No. S218066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, *et al.*,

Defendants and Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff and Real Party in Interest

REAL PARTY IN INTEREST'S 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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ISSUE PRESENTED

Whether written communications about the public's business, sent or received by public officials and employees using personal equipment such as personal electronic devices or personal email and texting accounts, are "public records" within the meaning of the California Public Records Act ("CPRA"), and article I, section 3, subdivision (b)(1) of the California Constitution.

INTRODUCTION

This petition invites the Court to answer a significant question of first impression: although government officials' emails and texts about government business are "public records" subject to disclosure when sent or received using a government email or texting account,

may public employees and officials avoid disclosure through the simple expedient of sending or receiving those emails and texts using a private device or account? This issue presents an important question of public policy that concerns all citizens. Openness in government is critical to a functioning democracy. If the Court of Appeal's decision in this case is allowed to stand, public employees can easily avoid accountability and subvert the intent of the CPRA by hiding any communications that suggest corruption or the appearance of corruption in private accounts.

The CPRA provides that public records of "each state or local agency" are open to public inspection and must be made available to any person upon request. It also sets forth a broad definition of a public record: "[A]ny 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." Gov. Code § 6252(e). The California Constitution also provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, § 3,

subd. (b)(1) (emphasis added). The question raised here is whether text messages and email communications related to the public's business and created by public officials or employees using their own personal electronic devices or accounts are covered by the CPRA, or if such records are categorically shielded from disclosure.

Notwithstanding the broad definition of a public record, the purpose of the CPRA, and the command of article I, section 3(b) of the California Constitution, the Sixth District Court of Appeal published an opinion in this case holding that a local agency, in response to a CPRA request, had no responsibility to produce messages "stored on personal electronic devices and accounts that are inaccessible to the agency, or to search those devices and accounts of its employees and officials ...." (Opinion, p. 24 (attached as Exhibit A to this petition).) Essentially, the Court of Appeal has granted individual government officials and employees the right to hide documents regarding the public's business that they have prepared, owned, used, or retained, as long as those documents are kept on personal accounts.

The opinion of the Court of Appeal cannot be squared with the language of the CPRA, nor with the provisions of article I, section

3(b) of the California Constitution, enacted by the voters via Proposition 59 in 2004. "In enacting [the CPRA], the Legislature, ... [found] and declare[d] that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code § 6250. Not only does the California Constitution give the people of the state the "right of access to information concerning the conduct of the people's business," but when construing any statute that existed when Proposition 59 took effect – such as the CPRA – a court is to construe the statute "broadly ... if it furthers the people's right of access, and narrowly ... if it limits the right of access." Cal. Const., art. I, § 3, subd. (b)(2).

The purpose of the CPRA is to give the people of the State of California the right to see what their elected officials are writing, using and keeping in performing the business of the public. In enacting Proposition 59, the voters sought to reinforce the goal of open government. Ignoring the legal maxim that "[a]n interpretation which gives effect is preferred to one which makes void" (Civ. Code § 3541), the Court of Appeal has issued a decision that undermines the effect of the CPRA, runs counter to the mandates set forth in the

California Constitution, and ensures that government officials will be able to hide documents from public scrutiny.

This is an important issue of constitutional and statutory interpretation. The CPRA is a critical tool in enabling the voters to participate meaningfully in the democratic process, but public employees now have an easy way to subvert that goal as a result of the Sixth District's published opinion in this case. The possibility that individual government officials may easily hide their misdeeds from public view has attracted media attention. This Court should address the issue now to clarify whether members of the public have the right to review and obtain copies of all writings owned, used, prepared, or retained by public employees to conduct the public's business, even if they are maintained on personal devices or in personal accounts.

STATEMENT OF FACTS

I. SMITH'S CPRA REQUEST.

On June 1, 2009, Real Party in Interest, Ted Smith ("Smith"), submitted a CPRA request to the City of San Jose ("the City") seeking thirty-two (32) categories of public records. (2 Petitioners' Appendix 323-326 ("PA").) The request sought public records which included, but were not limited to, "voicemails, emails or text messages sent or

received on private electronic devices" of Mayor Chuck Reed, City Council members Pierluigi Oliverio and Sam Liccardo, and all other members of the San Jose City Council and their staff, and which concerned former San Jose mayor Tom McEnery, John McEnery, San Pedro Square Properties, Urban Markets LLC, Barry Swenson, Sarah Brouillette, and other issues related to downtown San Jose development. (2 PA 323-326, ¶¶ 27-30.)

In response to Smith's CPRA request, the City produced some documents on June 29, 2009 and July 2, 2009. (2 PA 320, ¶ 9; 2 PA 348-353.) Included in the document production were emails between Lisa Herrick, then counsel for the City, and Ken Machado, counsel for former mayor McEnery, regarding a public records request from Mr. Machado. (2 PA 341, ¶ 14; 2 PA 378-388.) Ms. Herrick's emails originated from her non-City e-mail address, and at least some appeared to have been sent from her Blackberry phone. (2 PA 378-388.) Even so, on July 24, 2009, the City, in a letter to Smith's counsel, stated that "[s]ince the City does not prepare, own, use or retain any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records." (2 PA 355-357.)

II. THE FEBRUARY 24, 2009 TEXT MESSAGES TO COUNCIL MEMBER LICCARDO AND SMITH'S LAWSUIT.

On August 16, 2009, the San Jose Mercury News published an article, "Many Records Still Secret Despite San Jose's Promises Of Openness." (2 PA 362-364.) According to the article, a former labor leader named Phaedra Ellis-Lamkins text messaged City Council Member Sam Liccardo, by accident, as she was text messaging other City Council members during a City Council meeting about a proposal to give "millions of city redevelopment dollars to former Mayor Tom McEnery." (2 PA 364.) The first text message, dated February 24, 2009, and sent at 8:18 p.m., states, "Ok as long as inclusion on motion for ba [*sic*] protection." (2 PA 376.) The second text message, sent shortly thereafter at 8:31 p.m., states, "Accidentally texted you. Sorry[.]" (2 PA 377.) The article stated that both messages were provided to the Mercury News in response to a CPRA request filed by the newspaper. (2 PA 320, ¶ 11; 2 PA 364.)

According to the Mercury News Article, the time stamps on the text messages, and the City Council's Meeting Minutes, the text messages appear to have been sent to Council Member Liccardo during, or shortly after, the February 24, 2009 City Council and Redevelopment Agency Board hearing, considering, among other

things, the approval of a Building Rehabilitation and Loan Agreement with Urban Markets, LLC, for improvements related to the San Pedro Square Urban Market. (2 PA 162-163, 374-377, 392.)

On August 21, 2009, Smith filed a Complaint for Declaratory Relief under the CPRA, naming the City, the San Jose Redevelopment Agency[1], and San Jose City officials and former officials sued in their official capacities as defendants (hereinafter collectively "the City"). (1 PA 1-17.) The Complaint summarized the dispute between Smith and the City as follows: "Plaintiff contends, and defendants deny, that the City must produce the records sought by plaintiff in his [CPRA 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." (1 PA 7, ¶ 38.) Smith sought 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." (1 PA 7, ¶ 40.)

[1] After Smith filed his lawsuit, the San Jose Redevelopment Agency was dissolved by operation of law and the City of San Jose has been designated as its successor agency.

On June 29, 2011, almost two years after Smith filed his action, the City agreed to produce the two text messages to Council Member Liccardo that already had been produced in response to the Mercury News' CPRA request in 2009. (2 PA 320-321, ¶ 14.) Both text messages would have been directly responsive to categories 27 and 29 of Smith's June 1, 2009 CPRA request. (1 PA 013; 2 PA 376-377, 392.) Other than the two text messages and the Herrick emails, Smith has not received, any other documents that would be responsive to his June 1, 2009 request. (2 PA 321, ¶ 15.)

III. THE CITY'S PUBLIC RECORDS POLICIES.

On August 17, 2009, one day after the San Jose Mercury News article regarding the text message to Council Member Liccardo was published, Mayor Chuck Reed issued a memorandum including recommendations for the "Sunshine Reform Task Force." (2 PA 121, 164-167.) With respect to "[n]ew [t]echnologies," Mayor Reed's memorandum stated:

> **Records of city business created with personal equipment, such as personal email, text messages, cell phones, social networking websites, and other new technologies should be covered by the California Public Records Act.** The question of how to make them available to the public needs some research and discussion. That work should be referred to the Rules and Open Government Committee.

> In addition, if lobbyists are attempting to influence Councilmembers prior to a Council vote through the use of emails, texts, or another type of technological communication, those contacts should be reported from the dais by the Councilmember.

(2 PA 167 (emphasis added).) At the August 18, 2009 City Council meeting, the City Council approved Mayor Reed's memorandum (2 PA 122, 168-183), and referred to the Rules and Open Government Committee "the question of how communications about City business made with personal email, text messages, cell phones, social networking websites and other new technologies should be dealt with as public records." (2 PA 179.)

