No. S218066

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, *et al.*,

Defendants and Petitioners Below,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff, Real Party in Interest, and Petitioner Here.

SMITH'S REPLY TO THE CITY OF SAN JOSE'S ANSWER TO PETITION FOR REVIEW

After Decision by the Court of Appeal
Sixth Appellate District
Case No. H039498
Santa Clara County Superior Court, Case No. 1-09-CV-150427

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TABLE OF CONTENTS

INTRODUCTION 1

LEGAL ARGUMENT 4

I. REVIEW IS NECESSARY TO CORRECT THE SIXTH DISTRICT'S FLAWED INTERPRETATION OF THE CPRA, WHICH CONFLICTS WITH CONSTITUTIONAL REQUIREMENTS 4

A. Reversing The Sixth District Will Not Judicially Amend The CPRA. 4

B. Review Is Warranted Because The Sixth District Did Not Interpret The CPRA Consistently With Proposition 59, Which Refers Expressly To "Public Officials." 6

1. Proposition 59 Supports Smith's Interpretation Of The CPRA. 6

2. The City's Argument That Proposition 59 Had No Effect On Established Privacy Rights Does Not Support Denial Of Review. 7

C. Smith Has Stated Grounds For Review Because – Faced With The Novel Issue Of Whether Public Employees May Conceal Records Concerning The Public's Business In Private Accounts – The Sixth District Interpreted The CPRA To Exclude Such Records And Potentially *Any* Record Not "Prepared, Owned, Used, Or Retained" By The Legislative Body *As A Whole* 10

II. WAITING FOR LOWER COURTS TO RULE WOULD ONLY SERVE TO WEAKEN PUBLIC TRUST IN STATE AND LOCAL GOVERNMENT. 12

III. THE *REGENTS* CASE IS INAPPOSITE BECAUSE IT DID NOT CONCERN RECORDS PREPARED, OWNED, USED, OR RETAINED BY A LOCAL AGENCY'S OWN EMPLOYEES 14

IV. IF THE COURT DECIDES TO REVIEW THE ISSUE OF WHETHER RECORDS STORED IN PERSONAL ACCOUNTS OR ON PERSONAL DEVICES ARE "PUBLIC RECORDS," CLARIFICATION IS ALSO NEEDED ON HOW THE CONCEPT OF CONSTRUCTIVE POSSESSION APPLIES IN THE CONTEXT OF THE CPRA. 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Bernardi v. County of Monterey (2008) 167 Cal.App.4th 1379 8

Caston v. Hoaglin (S.D. Ohio 2009) 2009 WL 1687927 13

City of Ontario v. Quon (2010) 560 U.S. 746 13

Commission on Peace Officer Standards & Training v. Superior Court (Los Angeles Times Communications LLC) (2007) 42 Cal.4th 278 10

Consolidated Irrigation Dist. V. Superior Court (City of Selma) (2012) 205 Cal.App.4th 697 15

County of Los Angeles v. Superior Court (Axelrad) (2000) 82 Cal.App.4th 819 8

Gray v. Faulkner (N.D. Ind. 1992) 148 F.R.D. 220 13

Hill v. National Collegiate Athletic Association (1994) 7 Cal.4th 1 9

International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319.......................... 9

International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers, Inc.) (2007) 42 Cal.4th 319 11

Long Beach Police Officers Association v. City of Long Beach (May 29, 2014, S200872) __ Cal.4th __ 11

O'Grady v. Superior Court (2006) 139 Cal.App.4th 1423.......................... 5

Regents of the University of California v. Superior Court (Reuters America LLC) (2013) 222 Cal.App.4th 383 14

San Gabriel Tribune v. Superior Court (City of West Covina) (1983) 143 Cal.App.3d 762 .... 3, 16

STATUTES

Gov. Code, § 6252, subd. (e) 4, 15

Gov. Code, § 6253(c) 12, 15

Gov. Code, § 6258 12

OTHER AUTHORITIES

S. Rep. No. 813, 89th Cong., 1st Sess., p. 1 (1965) 16

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I, § 3, subd. (b)(1) 7

Cal. Const., art. I, § 3, subd. (b)(2) 7

INTRODUCTION

The California Public Records Act ("CPRA") is a key part of the democratic process in California. It ensures that the public has access to records of state and local public entities, officials, and employees, who are paid with public funds to perform work on behalf of the public. The CPRA thereby provides a critical tool for citizens to hold public entities and their individual representatives and employees accountable for their actions.

