Supreme Court Case No. S218066
6th Civil No. H039498

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, et al.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH,

Plaintiff and Real Party in Interest.

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H039498
Santa Clara County Superior Court Case No. 1-09-CV150427

APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND PETITIONERS CITY OF SAN JOSE, ET AL. AND PROPOSED AMICUS CURIAE BRIEF

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APPLICATION OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS/PETITIONERS CITY OF SAN JOSE, ET AL.

TO: THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Education Legal Alliance of the California School Boards Association ("Amicus Curiae") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Curiae Brief") in support of Defendants/Petitioners City of San Jose, et al. ("Petitioners"). Amicus Curiae will address why the Court of Appeal's decision properly understood the current scope of the California Public Records Act ("CPRA") and appropriately left any expansion of its scope to include private electronic communications to the Legislature. Amicus Curiae will also address how judicial expansion of the scope of the CPRA to private electronic communications, without limitation or guidance from the Legislature on how such requests would be handled, would be problematic for the over 1,000 school districts and county offices of education in California, along with their elected school board members, officials, and employees.

II. INTEREST OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance (the "ELA") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represents the interests of its members. While members of CSBA support the goal of transparency underlying the CPRA, if the Court were to expand the scope of the CPRA without legislative consideration of the impacts of that expansion, each member of CSBA would be dramatically and negatively impacted.

III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus Curiae have reviewed the parties' briefs and are familiar with the questions involved in this case and the scope of their presentation. Amicus Curiae believes that its Amicus Curiae Brief will assist the Court in

the following key ways: (1) by addressing relevant points of law and arguments not discussed in the briefs of either party; (2) further distinguishing and clarifying the case law relied upon by the parties; (3) illuminating the practical and legal consequences on school districts and county offices of education from the expansion of the CPRA's scope outside the legislative process.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that the Court accept the accompanying Brief for filing in this case.

DATED: July 22, 2015

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution & Statutes

PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS/PETITIONERS CITY OF SAN JOSE, ET AL.

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following argument regarding the above captioned matter.

I. INTRODUCTION

The Education Legal Alliance of the California School Boards Association ("Amicus Curiae") submits this amicus curiae brief in support of Defendants/Petitioners City of San Jose, et al. ("Petitioners"), pursuant to California Rules of Court, rule 8.520 ("Amicus Curiae Brief"). As part of California School Boards Association ("CSBA"), the Education Legal Alliance ("ELA") helps to ensure that local school boards and county boards of education retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. By submitting this Amicus Curiae Brief, CSBA asserts its vital interest in the outcome of this matter and in this Court's review of the issues raised by this action.

Part of every school district's responsibility is to be accessible and open to the members of the public they serve. The California Public Records Act ("CPRA") applies to all local agencies and plays an important part in guaranteeing that public records are made available to members of

the public as judged appropriate by the Legislature. It represents a balance of competing policy interests which are impacted by such a requirement, including the protection of individual privacy and interference with the ability of public agencies to commit resources to their primary mission. It also provides detailed guidance to requesters and local agencies regarding each step of making and responding to, requests for public records within the CPRA's scope.

Plaintiff and Real Party in Interest Ted Smith ("Smith") asks the Court to expand the scope of the CPRA – without legislative involvement – by enlarging the definition of "public record" in the CPRA to include private electronic communications exchanged by public officials or employees on their private devices and private accounts which are not directly accessible to public agencies. ELA does not disagree that such expansion might serve to require disclosure of additional records of interest to the public. However, it also recognizes that there are many categories of records which are not subject to disclosure under the CPRA – even if they may be of substantial interest to the public – and that the CPRA does not provide any direction to local agencies on how such requests would be addressed.

The CPRA represents a balance struck by the Legislature. This is evident not only in the language of the CPRA, but in the multiple ways that judicial expansion of the scope of the CPRA would be problematic for

school districts and other local agencies – not only because of the sizable burden it would place on these agencies, but also because such expansion would be without corresponding legislative guidance on the process for receiving and responding to such requests. While the CPRA is replete with details on how to respond to a CPRA request for records in the possession of a local agency, nowhere does it explain how to respond to the type of requests that Smith believes are allowed by the CPRA. This suggests that not only did the Legislature not contemplate such requests coming within the scope of the CPRA, but that *if* such records were to be subject to disclosure under the CPRA it would be necessary for the Legislature to make that amendment so that it could also provide statutory guidance.

