

1 JOSEPH D. ELFORD (S.B. NO. 189934)
2 1875 Mission Street #311
3 San Francisco, CA 94103
4 Telephone: (415) 573-7842
5 Email: joelford@yahoo.com

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Counsel for Plaintiff
KERRY BURROUGH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO

KERRY BURROUGH,) Case No.
)
Plaintiff,) **VERIFIED PETITION FOR WRIT OF**
) **MANDATE TO ENFORCE THE**
v.) **PUBLIC RECORDS ACT**
)
CITY OF FRESNO and TINA YOUR,)
)
Defendants.)
)

INTRODUCTION

1. A properly functioning democracy requires that the public have access to information about the government’s workings to make informed decisions. To ensure such transparency in government, both and the California Public Records Act (Cal. Gov. Code, § 6250 *et seq.*) (“CPRA”) and Article I, § 13 of the California Constitution require the government to disclose the records it maintains to the public. Precisely as these laws were intended, plaintiff Kerry Burrough (“Burrough”), on November 5, 2021, filed a CPRA request with the City of Fresno (“Fresno” or “City”) seeking internal communications among those charged with administering the City’s Commercial Cannabis Business Permit (“CCB Permit”) selection process (“CPRA Request”). Despite the need for these materials to assist Burrough and, very importantly, the public understand the City’s confusing and opaque selection process, evaluate its fairness, and prevent against corruption, the City issued its final response to Burrough’s

1 CPRA Request on April 7, 2022, in which it disclosed only a miniscule fraction of the requested
2 records (32 pages of email chains), but refused to disclose the remaining approximately 12,000
3 emails, based on four claimed exemptions to the CPRA. Because none of these claimed
4 exemptions to the CPRA have been shown to have any merit, the City continues to withhold
5 records that are subject to disclosure under the CPRA and the California Constitution without
6 lawful justification. To vindicate the rights of herself and the public to the disclosure of critical
7 information to determine the propriety and continued employment of the City's current selection
8 process for CCB Permits, Burrough has filed this action.

9 JURISDICTION AND VENUE

10 2. The Court has jurisdiction over this action, pursuant to California Government
11 Code sections 6258 and 6259; California Code of Civil Procedure section 1085, and Article VI
12 of the California Constitution.

13 3. Venue is proper in this Court, pursuant to California Government Code section
14 6259 and California Code of Civil Procedure section 401(1), because the records in question, or
15 most of them, are located in the County of Fresno and the acts and omissions complained of
16 herein occurred there.

17 PARTIES

18 4. Plaintiff/requestor Kerry Burrough is a lifelong resident of the County of Fresno.
19 She was an applicant for a CCB Permit with the City of Fresno, which application was denied by
20 the City by letter, dated June 25, 2021.

21 5. Defendant City of Fresno is, and at all times mentioned herein was, a charter city
22 incorporated under the laws of the State of California located in the County of Fresno. The City
23 is the legal custodian of records at issue in this action and has indicated that it maintains the
24 requested records, but is withholding them from disclosure under four claimed exemptions under
25 the CPRA. (See Gov. Code, §§ 6254, subd. (b), (k) and 6255, subd. (a).) The City is a local
26
27

28 ¹ The parties are designated plaintiff and defendant under Code of Civil Procedure § 1063.

1 agency under Government Code § 6252(a) and, as such, is governed by the public-disclosure
2 requirements of the CPRA and Article I, § 3 of the California Constitution.

3 6. Defendant Tina Your is the Records Supervisor for the City of Fresno. According
4 to the City’s website, she is responsible for handling the City’s CPRA requests. She is,
5 therefore, a responsible party under the CPRA.

6 **FACTS APPLICABLE TO ALL CAUSES OF ACTION**

7 **A. Fresno’s CCB Ordinance and Guidelines**

8 7. In 2016, the citizens of the State of California passed Proposition 64, thus
9 legalizing commercial cannabis activity and adult recreational use in California. Proposition 64
10 gave each locality in California the discretion either to allow or prohibit commercial cannabis
11 activities within their local jurisdictions.

