

RE: December 6, 2022 Liccardo Memorandum (Biannual Ethics Review)

Northern California Society of Professional Journalists Freedom of Information Committee

[REDACTED]

Wed 5/17/2023 3:22 PM

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2023-05-17 Letter to City of San Jose.docx.pdf;

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Dear Ms. Maguire,

We write on behalf of The Society of Professional Journalists, Northern California Chapter ("SPJ NorCal") and a committee of journalists, attorneys and advocates within the chapter called the SPJ NorCal Freedom of Information Committee.

Former San Jose Mayor Sam Liccardo's outgoing recommendations to the City regarding so-called "fishing expeditions" of open records have raised alarm among journalists, attorneys, and First Amendment watchdogs.

We are troubled by the advice given by Liccardo, which if followed, would point San Jose in the wrong direction in terms of open-access to the public.

Please see our attached letter for recommendations and analysis around this vital issue. Thank you for your time.

Sincerely,

Society of Professional Journalists, Northern California Chapter
Ben Trefny, president

SPJ Northern California Freedom of Information Committee
Shaila Nathu and Joe Fitzgerald Rodriguez, co-chairs

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May 17, 2023

VIA EMAIL

City of San José
Office of the City Manager
Attn: Jennifer Maguire, City Manager
200 East Santa Clara St.
San Jose, CA 95113
jennifer.maguire@sanjoseca.gov

RE: December 6, 2022 Liccardo Memorandum (Biannual Ethics Review)

Dear Ms. Maguire,

We write on behalf of The Society of Professional Journalists, Northern California Chapter (“SPJ NorCal”) and a committee of journalists, attorneys and advocates within the chapter called the SPJ NorCal Freedom of Information Committee.

Overview

Former San Jose Mayor Sam Liccardo’s outgoing recommendations to the City regarding so-called “fishing expeditions” of open records have raised alarm among journalists, attorneys, and government open-access watchdogs. (See <https://sanjosespotlight.com/ex-san-jose-mayors-public-records-reforms-spark-alarm/>.) Our hackles collectively raised at the advice given by Liccardo, which if followed, would point San Jose in the wrong direction in terms of open-access to the public — and away from transparency.

In addition to our concerns that San Jose would curtail access, we are also concerned that the ideas proposed by Liccardo would run contrary to the California Public Records Act, and would do so without seeking necessary public input.

Transparency helps everyone involved in making San Jose the world-class city it is: It helps citizens hold their government accountable, journalists inform the public, and San Jose city government in reaching its own goals through honesty. Maintaining the widest-possible access to government helps ensure that transparency is maintained.

If staffers are truly “overburdened” with records requests, SPJ NorCal strongly urges the City to focus inward and bolster its resources to comply with open records laws, instead of adopting protocols that in any way curtail or discourage sunshine for citizens and journalists.

Agencies may not provide less access under the law



In his December 6, 2022 memorandum, former Mayor Liccardo recommended that the City Council direct the City Attorney and City Manager to bring to the Council proposed changes to the City's open government, transparency and accountability laws and policies. Among other things, Mr. Liccardo specifically requested changes to accomplish the following:

Identify voluntary protocols that can lawfully encourage media and other entities to better focus their PRA requests to satisfy their (& the public's) need for information without overburdening understaffed City records offices seeking to comply with voluminous, "fishing expedition" re-productions of audio, video, and paper records.

This language is unsettling because it suggests that an acceptable solution to the City's understaffing is to pressure "media and other entities" to narrow their requests, even though the City controls the information that requesters need to make more targeted requests. This includes technical information about the City's record-keeping systems and the individual records maintained in those systems.

The CPRA accounts for this information asymmetry between agencies and requesters by requiring only that a request "*reasonably describ[e]* an identifiable record or records." (Gov. Code, §§ 7922.530, 7922.600.) In addition, the CPRA imposes on agencies a duty to assist the public, by doing "all of the following, to the extent reasonable under the circumstances":

- (1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
- (2) Describe the information technology and physical location in which the records exist.
- (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

(Gov. Code, § 7922.600, subd. (a)(1)-(3).) Alternatively, public agencies may satisfy their duty to assist by making available an index of records. (Gov. Code, § 7922.605, subd. (b).)

