SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

First Amendment Coalition and Working Partnerships U.S.A., Petitioners, vs. City of San Jose, Respondent.	Case No. 18CV338053 ORDER DENYING PETITION FOR WRIT OF MANDATE

The two issues presented to the court by the First Amended Petition for Writ of Mandate filed on January 7, 2019, by Petitioners First Amendment Coalition and Working Partnerships U.S.A., as briefed and argued, are whether Respondent City of San Jose has conducted an adequate search of documents responsive to Petitioners' requests under the Public Records Act (Govt. Code section 6250 et seq. ("PRA")), and whether the documents withheld by the City as privileged are exempt from disclosure.

On August 1, 2019, the matter came on for hearing in Department 3 before the Honorable Patricia M. Lucas, Karl Olson of Cannata O'Toole Fickes & Olson LLP appearing for Petitioners and Kathryn Zoglin of the Office of the City Attorney appearing for the City. At the conclusion of the hearing, the matter was submitted.

I. THE RECORD EVIDENCE

A. Requests for Judicial Notice

The City filed a Request for Judicial Notice of section 803 of the City Charter and Title 12 of the San Jose Municipal Code. Petitioners had no objection, and the request is granted.

Not in a separate Request for Judicial Notice but in the Declaration of Peter Scheer, Petitioners made a request for judicial notice of a ballot argument in support of Proposition 59. The City has no objection and the request is granted, but the court finds the evidence of limited value for the following reason. Using the declaration to present argument, Petitioners assert that the intent of Proposition 59 was "to do away with or severely limit the so-called 'deliberative process privilege'" (Scheer Declaration, at 1:24-25). Petitioners rely on *Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1255-56 (affirming trial court's ruling that local ordinance passed by initiative is unconstitutional). However, the *Jahr* court did not credit the proffered ballot pamphlet language, honoring the cited principle that if the statute is unambiguous (as was the disputed language in that case), it is not "'necessary to resort to indicia of the intent ... of the voters....'" (*Jahr*, *supra*, 70 Cal.App. 4th at 1254, quoting *Delaney v. Superior Court* (1990) 50 Cal.3d. 785, 798.) Petitioners here do not argue that the PRA is ambiguous. In dicta, the *Jahr* court then noted that even if the language were ambiguous (which it was not), the ballot pamphlet supported the trial court's finding. (*Jahr, supra,* 70 Cal.App.4th at 1256.)

B. The City's Objections to Petitioners' Evidence

An affidavit or declaration is written testimony under oath. (Code of Civil Procedure sections 2002, 2003, and 2015.5.) It is improper to include legal arguments in a declaration. (*Marriage of Heggie* (2002 99 Cal.App.4th 28, 30.) As noted above and as reflected in the rulings below, Petitioners improperly filled the proffered declarations with legal argument.

1. Declaration of Jeffrey Buchanan

Objections 1, 12 and 13 are overruled, and the remaining objections are sustained.

2. Declaration of Derecka Mehrens

Objections 20, 26, 42 and 63 are overruled. and the remaining objections are sustained.

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3. Declaration of Peter Scheer

The objections are sustained.

4. Declaration of David Snyder

Objections 6 and 9 are overruled. and the remaining objections are sustained.

C. Petitioners' Objections to the City's Evidence

1. Declaration of Ahmad Chapman

The objections are overruled.

2. Declaration of Richard Doyle

Objection 1 is overruled. Objection 2 is sustained only as paragraphs 7-12, 14-21, and 24-32 and only to legal conclusions and not as to foundational facts, and is otherwise overruled. Objection 3 is sustained as to the first sentence in paragraph 23, and is otherwise overruled.

3. Declaration of Bill Ekern

The objections are overruled.

4. Declaration of Bruce Galloway

The objections are sustained only as to legal conclusions and not as to foundational facts, and are otherwise overruled.

5. Declaration of Nanci Klein

Objection 14 is sustained only as to paragraphs 46 and 57-59 and only as to legal conclusions and not as to foundational facts. The objections are otherwise overruled.

6. Declaration of Rosario Neaves

Objection 4 is sustained and the remaining objections are overruled.

7. Declaration of Johnny Phan

The objections are sustained only as to legal conclusions and not as to foundational facts, and are otherwise overruled.

