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Clerk of the Superior Court  
By B. Ramirez, Deputy Clerk

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11 SAN DIEGO CITY FIREFIGHTERS, I.A.F.F.  
12 LOCAL 145; GABRIEL ORTIZ

Case No.: 24CU028176C

Petitioners,

PETITIONERS' VERIFIED PETITION FOR WRIT OF MANDAMUS

vs.

13 CITY OF SAN DIEGO; CITY OF SAN DIEGO  
14 FIRE-RESCUE DEPARTMENT,

[CAL. CODE CIV. PROC. §§ 1085; 1094.5-1094.6; GOV. CODE §§ 3253; 3256.5, 3260]

Respondents.

15  
16  
17 Comes now, Petitioners, San Diego City Firefighters, I.A.F.F. Local 145 ("Local 145")  
18 and Gabriel Ortiz ("Firefighter Ortiz"), who alleges as follows:

19 **PARTIES**

20 1. Respondent City of San Diego Fire-Rescue Department ("Department") is now,  
21 and at all times herein mentioned was, the official agency of the City of San Diego ("City")  
22 charged with providing fire, emergency medical, lifeguard and emergency management services  
23 across the community. In its capacity as a emergency services agency, the Department is  
24 responsible for hiring and maintaining employees whose function is to serve the public at large.

25 2. The City of San Diego was and is, and at all times herein mentioned, the public  
26 agency employer of Petitioner Gabriel Ortiz.

27 3. Petitioner San Diego City Firefighters Association, I.A.F.F. Local 145 ("Local  
28 145") is, and at all times mentioned herein was, the "recognized employee organization" as that

1 term is defined in Government Code § 3501(b), representing firefighter employees of the  
2 “Department”.

3 4. Petitioner Gabriel Ortiz (“Firefighter Ortiz”) is, and at all times mentioned herein  
4 was, a sworn California firefighter employed by the City of San Diego Fire-Rescue Department.  
5 As a sworn member of the Department, Firefighter Ortiz was a “firefighter” as defined by  
6 Government Code section 3251, subdivision (a)(1) and was therefore entitled to the protections  
7 afforded by the Firefighters Procedural Bill of Rights Act (“FBOR”, Gov. Code, §§ 3250, *et*  
8 *seq.*)

### 9 **VENUE AND JURISDICTION**

10 5. Venue is proper in the Superior Court of the State of California, for the County of  
11 San Diego, Central Division, in that the underlying acts, omissions, injuries and related facts  
12 and circumstances giving rise to the present action occurred in the County/City of San Diego.

13 6. This Court has jurisdiction over this matter pursuant to California Government  
14 Code Section 3260 and California Code of Civil Procedure sections 1085, 1094.5 and 1094.6.

### 15 **GENERAL ALLEGATIONS AND FACTS RELEVANT TO ALL CLAIMS**

16 7. The Firefighters Procedural Bill of Rights Act (“FBOR”, Gov. Code, §§ 3250, *et*  
17 *seq.*) affords California firefighters, among other things, various rights and protections in  
18 regards to their employment with public safety departments.

19 8. FBOR Section 3253 (c) provides that: “The firefighter under investigation shall  
20 be informed of the nature of the investigation prior to any interrogation.”

21 9. FBOR Section 3253 (j) provides that: “A firefighter shall not be loaned or  
22 temporarily reassigned to a location or duty assignment if a firefighter in his or her department  
23 would not normally be sent to that location or would not normally be given that duty assignment  
24 under similar circumstances.”

25 10. FBOR Section 3255 requires the employer to inform the firefighter of any  
26 comment adverse to his or her interest in a personnel file or any other file used by the employer  
27 for personnel purposes.

28 //

1           11.     FBOR Section 3256 entitles a firefighter to respond in writing to any adverse  
2 comment “entered in his or her personnel file” and the response “shall be attached to, and shall  
3 accompany, the adverse comment.”

4           12.     FBOR Section 3256.5 (a) entitles a firefighter to inspect “personnel files that are  
5 used or have been used to determine that firefighter's qualifications for employment, promotion,  
6 additional compensation, or termination or other disciplinary action.”

7           13.     Moreover, analogous caselaw provides that, “...regardless of whether the  
8 employing agency contemplates or has rejected further action regarding an adverse comment  
9 made against a peace officer employee, the officer is entitled to disclosure of the comment if it  
10 is entered in an agency file used for a personnel purpose.” *Sacramento Police Officers Assn. v.*  
11 *Venegas* (2002) 101 Cal. App. 4th 916, 926. The language in FOBR should be construed  
12 broadly to include any document “...which may serve as a basis for affecting the status of [an  
13 officer’s] employment,” regardless of whether it is kept separate from the officer’s general  
14 personnel file. *Aguilar v. Johnson* (1988) 202 Cal. App. 3d 241, 251; See Also *Poole v. Orange*  
15 *County Fire Authority* (2015) 61 Cal. 4th 1378, 1387 [“...a document containing adverse  
16 comments may come within the disclosure requirement even if not formally entered into the  
17 official personnel file, if the document was either (1) maintained in such a manner that it would  
18 be available to those making personnel decisions in the future, or (2) was actually used by the  
19 employer in making a personnel decision, or both.”].

20           14.     At all relevant times, Petitioner Firefighter Ortiz was, and still is, a permanent  
21 non-probationary firefighter employed within the Department as defined by Government Code  
22 section 3251, subdivision (a)(1) and was therefore entitled to the protections afforded by the  
23 FBOR.

24           15.     On or about June 22, 2024, Firefighter Ortiz responded to an emergency call  
25 alongside paramedic employees privately employed by the company Falck, who is under  
26 contract with the City to provide relevant paramedic emergency response and other healthcare  
27 services. During this emergency call, a Falck employed paramedic was designated as the  
28

1 “airway paramedic” and performed these relevant duties together with another Falck employee  
2 who was a licensed paramedic getting field-trained during this call for service.

3 16. Two days after this emergency call, on June 24, 2024, Firefighter Ortiz received a  
4 commendation from Quality Assurance (“QA”), which encompasses a process in the City  
5 designed to monitor, evaluate, and improve the quality of healthcare delivery. This initial  
6 commendation from QA stated: “Excellent communication and teamwork. Excellent patient  
7 care. Nice work everyone.”

8 17. However, notwithstanding this commendation, on June 26, 2024, Firefighter Ortiz  
9 received a follow-up email from QA advising that a complaint had been filed (Complaint  
10 FS24109177) regarding his actions during the June 22, 2024 emergency call.

11 18. During an interview with QA regarding this complaint, Firefighter Ortiz was  
12 advised that there was an allegation of an issue with esophageal intubation. The QA Staff  
13 interviewing him advised that since he was not the airway paramedic, they would consider this  
14 matter an educational issue and that there would be no further inquiry.

15 19. However, on or about July 8, 2024, Firefighter Ortiz received an email from  
16 Department Chief Adams asking him if he was available July 10, 2024 to sit down with QA  
17 staff to conduct an airway case review.

