

Summary.

In my opinion, El Dorado County Irrigation District (EID) directors Greg Prada and Alan Day violated their oath of office at the September 11, 2017 board meeting through their verbal comments and their votes in Agenda Item 9, a public hearing for adoption of a Board Policy and an Administrative Regulation. They respond to a Supreme Court ruling on March 2, 2017 which I will informally refer to as the "San Jose Case". Its subject was public access to public records that are stored in the private accounts and personal electronic devices of public agency officers and employees.

A more complete case name is City of San Jose v. the Superior Court of Santa Clara County, Respondent; Ted Smith, Real Party in Interest (S218066).

Breaches of oath of office are significant. In Federal law breaching an oath of office is the crime of Perjury of Oath of Office, carrying penalties of removal from office and either confinement or a fine. California State law does not recognize perjury of oath of office as a crime. However, it is appropriate as a standard for public ethics.

There is a valid question whether Directors Prada and Day are colluding for reasons of their own personal political interests. Director Day was elected in 2011 based on false claims whose details first appeared in writings by Mr. Prada, using a campaign slogan of "fight back". Director Prada was elected in 2013 based on similar false claims about EID, and was already fighting by writing anti-EID arguments on www.fixeid.org. In general, those arguments ranged from flawed to false.

It would be reasonable to recognize Mr. Prada's writings as libelous, arguably protected as free political speech. Mr. Prada also libeled me personally in May, 2013 and to a lesser degree in September, when we both wrote letters to editor regarding EID business. There is ample reason for the Grand Jury to investigate the records of Mr. Prada and Mr. Day: In part, their voting records show a history of opposing public needs and EID business that is necessary and appropriate to the people EID serves.

The current situation is an example that crossed the line that divides freedom of speech to perjury of the solemn oath of office. The relevant part is *"[I] solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California."*

Directors Prada and Day, by their speech and their votes on 9/11/2017 attacked the public's Constitutional right to identify and inspect public records, and in doing so contradicted the California Supreme Court's ruling in the San Jose Case. They stated that they accepted that ruling but that the proposed language of EID Board Policy 3075 went beyond the ruling.

The latter claim is absolutely false. In fact, the language proposed by EID General Counsel Brian Poulsen and adopted by a 3/2 vote of the board, Directors Prada and Day opposing, begins by explicitly saying:

“The District shall respond to requests for public records in accordance with the California Public Records Act (CPRA), Government Code Section 6250 et seq, and the case law interpreting CPRA.”

The case law in question is the Supreme Court’s 3/2/2017 San Jose ruling, which resolved an issue in California constitutional law. This issue rose through the courts to the Supreme Court for the particular case of public rights to discover and inspect public records which are stored in the personal accounts and personal electronic devices of a public agency’s officers and employees.

In my opinion, the Supreme Court’s published opinion is a very high quality document to define the result: It’s well organized, its references to sources of law are well documented, and its reasoning based on those sources is valid. In part, the Court found that:

- Public records can exist in private accounts and personal electronic devices.
- The public has a constitutionally-based right to discover and inspect such public records.
- Discovery and retrieval of such records can be done without compromising the private rights of public officers and employees.

The final point is essential to evaluation of the claims of Directors Prada and Day. The Supreme Court did in fact write approximately a full page regarding this under the title “Guidance for Conducting Searches”.

EID’s Board Policy 3075 (attached in this submission) is equally valid as EID’s basic policy to implement that Supreme Court ruling. The statements by Directors Prada and Day that it goes beyond the Supreme Court’s ruling are false, and it seems the only possible reasons for that falsehood would be these:

- They deliberately lied.
- They failed to understand the Supreme Court’s San Jose ruling, despite Director Prada’s statements that he had studied that and the CPRA “many, many times”.
- They were negligent in their research.

In their disbelief they denied validity of legal advice by EID’s General Counsel, Brian Poulsen. Directors Prada and Day relied on their own false beliefs instead of expert advice by a well-qualified legal expert.

Appended Documentation:

- Copy of EID Board Policy 3075, as adopted 9/11/2017 by 3/2 vote of the board
- Copy of the California Supreme Court's "San Jose Case" ruling, published 3/2/2017
- Annotated transcript of discussion during the EID board meeting agenda item for adoption of Board Policy 3075

BP 3075 Public Records Act Requests

Adopted:

The District shall respond to requests for public records in accordance with the California Public Records Act (CPRA), Government Code section 6250 et seq, and the case law interpreting the CPRA. The Office of General Counsel shall be responsible for overseeing and responding to such requests pursuant to the CPRA.

By law, written records sent, received, or stored in a personal electronic account (such as a personal e-mail account) or on a personal device (such as a personal computer, smartphone, or tablet) of a District employee or officer may be considered “public records” subject to disclosure under the CPRA, if, at a minimum, they relate in some substantive way to the conduct of the District’s business. Communications that are primarily personal and contain no more than incidental mentions of District business, generally will not be considered public records.

District employees and officers shall use their District accounts for communications that relate to District business. District employees and officers shall avoid using private electronic accounts when conducting such communications. The General Manager and General Counsel shall adopt and oversee administrative regulations to carry out the purposes of this Policy.

District employees and officers shall forward emails that relate to the District’s business received on private accounts to their respective eid.org accounts for appropriate District retention. Employees and officers that communicate on social media about District business shall adhere to the administrative regulation adopted hereunder when responding to public record requests.

Supreme Court of California, California.

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA, CLARA COUNTY, Respondent; TED SMITH, Real Party in Interest.

