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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SANTA CLARA

10 UNLIMITED JURISDICTION

23CV415609

11 SAN JOSE MERCURY NEWS LLC,

) Case No.

12 Petitioner/Complainant,

) SAN JOSE MERCURY NEWS LLC'S
VERIFIED PETITION FOR WRIT OF
MANDATE DIRECTED TO CITY OF
SAN JOSE ORDERING COMPLIANCE
WITH THE CALIFORNIA PUBLIC
RECORDS ACT AND ARTICLE 1,
SECTION 3(b) OF THE CALIFORNIA
CONSTITUTION; COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF
) (Cal. Gov't Code § 7921.000, et seq.; Cal.
Const. Art. 1, 3(b); Cal. Civ. Proc. Code §
1085, et seq.)

13 v.

14 CITY OF SAN JOSE,

15 Respondent/Defendant.

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20 INTRODUCTION

21 Petitioner/Complainant SAN JOSE MERCURY NEWS LLC, *dba* The Mercury News
22 (collectively referred to herein as "The Mercury News" or "newspaper"), petitions this Court,
23 through this Verified Petition for Writ of Mandate/Complaint for Access to Public Records to
24 command Respondent/Defendant City of San Jose ("San Jose" or "the City") to produce all
25 writings pertaining to: (1) its "investigation regarding Fire Engine 4's activity on October 4, 2022
26 and its interactions with employees from the Pink Poodle and AJ's Bikini Bar"; (2) "disciplinary
27 actions taken against employees involved in Fire Engine 4's activity on October [5], 2022"; and
28 (3) "any underlying documents that formed the basis of the investigation and resulting discipline,

1 including any statements or interviews with employees or witnesses or other documentary
2 evidence gathered as part of the investigation.”

3 On the evening of October 5, 2022, according to video posted to an Instagram account, San
4 Jose Fire Department Engine 4, with lights flashing, was parked outside a strip club called the
5 Pink Poodle on South Bascom Avenue in San Jose. A woman in a bikini is seen exiting the
6 vehicle, closing the door then walking towards the Pink Poodle’s entrance. The video is captioned
7 “Only in San Jose do you see a stripper come out of a firetruck.” As later discovered through GPS
8 tracking information produced by the City in response to a Novmeber 16, 2022 California Public
9 Records Act request by The Mercury News, Engine 4 was also tracked to another adult
10 entertainment establishment that night about two miles away called AJ’s Bar, located on Lincoln
11 Avenue in San Jose.

12 On October 7, 2022, after news broke of the incidents, then San Jose Mayor Sam Liccardo
13 issued a statement to a Mercury News reporter saying: “If the investigation concludes that his
14 video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue
15 apparatus relegated to frat party bus, nor tolerate any conduct that so demeans the heroic work of
16 the rest of our SJFD team.” Five months after the incident, San Jose Fire Chief Robert Sapien, Jr.
17 issued his first public statement, describing the actions of the involved fire personnel as “seriously
18 misaligned with the Department’s mission and values and … highly detrimental to the confidence
19 and trust of our community and workforce.,” and stating that it was taking “appropriate action
20 based on the findings.”

21 While the actions of the involved fire personnel admittedly constitute egregious violations
22 of the public’s trust with enormous public safety implications, as well as a serious abuse of
23 taxpayer dollars, San Jose has flatly refused to release to The Mercury News, and therefore the
24 public, the completed investigation report, disciplinary records, and related records, invoking the
25 California Public Record Act’s personnel files exemption, Cal. Gov’t Code § 7927.700, and the
26 public interest balancing test, Cal. Gov’t Code § 7922.000, as a basis for its denial. Because the
27 denial decision violates long-standing legal authority pertaining to public access to writings
28 reflecting public employee wrongdoing, The Mercury News brings the instant action seeking an

1 order commanding compliance with the CPRA and Article 1, Section 3(b) of the California
2 Constitution, among other relief. *See Marken v. Santa Monica-Malibu Unified School Dist.*, 2002
3 Cal. App. 4th 1250 (2012); *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742 (2006);
4 *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045 (2004); *American*
5 *Federation of State, County and Municipal Employees v. Regents of Univ. of Cal.* (“AFSCME”),
6 80 Cal. App. 3d 913 (1978).

7 **VENUE AND JURISDICTION**

8 1. The relief sought by The Mercury News is expressly authorized under Government
9 Code Section 7923.000, Civil Procedure Code Section 1085 et seq., and Article 1, Section 3(b) of
10 the California Constitution. *See Degrassi v. Cook*, 29 Cal. 4th 333, 338 (2002) (“[t]he free speech
11 clause of article 1, section 2(a) ‘is self-executing, and … even without any effectuating legislation,
12 all branches of government are required to comply with its terms. Furthermore, it also is clear
13 that, like many other constitutional provisions, this section supports an action, brought by a private
14 plaintiff against a proper defendant, for declaratory relief or for injunction.”) (Emphasis in
15 original.). The Mercury News is informed and believes that the writings to which it seeks access
16 are owned by the City or were used by it and are within its possession, custody or control and/or
17 are situated within City offices located in San Jose, California. The denial of access to public
18 records has been undertaken by and through officers and employees of the City, including but not
19 limited to the San Jose City Manager’s office and the San Jose Fire Department, and has all
20 occurred within the County of Santa Clara and, therefore, venue in Santa Clara is proper.

21 **THE PARTIES**

22 2. Petitioner/Complainant SAN JOSE MERCURY NEWS LLC is a limited liability
23 corporation organized under the laws of California and doing business as The Mercury News, a
24 daily newspaper of general circulation distributed throughout Santa Clara County and the greater
25 Bay Area. The Mercury News is an entity within the class of persons beneficially interested in
26 San Jose’s faithful performance of its duties to the public under the CPRA and Article 1, Section
27 3(b) of the California Constitution. Furthermore, it has been covering this story for its readers,
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1 including the City's denial of access to public records. True and correct exemplar copies of its
2 news reporting are attached hereto as Exhibit 1.

3 3. Respondent, the City of San Jose, acting through its various departments, including
4 the San Jose Fire Department and City Manager's Office, is a "local agency" within the meaning
5 of the CPRA. Cal. Gov't Code § 7920.515.

FACTS GIVING RISE TO CLAIM

A. **On-Duty Fire Personnel Drive Engine 4—"A Life-Critical Emergency Rescue Apparatus"—to the Pink Poodle, where a Scantly Clad Women is Seen Exiting the Firetruck, and to A.J.'s Bar; the City Finds the Conduct "Seriously Misaligned" with the Department's Mission and a Violation of the Public's Trust.**

11 4. On the evening of October 5, 2022, according to video posted to an Instagram
12 account, San Jose Fire Department Engine 4 is seen parked outside of a strip club called the Pink
13 Poodle located on Bascom Avenue in San Jose. A woman in a bikini is seen exiting the vehicle,
14 closing the door and then walking toward the Pink Poodle's entrance. The video is captioned,
15 "Only in San Jose do you see a stripper come out of a firetruck." A link to the video is publicly
16 accessible at [San José Foos on Instagram](#): "⌚⌚ video from @d osc r".

17 5. As later discovered through GPS tracking information produced by the City in
18 response to a November 16, 2022 CPRA request by The Mercury News, Engine 4 also was
19 tracked to another adult entertainment establishment that night about two miles away called A.J.'s
20 Bar, located on Lincoln Avenue.

21 6. On information and belief, dispatch records produced by the City in response to a
22 CPRA requests made by another news organization, show that no calls for service were made on
23 this night for these locations.

24 7. On October 7, 2022, then-Mayor Sam Liccardo issued a statement through his
25 office's Chief Communications Director to a reporter at The Mercury News saying:

26 If the investigation concludes that this video is as bad as it looks, then heads must
27 roll. We cannot have a life-critical emergency rescue apparatus relegated to a frat
28 party bus, nor tolerate any conduct that so demeans the heroic work of the rest of
our SJFD team. I expect that Chief Robert Sapien, as one of our nation's finest
fire chiefs, will respond accordingly.

1 A true and correct copy of this statement, issued via email, is attached hereto as Exhibit 2.

2 8. On information and belief, on this same day, October 7, 2022, according to a later
3 issued memorandum, San Jose Fire Chief Robert Sapien, Jr. directed the initiation of an
4 investigation “to determine the facts and circumstances related to the posted video.”

5 9. Over 5 months later, Chief Sapien issued a Memorandum dated March 10, 2023, to
6 San Jose City Mayor Matt Mahan and the City Council summarizing the investigation. Sapien
7 described the actions of the involved fire personnel as “seriously misaligned with the
8 Department’s mission and values and highly detrimental to the confidence and trust of our
9 community and workforce.”¹ Based on the investigation findings, according to Sapien, it was
10 determined that “the actions relating to the video” constituted violations of “specific [though
11 unstated] policies and procedures and rules and regulations.” Based on this determination,
12 according to the memo, Chief Sapien forwarded a recommendation for disciplinary action to the
13 City Manager. Sapien also states in the memo that subject employees “have been notified of the
14 investigation’s conclusions and of the outcomes, respectively, and the City is taking appropriate
15 action based on the findings.” Sapien stated that “[i]t is important to note that employees’
16 personnel information is confidential, and the City is unable to elaborate further.” A true and
17 correct copy of Chief Sapien’s March 10, 2023 Memorandum to Mayor Mahan and the City
18 Council is attached hereto as Exhibit. 3.

19 **B. The Mercury News’s Repeated Requests for Public Records and the City’s**
20 **Blanket Denial of Same.**

21 10. On November 16, 2022, The Mercury News’ reporter Austin Turner made a CPRA
22 request through the City’s online Public Records Center seeking access to records reflecting
23 disciplinary actions taken against the fire staff inside Engine 4 on the night in question, internal
24 communications between SJFD personnel regarding Pink Poodle disciplinary actions, and reports
25 regarding the subject investigation. The request was given the reference number R000459-

27 ¹ He also confirmed that he directed the initiation of an investigation on October 7, 2022, and that
28 it “was coordinated with the City Manager’s Office of Employee Relations and proceeded under
conditions required by the Firefighters Procedural Bill of Rights.” See Exhibit 3.

1 111622. A true and correct copy of the November 16, 2022, CPRA request is attached hereto as
2 Exhibit 4.

3 11. On this same day, the City issued a blanket denial to this part of the request
4 claiming that the records were protected from disclosure under the CPRA's investigatory records
5 exemption of then Gov't Code Section 6254(f), and the public interest balancing test of then Gov't
6 Code Section 6255. The City claimed that disclosure would "endanger the successful completion
7 of the investigation, or a related investigation." A true and correct copy of the City's response to
8 the November 16, 2022, CPRA request is attached hereto as Exhibit 5.²

9 12. On March 24, 2023, given that the investigation had concluded, The Mercury News
10 again requested access to the completed investigation report and records of disciplinary actions
11 taken against the involved employees. This CPRA request was given the reference number
12 R001280-032423. A true and correct copy of this March 24, 2023, CPRA request as received
13 from the City is attached hereto as Exhibit 6.

