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COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE; SAN JOSE REDEVELOPMENT AGENCY, HARRY MAVROGENES, in his official capacity as Executive Director of the San Jose Redevelopment Agency; MAYOR CHUCK REED, in his official capacity as Mayor of the City of San Jose, and PETE CONSTANT, ASH KALRA, SAM LICCARDO, PIERLUIGI OLIVERO, MADISON NGUYEN, ROSE HERRERA, JUDY CHIRCO, KANSEN CHU, NORA CAMPOS, NANCY PYLE, in their official capacities as individual Council members for the City of San Jose, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, Respondent. TED SMITH, an individual, Real Party in Interest.	NO. H039498 (Superior Court of California, County of Santa Clara Case No. 1-09-CV-150427) Dept. 1 (Complex Civil) Tel.: (408) 882-2110 Hon. Judge James P. Kleinberg

On Appeal From the Superior Court of California, County of Santa Clara
Judge: James P. Kleinberg

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND[PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONER CITY OF SAN JOSÉ'S PETITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court, Rule 8.208, *amicus curiae* League of California Cities, to the best of its knowledge, is unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated: June 17, 2013

BEST BEST & KRIEGER LLP

By: _____

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APPLICATION

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") respectfully applies for permission from the presiding justice to file the *Amicus Curiae* Brief contained herein. The League is an association of 469 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. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The League has a direct interest in the legal issues presented in this case because of the substantial, statewide implications the decision will have on the actions municipalities must take when responding to requests for public records under the California Public Records Act. The Court's decision could have far reaching effects on both the rights of individual citizens to communicate with their public officials and on individual public officials of California municipalities. The perspective of the League on this important, statewide issue will assist the Court in deciding the Petition.

For these reasons, the League respectfully requests leave to file the *Amicus Curiae* Brief contained herein.

Dated: June 17, 2013

BEST BEST & KRIEGER LLP

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I.

INTRODUCTION AND STATEMENT OF THE CASE

The California Public Records Act ("Act") requires that "public records" be open to the public, upon request, unless there is a specific legal basis not to disclose them. (Gov. Code § 6253(a).) The Act defines public records to include "any writing containing information relating to the conduct of the public's business *prepared, owned, used, or retained* by any state or local agency regardless of physical form or characteristics." (Gov. Code § 6252(e)) (Emphasis Added.) This case presents the important question of whether the Act's definition of public records extends to writings that are not "prepared, owned, used or retained" by the local agency itself. In addition, the specific question presented arises in the context of electronic records and thus implicates the provisions of the Act that address information in an electronic format. (Gov. Code § 6253.9.)

Respondent Superior Court of the State of California ("Trial Court") ordered Petitioner City of San José, *et al.* ("City") to provide certain public records to Real Party in Interest, Ted Smith ("Mr. Smith"), who, pursuant to the Act, sought voicemails, emails, or text messages sent or received on private electronic devices used by City of San José Council members and their staff "regarding any matters concerning the City of San José...." (Petition, p. 10, 6.)

It appears undisputed that the "private devices" Mr. Smith targeted were neither paid for nor subsidized by the City, and the City has no ownership or possessory interest in those devices. (Petition, p. 11, 10-12.) As such, when responding to Mr. Smith's request, the City did not reach beyond its own equipment to recover voicemails, emails, and text messages stored in Council members' private devices, such as cell phones, home computers, and tablets. (Petition, p. 11, 9-12.) The City also did not reach

beyond its own servers to recover voicemails, emails, and text messages stored in Council members' private accounts, to which the City had no access. (Petition, p. 11, 9-12.)

In ruling that the City must disclose Council members' private, electronic communications, the Trial Court strayed far from the Act's express language, intent, and purpose and expanded the definition of a "local agency" and a "public record." The Trial Court's ruling discards a dividing line between a public entity and a private individual by concluding that the two are synonymous. Going further, the Trial Court states that *anytime* an individual City official drafts a communication relating to a City issue, his or her writing may be open to public disclosure. In supporting its ruling, the Trial Court dismissed the notion that public officials have a right to privacy, and ignores the enormous burdens that public agencies throughout the State will face if they are required to police every public official's and employee's private desktop computers, cell phones, and tablets, as well as potentially hundreds of private email, cell phone, and social networking accounts maintained by those individuals.

