



STEERING  
COMMITTEE  
& ADVISORS

March 5, 2017

**Application of California Supreme Court Decision in *City of San Jose***

mark armour  
victor fresco  
diana gordon  
dan jansenson  
sherrill kushner  
mary marlow  
bea nemlaha  
jacob samuel  
lorraine sanchez  
susan scarafia  
jeff segal  
carol sobel  
maryanne solomon  
doris sosin  
linda sullivan  
peter tigler  
bill zimmerman

Dear Mayor Winterer and City Council, Interim City Attorney and City Clerk,

As you know, last Thursday a unanimous California Supreme Court issued a very important opinion strongly affirming the central role of public records requests to our democratic institutions, and to holding public officials more accountable. In doing so, the Court found that documents relating to the conduct of the public's business are public records even if the city councilmember or other official or employee uses their personal email or text account.

This Opinion should be a wake-up call to City Hall. Hopefully, this forceful opinion from the Supreme Court will result in meaningful changes in Santa Monica. The City must do much better and stop treating public records requests as, at best an annoyance, at worst a challenge to its right to govern without public interference or scrutiny. Rather, City Hall must welcome them as "essential" to a transparent and accountable democracy.

We recognize that most people go into government to serve the public good and that this could necessitate handling their personal emails and text accounts differently than they do now. But any such changes should be assumed without reservation because as the Supreme Court found, "open access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the public they serve."

**The Supreme Court held:**

- "It is no answer to say...that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption."
- "Indeed, the rationale behind the [Public Records] Act is that it is for the *public* to make that determination based on information to which it is entitled under the law. Open access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the

public they serve.”

- “[W]e conclude a city employee’s [or councilmember’s] communications related to the conduct of public business do not cease to be public records because they were sent or received using a personal account.” *City of San Jose v. Superior Court (Smith)* (Italics in Opinion.)

### **Santa Monica Must Change Its Policies and Cease Its Hostility to PRRs**

SMCLC and the press have used public records requests to uncover malfeasance, misdeeds and favoritism to developers in Santa Monica government. SMCLC and the press have discovered problems within the operations of City government that even City officials were unaware of. However, requests have too often been met by the City with hostility, lengthy delays, improper invocations of exemptions, and incomplete document productions.

At one point, SMCLC had to go to court because the City Attorney refused to construe even emails on *the City’s own server* as covered by the Public Records Act. In the Elizabeth Riel matter, it took SMCLC a year to finally get the underlying documents that uncovered her illegal firing because the City wrongly denied they existed. Moreover, documents from the Riel federal lawsuit revealed that a top City staff member had used her personal gmail account (then exempt from any City public records review) and instructed other senior staff to do likewise following the firing.

The City’s ongoing resistance to public records requests needs to end. Responses are being delayed for months and the City can be uncooperative in resolving issues that emerge.

### **Proposed Action Plan to Deal with New Rules and Correct Old Mistakes**

We call on the City to:

- **Immediately ensure that all public records using private accounts—including emails, texts and other electronic, audio and paper records—are maintained and preserved.**
- **Promptly set up procedures for their inclusion in public records reviews and production.**

- **Provide adequate staff and stop short-changing public records requests** to meet its Constitutional obligations so that delays are eliminated, excessive and misuse of exemptions cease and the cooperative approach required under the law is established.
- **Get its own house in order and preserve texts and all electronic forms of communication as required by the law. The Supreme Court made clear that “email, text messaging and other electronic platforms” are covered by the Act’s definition of a “writing.”** SMCLC communicated several times with the City Attorney last year about the City’s failure to maintain texts at all, certain other electronic records for the legally required two-year period, as well as its failure to maintain all paper records for that period. We do not believe this has yet been fully resolved.
- **Ensure that the new City Attorney is fully committed to a transparent government** and a progressive, democratic approach to the public’s Constitutional right to know what is happening in its government. Our new City Attorney should have clearly demonstrated this commitment in his/her prior work.

Sincerely,

*Diana Gordon*

Diana Gordon, Co-chair

Cc: City Manager  
Planning Commission