8. Declaration of David Snow

The objections are sustained only as to legal conclusions and not as to foundational facts, and are otherwise overruled.

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9. Declaration of Anh Tran

Objection 4 is sustained only as to paragraph 13, Objection 5 is sustained, and the remaining objections are overruled.

10. Declaration of Kim Walesh

Objection 2 is sustained only as to the last two sentences in paragraph 13 (at 5:21-27) and is otherwise overruled. Objection 7 is sustained only as to paragraphs 43, 46, 51, 65 and 66 and only as to legal conclusions and not as to foundational facts, and is otherwise overruled. The remaining objections are overruled.

11. Declaration of Kathryn Zoglin

The objections are overruled.

D. The City's Objections to Petitioners' Evidence Proffered in Reply

The City objects to the evidence presented with Petitioners' Reply (i.e., the Reply Declarations of Karl Olson and Jeffrey Buchanan), on the ground that Petitioners are not allowed to supplement their evidence on reply. In support of the objection, the City relies on *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 432 n. 3 (on summary judgment motion, trial court and court of appeal disregarded new evidence filed with reply papers). The court has considered the comments made on behalf of Petitioners at oral argument concerning these objections.

The objections are sustained.

II. THE REQUESTS FOR RELIEF

The First Amended Petition seeks relief under the PRA and the California Constitution. Enacted in 1968, the PRA grants access to public records held by state and local agencies. In 2004, through Proposition 59, the public right of access to information became part of the California Constitution, which directs that statutes are to be narrowly interpreted to further the people's right to access and narrowly construed to limit that right. (Cal. Const., art. I, section 3, subd. (b)(2).)

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"Despite the value assigned to robust public disclosure of government records both in the California Constitution and in the PRA, two statutory exceptions nonetheless exist. The first is section 6255(a), the PRA's catchall provision allowing a government agency to withhold a public record if it can demonstrate that 'on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.' In determining the propriety of an agency's reliance on the catchall provision to withhold public records, the burden of proof is on the agency 'to demonstrate a clear overbalance' in favor of nondisclosure. (*Michaelis, Montari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.) The second is section 6254, which lists certain categories of records exempt from PRA disclosure. These exemptions are largely concerned with protecting '"the privacy of persons whose data or documents come into governmental possession."' [Citation.]" (*Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 291.)

This case concerns both the "catch-all" exemption of section 6255 in the form of the "deliberative process" privilege and a specific statutory exemption in section 6254(k) for documents subject to the attorney-client privilege and work product protection.

A. Request for Order That Documents Not Produced Be Disclosed

1. Attorney-Client Privilege and Work Product Protection

The PRA does not require disclosure of records if such disclosure is "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Govt. Code section 6254(k).) Evidence Code section 950 et seq. prohibits disclosure of confidential attorney-client communications, and Evidence Code 915 and Code of Civil Procedure section 2018.030 prohibit disclosure of attorney work product. '"Although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of the state has determined that these concerns are outweighed by the importance of preserving the confidentiality of the attorney-client relationship."' (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740-41.)

According to the City's twelve-page amended privilege log which Petitioners include in their opening papers as Exhibit C to the Olson Declaration ("the Log"), 78 of the 94 documents

identified by the City as responsive but not produced are withheld on the basis of the attorney-client privilege, or on the basis of that privilege as well as the work product protection.[1]

In their Opening Memorandum, Petitioners assert that there has been an "utter failure [by the City] to explain why any of the records sought would be privileged" (Opening Memorandum, at 14:25-26), but do not address any of the information that had been provided to Petitioners in the Log.

In opposition, the City submits declarations from two attorneys at the Office of the City Attorney advising on these matters (Declarations of Richard Doyle and Johnny Phan), as well as two outside attorneys (Declarations of David Snow and Bruce Galloway). In addition, the City has presented declarations from three staff members who sought and obtained legal advice from these attorneys (Declarations of Bill Ekern, Nanci Klein, and Kim Walesh). In these declarations, every one of the documents withheld on the basis of the attorney-client privilege, or on the basis of that privilege as well as the work product protection, is addressed in detail by both attorney and client. These detailed accounts meet the City's prima facie burden to establish that these communications were made in the course of an attorney-client relationship. (*Costco, supra,* 47 Cal.4th at 733.)