18 20. On or about July 10, 2024, Firefighter Ortiz informed Department Chief Adams  
19 that he was out of town and scheduled to return to work on July 15, 2024 for an overtime shift.  
20 Department Chief Adams responded that they could schedule the sit down with QA when he  
21 returned and to enjoy his vacation.

22 21. On July 12, 2024, Deputy Fire Chief Pierce sent an email to PSU Fire Chief  
23 Bunsold (Chief of administrative discipline investigations), Captain Finch (Captain of  
24 administrative investigations) and Fire Chief Logan stating: “Chiefs et al, I’ve taken the liberty  
25 of **attaching Dr. Kahn’s letter** and the QA and Airway Policies to confirm PSU and EMS’s  
26 roles and responsibilities on this matter. [REDACTED]. In order to proceed per QA policy,  
27 PSU needs to determine whether there has been a policy violation outside of EMS’s review on  
28 patient care. Once this determination is made, it is essential that PSU and EMS collaborate to

1 administer the appropriate and recommended remediation per policy. The goal is to ensure that  
2 all actions taken are in alignment with both PSU and QA policies, providing a clear and  
3 consistent approach to remediation and discipline. This will help maintain the integrity of our  
4 processes and ensure that FF/PM Ortiz receives the necessary guidance and support to improve  
5 his performance. Please let me know how we can move forward with this process and if there  
6 are any additional steps required from my end. I am available to discuss this further at your  
7 earliest convenience.” That letter forms a basis of the request for disclosure, noting that it was  
8 the “complaint” that launched the PSU Investigation.

9 22. Despite this, on or about July 12, 2024, while Firefighter Ortiz was still off work  
10 as explained to Chief Adams, Firefighter Ortiz received a phone call and email from Captain  
11 Finch at the Department’s Professional Standards Unit (“PSU”), the unit responsible for  
12 conducting internal investigations into Department employees. Captain Finch communicated  
13 that Firefighter Ortiz would be placed on administrative assignment and have his Paramedic and  
14 Emergency Medical Technician (EMT) license temporarily suspended. In addition, Firefighter  
15 Ortiz was provided with a “Notice of Administrative Assignment” from the Department. The  
16 Notice did not provide any basis for Firefighter Ortiz’s placement on administrative assignment  
17 and/or any information relating to the expected duration of his administrative assignment.

18 23. As a result, on or about July 13, 2024, Firefighter Ortiz emailed Chief Adams to  
19 request further clarification regarding the basis of these Department actions, whether these  
20 Department actions could potentially result in discipline, and whether he needed to seek union  
21 representation. Chief Adams did not reply to this email until July 25, 2024.

22 24. On or about July 16, 2024, PSU provided Firefighter Ortiz with a “Fact-Finding  
23 Pre-Notification of Interview” regarding: “...possible misconduct related to FS#24109177 in  
24 violation of City of San Diego and San Diego Fire-Rescue Department policies.” There was no  
25 mention of which policies he allegedly violated nor the reason why the PSU fact finding would  
26 precede a QA review.

27 25. On July 25, 2024, Chief Adams communicated to Firefighter Ortiz that the QA  
28 review for this incident was on stand-by and that if he had any questions to refer to PSU.

1           26.     On July 26, 2024, Chief Adams communicated to Firefighter Ortiz that the QA  
2 airway debrief/call review process could move forward and a debrief was scheduled for July 30,  
3 2024 at 11:00 a.m.

4           27.     However, on or about July 30, 2024, Firefighter Ortiz was informed that the QA  
5 process would not be conducted at the advice of the City and continued to remain suspended  
6 from his usual and customary duties.

7           28.     On August 1, 2024, Deputy Fire Chief Pierce sent an email to a representative  
8 from Petitioner Local 145, Firefighter Ortiz’s designated labor representative, stating that: “To  
9 clarify, Firefighter Ortiz’s approval to provide prehospital care by the Medical Director has  
10 been suspended pending further investigation.”

11           29.     On or about August 5, 2024, Petitioner Local 145, submitted a formal Request for  
12 Information to Department Chief Pierce, Chief Stowell and Chief Logan requesting specific  
13 information regarding Firefighter Ortiz’s suspension, including what information was  
14 considered/referred to by the Medical Director in support of the determination to suspend  
15 Firefighter Ortiz’s ability to provide prehospital care before any relevant QA process could be  
16 completed and a copy of the actual complaint/report recommending Firefighter Ortiz’s  
17 immediate suspension. Petitioner Local 145 also requested information relevant to determine  
18 whether there was a change in Local 145 members’ terms and conditions of employment  
19 considering the City/Department’s departure from the preexisting QA process. No immediate  
20 response was provided by the City or Department to this Request for Information.

21           30.     Subsequently, on or about August 9, 2024, Counsel for Petitioners reached out to  
22 Department Chief Stowell to express concerns with the Department’s handling of the QA  
23 process in relation to this service call, the Department’s premature suspension of Firefighter  
24 Ortiz, the Department’s failure to provide adequate notice of any alleged policy violations, and  
25 for departing from standard past Department practice as it relates to incidents of a similar  
26 nature. Counsel for Petitioners also advised the City that an unfair labor practice charge would  
27 be filed with the California Public Employee Relations Board (PERB) if the Department failed  
28

1 to participate in meet and confer attempting to resolve this matter as is required by the Meyers-  
2 Miliias-Brown Act (MMBA).

3 31. On or about August 10, 2024, Department Chief Stowell responded to Counsel for  
4 Petitioners' email and stated that: "I did give direction last week to proceed with a 'dual path'  
5 process allowing for both the QA/QI process to be completed which will get FF/PM Ortiz back  
6 to work in Operations while simultaneously the PSU process moves forward. I believe Chief  
7 Wood and George have agreed to this process and I recently received an email from city HR  
8 confirming this will occur. I'm in complete agreement that this airway policy as written is  
9 ineffective and leaves much to interpretation and lack of a clear process of how QA/QI and  
10 discipline is handled when overlapping. Priority moving forward will be for management and  
11 L145 to revisit this policy and update it accordingly. I'm also disappointed that FF/PM Ortiz  
12 wasn't at least notified of why he was being put on administrative assignment as has been past  
13 practice and we will address that internally."

14 32. On or about August 15, 2024 at 9:18AM, City of San Diego Department of  
15 Human Resources Deputy Director Abby Jari-Veltz sent an email to Counsel for Petitioners and  
16 Petitioner Local 145 stating that Firefighter Ortiz would be expected to complete the QA  
17 process as the PSU investigation was ongoing and that "this email confirms Local 145's  
18 withdrawal of the information request dated August 5, 2024." At no point in time prior to this  
19 August 15, 2024 email did Petitioners communicate any intent to withdraw their information  
20 request dated August 5, 2024.

21 33. On or about August 15, 2024 at 9:26AM, Counsel for Petitioners sent  
22 correspondence to Chief Stowell to address the issues resulting from the Department's inquiry  
23 into Firefighter Ortiz and requesting certain FBOR related protections to apply to any testimony  
24 that Firefighter Ortiz would be compelled to provide pursuant to any QA process as the PSU  
25 investigation was also ongoing.

26 34. On or about August 15, 2024, Firefighter Ortiz met with Emergency Medical  
27 Director Dr. Kahn and the QA/QI panel. The QA/QI case review of incident FS #24109177 was  
28 completed on that day.