On March 2, 2010, the City Council unanimously passed Resolution No. 75293, which revised City Council Policy 0-32, entitled "Disclosure and Sharing of Material Facts," and City Council Policy 0-33, entitled "Public Records Policy and Protocol." (2 PA 122-123, 184-203.)

The purpose of revised City Council Policy 0-32 is "to require 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." (2 PA 204.) City Council Policy 0-32 explicitly applies to text messages, emails, and telephone calls received during Council meetings. (2 PA 204.)

Revised City Council Policy 0-33 states the following with regard to CPRA requests:

> Records available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics, and, in addition, **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.** The records do not have to be written but may be in another format that contains information such as computer tape or disc or video or audio recording.

(2 PA 207 (emphasis added).) The City claims that these policies are no longer enforced, and were voluntary. (4 PA 869, lines 20-24.)

IV. THE TRIAL COURT AND SIXTH DISTRICT APPELLATE COURT DECISIONS.

A. Cross-Motions For Summary Judgment In The Trial Court.

In July 2012, both Smith and the City brought motions for summary judgment. (1 PA 22-37, 89-112.) After briefing and oral argument, the Respondent Court entered its order on March 19, 2013, granting Smith's motion and denying the City's motion. (4 PA 846-

855.) The Respondent Court rejected the City's arguments that individual City officers are not included in the CPRA's definition of "public agency,"[2] and that the CPRA as a whole indicates legislative intent to exclude individual officials from that definition. (4 PA 846-855.) Because the City can only execute its public duties "by and through its officers and agents," the trial court reasoned, a communication relating to the conduct of the public's business drafted by a public officer or maintained on his or her private account is a "writing" that is "prepared, owned, used, or retained" by the local agency and, therefore, is a "public record" under the CPRA. (4 PA 854.)

B. The City's Writ Petition Before The Sixth District.

On April 10, 2013, the City filed a Petition for Writ of Mandate or Alternative Writ of Prohibition ("the Petition"), seeking review of the Respondent Court's March 19, 2013 Order. The Sixth District Court of Appeal granted review, and on March 27, 2014, issued a published opinion reversing the Respondent Court's decision. The Court of Appeal found, "it is the *agency* ... that must prepare, own,

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[2] "Public agency" is defined as "any state or local agency." Gov. Code § 6252(d). "Local agency" is defined in Government Code section 6252(a) and is incorporated into the definition of "public record" in Government Code section 6252(e).

use, or retain the writing in order for it to be a public record, [and thus] 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).) The Court of Appeal went on to say that "the language of the CPRA does not afford a construction that imposes on the City an affirmative duty to produce messages stored on personal electronic devices and accounts that are inaccessible to the agency, or to search those devices and accounts of its employees and officials upon a CPRA request for messages relating to City business." (Opinion, p. 24.)

On April 11, 2014, Smith filed a Petition for Rehearing And/Or Modification of Opinion. Smith sought rehearing on two grounds: (1) the Opinion incorrectly stated there was no evidence in the record that the City of San Jose had "actual or constructive control" over its officials' privately stored communications; and (2) the Opinion erroneously awarded costs to the City in violation of the CPRA. On April 18, 2014, the Sixth District deleted the award of costs but otherwise denied the petition for rehearing.

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LEGAL ARGUMENT

I. WRIT REVIEW IS APPROPRIATE TO SETTLE AN IMPORTANT QUESTION OF LAW.

"The Supreme Court may order review of a Court of Appeal decision: When necessary to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court, rule 8.500(b)(1).

This Court has never addressed whether a local agency's obligation under the CPRA to search for and produce responsive, non-exempt, public records extends to writings relating to the public's business that are prepared, owned, used, or retained by individual officials when the responsive documents only exist on the official's personal email or other accounts. Put another way, this Court has not decided "whether personal e-mails [or texts] sent without using the City's resources but discussing the City's business are 'public records.'" *See Tracy Press, Inc. v. Superior Court (City of Tracy)* (2008) 164 Cal.App.4th 1290, 1300.[3]

Given the number of CPRA requests submitted to California public entities, and the incentive created by the Sixth District's opinion to use personal electronic devices and accounts to try to avoid

[3] The court in *Tracy Press* did not decide the issue due to a procedural technicality.

the CPRA, the issue is certain to arise in other districts. Review will allow this Court to resolve this issue and to let the public know that it has the right to obtain the documents the City, in this case, seeks to keep out of reach.

II. THE COURT OF APPEAL'S INTERPRETATION OF "LOCAL AGENCY" TO EXCLUDE INDIVIDUAL PUBLIC OFFICERS AND EMPLOYEES WILL EVISCERATE THE CPRA AND PROPOSITION 59.

In holding that documents maintained on personal electronic devices, or in personal accounts, are not covered by the CPRA, the Court of Appeal has provided a roadmap for government officials to keep significant or controversial documents hidden from the public eye. If it remains unchallenged, this roadmap will have statewide impact on the public's constitutionally protected right to receive information about government activities.

The Court of Appeal concluded that a writing relating to the public's business could not qualify as a "public record" under the Government Code section 6252 unless it was "prepared," "owned," "used," or "retained" by "the legislative body as a whole," not the individual officials who make up the agency or legislative body. (Opinion, pp. 13-15.) Under this reasoning, if a lobbyist communicates with a City Council member about a public issue via

the Council member's personal email account, those emails are "inaccessible" under the CPRA because they were not "prepared" or "used" by the Council as an entity. Such a result fails to recognize how a city council naturally operates.

A "body politic," such as a city or county, "like a corporation, can act only through its officers and employees." *Suezaki v. Superior Court (Crawford)* (1962) 58 Cal.2d 166, 174; *see also Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.* (1976) 63 Cal.App.3d 292, 295-96 (a corporation "can only function through its agents.") As a municipal corporation, the City "is an artificial person created and recognized by the law, invested with important corporate powers, public, and in a sense official, in their nature, and charged with public duties which it executes by and through its officers and agents." *Regents of the University of California v. Superior Court (Karst)* (1970) 3 Cal.3d 529, 540 (*quoting Jones v. Town of Statesville* (1887) 97 N.C. 86); San Jose City Charter, art. I, § 100 (establishing that the City of San Jose is a municipal corporation). The City, or any other local agency, can only "prepar[e], ow[n], us[e], or retai[n]" records through the acts of its officials and employees, *i.e.*, natural persons working as its agents. *See* Gov. Code § 6252(e); *Fiol v.*

Doellstedt (1996) 50 Cal.App.4th 1318, 1328 (an agent is a person authorized by the principal "to exercise a degree of discretion in effecting the purpose of the principal.")

It is unclear from the Opinion whether an otherwise qualifying writing retained on City-owned property but "prepared" or "used" only by an individual employee and not the "legislative body as a whole" would meet the definition of a "public record" under the Sixth District's new rule. This new rule ignores how local agencies and legislative bodies act and ignores the plain meaning of the words "prepare," "own," "use," and "retain." Clarification is needed so that lower courts, local agencies, and the public understand that documents relating to the public's business that are prepared, owed, used, or retained by agency officials to perform their public duties are "public records" under the CPRA.

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III. THE APPELLATE COURT'S DEFINITION OF "PUBLIC RECORDS" INCORPORATED AN UNREASONABLY RESTRICTIVE INTERPRETATION OF HOW A "LOCAL AGENCY" MAY "PREPARE," "OWN," "USE," OR "RETAIN" WRITINGS RELATED TO THE PUBLIC'S BUSINESS.

A. The Court Of Appeal's New Rule That A Writing Is Not A Public Record Unless "A Legislative Body As A Whole" Prepares, Owns, Uses, Or Retains It Unreasonably Limits The Plain And Ordinary Meaning Of Those Terms.

The Court of Appeal's failure to apply the commonsense meanings of the words "prepare, own, use, and retain" further demonstrates the limiting effect of its determination that only documents prepared, owned, used or retained by the local agency's "legislative body as a whole" qualify as "public records."

The Court of Appeal acknowledged that it must give the statutory language a plain and commonsense meaning, follow the plain meaning when the language is clear unless it would result in unintended consequences, and broadly construe the meaning when it furthers access to public records and narrowly construed if it narrows that access. Opinion, p. 13; *see also Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, at 165, 166; *Comm'n on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290 ("*CPOST*"); Cal. Const., art. 1, § 3, subd. (b)(2). The appellate court

nonetheless failed to follow these prescriptions in construing the terms "prepare, own, use, and retain" so as to limit the public's right of access.

