



December 20, 2023

Honorable Patricia Guerrero, Chief Justice
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter in Support of Petition for Review
City of Gilroy v. Superior Court, No. S282937

Dear Chief Justice Guerrero and Associate Justices,

Pursuant to Rule 8.500(g) of the California Rules of Court, the First Amendment Coalition (“FAC”) submits this letter urging the Court to grant review of the published decision in *City of Gilroy v. Superior Court*, which confuses the law on remedies for violations of the California Public Records Act (“CPRA”) and threatens to undermine the transparency obligations of public agencies throughout the state. The Court of Appeal’s decision conflicts with other published decisions and frustrates the ability of trial courts to hold agencies accountable for practices such as inadequate searches that prevent full disclosure as much as outright refusals to provide records. Joining this letter are Californians Aware, California Newspapers Partnership, Electronic Frontier Foundation, and Susan E. Seager, Adjunct Clinical Professor of Law at University of California, Irvine School of Law.

I. Interests of Amici Curiae

FAC is a nonprofit organization dedicated to defending freedom of speech, freedom of the press, and the people’s right to know. FAC provides legal information and consultations regarding access rights under state and federal law. FAC regularly files amicus briefs in state and federal courts and engages in litigation to protect and expand the rights of the press and public to transparency in government.

Californians Aware is a nonpartisan, nonprofit advocacy group with a board comprised of journalists, current and former government officers and employees, and public interest advocates. Its mission is to foster the improvement of, compliance with, and public understanding of open government laws throughout California.

California Newspapers Partnership, *dba* Bay Area News Group and Southern California News Group, publishes daily newspapers throughout California, including The Orange County Register, The Press-Enterprise, San Bernardino Sun, Long Beach Press-Telegram, East Bay Times, Marin Independent Journal, Santa Cruz Sentinel,

Monterey Herald, Times Standard, Lake County Record-Bee, Ukiah Daily Journal, Times-Herald; San Jose Mercury News LLC, *dba* The Mercury News; and the San Diego Union Tribune. Each of the forementioned newspapers regularly relies on the CPRA as a tool for gathering information for the dissemination to the public. Therefore, faithful compliance with the provisions of the CPRA and corresponding constitutional provisions governing access to public records is imperative to their missions.

The Electronic Frontier Foundation (“EFF”) is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect free speech, privacy, security, and innovation in the digital world. With more than 35,000 members, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies. In support of its mission, EFF frequently litigates California Public Records Act requests to scrutinize government’s use of digital technology in ways that threaten individuals’ privacy and free expression. *See, e.g., Am. C.L. Union Found. of S. Cal. v. Superior Ct.*, 3 Cal. 5th 1032 (2017) (serving as co-plaintiff in CPRA suit seeking access to Automated License Plate Reader data).

Professor Seager is a First Amendment/media law litigator and adjunct clinical law professor directing the Press Freedom Project providing student pro bono legal services to independent journalists and government watchdog nonprofits, with a focus on Public Records Act litigation against state and local government agencies. Professor Seager has a professional interest in seeing California’s sunshine laws develop to promote the maximum public access to government activities. Professor Seager’s institution is listed for affiliation purposes only; she is a signatory in her personal capacity, not on behalf of her institution.

II. Why Review Should Be Granted

The Petition for Review presents two significant issues, but in the interest of brevity, this letter focuses on why the Court should grant review to resolve a conflict on the important question whether the CPRA authorizes trial courts to grant relief beyond merely ordering an agency to disclose records. Although the power to order disclosure is essential, it is not sufficient to ensure robust enforcement of the CPRA, which depends on holding agencies accountable for the failure to conduct an adequate search.

The duty to search for requested records is intrinsic to fulfilling the constitutional mandate of transparency in government. Cal. Const., art. I, § 3(b). The power to enforce the “right . . . to inspect or receive a copy of any public record or class of public records” must necessarily encompass the power to address the duty to make an adequate

search, without which the ultimate right to disclosure is effectively meaningless. Gov't Code § 7923.000.

In public records litigation, “the unusual nature of the statutory processes renders enforcement of the statutory requirements difficult” due to the informational asymmetry inherent in any records request. *Am. C.L. Union of N. Cal. v. Superior Ct. (ACLU)*, 202 Cal. App. 4th 55, 82 (2011). Only the agency knows what records it has and where or how they are stored. Courts recognize the “reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought. Thus, writings may be described by their content,” and the agency is “obliged to search for records based on criteria set forth in the search request.” *Cal. First Amend. Coal. v. Superior Ct.*, 67 Cal. App. 4th 159, 165–66 (1998). Indeed, the duty to search is embedded in an agency’s obligation to “determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency” and “promptly notify the person making the request of the determination and the reasons therefor.” Gov’t Code § 7922.535(a); see also Gov’t Code § 7922.535(c)(1) (acknowledging an agency’s “need to search for and collect the requested records”).