14 13. On March 27, 2023, the City denied the request, asserting that the documents were
15 exempt from disclosure under the personnel files exemption of Government Code Section
16 7927.700 (formerly Section 6254(c) of the Government Code), the public interest balancing test of
17 Government Code Section 7922.000 (formerly Section 6255(a)), and Government Code Section
18 7927.705 (formerly Section 6254(k)), which itself is not an exemption but merely incorporates
19 other state or federal laws that themselves exempt or prohibit release of otherwise public records.
20 The City did not specify what state or federal law it was asserting through invocation of Section
21 7927.705 beyond mentioning generally that this section can incorporate provisions of the
22 Evidence Code relating to privilege. The City did not specify which asserted exemption applied to
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25 ² Following the completion of the City's investigation and in response to a subsequent CPRA
26 request seeking essentially the same records, the City is no longer relying on the investigatory
27 records exemption as a basis for its denial position, nor could it. The law enforcement
28 investigatory records exemption protects from disclosure only investigatory files compiled by state
or local agencies for correctional, law enforcement or licensing purposes. Cal. Gov't Code §
7923.600(a); *Williams v. Superior Court*, 5 Cal. 4th 337, 354 (1993). It is not a "carte blanche"
exemption for anything an agency may label investigatory. *Williams*, 5 Cal. 4th at 356.

1 which category of records sought by the newspaper. A true and correct copy of this March 27,
2 2023, response to the newspaper's CPRA request is attached hereto as Exhibit 7.

3 14. On March 28, 2023, The Mercury News asked the City to state the statutory basis
4 for withholding records under 7927.705, and asked that it further clarify which of the asserted
5 exemptions apply to each category of records sought as required of public agencies under
6 Government Code Sections 7922.535(a) and 7922.540(a). A true and correct copy of this March
7 28, 2023 email as received from the City is attached hereto as Exhibit 8.

8 15. On March 29, 2023, the City clarified its denial position as to each category of
9 records requested, claiming that all three exemption claims asserted applied to the two categories
10 of records sought in the March 24, 2023, CPRA request—a claim it has since recanted as to the
11 attorney-client privilege. The City failed once again to identify the specific statutory basis of its
12 purported withholding under Section 7927.705. A true and correct copy of this March 28, 2023,
13 email is attached hereto as Exhibit 9.

14 16. On this same day, March 29, 2023, because the City's blanket denial of access to
15 its internal investigation, disciplinary records and related communications did not comport with
16 the clear and substantial body of law governing access to public records pertaining to public
17 employee wronging, The Mercury News' outside counsel wrote to the City explaining the
18 relevant law and asking that it reconsider its denial position. A true and correct copy of the
19 March 29, 2023, letter of Duffy Carolan to Chief Sapien and Mayor Mahan is attached hereto as
20 Exhibit 10.

21 17. In that letter, The Mercury News explained that it was seeking access to the
22 completed investigation report, records of disciplinary action, and "any underlying documents
23 that formed the basis of the investigation and resulting discipline, however informal, including
24 any statements or interviews with employees or witnesses or other documentary evidence
25 gathered as part of the investigation." The paper asked that to the extent the City did not view the
26 original requests as already encompassing this latter category of records, it should consider it a
27 new CPRA request under Article 1, Section 3(b) of the California Constitution and the CPRA.
28 *Id.*, Ex. 10.

1 18. On April 3, 2023, the newspaper’s counsel followed up with Chief Sapien and
2 Mayor Mahan asking that the City acknowledge receipt of the letter. A true and correct copy of
3 this April 3, 2023, email from the newspaper’s counsel is attached hereto as Exhibit 11.

4 19. On April 11, 2023, the city responded through its Open Government Manager,
5 acknowledging receipt of the letter “requesting the City of San Jose to reconsider its denial
6 positions on requests # R00459-111622 and 3R001280-32423 and to disclose related records.”
7 The Open Government Manager said that he was “following up with the appropriate departments”
8 and would respond “as soon as I have more information.” A true and correct copy of this April
9 11, 2023 email, and related subsequent emails, is attached hereto as Exhibit 12.

10 20. On April 20, 2023, having not received any substantive response from the City, the
11 newspaper’s counsel followed up with the City seeking an update on the status of its request for
12 reconsideration, explaining that “[t]he law is straightforward so the delay from our March 29,
13 2023 request for reconsideration is perplexing.” *Id.*

14 21. On April 27, 2023, still not having received a response from the City, the
15 newspaper’s counsel again emailed the City seeking an official response to its request for
16 reconsideration. *Id.*

17 22. On April 28, 2023, nearly a month after the newspaper requested that the City
18 reconsider its denial position, the City sent a letter to the newspaper’s counsel reaffirming its
19 denial position. It clarified, however, that the investigation report and records of disciplinary
20 actions were being withheld only under the personnel files exemption of Section 7927.700, and
21 the public interest balancing test of Section 7922.000. With respect to “records relating to these
22 two items,” the City additionally asserted that “some records are exempt from disclosure under
23 California Government Code Section 7927.705 on the basis of the Attorney-Client Privilege.”
24 Without providing any legal analysis or citation to law, the City merely asserted that it disagreed
25 with the newspaper’s legal position, claiming vaguely that disclosure would constitute an
26 unwarranted invasion of City employee privacy. A true and correct copy of this April 28, 2023,
27 letter is attached hereto as Exhibit 13.

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1 C. **Chief Sapien Issues Second Memo to City Council Soft-pedaling the Conduct at**
2 **Issue and Shifting Blame to the Scantly Clad Female, Heightening the Public's**
3 **Need for Oversight of the City's Investigation and Resulting Discipline.**

4 23. On information and belief, on April 25, 2023, admittedly under pressure to provide
5 more information about the investigation “in light of significant public inquiries related to the
6 video published on social media on October 6, 2022, and subsequent investigation,” Chief Sapien
7 issued a second memorandum to Mayor Mahan and the City Council. In that one-page memo, it
8 was disclosed that on October 5, 2022, the crew of Engine 4 transported an unidentified male
9 from the station to The Pink Poodle. While stopped in front of The Pink Poodle, a “female
10 climbed into the cab of the fire engine and requested a ride-along. The crew first declined to
11 provide the female with a ride-along; however, she persisted and was driven partially around the
12 block and returned to The Pink Poodle at approximately 9:10 p.m.” The memo also
13 acknowledged what the paper had already reported, that the fire engine traveled from The Pink
14 Poodle to the vicinity of AJ’s Bar, where it reportedly stopped “for approximately two minutes,”
15 before departing “at approximately 9:16 p.m. before returning to the fire station at approximately
16 9:20 p.m.” A true and correct copy of Chief Sapien’s April 25, 2023 memorandum to Mayor
17 Mahan and the City Council is attached hereto as Exhibit 14.

18 24. Chief Sapien’s second memo stated that the “use of a City vehicle to transport
19 unauthorized passengers” violated the City’s Code of Ethics and Use of City and Personal
20 Vehicles polices, as well as the Fire Department’s Ride-Along Program and Leaving First-In
21 Response Areas policies and procedures. *Id.* It also stated that the City has taken “appropriate
22 disciplinary action and now considers this matter closed as all required due process has been
23 completed and no appeal of the discipline has been filed.” *Id.*

24 25. The City’s denial position violates clearly established law with respect to the
25 public’s interest in access to records pertaining to public employee wrongdoing, especially in
26 cases where discipline is imposed. Its apparent acceptance that the involved personnel were
27 somehow coaxed against their will to drive a bikini clad woman around in a fire engine, so much
28 so that they elected to go to another bikini bar after dropping her off, illustrates why public
 oversight is not only compelled under the law but necessary in this case. That the discipline

1 imposed, as implied from Chief Sapien’s memo, appears far removed from that advanced by then-
2 Mayor Sam Liccardo—that heads should roll—further illustrates the need for transparency. Was
3 appropriate discipline imposed? The CPRA and state constitution provide a mechanism for public
4 oversight of government agencies and personnel precisely so the public is not forced to accept the
5 government’s version of events. Through this lawsuit, The Mercury News seeks to hold the City
6 of San Jose accountable to the public.

7 **FIRST CAUSE OF ACTION**

8 **(Violation of Art.1, Section 3(b) of the California Constitution)**

9 26. The Mercury News realleges Paragraphs 1 through 25 above as though
10 fully incorporated herein.

11 27. Article 1, Section 3(b)(1) of the California Constitution states:

12 The people have the right of access to information concerning the conduct of the
13 people’s business, and, therefore, the meetings of public bodies and the writings
14 of public officials and agencies shall be open to public scrutiny.

15 28. This constitutional amendment, passed by an overwhelming number of voters in
16 November of 2004, reflects a paramount public interest in access to information about how the
17 government is conducting the people’s business.

18 29. This constitutional amendment expressly requires that any statute, court rule or
19 other authority must be broadly construed if it furthers the public’s right of access and narrowly
20 construed if it limits the right of access. Cal. Const. Art. 1, § 3(b)(2).

21 30. The writings in the City’s possession responsive to The Mercury News’ November
22 16, 2022, and March 24, 2023, (as modified by counsel’s letter of March 28, 2023) CPRA requests
23 are clearly encompassed within these constitutional mandates regarding the public’s right of
24 access to writings of public officials and agencies.

25 31. The City has violated the mandates of the Article 1, Section 3(b) of the California
26 Constitution by failing to disclose the writings requested by The Mercury News in its November
27 16, 2022, and March 24, 2023, CPRA requests.

28 32. An actual controversy exists between The Mercury News and the City in that The
29 Mercury News contends that the writings it seeks are public records required to be disclosed under

1 Article 1, Section 3(b) of the California Constitution and are not exempt under the personnel files
2 exemption of Government Code Section 7927.700, the public interest balancing test of
3 Government Code Section a 7922.000, or the attorney-client privilege incorporated under
4 Government Code Section 7927.705, or any other provision of law. The City, on the other hand,
5 contends that the writings sought are exempt from disclosure under Section 7927.700, 7922.000,
6 and—for some records *relating to* the investigation and disciplinary records—under Section
7 7927.705, and, therefore, that it has no obligation to disclose the writings to The Mercury News.
8 Therefore, The Mercury News and the public are, and will continue to be, unable to obtain access
9 to public writings about well-founded allegations of public employee wrongdoing of a substantial
10 nature, the City’s response to those allegations, including investigations undertaken, findings
11 made and discipline meted out against Fire Department personnel. Accordingly, The Mercury
12 News is entitled to an order declaring that the writings sought by the newspaper are public records
13 within the meaning of Article 1, Section 3(b) and must be disclosed.

