No. S218066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

---

CITY OF SAN JOSE, *et al.*,

*Defendants and Petitioners Below,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

*Respondent.*

---

TED SMITH,

*Plaintiff, Real Party in Interest, and Petitioner Here.*



---

# OPENING BRIEF ON THE MERITS

---

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

JAMES McMANIS (40958)
MATTHEW SCHECHTER (212003)
CHRISTINE PEEK (234573)
TYLER ATKINSON (257997)
JENNIFER MURAKAMI (273603)
McMANIS FAULKNER
A Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244

Attorneys for Plaintiff, Real Party in Interest, and Petitioner Here,
TED SMITH

No. S218066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

---

CITY OF SAN JOSE, *et al.*,

*Defendants and Petitioners Below,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

*Respondent.*

---

TED SMITH,

*Plaintiff, Real Party in Interest, and Petitioner Here.*

---

# OPENING BRIEF ON THE MERITS

---

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

JAMES McMANIS (40958)
MATTHEW SCHECHTER (212003)
CHRISTINE PEEK (234573)
TYLER ATKINSON (257997)
JENNIFER MURAKAMI (273603)
McMANIS FAULKNER
A Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244

Attorneys for Plaintiff, Real Party in Interest, and Petitioner Here,
TED SMITH

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

**OTHER AUTHORITIES**

**RULES**



**CODES**



**CONSTITUTIONAL PROVISIONS**

## STATEMENT OF ISSUES

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

The CPRA requires disclosure of "writings" relating to the conduct of the public's business that are "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code § 6252, subd. (e) (defining the term "public records").) The parties to this action[1] dispute whether the CPRA's definition of "public records" covers writings relating to the public's business that are stored in personal accounts or on personal devices. Petitioner Ted Smith ("Smith") argued that such writings qualify as "public records." The trial court concluded that Smith's interpretation was correct, because as a "local agency," the City can

[1] Defendants and petitioners below included the City of San Jose, San Jose Redevelopment Agency, and San Jose City officials and former officials sued in their official capacities (collectively, "the City").

only execute its public duties through its individual officers and agents, and therefore such writings were "prepared, owned, used, or retained" by the City.

On writ review, the Sixth District Court of Appeal disagreed and adopted a narrow interpretation of the terms "local agency" and "public records." It held that the definition of "local agency" referred only to the legislative body as a whole, and therefore any writings relating to the public's business stored on personal electronic devices or in personal accounts need not be produced in response to a CPRA request. (Opinion, pp. 13-15, 24.) The Sixth District's interpretation fails to harmonize the plain language of all the CPRA's provisions. It also fails to give effect to the CPRA's purpose of furthering the right of access, as expressed in Government Code section 6250 and in the California Constitution at article I, section 3, subdivision (b)(1)-(2). It would lead to unreasonable results if upheld, including confusion over whether the Sixth District's "legislative body as a whole" formulation also applies to writings stored on City infrastructure.

The City's proposal to exclude otherwise qualifying writings based on the fact that they are stored in private accounts or on private devices would unreasonably undermine the public's right of access,

and create an easy way for public employees to conceal wrongdoing. The City fails to offer any persuasive countervailing policy reasons for restricting the right of access. Although Smith disagrees that his interpretation of the term "public records" implicates employees' privacy rights, public employees may avoid any such risk by choosing not to use their private accounts and devices to conduct public business. Smith respectfully requests that this Court adopt his interpretation of the term "public records" and hold that writings concerning the public's business that are stored in private accounts or on private devices of individual officials and employees must be produced.

## STATEMENT OF FACTS

### I. SMITH'S JUNE 1, 2009 CPRA REQUEST.

On June 1, 2009, Smith submitted a request to the City under the CPRA, seeking 32 categories of public records. (2 Petitioners' Appendix ("PA") 323-326; 4 PA 761-763.) Smith's request generally sought public records concerning Tom McEnery, John McEnery, San Pedro Square Properties, Urban Markets LLC, Barry Swenson, Sarah Brouillette, and issues related to downtown San Jose development. (2 PA 323-326; 4 PA 761-763.)

Four of the categories in Smith's request specifically sought "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 City Council and their staff. (2 PA 323-326, ¶¶ 27-30; 4 PA 761-763.) These requests sought communications with parties working on the San Pedro Square Urban Market, a downtown property development by developer Urban Markets LLC, which was funded at least in part by a loan from the City. (2 PA 162-163; 2 PA 323-326.)

The City produced some documents in response to Smith's June 1, 2009 request on June 29, 2009 and July 2, 2009. (2 PA 320, ¶ 9; 2 PA 348-353; 4 PA 765-766.) The only documents from these productions that appeared to be from personal email accounts or personal electronic devices were emails between Lisa Herrick, then counsel for the City, and Ken Machado, counsel for Tom McEnery, regarding a public records request from Mr. Machado. (2 PA 341, ¶¶ 9, 14; 2 PA 378-388; 4 PA 765-766.) 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; 4 PA 765-766.) Notwithstanding these emails, the City took the position 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; *see also* 2 PA 359.)

## II. THE FEBRUARY 24, 2009 TEXT MESSAGES TO COUNCIL MEMBER LICCARDO.

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; 4 PA 763-764.) 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; 4 PA 763-764.) 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 protection." (2 PA 376; 4 PA 763-764.) The second text message, sent shortly thereafter at 8:31 p.m., states, "Accidentally texted you. Sorry[.]" (2 PA 377; 4 PA 763-764.) The article stated that both messages were provided to the Mercury News in response to a CPRA request by the newspaper. (2 PA 320, ¶ 11; 2 PA 364; 4 PA 763-765.)

Based on the San Jose 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 on 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.)

