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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SANTA CLARA
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17 SAN JOSÉ SPOTLIGHT and FIRST
AMENDMENT COALITION,

18 Petitioners,

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

22 Respondents.
23

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND DECLARATORY AND
INJUNCTIVE RELIEF UNDER THE
CALIFORNIA PUBLIC RECORDS ACT**

24
25 Petitioners San José Spotlight (“Spotlight”), a nonprofit digital news organization, and
26 First Amendment Coalition (“FAC”), a non-profit organization (collectively, “Petitioners”),
27 petition the Court, through this Verified Petition for Writ of Mandate, to command Respondents
28

1 City of San José (the “City”) and Mayor Samuel Liccardo (“Liccardo”), individually and as an
2 official for the City of San José (collectively, “Respondents”), to comply with the California
3 Public Records Act (“CPRA”), Government Code section 6250, *et seq.*, the California
4 Constitution, Article I, section 3(b), and San José Open Government Ordinance No. 12.21.010 and
5 to declare that Respondents have failed to do so.

6 INTRODUCTION

7 1. This Petition for Writ of Mandate under the California Public Records Act seeks to
8 enforce the public’s right of access to records, including but not limited to those relating to
9 communications between city staff and lobbyists for business and other interests. In particular, but
10 not exclusively, this Petition seeks to enforce the public’s right of access to communications sent
11 or received on non-governmental email accounts—a right squarely enunciated by the California
12 Supreme Court in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 620 (“*San Jose*”).
13 Despite the Supreme Court’s ruling in a case involving his own City, Mayor Liccardo continues to
14 engage in extensive work-related correspondence on his non-governmental electronic devices, a
15 practice discouraged by the Supreme Court’s ruling.

16 2. As explained more fully below, it is evident from the unlawful manner in which
17 Respondents have withheld records that, contrary to the *San Jose* decision, Respondents are either
18 not properly preserving or not properly producing—or both—emails and other records contained
19 on non-governmental devices and accounts, as required.

20 3. Between December 2020 and May 2021, Petitioners made several requests to
21 Respondents for access to public records pursuant to the CPRA. Respondents’ responses to these
22 requests were not in compliance with the CPRA, in particular (but not exclusively) by failing to
23 fully produce responsive documents from Respondent Liccardo’s personal email account and texts
24 from Liccardo’s personal device(s).

25 4. San José, more than other cities in California, is or should be aware of the
26 requirement under the CPRA that public agencies conduct an adequate search of, and produce
27 public records from, non-governmental devices or accounts, such as Liccardo’s personal email
28 account. In *San Jose*, this state’s high court held that “a city employee's writings about public

1 clear, present and substantial right to the relief sought herein and no plain, speedy and adequate
2 remedy at law other than that sought herein. Under Government Code section 6258, “[a]ny person
3 may institute proceedings for injunctive or declarative relief or writ of mandate . . . to enforce his
4 or her right to inspect or to receive a copy of any public record or class of public records under this
5 chapter.”

6 10. Respondent City of San José is a local agency, under Government Code section
7 6252, subdivision (a), in possession of records subject to the CPRA, with offices in San José.
8 Respondent Mayor Samuel Liccardo is a government official in possession of records subject to
9 the CPRA, with offices in San José.

10 **JURISDICTION AND VENUE**

11 11. The relief sought by Petitioners is expressly authorized under Government Code
12 sections 6258 and 6259, subdivision (a), Code of Civil Procedure sections 1060 and 1085, *et seq.*,
13 Article 1, section 3(b) and Article VI, section 10 of the California Constitution, and San José Open
14 Government Ordinance No. 12.21.290. Venue is proper under Code of Civil Procedure sections
15 394 and 395, Government Code section 6259, subdivision (a). Petitioners are informed and
16 believe that some or all of the records to which they seek access are in Santa Clara County, and
17 that the acts and events giving rise to the claims occurred in Santa Clara County.

