CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: **SAN JOSÉ SPOTLIGHT PUBLIC RECORDS ACT REQUEST APPEAL**

DATE: April 28, 2022

RECOMMENDATION

Consider the appeal of San José Spotlight regarding the City's response to its Public Records Act request.

INTRODUCTION

The City Council is being asked to consider the appeal of San José Spotlight, regarding the City's response to its Public Records Act request. The requested records can be exempt from disclosure under the Public Records Act as privileged attorney-client communications. This memo will provide the Council with background on the request, the City's process for appealing a decision that documents are exempt from disclosure, and the law pertaining to the Attorney-Client Privilege.

BACKGROUND

On May 9, 2021, Ramona Giwargis, on behalf of San Jose Spotlight ("Spotlight"), requested the following under the Public Records Act:

> A copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months.

The City read Spotlight's May 9th request broadly and determined that emails between the Mayor's Office staff and the City Attorney's Office mentioning Solutions San Jose were responsive. In fact, these emails actually were not responsive to the request because they were not between the Mayor's Office staff and Solutions San Jose.

On May 18, 2021, the City, through the Records Coordinator in the Mayor's Office, notified Spotlight of its decision to withhold documents. The documents were emails seeking and providing legal advice between staff in the Mayor's Office and the City

Attorney's Office, and were identified as confidential, Attorney-Client Privileged communications exempt from production under California Government Code section 6254(k).

The City's "Open Government Ordinance," under San José Municipal Code (SJMC) section 12.21.430, has a process for a records requestor to appeal a withholding of records under the Public Records Act. This administrative process serves as an alternative means for a requestor to seek withheld documents instead of or before filing a civil suit. Requestors are not required to follow these administrative procedures before filing suit, and the City's failure to follow them will not invalidate any action taken by the City.[1]

A requestor dissatisfied with the City's response to a records request may appeal to the Open Government Manager.[2] The requestor may also appeal to the Rules and Open Government Committee ("Rules Committee"), either before or after the appeal to the Open Government Manager.[3] If the requestor is dissatisfied with the response from the Rules Committee, the requestor may submit a complaint to the Board of Fair Campaign and Political Practices ("the Board") or directly to the City Council.[4] If the response of the Board is unacceptable to any party, the party may appeal to the City Council.[5]

On June 3, 2021, Spotlight appealed the City's decision to the Rules Committee, asserting that "it is simply not possible that all communications relating to Solutions San Jose meet all three of the [Attorney -Client] privilege's requirements" which are "(1) communications between a lawyer and her client, (2) regarding legal advice, (3) that is not disclosed to third parties."[6] The Rules Committee heard the appeal on June 23, 2021 (Attachment A: Memorandum dated June 18, 2021) and directed City staff to conduct another search of emails within the scope of the request, including the Mayor's personal accounts and devices, and to create an Email Log disclosing information about the withheld documents such as the email addresses used, the sender, the receiver, and the time and date of the withheld communication. City staff performed another search and did not find additional responsive documents. City staff also provided the following Email Log to Spotlight. (See also Attachment B: Email Log):

Date & Time	From	To	CC
2/12/2021, 5:11 p.m.	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Jim Reed <jim.reed@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>

[1] SJMC §§12.21.430.E, G.
[2] SJMC §12.21.430.B
[3] SJMC §12.21.430.B.
[4] SJMC §12.21.430.C.
[5] SJMC §12.21.430.D.
[6] San Jose Spotlight Letter of Appeal dated June 3, 2021.

2/12/2021, 4:47 p.m.	Jim Reed <jim.reed@sanjoseca.gov>	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>
2/12/2021, 2:36 p.m.	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Jim Reed <jim.reed@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>

Following the production of the Email Log, Spotlight lodged an appeal with the Board asking to reevaluate the withholding of these records. The City Attorney's Office informed Spotlight that only the City Council can waive the Attorney-Client Privilege and produce these records. The City Attorney's Office asked Spotlight if it wanted to direct its appeal to the City Council, but Spotlight declined to do so.

