

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE; SAN JOSE  
REDEVELOPMENT AGENCY, HARRY  
MAVROGENES, in his official capacity as Executive  
Director of the San Jose Redevelopment Agency;  
MAYOR CHUCK REED, in his official capacity as  
Mayor of the City of San Jose, and PETE  
CONSTANT, ASH KALRA, SAM LICCARDO,  
PIERLUIGI OLIVERO, MADISON NGUYEN, ROSE  
HERRERA, JUDY CHIRCO, KANSEN CHU, NORA  
CAMPOS, NANCY PYLE, in their official capacities  
as individual Council members for the City of San  
Jose,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA,

Respondent.

---

TED SMITH, an individual,  
Real Party in Interest.

NO. H039498

(Superior Court of California,  
County of Santa Clara Case  
No. 1-09-CV-150427)

**IMMEDIATE STAY**  
**REQUESTED by April 15, 2013**

Re: Order after Hearing on  
March 15, 2013

(Order regarding Plaintiff's  
complaint for declaratory relief  
under Public Records Act)

Dept.: 1 (Complex Civil)  
Tel.: (408) 882-2110  
Hon. Judge James P. Kleinberg

**PETITION FOR WRIT OF MANDATE  
OR ALTERNATIVE WRIT OF PROHIBITION,  
AND REQUEST FOR IMMEDIATE STAY;  
MEMORANDUM OF POINTS AND AUTHORITIES**

---

Petition for Review of an Order after Hearing re Plaintiff's Public Records Act request  
Superior Court of California, County of Santa Clara  
Honorable James P. Kleinberg, Judge

---

RICHARD DOYLE, City Attorney (88625)  
NORA FRIMANN, Assistant City Attorney (93249)  
MARGO LASKOWSKA, Senior Deputy City Attorney (187252)  
Office of the City Attorney  
200 East Santa Clara Street, 16<sup>th</sup> Floor  
San José, California 95113-1905  
Telephone Number: (408) 535-1900  
Facsimile Number: (408) 998-3131  
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for Petitioners

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, <b>SIXTH</b> APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: <del>H037626</del> <b>H039498</b>
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): RICHARD DOYLE, City Attorney (88625) MARGO LASKOWSKA, Senior Deputy City Attorney (187252) OFFICE OF THE CITY ATTORNEY 200 E. Santa Clara St., 16th Flr., San Jose CA 95113 TELEPHONE NO.: (408) 535-1900 FAX NO. (Optional): (408) 998-3131 E-MAIL ADDRESS (Optional): cao.main@sanjoseca.gov ATTORNEY FOR (Name): Petitioners CITY OF SAN JOSE, et al.	Superior Court Case Number: <b>1-07-CV-089167   -09-CV-150427</b>
APPELLANT/PETITIONER: CITY OF SAN JOSE, et al.  RESPONDENT/REAL PARTY IN INTEREST: SUPERIOR COURT OF THE STATE	FOR COURT USE ONLY
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (name): Petitioners CITY OF SAN JOSE, et al.

2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.  
 b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 9, 2013

MARGO LASKOWSKA  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF PARTY OR ATTORNEY)

TABLE OF CONTENTS

INTRODUCTION.....5

    A.    WHY WRIT RELIEF SHOULD BE GRANTED.....5

    B.    WHY IMMEDIATE STAY SHOULD ISSUE .....7

PETITION FOR WRIT OF MANDATE, OR ALTERNATIVE  
WRIT OF PROHIBITION.....9

PETITION.....10

    Facts .....10

    The Underlying Action .....12

    Timeliness of Petition .....12

    Basis for Relief.....13

    Absence of Other Remedies.....13

PRAYER.....14

VERIFICATION.....14

MEMORANDUM OF POINTS AND AUTHORITIES .....17

    I.    INTRODUCTION .....17

    II.   SUMMARY OF FACTS .....18

    III.  ARGUMENT.....20

        A.    INDIVIDUAL OFFICIALS ARE NOT  
            INCLUDED IN THE DEFINITION OF  
            “PUBLIC AGENCY” UNDER THE ACT. ....20

            1.    The “Public Records” Definition Has Two  
                Elements. ....20

2.	The Plain Language of the Act Governs Because the Definition of the “Public Record” Is Not Ambiguous. ....	22
3.	One of the Two Elements of the Definition Is Absent Because Individual Public Officials Are Not a Public Agency.....	24
B.	PETITIONERS’ INTERPRETATION IS CONSISTENT WITH PUBLIC POLICY.....	31
1.	The <i>CPOST</i> Case Is Irrelevant.....	31
2.	The City’s Interpretation Correctly Balances the Public’s Right to Know and the Burdens Imposed on a Public Entity.....	32
3.	The Legislature Is Mindful of Individuals’ Privacy Rights.....	33
4.	The Order Also Implicates Council Members’ Mental Processes.....	34
5.	The Council’s 2010 Electronic Records Disclosure Policy Is Not Relevant to the Interpretation of the CPRA.....	34
IV.	CONCLUSION.....	34

## TABLE OF AUTHORITIES

### Cases

<i>California State University, Fresno Association, Inc. v. Superior Court</i> (2001) 90 Cal.App.4th 810 .....	passim
<i>City of San Jose v. Sup. Ct. (San Jose Mercury News, Inc.)</i> (1999) 74 Cal.App.4th 1008 .....	21
<i>Commission on Peace Officer Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278 .....	31, 32, 33
<i>Coronado Police Officers Assn. v. Carroll</i> (2003) 106 Cal.App.4th 1001 .....	20
<i>Cryolife, Inc. v. Sup. Ct.</i> (2003) 110 Cal.App.4th 1145 .....	28
<i>Flagg v. City of Detroit</i> (2008) 252 F.R.D. 346 .....	16, 21
<i>Gourley v. State Farm Mutual Auto Ins. Co.</i> (1991) 53 Cal.3d 121 .....	28
<i>Hopkins v. Dunkan Township</i> (2011) 812 N.W.2d 27 .....	passim
<i>Howell Education Association MEA/NEA v. Howell Board of Education</i> (2010) 789 N.W.2d 495 .....	16, 21, 27
<i>In re Silberstein,</i> 11 A.3d 629 (2011) .....	passim
<i>Long Beach City Employees Ass'n v. City of Long Beach</i> (1986) 41 Cal.3d 937, 952 .....	33
<i>Porter County Chapter of Izaak Walton League, Inc. v. United States Atomic Energy Commission</i> (1974) 380 F.Supp. 630.....	16, 27, 28

<i>Regents of the University of California v. Superior Court</i> (1970) 3 Cal.3d 529 .....	30
<i>San Gabriel Tribune v. Superior Court</i> (1983) 143 Cal.App.3d 762.....	29
<i>Suezaki v. Superior Court</i> (1962) 58 Cal.2d 166 .....	29

**Statutes**

California Constitution, Article I §1 .....	33
---	----

**Government Code**

§6250.....	20, 33
§§6250 <i>et seq</i> .....	20
§6252(a).....	28
§6252(b).....	30
§6252(c).....	30
§6252(e).....	20
§6252.5.....	29, 30
§6252.7.....	30
§6253.....	20
§6253(a).....	20
§6253(b).....	20
§6253.9.....	29
§6253.9(a).....	29
§§6254 <i>et seq</i> .....	33
§6254(d).....	33
§6254(v).....	33
§6254.21.....	29
§6254.21(f)(6).....	29
§6259(c).....	7, 13

**Penal Code**

§832.7.....	32
§832.8.....	32

## INTRODUCTION

### A. WHY WRIT RELIEF SHOULD BE GRANTED

This petition challenges an order effectively requiring the City of San José to obtain and disclose personal communications created and received by City of San José Council members in their personal electronic accounts using their personal electronic devices. The order errs as a matter of law in its interpretation of the definition of a “public record” in the Public Records Act. The order essentially disregards the second prong of the two-part definition that a “public record” must not only be related to public business, but must also be “prepared, owned, used, or retained” by the public agency. The order amounts to a ruling that as long as communications by Council members are related to public business they are per se public records because Council members are necessarily “agents” of the City and therefore for purposes of the Act they are a “public agency.”

The real party in interest Ted Smith sought voicemails, text messages, and emails sent or received by Council members that were in existence on June 1, 2009, generally related to a downtown redevelopment project in San José. The communications at issue were those created or received by the San José Mayor and Council members and their staff in their private, non-City, accounts not accessible to the City through City servers.

A communication, even if related to public business, is not a “public record” under the Public Records Act when it is inaccessible to the public agency because the agency is not its custodian, and it is not in the agency’s possession. Individual officials are not included in the Act’s definition of “public agency” because the Act read as a whole indicates that the Legislature meant to exclude individual officials from that definition. Such interpretation is also consistent with public policy because it balances the

public's right to know and the burdens imposed on public entities and because the Legislature is also mindful of privacy rights. Courts may not re-write the Public Records Act even where the Legislature has defined the applicability of the Act more narrowly than the Act's stated goal.

*(California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 830.)

There is a distinction between transactions and activities of the Council as a whole, which may be a public record, and emails or documents of an individual Council member. A Council member is not a governmental entity. A Council member is an individual public official with no authority to act alone on behalf of the City. Consequently, emails and documents found on a Council member's personal computer or personal electronic device do not fall within the definition of a public record because any record personally and individually created by a Council member is not a documentation of a transaction or activity of the City as a local agency. Nor can it be said that such a record is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the City. Unless emails and other documents in a Council member's possession were created with the authority of the City as a local agency, or were later ratified, adopted, or confirmed by the City, they cannot be deemed public records under the Act because they are not records "of" the City. (*See In re Silberstein*, 11 A.3d 629, 633 (2011).)

Absent writ relief, the City and the other Petitioners will have no remedy to avoid intrusive search and disclosure of the Council members' personal communications. This case raises important issues affecting the balance between two directly competing interests: the public's right to access information concerning the people's business and the individuals' just claims to privacy, including the Council members' mental processes. A

writ petition is the City's only avenue of redress. The Order's overly expansive interpretation of the Public Records Act has potentially broad repercussions across the State, such as discouraging capable persons from seeking public office if they had to submit their private communications to broad searches by their public agency. The issue whether communications created or received in Council members' personal electronic accounts appears to be an issue of first impression in California and there are few decisions on that topic in other states. Therefore, Petitioners respectfully request the Court to vacate the above Order and to enter a new and different order declaring that communications created or received in Council members personal electronic accounts are not public records under the Public Records Act because Council members are not included in the definition of "public agency" under the Act.

**B. WHY IMMEDIATE STAY SHOULD ISSUE**

The petitioners request immediate stay of the Superior Court's March 19, 2013, order within the next five days, i.e. on or before April 15, 2013. According to Government Code Section 6259(c), "[a] stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits." (Gov. Code §6259(c).)

Unless the this Court issues an immediate stay, the petitioners will be obligated to obey the Trial Court's Order that declares the subject communications to be public records. The petitioners will sustain irreparable damage because once private information has been released, there are no means available to remedy the encroachment on the Council members' privacy and mental processes. An immediate stay is necessary to preserve the status quo and provide this Court with sufficient time to consider this petition.

The petitioners are likely to prevail on the merits because a communication, even one related to public business, is not a “public record” under the Public Records Act when it is inaccessible to the public agency, such as when the agency is not its custodian and the communication is not in the agency’s possession. A communication stored solely in a private electronic account is not a “public record” because it is not “prepared, owned, used, or retained” by the public agency. Individual officials are not included in the Act’s definition of “public agency” because the Act read as a whole indicates that the Legislature meant to exclude individual officials from that definition. Such interpretation is also consistent with public policy because it balances the public’s right to know and the burdens imposed on public entities and because the Legislature is also mindful of privacy rights. Courts may not re-write the Public Records Act even where the Legislature has defined the applicability of the Act more narrowly than the Act’s stated goal. (*California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 830.) Additionally, courts in other jurisdictions, interpreting similar public records disclosure laws, determined that an individual elected official is not a government entity (*see, e.g. In re Silberstein* (2011) 11 A.3d 629, 633), and were not inclined to judicially convert every email sent or received by public officials into public records in the absence of specific direction from the legislature. (*Hopkins v. Dunkan Township* (2011) 812 N.W.2d 27, 36.)

Therefore, stay of the underlying case should issue pending resolution of this matter through the present petition.

///

///

///

**PETITION FOR WRIT OF MANDATE,**  
**OR ALTERNATIVE WRIT OF PROHIBITION**

TO THE SIXTH DISTRICT COURT OF APPEAL:

Petitioners City of San José, San José Redevelopment Agency, Harry Mavrogenes, in his official capacity as Executive Director of the San José Redevelopment Agency, Mayor Chuck Reed, in his official capacity as Mayor of the City of San José, and Council members Pete Constant, Ash Kalra, Sam Liccardo, Pierluigi Oliverio, Madison Nguyen, Rose Herrera, Judy Chirco, Kansen Chu, Nora Campos, and Nancy Pyle, in their official capacities as Council members for the City of San José, by and through their attorneys, hereby petition this Court for a writ of mandamus, or in the alternative, writ of prohibition, to Respondent Superior Court of California, County of Santa Clara, directing it to vacate its March 19, 2013 Order, and to the extent it declares that voicemails, text messages, and email communications related to public business are public records under the Public Records Act, even though they are inaccessible to the City of San José to the extent they were created or received by Council members using their personal electronic devices and personal electronic accounts. The City of San José is not the custodian of such communications, they are not in the City's possession, and they are not required by law to be kept by the above public officials.

Therefore, Petitioners respectfully request the Court to vacate the above Order and to enter a new and different order declaring that such communications are not public records under the Public Records Act.

///

///

///

//

## PETITION

### **Facts**

1. Between September 4, 2008 and January 29, 2009, the City received a number of Public Records Act requests from the law firm of McManis Faulkner.
2. The City responded to those requests completely, withholding only those records that were either exempt under the Act or outside the definition of a “public record” under the Act.
3. The City did not disclose records that were outside the definition of a “public record” under the Act: voicemails, emails, or text messages concerning Tom McEnery and other individuals associated with Urban Markets LLP and San Pedro Square Properties, and concerning the San Pedro Square project, sent or received on private electronic devices used by Mayor Chuck Reed, Council members, or their staff, using their private accounts.
4. On or about June 1, 2009, Ted Smith, the plaintiff in the underlying case and real party in interest herein, repeated all the above requests previously made by the law firm of McManis Faulkner.
5. In response to Smith’s June 1, 2009 request for public records, the City confirmed that all non-exempt records regarding items 1 through 26 and items 31 and 32 of the request had already been disclosed.
6. The remaining items of the request, i.e. items 27 through 30, asked for “[a]ny and all voicemails, emails or text messages sent or received on private electronic devices used by” Mayor Chuck Reed, Council member Pierluigi Oliverio, Council member Sam Liccardo, their staff, and the other members of the City Council and their staff “regarding any matters concerning the City of San José....”

7. The Mayor and Council members and their staff have City accounts which are City telephone numbers and City email addresses, such as [mayoremail@sanjoseca.gov](mailto:mayoremail@sanjoseca.gov), [District1@sanjoseca.gov](mailto:District1@sanjoseca.gov), or [pierluigi.oliverio@sanjoseca.gov](mailto:pierluigi.oliverio@sanjoseca.gov).

8. In response to items 27 through 30, the City disclosed all non-exempt records, including voicemails, emails and text messages, if any, sent from or received on private electronic devices used by Mayor Chuck Reed, Council member Pierluigi Oliverio, Council member Sam Liccardo, their staff, and other Council members and their staff, using their **City accounts**.

9. The City did not disclose any records sent from or received by those persons on private electronic devices using their **private accounts**.

10. Since at least 2002, communications using private electronic devices of the Mayor, City Council members, and their staff, to and from their private accounts, have not been stored by the City on any City equipment and are not accessible to the City.

11. Examples of such communications are voicemail and text messages on personally acquired electronic devices—that is those not provided by the City—such as cell phones from AT&T, Sprint, Verizon, and the like; iPhone, Android and Blackberry smartphones, and other devices capable of accessing non-City email accounts such as Hotmail, Gmail and Yahoo mail by directly accessing services provided by software companies such as Microsoft, Google, Yahoo, and the like.

12. In all of such cases, where personal electronic devices are used for communications to and from private accounts, such communications are not stored on City servers and are not accessible to the City.

///

///

### **The Underlying Action**

13. On August 21, 2009, Smith filed a Complaint for Declaratory Relief and Injunctive Relief. Smith's complaint alleged that "the City must produce the records sought by plaintiff in his [records request] including e-mails, text messages, and other electronic information relating to public business, regardless of whether they were created or received on the City owned computers and servers **or the City Officials' personal electronic devices.**" (Complaint ¶38.) (emphasis added)

14. Smith's complaint asked for "a judicial determination and declaration that defendants are required to produce all records pertaining to the public's business, created or received by City Officials, regardless of what electronic device was used." (Petitioners' Appendix (PA), Exh. 1 at 7.)

15. In July 2012 the parties brought cross-motions for summary judgment on Smith's complaint. The motions were heard on March 15, 2013. On March 19, the Trial Court issued an order granting summary judgment in favor of Smith and denying the City Petitioners' motion.

16. According to Government Code Section 6259(c), "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (Gov. Code §6259(c).)

### **Timeliness of Petition**

17. This Petition is timely because it is filed within 20 days from the issuance of the Trial Court's order declaring that communications related to public business but created or received by public officials in their personal electronic accounts are public records subject to disclosure. (*Id.*)

### **Basis for Relief**

18. An order directing disclosure of public records is immediately reviewable by a court of appeal upon petition for an extraordinary writ.

(Gov. Code §6259(c).)

19. The Trial Court encroached on the province of the Legislature by expanding the scope of the Public Records Act to include within the definition of “public agency” individual Council members rather than the Council acting as a body. As a result, the Trial Court improperly expanded the definition of “public records” by including within it any communications relating to public business even when the public entity has no control over or custody of such communications where they were created or received on individual Council members’ personal electronic devices and in their personal electronic accounts.

20. The City produced all non-exempt records subject to the Public Records Act that Smith requested, including those communications that were sent or received using City officials’ **personal electronic devices** that used **City accounts**, but did not produce communications that are not within the definition of “public records”, i.e. those communications that were sent or received using City officials’ personal electronic devices that used their private accounts.

### **Absence of Other Remedies**

21. Petitioners have no adequate, legal remedy other than writ relief because an order directing disclosure of public records is not a final order, and therefore, not appealable. (Gov. Code §6259(c).) Unless writ relief is granted, Petitioners will be forced to disclose private communications and their mental processes.

///

///

## **PRAYER**

Petitioners City of San José, San José Redevelopment Agency, Harry Mavrogenes, in his official capacity as Executive Director of the San José Redevelopment Agency, Mayor Chuck Reed, in his official capacity as Mayor of the City of San José, and Council members Pete Constant, Ash Kalra, Sam Liccardo, Pierluigi Oliverio, Madison Nguyen, Rose Herrera, Judy Chirco, Kansen Chu, Nora Campos, and Nancy Pyle, in their official capacities as Council members for the City of San José, pray that this Court:

1. Pending resolution of this writ petition, issue an immediate temporary stay of Trial Court's March 19, 2013 Order after Hearing and any judgment that may issued as a result thereof; and
2. Issue a peremptory writ of mandate and/or prohibition to Respondent Superior Court of California, County of Santa Clara, directing it to vacate its March 19, 2013 Order; or
3. Should it deem such action necessary and appropriate, issue an alternative writ directing Respondent Court either to grant the relief specified in paragraph 2 of this prayer or to show cause why it should not be ordered to do so, and upon the return of the alternative writ, issue an peremptory writ as set forth in paragraph 2 of this prayer, and
4. Grant such other relief as may be just and proper.

## **VERIFICATION**

I, MARGO LASKOWSKA, declare:

1. I am an attorney licensed to practice law before all the courts of the State of California. I am a Senior Deputy City Attorney in the San José City Attorney's Office. The San José City Attorney's Office has been counsel of record for Petitioners City of San José, San José

Redevelopment Agency, Harry Mavrogenes, in his official capacity as Executive Director of the San José Redevelopment Agency, Mayor Chuck Reed, in his official capacity as Mayor of the City of San José, and Council members Pete Constant, Ash Kalra, Sam Liccardo, Pierluigi Oliverio, Madison Nguyen, Rose Herrera, Judy Chirco, Kansen Chu, Nora Campos, and Nancy Pyle, in their official capacities as Council members for the City of San José at all times pertinent to this action.

2. I am familiar with all of the proceedings which have occurred in this case, *Smith v. City of San José et al.*, Superior Court of California for the County of Santa Clara Case Number 1-09-CV-150427, and have read the foregoing Petition for Writ of Mandate or Alternative Writ of Prohibition.

3. I declare that the matters stated therein are true and correct except as to those alleged on information and belief. As to those matters, I am informed and believe that the statements made are true and on that ground allege them to be true.

4. I make this declaration on behalf of Petitioners City of San José, Petitioners City of San José, San José Redevelopment Agency, Harry Mavrogenes, in his official capacity as Executive Director of the San José Redevelopment Agency, Mayor Chuck Reed, in his official capacity as Mayor of the City of San José, and Council members Pete Constant, Ash Kalra, Sam Liccardo, Pierluigi Oliverio, Madison Nguyen, Rose Herrera, Judy Chirco, Kansen Chu, Nora Campos, and Nancy Pyle, in their official capacities as Council members for the City of San José, and I am the attorney employed by the San José City Attorney's Office who is most familiar with the proceedings that have occurred in this case to date.

5. The exhibits accompanying this petition, filed under a separate cover, are true and correct copies of original documents filed with

the Trial Court, except for Exhibit 42, which is a true and correct copy of the reporter's transcript of the March 15, 2013 hearing before the Honorable Judge James P. Kleinberg. The exhibits are paginated consecutively.

6. Petitioners attach to the Petition true and correct copies of non-California authorities as follows:

a. *In re Silberstein* (2011) 11 A.3d 629, attached hereto as Exhibit A;

b. *Flagg v. City of Detroit* (2008) 252 F.R.D. 346, attached hereto as Exhibit B;

c. *Hopkins v. Township of Duncan* (2011) 812 N.W.2d 27, attached hereto as Exhibit C;

d. *Howell Education Association MEA/NEA v. Howell Board of Education* (2010) 789 N.W.2d 495, attached hereto as Exhibit D; and

e. *Porter County Chapter of Izaak Walton League, Inc. v. United States Atomic Energy Commission* (1974) 380 F.Supp. 630, attached hereto as Exhibit E.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on April 9, 2013 at San José, California.

  
MARGO LASKOWSKA

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

At issue in this California Public Records Act case are communications by the San José Mayor and Council members and their staff stored solely in their private, non-City, accounts not accessible to the City through City servers. A “public record” under the Act must satisfy the following two requirements at the same time: it must be 1) related to public business, and 2) “prepared, owned, used, or retained” by the public agency. Here, the second prong is absent. The Legislature could have included such records within the scope of the Act but did not.

A communication, even one related to public business, is not a “public record” under the Public Records Act when it is inaccessible to the public agency. A communication stored solely in a private electronic account is not a “public record” because it is not “prepared, owned, used, or retained” by the public agency. Individual officials are not included in the Act’s definition of “public agency” because the Act read as a whole indicates that the Legislature meant to exclude individual officials from that definition.

Such interpretation is also consistent with public policy because it balances the public’s right to know and the burdens imposed on public entities and because the Legislature is also mindful of privacy rights. Courts may not re-write the Public Records Act even where the Legislature has defined the applicability of the Act more narrowly than the Act’s stated goal. (*California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 830.)