S218066

Decided: March 02, 2017

Counsel: Richard Doyle, City Attorney, Nora Frimann, Assistant City Attorney, and Margo Laskowska, Deputy City Attorney, for Petitioners. Keith J. Bray, Joshua Rosen Daniels; Dannis Woliver Kelley, Sue Ann Salmon Evans and William B. Tunick for Education Legal Alliance of the California School Boards Association as Amicus Curiae on behalf of Petitioners. Jennifer B. Henning for California State Association of Counties as Amicus Curiae on behalf of Petitioners. Best, Best & Krieger, Shawn D. Hagerty and Hong Dao Nguyen for League of California Cities, California Association of Sanitation Agencies and California Special Districts Association Amici Curiae on behalf of Petitioners. No appearance for Respondent. McManis Faulkner, James McManis, Matthew Schechter, Christine Peek, Tyler Atkinson and Jennifer Murakami for Real Party in Interest. Mastagni Holstedt, David E. Mastagni, Isaac S. Stevens and Jeffrey R.A. Edwards for Sacramento Police Officers' Association, Stockton Police Officers' Association, Sacramento County Deputy Sheriffs' Association, Sacramento County Law Enforcement Managers Association, San Bernardino County Public Attorneys Association, Deputy Sheriffs' Association of Alameda County, Statewide University Police Association, Sacramento Area Firefighters, International Association of Firefighters, Local 552, AFL-CIO, Palo Alto Firefighters, International Association of Firefighters, Local 1319, AFL-CIO, San Mateo County Deputy Sheriffs' Association, Rialto Professional Firefighters, International Association of Firefighters, Local 3688, AFL-CIO, Vallejo Police Officers' Association, Elk Grove Police Officers Association, Ontario Police Officers' Association, Placer County Deputy Sheriffs' Association, Federated University Police Officers' Association and Los Angeles Airport Peace Officers' Association as Amici Curiae on behalf of Real Party in Interest. Counsel: Jack Cohen as Amicus Curiae on behalf of Real Party in Interest. Ram, Olson, Cereghino & Kopczynski, Karl Olson; Juan F. Cornejo; Jeffrey D Glasser; and James W. Ewert for California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., Hearst Corporation, First Amendment Coalition, Society of Professional Journalists, Californians Aware and the Reporters Committee for Freedom of the Press as Amici Curiae on behalf of Real Party in Interest. Michael T. Risher, Matthew T. Cagle, Christopher J. Conley; Peter Bibring, Peter Eliasberg; David Loy; and Jennifer Lynch for American Civil Liberties Union Foundation of Northern California, Inc., American Civil Liberties Union of Southern California, Inc., American Civil Liberties Union of San Diego & Imperial County, Inc., and Electronic Frontier Foundation as Amici Curiae on behalf of Real Party in Interest. Counsel who argued in Supreme Court (not intended for publication with opinion):, Nora Frimann, Assistant City Attorney, 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113-1905, (408) 535-1900, James McManis McManis, Faulkner, 50 West San Fernando Street, 10th Floor, San Jose, CA 95113, (408) 279-8700, Karl Olson, Ram, Olson, Cereghino & Kopczynski, 555 Montgomery Street, Suite 820, San Francisco, CA 94111, (415) 433-4949

Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act).¹ We overturn the contrary judgment of the Court of Appeal.

I. BACKGROUND

In June 2009, petitioner Ted Smith requested disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency and the agency's executive director, along with certain other elected officials and their staffs.² The targeted documents concerned redevelopment efforts in downtown San Jose and included emails and text messages “sent or received on private electronic devices used by” the mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and email accounts but did not disclose communications made using the individuals' personal accounts.

Smith sued for declaratory relief, arguing CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated, or stored. The City responded that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The trial court granted summary judgment for Smith and ordered disclosure, but the Court of Appeal issued a writ of mandate. At present, no documents from employees' personal accounts have been collected or disclosed.

II. DISCUSSION

This case concerns how laws, originally designed to cover paper documents, apply to evolving methods of electronic communication. It requires recognition that, in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace.

Enacted in 1968, CPRA 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." (§ 6250.) In 2004, voters made this principle part of our Constitution. A provision added by Proposition 59 states: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) Public access laws serve a crucial function. "Openness in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.' " (International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 328-329 (International Federation).)

However, public access to information must sometimes yield to personal privacy interests. When enacting CPRA, the Legislature was mindful of the right to privacy (§ 6250), and set out multiple exemptions designed to protect that right. (Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 288 (Commission on Peace Officer Standards); see § 6254.) Similarly, while the Constitution provides for public access, it does not supersede or modify existing privacy rights. (Cal. Const., art. I, § 3, subd. (b)(3).)

CPRA and the Constitution strike a careful balance between public access and personal privacy. This case concerns how that balance is served when documents concerning official business are created or stored outside the workplace. The issue is a narrow one: Are writings concerning the conduct of public business beyond CPRA's reach merely because they were sent or received using a nongovernmental account? Considering the statute's language and the important policy interests it serves, the answer is no. Employees' communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission.

A. Statutory Language, Broadly Construed, Supports Public Access

CPRA establishes a basic rule requiring disclosure of public records upon request. (§ 6253.)³ In general, it creates "a 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." (Sander v. State Bar of California (2013) 58 Cal.4th 300, 323, italics added.) Every such record "must be disclosed unless a statutory exception is shown." (Ibid.) Section 6254 sets out a variety of exemptions, "many of which are designed to protect individual privacy." (International Federation, supra, 42 Cal.4th at p. 329.) The Act also includes a catchall provision exempting disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." (§ 6255, subd. (a).)

"When we interpret a statute, '[o]ur fundamental task . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.] 'Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence,

and part of an act in pursuance of the legislative purpose.’ ” (Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 165-166.)

In CPRA cases, this standard approach to statutory interpretation is augmented by a constitutional imperative. (See *Sierra Club v. Superior Court*, supra, 57 Cal.4th at p. 166.) Proposition 59 amended the Constitution to provide: “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.” (Cal. Const., art. I, § 3, subd. (b)(2), italics added.) “ ‘Given the strong public policy of the people's right to information concerning the people's business (Gov. Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)), “all public records are subject to disclosure unless the Legislature has expressly provided to the contrary.” ’ ” (Sierra Club, at p. 166.)

We begin with the term “public record,” which CPRA defines 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.” (§ 6252, subd. (e); hereafter “public records” definition.) Under this definition, a public record has four aspects. It is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency.

1. Writing

CPRA defines a “writing” as “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” (§ 6252, subd. (g).) It is undisputed that the items at issue here constitute writings.

In 1968, creating a “writing” could be a fairly involved process. Typically, a person would use an implement to type, or record words longhand, or would dictate to someone else who would write or type a document. Writings were generally made on paper or some other tangible medium. These writings were physically identifiable and could be retrieved by examining the physical repositories where they were stored. Writings exchanged with people outside the agency were generally sent, on paper, through the mail or by courier. In part because of the time required for their preparation, such writings were fairly formal and focused on the business at hand.

