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.

REPLY 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.

REPLY 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

CODES

CALIFORNIA CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

The City concedes it must respond to California Public Records Act (CPRA) requests, and that its duty to respond would require production of non-exempt public records located on City property or City devices. (Answer Brief on the Merits (ABM), pp. 2, 25-26.) But, the City argues it has no obligation to produce records if they were created or stored only on personal equipment, because such records purportedly are not "prepared, owned, used, or retained" by the City's legislative body as a whole, and therefore are "inaccessible" and outside the definition of "public records." (ABM, pp. 1, 16-17.)

The plain language of the CPRA's definition of "public records" does not include the term "accessibility." (Gov. Code, § 6252(e).) Although this concept is alluded to in Government Code section 6253(c)'s language – "in the possession of the agency" – the City did not object to the disputed requests on this ground. Instead, the City argued for an interpretation of "public records" that effectively injected the element of "accessibility" into the definition. The definition's plain language does not support this interpretation, which is contrary to the CPRA's purpose of providing access to

information about the people's business. (*See* Gov. Code, § 6250.) If the Court decides to reach the issue of whether the disputed requests seek records "in the possession of the agency," Smith respectfully submits that they do, because the City has authority over its Council Members and employees, and can set policy regarding their use of personal devices and accounts to conduct City business.

LEGAL ARGUMENT

I. THE PLAIN LANGUAGE OF THE CPRA DOES NOT SUPPORT THE CITY'S INTERPRETATION OF "PUBLIC RECORDS."

A. Although "Relating To The Conduct Of The Public's Business" Is Just One Element Of "Public Records," There Is No Real Dispute This Element Is Met.

The City incorrectly asserts that Smith conflates the definition of "public records" with the term "public business." (ABM, p. 11.) In fact, Smith's Opening Brief on the Merits (OBM) quoted the definition of "public records," and went on to discuss various different components of that definition. (*See* OBM, pp. 14-21.) Smith's requests defined the records sought according to whether the records were "regarding any matters concerning the City of San Jose." (2 PA 326, ¶¶ 27-29.) The City has not asserted there were responsive records that solely concerned personal matters. (*See* Gov. Code, §

6253(a) (any "reasonably segregable portion" shall be made available).) Therefore, there should be no real dispute that the "relating to the conduct of the public's business" element is met.[1]

B. It Was Unnecessary For The Legislature To Include The Term "Public Officers" In The Definitions Of "Public Agency" Or "Local Agency," Because The Local Agencies Have Control Over Their Agents, Employees, And Representatives.

The City relies on the Sixth District's reasoning that the CPRA's definitions of "public agency" and "local agency" do not expressly refer to individuals, as opposed to the definition of "state agency," which includes the term "officer." (ABM, pp. 11-13.) The Sixth District incorrectly concluded this meant "local agency" "denominates the legislative body as a whole." (Opinion, p. 14.) The Sixth District then concluded that records in private accounts or on private devices are not "public records," because such records are "not accessible" by the City and therefore cannot be "prepared, owned, used, or retained" by the City. (Opinion, pp. 13-15 ("The City cannot, for example, 'use' or 'retain' a text message sent from a council

[1] Contrary to the City's argument (ABM, p. 3), Smith's description of the records was not necessarily intended to narrow the requests, but to clarify that Smith sought records relating to a development funded at least in part with public money. (OBM, pp. 3-4.)

member's smartphone that is not linked to a City server or City account.").)

As explained in Smith's OBM, it is not reasonable to interpret the term "local agency" to include only "the legislative body as a whole," based on the definition of "state agency." (OBM, pp. 15-18.) This is because local agencies can only act through their officials and employees; there is no indication the Legislature intended to ignore this reality in drafting the CPRA; and the term "officer" serves to identify executive officers not otherwise described by the other terms in the definition of "state agency." (OBM, pp. 15-18.) The City does not provide new information in response to Smith's points, but simply reiterates the Sixth District's reasoning.

