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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

12 **Jim Bieber,**

13 Petitioner,

14 vs.

15 **City of San Clemente;**

16 **Joanne Baade**, in her official capacity as San  
17 Clemente City Clerk;

18 **James Makshanoff** in his official capacity as  
19 San Clemente City Manager;

20 **Tim Brown**, in his official capacity as Council  
21 Member for the City of San Clemente;

22 **Chris Hamm**, in his official capacity as  
23 Council Member for the City of San Clemente;

24 **Kathleen Ward**, in her official capacity as  
25 Council Member for the City of San Clemente;  
26 and DOES 1 through 10, inclusive,

27 Respondents.

28 Petitioner alleges:

1. The purpose of this action is to enforce Petitioner Jim Bieber's right to receive public records from the City of San Clemente pursuant to Government Code §§ 6250 *et seq.*,<sup>1</sup> the

<sup>1</sup> Unless specified otherwise, all subsequent code references are to the Government Code.

**ELECTRONICALLY FILED**  
Superior Court of California,  
County of Orange  
**03/03/2017** at 02:32:57 PM  
Clerk of the Superior Court  
By Giovanni Galon, Deputy Clerk

Case No.: 30-2017-00906718-CU-WM-CJC

Judge Theodore Howard

**Verified Petition for Writ of Mandate;  
Complaint for Declaratory and Injunctive  
Relief**

[Gov. Code §§ 6250 *et seq.*]

Action Filed:

1 California Public Records Act (PRA) and Section 3 of Article I of the California Constitution.

2  
3 **PARTIES**

4 2. Petitioner **Jim Bieber** is an individual residing in the City of San Clemente, County of  
5 Orange, State of California.

6 3. Respondent **City of San Clemente** (City) is a municipal corporation and local agency as  
7 defined by the PRA.

8  
9 4. Respondent **Joanne Baade** is sued in her official capacity as City Clerk for the City of San  
10 Clemente. In her official capacity as City Clerk, Baade has a ministerial duty to comply with the  
11 PRA on the City's behalf.

12 5. Respondent **James Makshanoff** is sued in his official capacity as City Manager for the  
13 City of San Clemente. In his official capacity as City Manager, Makshanoff has a ministerial duty  
14 to comply with the PRA on the City's behalf.

15 6. Respondents **Tim Brown, Chris Hamm, and Kathleen Ward** are elected members of  
16 the San Clemente City Council and sued in their official capacities. As elected members of the  
17 San Clemente City Council, they have a duty to comply with the PRA.

18 7. The true names of Respondent DOES 1 through 10, inclusive, are unknown to Petitioner,  
19 who therefore brings this Petition against DOES 1 through 10, inclusive, by such fictitious names  
20 and will seek leave of Court to show their true names, identities, and capacities when they have  
21 been ascertained.

22  
23 **JURISDICTION**

24 8. Pursuant to section 6258, "any person may institute proceedings for injunctive or  
25 declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her  
26 right to inspect or to receive a copy of any public record or class of public records under [the  
27 PRA]." Petitioner is a person suing to enforce his right to receive public records.

1 9. The Orange County Superior Court is the proper venue because the acts complained of  
2 which are the subject of this Petition, have all occurred or will all occur in the County of Orange,  
3 State of California. The relief sought in this Petition is within the jurisdiction of this Court.  
4

5 **FACTS COMMON TO ALL CAUSES OF ACTION**

6 **A. San Clemente's Attempt to Use Public Funds to Pay for a Political Recount**

7  
8 10. On November 8, 2016, voters in the City of San Clemente voted on Measure OO, a tax  
9 increase the San Clemente City Council placed on the ballot.

10 11. On election night, Measure OO was passing, but it was close. As ballots were counted, the  
11 Registrar of Voters updated the results almost every day. Petitioner is informed and believes that  
12 as of November 29, Measure OO was leading by 17 votes.

13 12. On or about November 30, the result flipped. Petitioner is informed and believes that as  
14 of November 30, 2016, Measure OO was trailing by five votes.

15 13. By December 6, the results were final. Measure OO lost by nine votes.