Whether and how private electronic communications should be subject to disclosure under the CPRA are important policy questions – but ultimately ones that must be addressed by the Legislature through amendment of the CPRA, not through litigation.

II. STATEMENT OF THE CASE

A. FACTS AND PROCEDURAL HISTORY

Amicus Curiae hereby adopts and incorporates by reference the factual background and procedural history set forth in the Statement of The Case of Petitioners' Answer Brief on the Merits. (Answer Brief, pp. 2-8.)

B. ISSUE PRESENTED

This case presents the following issue: Does the current text of the CPRA indicate that the Legislature contemplated and made provision for the CPRA's disclosure requirements to apply to private electronic communications exchanged by local agency officials and employees which relate to the public's business, but which are not stored on local agency servers or directly accessible to the local agency?

III. ARGUMENT

A. STATUTORY DEFINITIONS REFLECT THE LEGISLATURE'S BALANCING OF POLICY CONSIDERATIONS IN DEFINING THE CPRA'S SCOPE

The CPRA plays an important role in opening government to those it serves. As this Court has repeated on several occasions: "Openness in government is essential to the functioning of a democracy." (*International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 328.) The breadth of the CPRA reflects its purpose:

> "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 records. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*International Federation of Professional & Technical Engineers, Local 21, AFL–CIO v. Superior Court* (2007) 42 Cal.4th 319, 328–329 [].)

(*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 237, rev. denied Nov. 12, 2014.) The CPRA, along with the Ralph M. Brown Act and the Political Reform Act, provides a window into the interworking of government to allow members of the public to both scrutinize and understand the decisions made by those who represent them.

At the same time, the CPRA does not operate in a vacuum. "The right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) The goals of the CPRA can, and do, come into conflict with other "equally important" policy goals, including "protecting citizens and public servants from unwarranted exposure of private matters" (*City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1433), allowing for deliberation of decisionmakers (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1329), and ensuring the efficient operation of local agencies (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 235). This "inherent tension" is part and parcel of the CPRA. (*Los Angeles Unified School District, supra,* 228 Cal.App.4th at 241.)

The enactment of any public records disclosure requirement, like the CPRA, must necessarily confront this tension and address questions as to the appropriate scope of disclosure. A narrow scope may fail to fully serve the policy of disclosure, while a broad scope may impede other important rights and policies, placing undue burdens and liabilities on agencies. The

body charged with enacting such a provision must weigh these interests, adopt language which reflects how it decides the interests should be balanced, and provide guidance to both requesters and local agencies on the "ground rules" for implementing the disclosure requirements. These considerations are apparent in the way the Legislature defined the scope of the CPRA – both through definitional language and numerous exemptions determining what records are subject to the CPRA's requirements – and the procedural requirements applicable to CPRA requests.

In setting the CPRA's scope, the Legislature adopted Government Code, section 6252 as part of the CPRA.[1] It defines "public record" as: "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), italics added.) This plain language evidences the Legislature's intent to establish the scope of the CPRA, in part by excluding those records which *are not* "prepared, owned, used, or retained by any state or local agency."

There is no doubt that there are numerous records in some way related to the public's business which might be of interest to the public, but which are not subject to disclosure under the CPRA because they fall outside of its definition of "public record." For example, the records of a lobbyist who may be involved in discussing municipal ordinances with city

[1] Statutory references are to the Government Code unless otherwise noted.

councilmembers could very likely contain information that members of the public and press would find interesting – but those records are clearly outside the purview of the CPRA. (See also, *Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577, 600 [pilot logs of interest to the public were outside scope of the CPRA].)