Nor is it reasonable to combine the Sixth District's limited interpretation of "local agency" with the idea that writings in private accounts or devices are "not accessible" to the City, and conclude that such records cannot be "prepared, owned, used, or retained" by the City Council as a whole. (*See* Opinion, pp. 14-15.) First, Government Code section 6252(e) does not contain a separate "accessibility" requirement, and there is no basis for importing one into the definition of "public records." Second, the conclusion that

such records are "not accessible" is faulty. The City's authority to compel its employees and Council Members to disclose records and information relating to the public's business means that such writings are accessible by the City. (*See, e.g.*, Petitioner's Request for Judicial Notice (RJN), Exh. 3, Attachment A (Consolidated Open Government and Ethics Provisions), § 4.2.4 (defining "City Records" to include those in Council Members' personal devices not owned by the City or connected to a City computer network); *id.* at Exh. 4 (San Jose Municipal Code, § 12.12.800); *see also Gardner v. Broderick* (1968) 392 U.S. 273, 278; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 727 ("the Constitution affords a public employee no right to refuse to account for his or her job performance, or to avoid dismissal as punishment for such a refusal.").) The City has access to information about the conduct of City business that is within the control of its agents.

Moreover, the Sixth District's holding that the local legislative body as a whole must "prepare, own, use, or retain" records does potentially restrict the CPRA's scope, because it fails to clarify whether even records stored on City property or infrastructure will qualify as "accessible" or "prepared, owned, used, or retained" as "an

act of the agency." (*See* Opinion, pp. 12, 14-15; *see also* ABM, pp. 6, 31-32 (*citing In re Silberstein* (Pa. Commw. Ct. 2011) 11 A.3d 629).)

C. The Sixth District's Interpretation Cannot Be Upheld Under *Regents* or *Board of Pilot Commissioners.*

The City cites *Regents of the University of California v. Superior Court (Reuters America LLC)* (2013) 222 Cal.App.4th 383 in support of its argument that the Sixth District's interpretation of "local agency" and "public records" did not narrow the CPRA. The City's reliance on *Regents* is misplaced.

First, *Regents* is factually inapposite. *Regents* involved documents that were possessed by private equity firms and had not been provided to the Regents. (*Id.* at 389, 396.) In contrast, Smith seeks documents that were prepared, owned, used, or retained by City officials and employees in connection with a downtown development project. (2 PA 326, ¶¶ 27-29.) Information generated by City employees and Council Members is not the same as information generated by privately controlled equity firms. (*See Regents*, *supra*, 222 Cal.App.4th at 396 ("It is undisputed that Kleiner Perkins and Sequoia are private companies, not public agencies engaged in the public's business.").)

Here, the City argues the requested records are not "public records" under section 6252(e) because they are not "accessible," but section 6252(e) includes a disjunctive list of terms: "prepared, owned, used, or retained." (Gov. Code, § 6252, subd. (e) (emphasis added).) The terms "prepared" and "used" may apply absent physical possession or the ability to access the record directly. Under the plain language of the definition, responsive writings in private accounts or on private devices qualify as "public records" if they relate to City business and were "prepared, owned, used, or retained" by a local agency, by and through its representatives in the course of their public duties. (*See id.* (emphasis added).) Unlike the Regents, who established in the trial court that they did not "prepare" or "use" the information sought (*see Regents*, *supra*, 222 Cal.App.4th at 394, 398 & fn. 10), the City did not show its officials and employees did not "prepare" or "use" the requested records. Instead, City argued the records were not "public records" because they were not accessible. (*See, e.g.*, 4 PA 807.)

Second, *Regents*' footnote 13 does not support the City's position, because the *Regents* court did not analyze a local agency's obligation to produce records prepared, owned, used, or retained by its

own officials and employees. Therefore, the *Regents* court's observation that "the meaning of the statute is unambiguous" means little in the context of this case. Contrary to the City's suggestion (ABM, p. 14), Smith contends the plain language of the CPRA supports his interpretation of "public records" to include records "prepared, owned, used, or retained" by individual officials, agents, and employees of the City. In addition, the other prongs of the statutory interpretation analysis support Smith's position and must be considered. (*Compare* ABM, pp. 14-15 *with* OBM, pp. 15-16, 22-35.)

Board of Pilot Commissioners v. Superior Court (Pac. Merchant Shipping Assn.) (2013) 218 Cal.App.4th 577, cited by the City, also does not support the City's position. Again, the court in *Board of Pilot Commissioners* found it dispositive that the requested pilot logs were not used by the Port Agent in the performance of his duties on behalf of the public. (*Id.* at 584-86, 594-95, 597.) Here, the record does not show City employees or Council Members used responsive documents only for private purposes unrelated to their public duties. Nor did the City argue that its employees and Council Members did not prepare, own, use, or retain any responsive documents. Instead, the City defended the case by arguing it lacked

control over writings prepared, owned, used, or retained by its officials and employees, stored in private accounts or on private devices, even if they related to public business. (*See, e.g.*, 4 PA 807, lines 21-27.)