In one fell swoop, the Sixth District has undermined the reach and purpose of the CPRA by declaring that only writings of the legislative body – as a whole – are covered, and therefore any writings relating to the public's business stored on personal electronic devices or in personal accounts need not be produced in response to a CPRA request. (Opinion, pp. 13-15, 24.) The Opinion effectively grants officials free reign to hide documents from public scrutiny, gutting one of the most important mechanisms for holding government officials accountable to the citizens they serve.

Defendants and petitioners below (collectively, "the City") attempt to minimize the impact of the Sixth District's Opinion and ask this Court to deny review. The Opinion cannot be dismissed as a lone

outlier; rather, it portends far-reaching consequences. Predictably, other public entities will interpret and apply the Opinion to limit the public's right to obtain and inspect *any* records not "prepared, owned, used, or retained" by the legislative body as a whole – thereby defeating the purpose of the CPRA and article I, section 3(b) of the California Constitution. Delay in resolving these issues would erode the public's trust in government, as public entities and lower courts struggle with a published opinion that interprets the CPRA so as to create a gaping loophole and restricts the reach of the CPRA as a general matter. Review is warranted under Rule 8.500(b)(1) of the California Rules of Court, in order to secure uniformity of decision in CPRA cases and to settle an important question of law.

It is undisputed that the records sought in this case concerned the public's business – the City of San Jose's involvement in a major commercial development project in the downtown area. (1 PA 13 (Requests 27-30); 4 PA 853.) The City appears to concede that "public records" include not only those records required by law to be retained but also those records that an official keeps as "necessary or convenient" to the discharge of that official's duties. (*See* Answer, p. 2 (*citing San Gabriel Tribune v. Superior Court (City of West Covina)*

(1983) 143 Cal.App.3d 762).) Nevertheless, the City and its amicus, the League of California Cities, argue this Court should not accept review because (they claim) issues of employee privacy would have to be resolved and those issues should be addressed by the Legislature or by lower courts. As set forth below, the Court can resolve the broad question of whether public employees can shield public records from disclosure by hiding them in personal accounts without getting bogged down in the details of how to search for or produce such documents. Delay will not ripen the issues in Smith's Petition any further. The time for review is now.

This Court has the opportunity to provide important guidance on whether writings concerning the public's business, which individual employees keep on personal equipment as necessary or convenient to the discharge of their duties, qualify as "public records." For the reasons set forth herein, and in Smith's Petition, Smith respectfully requests that the Court grant his Petition and clarify that the definition of "public records" is much broader than the Sixth District recognized, and that public employees may not conceal records concerning the public's business in personal accounts.

/ / /

LEGAL ARGUMENT

I. REVIEW IS NECESSARY TO CORRECT THE SIXTH DISTRICT'S FLAWED INTERPRETATION OF THE CPRA, WHICH CONFLICTS WITH CONSTITUTIONAL REQUIREMENTS.

A. Reversing The Sixth District Will Not Judicially Amend The CPRA.

Interpreting the CPRA to include public officials and employees within the definition of "local agency," would neither amend the statute nor encroach on the Legislature's role, as the City contends. Courts routinely interpret and apply statutory language. The City cites no authority establishing either (a) when a statute is considered to have been "amended" or (b) that an interpretation of the CPRA contrary to the Sixth District's would somehow meet that standard. The CPRA broadly defines "public records" without reference to any specific technology or means of communication, and therefore does not require amendment in order to cover writings kept on personal equipment. (*See* Gov. Code, § 6252, subd. (e) (defining public records to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency *regardless of physical form or characteristics*.") (emphasis added).)

The City's argument that judicial deference is particularly appropriate in the context of new technologies is similarly inapt. This is not a case where technology has outpaced the language of the statute. Indeed, technology is always improving – companies consistently design and build products that are faster, smaller, and have more memory than their predecessors. It is not necessary for the Legislature to amend every single statute on the books each time there is a technological step forward. *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1443, on which the City relies, is inapposite because the CPRA clearly mandates disclosure of writings relating to the public business "*regardless of physical form or characteristics*." There is no exception based on the technology used to facilitate the communication.

While the City may agree with the Sixth District's interpretation, that does not transform other interpretations (such as the trial court's) into judicial amendments. Deferring to the Legislature would needlessly preserve the Sixth District's judicially created loophole until some indeterminate future date. Judicial interpretation of the CPRA would not usurp the Legislature's role in

any way. The City's argument to the contrary poses no barrier to review.

B. Review Is Warranted Because The Sixth District Did Not Interpret The CPRA Consistently With Proposition 59, Which Refers Expressly To "Public Officials."