16 14. Sometime between November 30 and December 6, the City of San Clemente starting  
17 thinking about requesting a recount.  
18

19 15. At approximately 8:15 a.m. on December 6, the City Clerk sent an email to the Registrar  
20 of Voters asking about a recount. She asked about costs, the likelihood of success, and how long it  
21 would take. The Registrar responded an hour later and answered her questions. He provided the  
22 Clerk with a summary of every recount since 2000 and informed her that under current law, none  
23 of the recounts would have been successful.<sup>2</sup>

24 16. Later that day, the Registrar of Voters certified the election results, and that evening, the  
25 San Clemente City Council voted to request and pay for a recount of Measure OO votes.  
26

27  
28 <sup>2</sup> Of the recounts since 2000, only a 2007 recount in a campaign for Orange County Supervisor was successful. The  
Elections Code subsequently changed. If that recount took place today, the outcome of the election would not  
change.

1 17. Councilwoman Lori Donchak supported Measure OO but opposed the recount because of  
2 the prospect of spending thousands of dollars with little hope of changing the outcome. In  
3 response to this, Councilman Chris Hamm stated: “Dude. Listen. Hey — I’m a gamblin’ man.  
4 The percentage that nine votes are gonna be different — I say it’s worth a shot.”

5 18. Councilman Hamm then moved to spend public funds in pursuit of a political recount and  
6 Councilmembers Tim Brown and Kathleen Ward joined him in voting yes on spending up to  
7 \$18,000 of City funds to support the effort. It passed 3:1:1 with Councilman Bob Baker, who was  
8 attending his last council meeting, abstaining and Lori Donchak voting “no.”

9 19. Petitioner is informed and believes that the City subsequently made an official request for  
10 the recount because the Registrar of Voters provided two invoices for recount costs. One invoice  
11 was for \$6,324.66 for setup, and the other was for the \$2,400 daily fee. Both invoices were made  
12 out to the City of San Clemente. The Registrar of Voters also issued a public notice of the  
13 pending recount.

14 20. On December 8, the City Clerk confirmed the City’s intention of paying for the recount  
15 by asking if the City could provide a check for the setup fee and then use the City’s credit card for  
16 the \$2,400 daily payment. According to the Clerk, this would eliminate the City’s need to send  
17 an employee to Santa Ana each day with a check.

18 21. At some point, the City was informed that the City, as an entity, could not request a  
19 recount because the Elections Code only allows “voters” to request a recount. The City is not a  
20 voter.

21 22. The City attempted to “correct” this by having Respondent James Makshanoff, the City  
22 Manager, request the recount as an individual San Clemente voter. Petitioner is informed and  
23 believes that Respondents Makshanoff and Joanne Baard along with Respondents Tim Brown,  
24 Chris Hamm, and/or Kathleen Ward participated in a conspiracy to use public resources to fund  
25 a political recount.  
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1 23. Respondent Joanne Baard used public resources, including her on-the-clock time as a City  
2 employee, a computer and software owned by the City, and Internet access paid for by the City to  
3 engage in the political activity of sending a letter on City letterhead to the Registrar of Voters  
4 requesting a recount, first on behalf of the City and then on behalf of Respondent Makshanoff.

5 24. The City has defended Baard's action by describing the letter as a "draft." Regardless of  
6 whether the letter was a "draft" or a final version, any expenditure of public resources in  
7 connection with the letter, starting with Baard's first keystrokes to compose a "draft," was  
8 improper.

9 25. The letter the also made it clear that Respondents intended to use city funds to pay for  
10 the recount described in the Makshanoff letter.

11 26. Petitioner is informed and believes that Baard was acting under Makshanoff's direction  
12 and that Makshanoff was, in turn, acting under the direction of Respondents Tim Brown, Chris  
13 Hamm, and/or Kathleen Ward.

14 27. As of mid-day on Friday, December 9, the City still intended to pay for the recount,  
15 which was scheduled to begin the next Monday morning.