If the City now claims it has no obligation to respond because the requested records are not "in the possession of" the City under section 6253(c), that is a different argument, which the City did not specifically raise below. (*See* 1 PA 27-37; 4 PA 744-759, 807-815.) If the Court decides to reach this issue, the City's failure to respond is not excused by section 6253(c) either. The City has control over its officials, agents, and employees, and can compel them to turn over information relating to the conduct of the public's business or face dismissal. (*See, e.g.*, *Spielbauer*, *supra*, 45 Cal.4th at 727; *see also* Gov. Code, § 6253.3 (a local agency "may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter.").)

D. Government Code Section 6250 Sets Forth The Purpose of the CPRA, And Provides Guidance As To Its Interpretation.

The City claims a preamble cannot extend the meaning of an unambiguous statute or create ambiguity (ABM, pp. 15-16), but Smith

did not argue that Government Code section 6250 creates ambiguity. Rather, Smith argued the City's interpretation of the term "public records" was inconsistent with the purpose of the CPRA, as set forth in Government Code section 6250. (OBM, pp. 22-27.)

The lack of an express reference to individual public employees in section 6252(e) does not mean the CPRA clearly and unambiguously meant to exclude records "prepared, owned, used, or retained" by public employees in the course and scope of their duties, unless those records are kept on public property or devices. The City's assumption that its interpretation reflects the clear unambiguous meaning of "public records" is incorrect.

As noted in Smith's OBM, "[t]he 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.) The City's attempt to distinguish *Silver* fails, because nothing in the CPRA's plain language indicates clear intent to limit its coverage to records "prepared, owned, used, or retained" only by the agency's legislative body as a whole, or to abandon commonly understood principles of agency. The CPRA's

plain language does not support the City's restrictive interpretation. To the contrary, it supports Smith's interpretation. To the extent there is any doubt, it is proper to consider the CPRA's purpose and legislative history in interpreting the definition of "public records." (*See id.*)

In contrast to *In re C.H.* (2011) 53 Cal.4th 94, 107, cited by the City, the City's literal interpretation would lead to absurd results that frustrate the purpose of the CPRA, enable corruption, and cast doubt on whether other records "prepared, owned, used, or retained" by individual City employees will qualify as "an act of the agency." (*See* Opinion, pp. 12-15.) As noted in *In re C.H.*, "...'judicial construction of unambiguous statutes is appropriate only when literal interpretation would yield absurd results.'" (*See id.* (*quoting Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583).) Under this standard, judicial construction is appropriate even if the Court finds the plain language of section 6252(e) unambiguously supports the City's interpretation, because the City's interpretation would lead to absurd results.

Finally, the City raises privacy concerns in support of its argument for judicial forbearance. As discussed below, these concerns do not cut in favor of interpreting the CPRA to exclude

coverage for writings "prepared, owned, used, or retained" by public employees fulfilling their official duties, when the employees choose to use their private accounts or devices without copying a City account.

II. READ AS A WHOLE, THE PLAIN LANGUAGE OF THE CPRA CONFIRMS THE WRITINGS AT ISSUE ARE "PUBLIC RECORDS."

A. Government Code Section 6270 Simply Prohibits Furnishing Records To Private Entities In A Manner That Interferes With Public Access, And Does Not Support The City's Position That Responsive Records Are Inaccessible.

The City cites to a provision of the CPRA that prohibits local agencies from selling or otherwise furnishing records to public entities in a manner that interferes with public access. (ABM, p. 17 (*citing* Gov. Code, § 6270); *see also* 2 Witkin, Cal. Evid. (5th ed. 2012) Witnesses, § 297, p. 636.) The City misinterprets section 6270's prohibition on interfering with public access to mean the public entity must have "direct" access to its officials' and employees' email accounts. (ABM, p. 17-18.) In the context presented here, however, section 6270 would merely prohibit the City from furnishing responsive emails to other private entities in a way that would prevent the City from producing those same emails directly to another

requester. It does not require "direct" access and does not support the City's position.

B. Government Code Sections 6254.19, 6253.9 And 6253 Pose No Barrier To Recognizing That Responsive Communications Are "Public Records."

