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June 12, 2014

VIA OVERNIGHT MAIL

The Honorable Chief Justice Tani G. Cantil-Sakauye and
Honorable Associate Justices of the
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: *City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75
Letter of *Amicus Curiae* League of California Cities in Opposition to Petition for Review [California Rules of Court Rule 8.500(g)]

Dear Honorable Chief Justice and Associate Justices of the Supreme Court:

On behalf of the League of California Cities ("League") and its member cities[1], we respectfully submit this letter in opposition to the Petition for Review filed by the Real Party in Interest, Ted Smith ("Petitioner"), in *City of San Jose v. Superior Court* ("*San Jose*") (2014) 225 Cal.App.4th 75, Supreme Court Case No. S218066.

I. THE LEAGUE'S INTEREST IN THE CASE

The League has a significant interest in the *San Jose* case because each of its local agency members are subject to, and are regulated by the Public Records Act (the "Act"). The League believes the Court of Appeal correctly ruled:

> [T]he 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 CRPA request for messages relating to City business.

(Opinion, p. 24.) The League also supports the Court's statement:

> Whether such a duty better serves public policy is a matter for the Legislature, not the courts, to decide.... The obstacles noted by

[1] The League is an association of 471 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

> petitioners and the League—the legal and practical impediments attendant to the extra task of policing private devices and accounts—would also be addressed more appropriately by the Legislature or the agency, not the courts.

(*Id.*) Therefore, the League opposes the Petition for Review solely on the ground that this Court should give the Legislature the opportunity to resolve these important policy questions.

II. WHY THIS COURT SHOULD DENY REVIEW

Significant public policy matters lie at this controversy's core. Indeed, both parties, including the League, as *amicus*, devoted substantial time and effort arguing policy implications to the Appellate Court. (*See* Opinion, pp. 5-10.) However, the Appellate Court appropriately limited its review to the words of the Act. (Opinion, p. 10 ["None of the parties' policy-based arguments informs our analysis.... We are bound to interpret the statutory language as written and avoid any encroachment on the province of the Legislature to declare public policy."].) The League agrees that the Legislature should resolve the policy matters central to this dispute.

As such, the League respectfully requests this Court to deny the Petition because (1) the Legislature is the appropriate branch to decide the far-reaching public policies implicated here, and (2) the Legislature is better suited to resolve the myriad of practical and legal burdens local agencies would face if the agencies were required to disclose privately-held records.

A. The Public Policies In This Dispute Should Be Legislatively Resolved

This case presents competing views on the extent and breadth of open government to which local agencies, public officials and employees must adhere. This Court has recognized that "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state. [Citations.]" (Opinion, p. 10, *citing Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71-72 and *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1299 [it is for the Legislature, not the courts, to weigh competing policy considerations].) "Indeed, 'public policy' as a concept is notoriously resistant to precise definition, and...courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch in order to avoid judicial policymaking." (Opinion, p. 10, *citing Green, supra*, 19 Cal.4th at p. 76 and *Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.)

Petitioner urges this Court to grant his Petition and rule that local agencies have an affirmative duty to disclose records from privately-held devices and accounts. Petitioner also presses this Court to find that the people's right to access public records is practically absolute, based on article 1, section 3(b)(1) of the California Constitution. (*See* Petition, pp. 3-5; 25-26.) The League opposes these views.

Local agencies are mandated to operate transparently, and the League fully supports that transparency. However, that directive must be balanced against the privacy interests of public officials and employees. A public employee or official does not surrender his or her private space simply by accepting a public position. Such an interpretation would dissuade many good and qualified individuals from entering public service.

It is true that the California Constitution recognizes the "right of access to information concerning the conduct of the people's business," and that "writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3(b)(1).) However, the Court of Appeal correctly noted that right of access is not absolute. (Opinion, p. 7.) Rather, it is "qualified by the assurance that this right of access does not supersede an individual's right of privacy." (Opinion, p. 7 and fn. 5, *citing* Cal. Const., art. I, § 3(b)(3) ["Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy....]".)

On the other hand, if any decision is made to open privately-held records to the public, that disclosure responsibility should lie with the individual public employee or official who has prepared, owned, used or retained that record on his or her personal device or account. That individual is in the best position to disclose that record. Either way, if there is to be any alteration of the rules governing the public/private divide in public officials' and employees' lives or rules governing local agencies' disclosure duties, the Legislature is best equipped to perform those tasks.

As such, the Court should provide the Legislature an opportunity to resolve these weighty public policy matters. The Court should also defer to Legislature to decide a multitude of other practical and legal issues related to this issue.

B. The Practical And Legal Burdens That Could Be Imposed On Local Agencies Should Be Legislatively Resolved

If local agencies are forced to pry into public officials' and employees' private devices and accounts to respond to records requests, a host of practical and legal impediments will arise. For example, to obtain these records, the agencies would be required to search all of its employees' and officials' privately maintained personal computers, tablets, and cell phones, not to mention private email and social networking accounts. The local agencies would require viable, legal means for searching for and producing those records. Without the employee or official's voluntary consent to search through his or her private devices and accounts, what other mechanism would the agencies have? A search warrant directed at the official? A subpoena to Verizon? On what legal grounds?

Moreover, the Act provides very short deadlines in which agencies must make public records available for inspection and copying (Gov. Code § 6253(a), (b), and (c)). These timelines would necessarily need to be increased if local agencies are directed to search the potentially hundreds of private devices and accounts collectively owned by its employees and officials.

Further, in a scenario where local agencies are responsible for disclosing privately-held records, it is troubling that the *agency* would be legally responsible if a public employee or official withheld that record. The Act allows any person to sue an agency to enforce his or her right to inspect or receive a copy of a non-exempt public record. (Gov. Code §§ 6258, 6254.) The Act expressly requires the *agency* to pay any costs or attorneys' award if a party successfully proves the agency's failure to disclose a public record. (Gov. Code § 6259 [costs and fees "shall be paid by the public agency of which the public official is a member or employee *and shall not become a personal liability of the public official.*"] Emphasis added.) As the laws currently exist, local agencies are in a lose-lose position if they are required to disclose privately-held records; there is no legal authority to obtain those records, but if agencies fall short of disclosing them, they will be penalized.

The courts are not institutionally well-suited to set policy and engage in the type of line-drawing and fine-tuning that is the Legislature's bread-and-butter. This separation is particularly appropriate in the context of access to public records. If the Court grants the Petition, it may delay any consideration the Legislature may give to these matters. As such, the Court should provide the Legislature the opportunity to resolve the public policy, practical, and legal issues raised in this case.

III. CONCLUSION

For the reasons set forth above, the League respectfully requests that this Court deny the Petition for Review.

Sincerely,

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PROOF OF SERVICE

I, Roberta L. Kelley, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On June 12, 2014, I served a copy of the within document(s): *City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75 Letter of *Amicus Curiae* League of California Cities in Opposition to Petition for Review [California Rules of Court Rule 8.500(g)]

☒ by placing the document(s) listed above in a sealed United Postal Service Overnight envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a United Postal Service agent for overnight delivery.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 12, 2014, at Irvine, California.

Roberta L. Kelley

PROOF OF SERVICE LIST

City of San Jose v. Superior Court (2014) 225 Cal.App.4th 75

Letter of *Amicus Curiae* League of California Cities in Opposition to Petition for Review

[California Rules of Court Rule 8.500(g)]

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