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May 22, 2014

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CLERK SUPREME COURT

The Honorable Chief Justice Tani Cantil-Sakauye
And Associate Justices
California Supreme Court
350 McAllister Street, Fourth Floor
San Francisco, CA 94102

**Amicus letter supporting request for review in *City of San Jose v. Superior Court*, No. S218066 (reported below at 225 Cal. App. 4th 75, 80 (2014), as modified (Apr. 10, 2014), as modified on denial of reh'g (Apr. 18, 2014)), review filed (May 7, 2014)**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

All three California affiliates of the American Civil Liberties Union and the Electronic Frontier Foundation urge the Court to grant review in this case. The Court of Appeal published a sweeping decision that violates both the letter and spirit of Article I, section 3 of the California Constitution and the California Public Records Act (PRA) by holding that emails relating to official business are outside the PRA merely because they are sent and received using non-governmental accounts. If the opinion stands, it will gut public disclosure law by allowing government officials and employees to circumvent the PRA simply by opening a new browser window and logging into a personal web-based email account as they sit at their government-owned computers.[1] The result would be to curtail if not eliminate public access to informal emails between individual officials and employees and with industry and special interests that provide critical insights into governmental operations beyond the often sanitized contents of formal memoranda and bulletins: not just *what* the government is doing but *why* it is doing it and at whose behest. These types of emails have provided the public with information on subjects ranging

[1] Web-based email accounts accessed through a web browser commonly leave no local copy of outgoing or incoming emails unless the user installs a separate program or browser plug-in to allow offline access; messages are kept only on the provider's servers. Although the records request in this case involved only messages sent using private devices, the Court of Appeal's reasoning applies equally to all records that are "not stored on [government] servers and are not directly accessible by the [government]." Slip. Op. at 2; *see, e,g, id.* at 19 ("the issue presented here [is] whether a writing that undisputedly *is* related to official business is subject to disclosure when it is *outside* the public body's electronic communication system.").





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These types of emails have provided the public with information on subjects ranging from California's implementation of its capital punishment laws to the apparently politically motivated closure of the George Washington bridge on the East Coast, all of which represent vital information that the public otherwise would never have obtained.

## I. Interests of Amici

Proposed Amici are the California affiliates of the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF). The ACLU is a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights law. Since their founding, both the national ACLU and California ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution and the Liberty of Speech Clause of the California Constitution.

EFF is a San Francisco-based, donor-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society.

Amici believe in – and have long advocated for – both governmental transparency and also personal privacy, both of which are expressly protected by our state constitution.[2] Because the Plaintiffs have ably explained why the categorical rule adopted by the Court of Appeal is inconsistent with the PRA, amici primarily discuss why the Court of Appeal's decision will harm governmental transparency and is not necessary to protect the privacy of government employees.

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[2] Amici and their counsel have advocated for open government under the PRA in cases such as *Sierra Club v. Super. Ct.*, 57 Cal. 4th 157 (2013); *Am. Civil Liberties Union Found. v. Deukmejian*, 32 Cal. 3d 440 (1982); *Am. Civil Liberties Union of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55 (2011); *N. Cal. Police Practices Project and ACLU v. Craig*, 90 Cal. App. 3d 116, 118 (Cal. Ct. App. 1979). They have advocated for privacy under article I § 1 of the California Constitution in cases including *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992 (2009); *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994); *Brown v. Shasta Union High Sch. Dist.*, C061972, 2010 WL 3442147 (Cal. Ct. App. Sept. 2, 2010).

## II. The Court of Appeal's broad opinion in this case is wrong and will have a devastating impact on the public's right to information about governmental operations.

In California, "information concerning the conduct of the people's business is a fundamental and necessary right of every person." Gov't Code § 6250. Our constitution specifically provides that "the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. Art. I, § 3(b)(1). To ensure that these rights are not diluted by executive or judicial decisions, every provision of law must be "broadly construed if it furthers the people's right of access." *Id.*; *see also Sierra Club v. Superior Court*, 57 Cal. 4th 157, 175 (2013). The PRA, like all statutes, should be read in light of what it is meant to accomplish and in order to "result in wise policy rather than mischief or absurdity." *People v. Zambia*, 51 Cal. 4th 965, 972 (2011).

