No. S218066

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN JOSÉ, et al.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff and Real Party in Interest

SUPREME COURT
FILED

MAR 30 2015

Frank A. McGuire Clerk

Deputy

ANSWER BRIEF ON THE MERITS

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

RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
MARGO LASKOWSKA, Senior Deputy City Attorney (187252)
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for CITY OF SAN JOSE, SAN JOSÉ REDEVELOPMENT AGENCY, HARRY MAVROGENES, in his official capacity as Executive Director of the San José Redevelopment Agency, Mayor CHUCK REED, in his official capacity as Mayor of the City of San José, and Council members PETE CONSTANT, ASH KALRA, SAM LICCARDO, PIERLUIGI OLIVERIO, MADISON NGUYEN, ROSE HERRERA, JUDY CHIRCO, KANSEN CHU, NORA CAMPOS, and NANCY PYLE, in their official capacities as Council members for the City of San José.

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I. INTRODUCTION

Communications of San Jose Councilmembers and employees to and from their private accounts on their private electronic devices are not "public records" under the California Public Records Act (CPRA) because they are not "prepared, owned, used, or retained" by the City. Even if they concern the City of San Jose, such communications—including e-mails, text messages, and voicemails—are not "public records" because they are not stored on City servers and are not accessible to the City.

The text of the CPRA's definition of "public records" demonstrates that writings in public officials' private accounts are not public records. The Act's broad structure confirms that such writings are not covered by the "public records" definition. That interpretation is reasonable in light of the CPRA's purpose, as well. And the history of public records law in California underscores that writings in private files and accounts are not public records.

The Act has been in place for nearly 50 years. The Legislature struck a careful balance between public access and privacy rights, and that balance is reflected in the Act's plain language. If cities controlled their councilmembers' and employees' private correspondence and telephone accounts as Smith suggests, then one would expect case law interpreting the Act to allow public access to public officials' home file cabinets, for example, to examine correspondence, telephone billings, or notes of phone calls. No such case law appears to exist. Similarly, giving one's password for a personal smart-phone or e-mail account to an employer for inspection would be like surrendering a house key. The kind of expansion of the CPRA that Smith advocates should come, if at all, from the Legislature. The City Defendants respectfully request the Court to affirm the appellate decision.

II. STATEMENT OF THE CASE

A. Requests for Records

Between September 2008 and January 2009, the City received Public Records Act requests from the law firm of McManis Faulkner, counsel herein. (1 City Petitioners' Appendix ("PA") 044.) The City fully responded, withholding exempt records and those outside the definition of a "public record." (1PA044-45.) The City provided writings from City computers and servers, but not voicemails, e-mails, or text messages sent or received on private electronic devices by Mayor Chuck Reed, Councilmembers, or their staffs, using their private accounts, for which copies were not found on City computers or servers. (1PA44-46.)

In June 2009, Plaintiff and Real Party in Interest Ted Smith repeated the McManis Faulkner requests. (1PA045 & 1PA047-50.) In response, the City confirmed that all non-exempt records for items 1 through 26 and items 31 and 32 of the request had already been disclosed. (1PA045.) The remaining items, 27 through 30, were similar to each other. (*Id.* & 1PA050.) Item 27 asked for the following documents:

> Any and all voicemails, emails or text messages sent or received on private electronic devices used by Mayor Chuck Reed or members of the City Council, or their staff, **regarding any matters concerning the City of San José**, including any matters concerning Tom McEnery, John McEnery IV, Barry Swenson, Martin Menne, Sarah Brouillette, or anyone associated with Urban Markets LLC or San Pedro Square Properties.

(1PA050.) (emphasis added) Even though item 27 covered all Councilmembers and their staffs, Item 28 repeated that request for "Council Member Pierluigi Oliverio, or his staff;" Item 29 for "Council Member Sam Liccardo, or his staff;" and Item 30 for Jessica Garcia-Kohl, a member of Councilmember Liccardo's staff. (*Id.*)

Contrary to Smith's representation, the requests for records on private devices were very broad, seeking virtually any records related to the City of San Jose. (1PA050.) Smith now appears to narrow his interpretation of his requests. (*See* Smith's Opening Brief on the Merits ("OBM") 3-4.) In reality, though, the requests are much broader as they ask for "any matters concerning the City of San Jose," which is more than "information relating to the conduct of the public's **business**." (1PA050; Gov. Code, § 6252, subd. (e), emphasis added.) For example, Smith's requests could cover Councilmembers' election campaign communications, which must be conducted through private accounts because Government Code section 54964 prohibits the use of public funds for campaign activities. (*See* Gov. Code, § 54964.)

The Mayor and Councilmembers have City accounts, i.e. phone numbers and e-mail addresses such as mayoremail@sanjoseca.gov, District1@sanjoseca.gov, or pierluigi.oliverio@sanjoseca.gov. (1PA045.) In response to items 27 through 30, the City disclosed all non-exempt records, including voicemails, e-mails and text messages, if any, sent from or received on private electronic devices used by Mayor Chuck Reed, Councilmembers Oliverio and Liccardo, their staffs, and other Councilmembers and their staffs, using their **City accounts**. (1PA045-46.) The City did not disclose communications that did not go through City servers, i.e. only from and to **private accounts**. (*Id.*)

Communications on private electronic devices of the Mayor, Councilmembers, and their staffs, solely to and from private accounts, would not use or be stored on City equipment and would not be accessible to the City. (1PA055.) These communications include e-mails, voicemail and text messages on personally acquired electronic devices—that is those not provided by the City—such as cell phones, smartphones, including

iPhone, Android, and BlackBerry, as well as tablets, computers, and other devices capable of accessing non-City e-mail accounts with Internet providers like Hotmail, Gmail and Yahoo mail. (*See id.*) When personal electronic devices are used for communications to and from private accounts only, those communications do not use and are not stored on City servers, and are not accessible to the City. (*Id.*)

Contrary to Smith's representations, all e-mails from Senior Deputy City Attorney Lisa Herrick to attorney Ken Machado, counsel for former San José Mayor Tom McEnery, were found in Herrick's City e-mail account. (*See* OBM 4; 2PA379-88.) This is because Herrick copied to her City account all official e-mails she received in and sent from her private e-mail account. (2PA379-88.) The City produced all relevant e-mails from City accounts. (1PA044-45.)

- The first e-mail that Herrick sent to Machado from her personal account she also copied to her City account. (2PA379; *see also* the same e-mail at 2PA380, 383, 385 & 387.)
- The second e-mail, a response from Machado to Herrick's personal account, Herrick forwarded to her City account. (2PA380.)
- The third e-mail, a response to Machado's forwarded communication, was sent from Herrick's City account. (2PA382.)
- The fourth e-mail is from Machado to Herrick's City account. (2PA384.)
- And the fifth was sent from Herrick's City account. (2PA386.)

Herrick thus consistently ensured that official communications sent from or to her personal account were preserved in her City account. That is confirmed by the fact that the produced e-mails were printed from Herrick's City account. (Compare 2PA379-88 with 2PA360 (a print-out from a City account sent by Teresa Rodriguez has a header "Rodriguez, Teresa" on the

top of the page; Herrick's print-outs are in the same format, i.e. they have "Herrick, Lisa" in the header).)