The City next cites a series of Government Code sections pertaining to electronic records. (ABM, p. 18.) Section 6254.19 merely clarifies that nothing in that section limits disclosure of non-exempt records stored on a local agency's information technology system. It does not limit the CPRA's coverage only to information stored on a local agency's information technology system. Likewise, nothing in section 6253.9 indicates the term "public agency" was intended to refer to the "legislative body as a whole," as opposed to the individual employees and officials fulfilling their public duties. Finally, section 6253, subdivisions (a) and (b), simply require local agencies to provide access to non-exempt public records, either by copying or by allowing inspection. They do not show legislative intent to exclude writings relating to the public's business based on whether a public employee chose to store them in private accounts or devices, or on City property or City devices.

///

C. Government Code Sections 6252.5, 6252.7, 6254.21, And 6254.5 Do Not Show Legislative Intent To Exclude Writings Relating To The Public's Business, "Prepared, Owned, Used, Or Retained" By Individual Officers And Employees Using Personal Equipment.

The City also cites other provisions of the CPRA that reference individuals. (ABM, pp. 19-20.) Again, these references do not show legislative intent to define "public records" based on whether they were created or stored using personal equipment or City equipment, or based on whether the City must ask its employees to retrieve responsive documents on its behalf. Government Code section 6252.5 simply clarifies that elected officers of a local agency are entitled to the same access to records as members of the public. Section 6252.7 simply clarifies that when such a request is made by a member of a legislative body, the local agency may not discriminate between or among those members "as to which writing or portion thereof is made available or when it is made available." If anything, the title of section 6252.7, "Authority of legislative body or local agency members to access a writing of the body or agency," implies that "agency" and "body" are not equivalent. (*See* Gov. Code, § 6252.7 (emphasis added).)

///

Government Code section 6254.21, also cited by the City, prohibits posting the home address and telephone number of an "elected or appointed official," and defines the term "elected or appointed official" for purposes of that section. (*See* Gov. Code, § 6254.21(a)-(b), (f).) It does not purport to modify the definition of "public records" to exclude records "prepared, owned, used, or retained" by individual public employees in the course of their official duties, based either on the location of the records or on the fact that an individual rather than the "legislative body as a whole" prepared, owned, used, or retained them.

The City finally relies on Government Code section 6254.5, which provides for waiver of the CPRA's exemptions whenever an "agency" discloses an otherwise exempt record. Section 6254.5 defines "agency" to include individual members, agents, officers, and employees, for purposes of that section. This does not show the Legislature meant that writings prepared, owned, used, or retained by individual officers and employees fall outside the definition of "public records." Although most if not all public employees create records as part of their official duties, not all public employees are authorized to release records as part of their official duties, and even if they are,

they may not have authority to release all records. The Legislature rationally could have found it important to clarify whose disclosure will result in a waiver for purposes of section 6254.5 and under what circumstances,[2] without meaning to suggest that local agencies need not require individual employees to look for and produce responsive records, wherever they may be stored.

D. Government Code Section 6250 Does Not Support The City's Position.

Despite criticizing Smith's reliance on Government Code section 6250, the City relies on section 6250's reference to individual privacy rights to support its argument for a narrower interpretation of "public records." (ABM, p. 20-21.) Citing *Copley Press, Inc. v. Superior Court (County of San Diego)* (2006) 39 Cal.4th 1272, 1282, the City argues the right of access is not absolute. In contrast to *Copley Press*, which concerned Civil Service Commission records relating to a peace officer's appeal of a disciplinary action (*id.* at 1279), here, any privacy interests do not justify categorically excluding from CPRA coverage all writings relating to the public's

---

[2] (*See Masonite Corp. v. County of Mendocino Air Quality Mgmt. Dist.* (1996) 42 Cal.App.4th 436, 452 (release of information was outside the proper scope of employee's duties); *see also id.* at 454-55 (contrasting the release of other information, which was "within the proper scope of authority to disclose public records").)

business that are "prepared, owned, used, or retained" using only personal equipment.

The City relies on *City of Ontario v. Quon* (2010) 560 U.S. 746 to support its claim that responding to Smith's requests would require the City to review its employees' private communications.[3] *Quon* provides little guidance here, because the court did not decide whether Quon actually had a reasonable expectation of privacy in the text messages at issue or in the place to be searched. (*Id.* at 759-60.) The court did note Quon was told his messages were subject to auditing, and he should have known his communications might be analyzed if his actions as a law enforcement officer came under scrutiny. (*Id.* at 751-52, 762.) Ultimately, the court held the search of Quon's text messages was reasonable (*id.* at 760-65), even though the messages did not pass through city computers. (*Id.* at 751.)