The City having met its initial burden, these communications are presumed to be privileged, and the burden shifts to Petitioners to show that "the communication was not confidential or that the privilege does not for other reasons apply." (*Costco, supra,* 47 Cal.4th at 733.) Petitioners' Reply addresses none of the declarations from the clients or the advising attorneys. (Reply, at 13-14.) Petitioners rely on language from *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 227, discussing the privilege in general terms, but the *Caldecott* court did not hold, as Petitioners assert, "that claims of attorney-client privilege swept too broadly." (Reply, at 13:1-3.) To the contrary, the Court of Appeal did not make any finding that documents claimed to be protected by the attorney-client privilege were not in fact privileged. (*Caldecott, supra*, 243 Cal.App.4th at 227.) Petitioners also rely on *Braun v. City of Taft* (1983)

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[1] As to some of those 78 documents, additional legal bases for nondisclosure are also listed in the log.

154 Cal.App.3d 332, 341, to support speculation that some of the City's documents "may be partially exempt" (Reply, at 13:27), but the *Braun* case does not involve an application of the attorney-client privilege.

Accordingly, the court finds that the documents withheld by the City under the attorney-client privilege are exempt from disclosure under the PRA.

Petitioners have offered no separate analysis of the City's work product assertions. The attorney declarations filed by the City provide detailed explanations in support of the claims for work product protection. Notes reflecting an attorney's thoughts and impressions are protected from disclosure even when intertwined with factual material. (*Coito v. Superior Court* (2012) 54 Cal.2d 480, 494.) Accordingly, the court finds that the documents withheld by the City under the work product protection are exempt from disclosure under the PRA.

2. The "Deliberative Process" Privilege

The City has withheld sixteen documents based on the "deliberative process" privilege under the "catchall exemption" of section 6255. (Opposition, at 13:18-20.) As referenced in the Log, those documents are: 11, 27, 46-48, 57-58, 60, 62-64, 66-67, 69, 71-72, and 74.

"Nothing in the text or the history of section 6255 limits its scope to specific categories of information or established exemptions or privileges. Each request for records must be 'considered on the facts of the particular case' in light of the competing "public interests." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338.)

a. The City's Evidence

In its opposition, the City has explained that the documents withheld pursuant to this exemption fall into three categories: community benefits, the location of a future fire training center, and parking by the SAP Arena. Each of these topics involves ongoing or anticipated negotiations with Google and/or other parties for which City staff are currently conducting extensive research and preparation.

With respect to community benefits, on December 4, 2018, the City Council approved a Memorandum of Understanding which explains a shared vision for the mixed-use development of properties transferred to Google and the intent to negotiate an agreement to vest certain

entitlements and development rights in exchange for community benefits. Negotiations with Google on these issues have not yet begun, but are expected to begin at the end of 2020. City staff is currently integrating community input and Council direction to formulate an approach to those negotiations. (Opposition, at 14-15.)

Concerning the fire training center, one of the parcels sold to Google is used for training exercises for the City's Fire Department. For decades the City has foreseen the need to replace the current "aged" facility and to relocate the center out of downtown. The City has not identified a specific recommended site and no negotiations have begun. (Opposition, at 15-16.)

With respect to the SAP parking, the City is contractually obligated to Sharks Sports and Entertainment ("SSE") to provide a certain amount of parking within the vicinity of the Arena. Some of the properties sold to Google include areas currently used for parking, so the City is developing strategies to comply with its obligations to SSE. (Opposition, at 16.)

For each of the sixteen documents withheld, the City has provided a detailed explanation of the circumstances of the document's creation and why the public interest in the document's disclosure is outweighed by the public interest in nondisclosure. (Declarations of Doyle at ¶ 33; Ekern, at ¶¶ 4-6, and 8; Klein, at ¶¶ 5, 10, 13-19, 26, 39, 44-45, 47-49, 52, 54, and 60; and Walesh, at ¶¶ 9, 14-20, 26-29. 35, 47, 53-58, and 60-61.) According to the sworn statements of these senior City officials, it is essential to the public interest that the City's potential approaches in certain matters yet to be negotiated not be disclosed to the public—and thus to parties potentially negotiating with the City—at this stage. "If the ideas were to be disclosed, it could significantly undermine the City's bargaining power and ability to obtain the most valuable terms and most community benefits possible for the City of San Jose and its residents." (Walesh Declaration at 7:7-9; see also Klein Declaration at 6:7-10.)