B. Litigation

In August 2009, Smith filed a Complaint for Declaratory Relief and Injunctive Relief, alleging that "the City must produce the records sought by plaintiff in his [records request] including e-mails, text messages, and other electronic information relating to public business, regardless of whether they were created or received on the City owned computers and servers or the City Officials' personal electronic devices." (1PA007.) The complaint requested "a judicial determination and declaration that defendants are required to produce all records pertaining to the public's business, created or received by City Officials, regardless of what electronic device was used." (*Id.*) In July 2012 the parties brought cross-motions for summary judgment that were heard in March 2013. (1PA022-4PA845.) The superior court issued an order granting summary judgment in favor of Smith and denying the City Defendants' motion. (4PA846-55.)

The newspaper article Smith refers to is hearsay and the facts in the article were not admitted into evidence for their truth; the identity of the person who allegedly texted Councilmember Liccardo and whether the text was received during a Council meeting, were not an issue in the case. (4PA763-65, 4PA734-35, 4PA850 & 4PA850; *see* OBM 5-6.)

The Sixth District Court of Appeal accepted the City Defendants' application for writ review, and after briefing and argument, in a published opinion, granted a peremptory writ of mandate directing the superior court to vacate its decision, deny Smith's motion, and grant the City Defendants' motion. (*City of San Jose v. Sup. Ct.* (2014) 225 Cal.App.4th 75, 97, *review*

granted and opinion superseded sub nom. City of San Jose v. S.C. (Smith), 326 P.3d 976 (Cal. 2014).)

C. San Jose's Form of Government

Charter Article III section 300 provides: "The municipal government established by this Charter shall be known as the 'Council-Manager' form of government." (3PA542.)

San Jose City Charter Article IV section 400 provides that "[a]ll powers of the City and the determination of all matters of policy shall be vested in the Council, subject to the provision of this Charter and the Constitution of the State of California." (3PA543.) The Charter does not vest authority in individual Councilmembers, but gives it to them as a group. (*Id.* (§401)) The Charter prescribes the following method of Council action on behalf of the City: "The Council shall act only by ordinance, by resolution, or by motion made, seconded and adopted." (3PA555 (§600).) Section 601 provides that "[e]xcept as otherwise provided elsewhere in this Charter, no ordinance, resolution or motion shall be passed, adopted, or become effective unless it receives the affirmative vote of at least . . . six (6) members of the Council. . . ." (*Ibid.*)

The Charter's Article IX section 900 enumerates the City officers:

> The officers of the City shall consist of the Mayor, members of the Council, the City Manager, the City Attorney, the City Clerk, the City Auditor, the Independent Police Auditor, the directors or heads of the various City offices or departments, the members of the various boards and commissions and such other officers as may be provided for by this Charter or by action of the Council.

(3PA572.)

D. San Jose's Ethics and Records Policies

In 1990, Article VI section 607, added to the Charter a requirement for the Council to adopt a Code of Ethics, which the Mayor must review every two years, to regulate campaign and post-elections contributions to candidates for elected City Offices; lobbyist reporting and registration requirements; gifts to City officers and employees; and disqualification of former City officers and employees in matters related to their former duties. (3PA557.)

Since 2007, San Jose Municipal Code section 12.12.800, entitled "Disclosure of communications with registered lobbyists," provides as follows:

> Before taking any legislative or administrative action, the mayor, each member of the city council, the chair and each member of the San José redevelopment agency board of directors, and each member of the planning commission, civil service commission, or appeals hearing board **must disclose all scheduled meetings and telephone conversations with a registered lobbyist about the action. The disclosure may be made orally at the meeting before discussion of the action on the meeting agenda. The oral disclosure must identify the registered lobbyists, the date(s) of the scheduled meetings and telephone conversations, and the substance of the communication.** This section does not limit any disclosure obligations that may be required by this code or city policy.

(City Defendants' Request for Judicial Notice ("City's RFJN") Exhibit A (p. 29), emphasis added.) Additionally, when Smith made his request for public records, Council policy 0-32, entitled "Disclosure of Material Facts and Communications Received During Council Meetings," required "every member of the City Council to publicly disclose (1) material facts; and (2) communications received during Council meetings that are relevant to a matter under

consideration by the City Council which have been received from a source outside of the public decision-making process." (3PA526.) The communications had to be disclosed "at the Council meeting before the Council takes any action on the item," and "no later than public discussion of the item under consideration." (3PA527.) Those communications included text messages, e-mails, and phone calls. (3PA526.)

Council's 2010 revision to the City's Public Records Policy and Protocol, Council policy number 0-33, added a requirement that in addition to City records, it makes available to the public "any recorded and retained communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network." (3PA528.) The Council imposed that element of the policy only on themselves and their staff, i.e. on about 30 out of several thousand City employees. (*See ibid.*) Smith's Public Records Act request was made in June 2009, about ten months before the policy was adopted in March 2010. (1PA045.) [1]

III. ARGUMENT

A. Rules of Statutory Interpretation

In *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, a CPRA case, this Court stated that in determining legislative intent, courts must first look to the statute's words:

> When we interpret a statute, "[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. **We first examine the statutory language, giving it**

[1] In 2014, Council policies 0-32 and 0-33 were rescinded and incorporated into the San Jose Open Government Resolution. (<http://www.sanjoseca.gov/documentcenter/view/35087> [as of March 26, 2015].)

> **a plain and commonsense meaning**. We do not examine that language in isolation, but **in the context of the statutory framework as a whole** in order to determine its scope and purpose and to harmonize the various parts of the enactment. **If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences** the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] "Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, **giving significance to every** word, **phrase**, sentence, and part of an act in pursuance of the legislative purpose." [Citation.]

(*Id.* at 165-66, emphasis added.) Similarly, in *People v. Snook* (1997) 16 Cal.4th 1210, this Court explained that in statutory interpretation the key to the Legislature's intent is in the statute's language because the language was vetted in the legislative process: "In determining the Legislature's intent, a court looks first to the words of the statute. [Citation.] '[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.' [Citation.]" (*Id.* at 1215.)

In *California Federal Savings and Loan Association v. City of Los Angeles* (1995) 11 Cal.4th 342, this Court explained that "[w]e may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Id.* at 349.)

Prefatory material is "a passage that precedes the text's operative terms." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (Thomson/West 2012) p. 217 (hereafter Scalia).) The prologue can be "considered in determining which of various permissible meanings the dispositive text bears." (*Id.* at 218.)

> There are, however, two serious **limitations on the use of prologues**. First, an expression of specific purpose in the

> prologue will not limit a more general disposition that the operative text contains. There is no inconsistency between the two, since legislative remedies often go beyond the specific ill that prompted the statute. Second, **an expansive purpose in the preamble cannot add to the specific dispositions of the operative text.** After all, no legislation or private disposition pursues its stated purposes at *all* costs.