"The dictionary is a proper source to determine the usual and ordinary meaning of words in a statute." *Humane Society of the United States v. Superior Court (Regents of the Univ. of California)* (2013) 214 Cal.App.4th 1233, 1251. One definition of the term "owner" is "one who has the rightful claim or title to a thing (though he may not be in possession)." 11 Oxford English Dict. (2d ed. 1989) p. 6; *see also* Black's Law Dict. (9th ed. 2009) p. 1214 ("One who has the right to possess, use and convey something."). "Retain" means "[t]o keep in custody or under control[.]" 13 Oxford English Dict. (2d ed. 1989) p. 768. The meaning of "use" includes "utilization or employment for or with some aim or purpose, application or conversion to some (esp. good or useful end" and "[t]o employ or make use of (an article, etc.), esp. for a profitable end or purpose[.]" 19 Oxford English Dict. (2d ed. 1989) pp. 350, 353.

Here, the appellate court did not discuss the plain meaning of the terms "prepare, own, use, and retain." It did not explain how a local agency would accomplish each of these actions as a practical

matter, if not through its officials, employees, and other agents. Instead, it simply pronounced that the statutory definition of "local agency" – a term incorporated within the definition of "public record" – did not include individuals and referred instead to "the legislative body as a whole." (Opinion, p. 14; *see also* Gov. Code § 6252, subds. (a), (e).)

This limiting construction calls into question whether certain records previously understood to be "public records" meet the new definition, which apparently requires that the agency's "legislative body" as a whole to have prepared, owned, used, or retained the record. (*See* Opinion, p. 14.) For example, the City, in response to Smith's CPRA request, produced an email written by Tom McEnery to then Police Chief Robert Davis about scheduling a lunch between Mr. McEnery, Chief Davis and the mayor of Salinas. Undisputedly, this is not an email prepared, owned, used, or retained by the Council; it is simply an email by the Mayor trying to schedule a lunch. It is unclear how the Sixth District's new rule applies to documents previously held or agreed to be public records, such as the email described above, but which are prepared, owned, used, or retained by

individual employees carrying out their ordinary job duties as opposed to the "legislative body as a whole."

In failing to consider the definitions of the words in the statute, and to give them a broad construction so as to further the people's right to access, the Court of Appeal has rendered the words "prepared," "owned," "used," and "retained" almost meaningless. The Court of Appeal has given those terms a narrow construction, thereby barring access to records that unquestionably concern the public's business and should be subject to release under the CPRA. As such, the decision of the Court of Appeal reflects an incorrect interpretation and application of the CPRA and calls for review and reversal by this Court.

B. The Plain Language Of The CPRA Does Not Support A More Restrictive Rule About What Documents Are Within A Government Entity's Possession, Custody, Or Control Than That Which Applies In The Context Of Civil Discovery.

The Court of Appeal's opinion is inconsistent with the civil discovery rules under both the California and federal systems. The appellate court specifically declined to apply well-recognized rules regarding when an entity is deemed to have control over records (*see* Opinion, pp. 17-18), but failed to explain convincingly why the City's

obligation to look for and produce responsive documents to CPRA requests should be treated differently than its parallel obligation in the civil discovery context.

California's Code of Civil Procedure and the Federal Rules of Civil Procedure provide that parties may obtain discovery of items in the responding party's "possession, custody, or control." *See* Code Civ. Proc. § 2031.010(a); Fed. R. Civ. P. 34(a)(1). Because Code of Civil Procedure section 2031.010(a) is based on Rule 34 of the Federal Rules,[4] federal cases are instructive on the interpretation of the terms, "possession, custody, and control." *Liberty Mutual Ins. Co. v. Superior Court (Frysinger)* (1992) 10 Cal.App.4th 1282, 1288.

Federal courts have made it clear that a party responding to a discovery request "'cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control.'" *Gray v. Faulkner* (N.D. Ind. 1992) 148 F.R.D. 220, 223 (emphasis added) (*quoting* 10A Federal Procedure, Law Ed. § 26:377, p. 49 (1988)). In

[4] *See* 2 Witkin, Cal. Evidence (4th ed. 2000) Discovery, § 118, pp. 958-59 (former Code Civ. Proc., § 2031 is based on Fed. R. Civ. P. 34).

fact, courts have "interpreted Rule 34 to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement." *Golden Trade, S.r.L. v. Lee Apparel Co.* (S.D.N.Y. 1992) 143 F.R.D. 514, 525; *see also Caston v. Hoaglin* (S.D. Ohio 2009) 2009 WL 1687927, *3 ("[An employer] has control over its current employees and the records within their possession."); *Miniace v. Pac. Martime Ass'n* (N.D. Cal. 2006) 2006 WL 335389, *2-3. This standard explains why litigants are deemed in "possession, custody, or control" even of documents in the hands of counsel.

Here, the documents sought were in the possession of the City's own councilmembers or employees. If, during the course of a civil lawsuit, the City received a request for production seeking the same documents as listed in Smith's CPRA request, it is obvious that they would have to be produced pursuant to Federal Rule 34 or Code of Civil Procedure section 2031.010. *Compare Gray, supra*, 148 F.R.D. at 223 *with* Gov. Code § 6253, subd. (c) (setting forth duty of agency to determine whether CPRA request seeks copies of disclosable public records "in the possession of the agency").

The Sixth District's opinion means that certain documents clearly within the City's possession, custody or control for purposes of civil discovery would simultaneously be deemed "inaccessible" for purposes of the CPRA, because they were not "prepared, owned, used, or retained" by the City or its legislative body "as a whole." Given the purpose behind the CPRA, the Sixth District's interpretation of the statute, which has the effect of providing lesser access to documents than under the rules for discovery, necessitates review by this Court.

IV. THE POLICIES UNDERLYING THE RIGHT OF PUBLIC ACCESS SUPPORT INTERPRETING "PUBLIC RECORDS" TO INCLUDE DOCUMENTS RELATING TO THE PUBLIC'S BUSINESS CREATED OR STORED BY PUBLIC OFFICIALS AND EMPLOYEES USING PERSONAL EQUIPMENT.

A driving force behind the CPRA was the idea "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code § 6250. Indeed, this Court has long recognized that the CPRA was "passed to ensure public access to vital information about the government's conduct of its business." *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656. As this Court also said in *Block*, and reiterated in *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers,*

Inc.) (2007) 42 Cal.4th 319 ("*IFPTE*"), "[i]mplicit 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." *Block*, *supra*, 42 Cal.3d at 651 (emphasis added); *IFPTE*, 42 Cal.4th at 328-29.

The importance of openness was amplified in 2004 when the people overwhelmingly voted in favor of Proposition 59, which added the following language to the California Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, ... the writings of public officials and agencies shall be open to public scrutiny." Cal. Const., art. I, § 3, subd. (b)(1) (emphasis added). The language of this constitutional provision cannot be more clear – the citizens of California have the right to access the writings "of public officials" that involve the public's business. Constitutional provisions adopted through initiative measures are interpreted so as to effectuate the voters' intent. *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538. Properly interpreted, article I, section 3(b) requires production of "writings" regarding the public's

business that were "prepared, owned, used, or retained" by the individual officials of a "local agency," through which the local agency acts, regardless of where those writings may be kept. *See San Gabriel Tribune v. Superior Court (City of West Covina)* (1983) 143 Cal.App.3d 762, 774 (definition of public records "is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition," such as "the shopping list phoned from home.").

Even in the face of such strong authority, the Court of Appeal interpreted the CPRA so as to limit the public's right of access, contrary to the CPRA's stated goal and that of Proposition 59. The Court of Appeal gave free reign to public officials to hide documents from public scrutiny as long as the documents are not "prepared, owned, used, or retained" by the "local agency" as a body, and are kept by officials on their personal accounts.

Indeed, the Court of Appeal's opinion virtually ensures that unscrupulous officials and government employees will use personal

gmail.com or yahoo.com accounts to send and receive email or text from personal phones to conduct the public's business in secret. Contrary to the suggestion by amicus for the City that public officials should be presumed under Evidence Code section 664 to be performing their duties appropriately (see Opinion, p. 8), the CPRA makes the opposite assumption and gives the public the tools it needs to test the government's compliance with the law. The "just trust us" mentality of the City, its amicus, and the Court of Appeal is detrimental to a functioning democracy.

While the Court of Appeal acknowledged that public officials concealing communications or other documents by using private devices and private accounts "is a serious concern[,]" it then brushed off this concern by saying that it is an issue for the Legislature. (Opinion, p. 15.) Referring the "problem" to the Legislature does not correct the gaping loophole the appellate court's opinion created in the meantime, which left officials free to subvert the CPRA at will through the simple expedient of not using their government accounts for anything they want to keep secret from the public.

It is essential that the writings of public officials and their employees, when those writings involve the public's business and are

not subject to any exemption, be available for disclosure. Only in this fashion can the "public business be conducted under the hard light of full public scrutiny and thereby to permit the public to decide for itself whether government action is proper[.]" *Times Mirror Co. v. Superior Court (State of California)* (1991) 53 Cal.3d 1325, 1350 (Kennard, J., dissenting) (internal quotation marks and citations omitted)); *see also IFPTE.*

The California Constitution states that "[a] statute, court rule, or other authority ... shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Cal. Const., art. I, § 3, subd. (b)(2). Although the Court of Appeal acknowledged the people's right to information about the public's business (Opinion, pp. 5-6 and 13), its decision runs counter to those statutory and Constitutional mandates and will act to limit the effect of the CPRA.