The Board heard the appeal at its October 13, 2021 meeting. The City Attorney's Office advised the Board that the documents had not been produced in response to the Public Records Act request because of the Attorney-Client Privilege. Because the City is the "client" for purposes of the privilege, the Board was advised that it would not be able to view the documents because the Council had not waived the privilege. The Board voted to refer the matter to its Independent Evaluator, the Hanson Bridgett law firm, to clarify whether the Board could review Attorney-Client Privileged documents as part of the records appeal process outlined in Title 12 of the Municipal Code.

At its December 8, 2021 meeting, the Independent Evaluator summarized its finding that the Attorney-Client Privilege rests with the client (City) and the City Council is the holder of that privilege. The Independent Evaluator noted that the Evidence Code does not provide the Board authority to review privileged documents and that the Board does not have explicit authority to review privileged documents without the City Council waiving the privilege.

At the conclusion of the December 8, 2021 hearing, the Board referred the appeal to the City Council without a determination on the merits of the appeal. Spotlight has indicated its intent to pursue its appeal to the Council.

ANALYSIS

1. The Public Records Act Exempts Attorney-Client Privileged Communications

The Public Records Act, under Government Code section 6254(k), exempts the production of documents that are protected by the Attorney-Client Privilege. The law strictly regulates how Attorney-Client Privileged communications are handled. The Attorney-Client Privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Cal. Evid. Code § 954). Confidential communications between a client and its lawyer are "information transmitted between a client and a lawyer in the course of that relationship and in

confidence…," and "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Cal. Evid. Code § 952).

The purpose of the Attorney-Client Privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." The City Council, as the "client," is the holder of the Attorney-Client Privilege, and may claim it to prevent disclosure of privileged communications or waive it. The City Attorney's Office has an affirmative duty to claim the privilege on behalf of the City Council whenever privileged documents are sought to be disclosed.

The City Attorney's Office is required under the City Charter to provide advice to the City Council and its members in "all matters of law pertaining to their offices or their powers and duties." (City Charter § 803(c)). It is common and required under the Charter for the City Attorney's Office to provide legal advice to individual Councilmembers as it relates to their roles in City business and the appropriate use of City resources. Such communications further the City's interests in complying with the law and fall within the attorney-client relationship and the Attorney-Client Privilege.

2. Only the City Council Can Waive the Attorney-Client Privilege

As the City's governing body, the City Council is the holder of the Attorney-Client Privilege for the City and may release withheld documents that are identified as privileged. The City Council is the only body authorized to make this decision, and the Council has not delegated this authority to any other person or body. While there are many exemptions under the Public Records Act, few are as strictly regulated or carry the same obligations as the Attorney-Client Privilege.

If the City Council decides to waive the Attorney-Client Privilege for these three emails, the waiver applies to all future requests for these three emails only.

COMMISSION RECOMMENDATION/INPUT

At its December 8, 2021 hearing, the Board of Fair Campaign and Political Practices referred the appeal to the City Council without a determination on the merits of the appeal.

CEQA

Not a Project, File No. PP17-010, City Organizational & Administrative Activities resulting in no changes to the physical environment.

Attachment A: Memorandum dated June 18, 2021
Attachment B: Email Log

ATTACHMENT A

RULES COMMITTEE: 06/23/21
FILE: 21-603
ITEM: I

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE

FROM: Sarah Zárate

SUBJECT: **PUBLIC RECORDS APPEAL - RAMONA GIWARGIS**

DATE: June 18, 2021

Approved Jennifer S. Maguire

Date 06/18/21

RECOMMENDATION

Deny the appeal from Ramona Giwargis regarding the City's response to her Public Records Act request.

BACKGROUND

On May 9, 2021 through the City's online Public Records Act request form, Ramona Giwargis requested a copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months.

On May 18, 2021 the City notified Ms. Giwargis of its decision to withhold responsive documents under the Attorney-Client Privilege pursuant to California Government Code §6254(k). The withheld documents were confidential correspondences seeking and providing legal advice between the Mayor's Office Staff and the City Attorney's Office and are therefore exempt from production under the California Public Records Act. On June 3, 2021 Ms. Giwargis formally appealed the City's decision to withhold the records stating that it is her belief that these records do not qualify under California Government Code §6254(k), and believes nonprivileged responsive records were improperly withheld. Ms. Giwargis' appeal is included as Attachment A.