Smith argues that the term "local agency" in the definition of "public records," should be read to incorporate every official and employee of the local agency and thus records "prepared, used, owned, or retained" by *individual public officials and individual employees* would be included within the definition of "public records." Petitioners contend that private communications exchanged on private devices and private accounts are not "prepared, owned, used, or retained by any state or local agency," and therefore not subject to the disclosure requirements of the CPRA. Below, the Court of Appeal agreed with the Petitioners in reading the second part of this definition to exclude electronic messages which are not stored on local agency servers and are not directly accessible to the local agency. (*City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75, 169 Cal.Rptr. 840, 842, rev. granted June 25, 2014.) Such records are not prepared, owned, used, or retained by the local agency and fall into the category of records which are outside the disclosure requirements of the

CPRA even if they may relate to the public's business. This conclusion is supported by the current text of the CPRA.[2]

An opposite conclusion – that the reference to "local agency" must be read to include all local agency officials and employees – would create a plethora of unanswered questions in applying the CPRA and is inconsistent with the CPRA's express limitations. Many of its provisions are relevant only to agencies, as opposed to public officials or employees. For example, the requirement that records be available for inspection "during the office hours of a state or local agency," and that, where a denial is issued, the denial "shall set forth the names and titles or positions of each person responsible for the denial," do not square with an interpretation that records which are held by an individual, rather than the agency are subject to the CPRA. (§ 6253, subds. (a) & (d).)

The definitional scope of the CPRA and its exemptions indicate a delicate balance struck by the Legislature between the competing interests touched by the CPRA. (See e.g., *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 298 ["in defining personnel records [in the CPRA] the Legislature drew the line carefully,

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[2] In reaching a consistent result regarding a request for records held by a private entity doing business with the Regents of the University of California, the First District Court of Appeal noted that this limitation was also supported by application of the federal Freedom of Information Act on which the CPRA was "modeled." (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 400.)

with due concern for the competing interests"].) Consequently, this Court has explained it "may not countermand the Legislature's intent to exclude or exempt information from the PRA's disclosure requirements where that intent is clear." (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166; *Copley Press, Inc., supra,* 39 Cal.4th at 1299 ["it is for the Legislature to weigh the competing policy considerations"].) If Smith and *amicus curiae* joining him disagree with the Legislature's policy decision, their arguments are appropriately heard in the State Capitol, not the courts.

B. EXPANDING THE CPRA WITH A BROAD BRUSH TO ALL PRIVATE ELECTRONIC COMMUNICATIONS WOULD DISTURB THE BALANCE SET BY THE LEGISLATURE

Aside from conflicting with the language of the CPRA, the view advanced by Smith would raise numerous conflicts and concerns for public agencies – none of which are addressed by the CPRA. This further suggests the Court of Appeal was correct in rejecting Smith's attempt to enlarge the scope of the CPRA and in finding that any amendment to the CPRA is more properly advanced through the Legislature. While the language of the CPRA is relatively clear, "[t]o the extent [] examination of the statutory language leaves uncertainty, it is appropriate to consider 'the consequences that will flow from a particular interpretation. [Citation].'" (*Copley Press, Inc., supra,* 39 Cal.4th at 1291, quoting *Harris v. Capital Growth Investors XIV* (1991) 53 Cal.3d 1142, 1165.)

As the largest class of local agencies, school districts would be significantly and uniquely effected by any decision enlarging the scope of the CPRA to include disclosure of private electronic communications, without comprehensively addressing these issues as the Legislature could. Specifically, an expansion of the scope of the CPRA would raise several concerns surrounding school districts employees' and officials' privacy as well as pragmatic concerns regarding the processing of such requests, the liability placed on school districts for the inability to provide private electronic communications, and the substantially enlarged burden that such a requirement would place on school districts and their personnel. The current text of the CPRA does not address these issues which suggests that the Legislature did not understand private electronic communications to come under the CPRA. These concerns counsel in the direction of affirming the holding of the Court of Appeal and allowing the policy concerns raised to be addressed by the Legislature.

1. Requiring School Districts To Obtain and Disclose Private Communications Would Conflict With Officials' and Employees' Privacy Rights & Relationship With The School District

One area of the CPRA where it is abundantly clear that the Legislature sought to toe the fine line between competing interests is records which implicate the privacy interests of individuals. "Indeed, the express policy declaration at the beginning of the [CPRA] bespeaks

legislative concern for individual privacy as well as disclosure." (*Copley Press, Inc., supra,* 39 Cal.4th at 1282, quotation omitted.) Thus, this Court has addressed the intersection of privacy rights and public disclosure on several occasions. (*County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905; *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, supra,* 42 Cal.4th 319.)