12 8. To implement the directives of this state law, the Fresno City Council enacted
13 Fresno Municipal Code (“FMC”) Chapter 9, Article 33 to regulate “Cannabis Retail Business
14 and Commercial Cannabis Business.” (Ord. 2018-68, § 1, effective January 24, 2019) (“CCB
15 Ordinance”). The CCB Ordinance was designed by the City to provide a permitting framework
16 and regulatory requirements for Adult Use and Medicinal Use Cannabis Business. (FMC, § 9-
17 3306, subd. (a).) Its overriding purpose is to provide access to cannabis for medical use for
18 recreational use by adults, “while imposing sensible regulations on the use of land to protect
19 the city's residents, neighborhoods, and businesses from disproportionately negative impacts.”
20 (FMC, § 9-3301.) In the CCB Ordinance, the City Council directed the City Manager to
21 formulate “the procedures to issue commercial cannabis business permits, *which shall include*
22 *or require the City Manager to provide detailed objective review criteria to be evaluated on a*
23 *point system or equivalent quantitative evaluation scale tied to each set of review criteria.”*
24 (Fresno Municipal Code (“FMC”), § 9-3316, subd. (a), italics added.) A true and correct copy
25 of FMC Chapter 9, Article 33 (the CCB Ordinance) is attached hereto as Exhibit C.

26 9. In his attempt to carry out the responsibility assigned to him by the City
27 Council, the City Manager, on October 19, 2020, issued his “Application Procedures &
28 Guidelines for a Commercial Cannabis Business Permit” (“CCB Guidelines”). A true and

1 correct copy of the CCB Guidelines, available on the City’s website at [Cannabis-Permit-](#)
2 [Application-Procedures-Guidelines_20201019.pdf \(fresno.gov\)](#), is attached hereto as Exhibit D.

3 10. Under the CCB Guidelines, the selection process proceeds in four phases. As
4 relevant here, Phase Two of the selection process involves an evaluation of the CCB Permit
5 applications to provide an initial ranking, out of a total of 1,600 points, based on the following
6 five criteria:

- 7 Section 1. Business Plan (300 points)
- 8 Section 2. Social Policy and Local Enterprise Plan (400 points)
- 9 Section 3. Neighborhood Compatibility Plan (300 points)
- 10 Section 4. Safety Plan (300 points)
- 11 Section 5. Security plan (300 points)

12 (CCB Guidelines [Exhibit B] at p. 5.) “The top applicants, as determined by the City, which
13 score a minimum of 80% (1,280 points) in Phase II will move on to Phase III of the application
14 process.” (*Ibid.*) The remaining applicants, including plaintiff Burrough, who score below this
15 threshold are not permitted to advance to Phase Three and are eliminated.

16 11. To clarify the evaluation criteria employed by the City in Phase Two of the
17 application process, the City Manager provided additional evaluative criteria in his Appendix to
18 the CCB Guidelines with respect to each of the five above-listed sections. (*Id.* at pp. 7-11.)
19 These additional evaluative criteria include such factors as: an operating budget, compensation
20 and benefits the applicant will provide to its employees; accident and incident reporting
21 procedures; cash handling procedures; maps and diagrams; and other criteria. (*Ibid.*) Notably,
22 neither the CCB Ordinance nor its Guidelines contained any reference to multiple criteria that
23 were ultimately relied upon by those who scored the applications.

24 12. Because many CCB Permit applicants received essentially the same cursory
25 denial letter as did Burrough and started asking questions, the City subsequently released the
26 aggregate scores for all seventy-five CCB Permit applications. A true and correct copy of
27 these aggregate scores provided by the City is attached hereto as Exhibit E. Conspicuously
28 absent from these aggregate scores is any breakdown of them vis-à-vis the five sections

1 enumerated in the CCB Ordinance or scores for any of individual implementing criteria
2 promulgated by the CCB Guidelines. (*Ibid.*)

3 13. Surprised by the rejection of her comprehensive and detailed CCB Permit
4 application and not satisfied with the City’s disclosure of only the aggregated scores, Burrough
5 filed a CPRA request with the City, which is not at issue here, seeking the Scoring Worksheets
6 for her application. Upon receiving the Scoring Worksheets in response to her CPRA request,
7 Burrough learned that the City evaluated the CCB Permit applications based on criteria that
8 were not publicly announced, so Burrough and the other applicants were deprived an
9 opportunity to address them in their applications, as due process requires. A true and correct
10 copy of the Scoring Worksheets provided to Burrough is attached hereto as Exhibit F.