The fundamental error the Court of Appeal made is that it adopted a possible, but cramped reading of the statutory language, rather than adopting a more plausible and broader reading, which it was required to do under Cal. Const. Art. I, § 3(b)(1).

### A. The Court of Appeal's categorical rule is inconsistent with the constitutional and statutory language and intent.

The Court of Appeal based its holding solely on its flawed conclusion that the statutory definition of public records excludes messages sent or received using non-governmental accounts. The PRA defines the term as follows:

> "Public records" includes 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.[3]

Thus, to constitute a public record, a document must (1) relate to the "conduct of the public's business" and (2) be "prepared, owned, used, or retained by any state or local agency." Although it acknowledged that the records here at issue relate to the conduct of the public's business, the Court of Appeal improperly read the second prong of this definition narrowly and held that emails sent and received by means of non-governmental accounts are never prepared, owned, used, or retained by the agency no matter how much they relate to the public's business.

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[3] Gov't Code § 6252(e).

This narrow reading is far from the only reasonable interpretation of the statute, and therefore it violates the mandate of Article I, section 3 to construe the PRA broadly in furtherance of "the people's right of access." A "public body[,] like a corporation, can act only through its officers and employees."[4] *Suezaki v. Superior Court of Santa Clara Cnty.*, 58 Cal. 2d 166, 174 (1962). "A principal is chargeable with and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is with reference to a matter over which his authority extends.... The agent acting within the scope of his authority, is, as to the matters existing therein during the course of the agency, the principal himself." [5] *Columbia Pictures Corp. v. De Toth*, 87 Cal. App. 2d 620, 630 (1948); *see also* Civil Code § 2332 ("both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other"). Thus, under longstanding agency law, the acts of a government official or employee acting within the scope of his duties are, like those of a private employee, attributed to the employer, and for purposes of those acts, the official or employee is in effect the government. In light of these principles, the PRA's reference to "writings ... prepared, owned, used, or retained by any ... agency" therefore must include documents that the agency's employees have prepared or used as part of their employment. Even if it were possible to read the statute more narrowly, as the

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[4] Neither the constitution nor the PRA defines "public official." Other parts of the Government Code define the term broadly to include all government employees. *See* Gov't Code § 82048 (for purposes of Political Reform Act, "'Public official' means every member, officer, employee or consultant of a state or local government agency."). The Court of Appeal read too much into the fact that the PRA defines state agencies, but not local agencies, to include a state "officer." *See* Slip. Op. at 14. This language is necessary to include elected state executive officers such as the Governor, Lieutenant Governor, Secretary of State, and Treasurer who are not part of any state agency. *See generally* Gov't Code §§ 12000, 12095, 12150, 12300, 12400, 12500. No such language was needed in the definition of "local agency" because the comprehensive definition of that term already includes all local employees.

[5] *See also Dearborn v. Grand Lodge, A.O.U.W.*, 138 Cal. 658, 663 (1903) ("[A]n artificial person .... cannot sit down and write its name. It acts through its members, or officers, or agents."); *Kight v. CashCall, Inc.*, 200 Cal. App. 4th 1377, 1392 (2011) ("Because a corporation is a legal fiction that cannot act except through its employees or agents, a corporation and its employees generally function as a single legal unit and are the same legal 'person' for purposes of applying various tort, agency, and jurisdiction principles."); *Shasta Douglas Oil Co. v. Work*, 212 Cal. App. 2d 618, 624 (1963) ("the acts of the agent are the acts of the corporation."). The drafters of the PRA are presumed to have been aware of these legal principles and incorporated them into the law. *See People v. Scott*, -- Cal.4th --, 2014 WL 2048420, at *5 (Cal. May 19, 2014); *People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 199 (2000).

Court of Appeal did, Article I § 3 mandates that the statute be read broadly so as to promote access, particularly in light of its command that "the writings of public officials...shall be open to public scrutiny."

