No. S218066

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN JOSE, et al.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff and Real Party in Interest

ANSWER TO PETITION FOR REVIEW

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

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

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

No. S218066

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN JOSE, et al.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff and Real Party in Interest

ANSWER TO PETITION FOR REVIEW

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. SUMMARY OF ARGUMENT

Smith argues for inclusion of individual officials in the "local agency" definition of the Public Records Act but that argument should be made to the Legislature. Smith's petition should be denied because the statute at issue is not ambiguous. The Legislature must have intended to distinguish between state and local agencies because the definition of a "state agency" expressly encompasses individual officials but that of a "local agency" does not. There are no conflicting appellate cases on this issue.

Relying on the Public Records Act, Smith requested communications of the San José Mayor and Council members, and their staffs, stored solely in their private non-City electronic accounts that are not accessible to the City of San José through City servers. A "public record" under the Act must satisfy two requirements: 1) the document must be related to public business, and 2) it must be "prepared, owned, used, or retained" by a state or local agency. (Gov. Code Sec. 6252.) Smith essentially disregards the second prong of the two-part definition, and argues that as long as communications by Council members are related to public business, they are per se public records of the City, even if found solely in Council members' private electronic accounts. Smith argues that the Act's definition of a "local agency" covers individual Council members but he is incorrect. Unlike the definition of a "state agency," the definition of a "local agency" does not mention "officials." (*Compare* Gov. Code Sec. 6252(f) *with* Sec. 6252(a).) The Act's definition of "local agency" is unambiguous and, therefore, does not require construction.

Based on the plain language of the Act, communications of local officials related to public business are public records only when they are records of the local agency, such as when they are found in agency

electronic accounts or in accounts otherwise accessible to the agency by contract for service with a private provider. They also are communications of the local agency if an official is required by law to keep them or if they are kept as necessary or convenient to the discharge of the official's duties. (*San Gabriel Tribune v. Sup. Ct.* (1983) 143 Cal.App.3d 762, 772.)

Where, as here, the relevant electronic accounts are private and not accessible to the City, their contents are not the City's records. Under the plain language of the Act, a voicemail, text message or e-mail, even one related to public business, stored solely in a private electronic account is not a "public record" because it is not "prepared, owned, used, or retained" by the local agency. The Legislature could have included such records within the scope of the Act but did not.

There are no grounds for this Court's review. A judicial amendment of the Act would be an inappropriate violation of the separation of powers doctrine. Therefore, the City respectfully requests the Court to deny Smith's petition.

II. BACKGROUND

A. REQUESTS FOR RECORDS AND THE CITY'S RESPONSES

Between September 2008 and January 2009, the City received a number of Public Records Act requests from the law firm of McManis Faulkner. The City responded to those requests completely, withholding only those records that were either exempt under the Act or outside the definition of a "public record" under the Act. The City produced a variety of records including those found on City computers and servers, but did not produce records that were outside the definition of a "public record": voicemails, e-mails, or text messages concerning former Mayor Tom McEnery and other individuals associated with Urban Markets LLP and San

Pedro Square Properties, and concerning the San Pedro Square project, sent or received on private electronic devices used by Mayor Chuck Reed, Council members, or their staff, using their private accounts and for which copies were not found on City computers or servers.

On or about June 1, 2009, Ted Smith, the petitioner here and plaintiff below, repeated all the above requests made by the McManis Faulkner law firm. In response, the City confirmed that all non-exempt records for items 1 through 26 and items 31 and 32 of the request had already been disclosed.

The remaining items 27 through 30 were similar to each other. Item 27 asked for the following documents:

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

(2 PA at 326.) (emphasis added) Even though item 27 already covered all Council members and their staff, Item 28 repeated that request for "Council Member Pierluigi Oliverio, or his staff," Item 29 – for "Council Member Sam Liccardo, or his staff," and Item 30 – for Jessica Garcia-Kohl, a member of Council member Liccardo's staff. (*Id.*)

The Mayor and Council members and their staff have City accounts which are City telephone numbers and City e-mail addresses, such as mayoremail@sanjoseca.gov, District1@sanjoseca.gov, or pierluigi.oliverio@sanjoseca.gov. In response to items 27 through 30, the City disclosed all non-exempt records, including voicemails, e-mails and text messages, if any, sent from or received on private electronic devices used by Mayor Chuck Reed, Council member Pierluigi Oliverio, Council

member Sam Liccardo, their staffs, and other Council members and their staffs, using their **City accounts**. The City did not disclose any records sent from or received by those persons on private electronic devices using their **private accounts** that did not go through the City's servers.