11 14. Based on this violation of due process and other legal infirmities, Burrough
12 timely filed a Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief in this
13 Court on September 23, 2021, contending, among other things, that she has a right to a proper
14 evaluation of her CCB Permit application based on objective criteria, which are scored or,
15 otherwise, quantitatively evaluated, in accordance with the CCB Ordinance and Guidelines. (See
16 *De Santis v. City of Fresno* (Sept. 23, 2021) Case No. 21CECG02863.) This action was stayed
17 by this Court on November 2, 2021, pending the resolution of the instant CPRA litigation. A
18 true and correct copy of this Order is attached hereto as Exhibit G.

19 **B. The Instant CPRA Request**

20 15. On November 5, 2021, in a follow-up to an earlier CPRA request Burrough, on
21 November 5, 2021, filed the instant CPRA Request “[s]eeking internal communications
22 between Fresno City officials, employees, and agents who administer the selection process for
23 Fresno’s Commercial Cannabis Business Permits relating to their selection of applicants” to gain
24 additional insight into the City’s flawed CCB Permit selection process. True and correct
25 copies of the all of the correspondence regarding Burrough’s CPRA Request, including the
26 City’s preliminary and final responses to the Request, are attached hereto as Exhibit A.

27 16. After this delay Burrough, through her attorney, revised the instant CPRA
28 Request to seek “internal communications between Fresno City officials, employees, and agents

1 who administered the application score phase for Fresno’s Commercial Cannabis Business
2 Permits relating to their scoring of applications, including any notes made by the scorers other
3 than what is provided in the score sheets.” The Request, as narrowed, seeks only the
4 communications involved in *administering* the selection criteria, rather than the *development* of
5 the criteria themselves.

6 17. On April 7, 2022, the City issued its final response to the instant CPRA Request,
7 wherein it disclosed only 32 pages of email chains and withheld what the City has indicated to
8 be more than 12,000 responsive emails. The City refused to disclose these numerous
9 remaining responsive records based on the following four exemptions to the CPRA:

- 10 (1) the attorney-client communication privilege (Gov. Code, § 6254, subd. (k));
- 11 (2) the deliberative process privilege (Gov. Code, § 6255, subd. (a));
- 12 (3) materials prepared for use in a pending litigation (Gov. Code, § 6254, subd. (b));
- 13 (4) the constitutional right to privacy (Gov. Code, § 6254(k); U.S. Const., 14th
14 Amend.; Cal. Const. Art. I, § 1).

15 A true and correct copy of the City’s final CPRA Response is attached hereto as Exhibit A at pp.
16 10-11 [April 27, 2022, email from Kathleen Abdulla to Joseph Elford].)

17 18. Burrough has, thus, exhausted all available administrative remedies, to the
18 extent that there are any.

19 **C. The Public Interest in the Requested Records**

20 19. The public interest in the disclosure of the requested records is very strong, as
21 public disclosure of them is needed to fully understand the City’s CCB Permit selection process,
22 evaluate its fairness, and prevent against corruption. Because this is the City’s first attempt to
23 implement a CCB Permit process to effectuate Proposition 64, the public has a strong interest in
24 knowing the details of this selection process to evaluate its fairness, comports with the purposes
25 of the CCB Ordinance, and should be maintained or modified in the future. (Cf. Gov. Code, §
26 6250 [“access to information concerning the conduct of the people’s business is a fundamental
27 and necessary right of every person in this state”]; *Los Angeles Unified School Dist. v. Superior*
28 *Court* (2014) 228 Cal.App.4th 222, 241 [“The basic goal [of the CPRA] is to open agency action