Additionally, courts in other jurisdictions, interpreting similar public records disclosure laws, determined that an individual elected official is not a government entity (*see, e.g. In re Silberstein* (2011) 11 A.3d 629, 633),

and were not inclined to judicially convert every email sent or received by public officials into public records when in the absence of specific direction from the legislature. (*Hopkins v. Dunkan Township* (2011) 812 N.W.2d 27, 36.)

## II. SUMMARY OF FACTS

Between September 2008 and January 2009 the City received a number of Public Records Act requests from the law firm of McManis Faulkner. The City responded to those requests completely, withholding only those records that were either exempt under the Act or outside the definition of a “public record” under the Act. The City did not disclose records that were outside the definition of a “public record” under the Act: voicemails, emails, or text messages concerning Tom McEnery and other individuals associated with Urban Markets LLP and San Pedro Square Properties, and concerning the San Pedro Square project, sent or received on private electronic devices used by Mayor Chuck Reed, Council members, or their staff, using their private accounts.

On or about June 1, 2009, Ted Smith, the real party in interest herein and Plaintiff in the underlying case, repeated all the above requests previously made by the law firm of McManis Faulkner. In response to Smith’s June 1, 2009 request for public records, the City confirmed that all non-exempt records regarding items 1 through 26 and items 31 and 32 of the request had already been disclosed. The remaining items of the request, i.e. items 27 through 30, asked for “[a]ny and all voicemails, emails or text messages sent or received on private electronic devices used by” Mayor Chuck Reed, Council member Pierluigi Oliverio, Council member Sam Liccardo, their staff, and the other members of the City Council and their staff “regarding any matters concerning the City of San José....” The Mayor and Council members and their staff have City accounts which are City

telephone numbers and City email addresses, such as [mayoremail@sanjoseca.gov](mailto:mayoremail@sanjoseca.gov), [District1@sanjoseca.gov](mailto:District1@sanjoseca.gov), or [pierluigi.oliverio@sanjoseca.gov](mailto:pierluigi.oliverio@sanjoseca.gov).

In response to items 27 through 30, the City disclosed all non-exempt records, including voicemails, emails and text messages, if any, sent from or received on private electronic devices used by Mayor Chuck Reed, Council member Pierluigi Oliverio, Council member Sam Liccardo, their staff, and other Council members and their staff, using their **City accounts**. Defendants did not disclose any records sent from or received by those persons on private electronic devices using their **private accounts**.

Since at least 2002, communications using private electronic devices of the Mayor, City Council members, and their staff, to and from their private accounts, have not been stored by the City on any City equipment and are not accessible to the City. Examples of such communications are voicemail and text messages on personally acquired electronic devices—that is those not provided by the City—such as cell phones from AT&T, Sprint, Verizon, and the like; iPhone, Android and Blackberry smartphones, and other devices capable of accessing non-City email accounts such as Hotmail, Gmail and Yahoo mail by directly accessing services provided by software companies such as Microsoft, Google, Yahoo, and the like. In all of such cases, where personal electronic devices are used for communications to and from private accounts, such communications are not stored on City servers and are not accessible to the City.

///

///

///

### III. ARGUMENT

#### A. INDIVIDUAL OFFICIALS ARE NOT INCLUDED IN THE DEFINITION OF “PUBLIC AGENCY” UNDER THE ACT.

##### 1. The “Public Records” Definition Has Two Elements.

The California Public Records Act is codified at Government Code §§6250 *et seq.* Section 6253 of the Act provides that public records are open for inspection “during the office hours of the state or local agency.” (Gov. Code §6253(a).) The Act also provides that “each state or local agency, upon a request for a copy ... shall make the [non-exempt] records promptly available to any person.” (Gov. Code §6253(b).) The records thus, by implication, must be within the public entity’s custody or control.

A “public record” under the Act must satisfy the following two requirements at the same time: it must be 1) related to public business, and 2) “prepared, owned, used, or retained” by the public agency:

“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. “Public records” in the custody of, or maintained by, the Governor’s office means any writing prepared on or after January 6, 1975.

(Gov. Code §6252(e).) (emphasis added)

If one of the elements of the definition of the “public record” is missing, the communication is not a public record. The two-prong analysis is reflected in the rule that “[t]he mere possession by a public agency of a document does not make the document a public record.” (*Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1006.) If the content of the writing is purely personal then the fact that the writing is within the government’s control does not mean that it is a public record. For example, the court in *California State University, Fresno Association,*

*Inc. v. Superior Court (McClatchy Co.)* (2001) 90 Cal.App.4th 810, used the two-prong analysis in the context of physical records. (*Id.* at 825.) The court found that the requested documents were public records because they were “unquestionably used and/or retained by the University” and that they “clearly relate[d] to the conduct of the public’s business.” (*Id.*)

In the context of electronic records, a Michigan state court used the two-prong analysis in a case decided under the federal Freedom of Information Act.<sup>1</sup> (*Howell Education Association et al. v. Howell Board of Education et al.* (2010) 789 N.W.2d 495.) Like the California Public Records Act, Michigan’s FOIA defined public records as writings “prepared, owned, used, in possession of, or retained by a public body in the performance of an official function.” (*Id.* at 499.) The Michigan court decided that the Act did not render the individual plaintiffs’ personal emails public records solely because they were captured in the public body’s email system’s digital memory. (*Id.* at 497.)

Similarly, a federal district court in Michigan ruled that text messages among officials and employees of the City of Detroit were public records under the Michigan FOIA because the city had “control” over the messages due to the fact that the city had a contract with the service provider SkyTel who stored the text messages. (*Flagg v. City of Detroit* (Mich. D.C. 2008) 252 F.R.D. 346, 355-58.) It was the City of Detroit that was the service provider’s customer, and as such, had control over the text messages. (*Id.*)

---

<sup>1</sup> Because California’s Public Records Act was modeled on the federal Freedom of Information Act, and they have a common purpose, the federal legislative history and judicial construction of the FOIA may be used in construing California’s statute. (*City of San Jose v. Sup. Ct. (San Jose Mercury News, Inc.)* (1999) 74 Cal.App.4th 1008, 1016.)

By the same token, even if the content of the writing is potentially related to government business, the fact that it is **not** “prepared, owned, used, or retained” by the government—i.e. not in the government’s control—means it is not a public record. Otherwise, the Legislature would have omitted the requirement that the writing be “prepared, owned, used, or retained” by the government in order to constitute a public record.

**2. The Plain Language of the Act Governs Because the Definition of the “Public Record” Is Not Ambiguous.**

The definition of “public records” in the Act is not ambiguous and the plain meaning of the Act should govern:

In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. **“We begin by examining the statutory language, giving the words their usual and ordinary meaning.”** If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history.

*(Estate of Griswold (2001) 25 Cal.4th 904, 910-11.)* (citations omitted) (emphasis added) Thus, any interpretation of the Act may not contradict its express language.

In *California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, the Fresno Bee, a local newspaper, made a Public Records Act request to California State University, Fresno, for records concerning the identity of the individuals and companies that purchased luxury suites in a new sports arena on the university campus. (*Id.* at 816.) When the University refused to disclose the records, the Fresno Bee filed a writ against the University and a non-profit auxiliary

corporation. (*Id.* at 819.) The corporation was affiliated with the public university and operated all of the university's commercial enterprises, including its bookstore, food services, housing, and student union. (*Id.* at 817.) It would also operate the arena, and entered into license agreements with donors for use of the luxury suites. (*Id.*)

One of the issues in the *Fresno Association* case was if the state university auxiliary corporation was subject to the Public Records Act, and specifically, if it was a "state agency" under the Act. (*Id.* at 825.) Even though the corporation was an entity affiliated with a public university, the court determined that it was not a "state agency" because it was a "nongovernmental auxiliary organization," which did not fit within the Act's definition of a state agency. (*Id.* at 829.) The court realized that its "conclusion seem[ed] to be in direct conflict with the express purposes of the CPRA—to safeguard the accountability of government to the public..." (*Id.* at 830.) The court stated that it had no choice but to follow the words of the statute:

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? In many ways, the Association can be characterized as a "state-controlled" corporation that should be subject to the CPRA. However, courts "do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature."

(*Fresno Association*, 90 Cal.App.4th at 830.) (citations omitted) The court refused to rewriting the statute because it is a legislative rather than a judicial function. (*Id.* at 830.) For the same reasons, the Trial Court may not disregard the language of the Act in order to expand its coverage. The express definition of "public records" excludes writings that are not

“prepared, owned, used, or retained” by the City even if they may relate to public business.

**3. One of the Two Elements of the Definition Is Absent Because Individual Public Officials Are Not a Public Agency.**

While the question whether electronic records in a public official’s personal electronic account appears to be one of first impression in California, the Commonwealth Court of Pennsylvania in *In re Silberstein* (2011) 11 A.3d 629, has already considered a similar issue. The *Silberstein* court of appeal decided that a township commissioner’s emails on his personal computer were not public records because a council member is not a local agency. (*Id.* at 633.) After a request for public records under Pennsylvania’s Right-to-Know Law, Pennsylvania’s Office of Open Records required the Township of York to obtain certain records that were stored on a personal computer of the township’s commissioner. (*Id.* at 630.) The trial court in *In re Silberstein* reversed that decision and the requester appealed to the Commonwealth Court. (*Id.* at 630-21.) The requester sought the following communications, among other records:

Any and all **electronic communications** or written correspondence **between Commissioner Ness and/or Commissioner Silberstein and citizens of [York] Township**, including but not limited to John Bowders, in reference to Charter Homes, the TND Application known as Stonebridge, ... from January 1, 2008 to date ....

(*Id.*) (emphasis added)

The York Township produced only documents and emails that were on the computers under the possession and control of the township, and did not produce any documents or emails that were on computers solely maintained by Commissioners Ness and Silberstein and/or businesses where

they worked or that they owned. (*Id.*) The township did not consider electronic communications between an individual commissioner and a citizen or citizens as public records under the Right-to-Know Law and so refused to disclose them. (*Id.*) The trial court agreed with the township and determined that such documents were not public records because “Silberstein is not a governmental entity.” (*Id.* at 631.) The trial court pointed out that the commissioner had no authority to act alone on behalf of the township, and he did not have “any obligation to keep records of, let alone disclose to the public, every conversation, note, email, or telephone call in which he discusses matters pertaining to York Township.” (*Id.*)

The *Silberstein* court of appeal agreed with the trial court and with the township. The court considered as a matter of first impression the issue “whether requested records contained on a township commissioner’s personal computer are public records in the possession or control of the township.” (*Id.* at 632.) Pennsylvania’s Right-to-Know Law defines “local agency” as “Any political subdivision . . . , ¶ Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.” (*Id.*) Based on that definition the *Silberstein* court concluded that the York Township was a local agency subject to the Law and thus required to disclose public records. (*Id.*) The Law defined a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” (*Id.*) The court determined that the request “on its face, seeks information that documents activity of York Township through its Commissioners in connection with the business of York Township.” (*Id.*)

Answering the question whether emails or documents on the commissioner's personal computer were public records, the *Silberstein* court of appeal held that such records cannot be deemed public records of the local agency because an individual commissioner is not a public entity:

[A] distinction must be made between transactions or activities of an agency which may be a "public record" under the RTKL and the emails or documents of an individual public office holder. As pointed out by the trial court, **Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.**

Consequently, emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record as any record personally and individually created by Commissioner Silberstein would not be a documentation of a transaction or activity of York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity of York Township. In other words, **unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, as a local agency, or were later ratified, adopted or confirmed by York Township. Said requested records cannot be deemed "public records" within the meaning of the RTKL as the same are not "of the local agency."**

(*Id.* at 633.) (italics in original) (bold added)

Similarly, a Michigan state court of appeal in *Hopkins v. Duncan Township* (2011) 812 N.W.2d 27, held that notes taken by a township board member, an elected official, during township board meetings were not a public record because they were taken for his personal use, were not circulated among other board members, were not used in the creation of minutes of any meeting, and were retained or destroyed at the board member's sole discretion. (*Id.* at 28.)

The party that requested the board member's notes argued that the township violated Michigan's Freedom of Information Act when it did not disclose the board member's notes. (*Id.* at 28.) The *Hopkins* court of appeal found that the case differed from another case where a private letter was read into the record and incorporated into the board's substantive decision-making. (*Id.* at 35-36.) In *Hopkins* there was no evidence that anyone else other than the board member read the notes. (*Id.* at 35.) Official records of the township were maintained by the township's clerk. (*Id.*) The *Hopkins* court also noted its previous decision in *Howell, supra*, where it stated that unofficial private writings should not be subject to public disclosure merely because they belong to a public official: "Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA." (*Hopkins*, 812 N.W.2d at 36 (quoting *Howell Ed. Ass'n*, 789 N.W.2d 495.)) The *Hopkins* court also found on point an Indiana District Court case, *Porter Co. Chapter of the Izaak Walton League of America, Inc. v. United States Atomic Energy Commission* (D.Ind., 1974) 380 F. Supp. 630, where the *Porter* court stated that notes not considered by other members and retained or disposed of at the discretion of the writer are not public records:

Disclosure of such personal documents would **invade the privacy** of and **impede the working habits** of individual staff members; it would **preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly.** Even if the records were "agency records," their disclosure would be akin to revealing the opinions, advice, recommendations, and **detailed mental processes of government officials.** Such notes would **not be available by discovery** in ordinary litigation.

(*Hopkins*, 812 N.W.2d at 36 (quoting *Porter*, 380 F. Supp. at 633.)  
(emphasis added)

The reasoning of *Silberstein* and *Hopkins* applies in the present case. When Smith made his request for records, and at present, communications using private electronic devices of the Mayor, City Council members, and their staff, to and from their private accounts, are not and were not stored on any City equipment and are not accessible to the City. An individual Council member is not a public entity because he or she has no authority to act on behalf of the City alone. The City has no custody or control over records of such communications.

The Trial Court incorrectly agreed with Smith's argument that individual City officials are included in the Act's definition of a "public agency." That conclusion is mistaken because that definition does not refer to "individual council members," "employees," or "public officials." (Gov. Code §6252(a).) The Act provides that "[p]ublic agency means any state or local agency." (*Id.*) As explained by this Court, "if statutory language is 'clear and unambiguous there is no need for construction, and courts should not indulge in it.'" (*Cryolife, Inc. v. Sup. Ct.* (2003) 110 Cal.App.4th 1145, 1154.)

Had the Legislature intended to include individual officials in the definition of "public agency" under the Act, it could have done so. The omission must mean, therefore, that the Legislature wished to exclude such persons from the definition of "public agency." (See *Gourley v. State Farm Mutual Auto Ins. Co.* (1991) 53 Cal.3d 121, 130 (absence of language indicating that statute applied to incidental damages demonstrated that the Legislature did not intend to include such damages within the ambit of the statute).)

Legislative intent in this regard is confirmed by the fact that other provisions of the Act specifically include such individuals. For example, Section 6252.5 provides that “an elected member or officer of any state or local agency is entitled access to public records of that agency on the same basis as any other person.” (Gov. Code §6252.5.) Section 6254.21, which provides for protections of elected officials’ home addresses and telephone numbers, includes “members of a city council” and others within the definition of “elected official.” (Gov. Code §6254.21(f)(6).)

Such interpretation is also bolstered by Section 6253.9, where the Act expressly refers to electronic records held by the public agency itself and not its agents: if the agency has information that is a non-exempt public record, the agency must make the information available “in any electronic format in which it holds the information,” and must provide a copy of an electronic record in a requested format “if the requested format is one that has been used by the agency ....” (Gov. Code §6253.9(a).)

The cases on which the Trial Court relied in deciding this case did not consider the issue whether individual officials are included in the Act’s definition of “public agency.” (See PA, Exh. 41 at 853.) Those cases are, therefore, irrelevant. In *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, the question was whether the Act required disclosure of financial data submitted to a city by a waste disposal company and on which the city relied in granting the company a rate increase. (*Id.* at 775.) In *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, the court considered the issue of attorney-client privilege in the context of litigation discovery: whether films of the plaintiff that were taken by an independent investigator on the request of an attorney for the defendant company were protected by the attorney-client privilege or whether they were subject to discovery production. (*Id.* at 170-71.) In the *Regents of the University of California*

*v. Superior Court* (1970) 3 Cal.3d 529, the Supreme Court considered whether the venue of the lawsuit was proper, i.e. whether the corporation known as the UC Regents falls within the definition of a “public officer” in Code of Civil Procedure Section 393. (*Id.* at 536-40.)

While the Public Records Act defines the terms "member of the public" (Gov. Code §6252(b)) and "person" (Gov. Code §6252(c)), the definition of "public records" still requires that a record be retained by the local agency itself. For example, Government Code Section 6252.5 provides that “an elected member or officer of any state or local agency is entitled to access to public records of that agency on the same basis as any other person.” (*Id.*) And Government Code Section 6252.7 provides that “the local agency ... shall not discriminate between or among any of those members [of a legislative body of a local agency] as to which writing [of the legislative body or the agency] or portion thereof is made available or when it is made available [to them].” (*Id.*) It is evident, therefore, that the Public Records Act views the records as belonging to the agency and treats the individual elected officials like other members of the public.

As explained above, since at least 2002, communications using private electronic devices of the Mayor, City Council members, and their staff, to and from their private accounts, are simply not maintained in the City’s system and thus are not accessible to the City.<sup>2</sup> The Trial Court views this fact as irrelevant because it considers the Mayor, Council members and their staffs as the City’s agents. But if the Legislature wanted to include individual agents in the definition of a public entity, it would

---

<sup>2</sup> Of course, if such communications are forwarded from a private account to a City account, they are no longer inaccessible—but such communications are not at issue here.

have done so, especially because the Legislature spelled out such individual agents in other parts of the Act.

**B. PETITIONERS' INTERPRETATION IS CONSISTENT WITH PUBLIC POLICY.**

**1. The *CPOST* Case Is Irrelevant.**

The Trial Court's Order speculates that public entities would hide their records in third-party storage to avoid compliance with the Public Records Act is unreasonable. But it is hornbook law that a lease grants control over the leased premises. Because of that control, any property (including electronic records) stored on such premises would still be accessible to the public entity. The City here does **not** have custody or control of individual officials' private electronic accounts because they are not in the City's system.

The Order also states that the City improperly focuses on where the records are stored. That is incorrect. The issue is not the records' location but whether the City has custody or control over them. The decision in *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278 [*"CPOST"*], on which the Order relies, is inapposite. In *CPOST*, the parties did not dispute that the records qualified as "public records." (*Id.* at 288.) Thus, the *CPOST* records were subject to disclosure unless any of the Act's exceptions applied. (*Id.*) Whether the state agency had custody or control over the records was not an issue because the electronic database where the information was stored was maintained by the state agency itself. (*Id.* at 285.) Here, on the other hand, the parties dispute the threshold question whether the records are public records at all because the City does not have access to them.

The *CPOST* analysis concerned an exemption from disclosure under the Act based on a confidentiality exception under Penal Code Sections

832.7 and 832.8 for police officer personnel records. (*Id.* at 290.) The Court determined that because those Penal Code sections did not list police officers' names, their employers, and employment dates as confidential, they were therefore not confidential even though they were part of the officers' personnel records. (*Id.* at 290-91.) The issue of accessibility or control of those records by the public agency was never part of the Court's analysis because such accessibility and control were assumed. (*See id.* at 291.) The *CPOST* case is simply too different to apply here.

**2. The City's Interpretation Correctly Balances the Public's Right to Know and the Burdens Imposed on a Public Entity.**

It is reasonable to surmise that the Legislature has not extended the reach of the Act to personal emails, texts, and voicemail because such a provision would burden a public entity with the task of expanding the scope of its searches for public records into the homes and personal devices of its employees and officials. As a practical matter, local agencies would be overburdened if the scope of the Public Records Act extended to the personal electronic accounts of their employees. The City has thousands of employees, and if with every Public Records Act request the City were required to search—in addition to City file cabinets, computers and servers—the personal electronic devices of each employee who may have relevant information, the burden and cost would be overwhelming. And without the requisite custody or control of such records, it is difficult to imagine how the City would be able to implement such searches if employees declined to cooperate. The current scope of the Act ensures a more proper balance between the public's right to obtain information and the burdens imposed on tax-funded public agencies to comply with Public Records Act requests.

### 3. The Legislature Is Mindful of Individuals' Privacy Rights.

Despite the fact that elected officials and City employees are public servants, they also have privacy rights guaranteed to every citizen of this State. (See Cal. Const. Art. I §1.) Indeed, although the fundamental purpose of the Act is to allow access to information concerning the people's business, the Legislature tempered this declaration by being "mindful of the right of individuals to privacy." (Gov. Code §6250; *CPOST*, 42 Cal.4th at 288.) Government Code Section 6250, enacted as an introduction to the Act, expressly recognizes individuals' rights to privacy: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code §6250.)

The Legislature has enacted provisions protecting various types of documents from disclosure under the Act. (See Gov. Code §§6254 *et seq.*) Included among them are those that appear based, at least in part, on protecting the privacy of public employees. (See, e.g., Gov. Code §6254(d) (protecting the "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); and Gov. Code §6254(v) (protecting the home addresses and telephone numbers of certain officials).) In *Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 952, the Supreme Court stated: "However much public service constitutes a benefit and imposes a duty to uphold the public interest, a public sector employee, like any other citizen, is born with a constitutional right of privacy". A requirement that the government search individuals' personal computers and other devices for information potentially responsive to Public Records Act requests would run counter to California's strong policy favoring privacy.

**4. The Order Also Implicates Council Members' Mental Processes.**

Such a requirement would also implicate the “mental processes” of Council members. Even acting in their public capacity, decision-makers such as Council members are entitled to keep some of their conversations out of the public domain--even if they concern public matters. For example, courts have recognized that judicial inquiry into the “mental processes” of legislators is inappropriate. (*See Sutter's Place v Superior Court* (2008) 161 Cal.App.4<sup>th</sup> 1370.)

**5. The Council's 2010 Electronic Records Disclosure Policy Is Not Relevant to the Interpretation of the CPRA.**

San José City Council chose to impose its policy only on Council members and their staff, i.e. on about 30 out of nearly 5,500 City employees. While Council members may declare that they and their staff will produce electronic records created and stored in their private electronic accounts, that fact is not relevant to this litigation. This is because Smith's request was made in June 2009 and the policy was established in March 2010, about ten months later, and the policy does not state that it is retroactive. Additionally, local policies simply do not affect the courts' interpretation of the Public Records Act. Finally, according to the Resolution that adopted this policy, the policy was enacted “for purposes of a one-year pilot program.” The policy, enacted in March 2010 has thus expired in March 2011.

**IV. CONCLUSION**

As it is currently written, the Public Records Act does not require the City to disclose to the public electronic communications of City officials sent to or from their private accounts by means of their private electronic devices even if those communications relate to public business; this is

because the City has no access to such communications as they are not stored on any City equipment.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: April 9, 2013

By: *Margo Laskowska*  
MARGO LASKOWSKA  
Senior Deputy City Attorney

Attorneys for Petitioners

CERTIFICATE REGARDING WORD COUNT

I, Margo Laskowska, counsel for City of San José, et al., hereby certify, pursuant to California Rules of Court, Rule 81204 (c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this PETITION FOR WRIT OF MANDATE OR ALTERNATIVE WRIT OF PROHIBITION, AND REQUEST FOR IMMEDIATE STAY; MEMORANDUM OF POINTS AND AUTHORITIES, exclusive of tables, cover sheet, and proof of service, according to my computer program is 8,657 words.