Today, these tangible, if laborious, writing methods have been enhanced by electronic communication. Email, text messaging, and other electronic platforms, permit writings to be prepared, exchanged, and stored more quickly and easily. However, the ease and immediacy of electronic communication has encouraged a commonplace tendency to share fleeting thoughts and random bits of information, with varying degrees of import, often to broad audiences. As a result, the line between an official communication and an electronic aside is now sometimes blurred. The second aspect of CPRA's “public records” definition establishes a framework to distinguish between work-related and purely private communications.

2. Relating to the Conduct of the Public's Business

The overall structure of CPRA, with its many exemptions, makes clear that not everything written by a public employee is subject to review and disclosure. To qualify as a public record, a writing must “contain[] information relating to the conduct of the public's business.” (§ 6252, subd. (e).) Generally, any “record . kept by an officer because it is necessary or convenient to the discharge of his official duty . is a public record.” (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340; see *People v. Purcell* (1937) 22 Cal.App.2d 126, 130.)

Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an email to a spouse complaining “my coworker is an idiot” would likely not be a public record. Conversely, an email to a superior reporting the coworker's mismanagement of an agency project might well be. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her

employment. Here, the City claimed all communications in personal accounts are beyond the reach of CPRA. As a result, the content of specific records is not before us. Any disputes over this aspect of the “public records” definition await resolution in future proceedings.

We clarify, however, that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records. For example, the public might be titillated to learn that not all agency workers enjoy the company of their colleagues, or hold them in high regard. However, an employee's electronic musings about a colleague's personal shortcomings will often fall far short of being a “writing containing information relating to the conduct of the public's business.” (§ 6252, subd. (e).)⁴

Coronado Police Officers Assn. v. Carroll (2003) 106 Cal.App.4th 1001 demonstrates the intricacy of determining whether a writing is related to public business. There, police officers sought access to a database of impeachment material compiled by public defenders. The attorneys contributed to the database and used its contents in their work. (Id. at p. 1005.) However, their representation of individual clients, though paid for by a public entity, was considered under case law to be essentially a private function. (Id. at pp. 1007-1009; see *Polk County v. Dodson* (1981) 454 U.S. 312, 321-322.) Accordingly, the Coronado court concluded the database did not relate to public business and thus was not a public record. (Id. at pp. 1007-1009.) The court was careful to note that not all documents related to the database were private, however. Documents reflecting policy decisions about whether and how to maintain the database might well relate to public business, rather than the representation of individual clients. (Id. at p. 1009.) Content of that kind would constitute public records. (Ibid.)

3. Prepared by Any State or Local Agency

The City focuses its challenge on the final portion of the “public records” definition, which requires that writings be “prepared, owned, used, or retained by any state or local agency.” (§ 6252, section (e).) The City argues this language does not encompass communications agency employees make through their personal accounts. However, the broad construction mandated by the Constitution supports disclosure.

A writing is commonly understood to have been prepared by the person who wrote it. If an agency employee prepares a writing that substantively relates to the conduct of public business, that writing would appear to satisfy the Act's definition of a public record. The City urges a contrary conclusion when the writing is transmitted through a personal account. In focusing its attention on the “owned, used, or retained by” aspect of the “public records” definition, however, it ignores the “prepared by” aspect. (§ 6252, subd. (e).) This approach fails to give “ ‘significance to every word, phrase, sentence, and part’ ” of the Act. (*Sierra Club v. Superior Court*, supra, 57 Cal.4th at p. 166.)

The City draws its conclusion by comparing the Act's definitions of “local” and “state” agency. Under CPRA, “ ‘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 local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952.” (§ 6252, subd. (a), italics added.) The City points out that this definition does not specifically include individual government officials or staff members, whereas individuals are specifically mentioned in CPRA's definition of “state agency.” According to that definition, “ ‘State agency’ means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.”⁵ (§ 6252, subd. (f)(1), italics added.) The City contends this difference shows the Legislature intended to exclude individuals from the local agency definition. If a local agency does not encompass individual officers and employees, it argues, only writings accessible to the agency as a whole are public records. This interpretation is flawed for a number of reasons.

The City's narrow reading of CPRA's local agency definition is inconsistent with the constitutional directive of broad interpretation. (Cal. Const., art. I, § 3, subd. (b)(2); see *Sierra Club v. Superior Court*, supra, 57 Cal.4th at p. 175.) Broadly construed, the term “local agency” logically includes not just the discrete governmental entities listed in section 6252, subdivision (a) but also the individual officials and staff members who conduct the agencies' affairs. It is well

established that a governmental entity, like a corporation, can act only through its individual officers and employees. (Suezaki v. Superior Court (1962) 58 Cal.2d 166, 174; Alvarez v. Felker Mfg. Co. (1964) 230 Cal.App.2d 987, 998; see United States v. Dotterweich (1943) 320 U.S. 277, 281; Reno v. Baird (1998) 18 Cal.4th 640, 656.) A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf. (See, e.g., Cal. Assn. of Health Facilities v. Dept. of Health Services (1997) 16 Cal.4th 284, 296-297; cf. Competitive Enterprise Institute v. Office of Science & Technology Policy (D.C. Cir. 2016) 827 F.3d 145, 149 [reaching the same conclusion for federal FOIA requests].) We presume the Legislature was aware of these settled principles. (See People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 199.) A writing prepared by a public employee conducting agency business has been “prepared by” the agency within the meaning of section 6252, subdivision (e), even if the writing is prepared using the employee’s personal account.

The City also fails to explain how its proposed requirement that a public record be “accessible to the agency as a whole” could be practically interpreted. Even when documents were stored in filing cabinets or ledgers, many writings would not have been considered accessible to all agency employees, regardless of their level of responsibility or involvement in a particular project.