On June 3, 2021, Ms. Giwargis submitted a second request similar to the one currently on appeal. The second Public Records Act Request asked for email, text and Slack (or other messaging system) communications between Mayor Sam Liccardo/Chief of Staff Jim Reed, Mayor's staff members and any entity or person not affiliated with the City (not City staff) that uses the phrase "Solutions San Jose" over the past six months. Staff reached out to Ms. Giwargis asking if she would be willing to wait until staff filled the second request before pursuing the appeal. Ms.

Giwargis informed staff that, although she had placed a second request, she wanted the appeal to proceed. On June 14, 2021, Mayor's Office staff responded that there were no responsive records to Ms. Giwargis' second request.

ANALYSIS

Ms. Giwargis is appealing the City's response to her May 9th Public Records Act request. The City located documents and determined that the located documents needed to be withheld pursuant to the Attorney-Client Privilege under Government Code Section 6254(k). These documents are confidential correspondences between the Mayor's Office Staff and the City Attorney's Office and are therefore exempt from production.

Ms. Giwargis contends that because the request relates to communications with Solutions San Jose, a non-City entity, it is not possible that all correspondences qualify under the attorney-client privilege.

In an effort to respond expeditiously, the City read Ms. Giwargis' May 9th request broadly, and determined that emails between the Mayor's Office staff and the City Attorney's Office mentioning Solutions San Jose were responsive. On May 18, 2021, the City notified Ms. Giwargis of its decision to withhold responsive documents under the Attorney-Client Privilege pursuant to California Government Code §6254(k). In hindsight, these emails were not responsive to Ms. Giwargis' request because they were not between the Mayor's Office staff and Solutions San Jose.

There are no records "between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months".

The withheld documents are communications that fall within the Attorney-Client Privilege. The Public Records Act exempts from disclosure confidential communications between attorney and client under both California Government Code Section 6254(k) and California Evidence Code Section 954. This exemption allows staff to have frank and candid conversations with their attorney; disclosure would have a chilling effect on this ability. For a correspondence to qualify under statutory law, "there must be a (1) communication, (2) intended to be confidential, and (3) made in the course of the lawyer-client relationship"[1]. The existing documents meet each of these three requirements.

In addition, California Evidence Code Section 954 states that this privilege can only be waived by the holder of the privilege. The City Council holds the authority to waive said privilege and can direct City staff to disclose the protected records.

[1] City & County of S.F. v. Superior Court (1951) 37 Cal. 2d 227, 234-235 [231 P.2d 26, 25 A.L.R.2d 1418].)

CONCLUSION

Ms. Giwargis' request for a copy of all emails, texts and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other Mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months involves records that are exempt from disclosure based on the attorney-client privilege.. Staff recommends that the Rules and Open Government Committee deny the appeal from Ms. Giwargis.

COORDINATION

This memorandum was coordinated with the City Attorney's Office.

/s/
SARAH ZARATE
Director of the Office of Administration, Policy and Intergovernmental Relations

For questions please contact Jessica Lowry, Open Government Manager, at publicrecordsrequest@sanjoseca.gov.

Attachment A: Correspondence with Ramona Giwargis

SAN JOSÉ spotlight
Your search for truth starts here.

June 3, 2021

To: Jessica Lowry, San Jose open government manager
cc: San Jose Rules & Open Government Committee
Re: Appeal of denial of PRA request

This letter is to inform you of San José Spotlight's request to appeal the city's denial of a recent public records request.