## III. THE CITY'S PUBLIC RECORDS POLICIES.

On August 17, 2009, one day after the San Jose Mercury News article on the texts to Council Member Liccardo was published, then Mayor Chuck Reed issued a memorandum including recommendations for the "Sunshine Reform Task Force." (2 PA 121, 164-167; 4 PA 766-767.) 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); 4 PA 766-767.) At the August 18, 2009 City Council meeting, the City Council approved Mayor Reed's memorandum (2 PA 122, 168-183; 4 PA 767), 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; 4 PA 767.)

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; 4 PA 767-768.)

The purpose of revised City Council Policy 0-32 was "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 applied to text messages, emails, and telephone calls received during Council meetings. (2 PA 204.) Revised City Council Policy 0-33 stated 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 these policies are no longer enforced, and were voluntary. (4 PA 869, lines 20-24.)

## IV. SMITH'S COMPLAINT.

On August 21, 2009, Smith filed a Complaint under the CPRA, naming the City of San Jose, the San Jose Redevelopment Agency,[2] and San Jose City officials and former officials sued in their official capacities as defendants. (1 PA 1-17.) Smith sought an order that the City was required to produce the requested records, regardless of

[2] After Smith filed his lawsuit, the San Jose Redevelopment Agency was dissolved by operation of law and the City of San Jose was designated as its successor agency. (2 PA 311-313.)

whether they were created or received on City-owned computers and servers, or on a private device. (1 PA 7-8.)

## V. THE CITY PRODUCES THE LICCARDO TEXTS AFTER SMITH FILES HIS CPRA ACTION.

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; 4 PA 766.) Both text messages would have been responsive to categories 27 and 29 of Smith's June 1, 2009 CPRA request. (1 PA 013; 2 PA 376-377, 392; 4 PA 756-766.) 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 for communications sent or received on private devices. (2 PA 321, ¶ 15; 4 PA 756-766.)

## VI. SMITH PREVAILS ON HIS MOTION FOR SUMMARY JUDGMENT IN THE TRIAL COURT.

In July 2012, Smith and the City brought cross-motions for summary judgment. (1 PA 22-37, 89-112.) Although the City effectively conceded its obligation to produce records sent or received from private devices using **City** accounts, it continued to refuse to

produce responsive communications from private devices using private accounts such as Yahoo! or Gmail. (4 PA 765.)

On March 19, 2013, the trial court granted Smith's motion and denied the City's motion. (4 PA 846-855.) The trial court rejected the City's arguments that individual City officers are not included in the CPRA's definition of "public agency,"[3] 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.)

///

///

///

---

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

## VII. THE SIXTH DISTRICT ISSUES A PEREMPTORY WRIT VACATING THE SUMMARY JUDGMENT ORDER, AND DIRECTING THE TRIAL COURT TO ENTER A NEW ORDER DENYING SMITH'S MOTION AND GRANTING THE CITY'S MOTION.

On April 10, 2013, the City filed a Petition for Writ of Mandate or Alternative Writ of Prohibition ("Writ Petition"), seeking review of the trial court's March 19, 2013 Order. The Sixth District Court of Appeal granted review, and on March 27, 2014, issued an opinion vacating the March 19, 2013 Order.

The Court of Appeal held that because the CPRA's definition of "local agency" referred to government bodies and not individual employees, "writings" that are "not accessible" to the City did not fall within the definition of "public records." (Opinion, pp. 14-15) Critical to the holding was the Sixth District's conclusion that the plain language of Government Code section 6252, subdivision (a) "denominates **the legislative body as a whole**; it does not appear to incorporate individual officials or employees of those entities." (Opinion, p. 14 (emphasis added).) The Court of Appeal ultimately concluded 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.

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW.

The interpretation of a statute is a question of law, subject to a de novo standard of review. (*Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.) Similarly, the application of a statute to the undisputed facts is a question of law, reviewed de novo. (*County of Los Angeles v. Superior Court (Anderson-Barker)* (2012) 211 Cal.App.4th 57, 62.)

///

## II. WRITINGS CONTAINING INFORMATION RELATING TO THE PUBLIC'S BUSINESS, SENT OR RECEIVED USING PRIVATE ACCOUNTS OR DEVICES, ARE "PUBLIC RECORDS" WITHIN THE MEANING OF THE CPRA.

"The primary objective of statutory interpretation is to ascertain and effectuate legislative intent." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 119; *accord Smith v. Superior Court (L'Oréal USA, Inc.)* (2006) 39 Cal.4th 77, 83.) Courts "'first, look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.'" (*MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082 (*quoting Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126).)

Here, the analysis of legislative intent supports Smith's interpretation of the term "public records" in Government Code section 6252, subdivision (e) to include records sent or received from private accounts or devices. Any other interpretation is contrary to the purpose of the CPRA, and would allow public employees to conceal records concerning the public's business from inspection.

///

### A. The Plain Language Of The CPRA Supports Smith's Interpretation Of The Term "Public Records."

In reviewing the plain language of the statute, courts give the words "'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning." (*MacIsaac*, *supra*, 134 Cal.App.4th at 1083 (*citing Flannery v. Prentice* (2001) 26 Cal.4th 572, 577).) If the language of the statute is clear and unambiguous, there is no need for further judicial construction. (*Ibid.*) As discussed below in Section II.B, however, courts will not follow the plain meaning of the statute when it would frustrate the purposes of the legislation as a whole or lead to absurd results. (*Ibid.*)

Here, Government Code section 6252 subdivision (e) defines the term "public records" as follows:

> 'Public records' includes any **writing** containing information relating to the public's business prepared, owned, used, or retained by any state or **local agency** regardless of physical form or characteristics.

(Gov. Code, § 6252, subd. (e) (emphasis added).) The statute defines the term "local agency" as follows:

> 'Local agency' includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or

> entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952.