Since at least 2002, communications using private electronic devices of the Mayor, City Council members, and their staffs, to and from their private accounts, have not been stored by the City on any City equipment and are not accessible to the City. (1 City Petitioners' Appendix ["PA"] at 054-55.) Examples of such communications are voicemail and text messages on personally acquired electronic devices—that is those not provided by the City—such as cell phones, smartphones such as the iPhone, Android and BlackBerry; and other devices capable of directly accessing non-City e-mail accounts with internet providers such as Hotmail, Gmail and Yahoo mail. (*Id.*) When personal electronic devices are used for communications to and from private accounts only, those communications do not use and are not stored on City servers, and are not accessible to the City. (*Id.*)

B. THE LAWSUIT

On August 21, 2009, Smith filed a Complaint for Declaratory Relief and Injunctive Relief, alleging that "the City must produce the records sought by plaintiff in his [records request] including e-mails, text messages, and other electronic information relating to public business, regardless of whether they were created or received on the City owned computers and servers or the City Officials' personal electronic devices." (1 PA at 007.) Smith's complaint asked for "a judicial determination and declaration that defendants are required to produce all records pertaining to the public's

business, created or received by City Officials, regardless of what electronic device was used." (*Id.*)

In July 2012 the parties brought cross-motions for summary judgment that were heard on March 15, 2013. (1 PA at 022-4 PA at 845.) The superior court issued an order granting summary judgment in favor of Smith and denying the City defendants' motion. (4 PA at 846-55.) This decision of the superior court encroached on the province of the Legislature by: (1) expanding the scope of the Public Records Act to include, within the definition of "public agency", individual Council members and (2) improperly expanding the definition of "public records" to include communications relating to public business even when the public entity has no control over or custody of such communications because they were created or received on individual Council members' personal electronic devices and in their personal electronic accounts.

The Sixth District Court of Appeal accepted the City defendants' application for writ review and after briefing and argument issued a published opinion granting a peremptory writ of mandate directing the superior court to vacate the decision granting Smith's motion for summary judgment, and to enter a new order denying Smith's motion and granting the City defendants' motion. (*City of San Jose v. Sup. Ct.* (2014) 225 Cal.App.4th 75, 97.)

/ / / / /

/ / / / /

/ / / / /

III. ARGUMENT

A. THE COURT SHOULD NOT JUDICIALLY AMEND THE CALIFORNIA PUBLIC RECORDS ACT. THE PREROGATIVE TO CLOSE POTENTIAL LOOPHOLES BELONGS TO THE LEGISLATURE.

In *People v. Snook* (1997) 16 Cal.4th 1210, this Court explained that in statutory interpretation the key to the Legislature's intent is in the statute's language because the language was vetted in the legislative process: "In determining the Legislature's intent, a court looks first to the words of the statute. '[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.'" (*Id.* at 1215.) (citation omitted) That well-established rule compelled the court in *California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, to follow the Public Records Act's express language, and to leave it to the Legislature to clarify or amend it, when the language appeared to conflict with the statute's professed purpose:

> We are fully cognizant of the fact that our conclusion seems to be in direct conflict with the express purposes of the CPRA—"to safeguard the accountability of government to the public . . . ." **The Legislature's decision to narrowly define the applicability of the CPRA, balanced against its sweeping goal to safeguard the public, leaves us scratching our judicial heads** and asking, "What was the Legislature thinking?" In many ways, the Association can be characterized as a "state-controlled" corporation that should be subject to the CPRA. **However, courts "do not sit as super-legislatures** to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.)