1. Proposition 59 Supports Smith's Interpretation Of The CPRA.

In Section III.D of its Answer, the City argues that Proposition 59 did not affect the interpretation of the CPRA and simply reaffirmed prior law regarding its construction. (Answer, pp. 9-12). As a result, says the City, the term "public officials" in Proposition 59 did not "amend the definition of 'local agencies' in the Public Records Act." (Answer, p. 11.) This argument fails because it incorrectly presumes that the terms "public records" and "local agency" in the CPRA were not intended to cover writings "prepared, owned, used, or retained" by individual employees and officials in the first place. Assuming for the sake of argument that Proposition 59 did not change the interpretation of the CPRA, the City still must establish that its interpretation of the CPRA is the correct one. The fact that Proposition 59 expressly refers to "public officials" suggests that its drafters and the voters

understood the CPRA to apply to "public officials" and not merely the legislative body as a whole. (*See* Cal. Const., art. I, § 3, subd. (b)(1).)

The City argues that Smith did not proceed under Proposition 59, but cites no authority that Smith had to "invoke" Proposition 59 in his CPRA request for Proposition 59 to apply. Proposition 59 applies generally and the CPRA must be interpreted consistently with its requirement of broad construction in favor of the right of access. (*See* Cal. Const., art. I, § 3, subd. (b)(2) (referring to authorities in effect on the effective date of Proposition 59).) Moreover, Proposition 59 also imposes specific conditions on future limits to the right of access: "A statute, court rule, *or other authority* adopted after the effective date of this subdivision *that limits the right of access* shall be adopted with *findings* demonstrating the interest protected by the limitation and the need for protecting that interest." (*See* Cal. Const., art. I, § 3, subd. (b)(2) (emphasis added).) Review is warranted because the Sixth District did not interpret the CPRA consistently with these provisions.

2. The City's Argument That Proposition 59 Had No Effect On Established Privacy Rights Does Not Support Denial Of Review.

The City argues that review should be denied because the Sixth District's opinion protects the privacy rights of city officials and

employees, while the trial court's decision would lead to searches "of **all** private communications in the private accounts and devices of the City Council members and employees." (Answer, pp. 11-12; emphasis in original.) This argument has no merit. The City cites no evidence in support of this assertion and fails to explain why it could not require its employees to search their own devices. More importantly, it is not necessary for this Court to resolve the details of hypothetical future productions in order to affirm the broad principle that writings about public business do not lose their public character just because an employee voluntarily takes work home and commingles it with personal files.

Trial courts have tools at their disposal – such as privilege logs and in camera review – to resolve specific disputes over privilege issues. (*See, e.g.*, *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1387 (County produced privilege log and special master reviewed documents in camera); *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 833-36 (ordering in camera inspection of documents).) In addition, claims for invasion of the constitutional right to privacy are subject to a balancing test. (*See International Federation of Professional &*

Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 338-39 ("*IFPTE*") (*citing Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 37-40); *see also Hill*, *supra*, 7 Cal.4th at 23-37.) If the Sixth District's Opinion stands, however, lower courts would have no reason to perform a detailed privilege analysis of records in personal accounts because the Opinion exempted those records from the CPRA en masse. Therefore, delaying review to allow lower courts to rule on similar cases would be unlikely to assist the Court in understanding any specific privacy issues that may arise.

In addition, the City's argument ignores the fact that councilmembers and other public employees voluntarily decide whether or not to commingle their work and personal communications by using personal equipment to conduct public business. Under the City's logic, if a public employee took hard copies of government documents home and placed them in a locked file cabinet with the employee's personal documents, those documents are exempt from disclosure because they are "inaccessible" to the local agency. This Court has rejected the argument that location trumps content in determining which records are subject to the CPRA. (*See*

Commission on Peace Officer Standards & Training v. Superior Court (Los Angeles Times Communications LLC) (2007) 42 Cal.4th 278, 291 ("*CPOST*").) Review is necessary to clarify that this rule applies in the context of communications voluntarily stored on personal electronic equipment. Even though Proposition 59 generally preserved privacy rights, that does not mean advances in technology require a narrower interpretation of the CPRA, especially when the decision to use personal equipment is within the public employee's control.