Respectfully submitted,

RICHARD DOYLE, City Attorney

Dated: April 9, 2013

By: *Margo Laskowska*  
MARGO LASKOWSKA  
Senior Deputy City Attorney

Attorneys for Petitioners

**PROOF OF SERVICE**

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

COURT OF APPEALS CASE NO.: H037626; SCC # 1-07-CV-089167)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San José, California 95113-1905, and is located in the county where the service described below occurred.

On **April 9, 2013**, I caused to be served the within:

**PETITION FOR WRIT OF MANDATE OR ALTERNATIVE WRIT  
OF PROHIBITION, AND REQUEST FOR IMMEDIATE STAY;  
MEMORANDUM OF POINTS AND AUTHORITIES**

by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

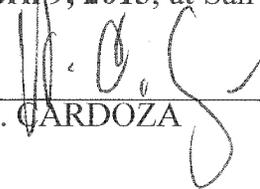
Addressed as follows:

Mr. Joshua Voorhees  
McManis Faulkner  
50 W. San Fernando Street, 10th Floor  
San José, CA 95113  
Phone Number: (408) 279-8700  
Fax Number: (408) 279-3244

Attorneys for  
TED SMITH

The Honorable James P. Kleinberg  
Superior Court of California  
County of Santa Clara  
191 North First Street  
San José CA 95113

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 9, 2013**, at San José, California.

  
\_\_\_\_\_  
S. C. CARDOZA

---

---

# **EXHIBIT A**

## In re Silberstein

Commonwealth Court of Pennsylvania  
December 7, 2010, Argued; January 6, 2011, Decided; January 6, 2011, Filed  
No. 814 C.D. 2010

**Reporter:** 11 A.3d 629; 2011 Pa. Commw. LEXIS 9; 39 Media L. Rep. 1225

In the matter of: Kenneth M. Silberstein appeal from grant of Open Record request; Commonwealth of Pennsylvania, Office of Open Records, York Township, and Stacey MacNeal, Esquire; Appeal of: Stacey MacNeal

**Prior History:** [\*\*1] Appealed from No. 2009-SU-004714-08. Common Pleas Court of the County of York. Renn, P.J.

### Case Summary

#### Procedural Posture

An attorney appealed an order of the Court of Common Pleas of York County (Pennsylvania) reversing a decision of the Office of Open Records (OOR) requiring a township to obtain certain records from a Township Commissioner stored on his personal computer and provide them to the attorney pursuant to the Right-to-Know Law (RTKL). The attorney contended that public officials were agency actors and subject to township control.

#### Overview

The attorney requested that the township provide electronic communications or written correspondence involving two Commissioners. The Township Open Records Officer produced only documents/emails that were on computers under the possession and control of the township. The township did not produce any documents/emails that were specifically on computers that were solely maintained by the Commissioners and/or businesses for which they owned or were employed. The township did not consider electronic communications between a Commissioner and a citizen public records. The appellate court held that a right-to-know request directed to a local agency required inquiry as to whether the public official was in possession, custody or control of a requested record that could be deemed public. It was then the open-records officer's duty and responsibility to determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure. The Open Records Officer fulfilled her duty under the RTKL when she determined that the correspondence were not public re-

cords.

#### Outcome

The judgment of the trial court was affirmed.

**Counsel:** Marc B. Kaplin, Blue Bell, for appellant.

Nathanael J. Byerly, Chief Counsel, Harrisburg, for appellee Office of Open Records.

Steven Mark Hovis, York, for appellee York Township.

**Judges:** BEFORE: HONORABLE RENÉE; COHN JUBELIRER, Judge, HONORABLE JOHNNY J. BUTLER, Judge, HONORABLE KEITH B. QUIGLEY, Senior Judge. OPINION BY SENIOR JUDGE QUIGLEY.

**Opinion by:** KEITH B. QUIGLEY

### Opinion

#### [\*630] OPINION BY SENIOR JUDGE QUIGLEY

Stacey MacNeal, Esquire, appeals from the April 5, 2010 order of the Court of Common Pleas of York County (trial court) reversing a decision of the Office of Open Records (OOR) requiring York Township to obtain certain records from York Township Commissioner Kenneth M. Silberstein stored on his personal computer and provide them to MacNeal pursuant to the Right-to-Know Law (RTKL).<sup>12</sup> We affirm.

On June 10, 2009, MacNeal requested that York Township provide: [\*\*2] (1) Any and all electronic communications or written correspondence from Charter Homes or its representatives or legal counsel, including Charles Courtney of McNees, Wallace & Nurick to York Township or the York Township Board of Commissioners from January 1, 2009 to date; (2) Any and all electronic communications or written correspondence between Commissioner Ness and/or Commissioner Silberstein and citizens of [York] Township, including but not limited to John Bowders, in reference to Charter Homes, the TND Application known as Stonebridge, . . . from January 1, 2008 to date; (3) Any and all electronic communica-

<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

<sup>2</sup> The Office of Open Records has filed a brief of amicus curiae in support of MacNeal's position. The Pennsylvania School Boards Association has filed a brief of amicus curiae in support of Silberstein's position.

tions or written correspondence between Commissioner Silberstein and any legal counsel other than [York] Township Solicitor regarding Charter Homes, the TND Application known as Stonebridge, . . . from January 1, 2008 to present. Reproduced Record (R.R.) at 3a-4a.

On July 14, 2009, York Township, by its Open Records Officer, produced only documents/emails that were on computers under the possession and control of the township. R.R. at 6a-7a. York Township did not produce any documents/emails that were specifically on computers that were solely maintained by Commissioner Ness [\*\*3] and/or Commissioner Silberstein and/or businesses for which they own or are employed. *Id.* York Township did not consider electronic communications between one individual Commissioner and a citizen or citizens of York Township public records as defined under the RTKL. *Id.* Therefore, York Township did not provide any such electronic communications or written correspondence. *Id.* York Township also refused to provide any electronic communications or written correspondence between Commissioner Silberstein and any legal counsel other than York Township Solicitor as not being public records and protected by the attorney client privilege. *Id.*

On July 22, 2009, the OOR received a timely appeal filed by MacNeal. R.R. at 97a-104a. The OOR did not hold a hearing; however, the OOR invited the parties to submit information and Commissioner Silberstein, Commissioner Ness and York Township filed documents and correspondence in response to MacNeal's appeal. *Id.* at 105a-157a. The OOR also accepted MacNeal's responses to said submissions and correspondence. *Id.*

[\*631] On August 21, 2009, the OOR issued its final determination granting MacNeal's appeal. R.R. at 159a-174a. The OOR found that the records on Ness's [\*\*4] and Silberstein's personal computers are "public records in possession of [York] Township" and required York Township to obtain the records from Commissioners Ness and Silberstein and provide them to MacNeal subject to redaction from any non-public or privileged information with appropriate identification and explanation for the redactions, if any. *Id.* The OOR pointed out that York Township did not provide any evidence that the requested records were exempt from disclosure and fur-

ther stated that it was not making any determination as to whether or not any of the several grounds for redaction or denial raised by Commissioner Silberstein applied, as the records for which he was claiming an exemption or privilege had not been sufficiently identified by Commissioner Silberstein or York Township. *Id.* The OOR further determined that if MacNeal disagreed with any redactions, she could file a request for an unredacted version of the records and appeal the redactions, if necessary. *Id.*

On September 21, 2009, Silberstein appealed the OOR's final determination to the trial court. <sup>3</sup> R.R. at 175a-183a. Argument on the petition was held by the trial court on October 21, 2009. <sup>4</sup>

The trial court determined that MacNeal had the burden of proving that the records she requested on Silberstein's personal computer are "public records." *Id.* The trial court held that the OOR erred in finding that the records maintained on Silberstein's personal computer were public records because they were records of a public officer and therefore within the control of the agency. *Id.* The trial court pointed out that the plain language of the RTKL does not support such a finding because Silberstein is not a governmental entity. *Id.* The trial court determined that Silberstein has no authority to act alone on behalf of York Township, nor does he have any obligation to keep records of, let alone disclose to the public, every conversation, note, email, or telephone call in which he discusses matters pertaining to York Township. *Id.* As such, the trial court found that MacNeal failed to sustain her burden. <sup>5</sup> *Id.* This appeal by MacNeal followed. <sup>6</sup>

Herein, MacNeal raises the following issues: (1) Whether an elected official may shield public records relating to York Township activity from public access by conducting York Township affairs from a third-party email address on a personal computer; and (2) Whether the requestor seeking records pursuant to the RTKL bears the burden of establishing that the requested records constitute a "public record."<sup>7</sup>

[\*632] In support of this appeal, MacNeal argues that records in the sole physical possession of elected public of-

<sup>3</sup> Commissioner Ness [\*\*5] did not appeal the OOR's final determination to the trial court.

<sup>4</sup> The trial court found that Silberstein had standing to pursue an appeal because he had a direct interest in the matter. R.R. at 399a-415a.

<sup>5</sup> The trial court did not decide the issue [\*\*6] of attorney client privilege due to its finding that the requested records are not public.

<sup>6</sup> *HNI* Because there is no dispute as to the facts in this case, "our review is limited to determining whether the trial court abused its discretion, committed any error of law or violated any constitutional rights." *SWB Yankees LLC v. Gretchen Wintermantel*, 999 A.2d 672, 674 n.2 (Pa. Cmwlth. 2010). "The scope of review for a question of law under the [RTKL] is plenary." *Id.* (quoting *Stein v. Plymouth Township*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. 2010)).

<sup>7</sup> We have reordered the issues presented in this appeal.

ficials fall within the scope of the RTKL. MacNeal contends that public officials are agency [\*\*7] actors and are subject to York Township control.<sup>8</sup> MacNeal argues that interpreting the RTKL to only extend to records in the physical possession of a public agency is not only contrary to the express language of the RTKL but is also inconsistent with case law. Herein, it is York Township policy for its Commissioners to use their personal computers to conduct York Township business; therefore, the public documents located in the Commissioners' personal email accounts and on their computers are in the possession, custody and control of the local agency and subject to disclosure under the RTKL. As such, MacNeal argues that the trial court erroneously placed the burden on MacNeal to establish that the communications are public records simply because of the records physical location.

This is a case of first impression under the new RTKL<sup>9</sup> for this Court as to the issue of whether requested records contained on a township commissioner's personal computer are public records in the possession or control of the township. We begin by reviewing the applicable provisions of the current RTKL.<sup>10</sup> *HN2* The term "local agency" is defined in the RTKL as any of the following:

- (1) Any political subdivision, [\*\*8] intermediate unit, charter school, cyber charter school or public trade or vocational school.
- (2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.

Section 102 of the RTKL, 65 P.S. §67.102. Thus, there is no dispute that York Township is a local agency subject to the RTKL and, as such, required to disclose public records. Section 302 of the RTKL, 65 P.S. §67.302.

The RTKL defines a "record" as *HN3* "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the

agency."<sup>11</sup> Section 102 of the RTKL, 65 P.S. §67.102. The RTKL defines a "public record" as follows: "A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708 [Exceptions for public records]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege." *Id.*

[\*633] Section 305(a) of the RTKL provides that *HN4* "[a] record in the possession of a . . . local agency shall be presumed to be a public record." 65 P.S. §67.305(a). Section 901 of the RTKL provides, in relevant part, that: "Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public [\*\*10] record, . . . and whether the agency has possession, custody or control of the identified record. . . ." 65 P.S. §67.901.

Herein, a review of MacNeal's request reveals that the request, on its face, seeks information that documents activity of York Township through its Commissioners in connection with the business of York Township, i.e., certain applications for development projects in York Township. *See* R.R. at 3a-4a. York Township denied MacNeal's request for any emails or written correspondence contained on any computers that were solely maintained by Commissioner Silberstein because said records were not under the possession and control of York Township. York Township also did not consider electronic communications between one individual Commissioner and a citizen or citizens of York Township public records as defined under the RTKL.

The initial question that must be addressed is whether emails or documents on Commissioner Silberstein's [\*\*11] personal computer are public records. As argued by both Commissioner Silberstein and The Pennsylvania School Boards Association, a distinction must be made between transactions or activities of an agency which may be a "public record" under the RTKL and the emails or documents of an individual public office holder. As pointed out by the trial court, Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.

<sup>8</sup> In support of this appeal, MacNeal relies heavily upon this Court's decision in *Lukes v. DPW*, 976 A.2d 609, 618 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 604 Pa. 708, 987 A.2d 162 (2009). However, our decision in *Lukes* was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, our decision in *Lukes* is not controlling in this matter.

<sup>9</sup> The new RTKL, effective January 1, 2009, repealed the former Right-to-Know Law, Act of June 21, 1957, PL. 390, *as amended*, formerly 65 P.S. §§66.1-66.4.

<sup>10</sup> As recently pointed out by this Court, "[t]he [RTKL] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions [\*\*9] of public officials, and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa.Cmwlth. 2010).

<sup>11</sup> The term "record" includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. Section 102 of the RTKL, 65 P.S. §67.102.

Consequently, emails and documents found on Commissioner Silberstein's personal computer would not fall within the definition of record as any record personally and individually created by Commissioner Silberstein would not be a documentation of a transaction or activity of York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity of York Township. In other words, unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, as a local agency, or were later ratified, adopted or confirmed by York Township, said requested [\*\*12] records cannot be deemed "public records" within the meaning of the RTKL as the same are not "of the local agency".

Moreover, *HN5* the current RTKL has a procedure in place that puts the burden upon a local agency, through its designated open-records officer, to first make a good faith determination as to whether any requested record is in fact a "public record" and, if so, then determine whether the identified public record is within its possession, custody or control. Sections 502 and 901 of the RTKL, 65 P.S. §§67.502; 67.901. In making such a good faith determination of whether a requested record is a public record, the open-records officer is required, *inter alia*, to direct requests to other appropriate persons within the agency. Section 502 of the RTKL, 65 P.S. §67.502. Therefore, this Court believes that a right-to-know request directed to a local agency, such as York Township in this case, requires that the local agency's open-records officer inquire of its public officials, such as Commissioner Silberstein in this case, as to whether the public official is in possession, custody or control of

a requested record that could be deemed [\*634] public. It is then the open-records officer's duty [\*\*13] and responsibility to determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure. It appears from the record as though the York Township's Open Records Officer fulfilled her duty under the RTKL when she determined that the emails and other written correspondence between Commissioner Silberstein and the citizens of York Township were not public records.

In other words, the current RTKL has effectively put forth safeguards to protect against the possibility that an agency may attempt to shield public records from disclosure by simply storing the records on a computer that is not in the physical possession or control of the agency.<sup>12</sup> Accordingly, we conclude that the trial court correctly held that the emails or documents requested by MacNeal that are contained on Commissioner Silberstein's personal computer are not public records subject to disclosure.<sup>13</sup>

The trial court's order is affirmed in accordance with the foregoing opinion.

KEITH B. QUIGLEY, Senior Judge

#### ORDER

AND NOW, this 6th day of January, 2011, the order of the Court of Common Pleas of York County entered in the above-captioned matter is affirmed in accordance with the foregoing opinion.

KEITH B. QUIGLEY, Senior Judge

<sup>12</sup> We note that Section 506(d)(1) of the RTKL provides as follows: "A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, [\*\*14] and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act." 65 P.S. §67.506(d)(1). However, we conclude that Section 506(d)(1) is inapplicable to the current issue as York Township has not contracted with the Commissioners as third parties. In addition, we do not believe that Section 506(d)(1) could reasonably be construed to mean that the only time that an agency is required to provide a record that is not in its physical possession is when the agency contracts for a governmental function.

<sup>13</sup> In light of our holding on the first issue raised herein, we need not address the second issue raised by MacNeal in this appeal.

---

# **EXHIBIT B**

## Flagg v. City of Detroit

United States District Court for the Eastern District of Michigan, Southern Division  
August 22, 2008, Argued; August 22, 2008, Decided; August 22, 2008, Filed  
Case No. 05-74253

**Reporter:** 252 F.R.D. 346; 2008 U.S. Dist. LEXIS 64735

ERNEST FLAGG, as Next Friend of JONATHAN BOND, Plaintiff, v. CITY OF DETROIT, et al., Defendants.

**Subsequent History:** Motion denied by, Motion granted by *Flagg v. City of Detroit*, 2008 U.S. Dist. LEXIS 67927 ( E.D. Mich., Sept. 4, 2008)

**Prior History:** *Flagg v. City of Detroit*, 2008 U.S. Dist. LEXIS 21923 ( E.D. Mich., Mar. 20, 2008)

### Case Summary

#### Procedural Posture

Defendants, a city and an employee, filed motions to preclude discovery of communications exchanged among certain officials and employees of the city via city-issued text messaging devices, arguing that the Stored Communications Act (SCA), 18 U.S.C.S. § 2701 *et seq.*, wholly precluded the production of civil production in civil litigation of electronic communication stored by a non-party service provider.

#### Overview

In an order, the court determined that the communications exchanged among city officials and employees were potentially discoverable under the standards of *Fed. R. Civ. P. 26(b)(1)*, and established a protocol under which two designated Magistrate Judges would review these communications and make the initial determination as to which of them are discoverable. The court rejected defendants' reading of the SCA as establishing a sweeping prohibition against civil discovery of electronic communications. Defendants' position, if accepted, would have dramatically altered discovery practice, in a manner clearly not contemplated by the existing rules or law, by permitting a party to defeat the production of electronically stored information created by that party and still within its control through the simple expedient of storing it with a third party. Because nothing in the plain language of the SCA required this result, and because defendants had not identified any other support for this proposition, the court held that the discovery effort contemplated in its opinion and related order could go forward, albeit through a means somewhat different from that employed by plaintiff to date.

#### Outcome

The court granted in part and denied in part defendants' motions to preclude discovery of electronic communications. Plaintiff was directed to promptly prepare and serve an appropriate *Fed. R. Civ. P. 34* request for production directed at the city, and the part were directed to proceed in accordance with the rulings in the opinion.

**Counsel:** **[\*\*1]** For Ernest Flagg, Next Friend of Jonathan Bond, Plaintiff: Robert S. Zawideh, LEAD ATTORNEY, Norman N. Yatooma, Ryan D. Bobel, Norman Yatooma Assoc., Howard Y. Lederman, Birmingham, MI.

For Morganroth & Morganroth, PLLC, Petitioner: Jeffrey B. Morganroth, Morganroth & Morganroth, Southfield, MI.

For Detroit, City of, Craig Schartz, Commander, Defendants: John A. Schapka, LEAD ATTORNEY, Detroit City Law Department, Detroit, MI; Krystal A. Crittendon, Detroit City Law Department, Detroit, MI.

For Ella Bully-Cummings, Police Chief, Defendant: John A. Schapka, LEAD ATTORNEY, Detroit City Law Department, Detroit, MI; Said A. Taleb, LEAD ATTORNEY, Kenneth L. Lewis, Randal M. Brown, Plunkett Cooney, Detroit, MI.

For Cara Best, Deputy Police Chief, Defendant: Jeffrey B. Morganroth, Mayer Morganroth, Morganroth & Morganroth, Southfield, MI; Krystal A. Crittendon, Detroit City Law Department, Detroit, MI.

For John Doe, Jerry Oliver, Christine Beatty, Billy Jackson, Police Lt., Defendants: Jeffrey B. Morganroth, Mayer Morganroth, Morganroth & Morganroth, Southfield, MI.

For Mike Cox, Defendant: Mark E. Donnelly, LEAD ATTORNEY, Michigan Department of Attorney General, Lansing, MI; Jeffrey B. Morganroth, **[\*\*2]** Mayer Morganroth, Morganroth & Morganroth, Southfield, MI.

For Kwame M. Kilpatrick, Defendant: James C. Thomas, Plunkett Cooney, Detroit, MI.

For Harold Cureton, Asst. Deputy Police Chief, Defendant: Jeffrey B. Morganroth, Mayer Morganroth, Morganroth & Morganroth, Southfield, MI; Krystal A. Crittendon, Detroit City Law Department, Detroit, MI.

For Bell Industries, Incorporated, Doing business as Sky-Tel, Movant: David E. Plunkett, Thomas G. Plunkett, Williams, Williams, Birmingham, MI.

For Detroit Free Press, Inc., Intervenor: Herschel P. Fink, Lara F. Phillip, Richard E. Zuckerman, Honigman, Miller, (Detroit), Detroit, MI.

**Judges:** PRESENT: Honorable Gerald E. Rosen, United States District Judge.

**Opinion by:** Gerald E. Rosen

### Opinion

#### [\*347] OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS TO PRECLUDE DISCOVERY OF ELECTRONIC COMMUNICATIONS

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on August 22, 2008

PRESENT: Honorable Gerald E. Rosen United States District Judge

#### I. INTRODUCTION

In an opinion and related order issued on March 20, 2008, the Court (i) determined that the communications exchanged among certain officials and employees of the Defendant City of Detroit via city-issued text messaging devices **[\*\*3]** were potentially discoverable under the standards of *Fed. R. Civ. P. 26(b)(1)*, (see 3/20/2008 Op. at 1011), and (ii) established a protocol under which two designated Magistrate Judges would review these communications and make the initial determination as to which of them are discoverable, (see 3/20/2008 Order at 3-8). Through the present motions, the Defendant City and one of the individual Defendants, Christine Beatty, seek to prevent this discovery effort from going forward, arguing that the federal Stored Communications Act ("SCA"), *18 U.S.C. § 2701 et seq.*,<sup>1</sup> wholly precludes the production in civil litigation of electronic communica-

tions stored by a non-party service provider.<sup>2</sup>

As discussed below, the Court rejects this proposed reading of the SCA as establishing a sweeping prohibition against civil discovery of electronic communications. Defendants' position, if accepted, would dramatically **[\*\*4]** alter discovery practice, in a manner clearly not contemplated by the existing rules or law, by permitting a party to defeat the production of electronically stored information created by that party and still within its control -- information that plainly is subject to civil discovery, see *Fed. R. Civ. P. 34(a)(1)* -- through the simple expedient of storing it with a third party. Because nothing in the plain language of the SCA requires this extraordinary result, and because Defendants have not identified any other support for this proposition, the Court holds that the discovery effort contemplated in its March 20, 2008 opinion and related order may go forward, albeit through a means somewhat different from that employed by Plaintiff to date.

#### II. BACKGROUND

During the time period of relevance to this case, the Defendant City of Detroit entered into a contract for text messaging services with non-party service provider SkyTel, Inc.<sup>3</sup> Under this contract, SkyTel provided text messaging devices and corresponding services to various City officials and employees, including at least some of the individual Defendants in this case. Although the City discontinued its contract with SkyTel in 2004, **[\*\*5]** the company evidently continues to maintain copies of at least some of the text messages sent and received by City officials during the **[\*348]** period when SkyTel provided this service to the City.<sup>4</sup>

Upon learning of SkyTel's apparent retention of such communications, Plaintiff issued **[\*\*6]** two broad subpoenas to SkyTel in February of 2008, seeking the disclosure of (i) all text messages sent or received by 34 named individuals, including the individual Defendants, during a number of time periods spanning over 5 years, and (ii) all text messages sent or received by any City official or employee during a four-hour time period in the early morning hours of April 30, 2003, the date that Plaintiff's mother was killed. Defendants promptly moved to quash these

<sup>1</sup> This statute was enacted as Title II of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, but will be referred to here by its more common name of the Stored Communications Act.

<sup>2</sup> Defendant Kwame Kilpatrick has since joined in Defendant Beatty's motion.

<sup>3</sup> SkyTel recently was acquired by Velocita Wireless, but will be referred to by its former name throughout this opinion.