Moreover, although employees are not specifically mentioned in the local agency definition, nothing in the statutory language indicates the Legislature meant to exclude these individuals from CPRA obligations. The City argues the omission of the word “officer” from the local agency definition reflects a legislative intent that CPRA apply to individuals who work in state agencies but not employees in local government. The City offers no reason why the Legislature would draw such an arbitrary distinction. If it intended to impose different disclosure obligations on state and local agencies, one would expect to find this difference highlighted throughout the statutory scheme, particularly when the obligations relate to a “fundamental and necessary right of every person in this state.” (§ 6250.) Yet there is no mention of such an intent anywhere in the Act. Indeed, under the City’s logic, CPRA obligations would potentially extend only to state officers, not necessarily state employees. The distinction between tenured public officers and those who hold public employment has long been recognized. (See *In re M.M.* (2012) 54 Cal.4th 530, 542-544.) Considering CPRA’s goal of promoting public access, it would have been odd for the Legislature to establish different rules for different levels of state employment. Contrary to the City’s view, it seems more plausible that the reference to “every state . officer” in the state agency definition (§ 6252, subd. (f)) was meant to extend CPRA obligations to elected state officers, such as the Governor, Treasurer, or Secretary of State, who are not part of a collective governmental body nor generally considered employees of a state agency.⁶

The City’s position is further undermined by another CPRA provision, which indicates that public records can be held by individual officials and need not belong to an agency as a whole. When it is alleged that public records have been improperly withheld, section 6259, subdivision (a) directs that “the court shall order the officer or person charged with withholding the records” to disclose the records or show cause why they should not be produced. If the court concludes “the public official’s decision to refuse disclosure is not justified,” it can order “the public official to make the record public.” (§ 6259, subd. (b).) If the court finds “that the public official was justified in refusing” disclosure, it must “return the item to the public official without disclosing its content.” (Ibid.) The Legislature’s repeated use of the singular word “official” in section 6259 indicates an awareness that an individual may possess materials that qualify as public records. Moreover, the broad term “public official” encompasses officials in state and local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

4. Owned, Used, or Retained by Any State or Local Agency

CPRA encompasses writings prepared by an agency but also writings it owns, uses, or retains, regardless of authorship. Obviously, an agency engaged in the conduct of public business will use and retain a variety of writings related to that business, including those prepared by people outside the agency. These final two factors of the “public records” definition, use and retention, thus reflect the variety of ways an agency can possess writings used to conduct public business.

As to retention, the City argues “public records” include only materials in an agency’s possession or directly accessible to the agency. Citing statutory arguments and cases limiting the duty to obtain and disclose documents possessed by

others, the City contends writings held in an employee's personal account are beyond an agency's reach and fall outside CPRA. The argument fails.

Appellate courts have generally concluded records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. (See, e.g., *Board of Pilot Comrs. for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577, 598; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710 (Consolidated Irrigation).) “[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person.” (Consolidated Irrigation, at p. 710.) For example, in *Consolidated Irrigation*, a city did not have constructive possession of documents in files maintained by subconsultants who prepared portions of an environmental impact report because the city had no contractual right to control the subconsultants or their files. (Id. at pp. 703, 710-711.) By contrast, a city had a CPRA duty to disclose a consultant's field survey records because the city had a contractual ownership interest and right to possess this material. (See *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1426, 1428-1429 (Community Youth).)

An agency's actual or constructive possession of records is relevant in determining whether it has an obligation to search for, collect, and disclose the material requested. (See § 6253, subd. (c).) It is a separate and more fundamental question whether a document located outside an agency's walls, or servers, is sufficiently “owned, used, or retained” by the agency so as to constitute a public record. (See § 6252, subd. (e).) In construing FOIA, federal courts have remarked that an agency's public records “do not lose their agency character just because the official who possesses them takes them out the door.” (*Competitive Enterprise Institute v. Office of Science and Technology Policy*, supra, 827 F.3d at p. 149.) We likewise hold that documents otherwise meeting CPRA's definition of “public records” do not lose this status because they are located in an employee's personal account. A writing retained by a public employee conducting agency business has been “retained by” the agency within the meaning of section 6252, subdivision (e), even if the writing is retained in the employee's personal account.

The City argues various CPRA provisions run counter to this conclusion. First, the City cites section 6270, which provides that a state or local agency may not transfer a public record to a private entity in a manner that prevents the agency “from providing the record directly pursuant to this chapter.” (Italics added.) Taking the italicized language out of context, the City argues that public records are only those an agency is able to access “directly.” But this strained interpretation sets legislative intent on its head. The statute's clear purpose is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside CPRA because it is no longer in the agency's possession. Furthermore, section 6270 does not purport to excuse agencies from obtaining public records in the possession of their own employees. It simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure requirements.

Next, the City relies on section 6253.9, subdivision (a)(1), which states that an agency must make a public record available “in any electronic format in which it holds the information” (italics added), and on section 6253, subdivision (a), which requires that public records be available for inspection “during . office hours.” These provisions do not assist the City. They merely address the mechanics of how public records must be disclosed. They do not purport to define or limit what constitutes a public record in the first place. Moreover, to say that only public records “in the possession of the agency” (§ 6253, subd. (c)) must be disclosed begs the question of whether the term “agency” includes individual officers and employees. We have concluded it does.

Under the City's interpretation of CPRA, a document concerning official business is only a public record if it is located on a government agency's computer servers or in its offices. Indirect access, through the agency's employees, is not sufficient in the City's view. However, we have previously stressed that a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located.

In *Commission on Peace Officer Standards*, supra, 42 Cal.4th at pages 289 to 290, a state agency argued certain employment information was exempt from disclosure under CPRA because it had been placed in confidential personnel files. In considering a Penal Code provision that deems peace officer personnel records confidential, we rejected an interpretation that made confidentiality turn on the type of file in which records are located, finding it “unlikely the Legislature intended to render documents confidential based on their location, rather than their content.” (Commission,

at p. 291.) Although we made this observation in analyzing the scope of a CPRA exemption, the same logic applies to the Act's definition of what constitutes a public record in the first place. We found it unlikely “the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in” a certain type of file. (Commission, at p. 291.) Likewise, there is no indication the Legislature meant to allow public officials to shield communications about official business simply by directing them through personal accounts. Such an expedient would gut the public's presumptive right of access (*Sander v. State Bar of California*, supra, 58 Cal.4th at p. 323), and the constitutional imperative to broadly construe this right (Cal. Const., art. I, § 3, subd. (b)(2)).

In light of these principles, and considering section 6252, subdivision (e) in the context of the Act as a whole (see *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83), we conclude a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account. Sound public policy supports this result.

B. Policy Considerations

Both sides cite policy considerations to support their interpretation of the “public records” definition. The City argues the definition reflects a legislative balance between the public's right of access and individual employees' privacy rights, and should be interpreted categorically. Smith counters that privacy concerns are properly addressed in the case-specific application of CPRA's exemptions, not in defining the overall scope of a public record. Smith also contends any privacy intrusion resulting from a search for records in personal accounts can be minimized through procedural safeguards. Smith has the better of these arguments.