1           35.     Subsequently, on or about August 15, 2024 at 12:58PM, Chief Stowell responded  
2 to Counsel for Petitioners’ email and stated that the Department would be coordinating a  
3 response with the City’s Human Resources Department based on Firefighter Ortiz’s meeting  
4 with Dr. Kahn and the QA/QI panel.

5           36.     On or about August 15, 2024 at 3:20PM, a representative from Local 145  
6 responded to Deputy Director Jari-Veltz’ email, indicating that: “Let me be clear: Local 145 has  
7 not withdrawn our RFI request.”

8           37.     Subsequently, on or about August 15, 2024, without any explanation, the  
9 Department sent a “Supplemental Notice of Administrative Assignment” to Firefighter Ortiz  
10 stating: “The purpose of this memorandum is to inform you that you have been placed on a  
11 Paid-Administrative Assignment effective July 15, 2024, due to review of incident  
12 FS#24109177...The City of San Diego Medical Director has suspended your approval to  
13 practice prehospital patient care in the City of San Diego until further notice.”

14           38.     On or about August 16, 2024 at 6:52AM, Counsel for Petitioners emailed Deputy  
15 Director Jari-Veltz asking the City to justify why Firefighter Ortiz had not been returned to full  
16 duty and indicating that Local 145 would be forced to file a charge with PERB if the City did  
17 not return Firefighter Ortiz to full duty status as of his next regular shift.

18           39.     On or about August 16, 2024 at 7:12PM, Department Senior Human Resources  
19 Officer Manual Quintero responded that Firefighter Ortiz was reinstated consistent with Dr.  
20 Kahn’s recommendation to the Department Appointing Authority that Firefighter Ortiz be  
21 approved to practice prehospital medicine in the City of San Diego. The Department Appointing  
22 Authority agreed with the recommendation and notified Firefighter Ortiz that he was reinstated  
23 to work in Emergency Operations immediately via email. In addition, Human Resources Officer  
24 Quintero indicated that although it was the City’s belief that Local 145 agreed to withdraw its  
25 August 5, 2024 information request, “...however, the City understands that Local 145 is now  
26 rescinding that agreement and reissuing its information request, effective August 15, 2024. The  
27 City is currently in the process of gathering responsive documents. Given the extensive nature  
28



1 of the requested information and the need to review for medical confidentiality and other  
2 privileged information, the City requires sufficient time to conduct a comprehensive review.”

3 40. On or about August 22, 2024, Counsel for Petitioners emailed Human Resources  
4 Officer Quintero inquiring when the City would be providing responses to Petitioners’ August  
5 5, 2024 Request for Information. No immediate response was provided by the City or  
6 Department.

7 41. On or about August 30, 2024 at 7:54AM, Counsel for Petitioners emailed Human  
8 Resources Officer Quintero again to inquire when the City would be providing responses to  
9 Petitioners’ August 5, 2024 Request for Information.

10 42. On or about August 30, 2024 at 10:57AM, Human Resources Officer Quintero  
11 responded that “the City will provide responsive information to Local 145’s information request  
12 the week of September 3, 2024.”

13 43. On or about September 6, 2024 at 10:06AM, Counsel for Petitioners emailed  
14 Human Resources Officer Quintero again to inquire when the City would be providing  
15 responses to Petitioners’ August 5, 2024 Request for Information and provided caselaw in  
16 support of Petitioners’ right to request information.

17 44. Subsequently, on or about September 6, 2024, the City provided partial responses  
18 to the August 5, 2024 Request for Information submitted by Petitioners. In their responses, the  
19 City rejected a majority of the requests for information indicating that the information sought  
20 was protected from disclosure under HIPAA, California Health and Safety Code Section 1370,  
21 and 45 CFR Section 164.502(a).

22 45. On or about September 10, 2024 at 6:24AM, Counsel for Petitioners emailed  
23 Human Resources Officer Quintero (with other relevant City employees and/or representatives  
24 CCd) to provide relevant caselaw relating to the burden of proof required to refuse to comply  
25 with a lawful request for information and to request further explanation from the City  
26 concerning the purported HIPAA related grounds that would justify noncompliance with  
27 Petitioners’ Request for Information. Counsel for Petitioners also requested supplemental  
28

1 responses to both Requests for Information relating to the City's specific objections and the  
2 reasons for their delayed responses.

3 46. On or about September 10, 2024 at 8:32AM, Human Resources Officer Quintero  
4 confirmed receipt of Counsel for Petitioners' September 10, 2024 email but did not provide any  
5 substantive response to any of the concerns raised in Counsel for Petitioners' email.

6 47. On or about September 16, 2024 at 10:10 PM, Human Resources Officer Quintero  
7 emailed Counsel for Petitioners and stated that: "Local 145's request for information raise  
8 concerns for the City regarding medical privacy and privileged information. Upon concluding  
9 these investigations, the City will provide timely notice and the opportunity to meet confer in  
10 good faith regarding the City's concerns over the unredacted information requested by Local  
11 145."

12 48. On or about September 17, 2024 at 3:02 PM, Counsel for Petitioners replied to  
13 Human Resources Officer Quintero's email and stated that: "It is believed that the unilaterally  
14 changed and misused QA/QI policies directly impacted Local 145's working conditions and as  
15 such the answers are not dependent upon the investigation." Counsel for Petitioners requested a  
16 mutually agreeable time to meet over these issues and indicated that Local 145 still did not  
17 believe that their Requests for Information were lawfully complied with. The City initially  
18 refused to meet and confer over the request for information or the providing of any information  
19 based upon HIPAA and privacy rights.

20 49. Consequently, on or about October 21, 2024 at 11:28AM, Counsel for Petitioners  
21 provided Respondents with a copy of an Unfair Labor Practice charge proposed to be filed with  
22 PERB should the City refuse to respond to Local 145's request to meet and confer over the  
23 request for information or the providing of any information based upon HIPAA and privacy  
24 rights.

25 50. On or about October 21, 2024 at 3:23PM, Human Resources Officer Quintero  
26 provided Counsel for Petitioners with the City's availability to meet and confer regarding  
27 Petitioners' Requests for Information and the City's responses.

1           51.     On or about October 23, 2024 at 10AM, Counsel for Petitioners and Respondents  
2 engaged in a meet and confer regarding Petitioners’ outstanding information requests. Counsel  
3 for Petitioners reiterated their request for all information that was considered/referred to by the  
4 Medical Director in support of the determination to suspend Firefighter Ortiz’s ability to  
5 provide prehospital care and a **copy of the complaint/report** recommending Firefighter Ortiz’s  
6 immediate suspension. At the conclusion of the meet and confer, Respondents communicated  
7 that they would provide supplemental responses.

8           52.     On or about November 8, 2024, Respondents provided supplemental responses to  
9 Petitioners’ Requests for Information. The City again refused to provide the requested  
10 information, stating “The Medical Director’s correspondence is protected from disclosure under  
11 the Health Insurance Portability and Accountability Act (HIPAA) and California Health &  
12 Safety Code section 1370... Paramedic Ortiz was removed from operations and placed in  
13 administrative assignment because the incident was referred to PSU.”