Protocols that simply implore requesters to be more specific, when they cannot do so effectively without the City's help, are not consistent with state law and are unlikely to reduce the workload for City staff. In considering any proposed changes to its transparency laws and policies, the City should reject proposals that depend on any member of the public "voluntarily" waiving the right of access secured by the Constitution and the CPRA. (See Cal. Const., art. I, § 3; Gov. Code, § 7921.000 [codifying the "fundamental and necessary" right of access to information concerning the conduct of the people's business].)

Our concern extends to "proposed technology solutions," referenced in Mr. Liccardo's memorandum. While technology can enhance the public's ability to exercise the right of access,



we caution the City that new technologies should not be adopted without public input, preferably well before decisions are made about their potential future use. Moreover, care should be taken to ensure the proposed solutions – technical or otherwise – actually do facilitate, rather than inhibit, the right of access. Public agencies are free to legislate for greater public access than that provided under the CPRA, but they may not provide less access. (See Gov. Code, § 7922.505 [an agency “may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the *minimum standards* set forth in this division.”] [emphasis added].)

San Jose should maintain a culture of compliance

We are also troubled by language in Mr. Liccardo’s memorandum insinuating that public records laws and the cost to comply with them are burdensome, and that resources devoted to compliance would be better spent on other City services. (See, e.g., December 6, 2022 Liccardo Memorandum, p. 1 [complaining about “fishing expeditions” and proposing legislative advocacy to “curtail” perceived “abuse” of CPRA requirements], p. 2 [complaining that “every individual consumed with this work is not providing other valued services to our community”].) Such language is inconsistent with the memorandum’s stated goal of “satisfy[ing] the legal and moral imperative of transparency.” It is difficult for the City to foster a culture of compliance when the City’s former Mayor speaks of CPRA compliance as a burden unworthy of the expense. In our experience, we find a culture of openness is as important in city government as the written law guaranteeing that openness.

Mr. Liccardo also claimed that, “[i]n the last three years, City expenditures to fund staff to respond to voluminous and frequent PRA responses have doubled to approximately \$2 million annually.” (December 6, 2022 Liccardo Memorandum, p. 2.) Assuming for the sake of argument this were correct, this amount must be considered in light of the City’s overall budget, which is measured in the billions of dollars (see generally Annual Report on City Services 2021-22, available at <https://www.sanjoseca.gov/your-government/appointees/city-auditor/services-report>), and in light of the Legislature’s intent that agencies bear the vast majority of the cost of CPRA compliance. (See *Nat’l Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 493-95, 507-08 [describing costs that are borne by agencies under the CPRA, and the comparatively limited types of costs that may be allocated to requesters].)

Given the scale of the City’s operations, it is reasonable to expect the City to devote significant resources towards compliance with this important state law, which codifies the “fundamental and necessary” right of access. The City can minimize costs by promptly responding to requests, and refraining from reflexively asserting exemptions.

Public input should be a top priority for open access policy changes

A January 25, 2023 article by San José Spotlight reported that the City Attorney’s Office told Spotlight it would “review local rules and report back to the Council on potential changes during



the budget season.” It is unclear whether this means the CAO anticipates reporting back with changes as part of the City’s 2023-2024 budget planning, or whether the CAO intends to do so outside of, but at the same time as, the 2023-2024 budget planning.

While it is critical to budget adequately for the City’s compliance obligations, the budget planning process does not allow sufficient time for public consideration of any proposed changes to City transparency policies. . Journalists and the public would not have a meaningful opportunity to provide feedback, given the numerous other issues the City must consider during its budget planning. We therefore request that the City calendar a study session, separate and apart from its budget planning process, to allow for public review and comment on any proposed policy changes before they are submitted to the Council.

Thank you for your time and attention to this matter.

Sincerely,

SPJ NORCAL
SPJ NORCAL FREEDOM OF INFORMATION COMMITTEE (spjnorcalfoi@gmail.com)

cc. Nora Frimann, City Attorney (nora.frimann@sanjoseca.gov)