(Gov. Code, § 6252, subd. (a).)

The CPRA also separately defines "writing" as follows:

> 'Writing' means 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.

(Gov. Code, § 6252, subd. (g).)

1. Records "Prepared, Owned, Used, Or Retained" By A Local Agency Include Records "Prepared, Owned, Used, Or Retained" By Its Individual Officials And Employees.

Nothing in the plain language of the definitions of "public records," "local agency," or "writing" suggests that the Legislature intended to limit the CPRA's coverage to records "prepared, owned, used, or retained" by a local agency's "legislative body as a whole." The words "legislative bodies" in section 6252, subdivision (a) are used only to clarify that the CPRA extends to additional subsidiary "legislative bodies" as defined by Government Code section 54952, which is part of the Ralph M. Brown Act. The plain language of section 6252, subdivision (a) does not indicate the term "legislative

bodies" was intended to limit the scope of the CPRA; to the contrary, it caused the CPRA to cover more "legislative bodies" than just a City Council, for example.

Nevertheless, the Sixth District erroneously concluded that "the plain language of the provision denominates **the legislative body as a whole**; it does not appear to incorporate individual officials or employees of those entities." (Opinion, p. 14 (emphasis added).) The Sixth District found support for its position in the definition of "state agency," which includes the term "officer." (Opinion, p. 14; *see also* Gov. Code, § 6252, subd. (f).) The Sixth District reasoned that the Legislature could have included the term "officer" in the definition of "local agency," had it intended to include individual officials or employees of those entities. (Opinion, p. 14.) Even if this argument has superficial appeal, it does not withstand scrutiny.

As Smith argued in the courts below, local agencies can only act through their officials and employees. 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 Kight v. CashCall, Inc.* (2011) 200 Cal. App.4th 1377, 1392.) The City 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, subd. (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").) Where an agent is acting on behalf of its principal, "there is in law only a single actor." (*Id.* at 1326.)

It is unlikely the Legislature intended that the CPRA would not incorporate long-standing legal principles regarding agency relationships in its definition of "local agencies," and thereby exclude individual officers and employees, but that its definition of "state agencies" would include individual officers. Not only would such an interpretation render the statute internally inconsistent in its treatment of state and local agencies, it would do so in a manner that defeats the express purpose of the CPRA as set forth in Government Code section 6250. (*Cf. Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 ("when interpreting a statute, we must harmonize its various parts if possible, reconciling them in the manner that best carries out the overriding purpose of the legislation").)

A much more plausible reading of the CPRA as a whole, including the term "officer" in the definition of "state agency," is the one suggested by the ACLU in its amicus letter brief, filed in this action on May 22, 2014. As the ACLU pointed out on page 4, footnote 4 of its letter brief, the term "officer" is needed to designate elected state executive officers not described by the other terms in the definition of a "state agency." (*See* Cal. Const., art. V, § 14(f) (defining "state officer"); *see generally* Cal. Const., art. V, §§ 1-11, 13-14 (providing for election and setting forth powers and duties of certain state executive officers).) Interpreted this way and read broadly to effectuate the purpose of the CPRA, the definitions of state and local agencies both may be understood to incorporate principles of agency and therefore bring records "prepared, used, owned, or retained" by individual public employees in the course and scope of their employment within the definition of "public records."

2. The City Has Control Over Its Officials And Employees, And May Compel Them To Produce Responsive Records, Wherever They May Be Stored.

Records "prepared, used, owned, or retained" by individual officers and employees of the City qualify as "public records" because the City has authority to require such individuals to search for and

produce writings relating to the public's business. Revised City Council Policy 0-33 shows the City has asserted such authority in the past:

> 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); *see also* 2 PA 202-213.)

Although the City has argued these policies are no longer enforced, and were voluntary (4 PA 869, lines 20-24), the policies were in effect during the pendency of Smith's lawsuit, and purported to exert control over the Mayor, Councilmembers, and their staff. (2 PA 206; 2 PA 202-213.) At a minimum, these policies show the City has memorialized its authority to require its agents to produce responsive public records. That the policy may have been temporary or was later repealed does not mean the City lacks the ability to control its agents.

In any event, recently enacted internal City policies revived the above language from former City Council Policy 0-33. (*See* Petitioner's Request for Judicial Notice, Exh. 3, Attachment A (Consolidated Open Government and Ethics Provisions), § 4.2.4 ("City Records").) Either way, a written policy is not needed for the courts to recognize that the City's control over its agents authorizes it to demand that they produce responsive records in their possession, regardless of where they are stored. The fact that the City may assert control over writings related to the public's business by virtue of its relationship with its individual officers and employees supports Smith's interpretation of the term "public records."

3. The Court of Appeal's Interpretation Does Not Harmonize The Provisions Of The CPRA.

The Sixth District's interpretation also prevents the defined term "writing" from being read in harmony with the definition of "public records," as required by the rules of statutory interpretation. (*See Cummins v. Superior Court (Cox)* (2005) 36 Cal.4th 478, 487.) According to the Sixth District, the term "local agency" designates the agency's legislative body as a whole, not individual officers and employees; therefore "writings" not linked to a City account or server are "inaccessible" and outside the scope of the CPRA. (Opinion, pp.

14-15.) Although the definition of "writing" in section 6252, subdivision (g), expressly includes "transmitting by electronic mail," the Sixth District's interpretation of "public records" has the effect of potentially excluding all emails "prepared, used, owned, or retained" by individual public employees rather than by the "legislative body as a whole." It is highly unlikely the Legislature intended the CPRA to cover only a small and vaguely described subset of emails, rather than all emails sent or received by public employees, as agents of their public employer, regarding the public's business.