16 28. Neither the City nor Mr. Makshanoff backed off from their attempt to use City funds to  
17 pay for the recount until Friday afternoon. At that time, the City was threatened with a lawsuit  
18 seeking a temporary restraining order prohibiting the use of public funds to pay for the recount,  
19 regardless of whether the recount was requested by the City, Mr. Makshanoff, or any other San  
20 Clemente voter.  
21

22 29. Petitioner is informed and believes that had Mr. Makshanoff succeeded in using City  
23 funds to pay for the recount, that he and each of the other Respondents involved in the  
24 conspiracy to use taxpayer funds for a political purpose would have been subject to criminal  
25 and/or civil penalties.  
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1       **B. Petitioner’s PRA Request and Related Discussions**

2       30. On or about December 12, 2016, Petitioner submitted a PRA request for records related  
3 to the City’s aborted attempt to illegally pay for a political recount. He submitted the request  
4 through the City’s website, which did not allow him to save his own copy of the request.

5       31. That day, Petitioner received an email from Jennifer Weiss, the City’s Records Manager.  
6 The email he received restated his request as requesting:

7               ALL records - electronic, paper notes, records of phone calls relating to Request  
8               for Recount of Measure OO – Election of November 8, 2016 ANY and ALL  
9               records/correspondence to and from the city attorney, manager, council  
10              members, members of the public, representatives from the Registrar of Voters  
              office, members of the media and any and all parties on the matter.

11       32. Based on Petitioner’s recollection of his online submission, he is informed and believes  
12 that Ms. Weiss’s restatement of his PRA request is generally accurate.

13       33. In Jennifer Weiss’s December 12 email, she also provided a form through which she  
14 requested keywords and a date range. In response, Petitioner clarified that the date range would  
15 be November 30, 2016 through the date of his December 15 email and expressed his concern that  
16 limiting his request to specific keywords would unreasonably narrow the scope of the request. To  
17 this end, he requested all emails to and from certain City employees over the duration of the  
18 request, which he extended to include all communication through December 23.

19       34. The City employees who were the subject of Petitioner’s request included but were not  
20 limited to all Council Members, the City Manager’s Office, the City Clerk’s Office, and the City  
21 Attorney’s Office.

22       35. In Petitioner’s December 20, 2016 email, he also stated: “I would like to see some  
23 verification that a request was made to obtain emails on private non city accounts that are related  
24 to the city funding a recount.” This is, in and of itself, a separate PRA request for public records  
25 showing that such a request was made. The City never directly addressed this request nor did it  
26 provide records in response to this request. Plaintiff is informed and believes that the City never  
27  
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1 requested that its employees and Council Members search their non-City email accounts or  
2 devices for records related to the Measure OO recount.

3 36. One month later, on January 20, 2017, Ms. Weiss sent Petitioner an email stating that she  
4 was “reviewing/redacting emails and need[ed] a couple more days.” She stated that she would  
5 send the first batch of emails on January 24.

6 37. On January 24, 2017, Ms. Weiss stated that she had reviewed 1,118 of 1,747 emails and  
7 that only 18 were responsive to Petitioner’s request. Since she was still reviewing the responsive  
8 emails for redactions, she asserted that she would send the records the next day. She also stated  
9 that she would continue reviewing the 629 remaining emails and send them by February 3.  
10

### 11 **C. The City’s Response to Petitioner’s PRA Request**

12 38. On January 25, 2017, Ms. Weiss provided the first batch of emails, which she made  
13 available for download from the City’s website. However, Weiss also informed Petitioner that  
14 two records were withheld based on the deliberate process privilege pursuant to *Times Mirror Co.*  
15 *v. Superior Court* (1991) 53 Cal.3d 1325 at page 1342. However, even if the records actually invoke  
16 the deliberative process exemption, which they do not, the exemption is not appropriate here  
17 because, among other reasons, the public interest in disclosing records related to an illegal  
18 expenditure of public funds is inherently greater than any public interest in withholding records  
19 related to an illegal action. If necessary, the court may review these records *in camera* to  
20 determine whether an exemption applies.