The cases considered by this Court involving privacy rights have addressed the requested disclosure of records or information already in the direct control of the agency, but which nonetheless implicate the privacy rights of public employees. (*County of Los Angeles, supra,* 56 Cal.4th at 911 [whether union is entitled to obtain home addresses and phone number of all employees held by the county]; *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, supra,* 42 Cal.4th at 327 [whether the names and salaries of certain public employees were exempt from disclosure under the CPRA].) The question raised by the expansion of the CPRA urged by Smith in this case is much different. It does not raise concerns about disclosure of information which is already held by a public agency, but instead would require public agencies to *obtain* records from their officials or employees (perhaps against the wishes of the official or employee) which the public agency does not otherwise

possess, and subsequently disclose those records.[3] This raises an entirely different specter of privacy concerns.

Public employment or serving as a public official does not strip an individual of their right of privacy. (*Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, 1271, quoting *Long Beach City Employees Association v. City of Long Beach* (1986) 41 Cal.3d 937, 951–952, ["[A] public sector employee, like any other citizen, is born with a constitutional right of privacy. A citizen cannot be said to have waived that right in return for the 'privilege' of public employment, or any other public benefit unless the government demonstrates a compelling need."].) While it is true that not every violation of privacy is a constitutional violation if it justified by a competing interest, the potential violation which would result from Smith's expansion of the CPRA would be particularly problematic under the test established by this Court.

This Court has relied on the three part analysis from *Hill v. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, "for examining how competing interests are managed in the privacy context." (*County of Los Angeles, supra,* 56 Cal.4th at 926.) *Hill* requires examining the legally

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[3] This Court's precedent is also distinguishable as it "balanced" these interests pursuant to direction and delegation by the Legislature indicated by the express terms of the CPRA. This case does not involve a statute which specifically delegates any balancing to the courts, instead section 6252 indicates the Legislature has already decided the appropriate balance when determining what records are "public records".

protected privacy interest, the reasonableness of any expectation of privacy, and the seriousness of the invasion. (*Id.*) The strength of the privacy interest is then balanced against countervailing interests.

First, the contents of one's private electronic device or account are clearly the type of confidential information protected by the State Constitution. Second, it is entirely reasonable for any individual, including a public official or employee to expect that the use of his or her private electronic device or private account is private. This expectation is so pervasive that attempts by government actors and private companies to access this information continually run into resistance from all sides. Finally, the invasion of privacy could be extremely serious in this instance; Smith's view could very well require public employees and officials to turn over their private electronic device and/or passwords to those devices and accounts in order to allow a local agency to search for and obtain requested records.

Unlike the balancing that this Court conducted in *County of Los Angeles* it would not appear that the competing interest of public disclosure would be strong enough to overcome this serious invasion of privacy. While there may be a strong concern in favor of disclosure, the Constitution enunciates an equally strong interest in protection of individual privacy. (Cal. Const., art. I, § 1 & § 3, subd. (b)(3).) Additionally, unlike *County of Los Angeles,* there is no suggestion that the privacy intrusion is "reduced"

based on the common practices of local agencies as local agencies do not regularly access officials' and employees' private devices and accounts.[4] (56 Cal.4th at 932.) Moreover, the violation of privacy in this insistence would go to the core of individual privacy in the digital age – access to private electronic devices and accounts which likely contain private messages, financial information, photos, videos, contact information, etc..

Beyond the legal contentions raised by Smith's approach, as a practical matter such a requirement could place school districts at odds with their own elected board members, officials, and employees. A school district superintendent or a member of the school district's information technology staff might be required to search and review the phone or personal computer of a board member in order to respond to a CPRA request. This would create, at best, an uncomfortable situation for all parties involved. Worse, an employee may simply refuse to provide access to a private account placing the school district without the ability to fully respond to the CPRA request. A requester might argue that the CPRA requires the school district to take legal action against its own employee or face liability itself.

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[4] In contrast to provisions of the Code of Civil Procedure which require the production of records in response to a subpoena, the CPRA does not include any requirement to provide notice or an opportunity to object to a request which implicates an individual's privacy. (Cf. Code Civ. Proc., § 1985.3 & § 1985.6.)

Under the current scope of the CPRA, school districts regularly search, review, and disclose electronic communications which are directly accessible to the school district. Public officials and employees would understand that their use of local agency email systems and servers would be subject to the review and control of the local agency itself. This allows the school district to obtain and disclose such communications with limited implications for privacy concerns. However, the same cannot be said for communications on private devices or private accounts in which a public official or employee would reasonably have an expectation of privacy. Smith's expansion of the CPRA would force local agencies to become entangled in disputes over the privacy of officials' and employees' private messages in a way not contemplated by the CPRA. While the policy goals of the CPRA may outweigh the privacy interests of public officials and employees in some contexts, it is a particularly sensitive balance which should be clearly established through the legislative process.