The League is mindful of and supports the broad public disclosure requirements of the Act. However, the Act's reach is not, and cannot be, unlimited. The Act defines public records of a local agency such that writings made or received by a city council member are not subject to the Act unless they are prepared, used, owned or retained by the local agency. Adopting the Trial Court's view that public records includes any and all writings prepared by a public official or employee that touches on agency business—whether it be located on the agency's website or in an official's online journal—would rewrite the express language of the Act and create an unworkable standard inconsistent with our complex democratic process.

There are three specific reasons why the Trial Court's expanded view of a "public record" should be rejected. First, the Trial Court's

expanded definition of "public records" is unworkable. It is administratively infeasible to require a local agency to produce what it has not prepared or used, what it does not own or retain. Taken to its logical conclusion, the Trial Court's mandate would require cities to search through all the private computers of their public officials and employees (including computers shared with family members) in order to respond to Public Records Act requests. It is not clear under what authority such searches could legally take place. If a public official or employee refused to consent to such a search, it is unlikely that a city could obtain a search warrant to conduct such a search. Certainly, a city could not respond to a records request within the very short timelines contained in the Act. The Trial Court's ruling thus creates an unworkable administrative system that would not provide more access to public records.

Second, the Trial Court's expanded definition of "public records" is inconsistent with existing laws and our democratic process. Subjecting virtually all communications of individual public officials and employees to review under the Act is inconsistent with other transparency laws such as the Ralph M. Brown Act (Gov. Code § 54950 *et seq.*), which do not extend their reach into private contacts between public officials and individual citizens. Extending the reach of the Act in the manner suggested would also be inconsistent with the constitutionally protected rights of our democratic process, including the right of citizens to instruct their representatives and petition their government for redress of grievances. (Cal. Const., Art. I, § 3(a).) Such a rule would obliterate the public/private divide in the lives of public officials and employees. For the greater good of public transparency and good governance, we demand that our public officials and employees make public certain information (salaries, economic interests, etc.) that a private person could keep private. However, we have never completely erased the dividing line between the public and

private lives of public officials and employees. The interpretation required by the Trial Court would erase that line. While not all personal communications will become public under the Trial Court's interpretation, all personal communications would have to be reviewed by the local agency to determine whether they relate to the public's business, thus erasing the public/private divide in the lives of public officials and employees.

Third, the expansive interpretation mandated by the Trial Court may have a chilling effect on both citizens and public officials. Private citizens who wish to communicate with their representatives may not do so if they know that their private communications with their representatives will be open to public scrutiny. Similarly, the extension of the Act into the private writings of officials may have a chilling effect on people who would otherwise wish to serve the public.

For all of these reasons, the League urges the Court to adhere to the express definition of public records in the Act. This definition ensures broad disclosure of writings "prepared, owned, used or retained" by the local agency but does not require disclosure of documents which the local agency has not prepared, owned, used or retained. In addition, this case presents particular facts and should not be used as a vehicle for deciding broader issues that are better suited for legislative rather than judicial resolution. However, should the Court find that public officials' private communications on their private devices must be open to the public, the League urges the Court to place that burden of disclosure on public officials who have access and control of those records, and are in the best position to disclose those records.

II.

ARGUMENT

A. THE ACT'S EXPRESS LANGUAGE IS CLEAR: THE GREATER PUBLIC AGENCY IS OBLIGATED TO DISCLOSE RECORDS UNDER THE ACT

At its core, this case presents simple questions of statutory interpretation—what constitutes a "local agency" under Act, and whether City officials' private emails, text messages, and voicemails are "public records" of a local agency, as defined in the Act. Based upon the Act's plain language, public officials are not a "local agency" and their private communications on private devices are not subject to the Act.