14 33. The Mercury News is also entitled to institute proceedings for a writ of mandate to
15 enforce its rights and the public’s right to obtain all writing responsive to its November 16, 2022
16 and March 24, 2023, CPRA requests. *See Degrassi v. Cook*, 29 Cal. 4th 333 (2002).

17 **SECOND CAUSE OF ACTION**

18 **(Violation of The Public Records Act, Cal. Gov’t Code Sec. 6250, et. seq.)**

19 34. The Mercury News realleges Paragraphs 1 through 33 above as though fully
20 incorporated herein.

21 35. The writings requested by The Mercury News are public records as defined by
22 Government Code Section 7920.530 in that they contain information relating to the conduct of the
23 public’s business prepared, owned, used, or retained by the local agency.

24 36. The City violated Government Code Section 7922.530(a) by failing to disclose the
25 writings requested in The Mercury News’ November 16, 2022, and March 24, 2023, CPRA
26 requests, as specified herein.

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1 37. The City violated Government Code Section 7922.000 by failing to demonstrate
2 how withholding the writings requested is justified under Section 7927.700, Section 7922.000,
3 Section 7927.705, or under any other provision of law.

4 38. An actual controversy exists between The Mercury News and the City in that The
5 Mercury News contends the writings sought by it are public records required to be disclosed under
6 the CPRA and controlling California case authority. The City, on the other hand, contends that
7 pursuant to Government Code Section 7927.700, Section 7922.000, and, as to some records
8 *relating to* the investigation report and disciplinary records sought, Section 7927.705, it has no
9 obligation to disclose to the public the writings requested. Therefore, The Mercury News and the
10 public are, and will continue to be, unable to obtain access to public writings about well-founded
11 allegations of public employee wrongdoing of a substantial nature, the City's response to those
12 allegations, including investigations undertaken, findings made and discipline meted out against
13 fire personnel or any other public employee. Accordingly, pursuant to Government Code Section
14 7923.000, The Mercury News is entitled to an order declaring that the writings sought by it are
15 public records within the meaning of the California Public Records Act and must be disclosed.

16 39. Under Government Code Section 7923.000, The Mercury News is also entitled to
17 institute proceedings for a writ of mandate to enforce its rights and the public's right to obtain the
18 writings requested. Further, under Section 7923.005, The Mercury News is entitled to have the
19 proceedings resolved on an expedited basis consistent "with the object of securing a decision as to
20 these matters at the earliest possible time." Cal. Gov't Code § 7923.005.

RELIEF DEMANDED

22 Therefore, The Mercury News demands judgment as follows:

23 1. That this Court order the City of San Jose to prepare a log of all documents being
24 withheld from the public and responsive to the November 16, 2022, and March 24, 2023, CPRA
25 Requests (as modified by counsel's March 28, 2023, letter), and the corresponding exemption it
26 has asserted as the basis of each withholding, and that this log be provided to The Mercury News
27 and the Court before any hearing on the merits.

1 2. That this Court order the City to submit under seal and for in camera review in
2 advance of any merits hearing the writings requested by The Mercury News and currently being
3 withheld by the City.

4 3. That this Court issue a peremptory writ of mandate under the seal of this Court,
5 directing the City to immediately disclose to The Mercury News all the writings currently being
6 withheld; or, alternatively, set a hearing on this matter as early as possible;

7 4. That this Court issue a declaration that the writings sought are writings of public
8 officials and agencies as set forth in Article 1, Section 3(b)(1) of the California Constitution and
9 that the City violated the California Constitution by refusing to make the writings available to the
10 public.

11 5. That this Court issue a declaration that the withheld writings are public records as
12 defined by California Government Code Section 7920.530 in that they contain information
13 relating to the conduct of the people's business, prepared, owned, used or retained by the City, and
14 that the City violated the California Public Records Act by refusing to make the writings available
15 to the public.

16 6. That this Court enter an order awarding costs and reasonable attorneys' fees
17 incurred in this action pursuant to California Government Code Section 7923.115(a)-(b) and
18 California Civil Procedure Code Section 1021.5; and

19 7. That this Court award The Mercury News such other and further relief as is just and
20 proper.

21 DATED this 3rd day of May, 2023.

23 JASSY VICK CAROLAN LLP

By: Duffy Carolan
Duffy Carolan

Attorneys for Petitioner/Complainant SAN JOSE MERCURY NEWS LLC

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VERIFICATION

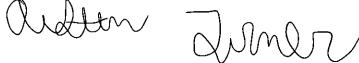
I, Austin Turner, do hereby certify and declare as follows:

1. I am a reporter for The Mercury News and in that capacity I made the requests for public records pertaining to the City of San Jose's Pink Poodle investigation that are the subject of this action.

2. I have read this Verified Petition for Writ of Mandate Directed to the City of San Jose Ordering Compliance With the California Public Records Act and Article 1, Section 3(b) of the California Constitution/Complaint for Declaratory and Injunctive Relief and know the contents thereof and I verify that the averments in paragraphs 4-15 and 23-25, along with the referenced Exhibits therein, are true of my own personal knowledge, except as to those matters stated on information and belief and as to those matter I believe them to be true.

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

Executed in San Jose, California on May 3, 2023.


Austin Turner

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VERIFICATION

I, Duffy Carolan, do hereby certify and declare:

1. I am an attorney licensed to practice law in the State of California and am a partner
in the law firm of Jassy Vick Carolan LLP, attorneys of record for Petitioner/Complainant SAN
JOSE MERCURY NEWS LLC, dba The Mercury News.

2. I have read the Verified Petition for Writ of Mandate Directed to the City of San
Jose Ordering Compliance with the California Public Records Act and Article 1, Section 3(b) of
the California Constitution/Complaint for Declaratory and Injunctive Relief and know the contents
thereof and I verify that the averments in paragraphs 1,2, 16-22 are true based information
provided to me that I believe to be true.

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

Executed in San Francisco, California on May 3, 2023.



Duffy Carolan

INDEX TO EVIDENCE AND EXHIBITS

DESCRIPTION	EXHIBIT NUMBER
Exemplar Copies of The Mercury News Articles	EXHIBIT 1
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April 25, 2023 Memorandum from San Jose Fire Chief Robert Sapien, Jr. to Mayor Matt Mahan and City Counsel	EXHIBIT 14

EXHIBIT 1

Investigation launched after video shows bikini-clad woman exiting fire engine in front of San Jose strip club

Mayor says 'heads must roll' if fire engine was used as a 'frat party bus'

By **AUSTIN TURNER** | aturner@bayareanewsgroup.com | Bay Area News Group

PUBLISHED: October 7, 2022 at 10:04 a.m. | UPDATED: October 7, 2022 at 4:01 p.m.

SAN JOSE — A video posted online Thursday showing a scantily clad woman exiting a fire truck in San Jose before walking into the Pink Poodle strip club drew quick condemnation Friday.

The video displays a fire truck with lights flashing and a marking that says "E4" stopped after dark in front of the club on South Bascom Avenue. After a few seconds, a door opens and a woman in a bikini emerges, turning and shutting the door before walking toward the club's entrance.

The video was originally posted by an Instagram user whose account is private. The video was reposted by an account called "San Jose Foos".

It was unknown whether the woman is employed by the Pink Poodle, which is described as "San Jose's only all-nude strip club" on the company's website. Calls to the club were not answered Friday morning.



"If the investigation concludes that this video is as bad as it looks, then heads must roll," Liccardo said in the statement. "We cannot have a life-critical emergency rescue apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work of the rest of our SJFD team."

San Jose fire officials said the department was investigating the video.

"The Department has become aware of a concerning video posted on social media," San Jose Fire Chief Robert Sapien, Jr. said in a statement Friday morning. "An investigation has been initiated to determine facts surrounding the video."

"If findings of an internal investigation reveal inappropriate behavior of any Department members, appropriate steps will be taken to address the matter," the statement continued. "The City of San José Code of Ethics policy guides the conduct of all City employees. All City of San José employees are expected to adhere to the Code of Ethics Policy they have agreed to as a condition of their employment."



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 Author **Austin Turner** | Breaking News Reporter

Austin Turner is a Bay Area News Group breaking news reporter for The Mercury News and East Bay Times. A graduate of San Jose State University with a BA degree in journalism, he returned to the Bay Area after spending time covering high school sports for the Red Rock News in Sedona, Ariz. Prior to that, he had professional bylines in outlets such as SB Nation, the Orange County Register and the Los Angeles Daily News.

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Report: San Jose Fire engine stopped at multiple adult-entertainment bars on night of infamous video

SJFD official thought Mayor Liccardo's statement could 'reflect more negatively on the dept than necessary'

By AUSTIN TURNER | aturner@bayareanewsgroup.com | Bay Area News Group

PUBLISHED: November 16, 2022 at 1:25 p.m. | UPDATED: November 17, 2022 at 11:11 a.m.

Fresh details surrounding last month's release of a video featuring a scantily-clad woman stepping out of a San Jose Fire Department engine and into a strip club were revealed Tuesday that could add a twist to an ongoing investigation, according to media reports.

The video, [posted last month but later deleted](#), shows a San Jose Fire engine with lights flashing and a marking that says "E4" stopped after dark in front of the Pink Poodle club on South Bascom Avenue. After a few seconds, a door opens and a woman in a bikini emerges, turning and shutting the door before walking toward the club's entrance.



As first reported by NBC Bay Area and later confirmed by Bay Area News Group, that wasn't the only adult entertainment establishment Engine 4 visited on the evening of Oct. 5. GPS data obtained by the news outlet showed that after the engine departed the Pink Poodle — where there had been no call for service, according to dispatch records — at 9:10 p.m., The engine then traveled approximately two miles to AJ's Bar, a bikini bar on Lincoln Avenue, where it remained parked from 9:14 until 9:18.

Text messages obtained by NBC Bay Area also revealed internal department conversations surrounding Mayor Sam Liccardo's scathing "heads must roll" statement after the video surfaced.

According to the outlet, a SJFD spokesperson texted fire Chief Robert Sapien Jr. that they told someone close to the mayor's office that Liccardo's statement could be "picked up as headlines that would reflect more negatively on the dept than necessary."

Liccardo's statement, which was not publicly altered or rescinded after its release, read: "'If the investigation concludes that this video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work of the rest of our SJFD team."

Bay Area News Group submitted record requests for internal information from both SJFD and the mayor's office, but officials had not responded at the time of publication. Liccardo's office has repeatedly declined to comment beyond his initial statement.