The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation “would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private.” (Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) 19 Comm. L. & Pol'y 293, 322.)

It is no answer to say, as did the Court of Appeal, that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is for the public to make that determination, based on information to which it is entitled under the law. Open access to government records is essential to verify that government officials are acting responsibly and held accountable to the public they serve. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) “Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.” (Ibid.) The whole purpose of CPRA is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.

The City counters that the privacy interests of government employees weigh against interpreting “public records” to include material in personal accounts. Of course, public employees do not forfeit all rights to privacy by working for the government. (*Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 951.) Even so, the City essentially argues that the contents of personal email and other messaging accounts should be categorically excluded from public review because these materials have traditionally been considered private. However, compliance with CPRA is not necessarily inconsistent with the privacy rights of public employees. Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review. (See § 6253, subd. (a).)

Furthermore, a crabbed and categorical interpretation of the “public records” definition is unnecessary to protect employee privacy. Privacy concerns can and should be addressed on a case-by-case basis. (See *International Federation*, supra, 42 Cal.4th at p. 329.) Beyond the definition of a public record, the Act itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda (§ 6254, subd. (a)), personal financial data (§ 6254, subd. (n)), personnel and medical files (§ 6254, subd. (c)), and material protected by

evidentiary privileges (§ 6254, subd. (k)). Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it “clearly outweighs” the public interest in disclosure. (§ 6255, subd. (a).) This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. (International Federation, at pp. 329-330; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755-756.) The analysis here, as with other exemptions, appropriately focuses on the content of specific records rather than their location or medium of communication. (See Commission on Peace Officer Standards, *supra*, 42 Cal.4th at p. 291.)⁷

The City also contends the search for public records in employees' accounts would itself raise privacy concerns. In order to search for responsive documents, the City claims agencies would have to demand the surrender of employees' electronic devices and passwords to their personal accounts. Such a search would be tantamount to invading employees' homes and rifling through their filing cabinets, the City argues. It urges no case has extended CPRA so far.

Arguments that privacy interests outweigh the need for disclosure in CPRA cases have typically focused on the sensitive content of the documents involved, rather than the intrusiveness involved in searching for them. (See, e.g., International Federation, *supra*, 42 Cal.4th 319; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.) Assuming the search for responsive documents can also constitute an unwarranted invasion of privacy, however, this concern alone does not tip the policy balance in the City's favor. Searches can be conducted in a manner that respects individual privacy.

C. Guidance for Conducting Searches

The City has not attempted to search for documents located in personal accounts, so the legality of a specific kind of search is not before us. However, the City and some amici curiae do highlight concerns about employee privacy. Some guidance about how to strike the balance between privacy and disclosure may be of assistance.

CPRA requests invariably impose some burden on public agencies. Unless a records request is overbroad or unduly burdensome, agencies are obliged to disclose all records they can locate “with reasonable effort.” (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.) Reasonable efforts do not require that agencies undertake extraordinarily extensive or intrusive searches, however. (See *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453; *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 371-372.) In general, the scope of an agency's search for public records “need only be reasonably calculated to locate responsive documents.” (*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 85; see *Community Youth*, *supra*, 220 Cal.App.4th at p. 1420.)

CPRA does not prescribe specific methods of searching for those documents. Agencies may develop their own internal policies for conducting searches. Some general principles have emerged, however. Once an agency receives a CPRA request, it must “communicate the scope of the information requested to the custodians of its records,” although it need not use the precise language of the request. (*Community Youth*, *supra*, 220 Cal.App.4th at p. 1417.) As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.

Federal courts applying FOIA have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two. (See *Ethyl Corp. v. U.S. Environmental Protection Agency* (4th Cir. 1994) 25 F.3d 1241, 1247.) A federal employee who withholds a document identified as potentially responsive may submit an affidavit providing the agency, and a reviewing court, “with a sufficient factual basis upon which to determine whether contested items were ‘agency records’ or personal materials.” (*Grand Cent. Partnership, Inc. v. Cuomo* (2d Cir. 1999) 166 F.3d 473, 481.) The Washington Supreme Court recently adopted this procedure under its state public records law, holding that employees who withhold personal records from their employer “must submit an affidavit with facts sufficient to show the information is not a ‘public record’ under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA.” (*Nissen v. Pierce County* (Wn. 2015) 183 Wn.2d 863 [357 P.3d 45, 57].) We agree with Washington's high court that this procedure, when followed in good faith, strikes an appropriate balance, allowing a public agency “to fulfill its responsibility to search for and disclose public records without unnecessarily treading on

the constitutional rights of its employees.” (Id., 357 P.3d at p. 58.)

Further, agencies can adopt policies that will reduce the likelihood of public records being held in employees' private accounts. “Agencies are in the best position to implement policies that fulfill their obligations” under public records laws “yet also preserve the privacy rights of their employees.” (Nissen v. Pierce County, supra, 357 P.3d at p. 58.) For example, agencies might require that employees use or copy their government accounts for all communications touching on public business. Federal agency employees must follow such procedures to ensure compliance with analogous FOIA requests. (See 44 U.S.C. § 2911(a) [prohibiting use of personal electronic accounts for official business unless messages are copied or forwarded to an official account]; 36 C.F.R. § 1236.22(b) (2016) [requiring that agencies ensure official email messages in employees' personal accounts are preserved in the agency's recordkeeping system]; Landmark Legal Foundation v. Environmental Protection Agency (D.D.C. 2015) 82 F.Supp.3d 211, 225-226 [encouraging a policy that official emails be preserved in employees' personal accounts as well].)

We do not hold that any particular search method is required or necessarily adequate. We mention these alternatives to offer guidance on remand and to explain why privacy concerns do not require categorical exclusion of documents in personal accounts from CPRA's “public records” definition. If the City maintains the burden of obtaining records from personal accounts is too onerous, it will have an opportunity to so establish in future proceedings. (See Connell v. Superior Court (1997) 56 Cal.App.4th 601, 615-616; State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177, 1188.)

D. Conclusion

Consistent with the Legislature's purpose in enacting CPRA, and our constitutional mandate to interpret the Act broadly in favor of public access (Cal. Const., art. I, § 3, subd. (b)(2)), we hold that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account.