2. The Questions & Conflicts Which Would Result From Adopting Smith's Argument Would Leave School Districts In An Untenable Position

The views advanced by Smith would not only create conflicts between school districts, their officials, and employees, but would leave them to discern the answers to a multitude of unanswered pragmatic questions. They would need to try to determine these answers under the

threat of paying prevailing party attorneys' fees and costs if their conclusions were deemed incorrect. Holding that the definition of "public record" is as expansive as Smith claims is only half the question – determining how such a definition would apply to real world requests is equally, if not more, important. The lack of guidance in the CPRA as to such application belies the underlying argument that it was intended to apply to such records and again stresses the need for any revision to be made by the Legislature.

The CPRA provides ample guidance to a requester seeking electronic records from a school district and guidance to a school district responding to such a request where the records are directly accessible by the school district. However, there is no similar guidance regarding electronic records sent or received by a school district official or employee on his or her private device using a private account. Such a request would raise numerous practical concerns for the agency and the individual.

These concerns are not just hypothetical. In *Tracy Press v. Superior Court* (2008) 164 Cal.App.4th 1290, a newspaper submitted a CPRA request seeking emails between city councilmembers and the Lawrence Livermore National Laboratory, the City of Tracy responded but did not produce emails exchanged by one member of the City Council on her private email account. (*Id.* at 1294.) The questions raised by such a

request became evident when the requester sought appellate review, but named only the City and not the Councilmember. (*Id.* at 1294.)

The Court of Appeal found the failure to name the Councilmember was fatal and dismissed the petition. It reasoned the Councilmember was an indispensable party. (*Id.* at 1297.) It noted her "interests in this proceeding are unique" and an order giving the newspaper "access to writings she possesses personally would necessarily affect her rights." (*Id.* at 1298-1300.) It saw "no effective way to grant relief [i.e. access to the emails] without affecting [her] interests ...." (*Id.* at 1300.)

As *Tracy Press* suggests, expanding the CPRA to require disclosure of private communications will necessarily involve individual employees and officials in the CPRA process and could place them in situations where their interests diverge from their agency and/or employer. This conclusion, along with the broader reasoning of *Tracy Press* raises numerous questions about how such requests would be processed and responded to with little guidance from the CPRA.

One example is the conflict presented by subdivision (d) of section 6259. Section 6259 allows a court to order "the officer or person charged with withholding the records to disclose the public record or show cause by he or she should not do so." (§ 6259, subd. (a).) Subdivision (d) states:

> The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by

> the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

This provision explicitly prevents an award of attorney fees and costs from becoming a "personal liability of the public official." However, Smith's argument creates two conflicts with this provision. First, the decision to place liability on the shoulders of the agency suggests it is the agency, not the individual who is subject to the CPRA. Second, if "local agency" must be read to include the officials and employees of a local agency, this prohibition on personal liability is meaningless. Such a result is to be avoided. (*Sierra Club, supra,* 57 Cal.4th at 170 [courts must avoid construing portions of the CPRA to render other portions a "virtual nullity"].)

There are many other examples of unanswered questions or conflicts that would be created by expanding the scope of the CPRA. For example:

- Who would the requester lodge a request with if the requester sought disclosure of private electronic communications? If the definition of "local agency" is read to include any school district employee or official, is a request to be filed with the school district, its employee, or its official, or with more than one? If a request comes directly to a school district, does it have a responsibility to inform and request private electronic communications from its employees and officials?

- If a request for private electronic communications of multiple employees or officials is submitted to the school district, must it determine if the request seeks copies of disclosable public records within 10 days or can it extend the time to make this determination by 14 days pursuant to section 6253, subdivision (c),

notwithstanding the fact that the grounds allowing the 14-day extension do not appear to allow additional time to locate records on private devices or private accounts?

- In responding to a request for private electronic communications, must the local agency itself search the records of an official or employee or may the official or employee perform the search and provide the results to the local agency for disclosure?

- What is the appropriate action by a school district if an official or employee refuses to provide access to private electronic communications?