### B. The Court of Appeal's *per se* rule will improperly prevent critical access to information about how our government is working.

Under the Court of Appeal's cribbed reading of the PRA, it is perfectly lawful for governmental officials and employees to conduct public business in secret, even as they sit in their government offices in front of their government computers, simply by logging on to a non-governmental email account. This result would frustrate the PRA's goal of ensuring public access to "every conceivable kind of record that is involved in the governmental process," other than those specifically exempted. *Sander v. State Bar of Cal.*, 58 Cal. 4th 300, 322 (2013). "Only purely personal information unrelated to 'the conduct of the public's business," *id.*, such as "the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities" is excluded from the definition of a public record. *California State University v. Superior Court*, 90 Cal. App. 4th 810, 825 (2001). This means that public records include not just official memoranda and directives, but also a government official's or employee's emails to colleagues about official business, notes they have taken at meetings, and communications with lobbyists and other members of the public, all of which must be disclosed unless they are exempt. Government officials cannot be allowed to circumvent the disclosure requirements merely by using non-governmental accounts to conduct public business.

This is particularly important because these less-formal emails and notes are often the most revealing materials released under the PRA. For example, when the ACLU was investigating how the state had obtained execution drugs from other states, many of the records it obtained from the CDCR were copies of emails between individual employees that they could easily have sent using non-government accounts. [6] These included records relating to the CDCR's decision to trade execution drugs with other states, in what officials described as a "secret ...

[6] These records are available at https://www.aclunc.org/sites/default/files/secret_mission_to_arizona.pdf; see https://www.aclunc.org/blog/documents-cdcr.

mission" that would be done "very discreetly."[7] These emails were widely covered in the media and have contributed to the continuing public debate over capital punishment.[8]

And, although it involves New Jersey rather than California officials, the famous email that led to the politically motivated partial closure of the George Washington Bridge last year is a perfect example of how government officials may use non-governmental accounts to try to hide unsavory aspects of how they are exercising their official powers: "Time for some traffic problems in Fort Lee," one official wrote from her yahoo account to another official's gmail account.[9] No California law requires government officials or employees to use their official email accounts to conduct public business. Under the Court of Appeal's holding, the public would have no right to see these emails. This result cannot be what the legislature or the voters intended when they passed the PRA and amended the state constitution to ensure public access to information about how, why, and on whose behalf our government is using its authority. *See* arguments in favor of Prop. 59.

### C. The Court of Appeal's categorical rule barring access is not needed to protect privacy.

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[7] *See id.* The reference to "a secret and important mission" and the promise that "it will be done very discretely" appear on the first page of this set, which is Bates stamped LI000859/ACLU PRA 000991.

[8] *See, e.g.,* Gregg Zoroya, *Death penalty spurs Wild West scramble for drugs*, USA TODAY (March 17, 2014), available at http://www.usatoday.com/story/news/nation/2014/03/09/executions-lethal-injection-drugs-prisons-death-penalty/5866947/ ("California launched a 'secret mission' to swap some of its muscle relaxant for vials of Arizona's sodium thiopental in 2010.....Scott Kernan, a California prison executive at the time, exulted over the mission's success in an e-mail that became grist for Comedy Central's Colbert Report: 'You guys in AZ are life savers. By (sic) you a beer next time I get that way.'"); John Schwartz, *Seeking Execution Drug, States Cut Legal Corners*, N.Y. Times April 13, 2011 (discussing these same emails).

[9] Mother Jones, Documents: Christe administration traffic jam correspondence, available at http://www.motherjones.com/documents/1003323-christie-administration-traffic-jam-correspondence; *see* Kate Zernike, *Christie Faces Scandal on Traffic Jam Aides Ordered,* The New York Time Jan. 8, 2014, available at http://www.nytimes.com/2014/01/09/nyregion/christie-aide-tied-to-bridge-lane-closings.html. The documents on the Mother Jones website show that this was just one of the many messages about the closures sent by public officials using private accounts.