<sup>4</sup> On this point -- as with so many others relating to the City's use of SkyTel as its text messaging service provider -- the record is devoid of helpful information. In particular, the City has not divulged, and the record does not otherwise reveal, the nature and extent of SkyTel's obligation under the parties' contract to maintain copies of communications sent or received via SkyTel text messaging devices during the period when the company provided these services to the City. More generally, the record discloses virtually nothing about the precise services provided by SkyTel to the City or the underlying technological means by which these services were performed. The Court revisits these evidentiary deficiencies below, as relevant to the issues presented in the motions now under consideration.

subpoenas, arguing (among other things) that none of these communications, regardless of their content, satisfied the standard for discovery as set forth in *Fed. R. Civ. P. 26(b)(1)*. In [\*\*7] an opinion and related order issued on March 20, 2008, the Court rejected this contention -- along with Plaintiff's contrary and equally sweeping assertion that all such communications were discoverable, without regard to their subject matter -- and established a protocol under which two designated Magistrate Judges would conduct an initial review of certain subsets of the communications retained by SkyTel and determine, subject to Defendants' objections and this Court's review, which of these communications should be produced to Plaintiff.

As this court-ordered process was getting under way, the Defendant City and one of the individual Defendants, Christine Beatty, filed the present motions, arguing that the federal Stored Communications Act ("SCA"), *18 U.S.C. § 2701 et seq.*, prevents Plaintiff from obtaining in civil discovery any text messages that remain in SkyTel's possession as a result of its role as the City's service provider. Apart from these motions, SkyTel has moved to quash Plaintiff's subpoenas or, alternatively, for entry of an order that would protect the company against liability under the SCA for its production of text messages in accordance with the protocol established [\*\*8] in this Court's March 20, 2008 order. Finally, by motion filed on July 23, 2008, the Detroit Free Press seeks leave to file an *amicus* brief in opposition to the motion brought by Defendant Beatty, arguing that the Court's resolution of this motion is likely to have a bearing on a state-court suit in which the newspaper seeks the production of certain text messages from SkyTel pursuant to the Michigan Freedom of Information Act.

### III. ANALYSIS

#### A. Defendants Have Not Forfeited Their Opportunity to Challenge Plaintiff's Discovery Effort as Precluded by the SCA.

Before turning to the merits of Defendants' SCA-based challenge, the Court first addresses Plaintiff's contention that Defendants' motions should be denied as untimely requests for reconsideration of the Court's March 20, 2008 rulings. As Plaintiff points out, under Local Rule 7.1(g)(1) of this District, such a request for rehearing or reconsideration must be filed within ten days after entry of the ruling at issue, but Defendants brought their present motions more than a month after the Court issued its March 20, 2008 opinion and related order. It follows, in Plaintiff's view, that Defendants' SCA-based challenge is untimely.

Yet, [\*\*9] regardless of whether Defendants' motions could be construed as requests for reconsideration, the

Court agrees with Defendant Beatty's contention in her reply brief that Defendants filed these motions in accordance with the Court's express authorization. So far as the Court's review of the record has revealed, Defendants first alluded to the possible impact of the SCA in a March 17, 2008 [\*\*349] reply brief in support of Defendants' initial round of motions to quash Plaintiff's SkyTel subpoenas. As the Court observed at a subsequent April 14, 2008 hearing, however, Defendants' passing reference to the SCA was far too "elliptical" to elicit a ruling on the merits of this issue. (*See* 4/14/2008 Hearing Tr. at 22.) Nonetheless, the Court invited defense counsel to properly and squarely raise this challenge through a separate motion. (*See id.* at 22, 34.) Accordingly, because Defendants' present motions were expressly contemplated and permitted by the Court, Plaintiff's claim of forfeiture is not well-taken.

#### B. The SCA Does Not Preclude Civil Discovery of a Party's Electronically Stored Communications That Are Maintained by a Non-Party Service Provider But Remain Within the Party's Control.

Turning [\*\*10] to the merits, Defendants' motions rest upon a simple yet sweeping proposition: namely, that the SCA "absolutely precludes the production of electronic communications in civil litigation." (Defendant Beatty's Motion at P 3; *see also* Defendant City of Detroit's Motion at P 5.)<sup>5</sup> In order to properly address this assertion, the Court finds it instructive to first (i) survey the SCA provisions that Defendants contend are pertinent here, (ii) describe the subset of communications that the Court envisioned as subject to production in its March 20, 2008 opinion and order, and (iii) review the terms and scope of the Federal Rules that ordinarily govern the discovery of a party's electronically stored information. Against this backdrop, the Court finds that Defendants' motions are rather easily resolved, without the need for an overly detailed or exhaustive construction of the terms of the SCA.

#### 1. The Potentially Relevant Provisions of the SCA

As pertinent here, [\*\*11] *HNI* the SCA generally prohibits -- subject to certain exceptions -- a "person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." *18 U.S.C. § 2702(a)(1)*. It further prohibits -- again, subject to certain exceptions -- a "person or entity providing remote computing service to the public" from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." *18 U.S.C. §*

<sup>5</sup> As discussed below, Defendants retreat somewhat from this broad proposition in the briefs in support of their motions, and instead argue that such communications cannot be obtained from an outside service provider in civil litigation.

2702(a)(2).<sup>6</sup>

As is evident from these provisions, the prohibitions set forth in § 2702(a) govern service providers to the extent that they offer either of two types of services: an "electronic communications service" or a "remote computing service." An "electronic [\*\*12] communications service" ("ECS") is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15).<sup>7</sup> A "remote computing service" ("RCS"), in contrast, is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).<sup>8</sup>

The potential importance of distinguishing between an "ECS" and an "RCS" lies in the different criteria for establishing an exception to the general rule against disclosure. [\*\*350] The provider of an RCS may divulge the contents of a communication with the "lawful consent" of the subscriber to the service, while the provider of an ECS may divulge [\*\*13] such a communication only with the "lawful consent of the originator or an addressee or intended recipient of such communication." 18 U.S.C. § 2702(b)(3). Apart from this exception for disclosures made with the appropriate consent, the SCA authorizes the provider of either an ECS or an RCS to divulge the contents of a communication under several other specified circumstances -- e.g., disclosure is permitted "to a person employed or authorized or whose facilities are used to forward such communication to its destination," 18 U.S.C. § 2702(b)(4), or "as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service," 18 U.S.C. § 2702(b)(5).

Yet, as noted by the courts and commentators alike, § 2702 lacks any language that explicitly authorizes a service provider to divulge the contents of a communica-

tion pursuant to a subpoena or court order. *See, e.g., In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp.2d 606, 611 (E.D. Va. 2008) (observing that "the statutory language of the [SCA] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas"); *see also* [\*\*14] U.S. Internet Service Provider Ass'n, *Electronic Evidence Compliance -- A Guide for Internet Service Providers*, 18 Berkeley Tech. L.J. 945, 965 (2003) (noting that none of the exceptions set forth in § 2702(b) "expressly permits disclosure pursuant to a civil discovery order" obtained by a private party).<sup>9</sup> Seizing upon this absence of express statutory authorization, Defendants contend in their present motions that neither Plaintiff (through a subpoena) nor this Court (through an order) may compel SkyTel to produce the contents of any communications it might still retain under its contract to provide text messaging services to the City of Detroit.<sup>10</sup>

## 2. The Communications That Are Potentially Subject to Production Under the Rulings and Corresponding Protocol Set Forth in the Court's March 20, 2008 Opinion and Related Order

Before returning to the terms of the SCA and their potential impact here, the Court first revisits its rulings in the March 20, 2008 opinion and related order. As discussed earlier, the subpoenas that were addressed in the March 20 opinion sought the production of the contents of (i) all messages that originated from or were received by the SkyTel text messaging devices issued to any of [\*\*16] 34 named individuals -- most (but not all) of whom

<sup>6</sup> The SCA also prohibits a service provider from divulging subscriber or customer information or records "to any governmental entity." 18 U.S.C. § 2702(a)(3). As discussed in the Court's prior May 6, 2008 order in this case, this provision is not applicable here, where any such subscriber or customer information is being sought by a private party, Plaintiff.

<sup>7</sup> The SCA incorporates by reference this definition (and others) found in the federal Wiretap Act. *See* 18 U.S.C. § 2711(1).

<sup>8</sup> An "electronic communications system," in turn, is defined as encompassing "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." 18 U.S.C. § 2510(14).

<sup>9</sup> In contrast to § 2702, a separate SCA provision permits a "governmental entity" to compel the disclosure of the contents of an electronic communication through such means as a warrant or an administrative subpoena. 18 U.S.C. § 2703(a)-(b). This provision does not apply here, however, where production of electronic communications is sought by a private party. Accordingly, this case presents no occasion to decide how a governmental entity could properly secure the disclosure of any text messages maintained by SkyTel.

<sup>10</sup> As SkyTel points [\*\*15] out in its motion to quash, while § 2702 lacks any language explicitly authorizing the disclosure of the contents of an electronic communication pursuant to a court order, a service provider's "good faith reliance" on such an order operates as a "complete defense to any civil or criminal action brought under [the SCA] or any other law." 18 U.S.C. § 2707(e); *see also McCready v. eBay, Inc.*, 453 F.3d 882, 892 (7th Cir. 2006). Not surprisingly, then, in the event that the Court permits the discovery of text messages maintained by SkyTel, the company requests that the Court issue an order compelling its participation in this effort.

were City of Detroit officials and employees<sup>11</sup> -- during several specified time periods spanning over five years, and (ii) all messages sent or received by any City of Detroit official or employee during the hours surrounding the death of Plaintiff's mother, Tamara Greene.

In its March 20 opinion, the Court rejected the extreme positions of Plaintiff and Defendants alike as to the discoverability of these communications -- *i.e.*, Plaintiff's contention that *all* of the text messages meeting these broad criteria were subject to production, [\*351] without regard to their contents, and Defendants' equally sweeping assertion that *none* of these communications were relevant to Plaintiff's claims in this case, also without regard to their subject matter. Instead, the Court looked to the standards of *Fed. R. Civ. P. 26(b)(1)*, concluding that Plaintiff was entitled to obtain copies of [\*17] those communications which addressed "any nonprivileged matter that is relevant to any party's claim or defense." The Court then established, through its separate March 20 order, a protocol by which two designated Magistrate Judges would review successive subsets of text messages retained by SkyTel under its contract with the Defendant City and determine -- subject to Defendants' objections and assertions of privilege and this Court's final review -- which of them met the *Rule 26(b)(1)* criteria for discoverability.

As a result of these rulings, the universe of text messages that will ultimately be produced to Plaintiff is narrowly confined to those that are found to be "relevant" and "nonprivileged" under *Rule 26(b)(1)*. Moreover, and as the Rule itself makes clear, the requisite determination of relevance will be made by reference to the parties' claims and defenses. In this case, then, the *Rule 26(b)(1)* inquiry will turn upon the relevance of any particular text message to the theory of recovery advanced in Plaintiff's complaint -- namely, that Defendants violated his constitutional right of access to the courts by deliberately delaying and obstructing the investigation into his mother's [\*18] murder, and by ignoring and actively concealing material evidence bearing upon this investigation.

When Plaintiff's discovery effort is viewed in this light, the appeals of Defendant Beatty -- as well as Defendant Kilpatrick, in his submissions stating his concurrence in his co-Defendants' motions -- to notions of "privacy" appear wholly inapposite. As explained, a text message is discoverable in this case only if it is relevant to Plaintiff's allegations of deliberate delay, obstruction, and disregard or concealment of evidence in the investigation of his mother's murder. Surely, any text messages exchanged among City of Detroit officials or employees concerning the topic of the Tamara Greene murder investigation are properly characterized as governmental, and not private or personal, communications.<sup>12</sup> Thus, to the extent that Defendants rely on case law -- principally, the Ninth Circuit's recent decision in *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 903-09 (9th Cir. 2008) -- that addresses a government employee's reasonable expectation of privacy in his or her personal communications using employer-provided equipment, such rulings provide no guidance here.<sup>13</sup>

For similar reasons, the Defendant City's attempts in its motion to interpose claims of privilege are, at best, premature, and have no bearing on the present SCA-based challenge. Contrary to the City's contention, it simply is not possible to meaningfully address such assertions of privilege generically, without first reviewing the text messages sent and received by the pertinent City officials and employees and identifying those which contain relevant subject matter. Consider, for example, a hypothetical text message in [\*352] which two City officials are discussing the possibility of concealing evidence that is material to the Tamara Greene murder investigation. The City could not possibly assert a legitimate claim of privilege as to such a communication -- and, in any event, any such claim would surely be overcome by Plaintiff's need for this information. *See, e.g., Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (citing as two [\*21] factors in a privilege inquiry (i) "whether the information sought is available through other discovery or from other sources," and (ii) "the importance of the information sought to the plain-

<sup>11</sup> This list included, for example, Carlita Kilpatrick, the wife of Detroit mayor (and Defendant) Kwame Kilpatrick. The record does not disclose whether a SkyTel text messaging device was issued to Carlita Kilpatrick under the company's contract with the City of Detroit.

<sup>12</sup> If, after [\*19] the Magistrate Judges' threshold determination of relevance, any Defendant wishes to oppose the production of one or more text messages on the ground that they should be deemed "private" communications, the Court certainly would entertain such a challenge at that time. As indicated, however, such a claim of privacy seems unlikely to succeed under the circumstances presented here.

<sup>13</sup> More generally, the Court notes that *Quon* addresses a government employee's reasonable expectation of privacy in the context of a *Fourth Amendment* claim asserted by the plaintiff employees in that case against their municipal employer. *See Quon*, 529 F.3d at 903. Here, in contrast, the discovery efforts of the private Plaintiff do not implicate the *Fourth Amendment* protection against unreasonable searches and seizures. *See United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984) (confirming that the *Fourth Amendment* "proscrib[es] only governmental action," and does not apply to searches conducted by private individuals); *see also United States v. International Business Machines Corp.*, 83 F.R.D. 97, 102 (S.D.N.Y. 1979) ("It strains common sense and constitutional analysis to conclude that [\*20] the *fourth amendment* was meant to protect against unreasonable discovery demands made by a private litigant in the course of civil litigation."). As to the possible relevance of other aspects of the *Quon* decision, the Court addresses this subject below.

tiff's case"). As this example illustrates, the City's appeal to various possible privileges, like Defendant Beaty's appeal to notions of privacy, does not obviate the need for an initial review of the available communications of the pertinent City officials and employees to identify those which are relevant to Plaintiff's claims in this case. Only then can any meaningful determination of privilege be made.

To be sure, some of the text messages reviewed by the Magistrate Judges in this process might include personal or private information, and some might be the subject of legitimate claims of privilege. Yet, this was the very purpose of the protocol established in the Court's March 20, 2008 order -- to review these communications *in camera*, and then to afford Defendants an opportunity to raise objections, as a means of protecting against disclosure to Plaintiff of irrelevant, privileged, or otherwise non-discoverable materials. In agreeing to this protocol, Defendants presumably recognized that [\*\*22] it was meant to safeguard their interests in preventing such disclosures, and they have not suggested how it might be inadequate to achieve this objective.<sup>14</sup>

Under these circumstances, Defendants' appeals to notions of privacy and privilege are simply beside the point. What they necessarily must show is far broader -- namely, that the SCA prohibits either (i) the submission of SkyTel text messages to the Court for an *in camera* review, or (ii) the production to Plaintiff of the subset of these communications that are determined by the Court to be discoverable under the standards of *Rule 26(b)(1)*. If the SCA dictates such a result, it must do so despite [\*\*23] the absence in this case of any real threat that personal or privileged communications might be disclosed to Plaintiff. This bears emphasis as the Court resolves Defendants' motions.

### 3. The Federal Rules Governing the Discovery of a Party's Electronically Stored Information

One final subject warrants consideration before addressing the merits of Defendants' SCA-based challenge. Although Plaintiff chose third-party subpoenas as the vehicle for seeking the production of SkyTel text messages, the Court finds it instructive to consider whether Plaintiff could have achieved the same objec-

tive through an ordinary *Fed. R. Civ. P. 34* request for production directed at the Defendant City. As discussed below, the Court answers this question in the affirmative.

*HN2* Under *Rule 34(a)*, a party may request the production of documents and various other categories of items that are "in the responding party's possession, custody, or control." *Fed. R. Civ. P. 34(a)(1)*. The items that may be sought under the Rule include "electronically stored information," *Fed. R. Civ. P. 34(a)(1)*, which plainly encompasses both electronic communications and archived copies of such communications that are preserved in electronic [\*\*24] form, see *Fed. R. Civ. P. 34*, Advisory Committee Note to 2006 Amendments; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 & nn. 36-38 (S.D.N.Y. 2003).<sup>15</sup> Thus, the archived text [\*\*353] messages under consideration here fit comfortably within the scope of the materials that a party may request under *Rule 34*.

As the language of the Rule makes clear, and as the courts have confirmed, *HN3* a request for production need not be confined to documents or other items in a party's possession, but instead may properly extend to items that are in that party's "control." *Fed. R. Civ. P. 34(a)(1)*; see also *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) ("Documents need not be in the possession of a party to be discoverable, they need only be in its custody or control."). The Sixth Circuit and other courts have held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); [\*\*25] see also *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).<sup>16</sup> In light of the Rule's language, "[a] party responding to a *Rule 34* production request cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control." *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (internal quotation marks and citation omitted).

The case law illustrates the variety of circumstances under which a party may be deemed to have "control" over materials not in its possession. First, the requisite "le-

<sup>14</sup> Notably, in finding that the review of text messages by the defendant city officials in *Quon* violated the plaintiff employees' *Fourth Amendment* rights, the Ninth Circuit cited various ways that this review could have been conducted differently in order to minimize the intrusion upon the plaintiffs' privacy interests. See *Quon*, 529 F.3d at 908-09. In this respect, *Quon* seems to support, rather than call into question, this Court's efforts to implement a protocol that protects against overbroad disclosure of communications to Plaintiff.

<sup>15</sup> Indeed, one of the principal objectives of the 2006 amendments to the Rule was to explicitly extend the Rule's coverage to electronically stored information. See *Fed. R. Civ. P. 34*, Advisory Committee Note to 2006 Amendments.

<sup>16</sup> Some courts have adopted a more expansive notion of "control," finding that it extends to circumstances where a party has the "practical ability to obtain the documents from a non-party to the action." *Bank of New York v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997).

gal right to obtain" documents has been found in contractual provisions that confer a right of access to the requested materials. See, e.g., Anderson v. Cryovac, Inc., 862 F.2d 910, 928-29 (1st Cir. 1988); [\*\*26] Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D.N.Y. 1992). The courts also have held that documents in the possession of a party's agent -- for example, an attorney -- are considered to be within the party's control. See, e.g., Commercial Credit Corp. v. Repper (In re Ruppert), 309 F.2d 97, 98 (6th Cir. 1962); American Society for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 212 (D.D.C. 2006); Gray, 148 F.R.D. at 223. As the Sixth Circuit observed, lilt\* this were not so, then the client could always evade his duty to produce by placing the documents with his attorney." In re Ruppert, 309 F.2d at 98; see also Cooper Industries, 102 F.R.D. at 920 (ordering the production of documents in the possession of the defendant corporation's overseas affiliate, and reasoning that if this party "could so easily evade discovery" by "destroying its own copies and relying on ... copies maintained by its affiliate abroad," then "every United States company would have a foreign affiliate for storing sensitive documents").

Next, the courts have found that HN4 a corporate party may be deemed to have control over documents in the possession [\*\*27] of one of its officers or employees. In Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994), for example, the defendant sought to compel the production of tape recordings of his telephone conversations with an officer of the plaintiff corporation, Mr. Wingo, who had not been named a party to the suit. The plaintiff argued that these tapes belonged to Wingo, and not the corporation, "and therefore should have been sought by subpoena served on him personally." Riddell Sports, 158 F.R.D. at 558. The court disagreed, explaining that when materials are "created in connection with the officer's functions as a corporate employee, the corporation has a proprietary interest in them and the officer has a fiduciary duty to turn them over on demand." 158 F.R.D. at 559. Accordingly, because Wingo made the recordings at issue "in furtherance of his functions" as an officer of the plaintiff corporation, the court found that the tapes were within the control of this party, and thus "must be disclosed in response to a proper notice for production." 158 F.R.D. at 559.

[\*354] Indeed, this principle extends not just to documents in the actual possession of a non-party officer or employee of a corporate [\*\*28] party, but also to materials that the officer or employee has a legal right to obtain. In Herbst v. Able, 63 F.R.D. 135, 136 (S.D.N.Y. 1972), for instance, the plaintiffs sought the production of transcripts of testimony given by non-party employees of the defendant corporation, Douglas Aircraft Company, at a private hearing before the Securities and Exchange Commission ("SEC"). Douglas Aircraft objected

to this request, stating that it did not have copies of these transcripts in its possession, and citing an SEC policy not to make such transcripts available to private litigants. Under another SEC rule, however, each witness was entitled to a transcript of his or her own testimony. In light of this rule, the court held that the plaintiffs were entitled to the requested transcripts, which Douglas Aircraft could obtain through its employees:

*Rule 34(a)* plainly provides that a party may request another party to produce any designated document which is within the possession, custody or control of the party of whom the request is made. Plaintiffs, consequently, may request Douglas to have its non-defendant employees procure copies of their private testimony before the SEC so that Douglas [\*\*29] may give same to plaintiffs. Plainly Douglas' employees are persons within its control. The testimony of these employees relates to Douglas' affairs.

Herbst, 63 F.R.D. at 138; see also In re Domestic Air Transportation Antitrust Litigation, 142 F.R.D. 354, 356 (N.D. Ga. 1992) (ordering the defendant corporations to secure the consent of their employees in order to obtain and produce transcripts of deposition testimony given by these employees in a Department of Justice investigation).

Finally, in a relatively recent decision, a district court found that defendant El Paso Corporation had "control," within the meaning of *Rule 34(a)(1)*, of electronic records maintained by a third party on the company's behalf. See Tomlinson v. El Paso Corp., 245 F.R.D. 474, 477 (D. Colo. 2007). In that case, defendant El Paso had a duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and its implementing regulations to ensure that its employee benefit records were "maintained in reasonable order and in a safe and accessible place, and in such manner as they may be readily inspected or examined." Tomlinson, 245 F.R.D. at 477 (quoting 29 C.F.R. § 2520.107-1(b)).

[\*\*30] Although El Paso employed a third party, Mercer Human Resource Consulting, to administer its employee pension plan and maintain the electronic records associated with this plan, the court held that El Paso could not delegate its recordkeeping duties under ERISA to this third party. 245 F.R.D. at 477. Rather, the court held that El Paso retained control over the pension plan data held by Mercer, and thus had the "authority and ability to obtain" and produce the data requested by the plaintiff plan participants. 245 F.R.D. at 477.

Applying *Rule 34(a)(1)* and its attendant case law here, the Court readily concludes that the Defendant City of Detroit has "control" over the text messages preserved by third party SkyTel pursuant to its contractual relation-

ship with the City. To be sure, and as noted earlier, the Court's inquiry on this point is significantly hindered by the City's failure to produce any meaningful documentation that might reveal the terms of its agreements with SkyTel. In response to the Court's May 6, 2008 order directing it to produce copies of "any and all contracts" pursuant to which SkyTel provided text messaging services to the City and its employees, the City furnished [\*\*31] a handful of one-page purchase orders, partial and unsigned SkyTel "Corporate Account Agreement" forms, and the like, none of which discloses the specific nature and extent of the services provided by SkyTel to the City during the course of their contractual relationship. Under this record, it is impossible to make any definitive pronouncements about the degree of control granted to the City under its agreements with SkyTel.