(*Id.* at 219, italics in the original, bold added.) (*See also* 2A Singer & Singer, Sutherland Statutory Construction (7th ed. 2008) § 47:4 (hereafter Sutherland); *Price v. Forrest* (1899) 173 U.S. 410, 427 [19 S.Ct. 434].)

"The judge should not presume that every statute answers every question, the answers to be discovered through interpretation." (Scalia, *supra*, p. 93, fn. omitted.) For example, Code of Civil Procedure section 1858 provides that what the statute omits should not be inserted:

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Code of Civ. Proc., § 1858.) And Civil Code section 3530 provides the following maxim: "That which does not appear to exist is to be regarded as if it did not exist." (Civ. Code, § 3530.)

"Where [a legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." (*Russello v. United States* (1983) 464 U.S. 16, 23 [104 S. Ct. 296].)

Finally, "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state. [Citations.]" (*Green v. Ralee Engineering Co.* (1988) 19 Cal.4th 66, 71-72.) Courts "do not sit

as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.)

B. The Text of the "Public Records" Definition Shows That the Writings at Issue Are Not Public Records.

1. "Public Business" and "Public Records" Are Separate Concepts Under the Act.

Under the Act, to constitute a "public record," a document must be 1) related to public business, and 2) "prepared, owned, used, or retained" by a "public agency":

> "Public records" includes 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. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(Gov. Code, § 6252, subd. (e), emphasis added.)

Smith conflates the terms "public business" and "public records." A "writing . . . relating to the conduct of the public's business" in the "public records" definition is not the same as a "public record." The CPRA treats those two terms as different concepts because a "writing relating to the conduct of public's business" is only one part of the "public record" definition. (Gov. Code, § 6252, subd. (e).) Smith's argument improperly disregards that distinction. (*See* OBM 2-3.) If an element of the definition is absent, the writing is not "a public record."

2. Not All Public Officers Are "Public Agencies."

The Act provides that "'[p]ublic agency means any state or local agency." (Gov. Code, § 6252, subd. (d).) The definition of a "local agency" does not refer to "individual council members," "employees," or

"public officials" but covers boards, commissions, agencies, and legislative bodies of local agencies:

> "Local agency" includes a county; **city**, whether general law or chartered; city and county; school district; **municipal corporation**; district; political subdivision; **or any board, commission or agency thereof**; other local public agency; **or entities that are legislative bodies of a local agency** pursuant to subdivisions (c) and (d) of Section 54952.

(Gov. Code, § 6252, subd. (a), emphasis added.) On the other hand, "'[s]tate agency' means every state office, **officer**, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution." (Gov. Code, § 6252, subd. (f).) The definition of a "state agency," which includes individual state officers, must be distinguished from that of a "local agency," which does not mention individual officers.

Under the "local agency" definition, the Council acting as a whole —as a legislative body—is deemed a public agency, but not individual Councilmembers when not acting as a body. Smith's contention that "a body politic" must include individuals because it can only act through individuals must fail in this context. (*See* OBM 16.) The state and cities are equally "bodies politic" and yet the Legislature chose to include officers only in the definition of "state agency." Therefore, individual Councilmembers are not "public agencies."

Throughout his brief, Smith insists that the Sixth Appellate District's opinion potentially narrows the "public records" definition to those documents that are created by the City Council only, and carves out all documents created by other City employees in City accounts that have until then been subject to the CPRA. (*See* OBM 2, 21, 26, 28 & n.4, 30 & 48-

49.) Smith attempts to create a non-issue. The court explained that its holding affects only "writings of individual city officials and employees" in their private accounts:

> 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. The City cannot, for example, "use" or "retain" a text message sent from a council member's smartphone that is not linked to a City server or City account. Thus, relying on the plain meaning of the language used in section 6252, subdivisions (a) and (e), we believe that the CPRA does not extend its disclosure mandate to writings of individual **city officials and employees** sent or received on their **private** devices and accounts.

(*City of San Jose*, *supra*, 225 Cal.App.4th at p. 89, italics in the original, bold added.) Thus, the opinion does not conflict with other law.

3. The Sixth District's Interpretation Was Reasonable.

The interpretation of "local agency" and "public records" in this case by the Sixth District Court of Appeal was not "narrow" but typical under the CPRA, as confirmed by *Regents of the University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383 (hereafter *Regents*), that considered "whether a public agency can be required . . . to seek records it does not prepare, own, use or retain in the conduct of its business." (*Id.* at 387; *see* OBM 2 & 29.)

In that case, the Regents had a contract with two private equity investment firms, and would receive financial information in confidence from them to monitor investments. (*Regents, supra*, 222 Cal.App.4th at pp. 388-89.) In 2003, the firms stopped providing the information. (*See id.* at 389.) In 2011, Reuters America LLC requested financial information from the Regents on all investments with those firms. (*See id.* at 393.) The

Regents did not have fund information for those firms after 2003. (*See ibid.*) Reuters sued. (*Id.* at 393.) The question was "whether the individual fund information which the trial court has ordered the Regents to make objectively reasonable efforts to obtain from [the investment firms] constitutes 'public records' within the meaning of the Act." (*Id.* at 396.)

The court agreed with the Regents that constructive possession is irrelevant to whether the sought information falls within the definition of public records. (*See Regents, supra*, 222 Cal.App.4th at p. 399.) The court explained that there are only two requirements for a document to qualify as a "public record:" "[U]nless the writing is related 'to the conduct of the public's business' *and* is 'prepared, owned, used, or retained by' a public entity, it is not a public record under the CPRA, and its disclosure would not be governed by the Act." (*Id.* at 399, italics in original.) The *Regents* court found that "[n]o words in this statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used, or retained them." (*Ibid.*)

In the present case, Smith argues that the Act's literal language of the "public records" definition leads to absurd results, and claims that it is ambiguous. (*See* OBM 22-24 & 29.) But the *Regents* court determined that the term "public records" is "unambiguous." (*Regents, supra*, 222 Cal.App.4th at p. 399 n.13.) The *Regents* court stated that public policy and other provisions of the Act are consistent with, and support, the plain meaning of the statute: Acknowledging the purpose of the Act to ensure public access to information about the people's business, the court stated that "the Act is clear that the Legislature intended to restrict the public's access to some material. A literal interpretation of section 6252, subdivision (e), is consistent with the purpose of providing the public with access to public records while recognizing that the access has some limits."

(*Id.* at 400.) Thus, in the present case, the Sixth Appellate District's analysis of the "public records" definition was reasonable.

Board of Pilot Commissioners v. Superior Court (2013) 218 Cal.App.4th 577, is another decision that focused on the "public records" definition. There, the Pacific Merchant Shipping Association asked the Board for pilot logs, prepared by a private organization, the San Francisco Bar Pilots, that were not used or maintained by the Board but that related to a public interest in safe navigation. (*See id.* at 596.) The president of the private organization was also a public official for some purposes because by virtue of his presidency he served as Port Agent of the Board. (*Id.* at 581.)