b. Public Entity Negotiations and the PRA

As a matter of common experience and common sense, a party is advantaged in negotiations when certain information is not known to the other negotiating party. Conversely, there are disadvantages when the other negotiating party is aware of information about the first party's options and limitations. The phrase "scientia potentia est" ("knowledge is power") is

widely attributed to Sir Francis Bacon, but undoubtedly its gist was well understood by humankind long before the 14th century. From a more modern observer: "Knowledge is power, and the more power you're armed with, the better you'll fare in the negotiation. Before entering any negotiation, do your research to understand the possible outcomes." William Ury, co-author of "Getting To Yes," and co-founder, Harvard Program on Negotiation, in "How to Know When You Should Walk Away from a Negotiation."

The California Supreme Court has recognized this reality of business negotiations, in Justice Chin's decision in *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1074: "the willingness of a negotiating party to agree depends in part on its assessment of the other party's alternatives." In *Michaelis*, the Supreme Court applied section 6255 to reverse the Court of Appeal and affirm a trial court's Public Records Act decision precluding disclosure of city documents relating to real estate negotiations with private entities. Specifically, the Supreme Court held: "we conclude that public disclosure of such proposals properly may await conclusion of the agency's negotiation process, occurring before the agency's recommendation is finally approved by the awarding authority." (*Michaelis, supra*, 38 Cal.4th at 1067.)

Los Angeles World Airports, a city department, desired to lease a parcel of land at the Van Nuys airport, and so issued a Request for Proposal. According to city procedures, once the department negotiated with proposers and submitted a proposed lease to the Board of Airport Commissioners—but before Board approval--there would be a five-day public comment period. After Board approval, the matter would come before the city council for approval. (*Michaelis, supra*, 38 Cal.4th at 1068.)

After the deadline for RFP submission but before negotiations with proposers had begun, the petitioner, "a law firm engaged in aviation related business," made a PRA request for copies of all proposals submitted in response to the RFP. (*Michaelis, supra*, 38 Cal.4th at 1068.) The department property manager wrote to the petitioner that the proposals would not be disclosed at that time, noting the "'long-established practice of most governmental agencies to make RFP proposals available for public review at the time the contract is presented to the awarding authority [i.e., the Board] for award. More precisely, proposals are first available for review

when the awarding authority's agenda containing the contract to be awarded is published. [¶] This practice allows for the public to obtain the information prior to the awarding authority's consideration and award of the contract. Importantly, it also allows the governmental entity, on behalf of its residents and taxpayers, to complete the negotiations without the proposers knowing each other's price and terms. To make proposals available for public review prior to this time would seriously impact the government's ability to negotiate a fair and cost effective proposed contract.'" (*Id,.* at 1069.)

The petitioner then sought a writ of mandate. Before the writ hearing, the City Attorney provided to the petitioner the names of the proposers but not the terms of the proposals, explaining that "disclosing the information at that time 'would irretrievably corrupt the process and harm not only the respondents, but also city taxpayers who may not receive the best value in return for the expenditure of their tax dollar,' because the successful proposer could gain a negotiating advantage if it knew the details of the unsuccessful proposals." (*Michaelis, supra*, 38 Cal.4th at 1069.) The trial court denied the petition, finding that to disclose the proposals before the selection of a successful bidder would adversely impact the city's negotiating position and that, pursuant to section 6255, "'the public interest in nondisclosure clearly outweighs the public interest in disclosure.'" (*Id.,* at 1070.)

The Court of Appeal split 2 to 1 in reversing the trial court, making the same points framed by Petitioners here: that the city had not met its burden to show the greater public interest in nondisclosure; that the asserted reasons for nondisclosure were speculative; and that the public had a strong interest in knowing whether the city was conducting its business properly and in accordance with all applicable rules. In dissent, Justice Mosk stated that "substantial evidence supported the trial court's findings that little if any public benefit would derive from premature disclosure of the competing proposals, and that such disclosure could impair the city's selection and negotiating process." (*Michaelis, supra*, 38 Cal.4th at 1070-71.)