Nonetheless, the record includes several other indicia of the City's control over the text messages maintained by SkyTel. First and foremost, the City's present motion is *premised* upon such control, first asserting [\*\*355] that the City has the *ability* to consent to SkyTel's production of the text messages at issue, but then stating that it is *unwilling* to do so. Specifically, in its motion and brief in support, the City affirmatively states that [p]ursuant to [its] contract" with SkyTel, it was the "customer or subscriber" of the text messaging service provided by SkyTel. (Defendant City's Motion at P 3; Br. in Support at 1.) Quoting the SCA provision permitting the disclosure of the contents of a communication "with the lawful consent of . . . the subscriber," the City [\*\*32] then states that "as subscriber to the subject SkyTel text messages," it "does not consent to the disclosure of these communications, as required by the SCA before such communications are divulged." (Defendant City's Motion, Br. in Support at 3 (citing 18 U.S.C. § 2702(b)(3))).

Yet, if the City can *block* the disclosure of SkyTel messages by *withholding* its consent, it surely follows that it can *permit* the disclosure of these communications by *granting* its consent. This acknowledged power readily qualifies as a "legal right to obtain" the messages held by SkyTel, and hence constitutes "control" within the meaning of Rule 34(a)(1). See In re Bankers Trust Co., 61 F.3d at 469. Indeed, the courts recognized precisely this point in Herbst, supra, 63 F.R.D. at 138,

and In re Domestic Air Transportation Antitrust Litigation, 142 F.R.D. at 356, determining in each case that a party had control over materials in the possession of a third party by virtue of its ability to secure the consent that was necessary to obtain a copy of these materials.<sup>17</sup> Moreover, the above-cited case law confirm the obvious point that it is immaterial whether a party, such as the City here, might prefer not to give [\*\*33] the necessary consent -- if a party has the requisite control over a requested document, it must exercise this control in order to comply with the mandate of Rule 34. See, e.g., Gray, supra, 148 F.R.D. at 223.<sup>18</sup>

The City's control over the SkyTel text messages is further confirmed by the Michigan law governing the maintenance and disclosure of public records. In particular, Michigan's Freedom of Information Act ("FOIA") mandates that, subject to various exceptions, a "public body shall furnish a requesting person a reasonable opportunity for inspection and [\*\*34] examination of its public records." Mich. Comp. Laws § 15.233(3). There is no question that the Defendant City is a "public body" under the FOIA, see Mich. Comp. Laws § 15.232(d)(iii), and that at least some of the SkyTel text messages satisfy the statutory definition of "public records," insofar as they capture communications among City officials or employees "in the performance of an official function," see Mich. Comp. Laws § 15.232(e); see also City of Warren v. City of Detroit, 261 Mich. App. 165, 680 N.W.2d 57, 62 (2004) (confirming that the statutory definition of a "public record" includes information captured in electronic form); Farrell v. City of Detroit, 209 Mich. App. 7, 530 N.W.2d 105, 109 (1995) (same).<sup>19</sup> Indeed, the City has acknowledged that at least some of these communications are "public records," both through a policy directive promulgated to its employees -- a directive which, among other things, cautions "users of the City's electronic communications [\*\*356] system" to "bear in mind that, whenever creating and sending an electronic communication, they are almost always creating a public record which is subject to disclosure," (see Plaintiff's Response, Ex. 9, Directive for the Use of the City of Detroit's Electronic Communications System at 2)

<sup>17</sup> These cases go farther, in fact, holding that a corporate party has the obligation to secure any necessary consent from its non-party employees. The Court returns below to this aspect of the case law.

<sup>18</sup> The discovery process would undoubtedly be more streamlined if a party's duty of disclosure were limited solely to the information it was willing to part with voluntarily. It is well established, however, that the Federal Rules governing discovery "often allow extensive intrusion into the affairs of both litigants and third parties." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30, 104 S. Ct. 2199, 2206, 81 L. Ed. 2d 17 (1984) (footnote omitted).

<sup>19</sup> The Court is aware, of course, of a suit pending in the Michigan courts in which two Detroit newspapers are pursuing disclosure under the FOIA of a different subset of text messages maintained by SkyTel under its contract with the City of Detroit. In its limited discussion here of the terms of the FOIA, the Court does not seek or intend to express any view as to whether any of the SkyTel text messages might be subject to disclosure under this Michigan statute, or whether any of the statutory exceptions to disclosure might apply. Rather, it is enough, for present purposes, to confirm that at least some of the text messages maintained by SkyTel surely qualify as "public records" within the meaning of Michigan's FOIA.

[\*\*35]<sup>20</sup> -- and through its appeal in its present motion to the deliberative process privilege -- a privilege which, as the City recognizes, encompasses only communications among City officials and employees pursuant to "their official positions within the City of Detroit government." (Defendant City's Motion at P 7).

Because at least some of the text messages maintained by SkyTel are "public records" within the meaning of Michigan's FOIA, it would be [\*\*37] problematic, to say the least, to conclude that the City lacks a legal right to obtain these records as necessary to discharge its statutory duty of disclosure. Such a conclusion also would be contrary to the pertinent Michigan case law. First, the Michigan courts have held that<sup>HN5</sup> the FOIA duty of disclosure, like the *Rule 34* duty of production, extends to public records within the possession or control of a public body. See *MacKenzie v. Wales Township*, 247 Mich. App. 124, 635 N.W.2d 335, 339 (2001); *Easley v. University of Michigan*, 178 Mich. App. 723, 444 N.W.2d 820, 822 (1989). Next, while there is no obligation under the Michigan FOIA to create public records, the statute does impose a "duty to provide access" to those public records that have been created and are the subject of a proper FOIA request, and this obligation "inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure." *Walloon Lake Water System, Inc. v. Melrose Township*, 163 Mich. App. 726, 415 N.W.2d 292, 295 (1987) (footnote omitted); see also *Mich. Comp. Laws § 15.233(3)* ("A public body shall protect [\*\*38] public records from loss, unauthorized alteration, mutilation, or destruction."). In this respect, then, the City here stands on a similar footing to the defendant corporation in *Tomlinson, supra*, 245 F.R.D. at 477, which was found to have control over electronic records in the possession of a third party by virtue of its statutory obligation to maintain these records and make them available for examination or inspection.

Indeed, the decision of the Michigan Court of Appeals in *MacKenzie, supra*, is particularly instructive here. In that case, the defendant townships contracted with a third party, the City of Port Huron, to prepare property tax notices to be issued to township property owners. Under this contract, the townships supplied paper documents to Port Huron, which then "created magnetic computer tapes containing the pertinent tax information on

each property owner." *MacKenzie*, 635 N.W.2d at 336. At the conclusion of this process, Port Huron returned the paper documents but retained the computer tapes. The plaintiff real estate broker submitted a FOIA request to the defendant townships seeking a copy of the computer tapes, but the townships resisted this request, contending that [\*\*39] the tapes were not in their possession and that they were under no obligation to obtain them from Port Huron.

The Michigan Court of Appeals rejected the townships' arguments and ordered them to disclose the computer tapes to the plaintiffs. In so ruling, the court first [\*\*357] found it immaterial that a third party, and not the townships, had created and retained possession of the tapes. Citing the FOIA's definition of a "public record" as including documents "used" by a public body in the performance of an official function, the court concluded that the townships had "used" the computer tapes, "albeit indirectly," by delegating to a third party, Port Huron, the "clerical task" of "prepar[ing] tax notices for mailing" and providing the information needed to perform this function. *MacKenzie*, 635 N.W.2d at 338. The court reasoned that this delegation did not defeat the townships' duty of disclosure, as public bodies "may not avoid their obligations under the FOIA by contracting for a clerical service that allows them to more efficiently perform an official function." *635 N.W.2d at 338*.

Of particular significance here, the court next found that the defendant townships "maintained a measure of [\*\*40] control over the tapes," by virtue of having provided the data used to create the tapes, and as evidenced by a letter from one of the townships to the plaintiff stating that Port Huron would not release the tapes without permission and that the township did not intend to give any such permission. *635 N.W.2d at 339*. In light of this retained control, the court deemed it legally insignificant that the tapes were not in the townships' possession. *635 N.W.2d at 339* (citing *Mich. Comp. Laws § 15.240(4)*, which authorizes the courts to order the production of "all or a portion of a public record wrongfully withheld, regardless of the location of the public record"). Rather, the court held that the townships were obligated to secure the production of the computer tapes, "whether by signing the release provided by Port Huron or [by] obtaining copies of the tapes and forwarding them to plaintiff." *635 N.W.2d at 339*. This decision in *MacKenzie* provides a compelling basis for concluding

<sup>20</sup> In her reply brief in support of her motion, Defendant Beatty challenges the authenticity of this directive submitted by Plaintiff, observing that it is signed [\*\*36] by Defendant Kilpatrick, and yet bears a date (June 26, 2000) prior to the date that he took office as the mayor of Detroit. Yet, this is surely a mere typographical error, as evidenced by the absence of any claim by either Defendant Kilpatrick or the City that this directive does not accurately reflect the City's policy regarding electronic communications. Plainly, these parties are in the best position to address this question, and yet neither has done so, despite ample opportunity. In any event, it appears that Defendant Kilpatrick recently issued a revised directive with similar language, stating that "electronic communications may be deemed under the law to be public records," and that "users of the City's electronic communications system must bear in mind that, whenever creating and sending an electronic communication, the information may be subject to court-ordered disclosure." (4/15/2008 Directive for the Use of the City of Detroit's Electronic Communications System at 2, available at <http://info.detnews.com/pix/2008/pdf/citydirective.pdf>.)

that the Defendant City has control, within the meaning of Rule 34(a)(1), over any "public records" that might be retained by third party SkyTel under its contract with the City.

Finally, while the record does [\*\*41] not disclose the terms of the City's contracts with SkyTel, it simply defies belief that SkyTel would maintain an archive of communications -- many of which, as discussed, presumably qualify as public records and concern official City business -- without providing any sort of contractual mechanism for the City to retrieve these messages. Presumably, a profit-seeking business such as SkyTel would not maintain such an archive unless it was compensated for this service, and the City, in turn, would not pay for this service unless it could gain access to the archive when desired.<sup>21</sup> In the absence of any evidence to the contrary, then, the Court assumes that the City has at least some sort of contractual right of access to the text messages preserved by SkyTel in the course of its contractual relationship with the City.

Given all these indicia of control, the Court finds that the text messages maintained by SkyTel would be an appropriate subject of a Rule 34 request for production directed at the Defendant City of Detroit. Pursuant to such a request, Plaintiff would be entitled to review any and all nonprivileged communications that are relevant to his claims, *see Fed. R. Civ. P. 26(b)(1)*, [\*\*43] absent some basis for concluding that these communications are beyond the reach of civil discovery. This, of [\*\*358] course, leads the Court back to the proposition advanced in Defendants' motions -- namely, that the SCA erects just such a bar to the production of any text messages preserved by SkyTel. Accordingly, the Court turns to this question.

#### 4. The SCA Does Not Override Defendants' Obligation to Produce Relevant, Nonprivileged Electronic Communications Within Their Possession, Custody, or Control.

As noted earlier, Defendants' challenge to Plaintiff's request for disclosure of the SkyTel text messages rests upon what they view as a straightforward reading of the

terms of the SCA. In particular, they first point to the SCA provision that generally prohibits a service provider such as SkyTel from (i) "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by" an electronic communication service ("ECS"), 18 U.S.C. § 2702(a)(1), or (ii) "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on" a remote computing service ("RCS"), 18 U.S.C. § 2702(a)(2). Next, while the SCA recognizes [\*\*44] various exceptions to this general rule of non-disclosure, Defendants submit that the only relevant exception is disclosure "with the lawful consent of" the originator or intended recipient of a communication or (in the case of an RCS) the subscriber to the service, 18 U.S.C. § 2702(b)(3), and they state their unwillingness to give the requisite consent. It follows, in Defendants' view, that SkyTel may not produce any text messages in this case, whether pursuant to the subpoenas issued by Plaintiff or in accordance with the protocol established in this Court's March 20, 2008 opinion and related order.

In analyzing this contention, the Court initially proceeds under the premise that Plaintiff has sought the production of SkyTel text messages under a Rule 34 document request directed at the Defendant City, rather than a third-party subpoena directed at SkyTel.<sup>22</sup> Under this scenario, SkyTel would not be called upon to produce any text messages directly to Plaintiff. Rather, any such production would pass through an intermediary, the Defendant City, which would be obligated under Rule 34 and the above-cited case law to obtain the text messages from SkyTel and make them available to Plaintiff [\*\*45] as materials within its "control."

There is reason to believe that the SCA might apply differently to (i) direct production to an outside party such as Plaintiff and (ii) production to a customer such as the City. First, the Court notes that the provisions upon which Defendants rely here prohibit a service provider from "divulg[ing]" the contents of a communication. 18 U.S.C. § 2702(a)(1)-(2). *HN6* Although disclosure to an outside party plainly would qualify as "divulg[ing]" the contents of a communication, it is not self-evident that

<sup>21</sup> The only evidence in the record that has any bearing upon this question is a printout of a SkyTel web page attached as an exhibit to Plaintiff's response to the City's motion. This web page describes a "Message Archiving" service that SkyTel apparently offers to its customers, under which a customer may retrieve messages stored by SkyTel by faxing a request to the company. [\*\*42] (*See* Plaintiff's Response, Ex. 8.) Unfortunately, the record does not indicate whether SkyTel provided this or some comparable service under its contracts with the City.

Nonetheless, SkyTel seemingly has confirmed, albeit only in a general way, that it provided some sort of archiving service to the City. In its brief in support of its motion to quash, SkyTel quotes a passage from the district court's decision in *Quon* characterizing the service provider in that case as having "archived" the defendant municipality's text messages as "a permanent record-keeping mechanism." (SkyTel's Motion, Br. in Support at 7 (quoting *Quon v. Arch Wireless Operating Co.*, 445 F. Supp.2d 1116, 1136 (C.D. Cal. 2006).)) SkyTel then states that "[t]his description applies squarely to" the service it provided to the City of Detroit. (*Id.*)

<sup>22</sup> The Court recognizes, of course, that this premise is inaccurate, and will return below to the legal significance of Plaintiff's election to proceed via subpoena.

a service provider "divulge[s]" the contents of a communication merely by retrieving the communication from an archive and forwarding it to a customer pursuant to a contractual obligation. To "divulge" information ordinarily entails "mak[ing] known" or revealing something which is "private or secret." Webster's Ninth New Collegiate Dictionary at 370 (1986); see also Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/divulge>. By fulfilling a request from its [\*\*46] customer, the City, to retrieve and forward communications from an archive that has been created and maintained at the customer's request, SkyTel cannot necessarily be characterized as having "divulged" any information to anyone outside the scope of the confidential relationship that exists between SkyTel and its customer.

If the archive and retrieval service provided by SkyTel qualifies as an RCS,<sup>23</sup> it is still more doubtful that this sort of retrieval would run afoul of § 2702(a). Under the pertinent subsection of § 2702(a), a service provider that provides an RCS is prohibited from "divulg[ing]" the "contents of any communication which is carried or maintained on [\*\*359] that service . . . on behalf of . . . a subscriber or customer" only if the service provider "is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing." 18 U.S.C. § 2702(a)(2). Yet, to the extent that the contracts between the City and SkyTel provide a mechanism for the City to request the retrieval of text messages from the archive maintained by SkyTel, such a request presumably would supply the necessary "authoriz[ation]" for SkyTel [\*\*47] to "access" the communications in this archive "for purposes of providing a[] service[] other than storage or computer processing" -- namely, the service of retrieval. It is not a foregone conclusion, then, that SkyTel necessarily would engage in any activity prohibited under § 2702(a) by fulfilling the City's demand to retrieve text messages from an archive maintained at the behest of this customer.<sup>24</sup>

Next, even assuming that SkyTel were deemed to engage in activity within the scope of § 2702(a) by retrieving text messages from an archive and forwarding

them to the City, the Court would not so readily conclude, as Defendants do, that only the "lawful consent" exception is potentially applicable here. Another exception permits the contents of a communication to be divulged "as may be necessarily incident to the rendition of the service" being provided. 18 U.S.C. § 2702(b)(5). As discussed earlier, it is difficult to see how an archive of text messages would be of any use or value to a customer if the service provider did not also offer a mechanism for retrieving messages from this archive. Seemingly, then, SkyTel's retrieval of messages from the archive it has maintained on the City's behalf is "necessarily incident to" its ability to carry out the text message transmission and storage services it has agreed to provide to the City.<sup>25</sup>

In [\*\*49] any event, even if Defendants are correct in their contention that SkyTel cannot produce any communications in this case without the "lawful consent" called for under § 2702(b)(3), the Court finds that the Defendant City has both the ability and the obligation to secure any such consent that the SCA may require. As observed earlier, the consent that is needed to satisfy § 2702(b)(3) depends upon the sort of service being provided. If this service is deemed to be an RCS, then the consent of the "subscriber" is sufficient to permit the service provider to divulge the contents of a communication maintained on this service. 18 U.S.C. § 2702(b)(3).<sup>26</sup> In contrast, if a service is determined to be an ECS, then only the "lawful consent of the originator or an addressee or intended recipient" of a communication will suffice to overcome the prohibition against divulging this communication. 18 U.S.C. § 2702(b)(3).

This distinction between an ECS and an RCS was central to the rulings of the district and appellate courts in *Quon*, with the district court initially determining that the service at issue in that case was an RCS. See *Quon*, 445 F. Supp.2d at 1137. In that case, the defendant municipality, the City of Ontario, California, entered into a contract with a service provider, Arch Wireless, that called for alphanumeric text-messaging devices and related wireless communication services to [\*\*360] be provided to various city employees. In an effort to determine whether and to what extent these devices were being

<sup>23</sup> The Court addresses this question in greater detail below.

<sup>24</sup> The Court recognizes that the defendant service provider in *Quon* engaged in similar activity, and that the Ninth Circuit held in its recent decision that the service provider had violated § 2702(a) as a matter of law. See *Quon*, 529 F.3d at 903. It does not appear from the published decisions in that case, however, that any party raised the question whether the service provider "divulge[d]" any communications within the meaning of § 2702(a), nor whether such "divulg[ing]" might be permissible if done in the course of providing an authorized service other than storage or computer processing. In addition, the Ninth Circuit's ruling in *Quon* rested in large part upon the court's determination that the service provider in that [\*\*48] case was providing an ECS, and not an RCS. See *Quon*, 529 F.3d at 903. Again, the Court addresses this question below.

<sup>25</sup> Again, it does not appear that the parties in *Quon* raised this issue, and the published decisions in that case do not address it.

<sup>26</sup> The parties agree that the City is the "subscriber" of SkyTel's text messaging services within the meaning of § 2702. Thus, if the relevant service provided by SkyTel to the City is properly characterized as an RCS, SkyTel need only secure the City's consent in order to divulge the [\*\*50] contents of any communications it has archived under its contracts with the City.

used for personal rather than work-related purposes, the city's chief of police ordered an audit of the text messages sent and received by two police officers over a two-month period. When this audit triggered an internal affairs investigation and other adverse consequences for the subjects of the audit and others whose communications were encompassed by the review, one of the police officers and several other city employees brought suit against Arch Wireless, the City of Ontario, and various city officials, asserting [\*\*51] federal claims under the SCA and 42 U.S.C. § 1983 as well as claims under California law.

Arch Wireless moved for summary judgment in its favor on the plaintiffs' SCA claim, arguing that the service it provided was an RCS and that the city, by requesting the disclosure of text messages maintained on this service, had provided the subscriber consent necessary to permit these disclosures without violating the prohibitions set forth in § 2702(a). In addressing this question, the district court initially observed that Arch Wireless appeared to have provided a "computer storage" service that was characteristic of an RCS, as the messages it had provided to the city were retrieved from long-term storage after already having been delivered and read by their recipients. See Quon, 445 F. Supp.2d at 1130-31. Nonetheless, the court acknowledged that the maintenance of the text message in storage was not enough, standing alone, to distinguish an RCS from an ECS, because the SCA expressly contemplates that an ECS also entails the "electronic storage" of communications. See Quon, 445 F. Supp.2d at 1134-36; see also 18 U.S.C. § 2702(a)(1) (prohibiting a provider of an ECS from divulging "the contents [\*\*52] of a communication while in electronic storage by that service").<sup>27</sup> Moreover, while it was clear that Arch Wireless provided an ECS to the city by supplying text messaging devices and associated services that enabled city employees to send and receive electronic communications, see 18 U.S.C. § 2510(15), the district court construed the SCA and its legislative his-

tory as eschewing an "all or nothing" approach to characterizing a service provider's activities, and as instead recognizing that a service provider such as Arch Wireless could provide *both* RCSs and ECSs to a single customer. Quon, 445 F. Supp.2d at 1136-37; see also Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1215-16 (2004) (noting the "functional nature of the definitions of ECS and RCS," with the result that a "provider can act as an RCS with respect to some communications [and] an ECS with respect to other communications").<sup>28</sup>

[\*\*361] Thus, the key question before the district court was whether the specific service that gave rise to the plaintiffs' SCA claims -- *i.e.*, Arch Wireless's retrieval of text messages from storage after they had been transmitted and read by their recipients -- should be deemed to be an RCS or an ECS. This, in turn, required the court to distinguish between the "electronic storage" utilized by an ECS and [\*\*55] the "computer storage" provided by an RCS. As to the former, the statute defines "electronic storage" as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof," or "any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Because the text messages that Arch Wireless had retrieved from storage and forwarded to the city had already been transmitted and read in the past, their continued storage could not be construed as "temporary" or "incidental to" their transmission. Rather, the district court reasoned that the characterization of Arch Wireless's service as an ECS or an RCS turned upon whether the text messages had been stored "for purposes of backup protection." See Quon, 445 F. Supp.2d at 1136.

The court concluded that this was not the purpose for which Arch Wireless had stored the text messages that it

<sup>27</sup> As the district court pointed out, this common feature of "storage" shared by both an ECS and an RCS serves to distinguish the types of activities covered by the SCA from the types of activities covered by the [\*\*53] federal Wiretap Act. See Quon, 445 F. Supp.2d at 1134-35 (citing Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 876-79 (9th Cir. 2002)).

<sup>28</sup> The Kerr article, the legislative history of the SCA, and other relevant authorities are discussed extensively in an *amicus* brief that the Detroit Free Press seeks to file in this case. Prior to this submission, neither Plaintiff nor Defendants had provided much discussion or analysis of the terms of the SCA, and they had cited very little case law or other pertinent authorities, apart from the Quon decisions, that might assist the Court in interpreting this statute. Spurred by the Free Press's submission, however, Defendants Beatty and Kilpatrick have filed briefs that give more extensive treatment to this subject.