14           53.     On or about November 8, 2024, Petitioners asked if PSU has been contacted  
15 about anything involving Ortiz and if so, when, what were they told and requested any/all  
16 copies of communications to PSU involving Ortiz. Respondents advised that “the information  
17 requested is confidential and interferes with a pending investigation. The City will provide  
18 responsive non-privileged information after the completion of investigation...Here, the PSU  
19 investigation did not result in any sustained findings, and nothing will be placed in Paramedic  
20 Ortiz’s personnel file. In addition, the Department did not receive a complaint, and instead, the  
21 case was internally referred from EMS to PSU pursuant to the QA/QI policy. The City does not  
22 consider communications from EMS to PSU to constitute the type of complaint discoverable  
23 under McMahon because it is not maintained in Paramedic Ortiz’s personnel file and does not  
24 contain adverse comments.”

25           54.     On or about November 8, 2024, when asked what specific information the  
26 Department has that formed the basis of the decision to remove Ortiz from active duty in  
27 operations, Respondents stated “Paramedic Ortiz was removed from operations and placed in  
28 administrative assignment because the issue was referred to PSU. Consistent with PSU protocol,

1 a subject employee can be removed from operations and placed in administrative assignment if  
2 there is a concern to public health and safety.”

3 55. On or about November 8, 2024, Respondents provided supplemental responses to  
4 Petitioners’ Requests for Information. The City’s response stated that: “On October 25, 2024,  
5 PSU closed its investigation...Since the PSU investigation is now closed, the Department is  
6 treating Local 145’s supplemental request as a request under California Government Code  
7 section 3256.5, which allows a firefighter to inspect ‘personnel files that are used or have been  
8 used to determine the firefighter’s qualifications for employment, promotion, additional  
9 compensation, or termination or other disciplinary action.”” Despite explicitly recognizing  
10 Firefighter Ortiz’s rights under FBOR, the City did not provide a copy of the complaint/report  
11 recommending his immediate suspension reasoning that: “the PSU investigation did not result  
12 in any sustained findings, and nothing will be placed in Paramedic Ortiz’s personnel file...the  
13 City does not consider communications from Emergency Medical Services (EMS) to  
14 Professional Standards Unit (PSU), the administrative investigative unit for SDFD, to constitute  
15 the type of complaint discoverable under *McMahon* because it is not maintained in Paramedic  
16 Ortiz’s personnel file and does not contain adverse comments.”

17 56. On or about November 13, 2024, Petitioner’s counsel specifically requested the  
18 Dr. Kahn report that was forwarded to PSU, asserting that the report was the complaint that  
19 initiated the disciplinary investigation and as such, is discoverable. The City refused to comply.

20 57. Ultimately, Respondents’ failure to provide the entirety of the PSU investigation  
21 opened into Firefighter Ortiz, which includes any complaints, reports or other memorialized  
22 communications recommending his immediate suspension and/or requesting a PSU  
23 investigation, violated Firefighter Ortiz’s rights under FBOR Section 3255 and 3256.5.

24 58. In addition, FBOR Section 3253(c) provides that “the firefighter under  
25 investigation shall be informed of the nature of the investigation prior to any interrogation.” The  
26 record reflects that Firefighter Ortiz was placed on administrative assignment and suspended  
27 from his regular work duties without being provided any notice of the nature of the  
28 investigation. Moreover, the record reflects that although Firefighter Ortiz initially provided

1 statements to QA regarding this issue in June 2024, the Department did not notify him of any  
2 PSU investigation until July 2024. This violated Firefighter Ortiz’s rights under FBOR Section  
3 3253(c).

4 59. Section 3253 (j) also provides that: “A firefighter shall not be loaned or  
5 temporarily reassigned to a location or duty assignment if a firefighter in his or her department  
6 would not normally be sent to that location or would not normally be given that duty assignment  
7 under similar circumstances.” In this case, Respondents circumvented the standard QA process  
8 in this case in a manner which resulted in Firefighter Ortiz’s unprecedented administrative  
9 assignment. This violated Firefighter Ortiz’s rights under FBOR Section 3253(j).

10 **FIRST CAUSE OF ACTION**

11 **TRADITIONAL WRIT OF MANDAMUS**

12 **[Code of Civil Procedure § 1085; Government Code §§ 3253; 3256.5; 3260]**

13 60. Petitioners reallege and incorporate paragraphs 1 through 59 as though fully set  
14 forth herein.

15 61. Petitioner Firefighter Ortiz is a firefighter entitled to the rights and protections  
16 afforded by FBOR, including the right to inspect “...personnel files that are used or have been  
17 used to determine that firefighter's qualifications for employment, promotion, additional  
18 compensation, or termination or other disciplinary action.” FBOR Section 3256.5 (a).

19 62. Courts have interpreted FBOR Section 3256.5 (a) as including the right to inspect  
20 unfounded complaints that are contained in files outside of the personnel file but are still  
21 accessible/reviewed for any personnel purposes: “...a document containing adverse comments  
22 may come within the disclosure requirement even if not formally entered into the official  
23 personnel file, if the document was either (1) maintained in such a manner that it would be  
24 available to those making personnel decisions in the future, or (2) was actually used by the  
25 employer in making a personnel decision, or both.” *Poole v. Orange County Fire Authority*  
26 (2015) 61 Cal. 4th 1378, 1387.

27 63. Analogous caselaw (the Peace Officers Bill of Rights or “POBR” is virtually  
28 identical to FOBR) also provides that, “...regardless of whether the employing agency

1 contemplates or has rejected further action regarding an adverse comment made against a peace  
2 officer employee, the officer is entitled to disclosure of the comment if it is entered in an agency  
3 file used for a personnel purpose.” *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.  
4 App. 4th 916, 926. To the extent that a formal PSU internal affairs investigation was undertaken  
5 into Firefighter Ortiz’s actions, Courts have characterized these types of investigations as being,  
6 “by any definition...[related to] a personnel purpose.” *Sacramento Police Officers Assn. v.*  
7 *Venegas* (2002) 101 Cal. App. 4th 916, 928. A comment alleging misconduct by a peace officer,  
8 “...may serve as a basis for affecting the status of the [officer's] employment.” *County of*  
9 *Riverside v. Superior Court* (2002) 27 Cal. 4th 793, 802.

10 64. In addition, FBOR Section 3255 provides that: “A firefighter shall not have any  
11 comment adverse to his or her interest entered in his or her personnel file, or any other file used  
12 for any personnel purposes by his or her employer, without the firefighter having first read and  
13 signed the instrument containing the adverse comment indicating he or she is aware of the  
14 comment. However, the entry may be made if after reading the instrument the firefighter refuses  
15 to sign it. That fact shall be noted on that document, and signed or initialed by the firefighter.”  
16 Simply placing a negative report in an employee’s file may be considered “punitive” under Gov.  
17 Code Section 3304(b) and permit appeal of the decision to place it there. *Hopson v. City of Los*  
18 *Angeles* (1983) 139 Cal. App. 3d 347, 353; See Also e.g., *Seligsohn v. Day* (2004) 121  
19 Cal.App.4th 518, 525–531 [police officers were entitled to a copy of the complaints filed  
20 against them, even though the investigation was closed without any action being taken against  
21 the officers and copies of the complaints were not placed in the officers' personnel files].