(*Id.* at 829-30.) (some citations omitted) (emphasis added) Judicial restraint and deference to the Legislature is particularly appropriate in the context of new technologies:

> The treatment of rapidly developing new technologies profoundly affecting not only commerce but countless other aspects of individual and collective life is not a matter on which courts should lightly engraft exceptions to plain statutory language without a clear warrant to do so. **We should instead stand aside and let the representative branch of government do its job.** Few cases have provided a more appropriate occasion to apply the maxim *expressio unius exclusio alterius est,* under which the enumeration of things to which a statute applies is presumed to exclude things not mentioned.

(*O'Grady v. Sup. Ct.* (2006) 139 Cal.App. 4th 1423, 1443.) (emphasis added)

In the present case, the appellate decision rigorously applied the well-settled rules of statutory interpretation to the unambiguous language of the Public Records Act. Smith does not appear to claim that the decision applied the wrong rules or that it applied them incorrectly. Contrary to Smith's argument, the appellate decision did not "create" any loopholes, but if it uncovered any, then it is a reason to engage the Legislature. It is not, however, a proper ground for this Court's review.

B. THE ISSUE OF COMMUNICATIONS OF LOCAL PUBLIC OFFICIALS WITH CONSTITUENTS ON PUBLIC MATTERS THROUGH PERSONAL ACCOUNTS HAS NOT YET PERCOLATED IN THE COURTS.

There are no conflicting decisions on point from other appellate districts. The issue of voicemail, text, and e-mail communications of local officials with constituents on public matters using private accounts has not yet percolated in the courts. Thorough vetting in the lower courts is critical in this context because the role and impacts of new technologies in society is in flux. In a case of e-mails and text messages that a police officer sent from a city-owned pager account, where messages were transmitted through

a third-party wireless provider, the Supreme Court of the United States advised caution:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. **The judiciary risks error by elaborating too fully on** the Fourth Amendment implications of **emerging technology before its role in society has become clear.** In *Katz,* the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. **Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises** that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.
>
> . . . .
>
> **A broad holding concerning** employees' privacy expectations vis–à-vis employer-provided **technological equipment might have implications for future cases that cannot be predicted.** It is preferable to dispose of this case on narrower grounds.

(*City of Ontario, Cal. v. Quon* (2010) 130 S.Ct. 2619, 2629-30.) (citations omitted) (emphasis added) Judicial forbearance is even more appropriate here, where electronic accounts and devices were not City-owned, but personal, and communications in those accounts or devices did not use, nor were they stored on, the City's computers or servers. The Court would lack the benefit of any debate among the District Courts on the issue if it accepted this case for review.

/ / / / /

/ / / / /

/ / / / /

C. OTHER CASE LAW SUPPORTS THE APPELLATE COURT'S DETERMINATION THAT THE DEFINITION OF "PUBLIC RECORDS" IS UNAMBIGUOUS.

Like the Sixth District Court of Appeal here, the First District in *Regents of the University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383, decided that the definition of "public records" in the Public Records Act is unambiguous. The issue in the *Regents* case was "whether a public agency can be required under the California Public Records Act . . . to seek records it does not prepare, own, use or retain in the conduct of its business." (*Id.* at 387.) Having examined the language of the Act, the *Regents* court found that "[n]o words in this statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used, or retained them." (*Id.* at 399.) The *Regents* court determined that because "the meaning of the statute is unambiguous," argument about the Legislature's intent regarding the meaning of "public records" was unnecessary. (*Id.* at 399 n.13.) The same principle applies here.

D. THE CONSTITUTION DOES NOT CHANGE THE ACT'S INTERPRETATION.

The Act provides that "'[p]ublic agency' means any state or local agency." (Gov. Code Sec. 6252(d).)

"'State agency' means every state office, **officer**, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution." (Gov. Code Sec. 6252(f).)

The Legislature, however, chose to omit individual officers from the definition of a local agency:

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

(Gov. Code Sec. 6252(a).)

The "local agency" definition covers boards, commissions, agencies, and legislative bodies of local agencies. The definition of a "state agency," which includes individual state officers, must be distinguished from that of a "local agency," which does not mention individual officers.

