Case No. S218066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, et al.,
Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
Respondent,

TED SMITH,
Plaintiff and Real Party in Interest.

On Appeal from a Decision of the Court of Appeal
Sixth Appellate District, Case No. H039498

Santa Clara County Superior Court Case No. 1-09-CV-150427
The Honorable James Kleinberg

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANTS AND PETITIONERS CITY OF SAN JOSE, ET AL.

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The California State Association of Counties ("CSAC")[1] seeks leave to file the attached amicus brief.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The case before this Court presents an issue confronting public officials at all levels of government across this country: How is individual privacy balanced with the public's right to transparency when the public's business is conducted on a public official's private electronic device? This issue is of critical importance to CSAC's member counties, who must simultaneously comply with the requirements of the California Public Records Act and honor the constitutional privacy rights of their employees and elected officials.

The greater part of the briefing already submitted to this Court addresses the threshold question in the case: Whether records concerning the public's business that are written and solely retained on privately-

[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

owned devices are "public records" within the meaning of the Public Records Act. In the proposed brief, CSAC does not take a position on that issue. Rather, the proposed brief argues that should this Court conclude that they are public records, the privacy rights of the individual public employees and officials who possess the records serve as a limit to what a public agency can be required to do to obtain those records. Thus, the proposed brief does not duplicate the party briefing, but will aid the Court in considering this important and novel issue.

For the foregoing reasons, CSAC respectfully requests that this Court accept the accompanying amicus curiae brief.

Dated: July 22, 2015

Respectfully submitted,

/s/

By: _____

JENNIFER B. HENNING

Attorney for Amicus Curiae
California State Association of Counties

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I. INTRODUCTION

In modern life, use of a mobile electronic device, like a cell phone, is ubiquitous. Merely walk down any city street or visit any coffee shop, and one will see this truism on display. The devices are often used to carry on various aspects of one's personal and professional lives simultaneously. For public officials and employees, conducting professional business on privately-owned devices raises issues about how the public's right to know what takes place within their government intersects with an individual's right to privacy. These questions are occurring at the federal, state, and local levels in all parts of the nation.

Though the technology is somewhat new, California courts have been grappling for decades with balancing these two competing interests in the Public Records Act: "[the] prevention of secrecy in government and the protection of individual privacy." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651.) Whether information on a private electronic device is a public record, and if so, what limitations are placed on public access to that record, is just the latest iteration in a string of questions about how privacy and transparency are balanced. What has emerged through these court reviews is a clear protection of privacy, but an acknowledgment that the reasonableness of the expectation of privacy varies based on context

and operational realities. The courts have made clear that public employees do not leave their privacy rights at their employer's door.

In this brief, CSAC does not take a position on whether the records sought in this case – emails and text messages concerning the public's business that are written and solely retain on privately-owned devices – are "public records" within the meaning of the Public Records Act (Gov. Code, § 6250 et. seq). That issue has been fully briefed and is before this Court.

Rather, this brief argues that *should* this Court conclude that they are public records, the privacy rights of the individual public employees and officials who possess the records serve as a limit to what a public agency can be required to do to obtain those records. Public agencies cannot lawfully be required to search through an employee or official's personal device for electronic public records any more than they could enter their home to search for hard copies of public records. As such, public agencies should not be held in violation of the Public Records Act for not searching personal electronic devices in response to a records request. Rather, the public's right to access information is satisfied by relying on the owners of the private devices to turn over any responsive public records maintained on those devices.

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II. ARGUMENT

A. The Right to Privacy is Enshrined in the Public Records Act and Must Be Considered in the Interpreting and Implementing the Act.

The first section of the first article of the California Constitution makes clear the intent of the people of this State to provide privacy to its citizens as an inalienable right. (Cal. Const., art. I, § 1; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) The ballot pamphlet that went to the voters in 1972 when this provision was added to the Constitution described its purpose as follows: "The right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose . . . . The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need." (*Id.* at p. 212., citing Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27.)