Under these circumstances, the Court finds that leave should be granted for the Detroit Free Press to file its proposed *amicus* brief in this suit. First, the Free Press points out that this Court's interpretation of the SCA -- to the extent that this is necessary to resolve Defendants' motions -- is likely to have at least some impact upon the interests that the newspaper seeks to vindicate in its pending state court FOIA suit against [\*\*54] the City of Detroit. There is undeniably some overlap in the legal issues raised in that case and in Defendants' motions, where the Free Press is seeking disclosure of a different subset of the text messages maintained by SkyTel on behalf of the City of Detroit, and where the newspaper faces an SCA-based challenge to this effort that is quite similar to the SCA-based challenge advanced in Defendants' present motions. Moreover, and as noted above, the *amicus* brief submitted by the Free Press offers a unique perspective and analysis of the terms of the SCA which the parties' submissions did not supply, at least prior to the Free Press's filing. The Court welcomes this assistance in resolving the issues before it, and thus has considered the Free Press's *amicus* brief in preparing this opinion.

subsequently provided to the city. In so ruling, the court relied principally on the Ninth Circuit's observation in an earlier case that a service does not store messages "for backup purposes" if it is "the only place [\*\*56] a user stores his messages." *Quon*, 445 F. Supp.2d at 1136 (quoting *Theofel v. Farey-Jones*, 359 F.3d 1066, 1077 (9th Cir. 2004)). The district court reasoned that "Arch Wireless' service would meet this definition," where the storage it provided was "long-term" and was "apparently . . . the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism." *Quon*, 445 F. Supp.2d at 1136; see also *Theofel*, 359 F.3d at 1076 (reasoning that an internet service provider "that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages"). Consequently, the court held that the service provided by Arch Wireless was an RCS, and that any disclosures of communications maintained on this service were permissibly made with the consent of the subscriber City of Ontario. See *Quon*, 445 F. Supp.2d at 1137.

In its recent decision, however, the Ninth Circuit reversed this aspect of the district court's ruling; and held that "Arch Wireless provided an 'electronic communication service' to the City." *Quon*, 529 F.3d at 903. This decision appears to rest on the "all-or-nothing" approach rejected by the district court, [\*\*57] with the Ninth Circuit broadly "categoriz[ing] Arch Wireless" as providing a service for sending and receiving electronic communications, as opposed to a "computer storage" service. *529 F.3d at 901*. While the court recognized that Arch Wireless did "archiv[e] . . . text messages on its server," it noted that both ECSs and RCSs entail some form of "storage," and it found that Arch Wireless did not provide the "virtual filing cabinet" function that was cited in the legislative history of the SCA as characteristic of an RCS. *529 F.3d at 901-02*.

The Ninth Circuit then explained that the district court's reliance on its *Theofel* decision was misplaced, and that this prior ruling, properly understood, actually led to the opposite conclusion. As observed in *Quon*, the court in *Theofel* held that an internet service provider ("ISP") had stored e-mail messages on its server "for purposes of backup protection," since "[a]n obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again -- if, for example, the message is accidentally erased from the user's own computer." *Theofel*, 359 F.3d at 1075. [\*\*58] The court in *Quon* found that this ruling governed the case before it, where "[t]he service provided by [the ISP in *Theofel*]" is closely analogous to Arch Wireless's storage of [the plaintiffs'] messages," and where it was "clear that the messages were archived for 'backup protection,' just as they were in *Theofel*." *Quon*, 529 F.3d at 902.

Finally, the Ninth Circuit addressed certain language in *Theofel* that Arch Wireless [\*\*362] (and the district court)

viewed as supporting the conclusion that its storage of messages was *not* for "backup protection":

Arch Wireless contends that our analysis in *Theofel* of the definition of "backup protection" supports its position. There, we noted that "[w]here the underlying message has expired in the normal course, any copy is no longer performing any backup function. An ISP that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages." [*Theofel*, 359 F.3d] at 1070. Thus, the argument goes, Arch Wireless's permanent retention of the [plaintiffs'] text messages could not have been for backup purposes; instead, it must have been for storage purposes, which would require us to classify Arch Wireless as an RCS. This [\*\*59] reading is not persuasive. First, there is no indication in the record that Arch Wireless retained a permanent copy of the text messages or stored them for the benefit of the City; instead, the [declaration of an Arch Wireless employee] simply states that copies of the messages are "archived" on Arch Wireless's server. More importantly, *Theofel's* holding -- that the e-mail messages stored on [the ISP's] server after delivery were for "backup protection," and that [the ISP] was undisputedly an ECS -- forecloses Arch Wireless's position.

*Quon*, 529 F.3d at 902-03. Thus, the court held that Arch Wireless provided an ECS to the city, and that it violated the SCA by disclosing transcripts of text messages to the city without first securing the consent of the originator, addressee, or intended recipient of each such communication. *529 F.3d at 903*.

Upon carefully reviewing the district and appellate court rulings in *Quon*, this Court finds the lower court's reasoning more persuasive, on a number of grounds. First, the Court reads the Ninth Circuit's decision in that case -- and, to some extent, the court's prior ruling in *Theofel* -- as resting on a unitary approach, under which service providers [\*\*60] contract with their customers to provide either an ECS or an RCS, but not both. Yet, the prohibitions against disclosure set forth in § 2702(a) focus on the specific type of service being provided (an ECS or an RCS) with regard to a particular communication, and do not turn upon the classification of the service provider or on broad notions of the service that this entity generally or predominantly provides. Thus, the Court is inclined to agree with the view of the district court in *Quon* that *HN7* "Congress took a middle course" in enacting the SCA, under which a service provider such as SkyTel may be deemed to provide both an ECS and an RCS to the same customer. *Quon*, 445 F. Supp.2d at

1137; see also *Kerr, supra*, at 1215-16.

In light of the SCA's functional, context-specific definitions of an ECS and an RCS, it is not dispositive that SkyTel indisputably did provide an ECS to the City of Detroit in the past, or that it presumably kept text messages in "electronic storage" at times in connection with the ECS that it provided. Rather, the ECS/RCS inquiry in this case turns upon the characterization of the service that SkyTel *presently* provides to the City, pursuant to which the company is [\*\*61] being called upon to retrieve text messages from an archive of communications sent and received by City employees in years past using SkyTel text messaging devices. The resolution of this issue, in turn, depends upon whether SkyTel has maintained this archive "for purposes of backup protection," 18 U.S.C. § 2510(17)(B), so that its contents may be deemed to be held in "electronic storage" by an ECS, 18 U.S.C. § 2702(a)(1), or whether this archive is more properly viewed as "computer storage" offered by an RCS, 18 U.S.C. § 2711(2).

Whatever might be said about the reasoning through which the district and appellate courts in *Quon* determined that the archive of text messages in that case did or did not serve the purpose of "backup protection,"<sup>29</sup> [\*\*363] the circumstances of this case are far clearer. SkyTel is no longer providing, and has long since ceased to provide, a text messaging service to the City of Detroit -- the City, by its own admission, discontinued this service in 2004, and the text messaging devices issued by SkyTel are no longer in use. Consequently, any archive of text messages that SkyTel continues to maintain on the City's behalf constitutes the *only* available record of these [\*\*62] communications, and cannot possibly serve as a "backup" copy of communications stored elsewhere. In this respect, this Court is in complete agreement with the Ninth Circuit's observations in *Theofel*, 359 F.3d at 1076-77, that a service provider "that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages," and that "messages are not stored for backup purposes" if a computer repository is "the only place" where they are stored. Regardless of whether these observations applied to the services at issue in *Theofel* and *Quon*, the Court concludes that they apply with full force here -- the service provided by SkyTel may properly be characterized as a "virtual filing cabinet" of communications sent and received by City employees. See *Quon*, 529 F.3d at 902. The Court finds, therefore, that the ar-

chive maintained by SkyTel constitutes "computer storage," and that the company's maintenance of this archive on behalf of the City is a "remote computing service" as defined under the SCA.

It is only a short step from this finding to the conclusion that the Defendant City is both able and obligated to give its consent, as subscriber, to SkyTel's retrieval of text messages so that the City may comply with a Rule 34 request for their [\*\*64] production. As previously discussed, a party has an obligation under Rule 34 to produce materials within its control, and this obligation carries with it the attendant duty to take the steps necessary to exercise this control and retrieve the requested documents. Moreover, the Court already has explained that a party's disinclination to exercise this control is immaterial, just as it is immaterial whether a party might prefer not to produce documents in its possession or custody. Because the SkyTel archive includes communications that are potentially relevant and otherwise discoverable under the standards of Rule 26(b)(1), and because the City has "control" over this archive within the meaning of Rule 34(a)(1) and the case law construing this term, the City must give any consent that might be required under the SCA in order to permit SkyTel to retrieve communications from this archive and forward them to the Magistrate Judges in accordance with the protocol established in this Court's March 20, 2008 order.

Contrary to Defendant Kilpatrick's contention in his response to the Detroit Free Press's *amicus* brief, it is not an "oxymoron" to conclude, under the particular circumstances presented [\*\*65] here, that a party may be compelled to give its consent. It is a necessary and routine incident of the rules of discovery that a court may order disclosures that a party would prefer not to make. As illustrated by the survey of Rule 34 case law earlier in this opinion, this power of compulsion encompasses such measures as are necessary to secure a party's compliance with its discovery obligations. In this case, the particular device that the SCA calls for is "consent," and Defendant Kilpatrick has not cited any authority for the proposition that a court lacks the power to ensure that this necessary authorization is forthcoming from a party with the means to provide it. Were it otherwise, a party could readily avoid its discovery obligations by warehousing its documents with a third party under strict instructions to release them only with the party's "consent."

Alternatively, even if the Court is mistaken in its conclusion that the service provided by SkyTel is an RCS,

<sup>29</sup> The Court confesses that it is puzzled by the Ninth Circuit's observation that there was "no indication in the record" in that case that "Arch Wireless retained [\*\*63] a permanent copy of the text messages or stored them for the benefit of the City," and that the evidence "instead" showed "that copies of the messages are 'archived' on Arch Wireless's server." *Quon*, 529 F.3d at 902-03. In this Court's view, an "archive" is commonly understood as a permanent record, and the district court in *Quon* characterized Arch Wireless's repository in that case as "the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism." *Quon*, 445 F. Supp.2d at 1136. Moreover, once a service provider has successfully delivered a given text message to its intended recipient and the message has been opened and read, it would appear that any retention of a copy of this message in an "archive" could only be intended "for the benefit of" the customer, because this practice would serve no apparent purpose, whether backup or otherwise, for the service provider in its role as ECS.

there is ample basis to conclude that the City nonetheless [\*364] has an obligation to secure the requisite consent from its employees that would permit SkyTel to proceed with its retrieval of communications. This, after all, [\*66] is precisely what the courts have held in the *Rule 34* case law discussed earlier, including *Riddell Sports*, 158 F.R.D. at 559, *Herbst*, 63 F.R.D. at 138, and *In re Domestic Air Transportation Antitrust Litigation*, 142 F.R.D. at 356. In particular, *Riddell Sports*, 158 F.R.D. at 559, holds that a corporate party has control over, and thus may be compelled to produce, documents in the possession of one of its officers or employees, and that the officer or employee has a fiduciary duty to turn such materials over to the corporation on demand. Next, *Herbst*, 63 F.R.D. at 138, and *In re Domestic Air Transportation Antitrust Litigation*, 142 F.R.D. at 356, illustrate the principle that the *Rule 34(a)* concept of "control" extends to a company's control over its employees, such that a corporate party may be compelled to secure an employee's consent as necessary to gain access to materials that the employee has the right to obtain. In accordance with these authorities, the Court finds that the City of Detroit is both able and obligated to obtain any consent from its employees that would be necessary to permit SkyTel to retrieve the communications of City employees from its archive and forward them [\*67] to the Magistrate Judges for review.

This conclusion is confirmed by the case law construing the same or similar "consent" provisions found in the SCA's close cousin, the federal Wiretap Act, *18 U.S.C. § 2510 et seq.* Under one such provision, the interception of a "wire, oral, or electronic communication" is permissible "where one of the parties to the communication has given prior consent to such interception." *18 U.S.C. § 2511(2)(d)*. Another provision, like its counterpart at *§ 2702(b)(3)* of the SCA, permits a "person or entity providing electronic communication service" to "divulge the contents of" a communication "with the lawful consent of the originator or any addressee or intended recipient of such communication." *18 U.S.C. § 2511(3)(b)(ii)*.

The courts have held that the requisite consent to interception or disclosure may be implied under circumstances analogous to those presented here. In *Griffin v. City of Milwaukee*, 74 F.3d 824 (7th Cir. 1996), for example, the plaintiff was employed as a telephone operator for the Milwaukee police department, and she alleged that her employer had illegally monitored and intercepted her personal telephone calls. In affirming the district court's [\*68] award of summary judgment in the employer's favor, the court noted that the plaintiff had been informed that "workstation telephone calls might be monitored for training, evaluation, and supervision purposes," and that the plaintiff herself had testified that "she knew that her telephone conversations at her workstation could be monitored by supervisors." *Griffin*, 74 F.3d at 827. Moreover, employees were told "that incoming emergency calls would be recorded," and the equip-

ment to do so was "located conspicuously in a glass case in the middle of [the plaintiff's] work area." *74 F.3d at 827*. Under this record, the court concluded that the defendant employer's "systematic monitoring of workstation telephones occurred with [the plaintiff's] consent." *74 F.3d at 827*; see also *United States v. Rittweger*, 258 F. Supp.2d 345, 354 (S.D.N.Y. 2003) (finding that an employee had given his implied consent to his employer's interception of his phone calls where the employer had disseminated a memo and handbooks advising employees that their calls were being recorded and were subject to review); *George v. Carusone*, 849 F. Supp. 159, 164 (D. Conn. 1994) (finding implied consent in light of the memoranda [\*69] circulated to employees informing them that their calls would be recorded and the warning labels to this effect that were affixed to many phones around the workplace).

In this case, City of Detroit employees were similarly advised, under the above-cited electronic communications policy directive signed by Defendant Kilpatrick, that they should "assume [as] a 'rule of thumb' that any electronic communication created, received, transmitted, or stored on the City's electronic communication system is public information, and may be read by anyone." (Plaintiff's Response, Ex. 9, Directive for the Use of the City of Detroit's Electronic Communications System at 4.) In addition, this directive states that all such communications [\*365] are "the property of the City," that they should not be "considered, in whole or in part, as private in nature regardless of the level of security on the communication," and that, "in accordance with the applicable law governing access or disclosure, the City reserves the right to access electronic communications under certain circumstances and/or to disclose the contents of the communication without the consent of" its originator or recipient. (*Id.* at 1-2.) Finally, [\*70] and as noted earlier, the directive cautions employees to "bear in mind that, whenever creating and sending an electronic communication, they are almost always creating a public record which is subject to disclosure" under the Michigan FOIA, regardless of "whether the communication is routine or intended to be confidential."

In light of this directive, a strong case can be made that City employees have given their implied consent to SkyTel's production of text messages to the City, at least under the circumstances presented here. First, SkyTel's disclosure here is for the limited purpose of enabling the City to fulfill its discovery obligations, which comports with the statements in the directive that employee communications are the property of the City and that, as such, the City reserves the right to access or disclose the contents of these communications in accordance with applicable law. Next, the Court already has explained that the text messages that are discoverable here can by no means be characterized as private or personal, but instead are confined to communications concerning official City business. Again, the directive emphasizes precisely this point, advising employees [\*71] that their

communications often will be deemed public records which are subject to disclosure.

To be sure, the courts have cautioned that consent under the federal Wiretap Act "is not to be cavalierly implied," *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 581 (11th Cir. 1983), and the case law illustrates that consent may not be implied where, for example, the employer's stated policy of monitoring does not encompass the particular sort of communication at issue, see *Watkins*, 704 F.2d at 581-82, or where the employer's actual practices deviate from its written policies, see *Quon*, 529 F.3d at 906-07. Yet, in this case, it is important to recall exactly *who* is challenging the efficacy of the City's policy directive as proof of the City's and its employees' consent to the disclosure of electronic communications. Out of the several current and former City of Detroit officials and employees who are named as Defendants in this case, only two have challenged Sky-Tel's retrieval and production of text messages as prohibited under the SCA: Defendant Kwame Kilpatrick, the mayor of Detroit, who signed the City's policy directive, and Defendant Christine Beatty, the mayor's chief of staff at all times [\*\*72] relevant to this case. The remaining Defendants have not joined in the SCA-based challenge being pursued by the City and Defendants Kilpatrick and Beatty.

Whatever any given City of Detroit employee might be able to say about his or her awareness of the City's electronic communications policy or any lack of rigor or consistency in its enforcement, such arguments are singularly ineffective -- and, indeed, give cause for concern -- when raised by two of the City's highest-ranking officials, at least one of whom unquestionably has policymaking authority for the City and *authorized the policy in question*. It is problematic, to say the least, for someone in Defendant Kilpatrick's position to attempt to deny or diminish the import of the City's electronic communications policy as it applies to him, when an important purpose of this policy is to provide notice to rank-and-file employees that their communications are subject to access and disclosure as public records and as property of the City. As *Quon* well illustrates, a municipal policy governing city employees may be undermined by a policymaker's or supervisor's inconsistent or contrary practice, see *Quon*, 529 F.3d at 906-07, thereby impairing [\*\*73] the city's ability to investigate employee wrongdoing.<sup>30</sup> Perhaps this is why [\*\*366] the remaining individual Defendants in this case -- including the City's

chief of police, Ella Bully-Cummings -- have elected not to join in the SCA-based challenge mounted by the Defendant City and Defendants Beatty and Kilpatrick, where a "victory" on this issue threatens to eliminate an important tool for uncovering government corruption.

Finally, the Court returns to the premise under which it has conducted its SCA analysis -- namely, that Plaintiff has sought the disclosure of SkyTel text messages via a *Rule 34* request for production, as opposed to a third-party subpoena. As this premise is incorrect, the Court necessarily must address the legal significance of [\*\*74] Plaintiff's election to proceed via the latter means of discovery. The question, in particular, is whether the Court's analysis and conclusions continue to hold true where production is sought directly from a non-party, rather than from a party that retains control over materials in the non-party's possession.

The Court finds it best to avoid this question, and to instead insist that Plaintiff reformulate his third-party subpoena as a *Rule 34* request for production directed at the Defendant City. If Plaintiff were to continue to proceed via a third-party subpoena, it seems apparent that Sky-Tel's compliance would qualify as "divulg[ing]" the contents of communications within the meaning of § 2702(a), and that, as Defendants have argued, this disclosure could only be made with the "lawful consent" referred to in § 2702(b)(3). Moreover, while *Rule 34* and its attendant case law provide clear authority for insisting that a party consent to the disclosure of materials within its control, there is very little case law that confirms the power of a court to compel a party's consent to the disclosure of materials pursuant to a third-party subpoena.<sup>31</sup>

In an effort to avoid such potentially difficult questions where a more straightforward path is readily available, the Court instructs Plaintiff to prepare and serve a *Rule 34* request for production of the relevant text messages maintained by SkyTel on behalf of the Defendant City. The City shall then forward this discovery request to SkyTel, and SkyTel, in turn, shall proceed in accordance with the protocol set forth in the Court's March 20, 2008 order. By directing the parties to proceed in this manner, the Court obviates the need to determine what powers it might possess to compel a service provider such as SkyTel to comply with a third-party subpoena, and the Court leaves this question for another day. Rather, because production will be sought under *Rule 34*, the Court may resort to the usual mechanisms for ensuring the par-

<sup>30</sup> Notably, while the defendant City of Ontario's review of text messages in *Quon* was primarily intended to ascertain the extent to which employees were using city-issued pagers for personal communications, these text messages also were reviewed in connection with an internal affairs investigation into police dispatchers who had tipped off Hell's Angels motorcycle gang members about an ongoing sting operation, See *Quon*, 445 F. Supp.2d at 1121-22.

<sup>31</sup> While there are cases in which, for example, [\*\*75] a party is ordered to execute a release authorizing the production of medical records from a non-party physician, these cases tend to rest upon notions of waiver rather than control over non-party materials. See, e.g., *Vartinelli v. Caruso*, No. 07-12388, 2008 U.S. Dist. LEXIS 45065, 2008 WL 2397666, at \*2-\*3 (E.D. Mich. June 10, 2008).

ties' compliance. *See, e.g., Fed. R. Civ. P. 37.*<sup>32</sup>

**[\*367] IV. CONCLUSION**

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY [\*78] ORDERED that Defendant Christine Beatty's April 25, 2008 motion to preclude discovery of electronic communications from SkyTel is GRANTED IN PART and DENIED IN PART, in accordance with the rulings in this opinion and order. Similarly, IT IS HEREBY ORDERED that the Defendant City of Detroit's May 2, 2008 motion to preclude discovery of electronic communications from SkyTel also is GRANTED IN PART and DENIED IN PART, in accordance with the rulings in this opinion and order. In light of these rulings, Plaintiff is directed to promptly prepare and serve an appropriate *Rule 34* request for production directed at the City of Detroit, and the parties are then directed to proceed in ac-

cordance with the rulings in this opinion and the protocol established in the Court's March 20, 2008 order.

Next, IT IS HEREBY ORDERED that non-party SkyTel's May 13, 2008 motion to quash is GRANTED IN PART and DENIED IN PART, in accordance with the rulings in this opinion and order. Finally, IT IS HEREBY ORDERED that the July 23, 2008 motion of the Detroit Free Press for leave to file an *amicus* brief is GRANTED.

SO ORDERED.

/s/ Gerald E. Rosen

Gerald E. Rosen

United States District Judge

Dated: August 22, 2008

---

<sup>32</sup> In [\*76] light of the Court's rulings, it would appear that the issues raised in SkyTel's May 13, 2008 motion to quash have now been resolved. In particular, the Court has elected to proceed in accordance with one of the alternatives suggested in SkyTel's motion -- namely, that the City be ordered to request and obtain the relevant text messages from SkyTel, thereby supplying the requisite "consent" for SkyTel's disclosure of these messages. (*See* SkyTel's Motion to Quash, Br. in Support at 7-8.) The Court trusts, then, that SkyTel no longer has any objection to the procedure established by the Court.

The Court remains extremely troubled, however, by a letter attached as an exhibit to SkyTel's motion. In this letter, dated March 12, 2008, an attorney who represents Defendant Kilpatrick in other matters (but not this case), Dan Webb, requests SkyTel's "immediate assurance that going forward it will not produce records regarding the contents of any text messages sent by or to [Defendant Kilpatrick] in response to civil discovery." (SkyTel's Motion, Ex. A, 3/12/2008 Letter at 2.) Yet, at the very time this letter was sent, Defendants (including Defendant Kilpatrick) had a motion pending before this [\*77] Court seeking to quash subpoenas Plaintiff had served on SkyTel.

This apparent extra-judicial attempt to circumvent the usual (and obviously available) procedures for challenging a third-party subpoena is wholly inappropriate and will not be tolerated. Defendant Kilpatrick is a party to this case, and is represented by counsel who have proven fully capable of challenging discovery efforts that are believed to be inconsistent with or contrary to the applicable rules and law. Once this Court rules on such a challenge, it expects Defendant Kilpatrick (like any other party) to abide by this ruling. It is simply unacceptable that another attorney for Defendant Kilpatrick, who has not appeared in this case, would send a letter demanding SkyTel's "assurance" that it will not comply with a discovery request made and presently under challenge in this case, without any apparent regard for how this Court might rule on this pending challenge. The Court trusts and expects that no further such communications will come to light in this case, whether from Defendant Kilpatrick's attorneys or the representatives of any other party.

---

# **EXHIBIT C**

## Hopkins v. Twp. of Duncan

Court of Appeals of Michigan  
October 20, 2011, Decided  
No. 300170

Reporter: 294 Mich. App. 401; 812 N.W.2d 27; 2011 Mich. App. LEXIS 1806; 39 Media L. Rep. 2513

DOUGLAS HOPKINS, Plaintiff-Appellant, v DUNCAN TOWNSHIP, Defendant-Appellee.

**Subsequent History:** Leave to appeal denied by *Hopkins v. Twp. of Duncan*, 810 N.W.2d 582; 2012 Mich. LEXIS 491 (Mich., Apr. 23, 2012)

**Prior History:** [\*\*\*1] Houghton Circuit Court. LC No. 2010-014471-CZ.

**Disposition:** Affirmed.

### Case Summary

#### Procedural Posture

The Houghton Circuit Court (Michigan) granted summary disposition to defendant township after plaintiff township resident filed a claim that the township violated Michigan's Freedom of Information Act, *MCL 15.231 et seq.*, by not producing for him the handwritten notes of a township board member. The township resident appealed.