Under the "local agency" definition, the Council acting as a whole—as a legislative body—is deemed a public agency but not individual Council members when not acting as such a body. Smith's contention that "artificial" bodies must include individuals because they can only act through individuals must fail in this context. (Smith's Petition for Review at 16.) The state and cities are equally "artificial" creatures and yet the Legislature chose to include officers only in the definition of "state agency." Therefore, individual Council members are not a "local agency."

Contrary to Smith's argument, Proposition 59, enacted into the California Constitution as Article 1, section 3(b)(1), does not affect the interpretation of the Public Records Act. (Smith's Petition for Review 3-5 & 25-26.) The Second and Third District Courts of Appeal have determined that Proposition 59 simply reaffirmed prior law regarding how the Act should be construed and thus had little impact on the Act's interpretation:

/ / / / /

/ / / / /

/ / / / /

> In 2004, California voters approved Proposition 59, which enshrined in our state Constitution the public's right to access records of public agencies. (Cal. Const., art. I, § 3, subd. (b).) . . . The amendment requires the Public Records Act to 'be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.' (Cal. Const., art. I, § 3, subd. (b), par. (2).) '**Such was the law prior to the amendment's enactment.** '

(*Los Angeles Unified Sch. Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765) (quoting *BRV, Inc. v. Sup. Ct.* (2006) 143 Cal.App.4th 750-51) (emphasis added)

Therefore, while Proposition 59 provides that "the meetings of public bodies and the writings of public officials shall be open to public scrutiny" (Cal. Const. Art. 1 sec. 3(b)(1)), there is no indication that the mention of "public officials" was intended to amend the definition of "local agencies" in the Public Records Act. Rather, the Proposition appears consistent with the Act's definition of "state agencies" that includes "state officers." (Gov. Code Sec. 6252(f).)

The Third District Court of Appeal also noted that Proposition 59 does not change established privacy rights:

> Moreover, the amendment does not modify or further limit an individual's right of privacy as protected by the Public Records Act. Nothing in the amendment "supersedes or modifies the right of privacy guaranteed by Section 1 [of the state Constitution] or affects the construction of any statute [such as the Public Records Act], court rule, or other authority to the extent that it protects that right to privacy...." (Cal. Const., art. I, § 3, subd. (b), para. (3).)

(*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 751.)

Privacy rights are implicated here because even if private communications were redacted and only those responsive to a request were produced, the search itself could still require a review of **all** private

communications in the private accounts and devices of the City Council members and employees. Such a search would intrude on and reveal intimate details of their lives. It would be much more invasive than the search of city-owned pager accounts considered in *City of Ontario, California v. Quon*, where the United States Supreme Court stated that the employer's "audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been." (*Quon*, 130 S.Ct. at 2631.)

Smith does not claim that he ever proceeded under Proposition 59, and his argument that the Constitution changed the Act's interpretation is unfounded.

E. SMITH DOES NOT STATE GROUNDS FOR REVIEW.

While Smith argues why the Public Records Act **should** cover electronic communications of individual local officials in their private accounts, his petition for review is silent as to the language of the Act supporting that assertion. (*See, e.g.* Smith's Petition at 15-17 & 24-29.) As this Court explained in *California Federal Savings and Loan Association v. City of Los Angeles* (1995) 11 Cal.4th 342, "[w]e may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Id.* at 349.) Therefore, the Legislature may decide to amend the Act, but there are no grounds for this Court's review.

Smith makes a specious argument when claiming that the Sixth District Court's opinion is "unclear . . . whether an otherwise qualifying writing retained **on City-owned** property but 'prepared' or 'used' only by an individual employee" and not the Council as a body, would be constitute

public record under the Act. (Smith's Petition at 17; *see also id.* at 18-21.) (emphasis added) The Sixth District did not need to address that point because that was never an issue in this case. This case concerned e-mails and text messages contained solely **in private accounts**, not accessible to the City.