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Tags: [Editors' Picks](#), [Mayor Sam Liccardo](#), [PM Report](#), [Public Safety](#), [South Bay Crime](#)

 Author **Austin Turner** | Breaking News Reporter

Austin Turner is a Bay Area News Group breaking news reporter for The Mercury News and East Bay Times. A graduate of San Jose State University with a BA degree in journalism, he returned to the Bay Area after spending time covering high school sports for the Red Rock News in Sedona, Ariz. Prior to that, he had professional bylines in outlets such as SB Nation, the Orange County Register and the Los Angeles Daily News.

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Why were San Jose firefighters at a strip club? Still no answers on Poodlegate

Chief apologizes after probe, but the chief and city manager refuse to release details



The exterior sign of the Pink Poodle on Bascom Avenue in San Jose, Calif., is photographed on Wednesday, April 30, 2014. (Gary Reyes/Bay Area News Group)

By **GABRIEL GRESCHLER** | ggreschler@bayareanewsgroup.com | Bay Area News Group

PUBLISHED: March 23, 2023 at 6:00 a.m. | UPDATED: March 23, 2023 at 1:38 p.m.



A five-month investigation into why a San Jose firetruck dropped off a bikini-clad woman at a strip club has concluded, but officials have yet to answer many questions about the scandalous incident caught on video, including which firefighters were outside the Pink Poodle and what discipline — if any — they face.

In a letter sent to city councilmembers earlier this month, San Jose Fire Chief Robert Sapien wrote the department “extends a sincere apology” to the community. But he said the identities of the firefighters seen at the strip club won’t be released.

“The actions portrayed in the video were received with disappointment and concern, as they appeared seriously misaligned with the Department’s mission and values and were highly detrimental to the confidence and trust of our community and our workforce,” Sapien wrote in the 343-word letter dated March 10. It was the first time that he apologized for the incident.

Sapien said the city would not elaborate on the incident as “employees’ personnel information is confidential,” but that the firefighters have been notified that “appropriate action” will be taken. He also promised that standards of conduct will be reinforced among its wider workforce.

“I tried to be as generous as possible with the memo sent to council,” Sapien said in an interview. “I don’t have any additional comments at this time.”

The city manager’s office also declined to provide any further details on the firefighters’ October visit to the Pink Poodle, which drew swift condemnation from then-Mayor Sam Liccardo. “If the investigation concludes that this video is as bad as it looks, then heads must roll,” Liccardo said in the statement at the time.





The exterior of the Pink Poodle on Bascom Avenue in San Jose, Calif., is photographed on Wednesday, April 30, 2014. (Gary Reyes/Bay Area News Group)

The “World Famous” Pink Poodle, established in 1963, is the city’s only “all-nude club”. It survived a 1984 decision by the Ninth Circuit Court of Appeals, which ruled that cities had the right to zone away adult businesses, but made an exception for the Pink Poodle, according to the strip club’s website.

The firefighter scandal first came to light on Oct. 6 when a video was posted to the Instagram account San Jose Foos showing an Engine 4 fire truck outside the strip club on South Bascom Avenue, and a scantily clad woman exiting the vehicle, closing its door and then walking toward the Pink Poodle’s entrance. The video was captioned, “Only in San Jose do you see a stripper come out of a firetruck.”

Dispatch records later revealed no calls for service were made at the address. A public records request made by Bay Area News Group revealed that the Pink Poodle wasn’t the only adult entertainment establishment visited by Engine 4 that night. GPS data shows that the firetruck also traveled to Aj’s Bar, a bikini bar on Lincoln Avenue 2 miles away from the Pink Poodle. The GPS data was first reported on by NBC Bay Area.



The entire situation has perplexed retired San Jose Fire Captain Richard Santos, who said in an interview that the investigation took much longer than usual and the incident was addressed too late by the chief.

"I'm kind of puzzled. The lingering on it is not good," Santos, currently a director at Santa Clara Valley Water District, said in an interview. "What was really done?"

Before the official investigation was closed, additional public records requests made by this news organization were denied by the city. Those requests included documents related to any disciplinary actions taken against the firefighters seen in the Oct. 6 video and internal fire department communications regarding the incident, as well as any related reports.



SAN JOSE, CA – APRIL 19: San Jose Fire Chief Robert Sapien, right, takes part in a press conference announcing Dyllin Jaycruz Gogue has been charged with felony arson and other charges on Tuesday, April 19, 2022, in San Jose, Calif. Gogue is alleged to have set fire to a Home Depot store on Blossom Hill Road while trying to steal tools. (Aric Crabb/Bay Area News Group)



Staff writer Austin Turner contributed reporting to this article.

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Author **Gabriel Greschler** | San Jose
Reporter

Gabriel Greschler is a Bay Area News Group reporter who covers San Jose for The Mercury News and East Bay Times. He previously worked as a staff writer for J. The Jewish News of Northern California and as an on-call interactive producer for KQED. He grew up in Boston, moved to Seattle when he was 10 and then attended the University of San Francisco where he earned a BA degree in politics with a minor in journalism. Gabriel is passionate about local news, trying new restaurants and escaping the San Francisco fog.

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Update: San Jose won't release Pink Poodle scandal records

The city's refusal appears to be in conflict with ample legal precedent



The exterior of the Pink Poodle on Bascom Avenue in San Jose, Calif., is photographed on Wednesday, April 30, 2014. (Gary Reyes/Bay Area News Group)

By **GABRIEL GRESCHLER** | ggreschler@bayareanewsgroup.com | Bay Area News Group

PUBLISHED: April 25, 2023 at 4:59 p.m. | UPDATED: April 27, 2023 at 9:07 a.m.



Six months after a scandalous video surfaced of a bikini-clad woman exiting an on-duty San Jose firetruck at the Pink Poodle strip club, the city is still refusing to fully explain what happened or make public its probe of the eyebrow-raising affair.

Late Tuesday, Fire Chief Robert Sapien sent a memo to city councilmembers about the incident in response to "significant public inquiries," but he shared few new details, continuing to withhold information about how city firefighters were disciplined for the incident, among other key facts.

Sapien's response, as well as a separate refusal Wednesday from the city's open government manager, appear to be in conflict with ample legal precedent regarding the public nature of investigations into government employee misconduct.

Sapien's memo revealed that fire crews dropped off an unauthorized male passenger at the Pink Poodle — his workplace — on Oct. 5 and described an almost comical interaction that subsequently happened that night outside of the South Bascom Avenue club. While the firetruck was stopped in front of the strip club, a woman asked the crew for a ride-along, and though firefighters initially refused, they relented after "she persisted."

In March — after the city's investigation concluded and Sapien apologized for the first time — this news organization requested the full investigatory report and any disciplinary records pertaining to the incident.

But the city asserted the privacy rights of the individual firefighters and maintained that disclosing the records is not in the public's interest — a legal stance it restated to this news organization Wednesday.

The case law surrounding the disclosure of records of public employee misconduct makes clear such records are public, says David Loy, Legal Director at the First Amendment Coalition, a nonprofit that advocates for open government.

"The public interest far outweighs any privacy rights in this situation," Loy said. "The public has the right to the full story, not just the official story, precisely so the press and the public can verify what is really going on here."

He added: "Do what you like on your own time, but on the public's dime, the public has the right to know."



In an interview on Tuesday after the memo's release — his second to councilmembers about the scandal — Sapien declined to answer any additional questions.

"I think the combination of this memo and the previous one is pretty much the extent of what I can share," he said.

Mayor Matt Mahan said in a statement that "significant" and "appropriate" discipline was taken as a result of the city's investigation. But he also would not divulge any additional information.

"I am disappointed and frustrated that the City policy doesn't allow us to share further details with the public," he wrote.

The Tuesday memo by the fire chief also included a timeline as to when and where the firefighters traveled that night.

For approximately four minutes after the woman joined the firefighters, according to the memo, the firetruck drove around the club, dropping her off at 9:10 p.m. The woman then went into the Pink Poodle. That was the moment captured on video and shared widely on social media by an Instagram account called San Jose Foos. The caption on the video read, "Only in San Jose do you see a stripper come out of a firetruck."

The memo stated that the firetruck then traveled near AJ's Bar — a bikini bar on Lincoln Avenue two miles away from the Pink Poodle. The truck remained at that spot for a couple of minutes before returning to its fire station at 9:20 p.m. No explanation for the second stop has been offered.

Sapien also shared in the memo that the disciplinary process has been completed — and that those involved in the episode did not challenge the punishment in an appeal.

"The use of a City vehicle to transport unauthorized passengers violated City and Fire Department policies, including the City's Code of Ethics and Use of City and Personal Vehicles policies as well as the Fire Department's Ride-Along Program," the chief wrote. "Additionally, taking the fire engine outside of the area to which it is assigned without being dispatched to a call for service violated City and Department policies, including the Fire Department's Policies and Procedures for Leaving First-In Response Area."



"The actions portrayed in the video were received with disappointment and concern, as they appeared seriously misaligned with the Department's mission and values and were highly detrimental to the confidence and trust of our community and our workforce," Sapien wrote in a memo dated March 10.

That memo followed revelations by this news organization and others in November that the dispatch records on the night of Oct. 5 showed no calls for service. Records also showed text messages from former Mayor Sam Liccardo calling for "heads to roll" because of the incident, a reaction that drew consternation within the fire department.

The "World Famous" Pink Poodle on 328 South Bascom Ave. is San Jose's only all-nude strip club and was established in 1963.

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Tags: [Bay Area Crime](#), [Crime](#), [San Jose City Council](#), [South Bay Crime](#), [South Bay Fires](#)

 Author **Gabriel Greschler** | San Jose Reporter

Gabriel Greschler is a Bay Area News Group reporter who covers San Jose for The Mercury News and East Bay Times. He previously worked as a staff writer for J. The Jewish News of Northern California and as an on-call interactive producer for KQED. He grew up in Boston, moved to Seattle when he was 10 and then attended the University of San Francisco where he earned a BA degree in politics with a minor in journalism. Gabriel is passionate about local news, trying new restaurants and escaping the San Francisco fog.

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EXHIBIT 2

Duffy Carolan

Subject: FW: Statement re: SJFD viral video

From: **Davis, Rachel** <Rachel.Davis@sanjoseca.gov>
Date: Fri, Oct 7, 2022 at 9:59 AM
Subject: Re: Statement re: SJFD viral video
To: Austin Turner <aturner@bayareanewsgroup.com>

Sorry quick minor edit.

"If the investigation concludes that this video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work of the rest of our SJFD team. I trust that Chief Robert Sapien, as one of our nation's finest fire chiefs, will respond accordingly."

Rachel Davis
Chief Communications Officer
Office of San Jose Mayor Sam Liccardo

On Oct 7, 2022, at 9:51 AM, Austin Turner <aturner@bayareanewsgroup.com> wrote:

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Thank you

On Fri, Oct 7, 2022 at 9:50 AM Davis, Rachel <Rachel.Davis@sanjoseca.gov> wrote:

Thanks Austin. Please see below.