Similarly, federal courts have interpreted the United States Constitution to provide protection to individuals against government intrusions. These assurances of privacy have been found in the First, Fourth, Fifth and Ninth Amendments. (*Stanley v. Georgia* (1969) 394 U.S.

557, 565; *Terry v. Ohio* (1968) 392 U.S. 1, 9*; Katz v. United States* (1967) 389 U.S. 347, 350 n. 5; *Griswold v. Connecticut* (1965) 381 U.S. 479, 491 (Goldberg, J., concurring).)

This fundamental right to privacy is embodied in the Public Records Act itself. The introductory clause to the Act states: "The Legislature, *mindful of the right to privacy*, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250 (emphasis added).) In recognition of the need to respect privacy, the Public Records Act excludes from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov. Code, § 6254, subd. (c).) Proposition 59, the 2004 initiative that amended the state Constitution to include a right of access to public records, explicitly preserves this personal privacy exception. (Cal. Const., art. I, § 3, subd. (b)(5).) Similarly, the federal Freedom of Information Act (FOIA), upon which the California Public Records Act was based, exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." (5 U.S.C. § 552, subd. (b)(6).)

While there is no question that a primary goal of the Public Records Act is transparency, the statute tempers that goal against individual rights. It is well understood that "[d]isclosure of public records has the potential to

impact individual privacy." (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1016.) Thus, both the FOIA and the Public Records Act "expressly recognize that the public's right to disclosure of public records is not absolute," and undertake a balancing approach in the competing interests of transparency and privacy. (*Ibid.*, citing *Department of Defense v. Federal Labor Relations Auth.* (1994) 510 U.S. 487, 495 ("In evaluating whether a request for information lies within the scope of a Freedom of Information Act exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree unwarranted, a court must balance the public interest in disclosure against the interest Congress intends the exemption to protect.")

B. Public Officials and Employees Do Not Lose Constitutional Privacy Rights by Virtue of Their Public Employment.

While one concern of the Public Records Act is protecting private individuals from unwarranted privacy invasions by their government, it is equally true that public employees also retain their constitutional privacy rights. Courts must balance transparency with the privacy rights of public employees.

1. Though public employers may exert control over their employees, there are limits on intrusions into their employees' private lives.

There is no disputing that the control a public agency may exert over its constituents is more restrained when it exercises "the power to regulate

or license, as lawmaker," than when it acts "as proprietor, to manage [its] internal operation." (*Cafeteria & Restaurant Workers v. McElroy* (1961) 367 U.S. 886, 896.) This distinction has "been particularly clear in . . . the context of public employment. Thus, 'the government as employer indeed has far broader powers than does the government as sovereign.'" (*Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 598, quoting *Waters v. Churchill* (1998) 511 U.S. 661, 671.)

Nevertheless, it is also the case that a public employee does not give up all privacy rights by virtue of public employment. This Court has found that the "mere status of being employed by the government should not compel a citizen to forfeit his or her fundamental right of privacy. Public employees are not second-class citizens within the ken of the Constitution." (*Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 951.) Under a federal constitutional analysis, the United States Supreme Court has similarly found that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." (*O'Connor v. Ortega* (1987) 480 U.S. 709, 717.)

This Court can be significantly aided in the novel issues before it by reviewing where the balance has been struck to date between a public agency acting as an employer and a public employee's right to be protected from his sovereign. For example, in *O'Connor, supra,* the United States Supreme Court concluded that a public employee may assert a right of

privacy to his office within the public building in which he works. But the Court also found that an intrusion into that right is permissible if it is reasonable under the circumstances. (*O'Connor, supra*, 480 U.S. at p. 718.) The Court therefore reversed a summary judgment in favor of the employee, concluding that the public employer could assert that a need to secure State-owned property within the employee's office may have provided reasonable cause to intrude on the employee's privacy. (*Ibid.*)