DISPOSITION

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

FOOTNOTES

1. Government Code section 6250 et seq. All statutory references are to the Government Code unless otherwise specified.
2. These parties, sued as defendants below and the petitioners here, are collectively referred to as the “City.”
3. CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552). (San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 772.)
4. We recognize that this test departs from the notion that “[o]nly purely personal” communications “totally void of reference to governmental activities” are excluded from CPRA's definition of public records. (Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9; see San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 774.) While this conception may yield correct results in some circumstances, it may sweep too broadly in others, particularly when applied to electronic communications sent through personal accounts.
5. Article IV establishes the Legislature, and article VI establishes the state's judiciary. (Cal. Const., arts. IV, VI.) These branches of government are thus generally exempt from CPRA. (See Sander v. State Bar of California, supra, 58 Cal.4th at p. 318; Copley Press, Inc. v. Superior Court (1992) 6 Cal.App.4th 106, 111.)
6. In one respect the local agency definition is worded more broadly than the state agency definition. Section 6252, subdivision (a) states that the term local agency “includes” a county, city, or one of several other listed entities. In statutory drafting, the term “includes” is ordinarily one “of enlargement rather than limitation.” (Ornelas v. Randolph (1993) 4 Cal.4th 1095, 1101.) “The ‘statutory definition of a thing as ‘including’ certain things does not necessarily

place thereon a meaning limited to the inclusions.’ ” (Flanagan v. Flanagan (2002) 27 Cal.4th 766, 774.) By contrast, the definition of “state agency” is couched in more restrictive language: “ ‘State agency’ means every state office, officer .,” and other listed entities. (§ 6252, subd. (f), italics added.)

7. While admitting it invoked no CPRA exemptions in the proceedings below, the City nevertheless asks us to decide that messages in employees' personal accounts are universally exempt from disclosure under section 6255. This issue has not been preserved and is beyond the scope of our grant of review. It also appears impossible to decide on this record. Answering threshold questions about whether employees have a reasonable expectation of privacy (see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35), or whether their messages are covered by the “deliberative process” privilege (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1339-1344) would require a fact-intensive review of the City's policies and practices regarding electronic communications, if not the contents of the challenged documents themselves. The record here is insufficient.

CORRIGAN, J.

WE CONCUR: CANTIL-SAKAUYE, C. J. WERDEGAR, J. CHIN, J. LIU, J. CUÉLLAR, J. KRUGER, J.

**Transcript of verbal comments in discussion for adoption of Board Policy 3075
for public records including those on private electronic devices**

Portions of text are highlighted in one of two colors:

Red indicates a statement which is inconsistent with law and/or facts.

The law in question usually is the California Constitution,
especially as clarified by the Supreme Court in the San Jose Case.

Orange indicates a statement which is problematic for reasons of ethics or judgment.

Blue indicates text which is of interest for other reasons.

Highlighted text also is rendered in italics to facilitate recognition,

especially if printed or copied in monochrome.

Square brackets enclose text that adds a note or was audibly indistinct in the recording.

Day:

I think I asked earlier, of the one or two thousand cities, counties, other agencies, special districts, how many other agencies or of those that you found have created policies?

main element of response:

"what was clear to me, what was communicated to me, was that
virtually everyone is dealing with this right now."

The point, my point that I made earlier, is *there are bigger agencies with more attorneys and more expertise in these matters and we should not be pioneering something, we could easily just wait a little bit and see what they do and get these and pick the - cherry pick the best, and come up with something that would work, that's my suggestion.*

I'm glad that you mentioned that General Counsel [Poulsen's(?)] letter, it's three pages, it's very detailed I think about a dozen ... in various things, I was going to read some of it but we are entering that in the minutes, I'd like to request it be entered in the minutes, thank you.

Again, I'm just a little bit amused by the rush, [This follows the Supreme Court ruling by half a year.] I thought this was going to be in October. It's been on-off. We seem to be rushing things; obviously the ruling, the spirit of the ruling, the supreme court ruling, I think we can abide by that and this policy actually is not so bad, it's the administrative regulations that I think we get into the weeds a little bit, when we don't need to. On and on an on

It reminds me of a Shakespearian farce, [reference to Ashland, little Shakespearian theater] you know you have various actors rushing onstage, you have the various actors pulling the string trying to figure out who's puppetmaster of it all and after this weekend's events I think I've kind of figured out who the actors are in all of this.

[brief discussion about reason for rescheduling from October to earlier, clarified by Jennifer

Sullivan... direction was that it should occur when all board members are present. Change in one director's vacation schedule was the reason for rescheduling to September.]

Prada:

It was specifically stated that this was going to be brought back in the first meeting of October.

Sullivan:

Exactly, and the reason why it was going to be moved to the first of October [paraphrased: was Director Raffety's vacation schedule. Raffety changed vacation schedule.]

Coco:

So first of all, this board policy only reiterates what the court said. Right?

It basically reiterates what the court said, and that's what we're supposed to do. What difference does it matter when we do it, number one, and number two, what difference does it matter what anyone else does? The court has issued a ruling. You're telling everyone basically that you need to have a policy that follows that ruling, and that's what we're doing.

I don't understand all this, because, I don't know, maybe I'm naive but I don't have any [take?] on my devices that I'm concerned about anybody seeking. And I just don't understand it. I think you have to protect privacy and you have to protect the public, and that's what we're doing. It's great balance just to enforce the administrative regulations and I think that's what we're doing.

And right now we're just trying to comply with what the court told us to do. I don't see how timing, or what anybody else says, has anything to do with it. Maybe I'm naive but...

Osborne:

In discussion with counsel an *the whole purpose of this policy is to protect the district, and potentially its employees and these officers who sit up here, from some kind of legal action if we don't follow the law. I don't understand why we have - why we have to wait and everything else. The law says we have to establish a policy.* So whether we do it this month or next month what we're doing is setting ourselves in a position to protect the district, and potentially its employees and these officers who sit up here, from some kind of legal action if they don't follow the law. I don't care what the timing is, why we have to wait, and everything else. The law has been set that we are to establish a policy. I don't care if we do it this week or next month, what we're doing is to protect the district from any legal challenges.

And the employees and ... So I don't see what the big problem is. ...