The Court of Appeal's opinion in this case defeats the legislative efforts of the voters made clear in Proposition 59, and undermines the democratic process. It is essential that this Court grant review to clarify that records concerning the public's business are not "inaccessible" by the City merely because an individual city

official or employee used personal equipment or accounts to create or store them.

V. THERE IS A CONFLICT AMONG THE APPELLATE COURTS ABOUT WHETHER CONSTRUCTIVE POSSESSION APPLIES IN THE CONTEXT OF THE CPRA.

A. Interpretation Of The Term "Possession" In Government Code Section 6253(c) Is Relevant To The Interpretation Of The Terms "Owned" And "Retained" In Section 6252(e).

The Court of Appeal rejected the argument "that the CPRA permits disclosure of the requested communications on the theory that the City has 'constructive control' over the records of its employees and officials." (Opinion, p. 23.) In doing so, it followed the lead of a recent appellate court decision, *Regents of University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383 (*Regents*), which concluded that "the proposition that 'possession' as used in section 6253, subdivision (c) includes 'constructive possession' is misplaced insofar as [one] ... seek[s] to incorporate constructive possession into the definition of public records [as set forth in section 6252, subdivision (e)." *Id.* at 401.

The decision of the Sixth District and of Division Two of the First District in *Regents* not to apply "constructive possession" to the

CPRA, either in its entirety or to its definition of public records, conflicts with other California Court of Appeal decisions. In *Consolidated Irrigation Dist. v. Superior Court (City of Selma)* (2012) 205 Cal.App.4th 697 (*Consolidated Irrigation*), the court considered "whether[, under the CPRA,] the files of consultants retained to prepare an EIR for the City are 'public records' that the City has a duty to seek [and] obtain to respond to a public records request." *Id.* at 709. Although the court ultimately concluded that the City did not have ownership rights in the subcontractors' files (*id.* at 711), it did find that "[f]or purposes of [the CPRA], we conclude an agency has constructive possession of records if it has the right to control the records, either directly or through another person." *Id.* at 710. Logically, if an agency has control over the records, then it "owns" or "retains" them. *See* Section III.A., *ante.*

After *Consolidated Irrigation* was decided, but prior to the decision in *Regents*, two other courts of appeal considered the question of constructive possession and the CPRA and followed the lead of *Consolidated Irrigation.* In *Board of Pilot Commissioners v. Superior Court (San Francisco Bar Pilots)* (2013) 218 Cal.App.4th 577 (*Pilot Commissioners*), the court cited to *Consolidated Irrigation*

and noted that "'[p]ossession' ... has been interpreted to mean both actual and constructive possession." *Pilot Commissioners*, 218 Cal.App.4th at 598 (emphasis added).

Later that same year, in *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, the court pointed out that it is "'well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA[5] to search barring an undue burden'" (*Id.* at 1425-26 (*quoting Valencia-Lucena v. U.S. Coast Guard* (D.C. Cir. 1999) 180 F.3d 321, 327)). In contrast to the Sixth District's decision in this case and the decision in *Regents*, the decisions in *Consolidated Irrigation, Pilot Commissioners* and *Community Youth Athletic Center* understood a public entity's duty to search for potentially responsive public records to be more similar to the duties imposed to search for documents responsive to a civil discovery request.

To be clear, the communications Smith requested could and should have been deemed "public records" on numerous grounds

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[5] "Because the FOIA provided a model for the Act, and because they have a common purpose, the Act and its federal counterpart 'should receive a parallel construction.'" *Times Mirror Co., supra*, 53 Cal.3d at 1350 (Kennard, J., dissenting) (*quoting American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 451).

under Government Code section 6252(e). Smith did not seek to bypass the definition of "public records" set forth in section 6252(e) by arguing that the City constructively possessed the documents under section 6253(c). Nevertheless, the term "possession" in section 6253(c) and the interpretation of that term in *Regents* appear to have influenced the Sixth District's interpretation of the terms "prepared, owned, used, or retained" in section 6252(e). In addition, whether the term "possessed" in section 6253(c) includes "constructive possession" logically bears on the meaning of the terms "owned" and "retained" in section 6252(e).

As these questions will continue to appear before trial and appellate courts, it is necessary for this Court to provide guidance on how the various terms of the CPRA concerning ownership or possession are to be interpreted.

B. The Sixth District Ignored Evidence In The Record That Tended To Show The City Did Exercise Control Over Its Employees' Communications Relating To The Public's Business, Even If Stored In Personal Accounts.

In rejecting the doctrine of constructive possession, the appellate court overlooked evidence in the record demonstrating that the City did exercise control over communications in personal accounts, or that it asserted the authority to do so. (Opinion, p. 23.)

In fact, the record showed the City produced emails written by Lisa Herrick, counsel for the City, on her own private email account, as well as texts sent to the personal cell phone of Sam Liccardo, a member of the City Council.[6] (2 PA 320-321, ¶¶ 13-14; 374-388.) In addition, the record showed the City at one time had in place a formal policy of including communications sent or received on personal electronic devices within the category of records available for inspection under the CPRA. (*Id.* at 202-213.)

This evidence tended to show the City does have control over, or a "right to possess," writings prepared or retained on individual council members' personal accounts or electronic devices, to the extent they relate to the public's business. The Sixth District improperly acted as if this evidence did not exist. (*Compare* Opinion, p. 23 ("Moreover, there is no evidence in either party's separate statement of undisputed facts that the City has actual or constructive control over the privately stored communications of its officials[]") *with* Real Party In Interest's Petition For Rehearing And/Or Modification Of Opinion, pp. 2-5 (citing evidence in Smith's separate

[6] In fact, two years before they were given to Smith, the texts to Mr. Liccardo were produced to a local newspaper in response to the paper's CPRA request. (2 PA 320, ¶ 11.)

statement showing the City had actual or constructive control over privately stored communications of its officials).

CONCLUSION

A local public agency can only act through its individual representatives. When City officials and employees prepare, own, use, or retain records pursuant to their official duties, they act on behalf of the City. The Sixth District unreasonably constricted the reach of the CPRA by giving short shrift to the concept of agency and creating its own vague and unworkable definition of "public record." Smith respectfully requests that this Court grant his petition for review, and clarify that documents related to public business and "possessed, used, owned, or retained" on the personal electronic devices or accounts of a local agency's individual representatives are not categorically excluded from the definition of "public records" subject to disclosure under the CPRA.

Dated: May 6, 2014 McMANIS FAULKNER

JAMES McMANIS
MATT SCHECHTER

Attorneys for Plaintiff/Real Party in Interest,
TED SMITH

CERTIFICATE REGARDING WORD COUNT

I, Matthew Schechter, counsel for Real Party in Interest, 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 6,837 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 6th day of May, 2014.

MATTHEW SCHECHTER

EXHIBIT A

Filed 4/18/14 (second of two modifications; first mod. and unmodified opn. follow)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, TED SMITH, etc. Real Party in Interest.	H039498 (Santa Clara County Super. Ct. No. 1-09-150427) ORDER

THE COURT:

The above captioned opinion, filed on March 27, 2014, is hereby modified as follows:

Page 25, last paragraph, delete the following: "Costs in this original proceeding are awarded to petitioners."

There is no change in the judgment.

The petition for rehearing is denied.

ELIA, J.

RUSHING, P. J.

PREMO, J.

Filed 4/10/14 (Unmodified opinion attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, TED SMITH, Real Party in Interest.	H039498 (Santa Clara County Super. Ct. No. 1-09-150427) ORDER

THE COURT:

The above captioned opinion, filed on March 27, 2014, is hereby modified as follows:

Page 6, second full paragraph, lines nine-eleven, delete the following: "*Federated University Police Officers Association v. Superior Court* (2013) 218 Cal.App.4th 18, 27 [names of police officers using pepper spray on protesters not protected under any CPRA exemption category] and."

There is no change in the judgment.

ELIA, J.

RUSHING, P. J.

PREMO, J.

Filed 3/27/14 Unmodified opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, TED SMITH, Real Party in Interest.	H039498 (Santa Clara County Super. Ct. No. 1-09-150427)

In this proceeding the City of San Jose (City), the City's mayor, and 10 city council members seek a writ of mandate or prohibition overturning an order that denied their summary judgment motion and granted that of real party Ted Smith, plaintiff in the underlying action.[1] The summary judgment ruling granted declaratory relief to Smith, who had asserted the right to inspect specified written communications (including e-mail and text messages) sent or received by public officials and employees on their private electronic devices using their private accounts. The issue presented is whether those

[1] Also named in Smith's complaint were the San Jose Redevelopment Agency and Harry Mavrogenes, the agency's executive director. The Redevelopment Agency, however, was later dissolved and succeeded by the City itself.

private communications, which are not stored on City servers and are not directly accessible by the City, are nonetheless "public records" within the meaning of the California Public Records Act (CPRA or the Act) (Gov. Code, § 6250 et seq.).[2] We conclude that the Act does not require public access to communications between public officials using exclusively private cell phones or e-mail accounts. We will therefore grant the requested relief.