There is no need for the Court's clarification on this point, anyway. No-one could seriously dispute that an e-mail sent or received by a City employee relating to City business was a public record under the Act if it was located in **a City-owned** e-mail account or City server, and the employee was required by law to retain it, or kept it as necessary or convenient to the discharge of official duty. (*See, e.g. San Gabriel Tribune v. Sup. Ct.* (1983) 143 Cal.App.3d 762, 772.)

Another red herring is Smith's alleged requirement for consistency of the Public Records Act with state and federal discovery rules. (Smith's Petition at 21-24.) Smith does not cite any authority that public officials' private e-mail and phone accounts would be subject to local agencies' control and thus discoverable in a suit against the local agency. Even assuming that the Act and the discovery rules mandate the same production,[1] Smith's claim that a local agency would have to produce in discovery communications in the officials' private accounts is unsupported.

/ / / / /

/ / / / /

/ / / / /

[1] Smith's argument is ironic, at best, for most public entities that endure in litigation the use of extensive Public Records Act requests as "fishing expeditions" to obtain information that would not meet the discovery test of relevance or "reasonably calculated to lead to the discovery of admissible evidence."

F. THERE IS NO CONFLICT AMONG THE DISTRICTS ABOUT "CONSTRUCTIVE POSSESSION."

Contrary to Smith's argument, there is no conflict among the courts of appeal on the issue whether the concept of "constructive possession" "appl[ies] . . . to the CPRA, either in its entirety or to its definition of public records." (Smith's Petition for Review at 29-30.) The Sixth District Court of Appeal did not decide whether the concept of "constructive possession" applied to the Public Records Act "in its entirety" because the court never had occasion to do so as its analysis concerned interpretation of Section 6252(e). (Smith's Petition for Review at 29-30.) The Sixth District's decision here does **not** conflict with

- the Fifth District's *Consolidated Irrigation District v. Superior Court* (2012)) 205 Cal.App.4th 697,
- the decision of the First District, Fifth Division, in *Board of Pilot Commissioners for the Bays of San Francisco, San Pablo & Suisun v. Superior Court* (2013) 218 Cal. App. 4th 577,
- or the decision of the Fourth District, Division One, in *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385.

In *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, the court explains that a two-step analysis is required:

> CID's [requester's] contentions imply that it need only demonstrate that the files of the consultant were "public records" and it is entitled to have City produce those files. This implication is not accurate because the duty set forth in Government Code section 6253, subdivision (c) pertains to "disclosable public records in the possession of the agency." **Thus, to be successful, CID must establish that the files (1) qualify as "public records" and (2) were in the possession of City.**

(*Id.* at 709.) (emphasis added) The parties disputed both issues: (1) whether the documents of subconsultants qualified as "public records" under Section 6252(e), and (2) whether they were "in the possession of the agency" under Section 6253(c). (*Id.* at 710.) The *Consolidated Irrigation* court proceeded with answering the second issue first, and affirmed the trial court's finding that the city did not control the subconsultants or their files. The court of appeal thus affirmed the trial court's denial of the requester's petition under the Public Records Act. (*Id.* at 711.)

But the *Consolidated Irrigation* court expressly declined to rule on whether the documents qualified as "public records": "Because we have inferred the trial court found against CID on the question of possession, **we do not address whether the subconsultants' files** 'were prepared, owned, used, or retained" by City and, thus, **constituted a 'public record'** for purposes of Government Code section 6252, subdivision (e)." (*Id.* at 711 n.8.) In other words, even if the documents qualified as "public records," the city would not need to provide them because they were not in its "possession." The court's shortcut was therefore reasonable.

The Sixth District's decision does not conflict with *Consolidated Irrigation*, first, because *Consolidated Irrigation* expressly followed a two-prong analysis, separating the concept of "public records" under Section 6252(e) from consideration of "possession" under Section 6253(c); and, second, because *Consolidated Irrigation* did not reach the issue whether the documents qualified as "public records."

Similarly, in the *Board of Pilot Commissioners* case the court made clear that the first requirement is for documents to qualify as "public records" under Section 6252(e), and only then it could consider the issue of "possession" under Section 6253(c). (*Bd. of Pilot Commissioners for the Bays of San Francisco, San Pablo & Suisun v. Sup. Ct.* (2013) 218 Cal.App.