The *Board of Pilot Commissioners* court considered the well-accepted rules that "'[t]he mere possession by a public [officer] of a document does not make the document a public record,'" and that "'[a]ny record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.'" (*Id.* at 593, citations omitted.) The court decided that the pilot logs were not public records, and found it significant that the Bar Pilots' president never used the logs in the performance of his duties as Port Agent: "If the data itself is not a public record, the fact that the Board could theoretically request it from Bar Pilots does not make it so." (*Id.* at 600.) The same principle applies here. The two-prong approach to analyze the "public records" definition is sound.

4. The Act's Preamble Cannot Extend the Meaning of Unambiguous Provisions.

While Smith argues that the Act should cover electronic communications of individual local officials in their private accounts, he does not point to any express language supporting that claim. (*See, e.g.* OBM 14-20 & 23-24.) It is well-established that a preamble, such as

section 6250, cannot extend the meaning of an unambiguous statute, and cannot be used to create doubt or uncertainty which does not otherwise exist. (*See* Scalia, *supra*, at p. 219; Sutherland, *supra*, at § 47:4; *see Price v. Forrest, supra,* 173 U.S. 410, 427.) Because the "public records" definition is unambiguous, the Act's Legislative findings and declarations in section 6250 may not be used to create ambiguity or to add to the terms of the statute.

5. The Legislature's Nuanced Approach Does Not Create Absurd Results.

In *Silver v. Brown*, which Smith cites for the rule that literal language of a statute may be disregarded to avoid absurd results, there were "ambiguities and technical errors" in the literal provisions that needed correction. ((1966) 63 Cal.2d 841, 846; *see* OBM 22.) Here, the absurd results rule does not apply because the definition of "public records" is not ambiguous and contains no errors. The literal reading of section 6252 does not yield absurd results. As explained in Part C below, the Act reflects the Legislature's "more nuanced approach" than what Smith advocates. (*See In re C.H.* (2011) 53 Cal.4th 94, 107.) Judicial forbearance is, therefore, appropriate. The Supreme Court of the United States remarked in *City of Ontario, California v. Quon* that "[t]he Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment . . . . " ((2010) 560 U.S. 762-63 [130 S.Ct. 2619].)

C. The Broad Structure of the Act Confirms that the Writings at Issue Are Not Covered by the "Public Records" Definition.

As mentioned above, communications on private electronic devices of the Mayor, City Councilmembers, and their staffs, to and from their

private accounts, are not maintained in the City's system and thus are not accessible to the City.[2] Smith views this lack of access as irrelevant because he considers the Mayor, Councilmembers and their staffs as the City's agents. But the statutory scheme supports the City's interpretation.

1. Section 6270

In section 6270 the Act provides that state and local agencies are meant to be able to access public records directly:

> Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency **from providing the record directly** pursuant to this chapter. Nothing in this section requires a state or local agency to use the State Printer to print public records. Nothing in this section prevents the destruction of records pursuant to law.

(Gov. Code, § 6270, subd. (a), emphasis added.) A public agency is not able to "directly" access its officials' private e-mail and phone accounts:

> The ownership of the equipment, when consent to interception exists, when interception occurs in the ordinary course of business, who provides the e-mail service, who sent the e-mail and who is the recipient can become key facts when determining **whether an employer can investigate e-mail and its contents**. Indeed, the owner of the facilities may even be viewed as a party to the e-mail communication. The **Electronic Communication Privacy Act of 1986 (EPCA) prohibits the interception and disclosure of electronic mail** unless the originator of the e-mail, the recipient of the e-mail or the owner of the facilities used for the e-mail consents to such interception or disclosure or unless the interception is by the provider of the service in the normal course of business related to the service or to protect the provider or unless the

[2] If such communications are forwarded from a private account to a City account, they are no longer inaccessible – but such writings are not at issue here.

> interception occurs in the ordinary course of business **or unless specific legal process is issued, e.g. a proper search warrant, court order, or subpoena**.

(Hartsfield, 1 Investig. Employee Conduct (2014) § 6:38, footnote citations omitted, emphasis added.)

2. Sections 6254.19, 6253.9 and 6253

Electronic records of a "public agency" appear to comprise those that are "stored within an information technology system of a public agency:"

> Nothing in this chapter shall be construed to require the disclosure of an information security record of a public agency, if, on the facts of the particular case, disclosure of that record would reveal vulnerabilities to, or otherwise increase the potential for an attack on, an information technology system of a public agency. Nothing in this section shall be construed to limit **public disclosure of records stored within an information technology system of a public agency** that are not otherwise exempt from disclosure pursuant to this chapter or any other provision of law.

(Gov. Code, § 6254.19, emphasis added.) Such interpretation is bolstered by section 6253.9, which refers to electronic records held by the public agency itself and not its agents: if the agency has information that is a non-exempt public record, the agency must make the information available "in any electronic format in which **it holds** the information." (Gov. Code, § 6253.9, subd. (a), emphasis added.) Additionally, section 6253 provides that public records are open for inspection "**during the office hours** of the state or local agency," and that "each state or local agency, upon a request for a copy . . . shall make the [non-exempt] records promptly available to any person." (Gov. Code, § 6253, subds. (a) & (b), emphasis added.) Thus, "public records" are those held by a public agency in its system.

3. Sections 6252.5, 6252.7, 6254.21, and 6254.5

Smith contends that a "public agency" must include public officials. (*See, e.g.* OBM 15-18.) But that is not always the case. In addition to distinguishing between state and local public agencies by omitting public "officers" from the definition of a "local agency," the Legislature also mentions individuals in other parts of the Act while, presumably intentionally, omitting them from the "local public agency" definition and thus from the definition of "public records." For example, section 6252.5 provides that "**an elected member or officer** of any state or local agency is entitled to access to public records of that agency on the same basis as any other person." (Gov. Code, § 6252, emphasis added.) Section 6252.7 provides that "the local agency . . . shall not discriminate between or among any of those **members** [of a legislative body of a local agency] as to which writing [of the legislative body or the agency] or portion thereof is made available or when it is made available [to them]." (Gov. Code, § 6252.7, emphasis added.) Section 6254.21 provides for protections of elected officials' home addresses and telephone numbers, and includes—for purposes of that section only—"**members of a city council**" and "**mayors**" within the definition of "elected or appointed official." (Gov. Code, §6254.21, subds. (f)(6) & (10), emphasis added.) The Legislature defines "public agency" as including its agents and employees only for purposes of a single section in the Act—section 6254.5—as follows:

> Notwithstanding any other provisions of law, whenever **a state or local agency** discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. **For purposes of this section**, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency office, or employment.

. . . .

(Gov. Code, § 6254.5, emphasis added.) If the Legislature wished to expand the definition of "public agency" to include its "agents," it would have stated "for purposes of this chapter" instead of limiting the definition to the specific section in which it appeared.

Reading the entire CPRA statute as a whole, it is evident that the operative language of the "public records" definition means that individual officials such as councilmembers are not "public agencies," and that writings in their private e-mail and phone accounts are not "public records."