Background

The CPRA defines "public records" to include any writing relating to the public's business if it is "prepared, owned, used, or retained by any state or local agency." (§ 6252, subd. (e).) In June 2009, Smith submitted a request to the City, seeking 32 categories of public records involving specified persons and issues relating to downtown San Jose redevelopment. The City complied with all but four categories of requests, namely items 27-30. These four requests were essentially for "[a]ny 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 Jose, 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." The City disclosed responsive non-exempt records sent from or received on private electronic devices using these individuals' *City* accounts, but not records from those persons' private electronic devices using their private accounts (e.g., a message sent from a private gmail account using the person's own smartphone or other electronic device). The City took the position that these items were not public records within the meaning of the CPRA.

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[2] Further statutory references are to the Government Code except as otherwise indicated.

Smith brought this action for declaratory relief[3] in August 2009, seeking a judgment entitling him to disclosure of the disputed information under the CPRA. The parties filed cross-motions for summary judgment, which were heard by the superior court in March 2013. Petitioners argued that messages sent from or to private accounts using private electronic devices are not "public records" under the CPRA, and that individual officials and employees are not included within the definition of "public agency" under the Act. In their view, only those records "within the public entity's custody and control" would be subject to disclosure under the Act.

Smith maintained that communications prepared, received, or stored on City officials' private electronic devices are public records under the CPRA, since local agencies "can only act through their officials and employees." Those officials and employees, he argued, are acting on behalf of the City, and therefore their disclosure obligations are "indistinguishable" from those of the City.

In its March 19, 2013 order, the superior court rejected petitioners' arguments, noting that "there is nothing in the [CPRA] that explicitly excludes individual officials from the definition of 'public agency,' " and a city is an " 'artificial person' " that can " 'only act through its officers and employees.' " Thus, a record that is "prepared, owned, used, or retained" by an official is "prepared, owned, used, or retained" by the City. The court further reasoned that if petitioners' interpretation were accepted, "a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own." Accordingly, the court denied petitioners' motion for summary judgment and granted that of Smith.

Petitioners then requested a writ of mandate or prohibition in this court. We issued a stay of the lower court's order and invited preliminary opposition. Smith chose

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[3] The complaint was titled "Complaint for Declaratory and Injunctive Relief," but only one cause of action was stated, for a judicial declaration of the parties' rights and duties.

not to submit such opposition. Upon the issuance of an order to show cause, however, Smith filed a return.

Discussion

The issue before us is whether the definition of "public records" in section 6252, subdivision (e), encompasses communications "prepared, owned, used, or retained" by City officials and employees on their private electronic devices and accounts. Underlying this dispute is the question of whether those officials and employees are "agents" of the City, as Smith contends. Petitioners, together with the League of California Cities (League) as amicus curiae, renew their argument that private communications are excluded from the statutory definition of "public records" under the CPRA. Smith, joined by representatives of the news media as amici curiae,[4] maintains that individual City officials and employees must be deemed public agencies, thus making their communications public records regardless of what devices and accounts are used to send and receive those messages.

1. Standard of Review

An order directing disclosure by a public official under the CPRA is not appealable, but it is immediately reviewable through a petition to the appellate court for issuance of an extraordinary writ. (§ 6259, subd. (c).) "The purpose of the provision limiting appellate review of the trial court's order to a petition for extraordinary writ is to prohibit public agencies from delaying the disclosure of public records by appealing a trial court decision and using continuances in order to frustrate the intent of the Act. [Citation.] The Legislature's objective was to expedite the process and make the appellate remedy more effective." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419,

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[4] Arguing as amici curiae in opposition to the petition are the First Amendment Coalition, California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., and California Broadcasters Association.

426-427.) Because this petition calls for interpretation and application of statutory provisions to undisputed facts, our review is de novo. (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 62; *Lorig v. Medical Board* (2000) 78 Cal.App.4th 462, 467; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 [ruling on summary judgment reviewed independently].)

2. Policy Objectives of the CPRA

The CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552). Their common purpose "is to require that public business be conducted 'under the hard light of full public scrutiny' [citation], and thereby 'to permit the public to decide *for itself* whether government action is proper.' [Citation.] . . . For both the FOIA and the Act, 'disclosure, not secrecy, is the dominant objective.' [Citation.]" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1350; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016.)

In enacting the CPRA the Legislature expressly declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) "Thus, the Act was passed 'to ensure public access to vital information about the government's conduct of its business.' " (*City of San Jose v. Superior Court, supra,* 74 Cal.App.4th at p. 1016, quoting *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 656; *Gilbert v. City of San Jose* (2003) 114 Cal.App.4th 606, 610.) As the California Supreme Court has explained, "[o]penness 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.' " (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329 (*International Federation*), quoting *CBS, Inc. v. Block, supra,* 42 Cal.3d at p. 651.)

"California voters endorsed that policy in 2004 by approving Proposition 59, which amended the state constitution to explicitly recognize the 'right of access to information concerning the conduct of the people's business' and to provide that 'the writings of public officials and agencies shall be open to public scrutiny.' (Cal. Const., art. 1, § 3, subd. (b)(1)." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1320; *International Federation, supra,* 42 Cal.4th at p. 329.) "Subdivision (b)(2) [of California Constitution, article I, section 3] provides guidance on the proper construction of statutes affecting this right of access: 'A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.' " (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166.)

Although the term "public records" encompasses a wide range of communications, disclosure "has the potential to impact individual privacy." (*City of San Jose v. Superior Court, supra,* 74 Cal.App.4th at p. 1016.) The Legislature acknowledged this fact by stating in section 6250 that it is "mindful of the right of individuals to privacy." Accordingly, section 6254 provides a number of exemptions that " 'protect the privacy of persons whose data or documents come into governmental possession.' [Citation.]" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282 [holding police officer's disciplinary records not subject to disclosure under section 6254, subdivisions (c) and (k) and Penal Code section 832.7; but see *Federated University Police Officers Association v. Superior Court* (2013) 218 Cal.App.4th 18, 27 [names of police officers using pepper spray on protesters not protected under any CPRA exemption category] and *International Federation, supra,* 42 Cal.4th 319, 346 [peace officers' names and salary information were not protected from CPRA disclosure under exemption of section 6254, subd. (c), or by Penal Code sections 832.7 and 832.8].) "Thus, the express policy declaration at the beginning of the Act 'bespeaks legislative concern for individual privacy as well as disclosure.' [Citation.] 'In the spirit of this declaration, judicial

decisions interpreting the Act seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy. . . .' [Citation.]" (*Copley Press, Inc. v. Superior Court*, *supra*, 39 Cal.4th at p. 1282.) Likewise, the right of access declared in article I, section 3(b)(1), of the California Constitution is qualified by the assurance that this right of access does not supersede an individual's right of privacy.[5]

Petitioners argue that the Legislature has not expanded the reach of the Act to personal devices and accounts because it recognizes the privacy rights of this state's citizens: "A requirement that the government search individuals' personal computers and other devices for information potentially responsive to [CPRA] requests would run counter to California's strong policy favoring privacy." Smith counters that officials "lose any expectation of privacy" when they choose "to send and receive messages regarding public business from their personal electronic devices and accounts."

The League acknowledges that public officials and employees have a diminished expectation of privacy, as illustrated by statutory duties to report certain personal financial information (§ 87200 et seq.) and the Brown Act requirement that legislative meetings be open and public (§ 54953). The League notes, however, that the Brown Act (section 54950, et seq.)— which "serves the same democratic purposes" as the CPRA (*International Federation*, *supra*, 42 Cal.4th at p. 333, fn. 6) -- permits private conversations about the public's business by fewer than a majority of its members outside of a public meeting (§ 54952.2, subd. (a)), and it does not apply to "individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b)." (§ 54952.2, subd. (c)(1).) In addition, the League reasons, the

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[5] Article I, section 3, subdivision (b)(3), states, in pertinent part, "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 . . . ." (Cal. Const. art. I, § 3(b)(3).)

ability to discuss public issues privately and confidentially allows dissident members of a legislative body to air "unpopular views" and develop "strategies for challenging the status quo or the powers that be." The superior court's ruling, by contrast, would destroy "this carefully crafted private space" and "could have a chilling effect on citizens who wish to exercise their constitutional rights to instruct their representatives and petition government for redress of grievances." The League also suggests that the trial court's ruling is potentially incongruous with the Brown Act; for example, "a meeting between a public official and a constituent that would not be directly subject to public review under the Brown Act could be indirectly subject to public review under the Public Records Act, if the public official made notes of the meeting. This cannot be the rule. The twin pillars of open government law in California, the Public Records Act and the Brown Act, must be interpreted so as to be reasonably consistent with one another." Finally, addressing the superior court's concern that a city "could easily shield information from public disclosure simply by storing it on equipment it does not technically own," the League contends that we must presume under Evidence Code section 664 that the "public officials are conducting City business in the public's best interest, and not willfully dodging applicable laws and regulations."