22 65. In this case, the record reflects that Petitioners were not provided any opportunity  
23 to read, review, and/or sign “the instrument containing the adverse comment.” Respondents’  
24 refusal to provide Petitioners with an opportunity to review “the instrument containing the  
25 adverse comment” violates FBOR Section 3255.

26 66. The Department’s determination that the complaint made against Firefighter Ortiz  
27 was unfounded does not change Respondents’ obligation to provide the requested investigative  
28 materials/initiating complaint as caselaw provides: “Although complaints that are determined to

1 be frivolous, unfounded, or exonerated may not be used for punitive or promotional purposes  
2 unless the investigation is reopened for sufficient cause, they can be used to require counseling  
3 or additional training. (Pen. Code, § 832.5, subd. (c)(2) & (3); Gov. Code, § 3304, subd. (g).)  
4 Moreover, as we have observed and the Department has conceded, internal affairs personnel  
5 could be influenced to a peace officer employee's detriment in a future investigation if the  
6 officer's internal affairs file or index card contains an unexplained or un rebutted adverse  
7 comment.” *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal. App. 4th 916, 929.

8 67. Moreover, the record reflects that several layers of City and Department  
9 management reviewed Firefighter Ortiz’s PSU investigation (including complaints, reports  
10 and/or other memorialized communications recommending his immediate suspension and/or  
11 requesting a PSU investigation) expressly for the purpose of determining whether  
12 administrative discipline was merited and in support of an initial determination to suspend  
13 Firefighter Ortiz’s ability to provide prehospital care and place him on administrative  
14 assignment. This investigation (and all relevant investigative materials) has undisputedly  
15 impacted Firefighter Ortiz’s employment, including but not limited to, loss of overtime  
16 opportunities, reduction of work responsibilities, and other reputational damage as the entire  
17 executive Department command staff now knows details of this matter that should have only  
18 been known to EMS staff, QA/QI staff, and Dr. Khan.

19 68. In addition, Section 3253 (j) provides that: “A firefighter shall not be loaned or  
20 temporarily reassigned to a location or duty assignment if a firefighter in his or her department  
21 would not normally be sent to that location or would not normally be given that duty assignment  
22 under similar circumstances.”

23 69. In this case, the record is clear that Firefighter Ortiz was placed on administrative  
24 assignment at a different location with different hours and days off, and was assigned menial,  
25 non-firefighter tasks for an extended period of time in a manner that was inconsistent with years  
26 of the Department’s past practice. All of these actions were justified by allegations of  
27 misconduct that were ultimately determined to be unfounded after full investigation.  
28 Respondents circumvented the standard QA process in this case in a manner which resulted in

1 Firefighter Ortiz’s unprecedented administrative assignment. This extraordinary reassignment  
2 violated Firefighter Ortiz’s rights under FBOR Section 3253(j).

3 70. The Department and City have a mandatory ministerial duty to comply with the  
4 provisions of FOBR, including Government Code Sections 3253, 3255, 3256 and 3256.5.

5 71. Furthermore, Government Code Section 3260 makes it unlawful for Respondents  
6 to deny or refuse to any firefighter the rights and protections guaranteed to him or her by FOBR,  
7 and further provides for relief including the award of damages, attorney fees and civil penalties  
8 for malicious violations of FOBR.

9 72. Respondents’ failure to provide all requested investigative materials expressly  
10 utilized for personnel purposes and reviewed by most, if not all, of Firefighter Ortiz’s executive  
11 Department command staff, violates his rights under FOBR.

12 73. Respondents also failed to follow the mandates of FOBR by initially not advising  
13 Petitioner Firefighter Ortiz of the true nature of the investigation, all alleged policy violations  
14 contemplated by his conduct, the basis for Firefighter Ortiz’s placement on administrative  
15 assignment, and/or any information relating to the expected duration of his administrative  
16 assignment.

17 74. Respondents also failed to follow the mandates of FOBR by placing Firefighter  
18 Ortiz on administrative assignment in a manner that the Department would not normally have  
19 done under similar circumstances.

20 75. Petitioners have a beneficial interest in the issuance of the writ in order to obtain  
21 the rights and protections guaranteed by FOBR.

22 76. Petitioners have attempted to enforce the duty imposed on Respondents by FOBR  
23 by demanding that Respondents comply with FOBR and explaining the relevant FOBR  
24 authority during meet and confer regarding this very issue.

25 77. Respondents have been able to comply with FOBR, but instead has denied, and  
26 continues to deny, Petitioner’s statutory rights. As a result, Respondents have acted in an  
27 arbitrary and capricious manner that is contrary to their ministerial duties to enforce and comply  
28 with the FBOR.



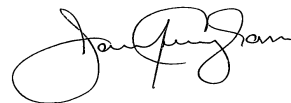




- b) For a preliminary and permanent injunction commanding Respondents, and each of them, to provide the requested investigative materials as described in Petitioners' August 2024 Requests for Information;
- c) For a judicial declaration that Respondents violated the statutory protections of FBOR;
- d) For an award of attorney's fees pursuant to Code of Civil Procedure Section 1021.5, Government Code Sections 800 and 3260, or as otherwise authorized by law;
- e) For an award of a \$25,000 civil penalty to each Petitioner against Respondents for each violation of FOBR;
- f) For actual damages against Respondents according to proof;
- g) For Petitioner's costs of suit incurred herein;
- h) For interest at the maximum legal rate on all sums awarded; and
- i) For such other and further relief as the Court may deem just, necessary and proper.

Dated: December 12, 2024

Respectfully Submitted,  
**Law Offices of James J. Cunningham, APC**



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James J. Cunningham  
Attorneys for Petitioners

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **A WRIT OF MANDATE IS THE APPROPRIATE**  
4 **PROCEEDING IN THE CASE HEREIN**

5 Code of Civil Procedure § 1094.6 states in pertinent part that:

6 *“...Judicial review of any decision of a local agency, other than school district, as the*  
7 *term local agency is defined in Section 54951 of the Government Code, or of any*  
8 *commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 of*  
9 *this code only if the petition for writ of mandate pursuant to such section is filed within*  
10 *the time limits specified in this section.”*

11 Code of Civil Procedure § 1094.5 states in pertinent part that:

12 *“...The inquiry in such a case shall extend to the questions whether the respondent has*  
13 *proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and*  
14 *whether there was any prejudicial abuse of discretion. Abuse of discretion is established*  
15 *if the respondent has not proceeded in the manner required by law, the order or decision*  
16 *is not supported by the findings, or the findings are not supported by the evidence.”*

17 In addition, Code of Civil Procedure § 1085 states in pertinent part that a writ of mandate:

18 *“...may be issued by any court, to any inferior tribunal, corporation, board, or person, to*  
19 *compel the performance of an act which the law specially enjoins, as a duty resulting*  
20 *from an office, trust or station, or to compel the admission of a party to the use and*  
21 *enjoyment of a right or office to which the party is entitled, and from which the party is*  
22 *unlawfully precluded by such inferior tribunal, corporation, board or person..”*

23 In *Ross v. Superior Court of Sacramento County*, the court decided:

24 *“Administrative functions of a county board of supervisors are not immune from judicial*  
25 *process and may be mandated or enjoined.”* *Ross v. Superior Court of Sacramento*  
26 *County* (1977) 19 Cal.3d 899, 909.