C. Smith Has Stated Grounds For Review Because – Faced With The Novel Issue Of Whether Public Employees May Conceal Records Concerning The Public's Business In Private Accounts – The Sixth District Interpreted The CPRA To Exclude Such Records And Potentially *Any* Record Not "Prepared, Owned, Used, Or Retained" By The Legislative Body *As A Whole.*

The City asserts Smith made a "specious argument" in observing that the Opinion appears to exclude writings prepared, owned, used, or retained only by an individual council member, and not the local agency as a whole. (Answer, pp. 12-13.) Regardless of whether the Sixth District needed to distinguish the agency as a whole from its individual employees, this distinction was an integral part of the Sixth District's reasoning:

> The plain language of [the CPRA's definition of 'local agency'] thus denominates the legislative body as a whole; it does not appear to incorporate individual officials or employees of those entities. [...] Because it is the *agency* – here, the City – that must prepare, own, use, or retain the writing in order for it to be a public record, those writings that are not accessible by the City cannot be said to fall within the statutory definition.

(Opinion, pp. 14-15; emphasis in original.)

At a minimum, the Sixth District's Opinion has the potential to generate significant confusion, and therefore requires clarification. Depending upon how public entities and other courts apply the Sixth District's rationale, documents or information previously assumed to be subject to the CPRA may become unavailable to the public.[1] The

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[1] *See, e.g., Long Beach Police Officers Association v. City of Long Beach* (May 29, 2014, S200872) __ Cal.4th __ (names of officers involved in police shootings not exempt on facts presented in that case); *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers, Inc.)* (2007) 42 Cal.4th 319, 346 (public employee salaries not exempt). It is unclear whether the Sixth District's requirement that the record be "prepared, owned, used, or retained by the legislative body *as a whole* means that the information held non-exempt in these cases would nonetheless be excluded from the Sixth District's definition of "public record." (See Opinion, pp. 15-16.) In addition, letters from councilmembers to constituents sent from the councilmember's individual office, memos or position papers on matters coming before the council, emails between councilmembers and other local or state officials, all of which involve the public business but may not be written or used by the "agency," may be held outside the definition of "public record" if the Sixth District's Opinion stands.

CPRA recognizes that citizens have an interest in timely disclosure. (*See* Gov. Code, § 6253(c) (10 day deadline for response, subject to extension of no more than 14 days), 6258 (times for responsive pleadings in a proceeding to enforce the CPRA shall be set "with the object of securing a decision ... at the earliest possible time").) If the Court delays or denies review, the public's right of access to certain documents may be irreparably lost.

II. WAITING FOR LOWER COURTS TO RULE WOULD ONLY SERVE TO WEAKEN PUBLIC TRUST IN STATE AND LOCAL GOVERNMENT.

In Section III.B of its Answer, the City argues that review should not be granted because other courts of appeal have not addressed the issue of storing public records in personal accounts. (Answer, pp. 7-8.) Waiting for lower courts to rule would weaken public trust in government, because the public's right to access information remains at risk in the interim, subject to the whim and caprice of public officials who naturally would be motivated to adopt an aggressive interpretation of the Sixth District's Opinion that limits the right of access. (*See*, *e.g.*, Answer, p. 13, fn. 1 (complaining about having to "endure" use of the CPRA for "fishing expeditions").)

As noted by amici in this case, public employees and officials have used personal devices or accounts to try to shield improper behavior from the public. (Ram, Olson, Cereghino & Kopczynski amicus letter (May 8, 2014), pp. 7-8; ACLU amicus letter (May 22, 2014), p. 6.) Accepting review now would deter future scandals and mitigate the erosion of the public's trust in government.

The City's related argument that delay is warranted because email, voicemail and texting are somehow "new" or "emerging" technologies ignores reality. These means of communication are not "new" and courts have had many years to ruminate on the scope of an entity's obligation to look for and produce such communications, especially in the context of civil discovery.[2]

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[2] The City contends that Smith cited no authority in support of his claim that courts may look to state and federal discovery procedures for guidance on the scope of the City's control over and obligation to look for responsive records. (Answer, p. 13.) In fact, Smith did cite authorities regarding the responding party's duties to produce items in its "possession, custody, or control." (*See* Petition, pp. 21-24 (*citing Gray v. Faulkner* (N.D. Ind. 1992) 148 F.R.D. 220, 223; *Caston v. Hoaglin* (S.D. Ohio 2009) 2009 WL 1687927, *3, among other authorities).) These authorities do not support exempting responsive communications in an employee's personal account from production. The Sixth District's Opinion failed to justify treating the obligation of public employees and agencies to search for and produce responsive documents differently in the context of the CPRA and civil discovery.