The Act provides that all public records of a local agency must be available for inspection and copying unless there is a legal basis not to disclose them. (Gov. Code § 6253(a) and (b).) "Public records includes [sic] any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code § 6252(e).) Further, a "local agency includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952." (Gov. Code § 6252(a).)

In statutory construction cases such as this one, courts have defined their role as follows:

> [O]ur fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the

> statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history.

(*Marshall v. Pasadena Unified Sch. Dist.* (2004) 119 Cal.App.4th 1241, 1254 [internal quotation marks and citations omitted].)

While courts interpret the Act broadly in order to promote its transparency goals (*see, e.g., San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774), courts must not ignore the plain meaning of the language of the Act and must not add language to it. (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 828-830 (noting that in interpreting the definition of "state agency" in the Act the court was limited by rules of statutory construction and could not rewrite the Act).)

When a statute is ambiguous, courts typically consider evidence of the legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.)

The Act's definitions of "local agency" and "public records" are clear, and the Act's plain meaning should govern. But even if the Court looks to the Act's statutory scheme and the federal legislation on which the Act is modeled, it is apparent that individual public officials are not a "local agency," and individuals' private communications on private devices are not "public records."

1. INDIVIDUAL CITY OFFICIALS ARE NOT A "LOCAL AGENCY" SUBJECT TO THE ACT'S OBLIGATIONS

A "local agency" must make its records open to members of the public. (Gov. Code § 6253(a).) The definition of "local agency" makes no mention of "individuals," "officials," or "employees." Rather, the plain meaning of the items listed under "local agency"—e.g. a "city," "municipal corporation," and "public entity"—denote an association of people or an organization with an identity separate from its members. (*See, e.g.*, definition of "entity" at http://www.merriam-webster.com/dictionary/entity, last visited June 16, 2013; *see also, e.g., Mohamad v. Palestinian Auth.* (2012) ___ U.S. ___, 132 S. Ct. 1702, 1706-1707 ["When a statute does not define a term, we typically give the phrase its ordinary meaning. As a noun, "individual" ordinarily means "[a] human being, a person" as opposed to a corporation or other organization.].) As such, the Trial Court improperly inserts language into the Act when it states that individual officials are also a "local agency."

The Trial Court asserts that public agencies act through their officials as a reason why individual officials are obligated under the Act. However, that fact simply does not determine the applicability of particular duties under the Act. The Act's statutory scheme consistently distinguishes between bodies and individuals that are each subject to different obligations and possess different rights under the Act. (Gov. Code §§ 6253 (a) and (b) [the Act obligates "local agencies" to make "public records" available for inspection by any "person," or to provide copies to any "person;" 6253.1 [the Act gives "member[s] of the public" a right to assistance locating "public records" and obligates "local agencies" to provide the assistance].) The Legislature was not oblivious to the distinction between an "individual" and an "entity."

The Act's federal counterpart, FOIA, also supports the assertion that individual members are not a "local agency" under the Act. The Act was modeled after FOIA, which was enacted to establish a statutory right for citizens to gain access to government information. (*Billington v. DOJ* (1998) 11 F.Supp.2d 45, 53 [overruled on other grounds.].) California courts may draw on FOIA for judicial construction and legislative history "in light of the lack of California cases construing the [Act]." (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 772.)

For example, in *Drake v. Obama*, the Ninth Circuit Court of Appeals upheld a district court's dismissal of FOIA causes of action brought against the U.S. President, his wife, the U.S. Vice President, and cabinet secretaries. ((9th Cir. 2011) 664 F.3d 774, 785-86.) No federal agency was named as a defendant. The Ninth Circuit explained that under FOIA, the district court had jurisdiction "to enjoin *the agency* from withholding agency records and to order the production of any agency records improperly withheld from the complainant." (*Id.* at p. 785 [emphasis in original.].) As such, the FOIA claims did not apply to any of the individual defendants in *Drake*, because those individuals were not "agencies." (*Id.*) The Ninth Circuit reasoned, "[FOIA] concern[s] the obligations of agencies as distinct from individual employees in those agencies." (*Id.* at p. 786.) Similarly, the Act concerns the obligations of a City as distinct from individual City officials in the City. Thus, both a plain reading and extrinsic examination of the Act supports the assertion that individual public officials are not subject to the Act in the same way as the greater public entity.