Of course, both the PRA and Article I § 3 both recognize the importance of protecting privacy, as do amici. Californians do not forfeit their state and federal rights to privacy when they enter government service. *See O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) *(plurality opn.); Long Beach City Employees Assn. v. City of Long Beach*, 41 Cal. 3d 937, 951 (1986). But the Court of Appeal's categorical rule denying access to all emails sent using non-governmental accounts – even those "indisputably" relating to official business or sent from a government-owned computer – is not needed to protect employee privacy. State and local agencies can use the same types of procedures and protocols that they currently use in responding to PRA or discovery requests to ensure that public access to official records stored in non-governmental accounts does not infringe on privacy.

In responding to PRA requests, state and local agencies do not rifle through the desks, briefcases, and filing cabinets of every employee who might have responsive records; indeed, in part because employees often keep personal items in these areas, agencies would likely be prohibited from doing so. *See O'Connor*, 480 U.S. at 717-19. Nor do agencies typically need to send a technician to search the local drives of each employee's computer to locate responsive records, if employees properly cooperate with a records search. Rather, they work with employees who might know about responsive records to locate them, whether those records are on paper or in electronic form, and whether they are stored in an employee's office, in a storage room, or in her home office or briefcase. Agencies could do the same here and require these employees to search non-governmental accounts and disclose work-related emails, as they would in responding to a discovery request. *See Gordon at* 167-68 (1984) (in civil discovery, a "public agency ... has a ... duty to obtain information from all sources under its control"); *cf. Long Beach City Employees Assn.*, 41 Cal. 3d at 947 ("a public employee may be required—on pain of dismissal—to answer questions specifically, directly, and narrowly relating to the performance of his official duties."). Employees who want to avoid these burdens can simply refrain from using non-governmental accounts to conduct official business, or can forward copies of any work-related messages to their government accounts.

Finally, it is important to remember that the PRA has exemptions that protect privacy. The government can withhold records – or parts of records – if the public interest in non-disclosure clearly outweighs the public interest in disclosure. Gov't Code § 6255(a); *see id.* §§ 6253(a), 6254(c). Thus, the government may, when

appropriate, redact an employee's private email address to protect privacy[10] and may, in appropriate circumstances, withhold messages or parts of messages that do not relate to official business.

## III. Conclusion

When the people of California overwhelmingly voted to enact Proposition 59, they made clear the importance that they attach to their "right of access to information concerning the conduct of the people's business." Cal. Const. art. I § 3. The Court of Appeal's unduly narrow reading of the PRA's definition of "public record" violates the constitutional imperative that the law be read broadly so as to increase public access to information about the people's business and will gut public disclosure law by allowing government officials and employees to circumvent the PRA. It is not necessary to protect privacy. This Court should grant review to address this important issue.

Sincerely,

Michael T. Risher
Senior Staff Attorney
Cal. Bar. #191627

Attorney on Behalf of Amici

[10] Amici take the position that in such cases the government should only partially redact these addresses, leaving the domain name (the part after the "@") so that the public can see whether the employee is using a private or an official account to conduct official business.

**DECLARATION OF SERVICE BY MAIL**

**Re: Amicus letter supporting request for review in *City of San Jose v. Superior Court*, Case No.: S218066**

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is clamprecht@aclunc.org. On May 23, 2014, I served a true copy of the attached,

**Amicus letter supporting request for review in *City of San Jose v. Superior Court*, No. S218066 (reported below at 225 Cal. App. 4th 75, 80 (2014), as modified (Apr. 10, 2014), as modified on denial of reh'g (Apr. 18, 2014)), review filed (May 7, 2014)**

each of the following, by placing same in an envelope(s) addressed as follows:

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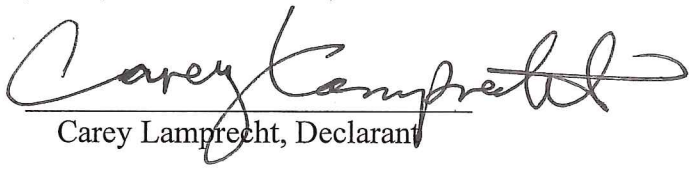
Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 23, 2014, at San Francisco, California.



Carey Lamprecht, Declarant