Before the Supreme Court, the petitioner made arguments echoed by Petitioners' current assertions: that there is an "'intense public interest'" in these transactions, given the potential benefits and burdens to the local community. (*Michaelis, supra*, 38 Cal.4th at 1072.)

In reversing the Court of Appeal, the Supreme Court adopted the views of the dissent below, holding that to require disclosure of the requested documents would adversely impact the city's negotiating position and thereby impair the strong public interest in achieving the best possible result for the city, while the public interest in disclosure was minimal. While acknowledging the legitimate and substantial public interest in ensuring a healthy bidding process with ample competition and safeguards against discrimination, favoritism and extravagance, all to the end of accomplishing the best result for the public, the Supreme Court nevertheless found that there would be ample opportunity for public scrutiny after negotiations were completed and that earlier disclosure would not provide any significantly greater benefit to the public. (*Id.*, at 1073.)

On the other hand, in analyzing the public interest in nondisclosure, the Supreme Court noted the trial court's concerns that "premature disclosure would reveal specific, confidential details of the competing proposals to the other proposers, thereby potentially impairing the city's negotiation and selection processes" and "advance disclosure of the various proposals could adversely affect the city's ability to maximize its financial return on the lease." (*Michaelis, supra*, 38 Cal.4th at 1074.) The Court of Appeal dissent elaborated on this dynamic, observing that "a bidder that is negotiating will be in a position to know that it does not have to accede to City requests because of the content of other bids." (*Id.*) The Supreme Court also agreed with the dissent's observation that the public would be benefited by allowing the city to negotiate in the first instance without the additional undesirable pressures, political and otherwise, that could result from public input at the negotiation stage, as distinct from the approval stage. (*Id.*, at 1075.)

Petitioners provided no argument, in briefing or at oral argument, to distinguish the rationale in *Michaelis* as applied to prohibition of pre-approval disclosure in this case.

c. Application and Findings

For the reasons developed at length in *Michaelis*, the City's arguments are not "speculative" that the greater public interest is in nondisclosure rather than disclosure. The City's ability to obtain the best value in land transactions and to maximize the community benefits it can achieve in negotiations with Google would be adversely impacted if the parties

with which the City negotiates had otherwise confidential information about the City's approaches, strategies, and options.

Given the City's extensive community outreach and engagement (Opposition, at 2), access to the sixteen withheld documents pending approval would not contribute any material incremental benefit to the public interest in accessing information about the Google project and in providing input. The public interest in holding government agencies accountable would still be amply served by disclosure in connection with public approvals. Accordingly, the court finds that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

As set forth above, *Michaelis* addresses specifically how the policies underlying the PRA, and in particular section 6255, apply when a city negotiates business deals with private entities. Because of the City's factual showing here, this case is distinguished from *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 306, (though City failed to provide "the detailed and specific showing required to establish its [deliberative process] privilege claim," petitioner failed to show prejudicial error), on which Petitioners rely.

The significant public disadvantage in disclosure is not theoretical or speculative for the reasons analyzed in *Michaelis*, and is wholly distinct from the security concerns addressed in the cases relied upon by Petitioners such as *CBS, Inc. v. Block* (1986) 86 42 Cal.3d 646, 652; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 76; and *Connell v. Superior Court* (1997) 56 Cal.App.4th 601. Nor does this case involve privacy concerns addressed in other cases on which Petitioners rely such as *International Federation of Professional and Technical Engineers, Local 21 AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329; *BRV. Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 759; *California State Fresno v. Superior Court* (2001) 90 Cal.App.4th 810; *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 225-26; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; and *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

B. Request for Order That Undisclosed Documents Be Reviewed In Camera

In their opening brief, Petitioners refer to but do not quote Govt. Code section 6259 to support their request that the court review all documents withheld, including those withheld on

the basis of the attorney-client privilege. The language of section 6259 limits in camera review as follows: "The court shall decide the case after examining the record in camera, *if permitted by subdivision (b) of Section 915 of the Evidence Code*...." (Govt. Code section 6259(a)(emphasis added).)

Evidence Code section 915(b) applies, by its terms, only to claims of privilege under the official information provision of Evidence Code section 1040, claims of privilege under the trade secret law, or claims of qualified work product protection. Section 915(b) does *not* allow in camera inspection of documents claimed to be protected by the attorney-client privilege or absolute work product protection. As the City points out in its opposition, section 915(a) specifically precludes such inspection: 'the presiding officer may not require disclosure of information claimed to be privileged ... in order to rule on the claim of privilege."