We observe, however, that in recognizing "the right of individuals to privacy" in section 6250, the Legislature did not distinguish between the privacy right of City officials and that of third parties whose personal information may be disclosed when records are accessed. (Compare *City of San Jose v. Superior Court, supra*, 74 Cal.App.4th at pp. 1018-1025 [balancing test under catch-all exception of section 6255, subd. (a), favors privacy interests of citizens complaining about airport noise over public interest in disclosure] and *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399) [public entity has no obligation to obtain fund information from private investment firms] with *International Federation, supra,* 42 Cal.4th 319, 346 [peace officers' names and salary information not protected from CPRA disclosure under

exemption of section 6254, subd. (c), or by Penal Code sections 832.7 and 832.8]; cf. *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 326-327 [information in state bar admissions database accessible if privacy of applicants can be protected and no legitimate public interest outweighs public interest in disclosure].)

Both the City and the League supplement their privacy concerns with practical considerations. Petitioners suggest that if local agencies were required to search the personal electronic accounts of their employees, "the burden and cost would be overwhelming." Indeed, petitioners suggest, "without the requisite custody or control of such records, it is difficult to imagine how the City would be able to implement such searches if employees declined to cooperate." The League likewise emphasizes that without access to and control over private messaging accounts and electronic devices, a public agency has no "viable, legal means of searching for and producing private documents of its employees and officials." The superior court's interpretation is unworkable, the League argues, because a records request would require the City to conduct an active search not only of devices and accounts stored in its system or under its control, but also of all private computers, phones, tablets, and other electronic devices of its employees and officials. And those searches, the League points out, would intrude into private conversations with family members or friends that happen to include some discussion of a public issue. As the League sees it, "[n]either the Legislature nor the electorate has demonstrated an intent that the Act reach those purely private communications."

In defending the lower court's ruling Smith and the media representatives also rely on policy objectives. They emphasize that section 6252, subdivision (e), must be construed broadly "if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).) The media suggest that petitioners' interpretation of "public records" is unreasonable and arbitrary because it would allow officials to "conceal evidence of error or malfeasance on a whim by storing

information relating to the public's business on their personal accounts or devices. They could also distort the truth by storing only records that tell a favorable tale on accounts or devices owned by a state or local agency." Smith adds, relying on *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278 (*CPOST*), "If petitioners' interpretation were to hold sway, an email, text or other communication concerning the public's business that was stored solely on a City Council member's cell phone would be exempt from disclosure. And yet, if the same email, text, or communication was [*sic*] stored on a City computer server, then it would be a public record. Petitioners' attempt to make the 'public' nature of a record dependent upon its storage location, rather than its content, is completely arbitrary and patently unreasonable."

None of the parties' policy-based arguments informs our analysis of whether the requested communications are public records within the meaning of section 6252. We are bound to interpret statutory language as written and avoid any encroachment on the province of the Legislature to declare public policy. As the Supreme Court has reminded us, "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.* (1998) 19 Cal.4th 66, 71-72; see also *Copley Press, Inc. v. Superior Court, supra,* 39 Cal.4th at p. 1299 [it is for the Legislature, not the courts, to weigh competing policy considerations].) Indeed, " ' "public policy" as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch' in order to avoid judicial policymaking." (*Green v. Ralee Engineering Co, supra,* 19 Cal.4th at p. 76; *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.) Whether personal accounts and devices of an individual must be deemed accessible for purposes of a CPRA request must be determined, if possible, by reading the language of the statute itself.

3. The Scope of "Public Records"

Under the CPRA, "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereinafter provided." (§ 6253, subd. (a).) As noted earlier, the term "public records" is defined in section 6252, subdivision (e), to include any writing relating to the public's business if it is "prepared, owned, used, or retained by any state or local agency."[6] "This broad definition is designed to protect the public's need to be informed regarding the actions of government . . . ." (*Poway Unified School Dist. v. Superior Court (Copley Press)* (1998) 62 Cal.App.4th 1496, 1501; accord, *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 824.) The Act defines a "local agency" to include "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." (§ 6252, subd. (a).)

In order to apply section 6253 in light of the expressed intent of section 6250 to ensure access to information relating to public business, we must first determine whether a written communication[7] transmitted to or from a city official's private electronic device using his or her private account is a "public record" within the meaning of the CPRA. Both sides submit cogent arguments in support of their respective positions. Petitioners,

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[6] A "writing" is defined in section 6252, subdivision (g) as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

[7] No party disputes that a "writing," as used in the Act, encompasses e-mail and text messages. (§ 6252, subd. (g).)

joined by the League as amicus curiae, rely on the exact language of section 6252, which applies the disclosure mandate to writings "prepared, owned, used, or retained" by a local or state *agency*, not by the agency's officials or employees. Petitioners argue that the superior court "encroached on the province of the Legislature" by expanding the reach of the statute to records of individual council members rather than those "prepared, owned, used, or retained" by the City itself. The League also argues that section 6253.9, which prescribes disclosure procedures for electronically stored information,[8] "unmistakably envisions a system of access to electronic records that are in the possession of the agency, not on the home computer of a city council member. It bolsters the conclusion that the Act means what it says in limiting the definition of public records to records 'prepared, owned, used, or retained' by the local agency."

As he did below, Smith asserts that because "local agencies are inanimate bodies, they can only act through their officials and employees; therefore, records 'prepared, owned, used, or retained' by a 'local agency' presumptively includes records 'prepared, owned, used, or retained' by City officials and employees." Thus, in Smith's view, the City and its "agents" -- that is, the individual members of San Jose's city council and their staff -- are "indistinguishable under these circumstances." This was the reasoning adopted by the superior court in its ruling.

Close examination of Smith's argument reveals its logical weakness. Even if we accept the first premise, that a local agency can act only through its officials, it does not follow that every act of an official is necessarily an act of the agency. Smith further

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[8] Section 6253.9 sets forth specific procedures for complying with its overall mandate, which states: "Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following . . . ." (Gov. Code, § 6253.9, subd. (a).)

asserts, quoting *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774 (*San Gabriel*) 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.' " This point, taken from *San Gabriel* out of context, merely begs the question of whether the information sought is a public record.

Determining the scope of "public records" must be made in light of the constitutional mandate of article I, section 3, and the intent expressed by the Legislature in the statutory scheme, particularly section 6250. "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 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." (*Sierra Club*, *supra*, 57 Cal.4th at pp. 165-166; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) We remain mindful, however, of the " 'strong public policy of the people's right to information concerning the people's business (Gov. Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)).' " (*Sierra Club*, *supra*, 57 Cal.4th at p. 166.) Accordingly, if there is ambiguity in the meaning or intent of the statutory language, "the California Constitution requires us to 'broadly construe[ ]' the PRA to the extent 'it furthers the people's right of access' and to 'narrowly construe[ ]' the PRA to the extent 'it limits the right of access.' (Cal. Const., art. I, § 3, subd. (b)(2).)" (*Ibid.*)

Guided by these principles, we examine the language of section 6252—specifically, its definition of "public records" as "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." (§ 6252, subd. (e), italics added.) If a "local agency" and its officials are, as Smith portrayed them below, "one and the same," then any writing prepared, owned, used, or retained by the official is deemed that of the agency itself. The statute's definition of "local agency," however, does not mention individual members or representatives of any public body; it refers to government bodies themselves, including counties, cities, "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."[9] The plain language of this provision thus denominates the legislative body as a whole; it does not appear to incorporate individual officials or employees of those entities. Had the Legislature intended to encompass such individuals within the scope of "public records," it could easily have done so. (Cf. *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, 873 [had Legislature intended section 1090 proscription against financial interests in contracts to apply to entire board, it would have worded statute differently].) And, in fact, it did so in defining "state agency" to include "officer." (§ 6252, subd. (f).)

We therefore cannot agree with Smith that individual city council members and their staff must be considered equivalent to the City for purposes of providing public access to their writings on public business. 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,

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[9] Section 54952 defines "Legislative body" in part as "(a) The governing body of a local agency or any other local body created by state or federal statute. [¶] (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter."

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.