2. CITY OFFICIALS' PRIVATE ELECTRONIC COMMUNICATIONS ARE NOT "PUBLIC RECORDS" OF A "LOCAL AGENCY" BECAUSE THEY WERE NOT "PREPARED, OWNED, USED, OR RETAINED" BY THE CITY

To constitute a public record subject to the Act, a writing must: (1) relate to the conduct of the public's business; and (2) be prepared, owned, used or retained by the local agency. (Gov. Code § 6252 (e).) If one of these two elements is missing, the writing is not a public record within the meaning of the Act.

Courts have held that mere custody of a writing (which was not present here) by a local agency does not mean that the writing is a public record within the meaning of the Act. (*Coronado Police Officers Ass'n v. Carroll* (2003) 106 Cal.App.4th 1001, 1006; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340.) In *Coronado Police Officers Ass'n*, the court held that a database compiled and maintained by the public defender's office, which consisted of information from client files as well as public records, was not a public record because the database's core function, to aid indigent criminal defendants, was a private, not a public, function. (*Coronado Police Officers Ass'n* at p. 1006-07.) Similarly, in *Braun*, the court noted that items such as a "shopping list phoned from home" or "the letter to a public officer from a friend which is totally void of reference to governmental activities" contain purely personal information and are not public records even when in the custody of a local agency. (*Braun* at p. 340.)

Likewise, the Act's express definition of "public records" excludes writings that, while they may relate to issues of public interest, are not "prepared, owned, used, or retained by a state or local agency . . . ." (Gov. Code § 6252(e).) The League has not found a case that directly interprets this portion of the Act's definition of a public record. Cases have

recognized, however, that this "control" element is one of the two required elements of a public record within the meaning of the Act.

For example, in *California State University v. Superior Court*, *supra*, 90 Cal.App.4th at 824-825, the Fifth Appellate District held that documents reflecting the identity of individuals and/or companies that purchased luxury suites in the $103 million multipurpose Save Mart Center, were public records within the meaning of the Act. The court reasoned that since the documents were unquestionably "used and/or retained" by the University as required under Gov. Code section 6252(e) and also "clearly relate to the conduct of the public's business, specifically, the operation of the Save Mart Center" they were public records under the Act. (*Id.*) The court's reasoning demonstrates that a two-step process is required to determine whether a writing is a "public record" within the Act's meaning.

Applied here, the Act's express definition supports the City's assertion that individual Council members' e-mails, voicemails, and text messages are not the City's public records. The private electronic records are not created or received on City equipment or on City accounts, and the City does not otherwise have any control of those private records. (Petition, p. 11, 9-12.)

The City's interpretation of the Act's definition of a "public record" is bolstered by the Act's treatment of information contained in an electronic format. (Gov. Code § 6253.9.) The Act speaks of electronic information in terms that emphasize the local agency's physical possession of and control over such records:

> (a) Unless otherwise prohibited by law, *any agency that has information* that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when

> requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which *it holds the information.*
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been *used by the agency* to create copies for its own use or for provision to other agencies....
> ....
>
> (c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format *if the agency no longer has the record available* in an electronic format.
> ....
>
> (f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which *it is held by the agency* if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.
> ....

(Emphasis added.)

As this case involves access to electronic records, the provisions of the Act governing access to such records are particularly instructive. Section 6253.9 unmistakably envisions a system of access to electronic records that are in the possession of the agency, not on the home computer of a city council member. It bolsters the conclusion that the Act means what it says in limiting the definition of public records to records "prepared, owned, used, or retained" by the local agency.