In reply, Petitioners does not address section 915(a) at all. Instead, Petitioners continue to urge that the court should conduct in camera review of documents withheld on the basis of the attorney-client privilege. (Reply, at 14:22.) Petitioners address but then dismiss the Supreme Court's decision in *Costco, supra,* 47 Cal.4th 725, arguing that *Costco* is "distinguished" because it was "clear" in that case that the document was covered by the attorney-client privilege. (Reply, at 14:26-28 n. 6.) Whether the claim of privilege is "clear" or not is immaterial: in camera inspection to determine the claim of attorney-client privilege or absolute work product is precluded by the statute. At oral argument, Petitioners agreed that section 915(a) states that the presiding officer may not require in camera review to rule on a claim of privilege.

In other contexts where in camera inspection in a PRA case is not statutorily precluded such as the evaluation of a section 6255 exemption claim , it is nevertheless disfavored, and should be undertaken only if necessary to resolve the applicability of the PRA. Govt. Code section 6259(a) does not compel in camera inspection where, as here, a court's decision is fully supported by the declarations and such inspection is not necessary to the court's decision. (*Times-Mirror Co., supra,* 53 Cal.3d at 1347 n. 15.)

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C. Order that the City Conduct an Adequate Search

1. Petitioners' PRA Requests and Demand for Affidavits

Although Petitioners in the First Amended Petition refer to six documents as "Petitioners' Public Records Act requests" (Exhibits A, O, Q, R, S and X) (First Amended Petition, at 9:16-18), in fact two of the documents are, by their own terms, not PRA requests at all: Exhibit Q, dated November 13, 2018, is entitled "Notice of Violations of the Brown Act (Gov. Code section 54950 et seq.) Demand to Cease and Desist, Cure and Correct Brown Act Violations"; Exhibit S, dated December 17, 2018, is entitled "Notice of Violations of the California Public Records Act." Exhibit R, dated November 21, 2018. requests only closed session transcripts, and Exhibit X, dated February 15, 2018, requests only nondisclosure agreements; there is no pending argument that the City has not disclosed those documents. Exhibit O, the August 23, 2018 request, is identical to Request #8 in Exhibit A, the May 14, 2018 request, except that it expands the start date of the request from June 30, 2017 back to January 1, 2016. Accordingly, only the May 14, 2018 request, as modified as to time frame by the August 23, 2018 request, is at issue with respect to the adequacy of the City's search.

In the Opening Memorandum, Petitioners assert without factual reference that the City has produced "few, if any, records from the 'personal' electronic devices of its employees and officials, including Mayor Sam Liccardo," and demand that the City be ordered "to provide affidavits from City officials about the extent to which they searched their 'private' electronic devices and whether they withheld documents." (Opening Memorandum, at 6: 10-14.) In support of this demand, Petitioners cite the Supreme Court decision in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 627-29

However, the *City of San Jose* decision does not support the proposition that the City is obligated to provide declarations from every City employee—or any particular City employee--who might have responsive documents, in order to assure a requester that each relevant individual received the request, was instructed to conduct a search, and forwarded all responsive documents. Such a requirement would place a substantial additional burden on large agencies in connection with every PRA request.

To the contrary, the California Supreme Court stated that "CPRA does not prescribe specific methods of searching for [responsive] documents." (*City of San Jose, supra,* 2 Cal.5th at 627.) "We do not hold that any particular search method is required or necessarily adequate." (*Id.*, at 629.) The reference in *City of San Jose* to employees providing affidavits is specifically with regard to the need for an agency to balance its obligation to respond to a public records request with a public employee's constitutional right of privacy. The California Supreme Court describes with approval a Washington State procedure whereby an employee who withholds a document from his employer on the basis that it is not responsive to the public records request would submit an affidavit "with facts sufficient to show the information is not a 'public record' under the PRA." (*Id.*, at 628.) Under such circumstances, providing that employee's affidavit to the requester would satisfy the agency's obligation to conduct a reasonable search. (*Id.*) However, there is no personal privacy issue asserted or argued in this case--and Petitioners do not contend otherwise—so the Washington State process for addressing nonresponsive documents withheld for privacy reasons does not apply in this case.