Similarly, there would be little point in expressly excluding, for example, "personnel, medical, or similar files," local agency investigatory files, or library circulation records if the only records covered are those "prepared, used, owned, or retained" by the legislative body as a whole. (*See* Gov. Code, § 6254, subds. (c), (f) & (j).) Courts must avoid interpretations that render any part of the statute surplusage. (*See Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.)

4. *In re Silberstein* Does Not Control Here.

Finally, to the extent the City relies on *In re Silberstein* (Pa. Commw. Ct. 2011) 11 A.3d 629, cited by the Sixth District (see

Opinion, pp. 20-22), such reliance is misplaced. The *Silberstein* court's emphasis on whether an individual city council member could conduct the business of a public body misses the mark as applied to California law. The CPRA broadly focuses on "writings" pertaining to "the public's business," not merely the items reflected in the City Council's agenda or meeting minutes. (*Compare* Gov. Code, § 6252, subd. (e); *with In re Silberstein*, *supra*, 11 A.3d at 632 ("[i]nformation ... that documents a transaction or activity of an agency....").)

For all these reasons, the Sixth District's interpretation does not give effect to the plain language of all of the CPRA's provisions, and the peremptory writ should be vacated.

### B. The City's Interpretation Of The Term "Public Records" Is Inconsistent With The Purpose Of The CPRA.

"The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." (*Silver v. Brown* (1966) 63 Cal.2d 841, 845; *see also Times Mirror Co. v. Superior Court (State of Cal.)* (1991) 53 Cal.3d 1325, 1334, fn. 7.) Here, even if the City's interpretation of section 6252, subdivision (e) were determined

to reflect its plain meaning, the other two prongs of the analysis compel the conclusion that the City's interpretation must be rejected to avoid absurd results and frustration of the CPRA's purpose.

1. The City's Interpretation Is Inconsistent With The Express Purpose Of The CPRA, As Well As Its Legislative History.

The California Legislature adopted the CPRA in 1968, declaring 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.) Consistent with this expressly stated goal, this Court also has acknowledged: "[o]penness in government is essential to the functioning of a democracy." (*International Federation of Professional and Technical Eng. v. Superior Court (Contra Costa Newspapers, Inc.)* (2007) 42 Cal.4th 319, 328 ("*IFPTE*").) The *IFPTE* court went on to describe the CPRA's vital role in ensuring the government's accountability to the public:

> '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.'

(*IFPTE, supra*, 42 Cal.4th at 328-29 (*quoting CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651).)

The definition of "public records" must be interpreted to give effect to the CPRA's expressly stated purpose of facilitating the fundamental right of access. This Court's observation that, "'[o]nly purely personal information unrelated to the "conduct of the public's business" could be considered exempt'" from the definition of "public records" is in line with this rule of statutory construction. *See Commission on Peace Officer Standards & Training v. Superior Court (Los Angeles Times Communications LLC)* (2007) 42 Cal.4th 278, 288, fn. 3 ("*CPOST*") (*quoting* Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9); *see also San Gabriel Tribune v. Superior Court (City of West Covina)* (1983) 143 Cal.App.3d 762, 774; 53 Ops. Cal. Atty. Gen. 136, 143 (1970) ("the definitions set forth in section 6252 are intended to be as broadly inclusive as possible and reflect a desire to minimize the possibility that records which may properly be made available to the public not be withheld on the basis of a technical question").) In contrast, the Sixth District recited the rules of

statutory construction, but failed to apply them so as to give effect to the CPRA's express goal.

The legislative history of the defined term "writing" further supports Smith's interpretation of the term "public records" to include communications between the named public officials and developers sent or received from private accounts or devices. The term "electronic mail" was added to the definition of "writing" in section 6252, subdivision (g) in 2002 by unanimous vote of the Legislature. (Assem. Bill No. 1962 (2001-2002 Reg. Sess.).) At the time of the amendment, the legislature was informed, in at least two reports, that such an amendment was needed because:

> According to the sponsor, the United States Justice Foundation, a municipality can claim that email and other electronic correspondence such as facsimiles are not "records" or "writings" and therefore avoid disclosure under the Public Records Act and use of such material in judicial proceedings.

(Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002, p. 2; Sen. Judiciary Com., Analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002, p. 2; *see also* Request for Judicial Notice, Exhibits 1 and 2.)

The term "electronic mail" was added to the definition of a "writing" specifically to prevent public agencies – including municipalities – from avoiding disclosure based on a misguided reading of the statute. The Sixth District's narrow interpretation of "public records" defeats the Legislature's intent in adding this terminology. Under the Court of Appeal's formulation, only records "prepared, owned, used, or retained" by a "legislative body as a whole" qualify as "public records." It is unclear how this rule would apply in the context of emails, but if applied literally, it would exclude from CPRA coverage the vast majority of emails sent in the course of performing the public's business. The Legislature could not have intended this result when it added the term "electronic mail" to the definition of "writing."

To the extent the Sixth District did not intend to subject emails located in City accounts or on City servers to its limiting construction, such an interpretation would impermissibly define records as "public" or "non-public" based on their location. This Court has rejected such an approach with respect to the CPRA's exemptions for peace officer personnel records under Government Code sections 832.7, 832.8, and 6254, subdivision (k). (*See CPOST*, *supra*, 42 Cal.4th at 291 ("We

consider it unlikely the Legislature intended to render documents confidential based on their location, rather than their content.").) It is equally unlikely the Legislature intended that emails concerning the public's business, located on servers or in accounts other than the City's, would lose their public character by virtue of that location.

2. The City's Interpretation Is Inconsistent With Proposition 59.

The CPRA also must be read and interpreted in harmony with Proposition 59's constitutional mandate. In 2004, the People of the State of California overwhelmingly voted in favor of Proposition 59. This legislative constitutional amendment introduced freedom of information, or "sunshine" provisions into the California Constitution, once the voters approved it.