Under the California Public Records Act, San José Spotlight on May 9, 2021 requested the following: *A copy of all email, text and Slack (or other messaging system) communications between Mayor Sam Liccardo, Chief of Staff Jim Reed and any and all other mayor's staff, consultants, lobbyists or associates related to Solutions San Jose over the past six months. Please include emails/texts sent and received from personal devices and accounts as it relates to public business.*

On May 18, 2021, Henry Smith, an agenda services manager and strategic initiatives associate with the office of Mayor Sam Liccardo, denied the request in its entirety. He cited just one statute for the denial decision: *Attorney-Client Privilege [California Government Code § 6254(k)]*

This is an improper denial of San José Spotlight's public records request, for the following reasons:

- Our request asked for all communications between Liccardo and other city staffers or consultants, associates, etc. The city has asserted one exemption, 6254(k), which allows the city to invoke attorney-client privilege as a basis to withhold. However, that privilege has well-defined limits.
    - It applies only to (1) communications between a lawyer and her client, (2) regarding legal advice, (3) that is not disclosed to third parties. See California Evidence Code section 952.
- It is simply not possible that all communications relating to Solutions San Jose meet all three of the privilege's requirements.
- First, Solutions San Jose is not a city entity. So, to the extent there are legitimately privileged communications between the city attorney and Liccardo regarding legal advice, the privilege would be destroyed if those communications were shared with anyone outside the attorney-client relationship (i.e., anyone other than city staff, including anyone associated with Solutions San Jose who is not also on city staff).
- Second, it is not possible that all internal city communications -- i.e., those as to which the privilege was not destroyed -- regarding Solutions San Jose are actually subject to the privilege, for two basic reasons:
    - For a communication between an attorney and client to be privileged, it has to relate to legal advice. Simply copying a lawyer does not render the communication privileged. It is very difficult to imagine that all communications between city officials relating to Solutions San Jose related to legal advice.

- In particular, it's difficult to imagine that all such communications were related to legal advice about Solutions San Jose. Why would the city attorney be advising city staff about legal issues surrounding a non-city entity like Solutions San Jose?

For the reasons cited above, we are appealing to the city's open government manager and its Rules & Open Government Committee to reevaluate this improper denial of public records and immediately release records pursuant to our request.

California law requires public agencies to separate exempt and non-exempt records. With this blanket denial, it appears the city did not attempt to provide any documents that might be disclosable, even with redaction. A more careful search is warranted.

Please advise us of next steps, including when the committee will consider our appeal during its regularly scheduled meeting. If you have any questions regarding this appeal, please do not hesitate to contact Ramona Giwargis at [redacted] or [redacted].

We look forward to hearing from you.

Sincerely,

[redacted]

Ramona Giwargis
Co-founder and editor
San José Spotlight

ATTACHMENT B

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Office of the City Attorney
NORA FRIMANN, CITY ATTORNEY

June 25, 2021

Ms. Ramona Giwargis
Co-Founder & Editor
San Jose Spotlight
[redacted]

Re: Log of Documents re: May 9, 2021 Public Records Act Request

Dear Ms. Giwargis:

Pursuant to the direction of the Rules and Open Government Committee and Committee of the Whole at their June 23, 2021 meeting, below is a log of the three emails that were the subject of the asserted privilege and the email addresses used in those communications. Without waiving the privilege, the emails contained general advice about the use of City property, staff, and resources for City purposes, and City communications regarding third party non-profits such as Solutions San Jose.

Date & Time	From	To	CC
2/12/2021, 5:11 p.m.	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Jim Reed <jim.reed@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>
2/12/2021, 4:47 p.m.	Jim Reed <jim.reed@sanjoseca.gov>	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>
2/12/2021, 2:36 p.m.	Neelam Naidu <neelam.naidu@sanjoseca.gov>	Jim Reed <jim.reed@sanjoseca.gov>	Nora Frimann <nora.frimann@sanjoseca.gov>

As I believe you know, under the California Rules of Professional Conduct and Evidence Code, attorneys have an ethical obligation to not reveal communications with a client, and advice provided to a client, unless the client gives informed consent to remove the privilege. The privilege is held by the client, not the attorney, and in the case of the City, the holder of the privilege is not necessarily the individual with whom the communication occurs.

Please do not hesitate to contact me or our office if you have further questions or comments.

Very truly yours,

NORA FRIMANN, City Attorney

Nora Frimann
Nora Frimann (Jun 28, 2021 11:34 PDT)

NORA FRIMANN
City Attorney

NVF/vvb