#### Overview

The township resident filed a complaint against the township alleging a violation of Michigan's Freedom of Information Act, *MCL 15.231 et seq.*, after the township did not produce any records responsive to his request for copies of any notes taken by any elected official during a township board meeting. The township filed a motion for summary disposition pursuant to MCL 2.116(C)(10). Provided with that motion were affidavits that revealed only one specific individual took notes at such a meeting, the notes were strictly for his personal use, they were kept in his personal journal, they were not shared with other members of the township board, and they were never placed in the township's files. The trial court granted the township's summary disposition motion. The appellate court found that the handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion, were not "public records" subject to disclosure under Michigan's Freedom of Information Act.

#### Outcome

The appellate court affirmed the trial court's judgment.

#### Counsel:

**Judges:** Before: STEPHENS, P.J., and SAWYER and K.F. KELLY, JJ.

### Opinion

[\*\*28] [\*402] PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant on plaintiff's claim that defendant violated Michigan's Freedom of Information Act (FOIA), *MCL 15.231 et seq.* We affirm, holding that handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion, are not public records subject to disclosure under FOIA.

#### I. THE PARTIES' PLEADINGS

On March 18, 2010, plaintiff filed a complaint alleging a FOIA violation. Plaintiff, a Duncan Township resident, claimed that defendant had failed to produce records plaintiff had requested on September 9, 2009, specifically "Copies of any notes taken by any elected official during any Duncan Township Board or Zoning Board meetings over the past 12 months[.]" Although defendant claimed that no zoning board meetings had been held, it did not address meetings held by the [\*403] Duncan Township Board of Trustees. Plaintiff alleged that a videotape revealed board members [\*\*\*2] taking notes during the meetings.

Defendant filed a motion for summary disposition pursuant to MCL 2.116(C)(10). Defendant provided the affidavits of the township board members, which revealed that only one individual-Frank Pentti-took notes at the meeting. Because the notes were strictly for his personal use, kept in his personal journal, not shared with other members of the board, and never placed in defendant's files, defendant [\*\*29] argued that Pentti's notes did not constitute "public records." *MCL 15.232(e)*. Pentti specifically averred that "[a]ny notes that I may have taken during Township Meetings were written in my personal diary, which also includes notes of meetings that [I] had with other groups such a [sic] local historical society."

Plaintiff filed a response to defendant's motion, arguing that Pentti's notes were, in fact, public records. Pentti acknowledged that he took notes at the meetings, and video footage from such meetings confirmed that he went back into his notes to advise the board of his recollection of what they had discussed at earlier meetings. Additionally, plaintiff argued, defendant never claimed that the notes were exempt and never specifically denied plaintiff's FOIA request, as was required. [\*\*\*3] Plaintiff asserted that defendant had failed to prove that defendant's refusal to disclose the notes was correct. Included in plaintiff's response were DVDs of defendant's meetings for August, September, and October 2009.

At his deposition, Pentti testified that he was a trustee on the Duncan Township Board of Trustees. Pentti was also secretary of the Kenton Historical Society. The township board had two trustees, a supervisor, [\*404] a clerk and a treasurer. The clerk conducted her business from her residence and from a store that she owned. The town's records were held jointly with the clerk and in the treasurer's office, which consisted of a desk and a chair in the Sidnaw town hall. There was also a building next door to the town hall where other "ancient" records were found, but "certainly, all active township records would be either with the clerk or the treasurer." Pentti brought his notebook to the deposition, which he referred to as his personal diary. The notebook contained a "mishmash of everything." Pentti did not use the notes in the performance of his duties as a trustee; rather, "it's something I started doing in college; and I found out that if I write things down, they stick—things [\*\*\*4] stick with me better." Pentti did not refer to the notes in the course of participating in township board meetings. He did not believe that he used the notes for any purpose other than the "mnemonic thing. I—seems that if I write it down, it goes in up here." Pentti saw other members jot down notes on copies of budgets and similar memoranda, but had no idea what the other board members did with their notes. Pentti deposited copies of the budget, agenda, and other notes in the garage. Pentti did not believe that he ever referred to his notes during a township meeting with other board members, nor had he ever referred to his notes in discussing matters with any citizen. He had never been asked to refer to his notes by the clerk in preparation of the minutes. During direct examination by plaintiff's attorney, Pentti testified:

Q. Okay. The notes that you make at the meetings, you're making those notes while you're participating as a trustee for Duncan Township, correct?

A. I would not say they're an inherent part of my participation; it's just the way I have existed since college.

[\*405] Q. Okay.

A. I jot things down.

Q. But when you do that, you're acting as a trustee of the township?

A. At the board [\*\*\*5] meeting, yes.

During cross-examination by defense counsel, Pentti testified:

Q. Mr. Pentti, the preparation of your personal notes that were made during these township board meetings, were they prepared in any way in connection with either your role or responsibilities as a member of the township board.

[\*\*30] A. No, I think they're just personal notes.

At her deposition, Shirley Wittingen testified that she was the township clerk. Wittingen also owned a convenience store. She was responsible for bookkeeping, recordkeeping, taking minutes of the meetings, and running elections. All of the board's files were kept in Wittingen's store. Some were in storage in a building next to the town hall. When Wittingen got plaintiff's request for documents, she went into her files to see if anything was there. She also asked the board members whether they had any notes. Pentti "was the only one that said that he had some notes. But they were his personal notes; they were not in the files." Wittingen had never reviewed Pentti's notes. Wittingen had not received official training about FOIA, but had a reference book that she consulted. She admitted that she never told plaintiff about Pentti's notes because [\*\*\*6] she believed that they were not subject to disclosure.

David Johnson provided an affidavit, averring that he had attended several township board meetings, including those that took place in September and October [\*406] 2009. Johnson witnessed Pentti "making notes in a spiral bound notebook." Additionally:

5. During one of the meetings I attended Skye Johnson inquired of the Board whether her home was in compliance and to what agencies she had been referred to.

6. At that meeting, I observed Frank Pentti refer to his notebook and turn pages back and he told her the agencies she was referred to.

## II. HEARING ON DEFENDANT'S MOTION

At the motion hearing, defense counsel relied on *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich. App. 228, 789 N.W.2d 495 (2010), arguing that Pentti's notes were not public documents because they were

not stored or retained by the township in the performance of an official function. Instead, plaintiff sought disclosure of Pentti's personal journal. Defendant did not argue that the documents were exempt from disclosure, but that they were not public in the first place.

In response, plaintiff claimed there was never a proper denial given; rather, defendant had made it appear as if no notes [\*\*\*7] existed. Plaintiff asked the court to conduct an in camera review of Pentti's notebook. Plaintiff contended that because there was no centralized filing and recordkeeping system, defendant could not argue that the documents needed to be under the control of the township and that the heart of the matter was that Pentti had taken notes in his official capacity and the clerk was under an obligation to search for them. Citing Walloon Lake Water System, Inc v Melrose Twp. 163 Mich. App. 726, 415 N.W.2d 292 (1987), plaintiff argued that an otherwise personal item may become a public record.

[\*407] Defendant argued that an in camera review would only be appropriate if the trial court first determined that the notes were public records.

The trial court declined to review the notes in camera. It ruled:

Here's what I'm thinking; Your motion is a (C)(10) motion. Um, I'm wondering if (C)(8) —I don't think that personal notes are public records. All right. Um, I think personal notes are just that. Personal notes. They're not intended to be a public record. They're intended to aid the maker of the note for whatever reason, maybe doesn't feel like he's got a good memory, or she's got a good memory; just a note taker. Some [\*\*31] people are note takers, they're [\*\*\*8] writing all the time.

\* \* \*

And I don't think that that person's, um, the way they function means that everything that they write down is all of a sudden part of the public record. Um, the notes of meetings that become a part of the record are the clerk's. That's within the official duty of the clerk, so obviously those minutes are public record. But someone who's a member of the board or whatever, and who's saying -writes down a note, ah, Mr. Smith from the audience indicated he's not for this ordinance, or whatever, just to keep track so when he wants to talk about it later he can reference Mr. Smith out there. I don't think that becomes a public record. That's a record of an individual member for the individual's own personal use. I don't think it's in furtherance, really, of the official business. And I think the *Howell* case used that language. Um,

where was that, in talking about the emails they said, "However, the school district does not assert that its backup system was purposely designed to retain and restore personal emails, or that those emails have some official function." So I got the impression there has to be some official function. And I don't see an official function [\*\*\*9] to an individual member's notes. It's to assist that individual member.

[\*408] The trial court entered judgment in defendant's favor. Plaintiff now appeals as of right.

### III. STANDARD OF REVIEW

Although the trial court made some indication that it would entertain an MCR 2.116(C)(8) motion, it is clear from the record that, in fact, the motion was granted pursuant to *HNI* MCR 2.116(C)(10) because the court had to go beyond the mere pleadings in order to conclude that the notes at issue were not subject to disclosure. See Capitol Properties Group, LLC v 1247 Center Street, LLC, 283 Mich. App. 422, 425, 770 N.W.2d 105 (2009). This Court reviews de novo a trial court's decision on a motion for summary disposition. Latham v Barton Malow Co. 480 Mich. 105, 111, 746 N.W.2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is appropriate only when the moving party can demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rose v Nat'l Auction Group, Inc. 466 Mich. 453, 461, 646 N.W.2d 455 (2002). This Court also reviews de novo a trial court's legal determination in a FOIA case. Herold Co, Inc v Eastern Mich Univ Bd of Regents, 475 Mich. 463, 470-472, 719 N.W.2d 19 (2006).

### IV. [\*\*\*10] STATUTORY LAW AND CASELAW

MCL 15.231(2) provides that

*HN2* [i]t is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

[\*409] *HN3* Under FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1); Coblenz v Novi, 475 Mich. 558, 571, 573, 719 N.W.2d 73 (2006). The exemptions are specifically enumerated in MCL 15.243, but are inapplicable to this case because defendant does not claim that the informa-

tion sought was exempt from [\*\*32] disclosure; rather, defendant maintains that the information was not a public record subject to disclosure, obviating the need to address whether the information was protected by any of the enumerated exemptions.

MCL 15.232(e) defines "public record" as follows:

**HN4** "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body [\*\*\*11] in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:

(i) Those that are exempt from disclosure under [MCL 15.243].

(ii) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

**HN5** A "writing" includes, all means of recording or retaining meaningful content, including handwriting. MCL 15.232(h); Patterson v Allegan Co Sheriff, 199 Mich. App. 638, 639-640, 502 N.W.2d 368 (1993). A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it. MacKenzie v Wales Twp, 247 Mich. App. 124, 129, 635 N.W.2d 335 (2001); The Detroit News, Inc v Detroit, 204 Mich. App. 720, 723-724, 516 N.W.2d 151 (1994). Mere possession of a record by a public body does not, however, render it a public record; a record must be [\*\*410] used in the performance of an official function to be a public record. Howell Ed Ass'n, 287 Mich. App. at 236.

At the heart of this case is whether Pentti's notes were taken in the performance of an [\*\*\*12] official function. If so, then the notes are subject to disclosure under FOIA. **HN6** The goal in interpreting a statute is to ascertain the Legislature's intent. Shinholster v Annapolis Hosp, 471 Mich. 540, 548-549, 685 N.W.2d 275 (2004). The first step in doing so is looking to the language used. Shinholster, 471 Mich. at 549. Effect must be given to each word, reading provisions as a whole, and in the context of the entire statute. Green v Ziegelman, 282 Mich. App. 292, 301-302, 767 N.W.2d 660 (2009). If the language is clear and unambiguous, the statute must be applied as written. Id. at 302; Practical Political Consulting, Inc v Secretary of State, 287 Mich. App. 434, 474, 789 N.W.2d 178 (2010). In such instances, judicial construction is neither necessary nor permitted. Practical Political Consulting, 287 Mich. App. at 474; People v Shakur, 280 Mich. App. 203, 209; 760 N.W.2d 272 (2008). Further, because FOIA is a prodisclosure statute, it must be broadly interpreted to allow public access. Practical Po-

litical Consulting, Inc v Secretary of State, 287 Mich. App. 434, 465; 789 N.W.2d 178 (2010).

Plaintiff relies on Walloon Lake Water Sys, Inc v Melrose Twp, 163 Mich. App. 726; 415 N.W.2d 292 (1987), as well as this Court's unpublished opinion WDG Investment Co, LLC v Michigan Dep't of Mgt & Budget, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 25, 2002 (Docket No. 229950) [\*\*\*13], in support of his position that Pentti's personal notes were transformed into public documents.

In Walloon, the plaintiff sought disclosure of a personal letter that had been read into the record at a township meeting. This Court concluded that because the letter was read into the record at a public meeting and its contents were considered by the township board, it became a public record subject to disclosure under FOIA. Walloon, 163 Mich. App. at 729.

[\*411] Without opining as to what extent an outside communication to an agency constitutes a public record, we believe that here, once the letter was read aloud and [\*\*33] incorporated into the minutes of the meeting where the township conducted its business, it became a public record "used . . . in the performance of an official function." Walloon, 163 Mich. App. at 730.]

In deciding that the letter had been "used" for purposes of the FOIA, this Court explained:

To be fully aware of the affairs of government, interested citizens are entitled to know not only the basis for various decisions to act, but also for decisions not to act. To further this purpose, we must construe the FOIA in such a manner as to [\*\*\*14] require disclosure of records of public bodies used or possessed in their decisions to act, as well as of similar records pertaining to decisions of the body not to act. Under this holding, not every communication received by a public body will be subject to disclosure. But where, as here, the content of a document is made part of the minutes of the body's meeting where it conducts its official affairs and the content of the document served as the basis for a decision to refrain from taking official affirmative action, that document must be considered a "public record," as defined by the FOIA. [Walloon, 163 Mich. App. at 730-731.]

Thus, a private letter became public because it was read into the record of the township meeting and used by the township board to resolve a specific issue. In this case, Pentti's notes were

never read into the record, nor is there any evidence that the notes were used in the township's decisions. The notes were kept for Pentti's personal use and were not provided to any of the other board members.

In *WDG*, the plaintiffs sought "all notes or other writings" of those individuals who participated in evaluating submitted proposals in connection with the [\*\*\*15] construction of a public facility, regardless of whether individuals were employed by the agency. *WDG*, [\*412] slip op'p 5. The defendants argued that there was no duty to disclose such "personal" notes. In a footnote, this Court stated, "It is not at all clear from the record what defendants mean by 'personal' notes. We therefore decline to address this argument at this time." *Id.* at 7 n 4. This Court went on to hold that the defendants had failed to meet their burden to justify the nondisclosure given that the defendants only argued that the notes were located in other departments. *Id.* at 8. "[E]ven if the requested records were not retained by the DMB, the DMB was still under a duty to conduct a reasonable search to request and locate the records." *Id.* at 7. Again, the case is not helpful to plaintiff. This Court specifically declined to decide whether personal notes could be considered public documents; instead, the focus was on the duty of the defendants to conduct a reasonable search to request and locate documents, which they clearly did not do. In contrast, the township clerk asked the individual township board members if they had any notes from the year's meetings. Only Pentti had notes, which he claimed [\*\*\*16] were in his personal diary.

During the motion hearing, the parties and the trial court referred to the *Howell Ed Ass'n* case, but the trial court hesitated in relying too heavily on the case, as the matter had been appealed to the Michigan Supreme Court. Since that time, however, the Michigan Supreme Court has denied leave to review.<sup>1</sup> Though not directly on point, *Howell Ed Ass'n* is instructive. It involved a "reverse" FOIA issue, in which a teacher's union objected to the release of [\*\*\*34] e-mails between the union and its members, arguing, among other things, that personal e-mails were not "public records." *Howell Ed* [\*413] *Ass'n*, 287 Mich. App. at 232. The plaintiffs' appeal was limited to whether the trial court properly concluded that the e-mails generated through the school district's e-mail system, retained and stored by the district, were public records subject to disclosure. *Id.* at 235. This Court found that the e-mails at issue had nothing to do with the essential operations of the schools and declined to find that they were equivalent to student information. *Id.* at 236-237. Further, this Court noted that

"unofficial private writings belonging [\*\*\*17] solely to an individual should not

be subject to public disclosure merely because that individual is a state employee." We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA. [*Id.* at 237, quoting *Kestenbaum v Michigan State Univ*, 414 Mich. 510, 539, 327 N.W.2d 783 (1982).]

The fact that the district maintained and saved the e-mails did not render e-mails sent by its employees while at work subject to release under FOIA. *Howell Ed Ass'n*, 287 Mich. App. at 237. This Court easily reconciled its finding with *Walloon Lake*, finding that it is possible that a personal document can become public, but only because "[the document's] subsequent use or retention 'in the performance of an official function . . . rendered [it] so.'" *Id.* at 243. This Court also referred to *WDG*, and noted that while the case declined to define the word "personal," it nevertheless offered "limited guidance." *Id.* at 244. "[T]o the degree [*WDG*] is helpful, it indicates that individual notes taken [\*\*\*18] by a decisionmaker on a governmental issue are still public records when they were taken in furtherance of an official function." *Id.*

Defendant also cites *Porter Co Chapter of Izaak Walton League of America, Inc v US Atomic* [\*414] *Energy Agency*, 380 F. Supp. 630 (1974). *HN7* Federal court decisions regarding whether an item is an "agency record" under the federal freedom of information act, 5 *USC 552*, are persuasive in determining whether a record is a "public record" under the Michigan FOIA. *MacKenzie*, 247 Mich. App. at 129, n 1. In *Porter*, the plaintiffs requested "[a]ssorted generally untitled, undated and uncirculated handwritten personal notes of [Atomic Energy Commission (AEC)] and Argonne National Laboratory personnel[.]" *Porter*, 380 F. Supp. at 632. In granting the defendant's motion for summary judgment, the district court noted that uncirculated handwritten personal notes were not subject to disclosure:

In executing their responsibilities relating to the AEC's health and safety and environmental reviews, individual AEC staff members frequently prepare assorted handwritten materials for their own use. Such materials are not circulated [\*\*\*19] to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not

<sup>1</sup> *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich. App. 228, 789 N.W.2d 495; 488 Mich. 1010, 791 N.W.2d 719 (2010) recon den 489 Mich. 976, 798 N.W.2d 767 (2011).

in any way consider such documents to be 'agency records,' nor is there any indication in the record that anyone other than the author exercises any control over such documents. [*Porter*, 247 F. Supp. at 633.]

#### V. APPLICATION OF LAW TO THE FACTS

Plaintiff argues that Pentti took his notes while acting in his official capacity as [\*\*35] an elected official at a public meeting. Defendant does not dispute that Pentti's handwritten notes are a "writing" for purposes of FOIA. *MCL 15.232(h)*. Nor does defendant argue that a writing that is otherwise private may become a public record subject to disclosure if the writing is possessed by the public body in the performance of an official function or if it is used by the public body. Defendant's [\*\*415] argument is simply that Pentti's handwritten notes were not in furtherance of an *official function*; rather, Pentti's notes, taken voluntarily, not circulated among other board members, not used in the preparation of meeting minutes, and retained at his sole discretion were [\*\*20] private writings not subject to disclosure under FOIA. We agree.

The town's records were held jointly with the clerk and in the treasurer's office, which consisted of a desk and a chair in the Sidnaw town hall. There was also a building next door to the town hall where other "ancient" records were found, but "certainly, all active township records would be either with the clerk or the treasurer." The clerk conducted her business from her residence and from a store that she owned. When plaintiff's FOIA request was made, the clerk immediately went to those records. Finding nothing there, she then asked each board member whether they had notes of the meetings. Pentti reported that he had kept notes in his personal diary, where he also kept notes of his other affairs, including as secretary of the Kenton Historical Society and a "mishmash of everything." Pentti took notes in hopes that in so doing, he would better retain information. Pentti did not refer to the notes in the course of participating in township board meetings. Plaintiff claims otherwise, pointing to the sworn affidavit of David Johnson, who specifically averred that during one of the meetings he saw Pentti refer to his [\*\*21] prior notes in answer to an inquiry from a citizen who asked to whom she had been previously referred for bringing her home into compliance with local building ordinances. Even accepting the averment as true, it appears that Pentti did little other than offer the citizen contact information. Such information had nothing to do with substantive decision-making.

[\*416] Pentti saw other township board members jot down notes, but had no idea what the other board members did with their notes. For his part, Pentti often deposited copies of the budget, agenda, and other notes in

the garbage. None of the board members shared notes with one another. The clerk never asked Pentti to refer to his notes in her preparation of the minutes, nor were the notes circulated among other board members. When asked if the notes were prepared in connection with his responsibilities as a member of the board, Pentti testified, "No, I think they're just personal notes."

The foregoing facts demonstrate that Pentti's notes were never in the township's possession, nor were they used in the performance of an official function. Regardless of plaintiff's opinion regarding the township's loose recordkeeping, the fact remains that all of the public records [\*\*22] relative to the township board meetings were kept and retained by the township clerk, either at her home or the convenience store she owned. The clerk was responsible for preparing the minutes of the meetings and admitted that she never saw nor read any of Pentti's notes. The fact that Pentti's notes were not for substantive decision-making or recordkeeping is supported by the fact that Pentti, alone, retained the records at his sole discretion. Unlike *Walloon*, in which a private letter was read into the record and incorporated into the board's substantive decision-making, there is absolutely no support that [\*\*36] anyone other than Pentti read the notes. *Howell Ed Ass'n* presented the opposite situation, in which the documents (e-mails) at issue were retained by the agency. This Court found that the mere possession of the material sought did not convert an otherwise private writing into a public document subject to disclosure. Quite the opposite:

[\*417] "[U]nofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." We believe the same is true for all public body employees. Absent specific legislative direction [\*\*23] to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA. *Howell Ed Ass'n*, 287 Mich. App. at 237 quoting *Kestenbaum*, 414 Mich. at 539.)]

Just as not every e-mail prepared and sent by a teacher on school-owned computer equipment was subject to disclosure, not every handwritten note prepared by a member of a public body, not otherwise used by the body's remaining members, should be subject to disclosure. Instead, individual notes taken by a decision-maker on a governmental issue are only a public record when the notes are taken in furtherance of an official function. *Howell Ed Ass'n*, 287 Mich. App. at 244.

We believe that the case most on point is *Porter*, which concluded that untitled, undated and uncirculated handwritten personal notes were not subject to disclosure un-

der the federal freedom of information act. Porter, 247 F. Supp. at 632. Notes not considered by other members of the board and retained or disposed of at the discretion of the writer cannot be anything other than personal in nature. *Porter* also states:

Disclosure of such personal documents would invade the privacy of and impede the working habits of individual [\*\*\*24] staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. Even if the records were 'agency records,' their disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. Such notes would not be available by discovery in ordinary litigation. [Porter, 247 F. Supp. at 633]

[\*418] Finally, given that Pentti's notes were not public records subject to disclosure under FOIA, plaintiff's claims that defendant failed to properly respond to the FOIA inquiry pursuant to MCL 15.235(2) and (3) are without merit. Plaintiff's claim that the trial court should have conducted an in camera review of the notes

under MCL 15.240(4) is also without merit because the statute specifically provides that a *HN8* "court, on its own motion, may view the public record in controversy in private before reaching a decision." Because Pentti's notes are not public records kept in the furtherance of a governmental function, an in camera review was unnecessary.

## VI. CONCLUSION

Handwritten notes of a township board member taken for his personal use, not circulated [\*\*\*25] among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion are not public records subject to disclosure under FOIA.