Proposition 59 added section 3(b)(1) to article I, which states: "[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 fact that Proposition 59 expressly refers to "**public officials**" suggests that its drafters and the voters understood the CPRA to apply to individual "public officials" and not merely the

legislative body as a whole. (*See* Cal. Const., art. I, § 3, subd. (b)(1).) Not only did Proposition 59 elevate the people's right of access to a constitutional right, it also instructs courts to construe any statute that existed when Proposition 59 took effect – including the CPRA – "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 Court of Appeal acknowledged Proposition 59's requirements (Opinion, p. 13), but did the opposite of what Proposition 59 required in interpreting the term "public records." Instead of construing the term "public records" broadly so as to further the right of access, the Sixth District adopted an interpretation that may cause records previously assumed to be subject to the CPRA to become unavailable to the public.[4] In doing so, it failed to give effect to the intent of the Legislature and the voters as set forth in Proposition 59, undermining the democratic process and the CPRA.

---

[4] (*See, e.g., Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 74-76 (names of officers involved in police shootings not exempt on facts presented in that case); *IFPTE, supra*, 42 Cal.4th at 346 (public employee salaries not exempt).) It is unclear whether the Sixth District's requirement that the record be "prepared, owned, used, or retained" by the legislative body as a whole means that the information held non-exempt in these cases would nonetheless be excluded from the Sixth District's definition of "public record." (*See* Opinion, pp. 15-16.)

In particular, the Sixth District did not reconcile its own narrow interpretation of the term "public records" with the inclusion of the term "public officials" in Proposition 59. The Sixth District's conclusion that "local agency" does not encompass individual agents and employees of that agency is inconsistent with Proposition 59's express reference to individual public officials.

For all these reasons, Smith respectfully urges this Court to vacate the writ issued by the Court of Appeal and construe the CPRA and Proposition 59 in a manner that affirms the intent of the Legislature and the voters. (*See Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037-38; *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538.)

### C. It Is Not Reasonable To Interpret The Term "Public Records" To Exclude Writings Sent Or Received From Private Accounts Or Devices.

If ambiguity remains after the first two steps in the analysis, courts look to the consequences that will flow from a particular interpretation, applying "'reason, practicality, and common sense to the language at hand.'" (*MacIsaac*, *supra*, 134 Cal.App.4th at 1084 (*quoting Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239); *see also CPOST*, *supra*, 42 Cal.4th at 290

(although Court of Appeal's construction was consistent with statutory language, it was unreasonable because it would lead to anomalous results).) Here, the Sixth District's interpretation inevitably would lead to unreasonable results, contrary to the purpose of the CPRA.

1. The Sixth District's Interpretation Would Lead To Results The Legislature And Voters Could Not Have Intended.

The Sixth District's ruling will inevitably lead to unintended results, because it enables public employees to hide records in a manner contrary to the purpose of the CPRA. The Court of Appeal's interpretation would render inaccessible emails or texts between a councilmember and a lobbyist regarding City business, as long as they are sent and received using the councilmember's personal accounts and devices. Such communications may not be covered at all under the Sixth District's interpretation if the Sixth District intended its construction of the term "local agency" to apply to records stored in City accounts or on City servers. Under the City's logic, if a public employee took home hard copies of records concerning City business, such as a public contract or publicly financed development project, and placed them in a locked file cabinet, those documents also would

be exempt from disclosure because they are "inaccessible" to the local agency.

The City's and Sixth District's proposed construction does not follow the established rule that statutory construction should avoid unreasonable results that do not comport with the Legislature's intent. (*See, e.g., In re Reineger* (1920) 184 Cal. 97, 103 (courts should not adopt "narrow or restricted meaning[s]" when it "would result in an evasion of the evident purpose of [a statute], when a permissible, but broader, meaning would prevent the evasion and carry out that purpose").) The examples above are the type of absurd consequences the Court of Appeal was to avoid in interpreting the statute.

2. Case Law Acknowledges The Location In Which Records Are Stored Does Not Diminish Their Public Character.

The Sixth District gave no weight to *CPOST*'s reasoning that content rather than location determined confidentiality when evaluating the scope of the term "personnel records" under Penal Code sections 832.7 and 832.8, and declined to apply this reasoning when construing the definition of "public records." (Opinion, pp. 15-16.) The Court of Appeal erred in discounting *CPOST*'s concern that it would be too easy to conceal unprotected information in a "file" that

also happens to contain protected information. (*See CPOST*, *supra*, 42 Cal.4th at 290-91.) In fact, this is the same unreasonable result that would occur if the City's interpretation were upheld: public employees could easily conceal non-exempt records concerning public business through the simple expedient of using private accounts and devices. The Sixth District erred in failing to adhere to the rule that content, not location, determines the public character of the record.

The Sixth District also erred in concluding that the issue was "not properly framed as one of location vs. content." (Opinion, p. 17.) The City's primary argument was that the requested records were not "public records" because they "are not and were not stored on any City equipment and are not accessible to the City." (4 PA 752.) Although the City also tried to distinguish between the "issues" of whether it had custody and control of the records and the records' location (4 PA 752-753), however framed, the City's position that it lacks access depends on the place where the records are stored. As explained further in Section III below, this position is untenable.

///

///

### 3. The Court Of Appeal Erred By Failing To Perform All Steps In The Statutory Interpretation Analysis.

The Sixth District relied on two cases in support of its decision to disregard the potential for unreasonable results due to its narrow construction of the CPRA: *California Federal Savings & Loan Association v. City of Los Angeles* (1995) 11 Cal.4th 342, 349, and *McLeod v. Parnell* (Alaska 2012) 286 P.3d 509. Neither case supports cutting off the statutory interpretation analysis at the "plain language" step.