Even a requirement that City employees submit devices for review by their government employer would not infringe reasonable expectations of privacy under article I, section 1 of the California Constitution, or the Fourth Amendment. As in *Quon*, City employees fairly may be assumed to know communications in the course of their

[3] The City does not address whether there are any protective measures or safeguards that could resolve any legitimate privacy concerns.

public duties are subject to scrutiny. The City concedes it must produce records from City accounts or City devices, so the only records subject to the "privacy" policy argument are those the employees did not copy to City accounts or otherwise make available to the City. It is not reasonable for City employees to expect their "private" accounts will remain private if they use them to conduct public business and fail to copy their City account. An employer's search under these circumstances would be reasonable as necessary to achieve a non-investigatory, work-related purpose, namely, compliance with the CPRA. (*Cf. Quon*, *supra*, 560 U.S. at 756-58 (raising possibility that review might be justified for "compliance with state open records laws"); *see id.* at 760-61 (*citing O'Connor v. Ortega* (1987) 480 U.S. 709, 725-26) (plurality).)

At least one other court agreed *Quon* "does not establish a broad right to privacy that would necessarily protect public information contained in a government official's personal e-mail account." (*Adkisson v. Paxton* (Tx. Ct. App., March 6, 2015) ___ S.W.3d ___, 2015 WL 1030295, at *11.)[4] Rather, a public records

[4] After Smith filed his OBM on November 24, 2014, the Court of Appeals of Texas withdrew its June 13, 2014 opinion and substituted the March 6, 2015 opinion cited above, which may be cited under the

request may require disclosure of records created in the transaction of public business, regardless of where they are physically located. (*See id.* at *12.)

As an employer, the City can require its employees and councilmembers to search their non-governmental accounts and produce responsive emails. (*See* 2 PA 207; Petitioner's RJN, Exh. 3, Attachment A, § 4.2.4; *see also Gordon v. Superior Court (U.Z. Manufacturing Co.)* (1984) 161 Cal.App.3d 157, 167-68 (public agency has duty to obtain information from all sources under its control when responding to interrogatories).) The City also has authority to set policies and conditions for use of personal devices to conduct public business, which can diminish or eliminate any reasonable expectation of privacy in communications about City business. (*See Quon, supra*, 560 U.S. at 751.) If the employees refuse to cooperate, the City can take disciplinary action consistent

///

Texas Rules of Appellate Procedure. (Tex. R. App. P. 47.2(c) (2014) ("[o]pinions and memorandum opinions in civil cases issued on or after January 1, 2003 shall not be designated 'do not publish.'"); *see also* Tex. R. App. P. 47.7(b) (2014), *available at* http://www.txcourts.gov/media/806639/texas-rules-of-appellate-procedure-updated-with-amendments-effective-1114-w-appendices.pdf.)

with applicable law. (*See Spielbauer*, *supra*, 45 Cal.4th at 727.) The City's policy argument is unpersuasive.

E. The Definition of "Public Records" Must Be Interpreted In Accordance With Proposition 59.

The City argues Proposition 59 simply reaffirmed prior law regarding construction of the CPRA. (ABM, pp. 22-23). This does not address Smith's argument that the definition of "public records" must be interpreted in light of Proposition 59. (*See Regents*, *supra*, 222 Cal.App.4th at 397 (describing Proposition 59, Cal. Const. art. I, section 3(b)(1)-(2), as a "rule of interpretation").) To the extent the City claims Proposition 59 need not be considered, that position is incorrect. (*See id.*; *see also* Cal. Const., art. I, § 3(b)(1)-(2).)

The City also argues Proposition 59 did not "amend" the definition of "local agencies." That argument fails because it assumes without support that the terms "public records" and "local agency" were not intended to cover writings "prepared, owned, used, or retained" by individual employees and officials in the first place.

The City asserts Smith did not claim to have made a request under Proposition 59 (ABM, p. 22, fn. 3), but whether or not Smith proceeded under Proposition 59 is irrelevant. Proposition 59 is appropriately used as an interpretive rule regardless of whether or not

Smith invoked it in his request. (*See Regents*, *supra*, 222 Cal.App.4th at 397.) The City also cites article I, section 3, subdivision (b)(5), but this subdivision merely provides that Proposition 59 does not nullify exceptions to the right of access. The definition of "public records" is not an exception to the right of access. For these reasons, the City's arguments regarding Proposition 59 are unpersuasive.