18 **FACTS SUPPORTING THE CAUSES OF ACTION**

19 **San José Spotlight’s Request for the Largent Emails**

20 12. On November 19, 2020, homeless advocate Scott Largent emailed Respondent
21 Liccardo at his government email address. (Ex. A.) Largent stated that he was “concerned that my
22 Emails are accessible by a records request and this can make my life very difficult.” (*Id.*) Liccardo
23 responded on January 12, 2021: “Please communicate with me at the following email: [redacted].
24 Please do not share the email address. I’m going to delete this email from my government
25 account.” (*Id.*)
26

27 13. However, when Spotlight submitted, on June 24, 2021, a CPRA request to
28 Respondents for “all email and text message communications” between Liccardo and Largent sent

1 or received after November 1, 2020 (“The Largent Emails”), Respondents claimed on July 20,
2 2021 that “City Staff did not identify any documents that are responsive to your request.” (Ex. B.)

3 14. On July 22, 2021, Spotlight notified City Attorney Nora Frimann that Spotlight
4 independently obtained emails between Liccardo and Largent that were clearly responsive to
5 Spotlight’s June 24, 2021 request. (Ex. C.) Spotlight inquired why the City had not provided
6 Liccardo and Largent’s email exchange—or any other records in response to that request. (*Id.*)
7 Spotlight notified Frimann that in the emails, Liccardo stated that he would “delete this email from
8 [his] government account” and directed Largent to contact him on his private email account. (*Id.*)

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10 15. The city then abruptly changed its tune. A few hours later, Liccardo’s staff
11 member Henry Smith notified San José Spotlight that the June 24, 2021 CPRA request was
12 “prematurely closed” and that Liccardo would search his personal email account once he returned
13 from vacation. (Ex. D.) On August 9, 2021, Respondents produced four heavily redacted emails.
14 (Ex. A.) In a corresponding letter, Respondents did not explain why these public records were not
15 acknowledged or provided until after Spotlight exposed the city’s failure to produce or explain
16 withholding for obviously responsive records, but asserted that the City “handled the email at
17 issue appropriately and lawfully.” (Ex. E; Ex. F.)

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19 16. In the August 9, 2021 letter, Respondents also asserted, inconsistent with the
20 CPRA, that “withholding of the email from disclosure would be proper to protect the privacy
21 interest of the resident who sent the email.” (Ex. F) The CPRA, however, permits redaction *at*
22 *most* to protect such privacy interests—not wholesale withholding of records. (See, e.g., Gov.
23 Code § 6253, subd. (a).) Indeed, the August 9 letter itself acknowledges this, stating that
24 “normally, we would redact Mr. Largent’s name to protect his identity as a potential whistleblower
25 under the official information privilege. However, because Mr. Largent and San José Spotlight has
26 made his identity public, we are not redacting his name.” (Ex. F.)
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1 17. Notably, Respondents’ August 9, 2021 letter does **not** assert that Respondents ever
2 searched through Liccardo’s personal emails, as required under the *San Jose* decision, prior to
3 being informed that Spotlight already had a copy of at least one responsive email. Respondents
4 ultimately produced largely unredacted emails between Liccardo and Largent, as set forth below,
5 in response to the “Personal Accounts Requests”. (See Ex. G.) However, one of the Largent
6 Request emails from January 13, 2021 at 6:27 AM was entirely withheld from the Personal
7 Accounts Requests production without explanation, indicating ongoing inconsistencies and issues
8 with Respondents' procedures. (See Ex. A.)

10 18. Upon information and belief, and based in part on Respondents’ behavior with
11 respect to the Largent Emails, Respondents regularly fail to search for public records residing on
12 non-governmental devices or accounts, particularly Liccardo’s non-governmental accounts.

14 19. Upon information and belief, and based in part on Respondents’ behavior with
15 respect to the Largent emails, Liccardo regularly and improperly deletes emails from his
16 governmental email account.