- How should a school district respond to a request for private electronic communications if the school district and the official or employee who exchanged the private electronic communications disagree as to the application of any exemptions from CPRA disclosure?

- If a school district receives a request for private electronic communications of a governing board member and the governing board member refuses to provide access to communications, is an action properly maintained against the school district, governing board member, or both?

- If a school district governing board member or employee incorrectly withholds private electronic communications and is ordered by a court to disclose the records, is an award of fees against the public agency pursuant to section 6259, subdivision (d) warranted?

- How should a school district respond if the request is for or includes private electronic communications of a former school district employee or official? Do such records cease to be subject to disclosure when the employee or official leaves employment or office?

These are only some the potential issues which may be raised by a judicial decision to expand the scope of the CPRA to include private electronic communication. The CPRA's lack of guidance on these

questions is in contrast with its explicit guidance as to records directly accessible to school districts. This not only suggests that the current text of the CPRA does not contemplate requests for private electronic records, but that if the scope of the CPRA was to be expanded in this matter, it should be through the legislative process. That process would allow a holistic approach with consideration – and allowance for – the impact such a change would have on the entire CPRA process.

3. Expanding The CPRA's Scope Beyond Its Current Language Would Impose Significant Burdens On School Districts Not Contemplated By The Legislature

School districts have been, and now more than ever, are asked to respond to numerous requests under the CPRA. In the large majority of cases, the request is straightforward and the records can be readily provided or the school district can help the requester locate the information or records they are seeking. While school districts are no longer reimbursed by the State for this mandate, they understand the importance of providing this information to the public and work to respond to such requests while continuing to fulfill their primary educational mission.

However, with the ubiquity of electronic communications, CPRA requests to school districts have shifted from requests for copies of hard documents to requests for *all* electronic communications exchanged by officials and employees. Such requests, even as currently limited by the

text of the CPRA to those electronic communication maintained on school district servers or directly accessible to the school district, can impose burdens of a different magnitude on school districts. These burdens are magnified by the variety of school district structures and sizes throughout the State and their unique public function.[5]

As expected, the impact of a request for private electronic communications on these varying school districts can impose a multitude of burdens on the agency. For a school district like LAUSD, the potential burden imposed by a CPRA request for *all* private electronic communications of its officials and employees is simply impractical. At the same time, while a larger school district might have the technical expertise to address such a request (although the amount of raw data would be crushing), smaller school districts – where it is common to operate with only a skeletal staff – may not have the technical expertise to be able to gather the electronic communications in an efficient manner. In both cases,

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[5] While there are just over 1,000 school districts in California, their structure and size varies greatly from district-to-district. For example, there are ten school districts in California with student enrollment of over 50,000 students, the largest being the Los Angeles Unified School District ("LAUSD") with an enrollment of over 650,000 students. At the other extreme, there are 19 school districts in California with student enrollment of under 15 total students, the smallest being the Panoche Elementary School District with an enrollment of 3 students. The number of certificated and classified staff at school districts correlates with this variation in enrollment, with LAUSD being one of the large employers in the County of Los Angeles. (Additional information on the size and structure of school districts can be found on the California Department of Education's website at: http://www.cde.ca.gov/ds/sd/cb/.)

the burden that such a request would impose on the school district and its staff would both be unreasonable and likely to interfere with the school district's primary educational mission.

Beyond the variety of school districts, their unique interaction with members of the public they serve would further complicate a request for private electronic communications. The large majority of school district employees are teachers or site-level administrators. They play a vital role in providing educational services to the public, but in most cases are not school district officials or directly involved in policy decisions. At the same time, school districts routinely receive CPRA requests which seek records related to individual teachers or site-level administrators. Where these requests are for electronic communications currently covered by the CPRA – those directly accessible to the school district – the burden can be minimized as the search and review of the communications can be conducted centrally at the district level.

However, if the CPRA were expanded to include private electronic communications – even those of teachers or site-level administrators – the burden imposed by such requests would be of a different scale. In order to comply with such a request a school district might need to obtain access to each teacher's private devices and private accounts or burden each teacher with searching their devices and accounts to locate responsive communications. Requiring a search of private devices and private

accounts is problematic as it cannot be accomplished through a centralized search, but necessarily involves each individual staff members and/or teacher taking time away from their educational responsibilities to try to respond to the request. (See *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 372 [recognizing the public's interest in the efficient operation of local agencies and the burden imposed by CPRA requests]; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1074-75 [the impact on the local agency, its employees and its interactions with the public are important considerations in applying CPRA].)