In *City of Ontario v. Quon* (2010) 560 U.S. 746, the United States Supreme Court examined whether a public employer could review text messages on a city-owned cell phone provided to an employee. The Court concluded that the search did not violate the employee's privacy rights, noting that whether a warrantless search in the employment context is reasonable depends on whether it is "excessively intrusive" in light of the circumstances giving rise to the search. (*Id.* at p. 761.) The Court further noted that "the extent of an expectation of privacy is relevant to assessing whether a search was too intrusive." (*Id.* at p. 762.) The city had a policy, which the employee had signed, putting him on notice that the phone would be subject to audit, which limited his expectation of privacy. (*Ibid.*) Thus, the city's search of text messages to assess the financial status of its cell phone program was reasonable in scope. Interestingly, the Court noted that the search of the employee's city-owned phone "was not nearly as intrusive

as a search of his *personal e-mail account or pager*, or a wiretap on his home phone line, would have been." (*Id.* at p. 762-763.)

In comparison to *O'Connor* and *Quon*¸ which both involved publicly-owned property, the Court in *Delia v. City of Rialto* (2010) 621 F.3d 1069, held that a warrantless search of a public employee's home to investigate possible abuse of sick leave violated the employee's Fourth Amendment rights.[2] The Court noted that "the warrantless search of a home is presumptively unreasonable unless the government can prove consent or that the search falls within one of the carefully defined sets of exceptions." (*Id.* at p. 1000.) Such exceptions are "'few in number and carefully delineated,' where one's home is concerned." (*Ibid,* quoting *Welsh v. Wisconsin* (1984) 466 U.S. 740, 749, and *United States v. United States District Court* (1972) 407 U.S. 297, 318.) The Court specifically rejected application of the *Quon-O'Connor* warrant exception to these facts: "The *Quon-O'Connor* workplace warrant exception, however, has no application here. Although the search at issue in this case arose as a result of a workplace investigation, defendants were not seeking to search Delia's workplace environment, but his home." (*Id.* at p. 1001.)

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[2] The city and individual city employee defendants were granted qualified immunity in this case, as the privacy right was not clearly established at the time of the constitutional violation. The United States Supreme Court later concluded that a private investigator retained by the city on contract was also entitled to qualified immunity. (*Filarsky v. Delia* (2012) 132 S. Ct. 1657.)

2. Private cell phones and email accounts should be afforded significant privacy protections.

The cases described above bring into focus the issue before this Court: Are the privacy expectations for privately-owned cell phones and email accounts more like the publicly-owned office space and cell phone in *O'Connor* and *Quon* (where a reasonable warrantless search did not violate the Fourth Amendment), or are they more akin to the strong protection afforded to the employee's home in *Delia* (where a warrantless search to carry out the public agency's business was unconstitutional)? This issue of first impression in this Court must resolve in favor of the stronger level of protection because of the critical role that private cell phones and email accounts has grown to play in our private lives.

This Court has found that a "reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. The reasonableness of a privacy expectation depends on the surrounding context. We have stressed that customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 927, quoting *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 36-37.) Indeed, "[a] particular class of information is private when well-established social norms recognize the need to maximize individual control

over its dissemination and use to prevent unjustified embarrassment or indignity." (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 330, quoting *Hill, supra,* 7 Cal.4th at p. 35.)

It is hard to overstate the social norms that have arisen around private cell phones and email accounts in our society. They have taken the place of intimately private matters that were formally conducted in private telephone calls, or in the privacy of our homes, the offices of our doctors, lawyers and financial institutions, and in so many other traditional places of upmost privacy. Our cell phones, and the access they provide to text messages and emails, also expose the private details of our family and friends— details that no reasonable person would consider available for review by a public agency or member of the public simply because they were communicated to an individual who happens to be a public employee or official. This fact of modern life has also been recognized by the United States Supreme Court, when it recently declared: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' *Boyd* [*v. United States* (1886) 6 S.Ct. 524, 630]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." (*Riley v. California* (2014) 134 S. Ct. 2473, 2494-2495 (holding

that a warrant is required to search an individual's cell phone during his arrest).)