4. Section 6250

The conclusion that the writings at issue here are not within the Act's definition of "public records" is further supported by the fact that, in enacting the CPRA, the Legislature balanced the public's right to know the people's business against individual privacy rights. (*See* Gov. Code, § 6250.) Based on section 6250, this Court recognized that "[t]he right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Sup. Ct.* (2006) 39 Cal.4th 1272, 1282.) The Court also found that "'[t]he same dual concern' for privacy and disclosure the Legislature stated in Government Code section 6250 'appears throughout the [A]ct.' [Citation.]" (*Ibid.*)

Privacy rights are implicated here because even if private communications were redacted and only those responsive to a request were produced, either the search, or its verification, would require review of **all** private communications in the private accounts of Councilmembers and employees. Such a search would intrude on and reveal intimate details of their lives. It would be much more invasive than the search of city-owned pager accounts considered in *City of Ontario, California v. Quon*, where the United States Supreme Court stated that the employer's "audit of messages

on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been." (560 U.S. 746, 762-63 [130 S.Ct. 2619].)

Even if the search was made by the account owner, this does not end the privacy issue because any verification whether the owner's search was performed accurately and honestly would require an additional review by City staff or the courts. If the City is not allowed to rely on the ethical rules and records preservation and disclosure processes it has in place, it would have to actually inspect Councilmembers' personal accounts in order to determine whether one of them has "chosen" to receive a public-business-related communication from a citizen in a private account. (*See supra* Part II.D; OBM 3, 35 & 43.)

The *Quon* Court cautioned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." (*Quon, supra*, 560 U.S. at p. 759.) The Court noted: "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." (*Id.* at 760.) Those remarks were made in the context of "employer-provided technology equipment." The case for privacy protection is even stronger for accounts and devices that are not provided by an employer but are personal, such as here.

The fundamental purpose of the Act is to allow access to information concerning the people's business, but the Legislature tempered this declaration by being "mindful of the right of individuals to privacy." (Gov. Code, § 6250.)

> In 1972, Californians, by initiative, added an explicit right to privacy in the state's Constitution: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Cal. Const., art. I, sec.1, italics added.)

(*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 926.) This Court stated: "However much public service constitutes a benefit and imposes a duty to uphold the public interest, a public sector employee, like any other citizen, is born with a constitutional right of privacy." (*Long Beach City Employees Association v. City of Long Beach* (1986) 41 Cal.3d 937, 951-52.) Despite the fact that elected officials and City employees are public servants, they have privacy rights guaranteed to every citizen of this State. (*See* Cal. Const., art. I, § 1.) A requirement that individuals submit their personal computers and other devices for government review or verification of searches for documents would disturb the careful balance of rights reflected in the Act.

5. Proposition 59

Contrary to Smith's argument, Proposition 59, enacted into the California Constitution as Article 1, section 3(b)(1), does not affect the analysis. [3] (*See* OBM 27-29.) It reaffirmed prior law regarding how the Act should be construed, and thus had little impact on the Act's interpretation:

> In 2004, California voters approved Proposition 59, which enshrined in our state Constitution the public's right to access records of public agencies. (Cal. Const., art. I, § 3, subd. (b).) . . . The amendment requires the Public Records Act to "be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal.

[3] Smith does not claim that he ever proceeded under Proposition 59.

> Const., art. I, § 3, subd. (b), par. (2).) "**Such was the law prior to the amendment's enactment.**"'

(*Los Angeles Unified Sch. Dist. v. Sup. Ct.* (2007) 151 Cal.App.4th 759, 765, emphasis added.) While Proposition 59 provides that "the meetings of public bodies and the writings of public officials shall be open to public scrutiny" (Cal. Const., art. I, § 3, subd. (b)(1)), it is simply consistent with the Act's definition of "state agencies" that includes "state officers." (Gov. Code, § 6252, subd. (f).) There is no indication that the mention of "public officials" was intended to amend the definition of "local agencies" in the Act; to the contrary, the Proposition expressly affirmed the status quo ante:

> This subdivision does not **repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records** or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(Cal. Const., art. I, § 3, subd. (b)(5), emphasis added.) In *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, this Court stated that "in light of article I, section 3, subdivision (b)(5), we may not countermand the Legislature's intent to exclude or exempt information from the CPRA's disclosure requirements where that intent is clear." (*Id.* at 166.)

And Proposition 59 does not change established privacy rights:

> **Nothing in this subdivision supersedes or modifies the right of privacy** guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(Cal. Const. art. I, § 3, subd. (b)(3), emphasis added.)

6. The Brown Act

The Ralph M. Brown Act also supports the City's interpretation. The Brown Act ensures that all meetings of the legislative body of a local agency are conducted in public. (*See* Gov. Code, §§ 54950 *et seq.*) But the Brown Act also specifically recognizes that it does **not** apply to "[i]ndividual contacts or conversations between a member of a legislative body or any other person." (Gov. Code, § 54952.2, subd. (c)(1).) Such individual encounters may lawfully occur outside of a public meeting and without public notice. (*See id.*) The California Constitution expressly grants the people the "right to instruct their representatives [and] petition government for redress of grievances." (Cal. Const., art. I, § 3, subd. (a).) Smith's interpretation runs counter to these principles and could have a chilling effect on the public wishing to contact their Councilmembers by phone, e-mail, or text message.

7. Smith's Cases Are Not on Point.

The cases on which Smith relies do not consider the issue whether individual officials are included in the Act's definition of "public agency." (*See* OBM 16-17, 24.) In *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, not a CPRA case, this Court considered the issue of attorney-client privilege in the context of litigation discovery: whether films of the plaintiff that were taken by an independent investigator on the request of an attorney for the defendant company were protected by the attorney-client privilege or whether they were subject to discovery production. (*Id.* at 170-71.)

Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, which Smith also cites, is not a CPRA case, either. The *Fiol* court interpreted the Fair Employment and Housing Act in the context of a sexual harassment lawsuit in order to determine whether the "agent of an employer" language imposes

personal liability on a non-harassing supervisor. (*See id.* at 1328.) Notably, the *Fiol* court stated that if the Legislature intended to impose personal liability on non-harassing supervisors for failure to take action on harassment complaints, it should amend the statute to expressly state so, and that the determination of the issue rested on "diverse public policy considerations" that were "not within the purview" of the court. (*Id.* at 1329-30.) And in *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, the question was whether the Act required disclosure of financial data in a city's possession, submitted to the city by a waste disposal company, on which data the city relied in granting the company a rate increase. (*Id.* at 775.) None of those cases are on point.

D. The City's Interpretation of "Public Records" Definition Is Reasonable in Light of the CPRA's Purpose.

This Court stated that "the Legislature enacted the CPRA 'for the purpose of increasing the freedom of information by giving members of the public access to information **in the possession of public agencies**. [Citation.]" (*Copley Press, Inc., supra,* 39 Cal.4th at p. 1281, emphasis added.) This Court explained that access to government files is needed to verify government accountability:

> Openness in government is essential to the functioning of a democracy. "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." [Citation.]

(*Internat. Federation of Prof. & Technical Engineers, Local 21, AFL-CIO v. Sup. Ct.* (2007) 42 Cal.4th 319, 328-29.)