The concern over such burdensome requests is not hypothetical. (See *Crews v. Willows Unified School District* (2013) 217 Cal.App.4th 1368, 1372 [school district spent nearly 200 hours reviewing 60,000 emails responding to underlying CPRA request]; *Bertoli, supra,* 233 Cal.App.4th at 371 ["overly aggressive, unfocused, and poorly drafted" request which resulted in disclosure of 65,000 pages of potential relevant records including electronic communications stored by agency].) It is not uncommon for school districts to receive CPRA requests for *all* communications. While school districts regularly work with requesters to focus their requests, such narrowing is not always possible.

Not only would such requests impose a strain on school district resources, there is a significant financial impact from such requests. Generally, only the "direct" costs of providing copies of records are

recoverable by a local agency under the CPRA. (§ 6253, subd. (b).) "[T]he ancillary costs of retrieving, inspecting, and handling material to be prepared for disclosure may not be charged to the requestor." (*Fredericks, supra,* 233 Cal.App.4th at 236.) Thus, it is unlikely that a school district could recover even a fraction of the cost in staff time that it would expend responding to a request for private electronic communications.

Additionally, *Crews* highlights the reality that while requesters can recover attorneys' fees and costs if they prevail in litigation flowing from a CPRA request, the standard for a local agency to recover its attorneys' fees and costs is significantly higher. (§ 6259, subd. (d); *Crews, supra,* 217 Cal.App.4th at 1383 [denying school district request for attorneys' fees and costs even where requester "was ultimately unsuccessful in securing any withheld documents"].) This requires any local agency to walk a tightrope when responding to a CPRA request with any misstep resulting in liability or attorneys' fees.

This is especially true for school districts who must not only consider the disclosure requirements of the CPRA and the implication on the privacy rights of officials, employees, and members of the public, but must also be careful not to disclose any confidential information about students. Pupil records are protected by State and federal law and their disclosure is prohibited. (20 U.S.C. § 1232g, Ed. Code, § 49060 et seq., Govt. Code, § 6276.36.) Frequently CPRA requests aimed at topics

unrelated to specific students capture correspondence which identifies students in ways which cannot be disclosed. The CPRA gives school districts little leeway in segregating these records with the penalty of attorneys' fees for any mistakes.

While every CPRA request imposes some burden on the agency to which it is directed, the scale of the burden that Smith's view would allow is unprecedented and cannot be what the Legislature intended in adopting the CPRA. The fact that the CPRA requires a response to the request from a local agency within 10 days, with limited grounds to extend this deadline by 14 days, suggests that the Legislature did not understand the CPRA to encompass all private electronic communications. The scope of the search required by a request for all private electronic communications – even limited to determining whether such records might exist and/or be subject to disclosure under the CPRA – would be a difficult task for any school district to complete in only 10 days.

While searches for electronic communications directly accessible to local agencies avoid privacy concerns, can be centralized, and can follow the response procedure contemplated by the CPRA, a request for private electronic communications would necessarily raise concerns in all of these areas. By involving every individual implicated in the CPRA request and their private devices and accounts, it would implicate their privacy rights, require their direct involvement, and raise a host of questions and issues not

addressed anywhere in the CPRA. Moreover, in the process, it would bring a burden of a different magnitude to CPRA requests.

It seems unlikely the Legislature would have imposed such a burden on local agencies without explaining the grounds for usurping employees' rights, without providing a structure for responding to such requests, and without a standard for determining when such requests are unreasonable. The lack of such direction suggests that the current text of the CPRA does not encompass private electronic communications and that if the CPRA is to be expanded to encompass them, that modification should be pursued through the Legislature where these issues can be fully addressed.

C. THE LEGISLATURE IS THE PROPER FORUM TO ADDRESS ANY MODIFICATIONS OF THE CPRA

This case highlights important question raised by the fundamental purpose of the CPRA and the evolution of the way in which local agencies and their employees and officials conduct the public's business. It is equally apparent that the current text of the CPRA does not explicitly encompass such communications and also does not provide guidance on how such communications should be requested or disclosed. Prior amendment of the CPRA illustrates that the Legislature is the appropriate channel for seeking any modification to address these concerns.