17 20. Liccardo frequently, if not exclusively, uses his personal email to conduct public
18 business. (Ex. H.) Indeed, he has instructed his staff to use his personal Gmail account to “ensure
19 [he] sees” messages and directs members of the public to use his personal email address. (Ex. I;
20 Ex. A [*See* January 12, 2021 email].) This practice appears to be well-known among Liccardo’s
21 staff, and his staff members have engaged in this practice as well. (Ex. J.)

23 21. When combined with the City’s and Liccardo’s regular failure to search through
24 Liccardo’s personal accounts, upon information and belief, these practices regularly result in an
25 absence of public access to the written communications of the Mayor of the largest city in the Bay
26 Area.

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26. Respondents have provided only one text message in response to the Personal Accounts Requests (Ex. M), although it is apparent from the face of what Respondents *have* produced that many more text messages exist, or at least did before improper deletion. For example, the following documents, among others, indicate that additional text messages responsive to the Personal Accounts Requests exist (or existed):

- Liccardo emailed Attorney General Rob Bonta’s Chief of Staff, Viviana Becerra, stating “I texted the Attorney General today.” (Ex. N.)
- In an email exchange with Ed Clendaniel of the Mercury News, Liccardo stated “Yeah, I’m particularly frustrated because I had a text exchange with Borenstein and sent an email to the first article’s author,” in reference to Mercury News articles about Valley Transportation Authority Spending. (Ex. O.)
- In an email discussing an upcoming infrastructure bill, Liccardo stated that “Therese texted me today to connect Alfredo and the MTC for a meeting on HSR lobbying for the upcoming infrastructure bill.” (Ex. P.)
- In an email to Golden State Warriors executive Yoyo Chan, Liccardo stated “My apologies for failing to remember to follow up on our text until today” regarding donations for San José Aspires. (Ex. Q.)
- Liccardo’s staff member Isela Chaparro emailed Liccardo with the subject line, “Just texted you Re: this Tomorrow” in reference to a Special Session for Harvard Mayors. (Ex. R.)
- Alex Shoor with Catalyze SV emailed Liccardo “Per our text exchange, in response to your request for an overview on Catalyze SV.” (Ex. S.)

1 exceptions to the CPRA that warrant withholding of material do not apply, including but not
2 limited to Respondents' failure to adequately demonstrate, as required under the CPRA and the
3 San José Open Government Ordinance, that information redacted from the records they have
4 produced can be lawfully withheld.

5 38. Respondents have repeatedly failed to conduct adequate searches in response to
6 Petitioners' requests, including but not limited to their failure to search personal devices and
7 accounts. These failures are violations of the CPRA.

8 39. Respondents have repeatedly violated the CPRA's mandate that agencies "shall
9 make [public] records promptly available" (Gov. Code § 6253, subd. (b)) and that agencies may
10 not "delay or obstruct the inspection or copying of public records." (Gov. Code § 6253, subd. (d).)
11 Respondents have also failed to comply with San José Resolution No. 77135, section 4.3.1.6(E),
12 requiring the City to provide an estimate as to when records will be made available.

13 40. An actual controversy exists as to whether the materials requested by Petitioners
14 must be disclosed, and whether those records, or any part thereof, are exempt from disclosure.

15 41. Petitioners have no plain, speedy and adequate remedy to obtain the records they
16 have requested, other than this Petition. Petitioner is entitled to institute proceedings for a writ of
17 mandate to enforce their rights and the public's rights to obtain records responsive to Petitioners'
18 requests. Furthermore, under Government Code section 6258, Petitioners are entitled to have the
19 proceedings resolved on an expedited basis consistent "with the object of securing a decision to
20 these matters at the earliest possible time." (Gov. Code section 6258.)

21 **SECOND CAUSE OF ACTION**

22 **For Declaratory and Injunctive Relief**

23 42. Petitioners reallege Paragraphs 1 through 41 above as though fully incorporated
24 herein.