The Court implies that if individual public officials' private devices and private communications are not subject to the Act, officials and staff will circumvent the law by using private accounts to do public business.

(Trial Court March 19, 2013 Order, Exhibit "A" [hereinafter "Opinion"], p. 6 ["[U]nder the [City's] interpretation of the [Act], a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own.") However, the Court must presume that legislators regularly perform their official duties. (Evid. Code § 664.) Here, that means the Court should presume that public officials are conducting City business in the public's best interest, and not willfully dodging applicable laws and regulations.

In ruling against the City, the Trial Court rewrites the Act by ignoring the "prepared, owned, used, or retained" portion of the Act's definition of public records. In its place, the Trial Court requires local agencies to seek, retrieve, and sort through records of individual council members, which were not "prepared, owned, used or retained" by the local agency, to determine whether the records were intended to relate to the public's business and thereby become public records. (Opinion, pp. 6-7.) Such a requirement is not consistent with the plain meaning of the Act, and, as explained below, there are ample reasons for the Court to steer clear of this invitation to rewrite the Act's definition of what constitutes a public record.

B. THE EXPANDED DEFINITION OF "PUBLIC RECORDS" MANDATED BY THE TRIAL COURT IS UNWORKABLE

The Act requires local agencies to make public records available for inspection and copying within a very short period of time. (Gov. Code § 6253(a), (b) and (c).) The structure of the Act is only workable if public records are under the control of the local agency receiving the request. If the local agency did not prepare, own, use or retain the document, it cannot produce it upon request. Indeed, the short timelines for response under the Act presuppose ready access to records being sought by a requester.

The expanded obligation to reach into private electronic devices and accounts would be infeasible to implement. Under the Trial Court's mandate, a request for all public records relating to a matter pending before the agency would not only require the agency to diligently search the agency's own records, databases, etc., for responsive documents, it would also require the agency to search all of its employees' and officials' privately maintained personal computers, tablets, and cell phones, and not to mention private email and social networking accounts for responsive records. While an agency has the ability to search for and produce documents under its control, it has no viable, legal means of searching for and producing private documents of its employees and officials.

By way of example, assume that a city manager, outside of work hours, sends an e-mail from his home computer, using his private e-mail account, to his brother in Chicago. The e-mail sets forth, in addition to family updates and other personal information, the city manager's thoughts on a pending application to construct a Wal-Mart in the city. The brother responds by e-mail, comments on the Wal-Mart application and refers to a similar application recently acted upon in Chicago. The next day, the city receives a Public Records Act request seeking all e-mails sent or received by city officials or employees in the last year related to the Wal-Mart application. Under the definition of public records set forth in the Act and under the Act's provisions regarding electronic information, the city would have to search for and produce all e-mails over which it had control. However, under the Trial Court's expanded mandate, the city would also be required to search all the private computers, phones, tablets, and other electronic devices of its employees and public officials. If the city manager did not consent to the city's search of his private computer, the city would be out of compliance with the Act because it could not produce the e-mail to the brother in Chicago and the brother's e-mail response. Such a system

is unworkable.

It is also important to recognize, as is the case here, that the plain language of the Act's definition of public records does not categorically insulate records sent from a private computer of a public employee or official. If the public official used his private computer to access his City-issued email account and transact City business, whatever record he produced on that government account could be disclosed under the Act, since the City had possession or control over those records.

The real impact of the expanded approach mandated by the Trial Court would, therefore, be on purely private electronic communications, and would push the reach of the Act into purely private discussions of public employees and officials with private persons, including even personal notes from friends that include some discussion of public issues. Neither the Legislature nor the electorate has demonstrated an intent that the Act reach those purely private communications. Because the expanded approach mandated by Trial Court is unworkable, it should be rejected.