4th 577, 596-600.) The *Pilots* court held that the documents in question there did not qualify as "public records" because there was no evidence that they were used by the Port Agent, or that they were necessary or convenient to the discharge of the Port Agent's duty. (*Id.* at 597.) After deciding that the documents were **not** public records, the court continued to address, in dicta, the remaining argument concerning the documents' possession. The court explained:

> As to the Port Agent, the argument reaches too far. Under PMSA's theory, any and all records held or maintained by a private organization would become public record simply because one of its officers concurrently held a position performing public functions. Whether the record is in the actual or constructive possession of a public official, **the requirement is still that the record be required by law to be kept by that official, or that it be "'necessary or convenient to the discharge of his official duty.'"**

(*Id.* at 598.) (emphasis added) "As to the Board, to prevail, PMSA must establish that the files **(1) qualify as public records** and (2) were in the possession of the Board." (*Id.*) (emphasis added) Because the *Pilots* court clearly distinguished between the two prongs of analysis, the Sixth District's decision here does not conflict with the *Pilots* case.

In *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, the court of appeal did **not** consider the issue whether the documents were public records under Section 6253(e). (*Id.* at 1418.) The trial court's finding that the documents sought were public records was not challenged on appeal. (*Id.*) Instead, the issue on appeal was the city's compliance with Section 6253.1 that imposes on public agencies a duty to assist requesters in inspecting or obtaining copies of public records. (*Community Youth*, 220 Cal.App.4th at 1417-18, 1424-27.) Section 6253.1 has never been part of Smith's case. It was not briefed by

the parties nor discussed by the lower courts. For that reason, and because the *Community Youth* court assumed that the documents were public records, the Sixth District's decision does not conflict with it.

Smith's contention that there exists a conflict among the district courts regarding "constructive possession" is unfounded.

G. THERE IS NO EVIDENCE THAT THE CITY ALLEGEDLY CONTROLLED E-MAILS IN ITS EMPLOYEES' PRIVATE ACCOUNTS.

Smith argues that the Sixth District Court of Appeal allegedly overlooked evidence that the City exercised control over communications in personal accounts. (Smith's Petition at 6, 32-33.) The e-mails from Senior Deputy City Attorney Lisa Herrick to attorney Ken Machado, counsel for former San José Mayor Tom McEnery, that Smith relies on do not support his argument. (*See* Smith's Petition at 6 & 32-33.) The record demonstrates that all those e-mails are found in Herrick's City e-mail account. (2 Petitioners' Appendix [PA] 379-88.)

- The first e-mail that Herrick sent to Machado from her personal account she also copied to her City account. (2 PA 379; *see also* the same e-mail at *id.* at 380, 383, 385 & 387.)
- The second e-mail, a response from Machado to Herrick's personal account, Herrick forwarded to her City account. (2 PA 380.)
- The third e-mail, a response to Machado's forwarded communication, was sent from Herrick's City account. (2 PA 382.)
- The fourth e-mail is from Machado to Herrick's City account. (2 PA 384.)
- And the fifth was sent from Herrick's City account. (2 PA 386.)

It is apparent, therefore, that Herrick consistently ensured that communications sent from or received in her personal account were also preserved in her City account. Additionally, all the e-mails were printed out from Herrick's City account. (Compare 2 PA 379-88 with *id.* at 360 (an print-out from a City account sent by Teresa Rodriguez has a header "Rodriguez, Teresa" on the top of the page; Herrick's print-outs are in the same format, i.e. they have "Herrick, Lisa" in the header.))

The text messages from a constituent to Council member Sam Liccardo that, according to Smith and the San José Mercury News, Council member Liccardo himself provided to the newspaper in 2009, do not support Smith's control argument, either. (Smith's Petition at 7, 9 & 32-33; 2 PA 320 (par. 11) & 364.) Just because a Council member voluntarily agrees to provide a text message from a personal account to a newspaper and later consents to production to Smith of the same—no longer private—message, does not stand for Smith's broad proposition that the City generally controls text messages and e-mails in Council members' personal accounts.