[may be abbreviated somewhat:] Making this as transparent to the public as possible I'd like to add an administrative regulation... training: I would add within 30 days of employment or swearing of all officers and all employees and all officers will receive training in agency business on personal electronic devices. Right off the bat. ... *[no excuses]* To me, this is a slam dunk. *We need to do it, get it over with, and move on.*

Coco:

[x]agree with what y *Every two years every member of this board has to take classes in ethics, in the law, and what you can and cannot do, and what you are and are not supposed to do. Then you have to pass a test. So every two years we are updated on what the law is, on what we can and cannot do, and what an ethics violation is. So there's basically no excuse for doing anything, whether it's on a private device or social media or anything else, that violates the ethics code.* So none of us should be concerned about any of this.

With that I'll open it up with public comment.

[public comment omitted from transcript for now:

Opens at ~39:37 in recording.]

[Tom Cumpston's comments were good: His discussion could be taken as exemplary for a well-executed code review in software engineering.]

[Osborne responded to final commentor: Good response]

[Counsel responded, regarding rights & privacy]

[period of interaction with final public commentor follows]

Raffety:

[Suggested ability to bring in an administrative person for review]

Abercrombie:

I think it's a great question. ... *And as an example I only use EID accounts for my business, period. For the rest I use my personal account, like when I send email to my kids or something like that. So anyone can search my EID records at any time, so as a public official or General Manager, so you're serving the public, and the public has a right to know what you're doing. And I think that's appropriate. [as suggested here use your EID account for EID business and your personal account for personal business]*

...

[Poulsen supplied legal clarification about San Jose case and searching private accounts/devices, additional discussion]

[Time ~ prior to 1:02, back to board]

Day:

Thank you again. *[x] going to ask you what's your beef with this stuff, and I don't have a beef with the California Supreme Court ruling, and again it's troublesome and I do have issues with government intrusion, it is a matter of principle for me which is why I'm raising concerns here, why I think we should go slowly and see what others do, because this can be used, based*

on how it's interpreted, can be used as a tool to harass, to invade your privacy, it can be using the powers of government intrusion listening to everything we do -- well, no if the police could walk in your house every time they would. No are we going to [?] and I've had discussions with Brian about this. It gets into the interpretation.

And I even think, Brian, it gets into several of the things you've said, I understand it's your role, especially in the ARs, *but you acknowledge you may not be protecting our constitutional rights. And it matters guys, it matters. We need to go slow and see what others do, cause this can be used as a tool of big government and big government intrusion. ["Intrusion" of public access to public business]*

[Time ~1:03:40]

Prada:

I'll take my turn now, thank you.

Good day, I'm glad that I waited for the public comments, *because I think it really helps flesh out my deep concerns with this policy. The proposed board policy does go beyond the Supreme Court's ruling and CPR [sic - CPRA] in legislation and beyond.*

The Supreme Court's ruling simply was that records in private accounts and public records MAY be subject to disclosure. MAY. The ruling decreed absolutely nothing more. *I've studied this 21 page document [The Supreme Court's ruling is 13 pages in standard 8.5"x11" page format.] many many times [Doubtful. Director Prada's statement of what the ruling says is not consistent with the ruling.],* because of the concern I have that *in the wrong hands it becomes a tool of political intrusion, vendetta* (ah..)

The Court also stated that [under] CPR [sic - CPRA] a requirement for a record to become a public record it must at a minimum deal with substantive conduct of official public business, SUBSTANTIVE. Not not [unclear], not "oh gee whiz", someone mentioned EID in a personal memo.

[The statement is substantially correct but uses its own language. The Court wrote that be a public record a writing "must relate in some substantive way to the conduct of the public's business".

Director Prada's very strong verbal emphasis on "SUBSTANTIVE" would be perceived by most listeners as setting a high threshold for being substantive. The court did not do that: The Court instead had noted the Constitution's directive in Article I Section 3.(b)(2) that:

"A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

"After that case, as for circumstances, Counsel here spent a lot of time a lot of time on this issue

since March, because *there's been public records requests - public records demands - that have been really just been totally off the wall.*

And when the Court further stated that, this is an interesting part, 'cause this comes a little bit at what that the content of specific records is not before us. **I think this thing that's over public records definition awaits resolution in future proceedings.**

[The Supreme Court's San Jose Case ruling devoted approximately five pages to discussion of defining what constitutes a public records. Its discussion referred to four aspects: A public record is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used or retained by any state or local agency.]

Next, was in the ruling and was in the CPR *[sic - CPRA]* which, you know I've read many times also, **both the Supreme Court ruling and the CPR *[sic - CPRA]* repeatedly stipulate that the COURT will decide when when this usurps rights. -- The Court.**

*[My reading of the same texts produces a much different conclusion: Handling of public records requests is primarily the responsibility of the agency that maintains public records whose scope and nature is responsive to specific requests. A sample citation from CPRA, at the beginning of Government Code §6253. (c), with typographic emphasis added for one word, is: "Each **agency**, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request in whole or in part, seeks copies of disclosable public records in the possession of the agency...".*

That statute's language as very specific, as is the fact that the Supreme Courts's San Jose Case ruling includes not less than a full page explicitly identified as guidance for agency searches. The ruling does not require court action, but it does provide appropriate advice for a court in the event that it receive an action such as litigation or is only consulted to seek legal clarification in a specific instance.

Any such court action can legitimately need to account for the City of San Jose case law precedent for guidance.]

This policy goes beyond the Court's ruling and CPR already.

[No. It is easily evident that EID's Board Policy 3075 is in compliance with the Supreme Court's ruling for the City of San Jose case.]

Counsel's proposed policy would usurp the court's proposed jurisdiction, and leave the interpretation of what constitutes public records to the opinion of and interpretation of Counsel and the General Manager.

[No. The ruling contains explicit guidance to agencies. Ultimate authority for EID as an agency rests with the General Manager and the General Counsel.]

The Court Ruling also, and CPRA also, says that if a record is in dispute that the COURT will decide when disputes arise. THE COURT, If it finds it's not substantive and all this stuff, and will return it to the individual, and it won't have to go past anybody else's eyes.

[No. This is simply another repetition of the same false claim as in his preceding comments.

Director Prada seems to have been exercising the advice that "If you repeat a lie often enough, it becomes the truth." That quotation usually is attributed to Joseph Goebbels.]

Now giving this power over EID employees to General Counsel and General Manager as to public records definition and interpretation absolutely goes beyond both the Supreme Court's ruling and CPRA.

[Again, No, as in the preceding instances.]