It is also useful to think of how our cell phones have essentially become extensions of our most highly protected private locations. For example, under the rationale of *Dalia*, and the paramount privacy protection *Dalia* affords to the home, if a public record were maintained in a hard paper format in an employee's house, public agencies would not be able to lawfully enter the employee's home to retrieve it. This notion is also reflected in the ballot pamphlet language cited above, which evidences that in adopting the right to privacy in the California Constitution, the voters intended to protect "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose . . . ." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27.) In our modern society, all of those elements are captured in our personal electronic devices.

Given the critical role that our private electronic devices and email accounts play in our lives – the significance of which has quickly become part of our societal norm, and has also been recognized by the United States Supreme Court – the government should not be permitted to search an employee's private cell phone or computer to retrieve electronic public record.

C. Having Public Employees and Officials Search Their Own Devices in Response to a Public Records Act Request Balances the Public's Need to Access Records with the Individual's Right to Privacy.

Citing to *Quon,* Real Party in Interest Smith argues in his reply brief that requiring public employees "to submit devices for review by their government employer would not infringe on reasonable expectations of privacy under article I, section 1 of the California Constitution, or the Fourth Amendment." (Reply Brief, p. 17.) However, as made clear above, this is simply not true. *Quon* itself distinguished a private email account from the city-issued device under review in that case. (*Quon, supra*, 560 U.S. at p. 762-763.) Further, the Supreme Court has subsequently made clear that a personal cell phone deserves heightened protection, even in the situation where an individual is being arrested for criminal conduct. (*Riley, supra,* 134 S. Ct. 2473, 2494-2495.) Certainly, if privacy is granted to an individual's electronic device in the context of criminal behavior, public officials and employees have reason to expect that same level of privacy.

Thus, contrary to Real Party in Interest's position, the proper view of this issue is that public officials and employees cannot be compelled to turn over their private devices for inspection by the public agency in response to a Public Records Act request.

This does not mean, however, that the public is without recourse in obtaining public records that are within a public employee or official's

private cell phone or computer. A public agency, in fulfilling its duty to respond to records requests, may require that individual employees or officials review their own devices and provide to the agency any responsive documents therein. The public agency may even require the employee to supply it with all public records within an employee's private cell phone or computer, whether or not the employee would conclude that all are responsive to the particular request, as a safeguard against an erroneous judgment as to whether a public record is in fact responsive. Those documents may then be further reviewed by the agency for any applicable privileges or exceptions to disclosure.

Public employees and officials are presumed as a general matter to regularly perform their official duties, (Evid. Code, § 664), and can be presumed to do so in reviewing their private cell phones and email accounts for public records as well. Indeed, employees are ultimately relied upon to find documents in Public Records Act and discovery requests in daily practice when those file are prepared and maintained on publicly-owned devices. Asking those same employees to search their privately-owned devices merely reflects that same reality.

This approach of self-review of private electronic devices protects the privacy of the individual employee from having his or her "privacies of life" reviewed by agency staff, while at the same time providing the public

access to records that involve the public's business. It fulfills the Public Record Act's dictate to balance privacy with transparency.

D. Public Agencies Should Not Be Penalized For Not Searching Private Electronic Devices.

Public agencies operate in the intersection between transparency and privacy. If records on private cell phones are public records, but the State and federal constitutions protect those same devices from warrantless searches, public agencies are faced with the dilemma of a duty to produce records they cannot constitutionally access. There is no mechanism for the public agency to directly access these records. (See, e.g., *O'Neil v. City of Shoreline* (2010) 240 P.3d 1149, 1152, 1155 [Washington Supreme Court concludes records on private device are public records under State law, and agency has a duty to inspect the private devices, but specifying that it was only considering the issue in the context of the employee consenting to the search, and specifically declining to address an employee refusing to allow a search]. See, also, Pain, *Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government* (2015) 90 Wash. L. Rev. 545, 547-548.)