That city council members may conceal their communications on public issues by sending and receiving them on their private devices from private accounts is a serious concern; but such conduct is for our lawmakers to deter with appropriate legislation. It does not make a literal interpretation necessarily "arbitrary, unreasonable, and absurd," as Smith and the media contend. "It is our task to construe, not to amend, the statute. 'In the construction of a statute . . . 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 omit what has been inserted . . . .' [Citation.] We 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." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349; cf. *McLeod v. Parnell* (2012) 286 P.3d 509 [declining to depart from literal meaning of "public records" in Alaska's Public Records Act, as legislature may allow agency employees to decide what documents should be "preserved"].)

Smith, along with the media, cites *CPOST, supra,* 42 Cal.4th 278, for the assertion that "the location in which public records are stored does not diminish their public character." The media draw from *CPOST* the inference that "the Legislature meant to exclude from the definition of public records only writings 'totally devoid of reference to government activities' based on their content."

But *CPOST* does not assist us in interpreting the language of section 6252. In *CPOST*, the issue was whether the information sought by a newspaper was exempt from

disclosure under section 6254, not whether it met the definition of a public record under section 6252. Indeed, it was undisputed that the requested information was a public record; rather, it was the scope of "personnel records" as used in Penal Code sections 832.7 and 832.8 that was at issue. (*Id.* at p. 288.) It was in this context that the high court determined that it was "unlikely the Legislature intended to render documents confidential based on their location, rather than their content." (*Id.* at p. 291.) The Supreme Court rejected the appellate court's interpretation of "personnel records" in Penal Code section 832.8, because "[u]nder the Court of Appeal's interpretation, the circumstance that a document was placed into a file that also contained the type of personal or private information listed in the statute would render the document confidential, regardless of whether the document at issue was of a personal or private nature, and regardless of whether it was related to personnel matters." (*Id.* at p. 290.) In other words, the location of a document should not be the basis for determining whether personnel records may be withheld, because it would be too easy to shield unprotected information in a "file" that contains protected material. "Furthermore, if records are stored in a computer in electronic form, it would be difficult, if not impossible, to determine which records are contained in the same virtual 'file.' " (*Id.* at p. 291.) The Supreme Court concluded that "[b]ecause section 832.7 deems peace officer personnel records and information obtained from those records to be 'confidential,' they are exempt from disclosure under the Act." (*Id.* at p. 289.) As the court had no occasion in *CPOST* to determine the scope of "public records" under section 6252, subdivision (e)(2), Smith's and the media's reliance on that case is misplaced.

The media offer a similarly flawed argument, relying on *San Gabriel, supra,* 143 Cal.App.3d at page 774, for the proposition that the scope of "public record" excludes only personal information unrelated to the public's business. But that point goes to the public nature of the writing, which is not at issue here. (Cf. *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340 [personnel records of city firefighter were public records, as

they "clearly related to the conduct of the City's business"].) We are not concerned here with disclosure requests for messages of purely personal content because it is undisputed that the records sought relate to City business; thus, the issue is not properly framed as one of location vs. content.

Nor does the media's reliance on *International Federation, supra,* 42 Cal.4th 319 compel a different result. In that case the Supreme Court held that peace officers' names and salary information were not protected from CPRA disclosure under exemption of section 6254, subdivision (c), or by the confidentiality provisions of Penal Code sections 832.7 and 832.8 The issue was not whether that information constituted a public record; the parties agreed that it did. Instead, the court primarily addressed the question of whether any exemption applied under section 6254, subdivision (c), pertaining to " '[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.' " (*Id.* at p. 329.)

Both parties have cited *Flagg v. City of Detroit* (E.D. Mich. 2008) 252 F.R.D. 346 to support their positions. In *Flagg*, a federal district court ruled that text messages exchanged by city officials and employees were not protected from civil discovery by the federal Stored Communications Act (18 U.S.C. § 2701 et seq.). The messages were exchanged by means of text messaging devices issued to city officials and employees under the city's contract with Skytel, its service provider. Because Skytel stored the messages under that contract, the city was presumed to have access to and control over them. Notably, the discovery request was based on a federal rule of civil procedure which permitted the requesting party to inspect documents "in the responding party's possession, custody, *or control.*" (Fed. Rules Civ.Proc., rule 34, 28 U.S.C.)

Smith sets up a false comparison between the situation presented in *Flagg* and the facts before us, by arguing that here the City has control over its *employees* simply "by virtue of the parties' [*sic*] relationship." There is no analogous control here. Section 6252 contains no description of public records that includes the element of control. Any

control the City has over its employees' behavior is not equivalent to control over, or even access to, the text messages and e-mail sent to and from its employees' private devices and accounts. Furthermore, it is noteworthy that the *Flagg* court regarded materials as under an agency's control if the agency had the *legal right* to obtain them. To apply that point here would make Smith's argument circular: we should deem the requested records to be within the City's control as a matter of law because it had the legal right to obtain them. Unquestionably, *Flagg* has no application here. (Cf. *MacKenzie v. Wales Tp.* (Mich. Ct. App. 2001) 635 N.W.2d 335, 339 [township may not avoid Freedom of Information Act obligation to release property tax roll information by contracting with outside preparer]; *Consolidated Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710-711 [city lacked actual or constructive possession of records under § 6253(c) because it did not control the subconsultant files].)

Petitioners, on the other hand, cite *California State University, Fresno Assn., Inc. v. Superior Court* (*Fresno Assn*) (2001) 90 Cal.App.4th 810 to support their argument that the plain language of section 6252, subdivision (e), excludes communications from officials' personal accounts and devices. The issues before the Fifth District in that case are not comparable to those before us. In *Fresno Assn* a local newspaper sought from a state university and a university-affiliated nonprofit association records revealing the identity of those who had bought luxury suites in a new sports arena on the state university campus. The Fifth District determined that those records held by the university, a "state agency," were public records, because they were "unquestionably 'used' and/or 'retained' " within the meaning of section 6252, subdivision (e). (*Id.* at p. 825.) The association, on the other hand, was not a "state agency" for purposes of the Act. (*Ibid.*) The most we can derive from *Fresno Assn* is confirmation that the CPRA, like any statute, should be construed according to the language used by the Legislature, even when "our conclusion seems to be in direct conflict with the express purposes of the

CPRA—'to safeguard the accountability of government to the public. . . . ' " (*Id.* at p. 830.)

Howell Ed. Ass'n, MEA/NEA v. Howell Bd. of Ed. (2010) 789 N.W.2d 495, also cited by petitioners, is likewise not helpful. There the plaintiff, a teachers' union, sought a judgment declaring that both personal and union-related e-mail relating to union business did not constitute a public record under Michigan's FOIA. The appellate court held that personal e-mails were not rendered public records merely because they were stored or retained by the defendant board of education in its e-mail system. These messages were not subject to disclosure unless they were used "in the performance of an official function," as called for in the statute. (*Id.* at p. 500.) *Howell* has nothing to do with the issue presented here, whether a writing that undisputedly *is* related to official business is subject to disclosure when it is *outside* the public body's electronic communication system.

Some courts have considered whether a public official's messages using a private device are public records if made during official public meetings. In a Michigan township, a letter read aloud in a township meeting and incorporated into the minutes became a public record under that state's FOIA because it was "used . . . in the performance of an official function." (*Walloon Lake Water System, Inc. v. Melrose Tp.* (Mich. Ct. App. 1987) 415 N.W.2d 292, 294 [163 Mich.App. 726, 730]; compare *Hopkins v. Duncan Tp.* (Mich. Ct. App. 2011) 812 N.W.2d 27, 33 [294 Mich.App. 401, 411] [board member's personal notes during meeting not a public record where they were never read into the minutes or used by the township board].) In *City of Champaign v. Madigan* (Ill. App. 2013) 992 N.E.2d 629, 639, the appellate court determined that text messages and e-mail sent or received by a city council member during council meetings constituted public records under Illinois's FOIA. The Illinois court accepted the city's argument that the individual council members were not themselves the "public body" within the meaning of the Act, where that legislation defined "public records" as

communications "pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." (5 Ill. Comp. Stat. Ann. 140/2, subd. (a).) The court noted that this definition did not include *members* of a public body, and that "[i]ndeed, an individual city council member, alone, cannot conduct the business of the public body." (*City of Champaign v. Madigan, supra,* 992 N.E.2d at p. 639.) The court then deviated from this line of reasoning by assuming that if the message is forwarded to enough council members to constitute a quorum, the individual member's messages become those of the entire "public body." (*Ibid.*) To hold otherwise, the court held, would "subvert the Open Meetings Act" and the FOIA "simply by communicating about city business during a city council meeting on a personal electronic device." (*Id.* at p. 640.)

The question of when a privately transmitted communication made during a public meeting becomes that of a "public body"—or in this case, a public "local agency"— is not presented in this writ proceeding. Smith did not confine his request to writings exchanged during city council meetings, but sought *all* communications transmitted during an unspecified period regarding "any matters concerning the City of San Jose," particularly those pertaining to the development of downtown San Pedro Square.