27 Mandamus will lie where the board or commission acts arbitrarily against the vested right  
28 of an individual to compel a recognition of such rights which the board or commission has  
denied in the abuse of its discretion. *Austin v. Board of Civil Service Commissioners of City of*  
*Los Angeles* (1942) 50 Cal.App.2d 436. A writ of mandate is available when the petitioner has  
no plain, speedy, and adequate remedy and the petitioner has a clear, present and beneficial right  
to performance. *Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 748. “Abuse of discretion is

1 established if the respondent has not proceeded in the manner required by law, the order or  
2 decision is not supported by the findings, or the findings are not supported by the evidence.”  
3 *Kolender v. San Diego County Civil Service Commission* (2007) 149 Cal.App.4th 464, 470.

4 Additionally, mandamus will lie to compel a public officer to perform specific duties  
5 imposed on him by law, where the public officer arbitrarily refuses to perform the duties, and  
6 where that refusal is based upon an erroneous conclusion of his legal duties, or constitutes clear  
7 abuse of discretion. *Tilden v. Blood* (1936) 14 Cal.App.2d 407. “Where only one choice can be a  
8 reasonable exercise of discretion, a court may compel an official to make that choice.” *Cal.*  
9 *Correctional Supervisors Org. v. Dep't of Corr.* (2002) 96 Cal. App. 4th 824, 827. A petitioner  
10 may obtain a writ of mandamus pursuant to Code of Civil Procedure § 1085 where the petitioner  
11 shows “the respondent has failed to perform an act despite a clear, present and ministerial duty to  
12 do so, and that the petitioner has a clear, present and beneficial right to that performance.”  
13 *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1289.

14 In this case, a writ of mandate is appropriate under both CCP §§ 1085 and 1094.5.  
15 Respondents did not proceed in the manner required by law by failing to appropriately follow  
16 FOBR. Furthermore, Respondents abused their discretion by refusing to provide Petitioners with  
17 the requested information consistent with FOBR and by imposing Firefighter Ortiz’s  
18 administrative re-assignment in a manner that is contrary to ordinary Department practices. As  
19 such, Respondents’ conduct in this case represents grounds for mandamus relief under Code of  
20 Civil Procedure Section 1085 and/or 1094.5.

21 In *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal. App. 4th 916, the  
22 California Court of Appeal reviewed a writ petition filed by a police officer and police officers’  
23 association contending that the Public Safety Officers Procedural Bill of Rights (POBR)  
24 permitted the officer to read and respond to information maintained by the police department,  
25 specifically documents relating to an allegation that the officer was neglectful in his duties and  
26 an index card listing all complaints made against the officer. The Court of Appeal ultimately held  
27 that the officer was permitted to review this information and that the index card was a file used  
28 for personnel purposes within the meaning of POBR.

1 In *Venegas*, the Court rejected the Sacramento police department’s argument that the  
2 officer had, “...no right to review this information because the incident did not result in any  
3 personnel action adverse to Kime, and because the internal affairs index card is not a personnel  
4 file or any other file used for personnel purposes by the Department,” (*Venegas, supra*, at 919),  
5 by reasoning that:

6 “...an unexplained and un rebutted charge of neglect of duty could color the investigator's  
7 view of Kime and affect the investigation of the new complaint. This is the type of  
8 comment adverse to his interest that the Bill of Rights Act gives Kime the opportunity to  
9 review and explain or rebut if he can...Although complaints that are determined to be  
10 frivolous, unfounded, or exonerated may not be used for punitive or promotional  
11 purposes unless the investigation is reopened for sufficient cause, they can be used to  
12 require counseling or additional training. (Pen. Code, § 832.5, subd. (c)(2) & (3); Gov.  
Code, § 3304, subd. (g).) Moreover, as we have observed and the Department has  
conceded, internal affairs personnel could be influenced to a peace officer employee's  
detriment in a future investigation if the officer's internal affairs file or index card  
contains an unexplained or un rebutted adverse comment.” *Id.* at 929.

13 Ultimately, the Court determined that: “...regardless of whether the employing agency  
14 contemplates or has rejected further action regarding an adverse comment made against a peace  
15 officer employee, the officer is entitled to disclosure of the comment if it is entered in an agency  
16 file used for a personnel purpose. Our conclusion is consistent with the reasoning of *County of*  
17 *Riverside, supra*, 27 Cal. 4th 793, which implies that an adverse comment contained in a  
18 background investigation file is subject to disclosure even if the officer does not suffer some sort  
19 of adverse consequence, as long as it has that potential. (*Id.* at p. 802 [the Bill of Rights Act  
20 applies to any comment that may serve as a basis for adversely affecting the status of the peace  
21 officer's employment].)” *Id.* at 926.

22 In this case, there is no dispute that a **report/complaint** was produced and provided to  
23 the PSU intake unit regarding Firefighter Ortiz’s actions. This report/complaint triggered a  
24 subsequent PSU investigation, was reviewed by Firefighter Ortiz’s supervisors, and was  
25 undoubtedly utilized for personnel purposes, regardless of its ultimate validity. Furthermore, at  
26 no point in time was Firefighter Ortiz ever allowed to see a copy of this report/complaint or  
27 provide any written response to these adverse comments. This conduct violates Firefighter  
28 Ortiz’s rights under FOBR Section 3255 and 3256.5.

1 To the extent that the PSU investigation, including the underlying report/complaint,  
2 represents an internal affairs inquiry conducted by a public agency employer, the Court in  
3 *Venegas* characterized these types of investigations as, "...by any definition...a personnel  
4 purpose," explaining that:

5 "Indeed, the function of a police agency's internal affairs section is to 'police the police'  
6 by investigating complaints and incidents to determine an officer's fitness to continue to  
7 serve, and whether disciplinary or other corrective action is required. **By any definition,**  
8 **that is a personnel purpose**...As the Supreme Court said in *County of Riverside, supra*,  
9 27 Cal. 4th 793: 'Where . . . the adverse comments arise out of an investigation, the very  
10 purpose of which was to assess the employee's qualifications for continued  
11 employment, . . . the Bill of Rights Act applies' (id. at p. 803), and the law does not  
12 permit a law enforcement agency to shield such a comment from a peace officer  
13 employee by purporting to segregate it from other personnel files. (Id. at p. 805.)"  
14 (emphasis added) *Id.* at 928.

15 As the report/complaint which triggered Firefighter Ortiz's PSU investigation and which is  
16 included in the PSU investigation represents material that was explicitly reviewed for personnel  
17 purposes related to Firefighter Ortiz's employment status, there is no basis for the City to  
18 withhold this material from Firefighter Ortiz in opposition to all relevant caselaw and statutory  
19 support.