"If the investigation concludes that this video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work of the rest of our SJFD team. I expect that Chief Robert Sapien, as one of our nation's finest fire chiefs, will respond accordingly."

Rachel Davis
Chief Communications Officer
Office of San Jose Mayor Sam Liccardo

On Oct 7, 2022, at 9:50 AM, Austin Turner <aturner@bayareanewsgroup.com> wrote:

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[External Email]

Hello,

My name is Austin Turner and I'm a reporter for the San Jose Mercury News.

I'm writing in regards to the viral video that has spread from last night, showing what appears to be a stripper exiting a firetruck outside of The Pink Poodle in San Jose.

We would like to ask for the Mayor's comment on this incident.

Thank you,

Austin Turner

--
Austin Turner Senior Breaking News Reporter | Editorial
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EXHIBIT 3



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Robert Sapien, Jr.

SUBJECT: FIRE DEPARTMENT
INVESTIGATION INITIATED ON
OCTOBER 7, 2022

DATE: March 10, 2023

Approved

Date

3/10/2023

INFORMATION

BACKGROUND

On the evening of October 6, 2022, the Fire Chief became aware of a video posted on a social media channel that appeared to reflect a San José Fire Department (Department) emergency response vehicle positioned in front of a business establishment located at 328 S. Bascom Avenue and engaged in activities possibly constituting violations of City and Department policies and procedures, and/or rules and regulations, and/or other breach(es).

On October 7, 2022, the Fire Chief directed initiation of an investigation to determine facts and circumstances related to the posted video. The ensuing investigation was coordinated with the City Manager's Office of Employee Relations and proceeded under conditions required by the Firefighters Procedural Bill of Rights Act¹. Advancement of investigation steps remained a Department priority until its completion in February 2023.

Based on investigation findings, it was determined that the actions related to the video that was discovered on October 6, 2022 was taken on October 5, 2022, and constituted violation of specific policies and procedures and rules and regulations. Based on this determination and consistent with City and Department procedures, the Fire Chief forwarded a recommendation for disciplinary action to the City Manager. Employees subject to investigation in this matter have been notified of the investigation's conclusion and of the outcomes, respectively, and the City is taking appropriate action based on the findings. It is important to note that employees' personnel information is confidential, and the City is unable to elaborate further.

¹ https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=4.&title=1.&part=&chapter=9.6.&article=

HONORABLE MAYOR AND CITY COUNCIL

March 10, 2023

Subject: Fire Department Investigation Initiated on October 7, 2022

Page 2

CONCLUSION

The actions portrayed in the video were received with disappointment and concern, as they appeared seriously misaligned with the Department's mission and values and were highly detrimental to the confidence and trust of our community and our workforce. The Department regrets that this event occurred and extends a sincere apology to all who bore the burden of this event including our community, employees and their families and friends, and City leadership. In addition to addressing involved personnel directly, the Department is acting to reinforce standards of conduct across the organization beginning with all senior officers and progressively to each employee.



ROBERT SAPIEN, JR.
Fire Chief, Fire Department

For questions, please contact Robert Sapien, Jr., Fire Chief, at robert.sapien@sanjoseca.gov or (408) 794-6952.



EXHIBIT 4

Duffy Carolan

Subject: Public Records Request - City :: R000459-111622

----- Forwarded message -----

From: **City of San Jose, CA Public Records Center** <sanjoseca@govqa.us>

Date: Wed, Nov 16, 2022 at 9:31 AM

Subject: Public Records Request - City :: R000459-111622

To: austint244@gmail.com <austint244@gmail.com>



Dear Austin Turner:

The City is in receipt of your Public Records Act Request which you submitted on 11/16/2022. Your request was given the reference number R000459-111622 for tracking purposes.

Records Requested: - GPS data from engine 4 on Oct. 4, 2022 - Disciplinary actions taken against fire staff inside engine 4 on Oct. 4, 2022 - Internal communications between SJFD personnel regarding the Pink Poodle disciplinary actions - Reports regarding the Oct. 4 investigation

Our staff is currently searching for and collecting documents. We will notify you by 11/28/2022 of disclosable public records. We will, at that time, also inform you of the costs incurred by the City in copying the responsive documents.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the Public Records Center.

City of San Jose

To monitor the progress or update this request please log into the [Public Records Center](#)



EXHIBIT 5

Duffy Carolan

Subject: [Records Center] Public Records Request - City :: R000459-111622

----- Forwarded message -----

From: City of San Jose, CA Public Records Center <sanjoseca@govqa.us>

Date: Wed, Nov 16, 2022 at 6:41 PM

Subject: [Records Center] Public Records Request - City :: R000459-111622

To: austint244@gmail.com <austint244@gmail.com>

--- Please respond above this line ---



RE: Public Records Request - City of November 16, 2022, Reference # R000459-111622

Dear Austin Turner,

The City of San Jose received a public records request from you on November 16, 2022. Your request mentioned:

- GPS data from engine 4 on Oct. 4, 2022
- Disciplinary actions taken against fire staff inside engine 4 on Oct. 4, 2022
- Internal communications between SJFD personnel regarding the Pink Poodle disciplinary actions
- Reports regarding the Oct. 4 investigation

The City of San Jose has reviewed its files and has located responsive records to your request. Please log in to the Public Records Center at the following link to retrieve the responsive records.

[Public Records Request - City - R000459-111622](#)

Please note that some documents have been withheld pursuant to *"Pending Investigations, per California Government Code 6254(f); Balancing Test, per California Government Code §6255 - The release of documents would endanger the successful completion of the investigation or a related investigation."*

Your request is now complete.

Any person who believes that he or she has been inappropriately denied access to City of San José public records, may appeal to the City Council Rules and Open Government Committee. For more information on the appeals process, see www.sanjoseca.gov/your-government/departments-offices/office-of-the-city-manager/official-city-records/appeals.

For questions or additional information, please reply to this email.

Sincerely,

Edwin Huertas
Open Government Manager
City of San Jose

To monitor the progress or update this request please log into the [Public Records Center](#)



EXHIBIT 6

Duffy Carolan

Subject: Public Records Request - City :: R001280-032423

----- Forwarded message -----

From: City of San Jose, CA Public Records Center <sanjoseca@govqa.us>

Date: Fri, Mar 24, 2023 at 7:59 AM

Subject: Public Records Request - City :: R001280-032423

To: austint244@gmail.com <austint244@gmail.com>



Dear Austin Turner:

The City is in receipt of your Public Records Act Request which you submitted on 3/24/2023. Your request was given the reference number R001280-032423 for tracking purposes.

Records Requested: 1. The full report of the completed investigation regarding Fire Engine 4's activity on October 4, 2022 and its interactions with employees from the Pink Poodle and AJ's Bikini Bar. 2. The full report on disciplinary actions taken against employees involved in Fire Engine 4's activity on October 4, 2022.

Our staff is currently searching for and collecting documents. We will notify you by 4/5/2023 of disclosable public records. We will, at that time, also inform you of the costs incurred by the City in copying the responsive documents.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed. Again, thank you for using the Public Records Center.

City of San Jose

To monitor the progress or update this request, please log into the [Public Records Center](#)



EXHIBIT 7



RE: PUBLIC RECORDS REQUEST of March 24, 2023., Reference # R001280-032423.

Dear Austin Turner,

The City of San Jose received a public information request from you on March 24, 2023. Your request mentioned:

"1. The full report of the completed investigation regarding Fire Engine 4's activity on October 4, 2022 and its interactions with employees from the Pink Poodle and AJ's Bikini Bar.

2. The full report on disciplinary actions taken against employees involved in Fire Engine 4's activity on October 4, 2022."

The City of San Jose has reviewed your request and has determined that the records requested are exempt from disclosure under FOIA for the following reasons:

California Government Code 7927.700- Personnel records, medical information, and related information is exempt from disclosure.

California Government Code 7922.000- Public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

California Code 7927.705- Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

Have a wonderful day.

Sincerely,

SJFDrecords PRA Coordinator

EXHIBIT 8

⌄ ⌂ On 3/28/2023 2:33:02 PM, Austin Turner wrote:

TO: "City of San Jose, CA Public Records Center"[sanjoseca@govqa.us]

Hello,

Is it the department's position that the full investigation report is exempt under Section 7927.705 (formerly 6254(k))? If so, please state the state or federal law the department is relying on to claim an exemption under this statute. We ask because the request sought two distinct categories of records yet the department's exemption claims were not specific as to each category. As a result, we don't know which of the exemptions cited applies to the separate categories of records sought.

Thank you for clarifying this matter.

Austin Turner

On Mon, Mar 27, 2023 at 4:04 PM City of San Jose, CA Public Records Center wrote:

EXHIBIT 9

Duffy Carolan

Subject: FW: [Records Center] Public Records Request - City :: R001280-032423

From: City of San Jose, CA Public Records Center <sanjoseca@govqa.us>

Date: Wed, Mar 29, 2023 at 11:34 AM

Subject: [Records Center] Public Records Request - City :: R001280-032423

To: austint244@gmail.com <austint244@gmail.com>

--- Please respond above this line ---



RE: PUBLIC RECORDS REQUEST of March 24, 2023., Reference # R001280-032423.

Dear Austin Turner,

The City of San Jose received a public information request from you on March 24, 2023. Your request mentioned:

"1. The full report of the completed investigation regarding Fire Engine 4's activity on October 4, 2022 and its interactions with employees from the Pink Poodle and AJ's Bikini Bar.

2. The full report on disciplinary actions taken against employees involved in Fire Engine 4's activity on October 4, 2022."

The City of San Jose has reviewed your request and has determined that the records requested are exempt from disclosure under FOIA for the following reasons:

California Government Code 7927.700- Personnel records, medical information, and related information is exempt from disclosure.

California Government Code 7922.000- Public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

California Government Code 7927.705- Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

All three California Government Codes above apply to both of the categories you requested.

Have a wonderful day.

Sincerely,

SJFDrecords PRA Coordinator

Fire Department

To monitor the progress or update this request please log into the [Public Records Center](#)

EXHIBIT 10

JASSY|VICK|CAROLAN

LOS ANGELES SAN FRANCISCO

601 Montgomery Street, Suite 850 | San Francisco, CA 94111 | T 415.539.3399 | F 415.539.3394 | JASSYVICK.COM

March 29, 2023

VIA E-Mail

Robert Sapien, Jr., Fire Chief
City of San Jose, Fire Department
1661 Senter Road
San Jose, CA 95112

Mayor Matt Mahan
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Re: Bay Area News Group's CPRA Requests Re Internal Investigation of Wrongdoing and Related Disciplinary Records. Reference Nos. R000459-111622, R001280-032423.