The San José City Council's 2010 revision to the City's Public Records Policy and Protocol, Council policy number 0-33, added a requirement that in addition to City records, made available to the public "any recorded and retained communications regarding official City business sent or received by the Mayor, Council members or their staffs via personal devices not owned by the City or connected to a City computer network." (2 PA at 207.) While Council members could declare that they and their staff would produce electronic records created and stored in their private electronic accounts, it is not relevant here. First, the Council chose to impose that element of the policy only on themselves and their staff, i.e. on about 30 out of nearly 5,500 City employees. (*Id.*) Second, that revision

was made "for purposes of a one-year pilot program," and thus expired in March 2011. (*Id.* at 203 & 206.) Third, Smith's Public Records Act request was made in June 2009, about ten months before the policy was added in March 2010. (Smith's Petition at 5 & 10.) The policy did not state it was retroactive. (2 PA at 202-209.) Finally, local policies simply do not affect interpretation of the Public Records Act.

Contrary to Smith's argument, another policy revised on the same date, Council policy number 0-32, entitled "Disclosure of Material Facts and Communications Received During Council Meetings," is still in force and the City never claimed that it expired. (*See* 2 PA 202-203.) That policy requires "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.) The communications must be disclosed "at the Council meeting before the Council takes any action on the item," and "no later than public discussion of the item under consideration." (*Id.*) Those communications include text messages, e-mails and phone calls. (*Id.*) Once disclosed at a Council meeting, such communications become part of the action of the Council as a whole, and thus become public records of the City under the Act.

Therefore, the Sixth District was correct in stating that "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." (*City of San Jose (Smith)* 225 Cal.App.4th at 96.)

Smith fails to explain how the City allegedly "controls" the Council members' and all City employees' private electronic accounts or personal

communication devices so as to be able to obtain and examine the contents of those accounts or devices absent the consent of the members or the employees.

IV. CONCLUSION

The various policy considerations encompassed by this litigation are for the Legislature to balance. If any loopholes exist in the Public Records Act, it is the Legislature's prerogative to close them. No California appellate decision has yet determined that a local official is a "local agency" for purposes of the Public Records Act. There is no conflict among the courts of appeal on this issue, and this Court does not have the benefit of a thorough debate among the district courts of appeal. The City defendants respectfully request that the Court decline review, and allow the Legislature and the courts of appeal to weigh in first.

Respectfully submitted,

RICHARD DOYLE, City Attorney

By: Margo Laskowska

MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants
CITY OF SAN JOSE, et al.

Dated: June 10, 2014

CERTIFICATE REGARDING WORD COUNT

I, Margo Laskowska, counsel for Respondents, hereby certify, pursuant to California Rules of Court, Rule 81204 (c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this Answer to Petition for Review, exclusive of tables, cover sheet, and proof of service, according to my computer program is 5,584 words.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: June 10, 2014

By: Margo Laskowska
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Defendants
CITY OF SAN JOSE, et al.

PROOF OF SERVICE

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

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

I, the undersigned declare as follows:

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

On June 10, 2014, I caused to be served the within:

DEFENDANTS' ANSWER TO PETITION FOR REVIEW

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

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

Addressed as follows:

James McManis, Esq.
Matthew Schechter, Esq.
Christine Peek, Esq.
Jennifer Murakami, Esq.
McMANIS FAULKNER
A Professional Corporation
50 West San Fernando Street, 10th Floor
San José, California 95113
Phone Number: (408) 279-8700
Fax Number: (408) 279-3244

Attorneys for Plaintiff and Real Party in Interest TED SMITH
One (1) Copy

Clerk of the Court
Sixth District Court of Appeal
333 West Santa Clara Street, Suite 1060
San José, California 95113
Phone Number: (408) 277-1004

One (1) Copy

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

One (1) Copy

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

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

designated by the express service carrier for next day delivery.

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

Addressed as follows:

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

Original and Eight (8) Copies with eSubmission

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 10, 2014, at San José, California.

Christabel S. Cimbra Cruz