It is undisputed that writings related to public business contained in City-owned devices and accounts are public records. "Putting aside the issue of the private electronic devices for the moment, it is **indisputable** that any e-mails contained on the City's municipal computers, to the extent they contain 'information relating to the conduct of the public's business,' constitute 'public records' for purposes of the PRA. [Citation.]" (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 373, emphasis added.) And in *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, the court noted that if a member of the city council had e-mailed from city offices discussing city business, "it is **undeniable** that the records would be 'public records' that must be produced." (*Id.* at 1300, emphasis added.) Such writings were produced in this case. (1PA044-46.)

But it is not the CPRA's purpose to disclose any and all information in which the public may be interested. Records otherwise private do not become "public records" simply by virtue of public interest in their content. (*See Bd. of Pilot Comrs. for the Bays of San Francisco, San Pablo and Suisun v. Sup. Ct.* (2013) 218 Cal.App.4th 577, 600.) There is no indication that the Act requires City Councilmembers and employees to open their homes so that their personal diaries and correspondence could be inspected for presence of writings that mention the City of San Jose. Such an interpretation of the Act would be unreasonable, and yet, it would be required if the Act was extended to writings at issue here. If Smith's position is taken to its logical conclusion, non-electronic files at public employees' homes would become subject to the Act, too. There is no indication that that was the Legislature's intent. [4] If it had been, it would

[4] It is unclear to what lengths a public entity would be obliged to extend in face of an individual's non-cooperation, and whether public entities would

have become apparent long ago. Sharing a password to one's private cell phone or e-mail account, especially with one's employer, for purposes of inspection, would be equally unthinkable to most. For purposes of the Constitution, the privacy rights of public employees are the same whether they are considered "agents" of the public agency or not. (*See, e.g.* OBM 2, 17, 19-20.)

Like Reuters in the *Regents of University of California v. Superior Court, supra*, 222 Cal.App.4th 383, Smith argues that *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, supports him because the *CPOST* Court stated that "the location in which public records are stored does not diminish their public character." (*See* OBM 26-27, 31-32, & 44.) The *Regents* court took the view that San Jose has been advancing—that "*CPOST* did not involve the question of what constitutes a public record." (*Regents*, 222 Cal.App.4th at 402.) "There was no dispute that the records sought [in *CPOST*] were public records within the meaning of section 6252, subdivision (e)." (*Id.*) The *Regents* court explained:

> The Supreme Court did say "[w]e consider it unlikely the Legislature intended to render documents confidential based on their location, rather than their content," but it did so in the context of applying the peace officer personnel file privilege of Penal Code section 832.8. [Citation.] **The Supreme Court had no occasion to review the question of whether "possession" in section 6253, subdivision (c) includes constructive possession or whether constructive possession should be written into section 6252, subdivision (e).**

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be required to institute lawsuits against such non-cooperating individuals in order to demonstrate good faith efforts to comply with judgments.

(*Id.*, emphasis added.) The *Regents* case, like here, concerned the issue whether certain information is covered by section 6252(e)'s definition of public records. Here, as in *Regents*, the *CPOST* decision is not pertinent. [5]

E-mails and text messages from and to private electronic accounts are private records unless and until they fulfill the dual requirement of the public records definition under the Act. If any such e-mail was "prepared, owned, used, or retained" by the City, i.e. here, by the Council acting as a whole in its capacity as the City's legislative body, or was forwarded to a City department for action, or to a City e-mail account, then it would become a public record because it would have been incorporated into the Council's official records or could be found in the City's system. The City discloses such writings.

Smith's alleged requirement for consistency of the Public Records Act with state and federal discovery rules is another distraction. (*See* OBM 37-39.) Even highly relevant, nonprivileged information may be shielded from discovery if its disclosure would impair a person's Constitutional "inalienable right of privacy." (*See Britt v. Sup.Ct. (San Diego Unified Port Dist.)* (1978) 20 Cal.3d 844, 855-56; *Pioneer Electronics (USA), Inc. v. Sup.Ct. (Olmstead)* (2007) 40 Cal.4th 360, 370 [right of privacy "protects the individual's *reasonable* expectation of privacy against a *serious* invasion" (emphasis in original)].) Smith does not cite any authority that public officials' private e-mail and phone accounts would be subject to local agencies' control and thus discoverable in a suit against the local agency. Even if the Act and the discovery rules mandated the same

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[5] Contrary to Smith's argument, this Court indicated that in appropriate circumstances, even "an otherwise disclosable document" may become non-disclosable when placed in a protected file. (*Copley Press, Inc., supra,* 39 Cal.4th at p. 1293 n.15.) (*See* OBM 2, 26-27, 31-33, & 44.)

production, Smith's claim that a local agency would have to produce in discovery communications in the officials' private accounts is unsupported.

The City has thousands of employees, and generally relies on their integrity to comply with CPRA requests. But if their personal e-mail and phone accounts and home computers were also subject to the Act, and such disclosures required independent verification, the burden and cost could be overwhelming. And the City could not implement such searches if employees declined to cooperate, as they could rightfully do. (*See supra* Part III.C.1.) In light of the Act's short compliance period, the Legislature could not have envisioned public agencies instigating court proceedings to access their employees' private files, devices, and accounts. The current scope of the Act ensures a more proper balance between the public's right to obtain information about the people's business and the burdens on tax-funded public agencies to comply with those requests.

E. History of the Public Records Law Underscores that Writings in Private Files and Accounts Are Not Public Records.

In *Sander v. State Bar of California* (2013) 58 Cal.4th 300, this Court explained that the right of a citizen to inspect public writings has its origin in the common law:

> Historically "'**[a]t common law every person was entitled to the inspection, either personally or by his agent, of public records**, including legislative, executive, and judicial records, **provided he had an interest therein such as to enable him to maintain or defend an action** for which the documents or records sought could furnish evidence or necessary information.'" [Citation.] **In California, the right of public access was codified in 1872 in statutes that did not limit the right of those seeking access for the purpose of litigation.** [Citation.] ¶ The State Bar is correct that under early California law, the term "public records" was generally used to refer to the official records of public entities.

(*Id.* at 313-14, citations omitted, emphasis added.) Documents subject to public inspection and disclosure were those kept in public offices:

> The case law recognized, however, that the right of public access was not limited to "public records" as so defined. First, relevant statutory language contemplated disclosure of some "other matters." [Citation.] Prior to the passage of the CPRA in 1968, both former Political Code section 1032 and its successor statute, Government Code section 1227 also provided: "The public records *and other matters* **in the office of any officer are at all times, during office hours**, open to the inspection of any citizen of this State." [Citation.]