C. THE EXPANDED DEFINITION OF "PUBLIC RECORDS" MANDATED BY THE TRIAL COURT IS INCONSISTENT WITH EXISTING LAWS AND OUR DEMOCRATIC SYSTEM

Our democratic system recognizes that there remains a public/private divide in the lives of public officials and employees. It is true that the California Supreme Court has made clear that public employees and officials have a diminished expectation of privacy when it comes to their positions as public employees and officials. (*International Federation of Professional and Technical Engineer, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 331.) In addition, under laws such as the Fair Political Practices Act (Gov. Code § 87100 *et seq.*), we require public officials and designated public employees to disclose what would otherwise be personal financial information. Finally, under the Brown Act,

we require the public's business to be conducted publicly by legislative bodies of local agencies. (Gov. Code section 54950, *et seq.*) However, our system (including the Act) has not obliterated the public/private divide in the lives of public officials and employees.

For example, the Brown Act provides that all meetings of the legislative body of a local agency shall be open and public. (Gov. Code § 54953.) The California Supreme Court has stated that the Brown Act serves the same democratic purposes of the California Public Records Act. (*International Federation of Professional and Technical Engineer, Local 21, AFL-CIO v. Superior Court*, *supra*, 42 Cal.4th at 334 fn. 6.) However, in several instances, the Brown Act recognizes that the individual actions and communications of local officials are not the actions or communications of the local agency as the collective, and thus do not come within the purview of the Brown Act. The Brown Act specifically recognizes that it does not apply to "[i]ndividual contacts or conversations between a member of a legislative body and any other person." (Gov. Code § 54952.2(c)(1).) Such individual contacts or conversations may lawfully occur outside of a public meeting and without public notice. This provision of the Brown Act is consistent with the right of citizens to instruct their representatives and petition their government for redress of grievances found in California Constitution, Art., I, section 3(a).

Similarly, the Brown Act permits a meeting of less than a majority of the members of a legislative body to occur without public notice and outside of a public meeting. (Gov. Code §§ 54952(b) and 54952.2(a).) Thus, even when those members are discussing the public's business among themselves, the law permits them to do so privately. Indeed, the ability of dissident members of a board to communicate among themselves confidentially is integral to the healthy functioning of our system of government. Sometimes such discussions are necessary to allow the airing

of unpopular views and the development of strategies for challenging the status quo or the powers that be.

The broad definition of public record mandated by the Trial Court is antithetical to these basic concepts that are so central to the Brown Act and the California Constitution. Under the Trial Court's mandate, for example, a meeting between a public official and a constituent that would not be directly subject to public review under the Brown Act could be indirectly subject to public review under the Public Records Act, if the public official made notes of the meeting. This cannot be the rule. The twin pillars of open government law in California, the Public Records Act and the Brown Act, must be interpreted so as to be reasonably consistent with one another.

The expansive mandate by the Trial Court also fails to acknowledge that in our democratic system, our elected officials (and sometimes our public employees) are also individual politicians. When acting as individual politicians, they are almost always engaged in communications involving public business. Our democratic system has traditionally separated the overlap between these dual roles (public official/politician) by making the use of public resources the dividing line. Stated more broadly, public officials and employees have the right to communicate their views on political issues (even to campaign) on their own dime and during their own time. The Trial Court's mandate would significantly change this long-standing approach and would place local agencies and the courts in the role of deciding, on a case-by-case basis, when a record is a public writing versus a private writing.

Although our democratic system and transparency laws carve out limited areas in which a public official may still act as a private citizen, there are significant checks and balances in the system to prevent rogue behavior by public officials under the guise of private action. Through the Act, a public official's otherwise private writings become subject to public

scrutiny if they are "prepared, owned, used, or retained" by the local agency. Thus, if the public official sends the writing to a public agency, the writing becomes public. In addition, if the public official uses public resources to prepare or send the writing, the writing becomes public.

While transparency laws are an integral and fundamental part of our democratic process, those laws recognize that not all thoughts or records of individuals who participate as public officials in our democratic system are subject to them. The Act appropriately draws this fine line by defining a public record as one that relates to the public's business and is prepared, owned, used, or retained by the local agency. The Trial Court's mandate destroys this line in a manner inconsistent with other transparency laws and the complex workings of our democratic process.