In *California Federal Savings & Loan Association*, the Court found a statutory reference to "Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure" was not ambiguous and plainly referred to all of Title 9. (*See Cal. Fed. Sav. & Loan Ass'n*, *supra*, 11 Cal.4th at 347.) It rejected plaintiff's proposed reading, which effectively would have rewritten the statute. (*Id.* at 349 ("In effect, plaintiffs would have us rewrite Government Code section 970.1, subdivision (b), to provide that judgments are 'not enforceable under Division 2 of Title 9 of Part 2 (commencing with Section 695.010) of the Code of Civil Procedure.'").) In contrast, Smith is not asking this Court to rewrite the CPRA, but rather, to recognize that the CPRA's drafters presumably knew the principles of

agency and did not choose to write them out of the statute in defining "public records" or "local agency." (*See People v. Scott* (2014) 58 Cal.4th 1415, 1424 (Legislature is deemed to be aware of statutes and judicial decisions already in existence).)

*McLeod* is inapposite because that court ultimately concluded the lower court's interpretation would not lead to absurd results (*see McLeod, supra*, 286 P.3d at 514-15), which is not the same as concluding the problem is a task for the Legislature. *McLeod* is also inapposite because it raised different issues than those addressed here, namely, whether Alaska's public records act was properly limited to those records that have been preserved, and whether it prohibited use of private emails to conduct public business. (*Id.* at 513-14.)

Here, Smith has not argued the definition of "public records" imposes a duty to preserve, although other applicable law may impose such a duty. California authorities have recognized that "public records" include "'[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[.]'" (*San Gabriel Tribune, supra*, 143 Cal.App.3d at 774 (*quoting City Council v. Superior Court* (1962) 204 Cal.App.2d 68, 73).) Similarly, while it may be unwise or ethically questionable

for City employees to use private accounts and devices to conduct public business, Smith is not arguing the CPRA prohibits such conduct. Rather, Smith argues that if City employees voluntarily choose to do business that way, any non-exempt "writings" memorializing such business that are "required by law to be kept" or actually kept as "necessary and convenient" to the discharge of official duty are subject to the CPRA and must be produced upon request. (*See* Gov. Code, §§ 6252, subd. (e); 6253, subds. (a)-(c).)

Even if this Court accepts that the City's proposed interpretation is consistent with the CPRA's plain language, the City's interpretation still unavoidably conflicts with the intent of the CPRA and Proposition 59, and would lead to unreasonable results contrary to the public policies embodied in those laws. Smith respectfully urges that all steps in the analysis must be completed, and submits that his interpretation prevails under that analysis.

///

///

///

///

///

## III. THE CITY MAY NOT AVOID ITS OBLIGATION TO SEARCH FOR AND PRODUCE RESPONSIVE PUBLIC RECORDS BY CLAIMING THE RECORDS ARE "INACCESSIBLE" AND THEREFORE NOT IN THE CITY'S POSSESSION.

### A. The Requested Records Are "In The Possession Of" The City Within The Meaning Of Government Code Section 6253(c).

Government Code section 6253, subdivision (c) obligates local agencies to "determine whether the request, in whole or in part, seeks copies of disclosable public records **in the possession of the agency**" within 10 days of receiving a request. (Gov. Code, § 6253, subd. (c) (emphasis added).) The City contends that records stored in private accounts or on private devices are "inaccessible" and therefore need not be produced. (4 PA 799.) Here, the City did not argue below that its response was excused because it was not in possession of responsive records under section 6253, subdivision (c); therefore the Court need not reach this issue. (*See* 1 PA 27-37; 4 PA 744-759, 807-815.) If the Court does decide to reach the issue, the City's failure to respond is not justified on this ground either. As argued above, because the City has control over its officials, agents and employees, public records in their possession are public records in the City's possession.

### B. In The Analogous Context Of Civil Discovery, A Responding Party Has A Duty To Obtain Information Reasonably Available From Employees, Agents, Or Others Subject To Its Control.

In the analogous context of civil discovery, both state and federal law provide that parties may discover items in the responding party's "possession, custody, or control." (*See* Code Civ. Proc., § 2031.010, subd. (a); Fed. R. Civ. P. 34(a)(1).) Since Code of Civil Procedure section 2031.010, subdivision (a) is based on Rule 34 of the Federal Rules of Civil Procedure (*see* 2 Witkin, Cal. Evidence (4th ed. 2000) Discovery, § 118, pp. 958-59), federal authorities are relevant in interpreting the terms "possession, custody, and control." (*Liberty Mutual Ins. Co. v. Superior Court (Frysinger)* (1992) 10 Cal.App.4th 1282, 1288 ("Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions.").)

"'[D]ocuments are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has *actual* possession, custody or control, **or has the legal right to obtain the documents on demand.**'" (*Netbula, LLC v. Chordiant Software, Inc.* (N.D. Cal., Oct. 15, 2009) 2009 WL 3352588, at *1 (emphasis added, italics in original) (*quoting In re Bankers Trust Co.* (6th Cir. 1995) 61

F.3d 465, 469).) 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 (*quoting* 10A Federal Procedure, Law Ed. § 26:377, p. 49 (1988)) (emphasis added); *see also Caston v. Hoaglin* (S.D. Ohio June 12, 2009) 2009 WL 1687927, *3 (observing that the defendant employer "has control over its current employees and the records within their possession.").)

Similarly, "information is 'in the possession of the government' if the prosecutor 'has knowledge of and access to the documents sought by the defendant.'" (*United States v. Santiago* (9th Cir. 1995) 46 F.3d 885, 893 (*quoting United States v. Bryan* (9th Cir.) 868 F.2d 1032, *cert. denied*, 493 U.S. 858 (1989)); *see also Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580, 588, n. 7 ("While a corporation or public agency may select the person who answers interrogatories in its behalf, it has a corresponding duty to obtain information from all sources under its control – information which

may not be personally known to the answering agent."); *Gordon v. Superior Court (U.Z. Manufacturing Co.)* (1984) 161 Cal.App.3d 157, 167-68.)