(*Id.* at 314, citations omitted, italics in the original, bold added.) [6]

> The CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency, and the record must be disclosed unless a statutory exception is shown. **Under the common law, on the other hand, no such presumption exists.**

(*Sander, supra*, 58 Cal.4th at p. 323, emphasis added.) This Court concluded that the right of public access to the records of public entities before the 1968 adoption of the CPRA "was not limited . . . to the official records of government actions." (*Id.* at 317.) But there is no indication that under either the early common law or the pre-CPRA statutory scheme, public records could be found in private desks at public employees' homes. Under the CPRA, "public records" by definition are not kept in private files or private accounts. On suspicion of improper dealings, such as corruption, the Attorneys General and district attorneys can seek access to private files

[6] "Case law interpreted the term 'other matters' based upon fundamental public policy: 'The <other matters> referred to . . . is matter which is <public,> and in which the whole public may have an interest.'" (*Id.* at 314.) (citation omitted) Whether a writing was "other matter" was a fact-specific inquiry. (*Id.* at 315.)

and accounts through subpoenas. (Bus. & Prof. Code, § 16759 & Gov. Code, § 11180.)

F. Non-California Cases

The California Public Records Act is modeled on the federal Freedom of Information Act, so "the judicial construction and legislative history of the federal act serve to illuminate the interpretation of its California counterpart." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447.) In *Kissinger v. Reporters Committee for Freedom of the Press* (1980) 445 U.S. 136 [100 S.Ct. 960], the high Court held that the State Department did not withhold agency records because Congress did not mean that an agency improperly withholds a document removed from the agency's possession before a FOIA request had been filed because the agency then has no custody or control over the document, and failure to sue a third party to obtain possession is not "withholding." (*Id.* at 150-51.) The FOIA's "exception for searching and collecting [requested records] certainly **does not suggest that Congress expected an agency to commence lawsuits in order to obtain possession of documents requested**, particularly when it is seen that where an extension is allowable, the period of the extension is only for 10 days." (*Id.* at 153, emphasis added.)

In Pennsylvania, the court in *In re Silberstein* (Pa. Commw.Ct. 2011) 11 A.3d 629 (hereafter *Silberstein*), decided that a township commissioner's e-mails on his personal computer were not public records under the Pennsylvania Right-to-Know Law because a commissioner is not a local agency. (*Id.* at 633.) Among other records, the requester sought "[a]ny and all electronic communications or written correspondence" of two commissioners with township citizens regarding certain township business.

(*Id.* at 630.) The township produced only documents and e-mails that were on the computers in its possession and control, and did not produce documents or e-mails that were on computers solely maintained by the two commissioners, or businesses where they worked or that they owned, because the township did not consider electronic communications between an individual commissioner and citizens as public records. (*See ibid.*)

The court considered "whether requested records contained on a township commissioner's personal computer are public records in the possession or control of the township." (*Silberstein, supra*, 11 A.3d at p. 632.) The court held that such records cannot be deemed public records of the local agency because an individual commissioner is not a public entity as he or she has no authority to act alone on behalf of the township. "[U]nless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, as a local agency, or were later ratified, adopted or confirmed by York Township, said requested records cannot be deemed "public records." (*Id.* at 633.)

In *Adkisson v. Abbott*, 2014 WL 2708424, discussed by Smith, the Texas Court of Appeals withdrew its opinion, and substituted another, non-published opinion at 2015 WL 1030295. (*See* OBM 46-47.)

G. Alternatively, Even If Writings in Public Councilmembers' and Employees' Private Accounts Were "Public Records," They Should Not Be Subject to Disclosure.

The City Defendants did not invoke CPRA exemptions for the writings that Smith requested because the City's position has always been that the writings at issue do not fall within the Act's definition of "public records." (*But see* 1PA019:21-23.) This Court, however, has discretion to consider any issue presented by the case. (*See Cedars-Sinai Med. Ctr. v.*

Superior Court (1998) 18 Cal.4th 1, 5-7.) As an alternative resolution of the issue—should this Court find that e-mails and text messages from councilmembers' and public agency employees' personal accounts fall within the "public records" definition—the City Defendants respectfully request the Court to consider taking the next step in the disclosure analysis because "[i]t is an issue of law that does not turn on the facts of this case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time." (*Id.* at 6.)

1. Should the Court Find that These Writings Are "Public Records," the City Defendants Request the Court to Take the Next Step and Balance the Public's Interest in Disclosure Against Councilmembers' and Employees' Reasonable Expectations of Privacy.

In *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, this Court analyzed public employees' privacy rights in the context of a CPRA request. The Court found useful "for examining how competing interests are managed in the privacy context" its *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, "framework for analyzing constitutional invasion of privacy claims:"

> An actionable [constitutional privacy] claim requires three essential elements: (1) the claimant must possess a legally protected privacy interest [citation]; (2) the claimant's expectation of privacy must be objectively reasonable [citation]; and (3) the invasion of privacy complained of must be serious in both its nature and scope [citation]. If the claimant establishes all three required elements, the strength of that privacy interest is balanced against countervailing interests. [Citation.] In general, the court should not proceed to balancing unless a satisfactory threshold showing is made. A defendant is entitled to prevail if it negates any of the three elements. [Citation.] A defendant can also prevail at the

> balancing stage. An otherwise actionable invasion of privacy may be legally justified it if substantively furthers one or more legitimate competing interests. [Citation.] Conversely, the invasion may be unjustified if the claimant can point to "feasible and effective alternatives" with "a lesser impact on privacy interests." [Citation.]

(*County of Los Angeles, supra,* 56 Cal.4th at 926, citations omitted.) "Legally recognized privacy interests include 'interests in precluding the dissemination or misuse of sensitive and confidential information'. . . ." (*Id.* at 927.)

The *County of Los Angeles* Court stated that "'[a] <reasonable> expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.' [Citation.] 'The reasonableness of a privacy expectation depends on the surrounding context. We have stressed that 'customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.'" (*County of Los Angeles, supra,* 56 Cal.4th at p. 927.) "Custom and practice can reduce reasonable expectations of privacy in information typically considered even more sensitive than addresses and phone numbers." (*Id.* at 928.)

The *County of Los Angeles* Court noted that *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, concerned a CPRA request for names and job titles of those city employees with salaries over $100,000. (*County of Los Angeles,* 56 Cal.4th at p. 928.) The *County of Los Angeles* Court explained that such a list is not exempt from disclosure because payroll information is public and, therefore, public employees do not have a reasonable expectation of privacy in that regard:

> [I]n light of the Attorney General's long-standing opinion that government payroll information is public, **the widespread**

> **practice of state and local governments** to disclose this information, and the strong public policy favoring transparency in government.
>
> As in *IFPTE,* disclosure of employees' home contact information to their union "**is overwhelmingly the norm**"

(*Id.* at 928-29, citations omitted, emphasis added.) While the *County of Los Angeles* and *IFPTE* opinions illustrate how to analyze public employees' privacy rights in the CPRA context, the cases differ from the present circumstances. First, the employers there possessed the requested information, while here the City does not. It is undisputed that the e-mails to which Smith seeks access are not on the City's servers so the City is unable to simply turn them over. Second, the content of private e-mail and text accounts is reasonably and traditionally considered private, even more so than a home address or phone number. There is no "consistent" "custom and practice" in California of cities obtaining access to their employees' or councilmembers' personal e-mail and text accounts for review and public disclosure. It's not "the norm."