21 39. Ms. Weiss also stated that “[p]ersonal information has been redacted such as private  
22 citizens’ names, personal home addresses, and phone numbers so as not to invade the personal  
23 privacy of private citizens, per Government Code 6255(a).” Most of the emails the City provided  
24 in response to Petitioner’s request contained redactions. Many of the redactions did not invoke  
25 protected privacy interests and are not proper under section 6255 or any other PRA exemption. If  
26 necessary, the Court may review unredacted copies of these records *in camera* to determine  
27 which redactions, if any, were proper.  
28

1 40. On February 3, 2017, Ms. Weiss provided the second batch of emails. Her February 3,  
2 2017 email also addressed Petitioner's request for phone records and emails "from private/non-  
3 city" accounts. Ms. Weiss stated that the request for phone calls would require a subpoena, and  
4 asserted that the emails on "private/non-city" accounts were "not subject to disclosure because  
5 they are not in the possession or control of the City of San Clemente." Telephone records are  
6 within the scope of public records as defined by the PRA (§ 6252, subds. (e) & (g) [sound  
7 recordings are public records]) and unless an exemption applies, must be disclosed without a  
8 subpoena. Furthermore, records in the City's constructive possession, *e.g.* records related to City  
9 business individually possessed by its employees and Council Members, must be disclosed even if  
10 the City does not directly possess the records. (*Cf. Consolidated Irrigation Dist. v. Superior Court*  
11 (2012) 205 Cal.App.4th 697, 710.)

12 41. Ultimately, the City's response did not include any records other than emails. The City  
13 omitted other types of responsive records, improperly withheld some emails, and most of the  
14 emails it did disclose had improper redactions.

15 42. From January 25, 2017 through February 6, 2017, Petitioner attempted to resolve any  
16 disputes between him and the City concerning the adequacy of the City's response to his request.

17  
18 a. When he attempted to discuss the propriety of the City's claimed deliberative  
19 process exemption, the City Attorney wrote to him that the City is not required to  
20 "participate in debate" regarding the City's response. By dismissing Petitioner's  
21 attempt to resolve the dispute as "debate," the City Attorney effectively cut-off  
22 communication between Petitioner and the City, eliminating any hope that this  
23 dispute could be resolved without litigation.

24 b. Jennifer Weiss confirmed that 26 emails was the full extent of the City's response  
25 to Petitioner's PRA request, which did not include a series of emails between the  
26 City Clerk and the Orange County Registrar of Voters that Petitioner received  
27 from a non-City source. The City's failure to produce these records begs the  
28 question of what other records were omitted from the City's response. Petitioner



1 is informed and believes there are other emails related to the Measure OO recount  
2 that the City has withheld.

- 3 c. Petitioner did not even get the opportunity to discuss (or “debate” as the  
4 Citymight phrase it) his request for phone records or his belief that the City  
5 should disclose emails that City Councilmembers and other employees might have  
6 attempted to conceal from public disclosure on non-City email accounts and  
7 devices.

8  
9 43. Given the City’s refusal to discuss the deliberative process exemption and its assertion  
10 that 26 emails is all the City will provide, Petitioner is informed and believes that the City will not  
11 provide any further records and that it would be futile to continue attempts to obtain the records  
12 he requested without litigation. To the extent that Petitioner had or has any administrative  
13 remedies, those remedies have been exhausted.

14 **D. Outstanding Public Records**

15 44. Petitioner is informed and believes that Respondents possess but have not disclosed the  
16 following public records, which are responsive to his request:

- 17 a. Additional emails sent to and/or from various City employees and  
18 councilmembers related to the Measure OO recount, including but not limited to  
19 emails between the City Clerk and the Registrar of Voters;  
20  
21 b. Copies of already-produced emails without improper redactions;  
22  
23 c. All records the City withheld based on the deliberative process exemption;  
24  
25 d. Records related to the Measure OO recount in forms other than emails;  
26  
27 e. Records of telephone calls related to the Measure OO recount;  
28  
29 f. All records possessed by City employees or councilmembers in non-City email  
30 accounts or devices relating the City’s attempt to request and/or pay for the  
31 Measure OO recount; and

1 g. All records showing the City’s request to the City Manager, City Council, and any  
2 other City employee demanding that all employees and council members search  
3 for and produce responsive records they possess in non-City email accounts or  
4 devices.

5 **FIRST CAUSE OF ACTION**

6 Writ of Mandate (Gov. Code § 6258; CCP § 1085)

7 45. Plaintiff incorporates by reference each preceding paragraph.