California State University v. Superior Court (2001) 90 Cal.App.4th 810, addressed the California State University, Fresno's denial of a CPRA

request for records of the University and "a University-affiliated, nonprofit auxiliary corporation." (*Id.* at 816.) While the Court of Appeal ultimately found the University inappropriately withheld records, it was unable to come to the same conclusion as to the nonprofit auxiliary corporation. (*Id.*) This conclusion was based on the Court's reading of the definitional language of "state agency" in the CPRA.

> ... we are bound to apply the plain meaning rule and determine what these words mean based on their ordinary usage. In doing so, we conclude a nongovernmental auxiliary organization is not a "state agency" for purposes of the CPRA. The words "state body" and "state agency" simply do not include a nongovernmental organization.

(90 Cal.App.4th at 829.) Thus, the opinion concluded that the nonprofit auxiliary corporation, and its records, were not subject to the CPRA. (*Id.* at 830, quotation omitted ["We cannot simply ignore the language used in attempting to determine what the Legislature intended since we are bound by the doctrine of stare decisis to first look to the words of a statute."].)

At the same time, the Court of Appeal expressed its concern with this result, but noted this concern was best addressed by the Legislature.

> We are fully cognizant of the fact that our conclusion seems to be in direct conflict with the express purposes of the CPRA .... The Legislature's decision to narrowly define the applicability of the CPRA, balanced against its sweeping goal to safeguard the public, leaves us scratching our judicial heads and asking, "What was the Legislature thinking?" ... However, courts "do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." [Citation.]

(90 Cal App.4th at 830.)

Subsequently, the Legislature met the challenge presented by the Court of Appeal, amending the Education Code to "require records maintained by an auxiliary organization ... to be available to the public to inspect or copy at all times during the office hours of the organization or foundation, as specified." (Stats. 2011, ch. 247, Sen. Bill No. 8 (2011-12 Reg. Sess.) ["SB 8"].) The legislative history of SB 8, recognized the outcome of *California State University* and explained that the bill "updates the California Public Records Act to include auxiliary organizations." (Sen. Rules Committee, Bill Analysis, Sen. Bill No. 8 (2011-12 Reg. Sess.), Aug. 16, 2011.) It also noted the bill was the product of negotiations between the interested parties resulting in accommodations to fit the specific records being sought. (*Id.*)

SB 8 demonstrates that the Legislature is aware and responsive to concerns related to the scope of the CPRA. It has the tools at its disposal to consider the various interests involved and craft language which specifically addresses the issue presented and makes provision for any consequences. This is especially appropriate where the issue involves the ever-changing use of electronic communications.[6] Thus, "the legal and

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[6] For example, "Snapchat" debuted while this case was pending. It allows to "take photos, record videos, add text and drawings, and send them to a controlled list of recipients.... Users set a time limit for how long recipients can view their Snaps ... after which they will be hidden from the recipient's device and deleted from Snapchat's servers." (See https://en.wikipedia.org/wiki/Snapchat.)

practical impediments attendant to the extra task of policing private devices and accounts – would also be addressed more appropriately by the Legislature or the agency, not the courts." (*City of San Jose, supra*, 169 Cal.Rptr. at 856.)

IV. CONCLUSION

The Legislature enacted specific definitional language which establishes the scope of the CPRA. Any expansion of its disclosure requirements – and the inherent practical implications – are best addressed by the Legislature. Based on the foregoing, Amicus Curiae urges the Court to affirm the holding of the Court of Appeal in its entirety.

DATED: July 22, 2015

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this Amicus Curiae Brief Of The Education Legal Alliance Of The California School Boards Association In Support Of Defendants/Petitioners was produced using 13-point Roman type including footnotes and contains approximately 8,462 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 275 Battery Street, Suite 1150, San Francisco, CA 94111.

On the date set forth below I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND PETITIONERS CITY OF SAN JOSE, ET AL. AND PROPOSED AMICUS CURIAE BRIEF** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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☒ **(VIA OVERNIGHT MAIL)** I caused such envelope to be deposited at an authorized "drop off" box on that same day with delivery fees fully provided for at 275 Battery Street, Suite 1150, San Francisco, CA 94111, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing July 22, 2015 at San Francisco, California.

Nancy Taylor

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