The duty to make an adequate search is thus intrinsic to vindicating the “fundamental and necessary right of every person” to obtain “information concerning the conduct of the people’s business.” Gov’t Code § 7921.000. An agency cannot disclose what it does not locate. The failure to produce public records due to an inadequate search is tantamount to an outright refusal to disclose. *Cmty. Youth Athletic Ctr. v. City of National City*, 220 Cal. App. 4th 1385, 1425 (2013) (“The effect of the City’s inability or unwillingness to locate the records had the same effect as withholding requested information from the public.”) (citing *ACLU*, 202 Cal. App. 4th at 85).

Agencies and officials often have an “incentive not to assist in the dissemination of their files,” whether to avoid embarrassment or otherwise. *ACLU*, 202 Cal. App. 4th at 85 (citing *Cap. Cities Commc’ns, Inc. v. NLRB*, 409 F. Supp. 971 (N.D. Cal. 1976)). It is all too easy for an agency to evade its disclosure obligations by making only a cursory search. If courts lack power to grant relief against such evasive tactics, the CPRA could become a dead letter. As a result, the power to award relief for failure to conduct an adequate search is essential to fulfilling the CPRA’s fundamental purpose to “safeguard the accountability of government to the public.” *San Gabriel Trib. v. Superior Ct.*, 143 Cal. App. 3d 762, 771 (1983).

A case recently litigated by FAC illustrates the importance of such relief. With San José Spotlight, FAC sued the City of San José for failure to comply with record requests designed to inform the public of the extent to which the city’s former mayor was doing public business on personal devices or accounts, an issue addressed by this Court in *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017). Not only did

the city improperly withhold numerous records, but it also failed to locate and disclose significant text messages referred to in other documents. As a result, the trial court both ordered disclosure of specific records and entered a declaratory judgment that the city failed to conduct an adequate search. See Joseph Geha & Jana Kadah, *Ex-San Jose mayor and city violated the law, judge rules*, San José Spotlight (Aug. 29, 2023), <https://sanjosespotlight.com/ex-san-jose-mayor-sam-liccardo-and-city-violated-the-law-judge-rules-california-public-records-act/>; Joseph Geha, *Former San Jose mayor must explain how he complied with records law*, San José Spotlight (July 16, 2023), <https://sanjosespotlight.com/former-san-jose-mayor-sam-liccardo-must-explain-how-he-complied-with-california-public-records-law/>; Tran Nguyen, *San José Spotlight is suing San Jose, Mayor Liccardo over private email use*, San José Spotlight (Feb. 3, 2022), <https://sanjosespotlight.com/san-jose-spotlight-is-suing-san-jose-mayor-liccardo-over-private-email-use/>. That result properly upheld the people’s right to know and delivered a strong message that failure to conduct an adequate search carries clear legal consequences.

If the court had lacked power to enter such declaratory relief, the city would have escaped any consequences for its failure to search, which would have sent exactly the wrong message to public agencies—that they are free to sabotage the CPRA with impunity by ignoring their search obligations. Yet that is exactly what the Court of Appeal’s ruling in this case would accomplish.

To allow the ruling to stand would threaten to make a mockery of the CPRA’s founding premise: “Openness in government is essential to the functioning of a democracy” and checking “the arbitrary exercise of official power and secrecy in the political process.” *Int’l Fed’n of Pro. & Tech. Eng’rs, Local 21 v. Superior Ct.*, 42 Cal. 4th 319, 328–29 (2007).

III. Conclusion

To prevent the Court of Appeal’s decision from undermining the fundamental right to governmental transparency, this Court should grant review to resolve an important conflict on the question whether a trial court may enter declaratory judgment against an agency that has failed to conduct an adequate search for public records.

Very truly yours,

FIRST AMENDMENT COALITION

John David Loy
Legal Director

PROOF OF SERVICE

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 Fourth Street, Ste. B, San Rafael, CA 94901.

On December 20, 2023, I served true copies of the following document(s) described as **Letter in Support of Petition for Review** on the interested parties in this action as follows:

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

Executed on December 20, 2023, at East Palo Alto, California.



Robin P. Regnier