2. The City's Evidence Concerning The Search

In its Opposition, the City provides sworn statements from five declarants to address the City's search for documents responsive to Petitioners' PRA requests: Rosario Neaves, the City's Communications Director, who oversees compliance with PRA requests; Anh Tran, Open Government Manager reporting to the Communications Director, who notifies departments about PRA requests and coordinates the collection of responsive documents; Nguyen Pham, who coordinated PRA responses during a four-month period from March to July 2018, before Ms. Tran took over as Open Government Manager and after the retirement of the previous Open Government Manager, Tamara Becker; Ahmad Chapman, who since 2013 has served as the designated Department Public Records Act coordinator for the Mayor and the Mayor's staff; and Tina Nasseri, who works in the City Attorney's office coordinating PRA responses.

These declarations establish that the City has written policies concerning public right of access to records and protocols for responding to PRA requests, and that these policies require that employees are responsible for conducting their own searches and providing responsive

records. (Neaves Declaration, at 2:8-17.) The City also designates a PRA coordinator within each department to ensure compliance, and conducts annual training for those coordinators. (Neaves Declaration, at 1:26-27; 2:2-8.) That training specifically informs coordinators that City records include emails and text messages concerning City business, even if located on personal devices. (Tran Declaration, 2:19-27.) In particular, the Mayor's staff has received such training, including direction that PRA requests call for information on personal devices such as home computers, personal emails, and personal cell phones. (Chapman Declaration, at 2:4-8.)

When a PRA request is received, the Open Government Manager notifies the PRA coordinator for each department involved in a request, and then each department coordinator ensures that the department employees have and follow an established process of compliance. (Tran Declaration, at 2:12-17.) The PRA coordinator for the Mayor's office forwards PRA requests to the Mayor as well as members of the Mayor's staff. (Chapman Declaration, at 2:9-11.)

The position of Open Government Manager had been held for many years by Ms. Becker, until approximately March 2018 when she retired and moved out of state. (Neaves Declaration, at 2:18-20.) Mr. Pham performed Ms. Becker's duties on an interim basis until July 2018 when Ms. Tran became the City's Open Government Manager. (Neaves Declaration, at 2:21-22.)

Given this transition and "in an abundance of caution," the City followed up to ensure that each relevant office in the City, including the offices of the Council and the Mayor, searched for and produced responsive documents. In December 2018, the Communications Director specifically inquired of all senior staff and all department PRA coordinators to ensure that records responsive to the three requests dated February 15, 2018, May 14, 2018, and August 23, 2018, were gathered. Furthermore, in January 2019, the Communications Director specifically forwarded the May 14, 2018 request to the Mayor, Council members, and their PRA coordinators, and then the Open Government Manager followed up directly to ensure that all responsive documents were gathered. (Neaves Declaration, at 2:23-3:4; Tran Declaration, at 3:17-4:22.)

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3. Petitioners' Response to the City's Evidence

Petitioners' Reply largely ignores the evidence presented by the City, but focuses instead on the significance, as perceived by Petitioners, of evidence not presented. They argue that the City failed to submit declarations from the Mayor, members of the City Council, or "key members of the City's Google team" (unspecified by Petitioners except for one: Reply, at 1:7-8), even though the *City of San Jose* case does not require that it do so. Then, Petitioners leap to the conclusion that without such declarations, there is no proof that: 1) the PRA requests were ever forwarded to those people (Reply, at 3:18-20; 4:14-15); 2) that those people were ever instructed how to conduct a search, and in particular, that they need to check their personal electronic devices (*id.*; Reply, at 3:23-27); and 3) that this group ever conducted a search that included personal electronic devices (Reply, at 4:16-17). From there, Petitioners speculate that these individuals "apparently" were never instructed to and did not search their personal electronic devices and that responsive documents were withheld because of this. (Reply, 2:7 and 4:16-17.) Based on this speculation, Petitioners conclude that no adequate search was conducted.