The City's reliance on *City of Ontario v. Quon* (2010) 560 U.S. 746 is misplaced. As in *Quon*, it is not necessary for this Court to resolve whether specific employees have a reasonable expectation of privacy in specific communications. *See id.* at 760-61. The Court may affirm the broad principle that public officials and employees may not use personal equipment to circumvent the CPRA without getting into the weeds about whether certain types of searches implicate privacy rights and whether those rights are outweighed by other interests. Lower courts may resolve these issues, keeping in mind that public employees may avoid implicating their privacy rights altogether by choosing not to conduct public business on personal devices.

Even if lower courts have not yet considered the issue, review should be granted now to minimize further erosion of the public's trust in government.

III. THE *REGENTS* CASE IS INAPPOSITE BECAUSE IT DID NOT CONCERN RECORDS PREPARED, OWNED, USED, OR RETAINED BY A LOCAL AGENCY'S OWN EMPLOYEES.

The City relies on *Regents of the University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383 ("*Regents*"), for the proposition that the CPRA's definition of "public

records" is unambiguous. (Answer, p. 9.) The City's reliance on this case is misplaced. *Regents* involved documents that were possessed by private equity firms and had not been provided to the Regents themselves. *Id.* at 389, 396. In contrast, Smith sought documents that had been prepared, owned, used, or retained by City officials and employees in connection with a downtown commercial development project. (1 PA 13 (Requests 27-30).) *Regents* is factually inapposite and does not aid the City's argument.

IV. IF THE COURT DECIDES TO REVIEW THE ISSUE OF WHETHER RECORDS STORED IN PERSONAL ACCOUNTS OR ON PERSONAL DEVICES ARE "PUBLIC RECORDS," CLARIFICATION IS ALSO NEEDED ON HOW THE CONCEPT OF CONSTRUCTIVE POSSESSION APPLIES IN THE CONTEXT OF THE CPRA.

The City argues at length that the authorities cited in Smith's Petition on the subject of constructive possession are not in conflict. (Answer, pp. 14-17.) For example, the City distinguishes the analysis of the term "possession" in Government Code section 6253(c) and "public records" in section 6252(e) in *Consolidated Irrigation Dist. v. Superior Court (City of Selma)* (2012) 205 Cal.App.4th 697, 710-11 & fn.8. (Answer, p. 15.) The City's argument is not persuasive. If the Court chooses to review whether the definition of "public records"

includes records prepared, owned, used, or retained by individual employees using personal equipment, the relationship between section 6252 and 6253(c) also requires clarification. It would defeat the goal of judicial economy for the Court to clarify that records stored on personal equipment qualify as "public records," but leave public entities free to raise new arguments that such records still cannot be produced because they are not "in the possession of the agency" within the meaning of section 6253(c). Therefore, Smith respectfully requests that the Court also address this potential source of confusion and conflicting rulings.

CONCLUSION

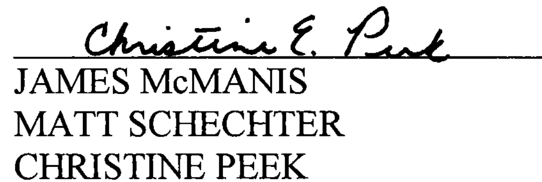
The importance of the CPRA in ensuring government's accountability to the public cannot be understated:.

> The concept that access to information is a fundamental right is not foreign to our jurisprudence: 'Nearly two hundred years ago, James Madison stated, "[knowledge] will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."'

(*San Gabriel Tribune*, *supra*, 143 Cal.App.3d at 772 (*citing* Schaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L.Rev. 203, 203-04, quoting from S. Rep. No. 813,

89th Cong., 1st Sess., p. 1 (1965)).) This case provides an opportunity to settle an important issue of law and clarify the scope of the CPRA and Proposition 59. Smith respectfully requests that the Court grant his Petition for Review.

Dated: June 20, 2014 McMANIS FAULKNER



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CERTIFICATE REGARDING WORD COUNT

I, Christine Peek, counsel for Real Party in Interest and Petitioner here, Ted Smith, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that the word count for this brief, exclusive of tables, according to Microsoft Word 2013, the program used to generate this brief, is 3426 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 20th day of June, 2014.

CHRISTINE PEEK

S218066

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 50 West San Fernando Street, 10th Floor, San Jose, California, 95113. I am employed in the County of Santa Clara, where this mailing occurs. I am over the age of 18 years, and not a party to the within action. I served the foregoing document described as:

REAL PARTY IN INTEREST'S REPLY TO THE CITY OF SAN JOSE'S ANSWER TO PETITION FOR REVIEW

on the following person(s) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on June 20, 2014, at San Jose, California.

ELENA K. SCHNEIDER