D. THE EXPANSIVE INTERPRETATION MANDATED BY THE TRIAL COURT MAY HAVE A CHILLING EFFECT ON CITIZENS AND PUBLIC EMPLOYEES AND OFFICIALS

Through its two-part definition of a public record, the Act allows individual employees and officials of local agencies to maintain a defined private space separate from their public position, and does not limit that private space to endeavors wholly unrelated to public business. When using public resources or providing information to the local agency, this private space is surrendered. However, consistent with the complexities of our democratic system and concepts of privacy rights, a public employee or official does not surrender his or her private space by accepting a public position.

Destroying this carefully crafted private space, as the Trial Court mandates, could have a chilling effect on citizens who wish to exercise their constitutional rights to instruct their representatives and petition government for redress of grievances. Private citizens who wish to communicate (via private e-mail or in writing) with their representatives

may not do so if they know that their private communications with that representative may be open to public scrutiny. This could have the effect of cutting off important lines of communications between citizens and their representatives, thus undermining the democratic process.

Similarly, the extension of the Act into the purely privately maintained records of public employees or officials may have a chilling effect on people who would otherwise wish to serve the public through public employment or an official position. If to accept a public position in effect requires abandonment of a private life, many good people will refrain from seeking such positions. While the balance struck between a city council member's public and private space is not immutable, if there is to be any alteration of the rules governing the public/private divide in public officials' lives, the Legislature is best equipped and most appropriately suited to perform that task.

E. THE COURTS SHOULD BE CAUTIOUS IN MAKING BROAD RULINGS AFFECTING THE ROLE OF EMERGING TECHNOLOGY IN SOCIETY

Indeed, the Nation's highest court has cautioned against sweeping court rulings on the issue of individuals' privacy expectations and technology.

The Trial Court eviscerates the dividing line between a public official's public and private life as it pertains to the official's privately held electronic records: "it is doubtful that City officials and agents can claim a reasonable expectation of privacy over their communications concerning the public benefit, particularly on topics that pertain to City business." (Opinion, p. 6.) However, the U.S. Supreme Court has been unwilling to venture so far. (*City of Ontario v. Quon* (2010) 130 S. Ct. 2619.)

In *Quon*, a police officer sued his police department employer after the officer's supervisors reviewed transcripts of messages he sent and

received from his department-issued pager. A point of contention was whether the officer had a reasonable expectation of privacy to his messages, even though the pager was employer-issued. The Supreme Court side-stepped the issue and stated that it wished to proceed with care in the area of privacy expectations in communications made on electronic equipment owned by a government employer: "[T]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.... Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." (*Quon* at p. 2629.) The Supreme Court avoided handing down a "broad ruling [that] might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds."

If the Supreme Court believes there is a colorable argument that public employees have a reasonable expectation in their *government*-issued electronic devices, the argument is even more potent that public officials and employees have a reasonable expectation of privacy in their *private* electronic devices, as is the case here. As the Supreme Court discussed, the judiciary must cautiously proceed when considering evolving technology because of the many ramifications on the public and the government's ability to serve the public.

F. THIS CASE PRESENTS PARTICULAR FACTS AND SHOULD NOT BE USED AS A VEHICLE FOR DECIDING BROADER ISSUES THAT ARE BETTER SUITED FOR LEGISLATIVE RATHER THAN JUDICIAL RESOLUTION

Here, greater issues are implicated by the facts of this case, and the League emphasizes the importance of judicial restraint because these larger issues are better suited for and more appropriately resolved by the

Legislature.

The facts of this case are limited in at least three ways that are significant. First, the public official here is a member of a city council, that is, a multi-member legislative body. The Court's decision therefore need not address—directly or by implication—the application of the Act to those public officials (and there are many) who are not members of a multi-member legislative body. Second, the communications at issue are exclusively with a governmental entity that is itself subject to public records laws. The Court's decision therefore need not address—directly or by implication—other types of possible communications entered into by a public official. Third, the communications at issue involve a particular medium, electronic mail and messages.