8 46. As a local agency, the City is required to comply with the PRA. Respondents have a  
9 ministerial duty to comply with the PRA on the City’s behalf.

10 47. As described above, Petitioner requested public records from Respondents and  
11 Respondent failed to provide all of the responsive records that Petitioner is entitled to receive.  
12 Petitioner is informed and believes that the undisclosed responsive records include the records  
13 listed in paragraph 44, above.

14 48. A Writ of Mandate is specifically authorized as a remedy for PRA violations.

15 49. Petitioner does not have any other plain, speedy, or adequate remedy in the ordinary  
16 course of law.

17 50. Petitioner requests a Writ of Mandate that will result in disclosure of the public records  
18 he requested. Petitioner further requests that the Court review the records in question *in camera*,  
19 if necessary.  
20

21 **SECOND CAUSE OF ACTION**

22 Declaratory Relief (Gov. Code § 6258; CCP § 1060)

23 51. Petitioner incorporates by reference each preceding paragraph.

24 52. There is an actual controversy between the parties as to whether Respondent satisfied all  
25 its PRA obligations.

26 53. Declaratory relief is necessary to resolve this controversy and determine whether  
27 Respondent violated the PRA.  
28

1 54. Declaratory relief is specifically authorized as a remedy under the PRA.

2 **THIRD CAUSE OF ACTION**  
3 Injunctive Relief (Gov. Code § 6258; CCP § 526)

4 55. Petitioner incorporates by reference each preceding paragraph.

5 56. The PRA specifically authorizes injunctive relief.

6 57. Respondents' continued denial of Petitioner's right to obtain public records would  
7 produce irreparable injury for which there is no adequate remedy in the ordinary course of law.

8 58. Respondents use of private email devices to conduct public business has the effect of  
9 limiting public access to public records.

10 59. Injunctive relief is necessary to ensure Respondents' compliance with the PRA.

11  
12 **PRAYER FOR RELIEF**

13  
14 Petitioner prays that:

15 1. The Court issue a peremptory Writ of Mandate and/or Alternative Writ of Mandate and  
16 Order to Show Cause to compel the following:

- 17 a. That Respondent Joanne Baade and/or the City of San Clemente request that all  
18 City of San Clemente employees and councilmembers search their non-city email  
19 accounts and devices for emails and other public records related to the City's  
20 attempt to request and/or pay for the Measure OO recount;
- 21 b. That Respondents Joanne Baade, James Makshanoff, Tim Brown, Chris Hamm,  
22 and Kathleen Ward search their non-city email accounts and devices for any  
23 emails or other public records related to the City's attempt to request and/or pay  
24 for the Measure OO recount and produce those records to the City for disclosure  
25 to Petitioner in response to his PRA request; and
- 26 c. That Respondents Joanne Baade and the City of San Clemente disclose to  
27 Petitioner all public records that are responsive to his request, including the public  
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1 records received from employees' and councilmembers' non-city email accounts  
2 and devices;

3 2. The Court enter declaratory judgment that Respondents violated the PRA as set forth in  
4 this Petition/Complaint;

5 3. The Court issue a mandatory injunction ordering Respondents to comply with the PRA as  
6 described in this Petition/Complaint;

7 4. The Court issue a prohibitory injunction prohibiting Respondents from conducting City  
8 business using non-City email accounts;

9 5. The Court award Petitioner his attorneys' fees and costs of suit incurred herein; and

10 6. The Court award Petitioner such other and further relief as the Court may deem just and  
11 proper.  
12

13  
14  
15 Dated: March 3, 2017

Respectfully submitted,  
LAW OFFICE OF CHAD D. MORGAN

16  
17 By: \_\_\_\_\_ /s/

18 CHAD D. MORGAN  
19 Attorney for Petitioner, Jim Bieber  
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**VERIFICATION**

I, Jim Bieber, declare that I am the Petitioner in the above-entitled action. I have read the foregoing **Verified Petition for Writ of Mandate; Complaint for Declaratory Relief** and know the contents thereof to be true to my own knowledge, except as to those statements made upon information and belief, and as to them, 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 on 03/03/2017 in San Clemente, CA.

  
\_\_\_\_\_  
Jim Bieber