20 Furthermore, in *Aguilar v. Johnson* (1988) 202 Cal. App. 3d 241, the Court of Appeal  
21 addressed the meaning of an adverse comment for purposes of sections 3305 and 3306 of POBR  
22 and explained: "Webster defines comment as 'an observation or remark expressing an opinion or  
23 attitude...' (Webster's Third New Internat. Dict. (1981) p. 456.) 'Adverse' is defined as 'in  
24 opposition to one's interest: Detrimental, Unfavorable.' (Id. at p. 31.)" *Id.* at p. 249. There is no  
25 question that a report/complaint which includes a recommendation to suspend and/or otherwise  
26 penalize Firefighter Ortiz for work-related conduct and which triggered the opening of separate  
27 PSU investigation represents an observation or remark expressing an opinion or attitude that is in  
28 opposition to Firefighter Ortiz's interest. This type of investigative material which was explicitly  
collected and considered by the City for personnel related purposes is exactly of the type of  
material which POBR and FOBR caselaw indicates must be disclosed subject to Government  
Code Sections 3306.5 and 3256.5 respectively.

1 In *County of Riverside v. Superior Court* (2002) 27 Cal. 4th 793, the California Supreme  
2 Court examined an officer's request pursuant to POBR to review certain background  
3 investigation materials which included a citizen complaint from a previous law enforcement  
4 assignment. In support of the officer's right to examine the citizen complaint and his background  
5 investigation case file, the California Supreme Court in *County of Riverside* explained that: "The  
6 Act applies to any adverse comment 'entered in [an officer's] personnel file, *or any other file*  
7 *used for any personnel purposes.*' (§ 3305, italics added.) In *Aguilar, supra*, 202 Cal. App. 3d  
8 241, the Court of Appeal construed this language broadly to include **any document that 'may**  
9 **serve as a basis for affecting the status of the employee's employment,' including citizen**  
10 **complaints the law enforcement employer kept in a file separate from the officer's**  
11 **personnel file.**" (emphasis added) *Id.* at 802. In this case, the record is clear that the relevant  
12 report/complaint recommending Firefighter Ortiz's suspension and which caused a subsequent  
13 PSU investigation represents a citizen, non-employee complaint utilized to affect the status of  
14 Firefighter Ortiz's employment irrespective of where this report/complaint was kept. Moreover,  
15 whether the relevant report/complaint recommending Firefighter Ortiz's suspension can be  
16 prospectively located in his personnel file versus some other file is not dispositive of whether the  
17 material can be lawfully withheld as the California Supreme Court has explained: "The label  
18 placed on the investigation file is irrelevant." *Id.* at 802.

19 Additional California Supreme Court caselaw indicates that the Court broadly interprets  
20 FOBR Section 3256.5 to encompass materials that are outside of an employee's designated  
21 personnel file in order to provide employees an opportunity to respond:

22 "Similarly, section 3256.5 permits the firefighter to request that any material in the  
23 personnel file that is unlawfully placed there or mistaken be removed or corrected, and  
24 both the request and any response by the employer 'become part of the personnel file.' (§  
25 3256.5, subds. (c), (d).) These statutes ensure that the employee's response is made part  
26 of the written record, so that any individual who accesses that record will have access to  
27 the employee's response as well as to the adverse comment. Thus, the Legislature appears  
28 to have included the phrase 'any other file used for any personnel purposes by his or her  
employer' in section 3255 to ensure that employers will not be able to evade the statute's  
protections by basing personnel decisions on materials contained in files that are not  
designated as the agency's official personnel files. Thus, read in context, **the phrase**  
**should be interpreted to encompass any written or computerized record that,**  
**although not designated a personnel file, can be used for the same purposes as a file**



1 **of the sort described in section 3256.5—as a record that may be used by the**  
2 **employer to make decisions about promotion, discipline, compensation, and the**  
3 **like.**” (emphasis added) *Poole v. Orange County Fire Authority* (2015) 61 Cal. 4th 1378,  
1386.

4 In *Poole v. Orange County Fire Authority* (2015) 61 Cal. 4th 1378, although the California  
5 Supreme Court did not determine that a specific investigator’s log was subject to disclosure  
6 subject to FOBR Section 3256.5, the Court in *Poole* did assert that if the investigator’s log was  
7 placed in a file which the employer had access to that this would have rendered the log  
8 disclosable. The California Supreme Court in *Poole* explained that:

9 “Cases applying similar statutes are consistent with this conclusion. They have held that a  
10 document containing adverse comments may come within the disclosure requirement  
11 even if not formally entered into the official personnel file, if the document was either (1)  
12 maintained in such a manner that it would be available to those making personnel  
13 decisions in the future, or (2) was actually used by the employer in making a personnel  
14 decision, or both.” *Id.* at 1387.

15 In this case, the PSU investigation, including the underlying report/complaint made against  
16 Firefighter Ortiz, represents materials that are (1) maintained in such a manner that it will be  
17 available to those making personnel decisions in the future, and (2) which have already been  
18 used by the employer in making a personnel decision. As the Court in *Poole* recognized:

19 “...cases from the Courts of Appeal have concluded that disclosure requirements apply to  
20 adverse comments about a police officer even though they were not entered into the officer's  
21 official personnel file, and even though they had not been used in making any personnel  
22 decision, when those files might be available to persons making personnel decisions in the  
23 future.” *Id.* at 1388. All caselaw supports Petitioner’s claim in this case and there is no evidence  
24 indicating that the requested investigative materials and underlying report/complaint will be  
25 destroyed or purged in such a manner where it will not be made available to persons making  
26 personnel decisions in the future.

27 FOBR Section 3251(c) provides: “‘Punitive action’ means any action that may lead to  
28 dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes  
of punishment.” Identical language is contained in POBR Section 3303. The statutory language  
of “may lead to” contained in both of these sections has been interpreted by the California Court

1 of Appeal as: “The statute does not require any showing of an adverse employment consequence  
2 has occurred or is likely to occur, merely that actions ‘may lead’ to such a consequence.” *Caloca*  
3 *v. County of San Diego* (1999) 72 Cal. App. 4th 1209, 1223. In *Caloca*, the Court of Appeal  
4 reviewed a Citizen Review Board’s report and determined that, although the Citizen Review  
5 Board’s report was completely advisory in nature, that the report’s findings constituted “punitive  
6 action” eligible for administrative appeal pursuant to POBR. The holding in *Caloca* ultimately  
7 supports the presumption that “punitive” acts include those which “may lead to” adverse  
8 consequences, all of which supports disclosing the requested investigative materials and  
9 underlying report/complaint made against Firefighter Ortiz.

10 Although the City cites *McMahon v. City of Los Angeles* (2009) 172 Cal. App. 4th 1324  
11 to support the assertion that “...requests for interview tapes, transcripts and other investigatory  
12 materials are not discoverable under section 3256.5 since such investigatory materials in  
13 unsubstantiated investigations are not maintained in a personnel file and not used for any  
14 personnel purpose. McMahon, 1335-1336,” *McMahon* is distinguishable from this case on  
15 several grounds. In *McMahon*, the involved peace officer wanted to inspect interview tapes and  
16 transcripts based on his speculation that they might contain additional adverse comments made  
17 against the officer. In this case, there is no speculation as Petitioners seek documentation of a  
18 complaint that was explicitly relied upon for personnel and investigative purposes. In addition, in  
19 *McMahon*, the involved public safety department provided the peace officer with comprehensive  
20 summaries of the complaints, which included the identities of the complaining parties and  
21 detailed descriptions of all accusations. In this case, the City has not provided the complaint or  
22 any investigative materials from the PSU investigation into Firefighter Ortiz.