F. The Brown Act Does Not Support The City's Interpretation Of "Public Records."

The City claims the Brown Act does not apply to "[i]ndividual contacts or conversations between a member of a legislative body or any other person." (ABM, p. 24 (*citing* Gov. Code, § 54952.2(c)(1)).) Even if this were true, it does not inform the interpretation of the CPRA's definition of "public records." Smith has not argued responsive records must be disclosed because a "meeting" has occurred under the Brown Act, but rather, because the City's objection that responsive records are not "public records" has no merit. Further, because the City imposes numerous reporting requirements both on "lobbyists" (defined very broadly in the City's Municipal Code) and Council Members, its concern that Smith's interpretation could have a "chilling effect" on the public is entitled to no weight. (*See* San Jose Municipal Code, §§ 12.12.170, 12.12.180,

12.12.310, 12.12.400, 12.12.410, 12.12.420, 12.12.430, 12.12.800, *available at* https://www.municode.com/library/ca/san_jose/codes/code_of_ordinances.)

G. Smith Properly Referenced Authorities On Agency And The Interpretation Of The Term "Public Records."

The City attempts to distinguish cases cited by Smith on the ground that they did not consider whether the term "public agency" includes individuals. (ABM, pp. 24-25 (*citing Suezaki v. Superior Court (Crawford)* (1962) 58 Cal.2d 166; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318; *San Gabriel Tribune v. Superior Court (City of West Covina)* (1983) 143 Cal.App.3d 762).) Even if *Suezaki* and *Fiol* did not consider that issue, they are relevant because they articulate long-standing legal principles regarding agency relationships that are pertinent to the issue presented in this appeal. *San Gabriel Tribune* is on point because the court specifically discussed the scope of the term "public records" as it appeared in a former version of Government Code section 6252. (*See San Gabriel Tribune*, *supra*, 143 Cal.App.3d at 774-75.)

///

///

III. THE CITY'S LOCATION-BASED PRIVACY ARGUMENTS DO NOT SHOW ITS INTERPRETATION OF "PUBLIC RECORDS" IS REASONABLE.

The City concedes it must produce responsive documents from City email accounts and devices. (ABM, pp. 25-26.) The City nonetheless raises a variety of privacy arguments against producing records in private accounts or on private devices.

The City challenges the idea that content rather than location is the relevant inquiry in determining whether the record qualifies under the CPRA. Citing *Copley Press*, *supra*, 39 Cal.4th at 1293, fn. 15, the City asserts that even disclosable documents may become non-disclosable when placed in a "protected" file. (ABM, p. 28, fn. 5.)

The *Copley Press* footnote did not say a "public record" would cease to qualify as such under any circumstances. (*Copley Press*, *supra*, 39 Cal.4th at 1293, fn. 15.) Rather, the Court observed: "'nonexempt materials' – i.e., those 'not on their face exempt from disclosure' under the CPRA – nevertheless become exempt through inclusion in an investigatory file." (*Ibid.* (*quoting Williams v. Superior Court* (1993) 5 Cal.4th 337, 354-55).) The Court went on to clarify:

> We also explained in *Williams* that a public agency cannot make the CPRA exemption for investigatory files applicable to a particular record 'simply by placing it in a file labeled "investigatory."'

(*Ibid.* (*quoting Williams*, *supra*, 5 Cal.4th at 355) (emphasis added).)[5] *Copley*'s footnote 15 is consistent with Smith's position, and the situation discussed in *Copley* and *Williams* is not presented here.

The City's observation that even relevant information may be withheld in discovery if disclosure would infringe privacy rights is also unpersuasive.[6] Whether or not a reasonable expectation of privacy exists is a mixed question of law and fact. (*See Pioneer Electronics (USA), Inc. v. Superior Court (Olmstead)* (2007) 40 Cal.4th 360, 370-71 (reasonable expectation must exist under the particular circumstances).) Any privacy interest is then balanced against other legitimate interests. (*Ibid.*; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-37.) Here, the City made no factual showing that any specific document would qualify as

---

[5] The City also relies on *Regents* and *Board of Pilot Commissioners* in support of its claim that it need not disclose responsive records. (ABM, pp. 26-27.) For the reasons stated in Section I.C., *supra*, these cases are inapposite.