Such unlawful judicial power further, would trample on employee constitutional rights to due process under amendments 4, 5, and 8 of the United States Constitution.

[Amendment 4: No. This amendments prohibits unreasonable searches and seizurse and requires probable cause for issuance of warrants. CPRA requests are authorized in statutory law, the California Government Code, and respond to rights of the public rooted in the California Constitution's Declaration of Rights.

Amendment 5: No. Public Records requests do not deprive any individual of life, liberty, or property and they ARE a form of due process of law. They do not take private property for public use without just compensation.

Amendment 8: No. Public records requests do not produce cruel and unusual punishment, nor do they require excessive bail.

]

Next, note that there is no CPRA law that requires a sworn affadavit from employees or public officials, let alone one that threatens penalties as does the one proposed by EID's General Counsel.

[EID's Board Policy 3075 has no requirement for a sworn affadavit, or more simply an affadavit: Part of the definition of "affadavit" is that it is sworn and signed under oath.

The draft Administrative Regulation does define a form for signature under penalty of perjury by officers and staff who conduct a search for public records in their private accounts and devices. The signature attests to the following affirmation:

"I declare under penalty of perjury under the laws of the State of California that the

foregoing is true and correct." This draft language almost certainly will be discussed by the EID board before the Administrative Regulation is finalized.

]

Instead, the California Public Records Act provides for no penalties to either the agency OR any public official. Just fourteen days ago, on September first *[sic - comments were made September 11th]* amended Assembly Bill 1479, in its sixth amendment, struck any such penalties from being legislatively enacted.

[CPRA has somewhat related statements for signature of the requestor of public records in two cases. Both relate to confidentiality of addresses of persons arrested by law enforcement agencies.]

A month ago Director Day requested that EID slow down, see and learn what other agencies are doing. *I've heard semantic oral comments that others are working on it. But I haven't seen anything of what anyone else is doing.*

[

In my opinion the guidance that's needed to define EID's policy and AR response to the San Jose Case ruling is in the San Jose Case ruling from the Supreme Court. The Supreme Court's findings are very clear: It's more appropriate and frankly easier to respond to the Court's ruling than to the combination of other agencies' interpretation of it with their specific administrative structure.

However, from a web search I found at least examples from the Cities of Long Beach and San Francisco, and saved a copy of the Long Beach documents. It's a proposed policy from the City Attorney, dated April 7, 2017, sent to the City Manager and City Council. Its content is very nearly the same measures as in the combination of EID's Policy 3075 and EID's draft Administrative Regulation to implement that policy.

This also illustrates one reason it's harder to find these responses in web searches: Long Beach's City Attorney wrote that the proposed policy can be adopted by the City Manager: It's an administrative measure, not a legislative measure. Such documents usually are not surfaced on the web. If Director Prada wants to see more he should contact other agencies personally. However, given his failure, demonstrated above, to understand major provisions of the US Constitution's Bill of Rights and the California Constitution's Declaration of Rights, I question whether seeing examples from other agencies will clarify beyond the Supreme Court Ruling will improve his understanding.

]

Director Day absolutely had the right idea, and even more so even more so in that the California legislature has pending new legislation tending to certain aspects of this public records issue.

[Repeating in different words: The best way to understand the Constitutional law settled by the Supreme Court is to read the Supreme Court's own ruling. This is idenpendent of

any action the legislature may take to incorporate that ruling into statutory law and any other agencies may take to incorporate it into their own internal administrative regulations.]

For whatever reason, counsel is being pressured to jump the gun, have EID to be first to adopt a policy, one that will be far more intrusive than one that will be adopted by other agencies.

[How can director Prada know that EID's Board Policy 3075 will be more intrusive than others when he perceives no others to exist?. Also, the Supreme Court's San Jose Case ruling explicitly provides guidance on how to provide appropriate public access without breaching rights of privacy of individual officers and employees.]

[audibly unclear, then...] this board should not enact a policy that goes beyond the CPRA and constitutional rights, aspects of which, the districts employees, including people in this building, should thumb their nose at.

[The EID board adopted Policy 3075 in compliance with CPRA and Constitutional rights. Also, nose thumbing is inappropriate in conduct of the public's business, regardless of whether it is done literally or metaphorically.]

Counsel comments in response to Director Prada regarding legislation: The legislation in question would have allowed the public to seek punitive damages for violation of the Public Records Act. EID opposed the bill. CPRA already includes provisions to recover costs and attorneys fees from prevailing party in a lawsuit.

Raffety:

[Confirming that next vote is on the Board Policy, not the Administrative Regulations, at this time.]

Coco:

We have the power to override and change Administrative Regulations at any time. This policy just implements what the courts said. I don't know, I grew up in a world of medicine, and there was INTENSE need to protect the privacy of the patient, and your medical information ... but on the other hand, it was just as critically important to protect that patient in peer review, to make sure things were done correctly, and reviewing records was paramount to that.

So I learned very early on you do the right thing, and you follow the rules.

And, if you make a mistake, you certainly want to be the first one to know that you made the mistake. And again, when I take that experience, and I bring it to this situation, again: We take classes on what is ethical, we take classes on what the law is. We have to pass a test to demonstrate that we are knowledgeable in what that is.

So there is absolutely no excuse for doing ANYTHING that is unethical or against the law. If you use a private device, then that's just not very smart with a law like this in place. So you just use your EID devices and you just stay on the EID network, so it's public record.

You're getting completely confused here about your private information versus what's pertinent about EID. So I don't know, I'm just concerned that the devil's in the details. We need to hear those out and that can be done on a separate day.

But, to me, you wouldn't want to talk about Shakespeare. I think that thou dost protest too much. It sounds like there's something to be hidden here.

I would be very happy to sit down with Brian or Jim any time, and go right through everything that I own and everything I've done and have him say "you should divulge this" or "you should divulge that". If I didn't trust a person to that extent, I would not employ them.

Raffety:

[still some issues with Administrative Regulations regarding cell phones, vote today should be just Board Policy, AR's later.]

Osborne:

[Stopped using private account...need to bring ARs back for review, today need to address the general state policy.]

Motion made by Osborne & adopted,
to adopt Tom Cumpston's comments into the proposed board policy.

Vote:

Yes: Div 1, 3, 4 Osborne, Raffety, Coco

No: Div 2, 5 Prada, Day