Under these analogous rules, the City deemed to possess "writings" meeting the definition of "public records" that are in the possession of officials, agents, and employees acting on the City's behalf. As argued above, an interpretation that produces unreasonable results contrary to the purpose of the CPRA must be rejected. (*See CPOST*, *supra*, 42 Cal.4th at 290.) Here, it would not be reasonable for courts to interpret the concept of possession in a restrictive manner for the CPRA, but liberally for civil discovery. Contrary to the Sixth District's view, the disjunctive nature of the terms "possession, custody, or control" does not make a difference here. As discussed below in the next section, the City has the right to demand writings concerning the public's business possessed by its officials, agents, and employees.

### C. <u>As Above, The Terms "In The Possession Of The Agency" Must Be Interpreted To Give Effect To The Legislative Intent Of The CPRA And Proposition 59.</u>

The Court of Appeal rejected the proposition "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" located outside the City's own electronic communication system. (Opinion, p. 23.) The Sixth District relied on *Regents of University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383 (*Regents*), modified on denial of rehearing. *Regents* held that regardless of whether the term "possession" in Government Code section 6253, subdivision (c) included "constructive possession," the concept of constructive possession was not incorporated into the definition of "public records." (*Id.* at 401.)

Here, it is not necessary to incorporate the concept of "constructive possession" into the definition of "public records" in order to find that the requested records are "writings" relating to the public's business, "prepared, owned, used, or retained" by the City through its agents and employees. If the Court were to reach the issue of whether the term "possession" in section 6253, subdivision (c) includes constructive possession, the rules of statutory construction require a finding that it does. This is the only interpretation that would give effect to the intent of the Legislature and the voters to construe the CPRA broadly to facilitate the constitutional right of

access. (*See* Gov. Code, § 6253.3 (prohibiting local agencies from allowing other parties to control the disclosure of information subject to the CPRA); *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1427-28 ("City had an ownership interest in the field survey material and it had the right to possess and control it, even though it did not enforce its contractual right"); *Consolidated Irrigation Dist. v. Superior Court (City of Selma)* (2012) 205 Cal.App.4th 697, 710 (interpreting "possession" in section 6253, subdivision (c) to mean both actual and constructive possession).)

## IV. GENERALIZED PRIVACY CONCERNS DO NOT SUPPORT INTERPRETING THE CPRA TO ALLOW PUBLIC EMPLOYEES TO HIDE WRONGDOING BY AVOIDING USE OF PUBLIC EMAIL ACCOUNTS AND DEVICES.

The City has never claimed that any specific document was exempt under Government Code section 6254. Since the City has never laid the foundation necessary to establish that any of these exemptions apply to any particular record, it may not rely on the exemptions to avoid disclosure here. (*See Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986, 992 ("Statutory exemptions from compelled disclosure under the CPRA are narrowly construed [.] The burden of

proving a specific statutory exemption applies...is on the proponent of nondisclosure.").) The City nevertheless argued before the Court of Appeal, and in its Answer to Smith's Petition for Review in this Court, that its interpretation gives effect to the provisions of the CPRA and the California Constitution that reference individual privacy rights. (*See, e.g.*, Answer to Petition for Review, pp. 7-8, 11-12.)

A party claiming a violation of the constitutional right of privacy established in article I, section 1 of the California Constitution must prove "(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (*IFPTE, supra*, 42 Cal.4th at 338; *see id.* at 338-39 (concluding that city employees' salary information was subject to disclosure under the CPRA).) The City has not satisfactorily explained why any of these factors would be implicated by a demand from a local agency as an employer to its employee to produce responsive writings relating to the public's business. Should the employee fail to comply voluntarily, the City as employer presumably may discipline its employees for failure to comply with the law or the City's internal policies. In addition, the CPRA

authorizes courts to order production. (*See* Gov. Code, §§ 6258, 6259.)

*City of Ontario v. Quon* (2010) 560 U.S. 746, cited by the City in its Answer, is not controlling here. As in *Quon*, it is not necessary for this Court to resolve whether specific employees have a reasonable expectation of privacy in specific communications. (*See id.* at 760-61.) This Court may affirm the broad principle that public officials and employees may not use personal equipment to circumvent the CPRA without examining whether certain types of searches implicate privacy rights or whether those rights are outweighed by other interests.

Lower courts may resolve these issues on a case by case basis, keeping in mind that public employees may avoid implicating their privacy rights altogether by choosing not to conduct public business on personal devices. (*See, e.g., Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1387 (County produced privilege log and special master reviewed documents in camera); *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 833-36 (ordering in camera inspection of documents).) Moreover, even if responsive public records also contain exempt information, "[a]ny

reasonably segregable portion" of those records still must be produced. (Gov. Code § 6253, subd. (a); *see State Board of Equalization v. Superior Court (Associated Sales Tax Consultants, Inc.)* (1992) 10 Cal.App.4th 1177, 1187-88 (requiring public records to be produced with confidential taxpayer information redacted).)

Public records do not become exempt simply because they are stored in City officials' and employees' personal accounts or on personal electronic devices. In the end, the City's privacy argument is indistinguishable from the argument rejected in *CPOST*: that simply placing a document into a file that also contains private information somehow renders the document confidential. (*See CPOST*, *supra*, 42 Cal.4th at 290-91 (concluding such a result would be "arbitrary and anomalous").) Generalized concerns about privacy do not warrant adopting the City's restrictive interpretation of the term "public records."