However, Petitioners are incorrect in asserting that the absence of declarations from any particular individuals shows that they were not involved in an adequate search. In fact, the evidence presented by the City supports the opposite inference: that the employees relevant to these searches received the training that personal devices must be searched; that the requests were forwarded to them; and that they complied with City policies and produced responsive documents. Since it is presumed that the regular course of business is followed, evidence of the practices and procedures of an organization is circumstantial evidence of how the organization proceeded in a particular instance. (See *County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1451.) Accordingly, proof as provided by the City of the general practices for responding to PRA requests is proof that those practices were followed in this instance. Moreover, the City provided evidence specific to the Mayor, the Council and staff, in the Chapman, Neaves and Tran Declarations.

Petitioners pose a series of rhetorical questions intended to suggest that the City has "artfully dodge[d]" the issue of the thoroughness of its procedures (Reply, at 3:18, 23-27; 4:14-

18), but, as explained above, those questions have been answered by the City's evidence. The City's burden is not to address every conceivable question that Petitioners might imagine, but to present a reasonable body of evidence about the practices in general and the conduct of this search in particular. The City has accomplished that.

Petitioners insist that Mayor Liccardo failed to search for emails, citing as an example that the City disclosed a document showing that the Mayor had discussions with Google's Mark Golan and yet "Liccardo has not produced any documents about those discussions." (Reply, at 4:22, 27.) However, two emails authored by the Mayor and specifically relating to conversations with Mr. Golan were gathered and were identified on the City's Log (listed as Items 52 and 53). When questioned by the court as to whether the identification of these emails impacts Petitioners' argument that there is no evidence that the Mayor responded to the requests, Petitioners replied—without any factual reference--that "presumably" the documents were produced by other people and not the Mayor.

The simpler explanation is the better. The relevant emails were searched, and produced except for those identified on the Log and found by the court to be exempt from disclosure.

D. Other Relief

1. Declaratory Relief that Non-Disclosure Agreements are Invalid

Even though the First Amended Petition listed a claim for declaratory relief as to non-disclosure agreements, Petitioners made no argument in their Opening Memorandum to support such relief. At oral argument, after three questions from the court, Petitioners conceded that they had made no such argument in the Opening Memorandum. Petitioners devote five lines on the last page of the Reply to this issue. No good cause was offered for the untimely presentation of the issue.

As a matter of procedural fairness, arguments for a claim for relief not raised until reply come too late, even if the relief has been sought in a pleading. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022 (even though injunctive relief was requested in complaint, when complaint was dismissed following sustaining of demurrer and failure to amend, plaintiff's initial arguments on appeal did not address injunctive relief: argument not

considered).) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' [Citations.]" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335 n.8.) (See also *Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1174 (issues not supported by argument and citation to authority are considered waived in mandate proceedings).)

Moreover, such relief would be advisory and moot. Petitioners also conceded at oral argument that there is no record evidence that any document has been withheld on the basis of the non-disclosure agreements. The record is undisputed that the agreements have not been in effect since June 9, 2017. (Doyle Declaration, at 8:15-16.)

2. Public Release of Transcripts of Closed Sessions

At the hearing, Petitioners argued that the court should issue an order requiring the City to release to the public transcripts of closed sessions of the council meetings, which have already been available for review at City Hall. Petitioners concede that such relief was not sought in the Petition or the First Amended Petition or argued in Petitioners' Opening Memorandum, but contend that it is sufficient to have mentioned the request in a footnote on the last page of Petitioners' Reply. For the reasons stated above, this request violates fundamental principles of procedural fairness.

In conclusion, Petitioners ignore substantive and procedural law and record evidence that disfavors their positions, but the court cannot. The petition is denied.

Dated: August 15, 2019

Patricia M. Lucas

Honorable Patricia M. Lucas
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA	**FILED** Date: 8-16-19 Rebecca J. Fleming Chief Executive Officer Clerk Superior Court of CA County of Santa Clara By: _____ Naomi Matautia, Deputy
Plaintiff/Petitioner: First Amendment Coalition and Working Partnerships U.S.A.	
Defendant/Respondent: City of San Jose	
PROOF OF SERVICE BY MAIL OF: **ORDER DENYING PETITION FOR WRIT OF MANDATE**	**Case Number:** **18CV338053**

CLERK'S CERTIFICATE OF SERVICE: I certify that I am not a party to this case and that a true copy of this document was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below and the document was mailed at SAN JOSE, CALIFORNIA on : **August 16, 2019**

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