23 Furthermore, in *McMahon*, the Court noted that the citizen complaints at issue were  
24 subject to additional statutory restrictions as Penal Code section 832.5, subdivision (c), provides  
25 that citizen complaints “...that are determined by the peace or custodial officer's employing  
26 agency to be frivolous...or unfounded or exonerated, or any portion of a complaint that is  
27 determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's  
28 general personnel file...[and] shall be retained in other, separate files that shall be deemed



1 by the Constitution to exercise judicial functions *Strumsky v. San Diego County Employees*  
2 *Retirement Ass'n* (1974) 11 Cal. 3d 28, 32, 35; *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 90–91.  
3 When review is sought by administrative mandamus under Code of Civil Procedure § 1094.5,  
4 “abuse of discretion is established if the respondent has not proceeded in the manner required by  
5 law, the order or decision is not supported by the findings, or the findings are not supported by  
6 the evidence.” *Kolender v. San Diego County Civil Service Commission* (2007) 149 Cal.App.4th  
7 464, 470. Under the abuse of discretion standard, “reversal is warranted when the administrative  
8 agency abuses its discretion, or exceeds the bounds of reason.” *Hankla v. Long Beach Civil*  
9 *Service Commission*, 34 Cal.App.4th 1216, 1222-1223 (1995).

10 The standard of review under Section 1085 is limited to an inquiry into whether the  
11 action was arbitrary, capricious or entirely lacking in evidentiary support. *Citizens for Improved*  
12 *Sorrento Access, Inc. v. City of San Diego*, 118 Cal.App.4th 808, 814 (2004). A court is  
13 authorized to review evidence when the challenged administrative order or decision substantially  
14 affects a vested fundamental right of the petitioner. *Strumsky v. San Diego County Employees*  
15 *Retirement Ass'n* (1974) 11 Cal. 3d 28, 32, 35; *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 90–91. A  
16 petitioner may obtain a writ of mandamus pursuant to CCP § 1085 where the petitioner shows  
17 “the respondent has failed to perform an act despite a clear, present and ministerial duty to do so,  
18 and that the petitioner has a clear, present and beneficial right to that performance.” *Riverside*  
19 *Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1289. Writ relief is available  
20 to correct a legislative act if the public officer failed to exercise his or her discretion or acted so  
21 unreasonably or arbitrarily as to indicate an abuse of discretion as a matter of law. Thus, a writ is  
22 available to correct a legislative decision that is arbitrary, capricious, entirely lacking in  
23 evidentiary support, contrary to established public policy, unlawful, or procedurally unfair.  
24 *Public Defender Assn. v Board of Supervisors* (1999, 4th Dist) 74 Cal App 4th 1327, 1332,

25 In addition, Courts have concluded that a writ of mandamus can be pursued  
26 simultaneously under both CCP §§ 1085 and 1094.5 as, “section 1094.5 does not preclude a  
27 broader challenge to agency conduct or procedures alleged to breach the agency's statutory  
28 obligations (*Timmons v. McMahon* (1991) 235 Cal. App. 3d 512). It is not inconsistent to award

1 relief under both sections 1094.5 and 1085 of the Code of Civil Procedure.” *Conlan v. Bonta*, 102  
2 Cal.App.4th 745, 794 (2002). In this case, the Petition challenges Respondents’ failure to follow  
3 applicable FOBR authority. Respondents’ actions in this case potentially represent grounds for  
4 administrative and/or ordinary mandamus depending on the Court’s characterization of  
5 Respondents’ actions/authority as either ministerial or discretionary. As such, relief under both  
6 sections 1094.5 and 1085 is appropriate.

7 **III.**

8 **THE STATUTORY PRIVATE ATTORNEY GENERAL**  
9 **THEORY ALLOWS AN AWARD OF ATTORNEY’S**  
10 **FEES IN THIS CASE**

11 Code of Civil Procedure Section 1021.5 states:

12 *“Upon motion, a court may award attorneys’ fees to a successful party against one or*  
13 *more opposing parties in any action which has resulted in the enforcement of an*  
14 *important right affecting the public interest if: (a) a significant benefit, whether*  
15 *pecuniary or nonpecuniary, has been conferred on the general public or a large class of*  
16 *persons, (b) the necessity and financial burden of private enforcement, or of enforcement*  
17 *by one public entity against another public entity, are such as to make the award*  
18 *appropriate, and (c) such fees should not in the interest of justice be paid out of the*  
19 *recovery, if any. With respect to actions involving public entities, this section applies to*  
20 *allowances against, but not in favor of, public entities, and no claim shall be required to*  
21 *be filed therefor, unless one or more successful parties and one or more opposing parties*  
22 *are public entities, in which case no claim shall be required to be filed therefor under*  
23 *Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government*  
24 *Code...”*

25 **IV.**

26 **AN AWARD OF ATTORNEYS FEES IS ALSO**  
27 **APPROPRIATE UNDER GOVERNMENT CODE**  
28 **SECTION 800**

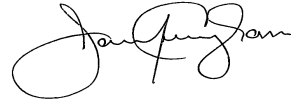
Government Code Section 800 sets forth in pertinent part:

*“In any civil action to appeal or review the award, finding, or other determination of any*  
*administrative proceeding under this code or under any other provision of state*  
*law...where it is shown that the award, finding, or other determination of the proceeding*  
*was the result of arbitrary or capricious action or conduct by a public entity or an officer*  
*thereof in his or her official capacity, the complainant if he or she prevails in the civil*  
*action may collect reasonable attorney’s fees, to be computed at one hundred dollars*

1 *(\$100) per hour, but not to exceed seven thousand five hundred dollars (\$7500)...where*  
2 *he or she is personally obligated to pay the fees, from the public entity, in addition to any*  
3 *other relief granted or other costs awarded.”*

4 Dated: December 12, 2024

5 Respectfully Submitted,  
6 **Law Offices of James J. Cunningham, APC**

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8 James J. Cunningham  
9 Attorneys for Petitioners

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**VERIFICATION**

**STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

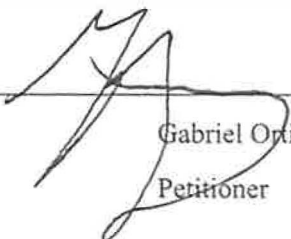
I, Gabriel Ortiz, declare:

I have read the foregoing Petition for Writ of Mandate and know the contents thereof. I am a real party in interest, a party to this action, and am authorized to make this verification for that reason.

I declare the allegations contained therein are true to my knowledge, except as to those matters which are alleged on information and belief, and as to those matters 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 DECEMBER, 11<sup>th</sup> 2024 in SAN DIEGO, California.

  
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Gabriel Ortiz  
Petitioner