Dear Fire Chief Sapien and Mayor Mahan:

This firm represents the Bay Area News Group (“BANG”), publishers of The Mercury News and East Bay Times, among other daily newspapers circulated throughout California. We write in response to the City of San Jose’s blanket denial of access to all records pertaining to the City’s internal investigation of fire personnel misconduct and resulting disciplinary actions in response to an incident on or about October 5, 2022. On that evening, according to video posted to an Instagram account, San Jose Fire Department Engine 4, with lights flashing, was parked outside of a strip club on South Bascom Avenue. A woman in a bikini is seen exiting the vehicle, closing the door and then walking toward the Pink Poodle’s entrance. The video was captioned, “Only in San Jose do you see a stripper come out of a firetruck.” As later discovered through GPS tracking information produced by the City in response to a November 16, 2022 California Public Records Act (“CPRA”) request by BANG, Engine 4 also was tracked to another establishment that night about two miles away called AJ’s Bar, located on Lincoln Avenue. According to later obtained dispatch records, no calls for service were made for these locations.

We understand from public records that on October 7, 2022, Fire Chief Robert Sapien directed the initiation of an investigation to determine facts and circumstances related to the events depicted in the video. That investigation “was coordinated with the City Manager’s Office of Employee Relations and proceeded under conditions required by the Firefighters Procedural Bill of Rights.”

See March 10, 2023 Memorandum of Robert Sapien, Jr. to San Jose Mayor Matt Mahan and the City Council. The internal investigation was completed in February 2023. *Id.*

On November 16, 2022, BANG made a CPRA request for access to records reflecting disciplinary actions taken against the fire staff inside Engine 4 on the night in question, internal communications between SJFD personnel regarding Pink Poodle disciplinary actions, and reports regarding the subject investigation. *See* Reference Number R000459-111622.

On this same day, the City denied the request, asserting the investigatory records exemption under former Section 6254(f), and the public interest balancing test of former Section 6255.

On March 10, 2023, Chief Sapien issued a memorandum to Mayor Mahan and city council members summarizing the City's investigation. That memo stated the investigation found violations of specific policies, procedures and rules and regulations. Recommendations for disciplinary actions, according to the memo, were forwarded to the City Manager. The subject employees were notified of the investigation's conclusions and, according to the memo, the City "is taking appropriate action based on the findings." Chief Sapien described the actions of the involved fire personnel as "seriously misaligned with the Department's mission and values and highly detrimental to the confidence and trust of our community and workforce."¹ Nevertheless, Chief Sapien stated that the employees' personnel files are "confidential," and therefore no further information would be provided to city council members.

On March 24, 2023, given that the investigation had concluded, BANG again requested access to the completed investigation report and records of disciplinary actions taken against the involved employees. *See* Reference Number R001280-032423. On March 27, 2023, the City denied the request, asserting that the documents were exempt from public disclosure under the personnel files exemption of Section 7927.700 (formerly Section 6254(c)), the public interest balancing test of Section 7922.000 (formerly Section 6255(a)), and Section 7927.705 (formerly Section 6254(k)), which is not itself an exemption but only incorporates other state or federal laws that themselves exempt or prohibit release of otherwise public records. Under this exemption, the City did not specify what state or federal law it was asserting through Section 7927.705, beyond mentioning generally that this section can incorporate provisions of the Evidence Code relating to privilege, as stated in Section 7927.705. On March 28, 2023, BANG sought clarification of the City's assertion of Section 7927.705, asking that it specify the statutory basis for withholding each category of records sought under Section 7927.705, as required of public agencies under the CPRA. *See* Cal. Gov't Code §§ 7922.535(a), 7922.540(a). On March 29, 2023, the City clarified its denial position as to each category of records requested, claiming that all three exemption claims asserted by the City applied to the two categories of records sought in the March 24, 2023

¹ Text messages of then Mayor Sam Liccardo reveal his own assessment of the situation: "If the investigation concludes that this video is as bad as it looks, then heads must roll. We cannot have a life-critical emergency rescue apparatus relegated to a frat party bus, nor tolerate any conduct that so demeans the heroic work of the rest of our SJFD team."

CPRA request. However, the City once again failed to identify the specific statutory basis of its withholding under Section 7927.705.²

Because the City's blanket denial of access to its internal investigation report, records pertaining to disciplinary actions and related communications does not comport with the clear and substantial body of law governing access to public records pertaining to public employee wrongdoing, we write to ask that the City immediately reconsider its denial position and promptly disclose the full investigation report, all disciplinary records pertaining to the incident and related communications between the City and subject employees (or their representatives).

The California Public Records Act and Article 1 Section 3(b) of the California Constitution Must be Broadly Construed.

In enacting the CPRA the Legislature expressly declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov't Code § 6250. As explained by the California Supreme Court, "access to government records has been deemed a fundamental interest of citizenship." *International Federation of Professional and Technical Eng. v. Superior Court*, 42 Cal. 4th 319, 328 (2007) ("Int'l Federation") (quoting *CBS Inc. v. Block*, 42 Cal. 3d 646, 652 n. 5 (1986)). By promoting prompt public access to government records, the CPRA is "intended to safeguard the accountability of government to the public." *Register Div. of Freedom Newspapers Inc., v. County of Orange*, 158 Cal. App. 3d 893, 901 (1984). As the Court recognized in *Int'l Federation*:

Implicit in a democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

Id. at 328-29 (quoting *Block*, 42 Cal. 3d at 651). The Court has emphasized that "maximum disclosure of the conduct of governmental operations [is] to be promoted by the act." *Block*, 42 Cal. 3d at 651-52 (emphasis added).

In 2004, California voters overwhelmingly approved an amendment to the state constitution recognizing the public's right of access to government information: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. Art. 1, § 3(b)(1). As amended, the constitution mandates that any statute

² For purposes of this letter, BANG will presume that the City is claiming that the records, in whole or in part, are exempt under the attorney-client privilege. If the City is withholding records under another statute or law, please provide the specific statutory basis of the withholding under Section 7927.705.

or other authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” *Id.* § 3(b)(2).

Because the CPRA and state constitution embody a strong policy in favor of access to government information, unless the public records of a local agency are expressly exempt from the provisions of the Act, they must be made available for public inspection. *Int’l Federation*, 42 Cal. 4th at 329; *Commission of Peace Officer Standards and Training v. Superior Court*, 42 Cal. 4th 278, 288 (2007). Moreover, disclosure exemptions asserted by the government are to be interpreted narrowly. *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 755 (2006); *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045(2004); *Cal. State Univ. v. Superior Court*, 90 Cal.App.4th 810, 831, 108 Cal. Rptr. 2d 870 (2001). And, “[t]he burden of proof is on the proponent of nondisclosure, who must demonstrate a clear overbalance on the side of confidentiality.” *CBS Broadcasting v. Superior Court*, 91 Cal. App. 4th 892, 908 (2001).

Records Pertaining Public Employee Wrongdoing Where Findings are Made that the Allegations are True or Where the Allegations are Substantive in Nature Must Be Disclosed.

While public employees have a significant privacy interest in their personnel files, the law is equally clear that once an agency imposes discipline, or finds a charge to be true, “the strong public policy against disclosure vanishes; this is true even where the sanction is a private reproof. In such cases a member of the public is entitled to information about the complaint, the discipline, and the ‘information upon which it was based.’” *American Federation of State, County and Municipal Employees Local 1650 v. Regents of the Univ. of Cal.* (“*American Federation*”), 80 Cal. App. 3d 913, 918 (1978) (quoting *Chronicle Pub. Co. v. Superior Court*, 54 Cal. 2d 548, 575 (1960)).

This holding was reaffirmed in *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal. App. 4th 1250, 1275 (2012), where the court rejected the notion that a sustained accusation of misconduct may not be sufficiently substantial in nature to warrant disclosure. Applying *American Federation* and *Chronicle Publishing*, the court held that “if the complaint has been upheld by the agency involved or discipline imposed, even if only a private reproof, it must be disclosed.” 202 Cal. App. 4th at 1275.

Separately, the *Marken* court went on to explain that “although disclosure is *mandated* if there has been a true finding by the agency, even without such a finding, if the information in the agency’s files is reliable and, based on that information, the court can determine the complaint is well founded and substantial, it must be disclosed.” *Id.* (emphasis added) (citing *Bakersfield Sch. Dist.*, 118 Cal. App. 4th at 1044). The rationale for this separate rule is clear: if the public were bound by a contrary determination by the public agency as to a public employee’s wrongdoing, the purpose of the Act would be largely frustrated. This is so whether or not the employing agency found the allegations to be true because the public is not required to trust the public entities’ conclusions. *AFSCME*, 80 Cal. App. 3d at 917, 918 (granting access to audits of internal

investigations of wrongdoing against two employees which were sought before any disciplinary action was taken by the University); *see also Cal. Ass'n of Prof'l Scientists v. Dept. of Health Services*, 31 Med. L. Rptr. 1986 (Cal. Sup. Ct. 2003) (where Contra Costa Times obtained access to approximately 200 disciplinary files even though the internal investigations were not final).

Here, BANG's requests seek records pertaining to sustained cases of wrongdoing where discipline was actually imposed or a true finding made by the City against the employees, *and* cases where the allegations are without question substantial in nature. Under these circumstances, the law is clear that the employees' privacy interests must give way to the public's right of access to the underlying investigatory and disciplinary records.

No different outcome would be warranted under the public interest balancing test of Section 7922.000, asserted by the City. Indeed, courts long have recognized that “[t]he weighing process under section 6254, subdivision (c) to determine whether the disclosure would constitute an unwarranted invasion of privacy requires a consideration of almost exactly the same elements that should be considered under section 6255. *Braun v. City of Taft*, 153 Cal. App. 3d 332, 345 (1984); *see also id.* at 347; BRV, Inc., 143 Cal. App. 4th at 755 (“The tests under the two statutes, however, are essentially the same.”). In any event, the public's interest in disclosure here is unquestionably paramount, and the City could not possibly meet its heavy evidentiary burden of proof to show how the public's interest in non-disclosure clearly outweighs its interest in disclosure. Cal. Gov't Code Section 7922.000. The events in question constitute a clear violation of public trust with enormous public safety implications, as well as an egregious abuse of taxpayer dollars. Even the City's former mayor recognized the public safety risks of diverting a “life-critical emergency rescue apparatus” to a “frat party bus.” And Chief Sabien recognized that the fire personnel's conduct was “seriously misaligned with the Department's mission and values and were highly detrimental to the confidence and trust of our community and our workforce.”

To provide cover to fire personnel under these circumstances through the assertion of Sections 7927.700 or 7922.000 is nothing short of irresponsible and a clear violation of the public's constitutional and statutory rights of access to public records pertaining to public employee wrongdoing.