[6] The City also asserts Smith cited no authority showing records regarding City business in private accounts are subject to the City's control (ABM, p. 28-29), but this is incorrect. (*See* OBM, pp. 36-39 and authorities cited therein.)

privileged or exempt, or that its officials and employees have a reasonable expectation of privacy when conducting City business from their private accounts and devices. (1 PA 44-46, 54-55; 2 PA 340; 4 PA 770-774.) The City also presented no evidence of the cost of compliance. (1 PA 44-46, 54-55; 4 PA 770-774.)

Instead, the City argued that all records located only in private accounts or devices were "inaccessible" and therefore not "public records" under the CPRA. (*See, e.g.*, 3 PA 640; 4 PA 807.) As noted above, the City has authority to require its officials and employees to produce documents in order to serve the City's competing (and overriding) interest in complying with the CPRA, even if those documents are located at the employee's house or on a personal device. (*See* Sections I.B-C, II.D, *supra.*) The City's additional privacy arguments lack support, and fail to address whether "[p]rotective measures, safeguards and other alternatives" would alleviate any privacy concerns. (*See Pioneer Electronics*, *supra*, 40 Cal.4th at 371.)

///

///

///

IV. THE SIXTH DISTRICT'S INTERPRETATION OF "PUBLIC RECORDS" TAKES A NARROWER APPROACH THAN THE PRE-CPRA COMMON LAW RIGHT OF PUBLIC ACCESS.

The City cites *Sander v. State Bar of California* (2013) 58 Cal.4th 300, but *Sander* supports Smith's position, not the City's. In *Sander*, the plaintiffs sought disclosure of the State Bar's admissions database on bar applicants. (*Id.* at 304.) Because most provisions of the CPRA do not apply to agencies created under article VI of the California Constitution, such as the State Bar, this Court analyzed plaintiffs' entitlement to the records under common law and constitutional principles. (*Id.* at 309-10, 313-17, 323-26.)

The Court observed that, historically, the right of public access extended not only to the official records of public entities, but also to "other matters" – "matter which is 'public' and in which the whole public may have an interest." (*Id.* at 314 (*quoting Whelan v. Superior Court* (1896) 114 Cal. 548) (internal quotations omitted).) In particular, plans and estimates related to a public works project were deemed disclosable "other matters," in which the public had an interest, though they did not reflect the official act of an agency. (*Id.* at 315 (*citing Coldwell v. Board of Public Works* (1921) 187 Cal. 510, 519-21).) Although the CPRA's "presumptive right of access to any

record created or maintained by a public agency that relates in any way to the business of the public agency" did not apply, the Court found no conflict between the CPRA's exemption of judicial branch records and the recognition that the common law right of access continues to exist. (*Id.* at 323.)

As noted in *Sander*, the CPRA begins with a presumption of public access. (*Id.* at 323.) It stands to reason that the CPRA, with its presumption of public access, would not provide less access than the common law right, which historically included "other matters" that did not necessarily reflect the agency's official acts. Yet, the Sixth District's conclusion that the records Smith sought were inaccessible appears to rest at least in part on the notion that the record somehow must reflect an "act of the agency." (*See* Opinion, pp. 12-15; *see also id.* at p. 22 (*citing In re Silberstein*).) To the extent this was intended to say that "public records" must reflect an act of the "legislative body as a whole," this is more restrictive than the common law right of access discussed in *Sander*.

The City also contends that "by definition" public records are not kept in private files or private accounts, but this merely reiterates what the City must show through its interpretation of the statutory

definition. *Sander* lends no support to the City's assertion that "by definition" records in "private" files are not public.

V. THE CITY'S NON-CALIFORNIA CASES DO NOT CONTROL HERE.

The City cites two non-California cases in support of its argument: *Kissinger v. Reporters Committee for Freedom of the Press* (1980) 445 U.S. 136, and *In re Silberstein, supra*, 11 A.3d 629. (ABM, pp. 31-32.) Neither of these cases controls here.

In *Kissinger*, the court held the State Department did not improperly withhold notes that had been transferred to the Library of Congress, and therefore no longer were in the possession or control of the State Department. (*Kissinger*, 445 U.S. at 143-144, 150-53.) As noted above, the City did not argue responsive records were not "in the possession" of the City under Government Code section 6253(c), and the City does have authority to compel its own employees and Council Members to search for and produce documents required to comply with the law. *Kissinger* is inapposite.