The first and third factors especially illustrate why the larger issues raised by this case would be best resolved by the Legislature. The role of a member of a multi-member governmental body is complex because the official functions both as part of a deliberative body that exercises power collectively, and as a lone individual, or sometimes as part of a group that is a minority within the body. The Brown Act demonstrates the Legislature's capacity to set many different types of rules that take into account the many hats a member of a legislative body wears. In contrast, courts are not institutionally well-suited to set policy and are not supposed to engage in the type of line-drawing and fine-tuning that is the bread-and-butter of the Legislature and that is particularly appropriate in the context of access to public records. Even as basic a distinction as that between members of elected legislative bodies and appointed legislative bodies can be easily drawn by the Legislature, with potentially different rules governing the two types of legislative bodies, but the leeway of courts to draw such distinctions is much more circumscribed.

For a variety of reasons electronic communications pose interesting

and important challenges for public records law. Indeed, in the public records context, as has been noted, the Legislature has already taken some major steps in regulating electronic records. If there have been electronic records abuses by public officials designed to evade the Act—and we do not in any way imply that that is the case here—there are a variety of possible legislative remedies that would be far preferable than distorting the concept of a public record and rewriting the Act in order to achieve a particular result in a particular case. Indeed, the Legislature is far better equipped than a court to ascertain if there is a significant problem of e-mail abuses that warrant amendment of the Act.

In this case, the Court should reject the Trial Court's efforts to judicially amend the Act.

G. IF THE COURT AFFIRMS THE TRIAL COURT RULING, THE RESPONSIBILITY TO DISCLOSE SHOULD BE PLACED ON INDIVIDUAL PUBLIC OFFICIALS

This brief has discussed in detail that it would be impracticable and burdensome to place on public agencies the responsibility to seek out private communications on private devices to disclose to the public. The League has also urged the Court to allow the Legislature to amend the Act, as needed. However, if the Court rules that private communications, recorded on personal devices and relating to public business, are public records, the League asks the Court to place the responsibility to disclose on the most capable party: the public official. It is the *individual official* that has prepared, owned, used, or retained the record on his or her personal device, and therefore, he or she is in the best position to disclose that record. Public agencies like the City are neither equipped with the physical resources nor the legal authority to access private individuals' communications and accounts. Requiring public agencies to police public officials' private electronic devices and accounts would further tax

agencies' limited staff and increase the agencies' liabilities. Individual officials and employees should bear the burden of disclosing their communications relating to public business to the public.

III.

CONCLUSION

For all the reasons set forth above, the League respectfully requests that the Court issue a writ in the first instance, directing the Trial Court to vacate its March 19, 2013 Order ("Order") granting summary judgment to the Real Party in Interest. In the alternative, the City requests this Court to issue an alternative writ or order to show cause directing the Trial Court to either vacate its Order, or to show cause why it should not be ordered to do so.

Dated: June 17, 2013

BEST BEST & KRIEGER LLP

By: _____

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CERTIFICATE OF WORD COUNT

I certify that the text of this brief consists of 6,459 words as counted by the Microsoft Word word-processing program used to generate the brief

Dated: June 17, 2013

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PROOF OF SERVICE

CASE NAME: Ted Smith v. City of San Jose, et al.

COURT OF APPEALS CASE NO.: H037626; SCC #1-7-CV-089167)

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 17, 2013, I served a copy of the within document(s):

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONER CITY OF SAN JOSE'S PETITION FOR WRIT OF MANDATE

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below. *

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below. **

SEE ATTACHED

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 17, 2013, at Irvine, California.

Roberta L. Kelley

PROOF OF SERVICE (CON'T.)

CASE NAME: Ted Smith v. City of San Jose, et al.

COURT OF APPEALS CASE NO.: H037626; SCC #1-7-CV-089167)

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The Honorable James P. Kleinberg* Superior Court of California County of Santa Clara 191 North First Street San Jose, CA 95113	Supreme Court of California** 350 McAllister Street San Francisco, CA 94105-1639