> The mere status of being employed by the government should not compel a citizen to forfeit his or her fundamental right of privacy. **Public employees are not second-class citizens** within the ken of the Constitution. . . .
>
> [L]egal distinctions between public and private sector employees that operate to abridge basic rights cannot withstand judicial scrutiny unless justified by a compelling governmental interest. However much public service constitutes a benefit and imposes a duty to uphold the public interest, a public sector employee, like any other citizen, is born with a constitutional right of privacy. **A citizen cannot be said to have waived that right in return for the 'privilege' of public employment**, or any other public benefit, unless the government demonstrates a compelling need.

(*Long Beach City Employees Assn. v. City of Long Beach, supra*, 41 Cal.3d 937, 951–52, citations omitted, emphasis added.)

2. If the Requested Writings Are "Public Records," the City Defendants Request the Court to Also Balance the Public's Interest in Disclosure Against the Public's Interest in Non-Disclosure.

In *Times Mirror Co. v. Sup. Ct.* (1991) 53 Cal.3d 1325, this Court explained that even if acting in their public capacity, decision-makers are entitled to keep some of their conversations out of the public domain, even if they concern public matters:

> If the law required disclosure of a **private meeting between the Governor and a politically unpopular or controversial group**, that meeting might never occur. Compelled disclosure could thus **devalue or eliminate altogether a particular viewpoint** from the Governor's consideration. **Even routine meetings between the Governor and other lawmakers, lobbyists or citizens' groups might be inhibited** if the meetings were regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press.
>
> In sum, while the raw material in the Governor's appointment calendars and schedules is factual, **its essence is deliberative**. Accordingly, we are persuaded that the **public interest in withholding disclosure** of the Governor's appointment calendars and schedules **is considerable.**

(*Id.* at 1344, fn. omitted, emphasis added.)

When the Los Angeles Times argued that the public was "entitled to know how [the Governor] performs his duties, including the identity of persons with whom he meets in the performance of his duties as Governor," the Court stated that the argument did not "lack substance, but pragmatism." (*Times Mirror Co., supra,* 53 Cal.3d at pp. 1344-45.) "The deliberative process privilege is grounded in the **unromantic reality of politics**; it rests

on the understanding that **if the public and the Governor were entitled to precisely the same information, neither would likely receive it.**" (*Id.* at 1345, emphasis added.) Knowing that the fact that the meeting occurred could be made public, either the Governor would refrain from meeting with persons of certain political persuasions, or those people would be reluctant to meet with the Governor. (*See id.* at 1354.) "To disclose *every* private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." (*Id.* at 1355, italics in the original.)

The same concerns apply to the Councilmembers' communications at issue here. If the Court decides that the communications in the Councilmembers' personal e-mail and phone accounts are public records, the Court should follow its reasoning in the *Times Mirror* case and find as a matter of law that the public interest in nondisclosure clearly outweighs the public interest of disclosure. If found to be "public records," such communications would implicate Councilmembers' mental processes. It is well-established that judicial inquiry into the "mental processes" of legislators is inappropriate. (*County of Los Angeles v. Sup. Ct.* (1975) 13 Cal.3d 721, 727-28.)

IV. CONCLUSION

The City of San Jose is firmly committed to the principle that government activities should be open to public scrutiny and inspection. But according to the unambiguous language of the Act, individual Councilmembers and employees are not "public agencies," and a writing is not a "public record" based simply on its content.

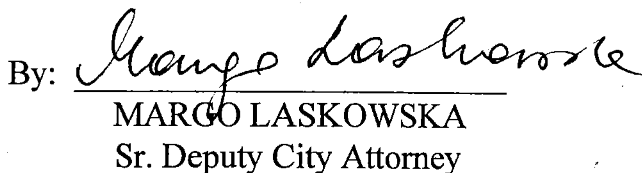
Contrary to Smith's argument, there is no doubt that employees' e-mails in City accounts are "owned" by the City; the same applies to "personnel, medical, or similar files," investigation files, and library circulation records. (*See* OBM 21.) But e-mails and text messages in private accounts of Councilmembers and employees are different because the City has no access to those accounts. And Smith's proposed interpretation of the Act would expand the definition of public records not only to contents of personal cell phone and e-mail accounts but to all personal "writings" at home, including private letters, journals, home movies, photograph albums, and other such personal documents. Smith's approach would disturb the Legislature's nuanced balance of public access and privacy rights implicit in the CPRA. The plain language of the CPRA should control here, and it is up to the Legislature to amend it, if necessary.

The City Defendants request the Court to affirm the Sixth Appellate District's decision.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: March 27, 2015

By: 

MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants and
Petitioners CITY OF SAN JOSE, et al.

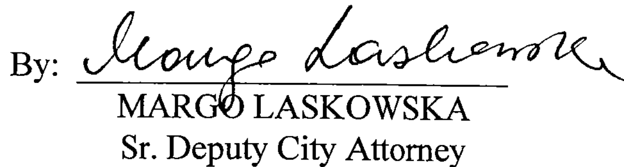
V. CERTIFICATE REGARDING WORD COUNT

I, Margo Laskowska, counsel for Defendants and Petitioners, hereby certify, pursuant to California Rules of Court, Rule 8.204 and Rule 8.520, that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this Answer Brief on the Merits, exclusive of tables, cover sheet, and proof of service, according to my computer program is 11,083 words.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: March 27, 2015

By: 
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants and Petitioners CITY OF SAN JOSE, et al.

PROOF OF SERVICE

CASE NAME: CITY OF SAN JOSE v. SUPERIOR COURT (TED SMITH)

SUPREME COURT OF CALIFORNIA CASE NO.: S218066
(Court of Appeals, Sixth District Case No.: H039498)
(Superior Court, County of Santa Clara Case No.: 1-09-CV-150427)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San José, California 95113-1905, and is located in the county where the service described below occurred.

On March 27, 2015, I caused to be served the within:

ANSWER BRIEF ON THE MERITS

☒ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Addressed as follows:

James McManis, Esq. Matthew Schechter, Esq. Christine Peek, Esq. Jennifer Murakami, Esq. McMANIS FAULKNER A Professional Corporation 50 West San Fernando Street, 10th Floor San José, California 95113 Phone Number: (408) 279-8700 Fax Number: (408) 279-3244	Attorneys for Plaintiff and Real Party in Interest TED SMITH One (1) Copy
Clerk of the Court Sixth District Court of Appeal 333 West Santa Clara Street, Suite 1060 San José, California 95113 Phone Number: (408) 277-1004	One (1) Copy

Clerk of the Court
Superior Court of California
County of Santa Clara
191 North First Street
San José, California 95113
Phone Number: (408) 882-2100

One (1) Copy

☒ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

☒ causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

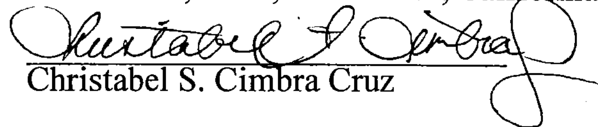
I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

Addressed as follows:

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102
Phone Number: (415) 865-7000

Original and Eight (8) Copies
with eSubmission

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 27, 2015, at San José, California.



Christabel S. Cimbra Cruz