  
25 determining whether a writing is related to public business.” (*Id.* at p. 619.)

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28 <sup>1</sup> 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           The City recognizes the “intricacy” identified by the California Supreme Court. Its  
2 Public Records Policy and Protocol, which is section 6.1.1 of the San Jose Administrative  
3 Policy Manual, states, “Determination of whether a writing is sufficiently related to the  
4 conduct of the public’s business requires an examination of the content, the context in, or  
5 purpose for which the writing was prepared, the audience to whom it was directed, and whether  
6 the writing was prepared by an official or employee acting or purporting to act within the scope  
7 of employment.” Applying this multi-factor balancing test requires significant training  
8 because terms like “public’s business,” “context,” “audience,” and “scope of employment”  
9 have specific meanings that require knowledge of federal and state law, along with statutory  
10 and Constitutional presumptions and other nuances of the law.

## 11 **II. DISCUSSION**

12           The declarations of Liccardo and Hadnot fail to set forth *in detail* the procedures they  
13 followed to locate the records requested by the Petitioners. Instead, they report only their  
14 general practices. Hadnot refers to her “practice for searching for responsive  
15 communications.” Liccardo too reports only his “practice.” They say they use “key words” to  
16 search for records in response to “a CPRA request.” But they say nothing about what they did  
17 to search Liccardo’s private email and text message accounts for records responsive to the  
18 particular requests at issue here. There are no details. They do not disclose the actual key  
19 words used, the date range of their searches, how many records the key words flagged, or how  
20 many records were withheld because they were privileged or did not concern City business.  
21 As stated in *Ethyl*, reporting “customary practice and established procedure” is inadequate.

22           Similarly, Liccardo and Hadnot do not describe *in detail* the training they received for  
23 separating public records from private communications under the standards set forth in *City of*  
24 *San Jose* and under the City’s own policies and protocols. Each declaration includes just one  
25 paragraph on the training in which they participated, and they include only the job titles of  
26 those who conducted the training. With respect to the number of training sessions they  
27 attended, Liccardo reports, “I can recall at least two occasions on which members of my Office  
28 and I received training on responding to Public Records Act requests.” Hadnot states, “I

1 received periodic training on the Public Records Act, including at least one training conducted  
2 by the City Attorney's Office." They only speculate about updates and office practices.

3 CPRA compliance is burdensome. But as demonstrated here, the task becomes more  
4 formidable when public officials use private email and text message accounts to conduct public  
5 business. More than six years ago our Supreme Court suggested alternatives:

6 [A]gencies can adopt policies that will reduce the likelihood of public records  
7 being held in employees' private accounts.... For example, agencies might  
8 require that employees use or copy their government accounts for all  
9 communications touching on public business. Federal agency employees must  
10 follow such procedures to ensure compliance with analogous FOIA requests.  
11 (See 44 U.S.C. § 2911(a) [prohibiting use of personal electronic accounts for  
12 official business unless messages are copied or forwarded to an official account];  
13 36 C.F.R. § 1236.22(b) (2016) [requiring that agencies ensure official e-mail  
14 messages in employees' personal accounts are preserved in the agency's  
15 recordkeeping system]; *Landmark Legal Foundation v. Environmental Protection  
16 Agency* (D.D.C. 2015) 82 F.Supp.3d 211, 225–22 [encouraging a policy that  
17 official e-mails be preserved in employees' personal accounts as well].)

18 (*City of San Jose*, 2 Cal.5th at pp. 628-629.) These alternatives could alleviate the burdens  
19 imposed on public officials using private accounts by centralizing the records and  
20 standardizing the search protocols.

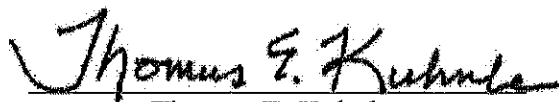
### 21 **III. DISPOSITION**

22 Respondents have not complied with the CPRA. Therefore, court must **AMEND** its  
23 July 3, 2023 Order Granting Writ of Mandate. Page 20 of that Order states, "The Court  
24 DENIES Petitioners' request for declaratory relief." The court now strikes that language and  
25 replaces it with "The court FINDS that Respondents Samuel Liccardo and the City of San Jose  
26 have failed to conduct an adequate search of Liccardo's private email account and his private  
27 text message account."

28 The court also clarifies that Liccardo's deficient CPRA searches were made in his  
capacity as an official of the City and not as an individual.

Petitioners are ordered to prepare a Proposed Judgment.

Dated: August 29, 2023



Thomas E. Kuhnle  
Judge of the Superior Court



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

**(ENDORSED)  
 FILED  
 AUG 29 2023  
 Clerk of the Court  
 Superior Court of CA County of Santa Clara  
 BY C. Pham DEPUTY**

**SAN JOSE SPOTLIGHT et al vs CITY OF SAN JOSE et al**

RE:  
 Case Number: **22CV394443**

**PROOF OF SERVICE**

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

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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 August 29, 2023. CLERK OF THE COURT, by Catherine Pham, Deputy.

**ALSO SERVED VIA EMAIL.**

- cc:** Karl Olson 100 PINE STREET, SUITE 350 San Francisco, CA 94111; kolson@cofolaw.com  
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