Other agencies have similarly applied the above body of law and disclosed in response to CPRA requests disciplinary case files. *See Cal. Ass'n of Prof'l Scientists v. Dept. of Health Services*, 31 Med. L. Rptr. 1986; *see also* Oakland Trak Record # 19666 (Oakland disclosing three years' worth of disciplinary case files of Oakland Public Works employees where discipline imposed or allegations found true); <http://www.eastbaytimes.com/2017/02/28/university-of-california-detailsemerging-on-100-sexual-harassment-cases-systemwide-new-documents-show/> (where UC disclosed over 100 disciplinary cases across its nine campuses in response to an East Bay Times CPRA request).

The Records Requested Are Not Covered by the Attorney-Client Privilege.

While the City has failed to specify the specific statutory basis for its withholding under Section 7927.705, it has alluded to the existence of a privilege. Writings constituting discipline meted out against individual fire personnel, related notices and determinations would not be protected from public disclosure under the attorney-client privilege. Likewise, given Chief Sabien's own description of the internal investigation as one being handled through the City Manager's Office of Employee Relations, it would appear that the final investigation report would not constitute a confidential communication between an attorney and client. Rather, it is an ordinary wrongdoing investigation handled through the City's normal channels for such matters. Even if an attorney conducted the investigation, facts which do not appear to be present here, that would not be sufficient to convert an ordinary work-place investigation into a confidential one protected from disclosure under the attorney-client privilege.

The attorney-client privilege is codified in Evidence Code Section 954, which provides that a client may refuse to disclose confidential communications with its lawyer. “[C]onfidential communication” under the code “means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means, which, so far as the client is aware, disclosed the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” Cal. Evid. Code § 952. Incorporated as an exemption to the CPRA through Government Code Section 7927.705, the attorney-client privilege must “be strictly construed” because it “serves to suppress” information. *People v. Superior Court*, 37 Cal. App. 4th 1757, 1762 (1995); *Grover v. Superior Court*, 161 Cal. App. 2d 644, 646 (1958).

For the attorney-client privilege to apply, the court must determine that the “dominant purpose” of the communication at issue was to render legal advice in furtherance of the attorney-client relationship. *Costco v. Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 745-46(2009); *Montebello Rose Co. v. Agricultural Lab. Rel. Bd.*, 119 Cal. App. 3d 1, 31-32 (1981). Put another way, the court must evaluate whether the document was prepared in the usual course of business, or for legal consultation, or for both. “A document prepared for a dual purpose is privileged, or not privileged, depending on the ‘dominant purpose’ behind its preparation.” *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1418 (1995). This rule emanates from *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 737 (1964), where the California Supreme Court held that when an entity “has more than one purpose” in directing its agents to prepare a report, “the dominant purpose will control, unless the secondary use is such that confidentiality has been waived.”

California courts have applied this “dominant purpose” test to determine whether the attorney-client privilege attaches to documents prepared by attorneys who were retained to conduct:

- pre-litigation investigations of discrimination claims; *see Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 119-124 (1997) (reversing and remanding for consideration on a document-by-document basis of whether an attorney retained to investigate an employee's discrimination claims was acting as an attorney or as a fact finder);
- labor negotiations; *see Montebello Rose Co.*, 119 Cal. App. 3d at 31-32 (ordering disclosure of communications because dominant purpose of communications was conduct of the negotiations; although the negotiations may have had "legal significance" with regard to a future unfair-labor-practice charge based on the alleged failure to negotiate in good faith, that "does not mean that the dominant purpose of these communications was of a legal nature"); and,
- in-house attorney insurance claims investigations; *see 2,022 Ranch LLC v. Superior Court*, 113 Cal. App. 4th 1377, 1397-98 (2003) (disapproved on other grounds, *Costco*, 47 Cal. 4th at 739).

The policy behind limiting the attorney-client privilege to communications whose "dominant purpose" is providing legal advice is clear. Courts will not allow corporations or government agencies to retain a lawyer to conduct a factual investigation, which otherwise could have been completed by a non-lawyer, solely to cloak the investigatory findings under the attorney-client privilege. In *Montebello*, for example, the court rejected the argument that the attorney-client privilege applied to communications relating to labor negotiations because the roles of attorney and negotiator supposedly were "inextricably intertwined." 119 Cal. App. 3d at 32. The court held that if that "argument were accepted, it would unfairly reward those organizations able to hire attorneys as their negotiators because their communications concerning pending negotiations would be protected, whereas the communications of organizations with lay negotiators would not receive protection." *Id.* Similarly, in *Watt Industries v. Superior Court*, 115 Cal. App. 3d 802, 805 (1981), the court refused to apply the work-product doctrine to an attorney's notes regarding a failed transaction to sell condominiums. "To apply the privilege in such a situation," the court explained, "would have the effect of placing a premium upon use of attorneys as business agents; nonattorneys or clients acting for themselves having no such right to protect their notes." *Id.*

These cases demonstrate that the attorney-client privilege does not apply when an attorney is "hired solely to investigate or adjust a claim, or to negotiate a contract, rather than to provide legal advice." Rutter Group, Cal Prac. Guide: Civ. Proc. Before Trial ¶ 8:217.2, 8C-57.

Applying the standards set forth in *Wellpoint* and these other cases, the attorney-client privilege plainly does not attach to an investigation launched to "determine facts and circumstances related to the posted video." *See* March 10, 2023 Memorandum. Nothing suggests that instead of this type of investigation, the City hired an attorney to advise it on its own legal exposure. Even if it did, resulting records are not within the purview of the present CPRA request, seeking access to records of the wrongdoing investigation directed to be initiated by Chief Sabien. Nor would the

privilege attach to communications to involved personnel denoting the disciplinary measures meted out against them, or providing notice of same.

Clearly, the dominant purpose of the investigation, even assuming it was carried out by an attorney, was to conduct an independent investigation into the events on October 5, 2022.

Compare Costco, 47 Cal. 4th at 735-36 (where attorney expert in wage and hour law was hired to render legal advice regarding exempt status of some employees and was asked to investigate the facts to render a legal opinion). The clear purpose of ordering an investigation to determine the “facts and circumstances related to the video” was to conduct an independent, unbiased investigation—one not colored by the City’s own self-interests. This type of factual investigation either was, or just as easily could have been, carried out within the City’s Office of Employee Relations by a non-lawyer or by a non-attorney investigator. Because the dominant purpose of the retention was to conduct an unbiased, independent factual investigation into allegations of public employee wrongdoing, as opposed to rendering legal advice about the City’s legal exposure posed by such conduct, the privilege simply does not attach to any of the records requested by BANG on November 16, 2022 or March 24, 2023.

Separately, any underlying documents that formed the basis of the investigation and resulting discipline, however informal, including any statements or interviews with employees or witnesses or other documentary evidence gathered as part of the investigation should be released. Such records would not be covered by the attorney-client privilege. *See, e.g., D.I. Chadbourne*, 60 Cal. 2d at 737 (explaining that statements of corporate employees to corporations attorney not privileged if employee speaks as independent witness); *see also Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 397 (1961) (“Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney”).³

Conclusion.

Because the City’s blanket denial of access to the investigation report and related disciplinary records wholly fails to comport with its disclosure obligations under Article I, Section 3 of the California Constitution and the CPRA, BANG requests that the City immediately reconsider its denial position, review and promptly produce the underlying responsive records. If the City refuses to reconsider its denial position, and BANG is required to obtain a court order compelling disclosure, BANG will be entitled to mandatory attorneys’ fees and costs under Government Code Section 7923.115. *See Filarsky v. Superior Court*, 28 Cal. 4th 419, 431 (2002) (the CPRA’s attorney-fee “provision contemplates that the public agency always will pay any costs and attorney fees should the plaintiff prevail.”)

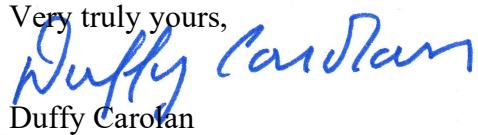
³ To the extent the City does not view these records as already encompassed within the initial request or the one made on March 24, 2023, please consider this request as one made anew under Article I, Section 3(b) of the California Constitution and the CPRA.

March 29, 2022

Page 9

We look forward to hearing from you regarding the anticipated time-frame for the City's production. Should you have any questions about the above or want to discuss this further, I can be reached at 415-539-3399.

Very truly yours,



Duffy Carolan

cc: Bert Robinson, Senior Editor

EXHIBIT 11

Duffy Carolan

From: Duffy Carolan
Sent: Monday, April 3, 2023 10:02 AM
To: 'Robert.Sapien@sanjoseca.gov'; 'mayor@sanjoseca.gov'
Cc: 'Bert Robinson'
Subject: FW: City's Denial of BANG's CPRA Request for Fire Department Wrongdoing Investigation and Related Disciplinary Records
Attachments: BANG's CPRA Request for Fire Department Disciplinary Investigation Re Actions on 10.5.22.pdf

Mayor Mahan and Fire Chief Sapien,

Please acknowledge receipt of the attached letter sent on behalf of the Bay Area News Group last Thursday, and let me know where the City stands on the issues addressed therein.

Thank you.

Duffy Carolan

Duffy Carolan
Jassy Vick Carolan LLP
601 Montgomery Street, Suite 850
San Francisco, CA 94111
415-539-3399
www.jassylvick.com

From: Duffy Carolan <dcarolan@jassylvick.com>
Sent: Wednesday, March 29, 2023 4:50 PM
To: 'Robert.Sapien@sanjoseca.gov' <Robert.Sapien@sanjoseca.gov>; 'mayor@sanjoseca.gov' <mayor@sanjoseca.gov>
Cc: 'Bert Robinson' <jhrobinson@bayareanewsgroup.com>
Subject: City's Denial of BANG's CPRA Request for Fire Department Wrongdoing Investigation and Related Disciplinary Records

Dear Mayor Mahan and Fire Chief Sapien,

This firm represents the Bay Area News Group, publisher of The Mercury News and East Bay Times. Please find attached our letter regarding the City's denial of access to the investigatory report and related disciplinary records pertaining to events on October 5, 2022, involving fire department personnel.

Your prompt attention to this matter is appreciated.

Regards,

Duffy Carolan

Duffy Carolan
Jassy Vick Carolan LLP

601 Montgomery Street, Suite 850

San Francisco, CA 94111

415-539-3399

www.jassylvick.com

EXHIBIT 12

Duffy Carolan

From: Duffy Carolan
Sent: Thursday, April 27, 2023 1:31 PM
To: 'Huertas, Edwin'
Cc: 'Tsongtaatarii, Rosa'; 'Robert.Sapien@sanjoseca.gov'; 'mayor@sanjoseca.gov'
Subject: RE: 03/29/23 Request for Consideration from BANG PRA to City of San Jose

Mr. Huertas,

We have not received a response to our March 29, 2023 request for reconsideration, or to my email of last week following up on that request. I understand that yesterday you communicated with one of BANG's reporters, who was on deadline for news reporting purposes, and was able to provide a response from the City as to its position with respect to the CPRA requests that were the subject of our March 29, 2023 letter.