In re Silberstein is inapposite for the reasons stated in Smith's Opening Brief. (*See* OBM, pp. 21-22.) The CPRA's broad focus on "writings" pertaining to "the public's business," stands in contrast to the Pennsylvania court's focus on whether an individual council

member was capable of conducting the business of the City. (*Compare* Gov. Code, § 6252, subd. (e); *with In re Silberstein*, *supra*, 11 A.3d at 632.) This is not consistent with California's broad treatment of public records,[7] and should not be adopted as the rule in California.

VI. THE COURT SHOULD ANSWER ONLY THE QUESTION BEFORE IT.

A. The Court Lacks An Adequate Record To Balance The Public's Interest In Disclosure Against Any Privacy Interests.

The City concedes it did not invoke the CPRA exemptions, but nevertheless asks the Court to conduct the privacy balancing test in its discretion. (ABM, pp. 32-33.) In contrast to *Cedars-Sinai Med. Center v. Superior Court (Bowyer)* (1998) 18 Cal.4th 1, 6, cited by the City, Smith's petition for review did not ask the Court to adjudicate the CPRA exemptions. Moreover, determining "whether the circumstances give rise to a reasonable expectation of privacy" necessarily precedes the privacy balancing test, and presents a mixed question of law and fact. (*Pioneer Electronics*, *supra*, 40 Cal. 4th at 370; *Hill*, *supra*, 7 Cal.4th at 40.)

---

[7] (*See, e.g.*, *San Gabriel Tribune*, *supra*, 143 Cal.App.3d at 774 ("'Only purely personal information . . . could be considered exempt from this definition . . .'").)

The City has not created a sufficient record of its customs, policies, and practices regarding employee use of personal equipment for City business for this Court to determine whether individual officers and employees have a reasonable expectation the City will not examine their devices in order to comply with the law. For example, it is unclear whether the City has any additional "bring your own device" (BYOD) customs, policies, and practices, or if so, what they are. The record of City policies which does exist does not favor the City. (2 PA 204-209; *see also* Petitioner's RJN, Exh. 3, Attachment A, § 4.2.4.) Contrary to the City's argument, Smith disputes the City's claim that it is unable to turn over responsive records. "In general, the court should not proceed to balancing unless a satisfactory threshold showing is made." (*County of Los Angeles v. Los Angeles County Employee Relations Comm.* (2013) 56 Cal. 4th 905, 926.)

Smith respectfully requests that this Court decline to resolve fact-dependent privacy issues not raised in his petition, affirm the broad principle that an individual's decision to conduct City business on personal equipment without forwarding the records created to the

///

City does not take such records outside the CPRA, and let the lower courts resolve specific privacy objections on a case by case basis.

B. The Court Lacks An Adequate Record To Adjudicate The Applicability Of The Deliberative Process Privilege.

The City also asks the Court to evaluate the "mental process" principle, which prohibits inquiry into the motives of individual legislators in passing specific legislation. (*See, e.g., Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1375.) Again, the City has not created an adequate record for review, having failed to specify what documents allegedly are protected.

Such a record lacks any proof that the records Smith requested "involved the formulation of policy," would "discourage internal policy debate," or would somehow undermine a Council Member's ability to perform his or her functions. (*American Civil Liberties Union v. Superior Court (Dep't of Corrections and Rehabilitation)* (2011) 202 Cal.App.4th 55, 76 (*quoting Times Mirror Co. v. Superior Court (State of Cal.)* (1991) 53 Cal.3d 1325, 1341).) Moreover, the City's own Municipal Code demonstrates that, under certain circumstances, disclosures that may implicate an individual legislator's motives must be made. (*See* San Jose Municipal Code, § 12.12.800; Petitioner's RJN, Exh. 4.) For these reasons, Smith

requests that this Court decline the City's request to resolve the applicability of the deliberative process principle.

CONCLUSION

Smith's interpretation of "public records" honors both the plain language of Government Code section 6252(e), and the purpose of the CPRA as stated in Government Code section 6250 and Proposition 59. Smith respectfully requests that this Court adopt his interpretation of the term "public records" and vacate the Court of Appeal's peremptory writ.

Dated: June 19, 2015

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 6,365 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of June, 2015.

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) REPLY BRIEF ON THE MERITS;

on the following person(s) in this action:

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

☒ **(BY 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 June 19, 2015, at San Jose, California.

SABA SHAKOORI