1 to the light of public review, with its core purpose designed to ‘contribut[e] significantly to
2 public understanding of the operations or activities of government.’” [quotation and italics
3 omitted].) Indeed, this is especially so where, as here, Burrough has already adduced evidence
4 of improprieties in the CCB Permit selection process, in particular, that the scorers of the CCB
5 Permit applications relied on criteria that were not publicly announced in either the CCB
6 Ordinance or Guidelines, in violation of due process. Further, the limited disclosures made by
7 Fresno in response to Burrough’s CPRA Request reveal confusion among the scorers about how
8 to apply the scoring criteria. A true and correct copy of the emails provided by the City is
9 attached hereto as Exhibit B. “Such confusion does not inspire confidence in the clarity of the
10 regulatory scheme.” (*General Elec. Co. v. U.S. E.P.A.* (D.C. Cir. 1995) 53 F.3d 1324, 1332.)
11 Additional disclosure of the internal communications sought by Burrough is needed to ensure
12 that the selection process is fair, even-handed, and comports with due process.

13 20. Furthermore, with the vesting of broad local authority in licensing and regulating
14 cannabis ventures comes the attendant evils of corruption and graft. This is primarily due to two
15 factors. The *first* is the enormous size of the cannabis market, which has been estimated to total
16 \$52 billion. (Brydne Slatter, *High Costs: Corruption Scandals in America’s Legal Marijuana*
17 *Industry*, The Global Anti-Corruption Blog, Feb. 28, 2020 [hereinafter *Slatter*] at p. *1.) *Second*,
18 “in most [localities] the license evaluation criteria, and the evaluation process, are extremely
19 opaque, and local government officials frequently have substantial discretion regarding who
20 receives these licenses.” (*Ibid.*) Where state and local officials are given such great power to
21 issue a small number of extremely valuable licenses through an opaque process, “it should come
22 as no surprise that the legal marijuana market has become a hotbed for corruption.” (*Ibid.*; see
23 also GAI, *Cannabis Cronyism*, Feb. 2021 [hereinafter *Cannabis Cronyism*] at p. 2 [“As with any
24 economic activity regulated by the government, affected businesses seek an advantage by hiring
25 insiders who have access to those close to the regulatory process.”]; *ibid.* at p. 5 [“evidence
26 suggests that the current California framework allows for increased corruption in a system where
27 ‘money talks’”].) Disclosure of the records sought by Burrough through the instant CPRA
28 Request will either dispel or confirm the likelihood of corruption in the CCB Permit selection

1 process, which is of paramount importance to the public. (Cf. *American Civil Liberties Union of*
2 *Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 69 [noting requestor’s
3 argument that disclosure of sought-after records “sheds light on the People’s business primarily
4 because it will assist in the detection of favoritism and fraud”].)

5 **FIRST CAUSE OF ACTION**
6 **Violation of the California Public Records Act, Gov. Code, § 6250, et seq. and**
7 **Article I, § 3 of the California Constitution**

8 21. Plaintiff realleges and incorporates by reference paragraphs 1 through 20 of this
9 Petition as though fully alleged herein.

10 22. The CPRA requires the disclosure of the records that Burrough has requested.

11 23. The City’s refusal to disclose the requested records violates the CPRA and Article
12 I, § 3 of the California Constitution.

13 **V. RELIEF SOUGHT**

14 WHEREFORE, plaintiff seeks the following relief:

15 1. A writ of mandate directing Defendant City of Fresno to provide petition
16 Burrough with the requested records;

17 2. Costs and attorneys fees incurred in this action; and

18 3. Such other and further relief as may be just and proper.

19 DATED: May 2, 2022

20 Respectfully submitted,

21 

22 JOSEPH D. ELFORD
23 Counsel for Plaintiff

24 KERRY BURROUGH

VERIFICATION

I declare that my offices are located in the County of San Francisco, which is not the same county as the named plaintiff, so I verify this Complaint on their behalf.

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

Executed on the 2nd day of May, 2022, in San Francisco, California.



Joseph O. Elford