Can you put me in contact with the City Attorney you referenced in your communications with the reporter (that you indicated you were following up with) so that I can reach out directly. Alternatively, we would appreciate receiving an official response to our March 29, 2023 letter seeking reconsideration of the City's denial position, even if it is the same response you provided to the reporter yesterday.

Your attention to this matter is appreciated.

Regards,

Duffy Carolan

Duffy Carolan
Jassy Vick Carolan LLP
601 Montgomery Street, Suite 850
San Francisco, CA 94111
415-539-3399
www.jassylvick.com

From: Duffy Carolan <dcarolan@jassylvick.com>
Sent: Thursday, April 20, 2023 9:23 AM
To: 'Huertas, Edwin' <Edwin.Huertas@sanjoseca.gov>
Cc: 'Tsongtaatarii, Rosa' <Rosa.Tsongtaatarii@sanjoseca.gov>; 'Robert.Sapien@sanjoseca.gov'
<Robert.Sapien@sanjoseca.gov>; 'mayor@sanjoseca.gov' <mayor@sanjoseca.gov>
Subject: RE: 03/29/23 Request for Consideration from BANG PRA to City of San Jose

Mr. Huertas,

Can you provide a status update on this matter? The law is straightforward so the delay from our March 29, 2023 request for reconsideration is perplexing. If the city has elected to provide notice of anticipated disclosure to the effected employees, please provide copies of those letters or, in the alternative, let us know the noticed date for anticipated disclosure contained therein.

Your continued attention to this matter is appreciated.

Duffy Carolan

Duffy Carolan
Jassy Vick Carolan LLP
601 Montgomery Street, Suite 850
San Francisco, CA 94111
415-539-3399
www.jassyvick.com

From: Huertas, Edwin <Edwin.Huertas@sanjoseca.gov>
Sent: Tuesday, April 11, 2023 10:50 AM
To: dcarolan@jassyvick.com
Cc: Tsongtaatarii, Rosa <Rosa.Tsongtaatarii@sanjoseca.gov>
Subject: RE: 03/29/23 Request for Consideration from BANG PRA to City of San Jose

Good morning Attorney Carolan,

As the City's Open Government Manager, I am in receipt of your March 29, 2023 letter sent to Mayor Mahan and Chief Sapien. In that letter, you are requesting the City of San Jose to reconsider its denial positions on requests #R000459-111622 and #R001280-032423 and to disclose related records.

I am following up with the appropriate departments and will respond to you as soon as I have more information.

Thank you.

-Edwin

Edwin Huertas Jr. | Open Government Manager ([he/him](#))
Office of Administration, Policy, and Intergovernmental Relations | Office of the City Manager
Email - edwin.huertas@sanjoseca.gov
www.sanjoseca.gov

EXHIBIT 13

April 28, 2023

Via E-mail

Duffy Carolan
Jassy Vick Carolan LLP
601 Montgomery Street, Suite 850
San Francisco, CA 94111

Re: Bay Area News Group's PRA re: Internal Investigation of Wrongdoing and
Related Disciplinary Records

Dear Ms. Carolan:

We have reviewed your letter dated March 29, 2023 regarding reconsideration of the request for records relating to the incident on or about October 5, 2022. Specifically, the Bay Area News Group ("BANG") seeks the completed investigation report and records of disciplinary action taken against City employees related to the events depicted in a video posted on a social media site involving San Jose Fire Department Engine 4. The City has responded on multiple occasions that such records are exempt from disclosure based on California Government Code Sections 7927.700, 7922.000 and 7927.705. To clarify, with respect to BANG seeking the completed investigation report and records of any disciplinary action taken against City employees, such records are exempt from disclosure under California Government Code Sections 7927.700 and 7922.000.¹

As you are aware, on April 25, 2023, Fire Chief Sapien issued an Information Memo, which provides the follow details relating to the incident:

On October 5, 2022, the crew assigned to a Fire engine company transported an unauthorized, male passenger from a fire station to his place of employment at The Pink Poodle located at 328 S. Bascom Avenue. The fire engine left the fire station at approximately 9:00 p.m. and arrived at The Pink Poodle at approximately 9:06 p.m.

¹ To the extent BANG is seeking records *relating to* these two items, in addition to being exempt from disclosure under Sections 7927.700 and 7922.000, some records are exempt from disclosure under California Government Code Section 7927.705 on the basis of the Attorney-Client Privilege.

While stopped in front of The Pink Poodle, an unauthorized, female climbed into the cab of the fire engine and requested a ride-along. The crew first declined to provide the female with a ride-along; however, she persisted and was driven partially around the block and returned to The Pink Poodle at approximately 9:10 p.m.

The fire engine departed The Pink Poodle at approximately 9:10 p.m. and traveled to an industrial area and stopped at 1111 Auzerais Avenue in the vicinity of AJ's Restaurant and Bar at approximately 9:14 p.m. The fire engine remained at this location for approximately two minutes and departed at approximately 9:16 p.m. before returning to the fire station at approximately 9:20 p.m.

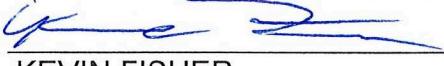
The use of a City vehicle to transport unauthorized passengers violated City and Fire Department policies, including the City's Code of Ethics and Use of City and Personal Vehicles policies as well as the Fire Department's Ride-Along Program. Additionally, taking the fire engine outside of the area to which it is assigned without being dispatched to a call for service violated City and Department policies, including the Fire Department's Policies and Procedures for Leaving First-In Response Area.

We have reviewed your analysis of case law relating to the limited circumstances when disclosure of a public employee's personnel records outweighs the employee's privacy rights. We disagree with the notion that a finding of any policy violation by a City employee results in disclosure of the investigation report and corresponding disciplinary records under the Public Records Act. In response to the video, the Fire Department conducted an investigation and found that the transportation of unauthorized passengers and the taking a fire engine outside the area to which it is assigned resulted in City policy violations. Disclosure of the investigation report and any disciplinary records relating to these findings would constitute an unwarranted invasion of privacy, as the public interest in the details of violations of the Ride-Along Program and Leaving First-In Response Area does not outweigh City employee privacy interests.

To the extent you believe that BANG has been inappropriately denied access to City of San José public records, BANG may appeal to the City Council Rules and Open Government Committee. For more information on the appeals process, see www.sanjoseca.gov/your-government/departments-offices/office-of-the-citymanager/official-city-records/appeals.

Very truly yours,

NORA FRIMANN, City Attorney

By: 
KEVIN FISHER
Assistant City Attorney

cc: Matt Mahan, Mayor
Jennifer Maguire, City Manager
Robert Sapien, Fire Chief

EXHIBIT 14



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Robert Sapien, Jr.

SUBJECT: FIRE DEPARTMENT
INTERNAL AFFAIRS
INVESTIGATION OF INCIDENT
AT THE PINK POODLE

DATE: April 25, 2023

Approved

Date

4/25/2023

INFORMATION

The City has been conservative with information regarding findings from the investigation initiated on October 7, 2022, involving an emergency response vehicle positioned in front of The Pink Poodle out of respect for the due process rights of involved personnel. In light of significant public inquiries related to the video published on social media on October 6, 2022, and subsequent investigation, the following provides additional information on the matter beyond my prior memorandum dated March 10, 2023.

On October 5, 2022, the crew assigned to a Fire engine company transported an unauthorized, male passenger from a fire station to his place of employment at The Pink Poodle located at 328 S. Bascom Avenue. The fire engine left the fire station at approximately 9:00 p.m. and arrived at The Pink Poodle at approximately 9:06 p.m.

While stopped in front of The Pink Poodle, an unauthorized, female climbed into the cab of the fire engine and requested a ride-along. The crew first declined to provide the female with a ride-along; however, she persisted and was driven partially around the block and returned to The Pink Poodle at approximately 9:10 p.m.

The fire engine departed The Pink Poodle at approximately 9:10 p.m. and traveled to an industrial area and stopped at 1111 Auzerais Avenue in the vicinity of AJ's Restaurant and Bar at approximately 9:14 p.m. The fire engine remained at this location for approximately two minutes and departed at approximately 9:16 p.m. before returning to the fire station at approximately 9:20 p.m.

The use of a City vehicle to transport unauthorized passengers violated City and Fire Department policies, including the City's Code of Ethics and Use of City and Personal Vehicles policies as well as the Fire Department's Ride-Along Program. Additionally, taking the fire engine outside of the area to which it is assigned without being dispatched to a call for service violated City and Department policies, including the Fire Department's Policies and Procedures for Leaving First-In Response Area.

The City has taken appropriate disciplinary action and now considers this matter closed as all required due process has been completed as no appeal of the discipline has been filed. Pursuant to my March 10, 2023, memorandum, I have initiated dialogue sessions with senior and middle management to reinforce professional conduct expectations, a process that will continue through all department ranks. The City Manager has reminded all City employees of the importance of adhering to all City policies, including the Code of Ethics. The City's Code of Ethics solidifies the most basic expectation that "City employees and

HONORABLE MAYOR AND CITY COUNCIL

April 25, 2023

Subject: Fire Department Internal Affairs Investigation of Incident at The Pink Poodle

Page 2

officials are expected to demonstrate the highest standards of personal integrity, honesty and conduct in all activities in order to inspire public confidence and trust in City employees.”

For informational purposes, the chart below provides a general overview of the City’s investigation and discipline process:

Step	Description
1	Complaint Raised
2	Investigation Conducted <ol style="list-style-type: none">Supporting documentation/evidence gatheredInterviews of all pertinent witnesses conducted
3	Investigative Report Written
4	Department recommends level of discipline to the City Manager or the City Manager’s Office of Employee Relations (OER) <ol style="list-style-type: none">City Manager or OER approves level of disciplineWhen appropriate, the investigation is provided to the City Attorney’s Office (CAO) and assigned to a litigator to review prior to serving to the employee
5	Employee is served with the following: <ol style="list-style-type: none">Notice of Intended Discipline including the recommended level of discipline, charges, and right to request a pre-disciplinary conference;Copy of the investigative report; andCopy of all materials relied upon in recommending the level of discipline.
6	Employee may request a conference (a pre-disciplinary meeting)
7	Final level of discipline is determined
8	Employee is served with a Notice of Discipline, which contains: <ul style="list-style-type: none">Discipline to be imposed;Effective date of discipline;Final charges; andNotice of appeal rights.
9	Employee requests appeal to Civil Service Commission (or to arbitration for employees represented by the POA or IAFF)
10	Appeal is scheduled
11	Appeal decision is issued

/s/

ROBERT SAPIEN, JR.
Fire Chief, Fire Department

For questions, please contact Robert Sapien, Jr., Fire Chief, at robert.sapien@sanjoseca.gov or (408) 794-6952.