25 43. The CPRA and California Constitution require disclosure of the public records
26 Petitioners have requested.

27 44. The burden lies with Respondents to demonstrate "on the facts of the particular
28 case the public interest served by not disclosing the record clearly outweighs the public interest

1 served by disclosure of the record.” (Gov. Code section 6255(a). Respondents have failed to carry
2 this burden and failed to carry the burden of showing any other potential exemption from the
3 CPRA.

4 45. The CPRA and California Constitution require Respondents to conduct an adequate
5 search of records in response to a PRA request. Respondents have failed to do so.

6 46. Respondents have demonstrated a pattern and practice of failing to adequately
7 search for and produce emails sent or received on non-governmental devices or accounts.
8 Respondent Liccardo has also engaged in a pattern and practice of deleting emails and texts on his
9 “private” electronic devices.

10 47. Petitioners seek a judicial determination that the records sought by Petitioners but
11 not yet disclosed by Respondents are public records as defined by Government Code section 6253,
12 subdivision (e), are subject to disclosure under Government Code section 6253, subdivisions (a)
13 and (b) and Article I, section 3(b) of the California Constitution, and that Respondents violated the
14 CPRA by failing to promptly make the requested materials available to the public.

15 48. Petitioners seek a judicial determination that the Respondents are in violation of the
16 mandate articulated by *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, that they search
17 for and produce public records sent or received on non-governmental devices and accounts.

18 49. Petitioners also seek an order, *inter alia*, prohibiting Respondents from allowing
19 employees to use only non-governmental accounts, i.e., that they must at a minimum copy
20 governmental accounts when sending communications that relate to the public’s business, as
21 outlined by the Supreme Court in the *San Jose* decision. (2 Cal.5th at 628 [advising that agencies
22 can “require that employees use or copy their government accounts for all communications
23 touching on public business”].) Petitioners additionally seek declaratory and injunctive relief that
24 if respondents deleted records responsive to petitioners’ requests, they violated the Public Records
25 Act and Government Code section 34090, which prevents deletion of records which are less than
26 two years old.
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1 **PRAYER FOR RELIEF**

2 Wherefore, Petitioners San José Spotlight and First Amendment Coalition pray for writ
3 relief and judgment as follows:

4 1. That the Court order Respondent Mayor Samuel Liccardo to conduct an adequate
5 search of his personal devices and accounts, and submit an affidavit “providing the agency and a
6 reviewing court with a sufficient factual basis upon which to determine whether contested items
7 were agency records or personal materials” pursuant to the procedure described in *City of San Jose*
8 *v. Superior Court* (2017) 2 Cal. 5th 608, 627-628.

9 2. That the Court order Respondents to do an adequate search of all the records
10 withheld or redacted, including a search for documents in personal accounts and documents held
11 on personal devices, and thereafter order such documents produced or, if produced but improperly
12 redacted, provided without such redactions.

13 3. That the Court order Respondents City of San José and Mayor Samuel Liccardo to
14 produce all of the records requested in Petitioners’ Public Records Act requests, including those
15 records currently being withheld by Respondents;

16 4. Alternatively, if the Court does not immediately order production of the records
17 requested, that it order Respondents to show cause why the records should not be released, to
18 prepare a log of withheld records, and thereafter order the requested records to be disclosed;

19 5. Alternatively, if the Court does not immediately order the requested records to be
20 disclosed and released, that the Court conduct an *in camera* review of the records requested, and
21 thereafter order them to be released;

22 6. For a declaration that the withheld materials are public records as defined by
23 Government Code section 6252, subdivision (e) in that they contain information relating to the
24 conduct of the people’s business, prepared, owned, used or retained by Respondents, and are
25 subject to disclosure under Article 1, section 3(b) of the California Constitution as writings of
26 public officials, and that Respondents violated the Public Records Act by both failing to promptly
27 make the materials available to Petitioners and the public, and by excessive delays;

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Dated: February 2, 2022

FIRST AMENDMENT COALITION

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