## V. THE MENTAL PROCESS PRINCIPLE DOES NOT WARRANT WHOLESALE EXCLUSION OF RECORDS CONCERNING THE PUBLIC'S BUSINESS FROM THE CPRA.

In the Court of Appeal, the City also invoked the "mental processes principle," which prohibits inquiry into the motives of individual legislators in passing specific legislation. (*See Sutter's*

*Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1375; *but see* San Jose Municipal Code, § 12.12.800 ("Disclosure of communications with registered lobbyists").) Here, the City failed to raise this objection in a timely fashion as to any particular record, and therefore has waived it. Moreover, the City's own municipal code expressly requires certain disclosures that may implicate individual legislator's motives:

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

(San Jose Municipal Code, § 12.12.800 (emphasis added); Request for Judicial Notice, Exhibit 4.) The mental process privilege is no basis for categorically exempting all writings stored in private accounts or sent or received from private devices.

///

## VI. THE COURTS OF OTHER STATES HAVE HELD THAT "PUBLIC RECORDS" ARE DEFINED BY THEIR CONTENT, NOT WHETHER THEY ARE STORED IN A GOVERNMENT OR A PERSONALLY MAINTAINED ACCOUNT.

If this Court adopted Smith's interpretation, it would not be alone in holding that qualifying writings stored in private accounts or on private devices are "public records." In *Nissen v. Pierce County* (Wash. 2014) 333 P.3d 577, the court found that text messages concerning government business were public records even when those messages were located on a government official's personal cell phone. (*Id.* at 581.) Because the official used his personal phone "to conduct government-related communications[, it] rendered his cellular phone use no longer purely personal[.]" (*Id.* at 582.) Furthermore, such government-related communications "clearly were 'prepared' and 'used' in his capacity as a public official," and therefore qualified as public records. (*Ibid.*)

In *Adkisson v. Abbott* (Tx. Ct. App. June 13, 2014) __ S.W.3d __, 2014 WL 2708424, Commissioner Adkisson took the position "that [official-capacity] e-mails held in personal accounts can never be public information, regardless of their content." (*Id.* at *6.) The court disagreed, concluding that "email correspondence between the

Commissioner in his official capacity and other people discussing County government matters that he is involved with is information used in connection with transacting official business." (*Id.* at *8.) Therefore, correspondence from Adkisson's personal e-mail accounts, "related to his official capacity as a county commissioner or as chairman of the San Antonio–Bexar County Metropolitan Planning Organization, or both[,]" qualified as "public information" under the Texas Public Information Act. (*Id.* at *1.)

Finally, in *Vining v. District of Columbia* (D.C. Sup. Ct., August 12, 2014) 2014 D.C. Super. LEXIS 13, the plaintiff sued under the D.C. Freedom of Information Act "for production of documents[,] ... [particularly] production of e-mail communications sent and received by ANC Commissioner Dianne Barnes from a personal e-mail account upon which she apparently transacted ANC business." (*Id.* at *1.) The court rejected the District's "novel" argument that "the only documents that should be considered 'records of the ANC' are documents that were created by the ANC while it was actually sitting in official session with a quorum[]" (*id.* at *3), noting that it would be "difficult to imagine what documents, other

than official minutes of the ANC proceedings, would fit within the cramped interpretation of the statute put forward by the District." *Id.*

In particular, the court reviewed one of Ms. Barnes' emails, and focused its analysis "on the substance of the document created by a government official or employee, rather than the happenstance of whether the document was sent or received by a personal or a government-maintained e-mail account." (*Id.* at *6.) Because the communication was "clearly made in pursuit of ANC business," the court concluded, "it is simply immaterial whether this communication, or others like it, happen to be sent or received from a personal or a government-maintained e-mail account." (*Ibid.*)

## CONCLUSION

For the reasons set forth above, the Sixth District erred in interpreting the definitions of "public records" and "local agency" in a manner that fails to harmonize the plain language of all the CPRA's provisions. Smith's interpretation is the only one that achieves this goal, and gives effect to the CPRA's purpose of furthering the right of access, as expressed in Government Code section 6250 and in the California Constitution, article I, section 3, subdivision (b)(1)-(2). Smith's interpretation also avoids the potential confusion over

whether the Sixth District's "legislative body as a whole" formulation also applies to writings stored on City infrastructure.

The City rightfully may be deemed to exercise control over its individual officials and employees, such that it may require them to produce writings prepared, used, owned or retained in the course of their public duties, wherever they may be located. Any other interpretation would undermine the intent of the Legislature and the voters, rendering the public ill-equipped to hold the government accountable:

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

(*San Gabriel Tribune*, *supra*, 143 Cal.App.3d at 772 (*citing* Schaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L.Rev. 203, 203-04, quoting from S. Rep. No. 813, 89th Cong., 1st Sess., p. 1 (1965)).)

///

///

///

Smith respectfully requests that this Court adopt his interpretation of the term "public records" and vacate the Court of Appeal's peremptory writ.

Dated: November 21, 2014 McMANIS FAULKNER

Christine E. Peek

CHRISTINE PEEK

Attorneys for Plaintiff/Real Party in Interest, TED SMITH

## CERTIFICATE REGARDING WORD COUNT

I, Christine Peek, counsel for Real Party in Interest and Petitioner here, Ted Smith, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that the word count for this brief, exclusive of tables, according to Microsoft Word 2013, the program used to generate this brief, is 9,928 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of November, 2014.

Christine E. Peek

CHRISTINE PEEK

**S218066**

## CERTIFICATE OF SERVICE

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

**1) OPENING BRIEF ON THE MERITS;**

on the following person(s) in this action:

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

☒ **(BY OVERNIGHT DELIVERY)**

I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above or on the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

Executed on November 21, 2014, at San Jose, California.

SABA SHAKOORI