More comparable to the issue before us was the more general request submitted to a Pennsylvania township in *In re Silberstein* (Pa. Commw. Ct. 2011) 11 A.3d 629. In that case Stacey MacNeal requested electronic communications between citizens and commissioners serving on the township board. The township produced writings in its possession and control, but it did not consider those made on computers maintained solely by a commissioner. Like Smith, MacNeal argued that an elected official should not be permitted to shield public records relating to township activity by using a third-party e-mail address on a personal computer. Also like Smith, MacNeal reasoned that public officials "are agency actors and are subject to York Township control." (*Id.* at p.

632.) The trial court, however, ruled that those communications were not "public records" under Pennsylvania's "Right-To-Know Law" (RTKL).[10]

The Commonwealth Court of Pennsylvania affirmed, holding that "a distinction must be made between transactions or activities of an agency which may be a 'public record' under the RTKL and the emails or documents of an individual public office holder. As pointed out by the trial court, Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township. [¶] Consequently, emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record[,] as any record personally and individually created by Commissioner Silberstein would not be a documentation of a transaction or activity *of* York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity *of* York Township. In other words, unless 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' within the meaning of the RTKL as the same are not 'of the local agency.' " (*In re Silberstein, supra,* 11 A.3d at p. 633.)

Smith asserts that *Silberstein* is inapposite because the RTKL defined a "public record" as a non-exempt record *of* a commonwealth or local agency, and Silberstein lacked authority to act alone on behalf of the township. That distinction is not helpful. The central premise of Smith's position is that the records of a City official are those of

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[10] The RTKL defined a public record as a nonexempt record of a commonwealth or local agency. (65 Pa. Stat. Ann. § 67.102.) A "record" was information, "regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency . . . ." (*Ibid.*)

the City, so it makes no difference that the RTKL, and not the CPRA, uses the word "of" in defining "public record." Also unsupported is the implicit assumption that a member of the city council or other official does, in contrast to Silberstein, have authority to act alone on behalf of the City.[11]

We thus find no reason to reject the plain language of section 6252 under the rules of statutory construction or parallel authority from other states' versions of the FOIA. The writings sought by Smith were not "prepared, owned, used, or retained" by a "local agency" as called for by section 6252.

The First District, Division Two, reached the same conclusion recently in *Regents of University of California v. Superior Court, supra,* 222 Cal.App.4th 383. The issue in that case was whether Reuters America LLC (Reuters) was entitled to confidential information regarding investments made by the Regents of the University of California. The superior court recognized that the information was not directly owned, retained, or used by the university Regents, but it nonetheless granted the petition of Reuters for fund-specific information because the Regents had not " 'demonstrated that the Fund Level Information does not relate to the conduct of the people's business or that it does not have constructive possession of that information.' " (*Id.* at pp. 394-395.) The court ordered the Regents to make a reasonable effort to obtain the requested information.

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[11] The Pennsylvania court later distinguished *Silberstein* in circumstances involving the e-mail correspondence between council members rather than, as in *Silberstein*, between the township commissioner and members of the public. (*Barkeyville Borough v. Stearns* (Pa. Commw. Ct. 2012) 35 A.3d 91, 97; see also *Mollick v. Township of Worcester* (Pa. Commw. Ct. 2011) 32 A.3d 859, 872 [e-mail exchanges on township business between township supervisors constituting a quorum are records of the township].) In *Barkeyville* the court further reasoned (in words similar to those of the trial court below) that the Borough "created the information sought because . . . the individual Council members make up the Borough government. As a result, the Borough has ownership in the emails." (35 A.3d at p. 97.) We find this reasoning strained; but more importantly, the communications requested in the case before us were not confined to those made exclusively between city council members.

The reviewing court granted writ relief to the Regents, holding that a literal interpretation of section 6252, subdivision (e), is consistent with the purpose of the Act as a whole but also with the FOIA, on which the CPRA was modeled. (*Id.* at p. 400.) Just as in the FOIA, the court concluded, "no language in the CPRA creates an obligation to create or obtain a particular record when the document is not prepared, owned, used, or retained by the public agency." (*Ibid.*) Once the superior court decided that the Regents had not directly "prepared, owned, used, or retained" the requested information, it should not have gone further to require the Regents to produce records in its *constructive* possession.

We agree with amici curiae from the media that *Regents* is not entirely comparable to the facts before us; the records sought in that case were held by private companies rather than parties to the case. (See also *City of San Jose v. Superior Court, supra*, 74 Cal.App.4th at p. 1025 [public interest in protecting privacy of people complaining about airport noise "clearly outweighs" public interest in disclosure of their names, addresses, and telephone numbers].) Obviously there could also have been no suggestion that the Regents and the private companies were "indistinguishable." But the reviewing court's emphasis on avoiding judicial additions to the statutory language is one we endorse as well. And just as the superior court in *Regents* improperly bypassed the definition of "public record" by relying on the agency's "constructive possession," here too we must reject Smith's argument that the CPRA permits disclosure of the requested communications on the theory that the City has "constructive control" over the records of its employees and officials. (*Regents of University of California v. Superior Court, supra,* 222 Cal.App.4th at p. 400.) Moreover, there is no evidence in either party's separate statement of undisputed facts that the City has actual or constructive control over the privately stored communications of its officials.

Smith also attempts to rebut a position not taken by petitioners, that their personal accounts and devices are protected from disclosure by one or more exemptions listed in

section 6254. Petitioners do not invoke any of these statutory grounds. Consequently, we need not address Smith's assertion that petitioners waived the issue of whether any section 6254 exemption applies, nor his contention that petitioners failed to meet their burden to demonstrate the applicability of a statutory exemption.

Conclusion

We conclude that the language of the CPRA does not afford a construction that imposes on the City an affirmative duty to produce messages stored on personal electronic devices and accounts that are inaccessible to the agency, or to search those devices and accounts of its employees and officials upon a CPRA request for messages relating to City business. Whether such a duty better serves public policy is a matter for the Legislature, not the courts, to decide. In addition, it is within the province of the agency to devise its own rules for disclosure of communications related to public business.[12] The obstacles noted by petitioners and the League— the legal and practical impediments attendant to the extra task of policing private devices and accounts — would also be addressed more appropriately by the Legislature or the agency, not the courts.

Disposition

Let a peremptory writ of mandate issue directing respondent court to vacate the order granting Smith's motion for summary judgment and to enter a new order denying

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[12] The record in this case, for instance, contains minutes of the City's adoption of a resolution addressing this very issue after Smith filed the action. Although we may take judicial notice of Resolution No. 75293 and its adoption on March 2, 2010 (Evid. Code, § 452, subd. (b); § 459), those documents are not relevant to an interpretation of the language of section 6252. (See *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.) If this court were to take judicial notice of them, as did the superior court, it would be solely to illustrate the point that cities are free to adopt their own policies and mandates regarding public access to private communications on public issues, whether made during or outside official meetings.

that motion and granting the summary judgment motion of petitioners. Upon finality of this decision, the temporary stay order is vacated. Costs in this original proceeding are awarded to petitioners.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. James P. Kleinberg
Attorneys for Petitioners:	Richard Doyle, City Attorney, Nora Frimann, Assistant City Attorney and Margo Laskowska, Sr. Deputy City Attorney
Attorneys for Amicus Curiae In support of Petitioners:	Best, Best & Krieger and Shawn D. Hagerty and Hong Dao Nguyen
No Appearance for Respondent	
Attorneys for Real Party In Interest:	McManis Faulkner and James McManis, Matthew Schechter, Christine Peek, and Jennifer Murakami
Attorneys for Amici Curiae in Support of Real Party in Interest:	Ram, Olson, Cereghino & Kopczynski and Karl Olson McClatchy Company and Juan F. Cornejo Jeffrey D. Glasser James W. Ewert

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H039498

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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:

PETITION FOR REVIEW

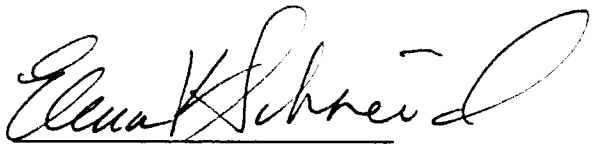
on the following person(s) in this action:

Richard Doyle Nora Frimann Margo Laskowska Office of the City Attorney 200 E. Santa Clara Street, 16th Floor San Jose, CA 95113	Attorneys for Defendants and Petitioners, City of San Jose
Clerk of the Court Sixth District Court of Appeal 333 W. San Carlos Street, Suite 1060 San Jose, CA 95113	
Clerk of the Superior Court Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113	
Ted Smith 465 S. 15th Street San Jose, CA 95112	Plaintiff and Real Party in Interest

☒ **(BY MAIL)** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above or on the attached service list. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Jose, California.

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

Executed on May 6, 2014, at San Jose, California.



ELENA K. SCHNEIDER