Real Party in Interest Smith suggests the issue of access can easily be overcome through the adoption of policies that prohibit use of personal devices to conduct the public business, and subjects the employee to discipline for failing to comply. (Opening Brief, p. 42.) While such a

policy may be a best practice in addressing technology and public records, the suggestion that it would eliminate the privacy concerns raised in this brief is not well founded.

First, there are limits to the ability of a public agency to impose restrictions upon autonomous officials, particularly elected officials. The public agency does not have the same disciplinary authority over such autonomous officials or the same ability to oversee their conduct. Certainly there is every expectation and presumption that the officials are carrying out the law appropriately. But our political system treats autonomous elected officials differently from other public employees, and Real Party in Interest makes no effort to address that distinction as it relates to enforcing electronic records policies.

Second, though it is beyond the scope of this brief, adoption of such a policy may trigger an obligation to meet and confer with local employee unions under the Meyers-Milias-Brown Act. (Gov. Code, § 3505; See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 817 [adoption of a policy prohibiting employees from using the city's car wash to wash their personal vehicles is subject to meet and confer].)

Most importantly, adoption of a policy prohibiting the use of private devices to conduct public business does not address the question of whether an agency has violated the Public Records Act if it does not search through a privately-owned electronic device to find a public record created and

maintained thereon, in spite of a policy prohibiting such conduct. This Court should make clear that public agencies do not violate the Public Records Act under these circumstances.

Whether an agency adopts a formal policy or it relies on employees and officials to search their own devices, the constitutional privacy afforded to privately-owned devices remains. Thus, if it is determined in a particular circumstance that a either an electronic records policy or a practice of relying on self-review of private devices is inadequate to retrieve public records, public agencies "should not face statutory penalties for failing to do the impossible." (Pain, *supra*, 90 Wash. L. Rev. at p. 547.)

III. CONCLUSION

Finding the proper balance between privacy and transparency has been a constant refrain in Public Records Act jurisprudence, though the notion of privacy evolves as our society changes its understanding and expectation of what we believe is private. Society has clearly reached the point where it is expected that the information maintained on our privately-owned electronic devices is worthy of heightened protection.

Therefore, should this Court determine that emails and text messages concerning the public's business that are written and solely retain on privately-owned devices are in fact public records within the meaning of the Act, CSAC urges this Court to also direct that: (1) the device owner's privacy rights prevent requiring the public agency to search the privately-

owned device; (2) the requirements of the Public Records Act are met when the device owner searches his or her own device and produces any public records thereon; and (3) the public agency cannot be found to violate the Public Records Act for failing to conduct a search of the privately-owned electronic device. So ruling would strike the appropriate balance between an individual's interest in his most private affairs and the public's right to an open and transparent government.

Respectfully Submitted,

Date: July 22, 2015 /s/

_____

Jennifer B. Henning, SBN 193915
Attorney for Amicus Curiae
California State Association of Counties

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,778 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22 day of July, 2015 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING
Attorney for Amicus Curiae

Proof of Service by Mail

City of San Jose v. Superior Court
Case No. S218066

I, Mary Penney, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **APPLICATION FOR PERMISSION TO FILE AND PROPOSED AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANTS AND PETITIONERS CITY OF SAN JOSE ET AL.** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Proof of Service List

Party	Attorney
City of San Jose, et al.: Defendants and Petitioners	Margo Laskowska Office of the City Attorney City of San Jose 200 East Santa Clara Street San Jose, CA 95113
Superior Court of Santa Clara County: Respondent	Honorable James P. Kleinberg 720 9th Street, Room 102 Sacramento, CA 95814
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Court of Appeal	Sixth District Court of Appeal 333 West Santa Clara Street Suite 1060 San Jose, CA 95113

and by placing the envelopes for collection and mailing following our ordinary business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2015, at Sacramento, California.

/s/

MARY PENNEY