The trial court did not err in granting defendant summary disposition.

Affirmed.

[\*\*37] /s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly

---

# **EXHIBIT D**

# Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.

Court of Appeals of Michigan  
January 26, 2010, Decided  
No. 288977

**Reporter:** 287 Mich. App. 228; 789 N.W.2d 495; 2010 Mich. App. LEXIS 143; 30 I.E.R. Cas. (BNA) 594; 188 L.R.R.M. 2054

HOWELL EDUCATION ASSOCIATION MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON MCDOWELL, and BARBARA CAMERON, Plaintiffs/Counter-Defendants/Appellants, v HOWELL BOARD OF EDUCATION and HOWELL PUBLIC SCHOOLS, Defendants/Appellees and CHETLY ZARKO Intervenor/Counter-Plaintiff/Appellee.

**Subsequent History:** Motion granted by *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, 781 N.W.2d 307, 2010 Mich. LEXIS 892 (Mich., 2010)  
Leave to appeal denied by, Motion granted by *Howell Education Ass'n MEA/NEA v. Howell Bd. of Educ.*, 2010 Mich. LEXIS 2608 (Mich., Dec. 29, 2010)

**Prior History:** [\*\*\*1] Livingston Circuit Court. LC No. 07-22850-CK.

## Case Summary

### Procedural Posture

Plaintiffs, teachers and a union, brought a "reverse" action under the Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, against defendants, a board of education and a public school system, after intervening defendant requestor sought certain e-mails. The Livingston Circuit Court (Michigan) granted summary judgment to defendants and dismissed the action. Plaintiffs appealed.

### Overview

The teachers were all union officials. The appeal was limited to the question of whether the trial court properly concluded that all e-mails generated through defendants' e-mail system that were retained or stored by defendants were public records. The court stated that in order for the documents to be public records under *MCL 15.232(e)*, they had to have been stored or retained by defendants in the performance of an official function. The retention of the e-mails here was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between e-mails sent pursuant to educational goals and those sent by employees for personal reasons. The back-up system did not constitute an "official function" sufficient to render the

personal e-mails public records subject to the FOIA. Next, the e-mails involving internal union communications were personal e-mails. They did not involve teachers acting in their official capacity as public employees, but in their personal capacity as union members or leadership. The release of those e-mails would only reveal information regarding the affairs of a labor organization, which was not a public body.

### Outcome

The court reversed the trial court's decision. It remanded the case for further proceedings consistent with its opinion.

### Counsel:

**Judges:** Before: CAVANAGH, P.J., and FITZGERALD and SHAPIRO, JJ.

## Opinion

[\*231] [\*\*497] PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants and dismissal of their "reverse" Freedom of Information Act (FOIA), *MCL 15.231 et seq.*, action.<sup>1</sup> We reverse and remand for further proceedings consistent with this opinion. While we believe the issue in this case is one that must be resolved by the Legislature, and we call upon the Legislature to address it, we conclude that under the FOIA statute the individual plaintiffs' personal e-mails were not rendered public records solely because they were captured in a public body's e-mail system's digital memory. Additionally, we conclude that mere violation of an acceptable use policy barring personal use of the e-mail system--at least one that does not expressly provide that e-mails are subject to FOIA--does not render personal e-mails public records subject to FOIA.

### I. FACTUAL AND PROCEDURAL BACKGROUND

In March 2007, the intervenor, Chetly [\*\*\*2] Zarko, began submitting a series of FOIA requests to defendant Howell Public Schools (HPS), including requests for all e-mail beginning January 1, 2007, sent to and from three

<sup>1</sup> HNI A "reverse FOIA" claim is one where a party "seek[s] to prevent disclosure of public records under the FOIA." *Bradley v Saranac Community Sch. Bd of Ed.*, 455 Mich 285, 290; 565 NW2d 650 (1997).

HPS teachers: plaintiffs Doug Norton, Jeff Hughey, and Johnson McDowell. During that time, each of these teachers was also a member and official for plaintiff Howell Education Association, MEA/NEA (HEA); Norton was president, Hughey was vice president for bargaining, and McDowell was vice president for grievances. After the filing of this lawsuit, Zarko also requested all e-mail sent to or from plaintiff Barbara Cameron that was to or from Norton, McDowell, [\*232] and Hughey. Cameron is the UniServ Director employed by the Michigan Education Association to provide representational services to the HEA. The requests were apparently made in the context of heated negotiations for a new collective [\*498] bargaining agreement that were being reported in the local media.

The HEA objected to having to release union communications sent between HEA leaders or between HEA leaders and HEA members and took the position that, to the extent the e-mails addressed union matters, they were not "public records" as defined under FOIA. The HEA asked [\*\*\*3] counsel for HPS to confirm whether the internal union communications of Norton, Hughey, and McDowell would be treated as non-disclosable. Counsel for HPS noted that there was no reported caselaw regarding whether personal e-mails or internal union communications maintained on the computer system of a public body were public records subject to disclosure under FOIA and suggested a "friendly lawsuit" to determine the applicability of FOIA to the e-mail requests made by Zarko.

Plaintiffs filed their complaint in May 2007 against HPS and defendant Howell Board of Education requesting a declaratory judgment that: (1) personal e-mails and e-mails pertaining to union business are not "public records" as defined by FOIA; (2) that the collective bargaining e-mails were exempt pursuant to *MCL 15.243(1)(m)*; and (3) that the e-mails containing legal advice were exempt pursuant to *MCL 15.243(1)(g)*. Plaintiffs also requested an injunction to prevent the release of the documents until the issues could be resolved. A temporary restraining order (TRO) was entered on May 7, 2007. Following a show cause hearing, Zarko was permitted to intervene as an intervening defendant and counter-plaintiff, the TRO was extended [\*\*\*4] [\*233] "until further notice," and the parties agreed to organize all the e-mails for an in camera review. The parties were directed to release all uncontested e-mails and to deliver to the court all e-mails they contended were either not public records, or were subject to an exemption under FOIA.

The trial court appointed a special master to review approximately 5,500 e-mails.<sup>2</sup> At the same time, plaintiffs informed the trial court that they were withdrawing

their request to defendants that an exemption under *MCL 15.243(1)(m)* be asserted regarding e-mail sent between one or more plaintiffs and the school administration. Defendants then released those e-mails to Zarko.

Defendants moved for summary disposition in July 2008, arguing that plaintiffs lacked standing to prevent disclosure because all the documents were public records and only defendants had the authority to assert the exemption provisions of *MCL 15.232*. Defendants also argued that the trial court could not grant relief to Hughey given that his e-mail had already [\*\*\*5] been released and could not grant relief as to any e-mail from the other plaintiffs to which Hughey was a party because that e-mail was "no longer secret." Defendants argued that any exemption under *MCL 15.243(1)(m)* was inapplicable because the collective bargaining agreement had already been reached. Thus, there could be no harm to the collective bargaining negotiations, as the negotiations had concluded. Finally, defendants argued that plaintiffs were not entitled to injunctive relief because they could not show irreparable harm.

[\*234] The trial court held a hearing on defendants' motion for summary disposition. As to the injunction, the trial court concluded that plaintiffs lacked standing to [\*\*\*499] assert the claim. As to the claimed exemptions, the trial court concluded that those issues were moot "because the disputed emails have been released to the intervenor," resulting in a lack of an actual controversy. Finally, the trial court concluded that "any emails generated through the District's email system, that are retained or stored by the district, are indeed 'public records' subject to FOIA. . . ." Plaintiffs now appeal.

## II. STANDARD OF REVIEW

The issue before us is one [\*\*\*6] of statutory interpretation and arises in the context of a summary disposition motion. *HN2* We review de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008).

## III. ANALYSIS

The issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous e-mail technology. This is a challenging issue and one that, as we noted at the outset, we believe is best left to the Legislature because it is plainly an issue concerning social policy. Unfortunately, until the Legislature makes its intention clear by adopting statutory language that takes this technology into account, we must attempt to discern, as best we can given the tools available to us, what

<sup>2</sup> These emails did not include any to or from Hughey. On May 2, 2007, before the suit was filed, the review of these e-mails was completed and defendants released the e-mails to Zarko.

the intent of the Legislature would have been under the circumstances presented by this technology that it could not have foreseen. Cf. *Denver Publishing Co v Bd of Co Comm'rs of Arapahoe Colorado*, 121 P3d 190, 191-192 [\*235] (Colo., 2005). We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation adopted [\*\*\*7] in a horse and buggy world to the world of automobiles and air transportation.

*HN3* "Consistent with the legislatively stated public policy supporting the act, the Michigan FOIA requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those requested public records." *Mich Federation of Teachers*, 481 Mich at 664-665. It is undisputed that defendants are public bodies. *MCL 15.232(d)(iii)*. A "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." <sup>3</sup> *MCL 15.232(e)*. Plaintiffs have specifically limited their appeal to whether the trial court properly concluded that all e-mails generated through defendants' e-mail system [\*\*\*500] that are retained or stored by defendants are public records subject to FOIA. <sup>4</sup>

[\*236] The trial court determined that the personal e-mails are public records because they are "in the possession of, or retained by" defendants. See *MCL 15.232(e)*. However, *HN5* "mere possession of a record by a public body" does not render the record a public document. *Detroit News, Inc v Detroit*, 204 Mich App 720, 724; 516 NW2d 151 (1994). Rather, the use or [\*\*\*9] retention of the document must be "in the performance of an official function." See *id.* at 725; *MCL 15.232(e)*. For the e-mails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function.

Defendants argue that retention of electronic data is an official function where it is required for the operation of an educational institution, citing *Kestenbaum v Mich. State*

*Univ.*, 414 Mich 510; 327 NW2d 783 (1982). <sup>5</sup> However, the lead opinion in *Kestenbaum* "accept[ed] without deciding" that the electronic data at issue was a public record. *Id.* at 522 (FITZGERALD, J.). Only Justice RYAN's opinion addressed the issue of "an official function." *Id.* at 538-539 (RYAN, J.). Justice RYAN concluded that the magnetic tape involved, which was the school's purposefully created and retained record of student names and addresses, was, in fact, "prepared, owned, used, processed, and retained by the defendant public body 'in the performance of an official function'" because the university could not have functioned "without such a list of students." *Id.* at 539.

In the present case, defendants [\*\*\*10] can function without the personal e-mail. There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an [\*237] educational institution. Thus, we decline to conclude that they are equivalent to the student information at issue in *Kestenbaum*. Furthermore, *HN6* "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id.* We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA.

Defendants offer a simple solution approach to this puzzle, which is to simply say that anything on the school's computer system is "retained" by the school and therefore subject to FOIA. However, the school district does not assert that its back-up system was purposely designed to retain and store personal e-mail or that personal e-mail has some official function. It appears that the system is intended to retain [\*\*\*11] and store e-mail relating to official functions, but that it is simply easier technologically to capture all the e-mail on the system rather than have some mechanism to distinguish them. We do not think that because the technological net used to

<sup>3</sup> Although unnecessary for the resolution of this case, we wish to address the suggestion of amicus curiae Mackinac Center for Public Policy that the "it" in the clause "from the time it is created" refers to the public body. The amicus asserts that interpreting the "it" as a writing would cause the overruling of *Detroit News, Inc v Detroit*, 204 Mich App 720; 516 NW2d 151 (1994). [\*\*\*8] However, this ignores that *Detroit News* explicitly interpreted the "it" as meaning a writing:

The city relies on the *HN4* statutory clause "from the time it is created" found in the definition of public record. We do not construe this clause as requiring that a writing be "owned, used, in the possession of, or retained by a public body in the performance of an official function" from the time the writing is created in order to be a public record. A writing can become a public record after its creation. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward. [*Id.* at 725.]

Accordingly, we reject the suggested interpretation.

<sup>4</sup> Thus, we are not ruling on whether any exemptions apply or who has the standing to argue them.

<sup>5</sup> *Kestenbaum* was a three to three decision and has no majority opinion.

capture public record e-mail also automatically captures other e-mails we must conclude that the other e-mails are public records. <sup>6</sup> [\*\*\*501] To rule as defendants request would essentially render all personal e-mail sent by governmental employees while at work subject to public release upon request. We conclude that this was not the intent of the Legislature when it passed FOIA.

[\*238] E-mail has in essence replaced mailboxes and paper memos in government offices. Schools have traditionally, as part of their function, provided teachers with mailboxes in the school's main office. However, [\*\*\*12] we have never held nor has it even been suggested that during the time those letters are "retained" in those school mailboxes they are automatically subject to FOIA. Now, instead of physical mailboxes, we have e-mail. However, the nature of the technology is such that even after the e-mail letter has been "removed from the mailbox" by its recipient, a digital copy of it remains, possibly in perpetuity. This effect is due solely to a change in the technology being used and, absent some showing that the retention of personal email has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA. We do not suggest that a change in technology cannot be a part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.

This position is consistent with federal cases interpreting whether an item is an "agency record" under the federal FOIA. <sup>7</sup> In *Bloomberg, LP v Securities & Exch Comm*, 357 F Supp 2d 156 (DDC, 2004), the court determined that the electronic calendar for the chairman of the Securities and Exchange Commission (SEC) was not an "agency record." *Id.* at 164. [\*\*\*13] This was true even though the calendar included both personal and business appointments and "the calendar was maintained on the agency computer system [\*239] and backed-up every thirty days . . ." *Id.* The plaintiff had argued that the backing-up process integrated the calendar into the agency record system. *Id.* The SEC countered that em-

ployees were "permitted 'limited use of government office equipment for personal needs'" and that the routine back-up system did "not distinguish between personal and SEC business-related documents." *Id.* In making its determination, the court reiterated that "'employing agency resources, standing alone, is not sufficient to render a document an 'agency record.'" *Id.* (citation omitted). <sup>8</sup>

[\*\*502] The e-mails in the present case are analogous to the electronic calendar and other personal uses of SEC office equipment. Defendants' storage and retention of personal e-mails is a byproduct of the fact that all e-mail is electronically retained, regardless of whether it was personal or business-related. We are not persuaded that personal e-mails are rendered "public records" under FOIA merely by use of a public body's computer system to send or receive those e-mails or by the automatic back-up system that causes [\*\*\*15] the public body to "retain" those e-mails.

Contrary to Zarko's position, our determination that personal e-mails are not public records does not render

[\*240] MCL 15.243(1)(a) nugatory. *HN8 MCL 15.243(1)(a)* provides that public records may be exempt from disclosure where they contain "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." As Justice RYAN noted in his opinion in *Kestenbaum*, 414 Mich at 539 n 6, "[t]he question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exemption' . . ." Implicit in this statement is that some documents are not public records because they are private while other documents are public records but will fall within the privacy exemption.

For example, *HN9* personal information that falls within this exclusion includes home addresses and telephone numbers. *Mich Federation of Teachers*, 481 Mich at 677. Thus, when someone makes a FOIA request for an em-

<sup>6</sup> Indeed, we should not presume that the question would even end with personal e-mail sent on government computers. At oral argument, defendants would not concede that employees' personal e-mail would not be subject to FOIA even if the employees sent it on their personal laptop computers if, because the laptops used a government wireless system, the e-mail was captured and retained.

<sup>7</sup> *HN7* "Federal court decisions regarding whether an item is an 'agency record' under the federal FOIA are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *MacKenzie v Wales Twp*, 247 Mich App 124, 129 n 1; 635 NW2d 335 (2001).

<sup>8</sup> We note that the United States Supreme Court has granted certiorari in the case of *City of Ontario, California v Quon*, U.S. \_\_\_, 130 S. Ct. 1011; 175 L. Ed. 2d 617 (2009). While that case involves an issue of privacy raised by new communications [\*\*\*14] technology, it is unlikely to have any bearing on this case. In *Quon*, the city had an informal policy of allowing its employees to use their city-supplied pagers for personal text messaging provided the employee paid the extra cost of service. *Quon v Arch Wireless Operating Co. Inc.*, 529 F.3d 892, 897 (2008). Despite assurances that the city would not review the contents of the personal text messages, the city did so and an employee brought an action claiming violation of his Fourth Amendment right to be protected against unreasonable searches and seizures. *Id.* at 897-898. Because *Quon* involves the Fourth Amendment and not FOIA, it is unlikely to answer the question now before us.

ployee's personnel file, the personnel file is a public record, [\*\*\*16] *Bradley v Saranac Community Sch Bd of Ed.* 455 Mich 285, 288-289; 565 NW2d 650 (1997), but the employee's home address and telephone number may be redacted because they are subject to the privacy exclusion in *MCL 15.243(1)(a)*. The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records.

We recognize that the present case is distinguishable from *Bloomberg*, where limited use of the office equipment [\*241] for "personal needs" was expressly permitted, because defendants' employees have no such permission. Before logging into defendants' computer system, users are greeted by the following statement:

This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy which may be viewed at <http://www.howellschools.com/aup.html>.

All data contained on any school computer system is *owned* by Howell Public Schools, and [\*\*\*17] may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.

*By logging into this system, you acknowledge your consent to these terms and conditions of use.* [Emphasis added.]

Defendants' acceptable use policy provides, in relevant part:

Howell Public Schools provides technology in furtherance of the educational goals and mission of the District. As [\*\*503] part of the consideration for making technology available to staff and students, users agree to use this technology only for appropriate educational purposes. . . .

\* \* \*

Email is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any or all activity on the district's computer system and to inspect any user's email files. *Users should not expect that their communications on the system are private.* Confidential information should not be transmit-

ted via email.

\* \* \*

Appropriate use of district technology is defined as a use to further the instructional goals and mission of the district. [\*242] Members should consider [\*\*\*18] any use outside these instructional goals and mission constitutes potential misuse . . . .

\* \* \*

Members are prohibited from . . . [u]sing technology for personal or private business, . . . or political lobbying . . . .

Defendants argue that their acceptable use policy notified users that personal e-mail was subject to FOIA. We disagree. Although the use policy certainly gives notice to the users that school officials may look at their e-mail, and that the documents could be released pursuant to a subpoena, it in no way indicates that users' e-mail may be viewed by any member of the public who simply asks for it. Thus, we conclude that the public employees' agreement to this acceptable use policy did not render their personal e-mail subject to FOIA.

Furthermore, *HN10* we are not persuaded that a public employee's misuse of the technology resources provided by defendants, by sending private e-mails, renders those e-mails public records. The acceptable use policy makes clear that "[a]ppropriate use of district technology is defined as a use to further the instructional goals and mission of the district." An employee's use of a public body's technology resources for private communication is clearly [\*\*\*19] not in the furtherance of the instructional goals of the public body. Although this is an inappropriate use that could subject the employee to sanction for violation of the policy, the violation does not transform personal communications into public records. Indeed, the fact that the communication is sent in violation of the use policy militates in favor of the conclusion that the e-mail is not a public record because it falls expressly outside the performance of an official function, i.e. the furtherance of the instructional goals of the district.

[\*243] Our reasoning is also consistent with *Walloon Lake Water Sys. Inc v Melrose*, 163 Mich App 726, 730; 415 NW2d 292 (1987). In *Walloon*, a letter was sent to the township supervisor that "pertained in some way to the water system provided by plaintiff to part of the township." *Id.* at 728. The letter was read aloud at the township board's regularly scheduled meeting. *Id.* at 729. The plaintiff subsequently sought a copy of the letter under FOIA, but the township refused to provide it, claiming it was not a public record. *Id.* This Court concluded that the letter was a public record because, "once the letter was read aloud and incorporated into the [\*\*\*20] minutes of the meeting where the township conducted its business, it became a public record." used . . . in the per-

formance of an official function.” *Id.* at 730. [\*\*504] Thus, *HNII* the caselaw is clear that purely personal documents can become public documents based on how they are utilized by public bodies. However, it is their subsequent use or retention “in the performance of an official function” that rendered them so. In the present case, the retention of the e-mail by defendants on which the trial court relied was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between e-mail sent pursuant to the district’s educational goals and that sent by employees for personal reasons. The back-up system did not constitute an “official function” sufficient to render the e-mails public records subject to FOIA. See *Bloomberg*, 357 F Supp 2d at 164.

In reaching our decision, we have also considered two unpublished cases in which our Court has addressed issues that may be relevant. These cases are not precedential authority. However, given the limited published caselaw on the issue and the issue’s significance, we have reviewed them for guidance. [\*\*\*21] In *WDG Investment Co v Mich. Dep’t of Mgt & Budget*, unpublished opinion [\*\*244] per curiam of the Court of Appeals, issued October 25, 2002 (Docket No. 229950), a rejected bidder on a government project sued the state Department of Management and Budget (DMB), alleging fraud in the manner in which the bid was awarded. A second count in the action sought production, under FOIA, of the individual notes written by bid reviewing board members concerning the bids. The DMB asserted that it had no obligation to provide the notes because they were “personal” and not kept in the DMB files. This Court held that the notes were public records. We specifically noted that the defendants’ use of the word “personal” was undefined and vague, stating “[i]t is not at all clear from the record what defendants mean by ‘personal’ notes. We therefore decline to address this argument at this time.” *Id.*, slip op p 7, n 4. Thus, the case can offer only limited guidance. However, to the degree it is helpful, it indicates that individual notes taken by a decisionmaker on a governmental issue are still public records when they were taken in furtherance of an official function. This does not suggest, however, that notes sent from one governmental employee to another [\*\*\*22] about a matter not in furtherance of an official function are also public records.

A similar approach was followed in *Hess v City of Saline*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 260394), which involved the use of video cameras to record a city council meeting. At some point, the council adjourned but the video camera was not turned off and it re-

corded conversations among city staffers who remained in the council chambers talking for some time after the council members had left. A copy of the videotape of the staffers’ postmeeting conversations was sought under FOIA. We held that “the unedited videotape was not a public record. . . [as] no official city business was [\*\*245] conducted during that time” despite the fact that the city retained the unedited tape. *Id.*, unpub op at 2. The inadvertent taping of the conversations in *Hess* was due to human error in forgetting to turn off the recorder. The “taping” of the personal e-mail in this case was similarly inadvertent because, as a result of the nature of the capture technology, the recorder can never be turned off.

This is *not* to say that personal e-mails cannot become public records. For example, were a teacher to [\*\*\*23] be subjected to discipline for abusing the acceptable use policy and personal e-mails were used to [\*\*505] support that discipline, the use of those e-mails would be related to one of the school’s official functions--the discipline of a teacher--and, thus, the e-mails would become public records subject to FOIA. This is consistent with *Detroit Free Press, Inc v Detroit*, 480 Mich 1079; 744 N.W.2d 667 (2008). It is common knowledge that underlying that case was a wrongful termination lawsuit that resulted in a multi-million dollar verdict against the city of Detroit. During the course of the lawsuit and subsequent settlement negotiations, certain text messages became public, which had been sent between the Detroit mayor and a staff member through the staff member’s city-issued mobile device. The text messages indicated that the mayor and the staff member had committed perjury. Two newspapers filed FOIA requests for the settlement agreement from the wrongful termination trial, along with various other documents. Our Supreme Court found no error in the trial court’s determination that the settlement agreement was a public record subject to disclosure under FOIA. *Id.* However, the Supreme Court did *not* [\*\*\*24] rule that the text messages themselves were public records. The Court’s order denying leave to appeal contains no reference to text messages. Rather, [\*\*246] the order indicated that the documents setting forth the settlement agreement were subject to FOIA. *Id.*

Having determined that the personal e-mails are not “public records” subject to FOIA, the next question is whether e-mails involving “internal union communications”<sup>9</sup> are personal e-mails. We conclude that they are. Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any e-mail sent in that capacity is personal. This

<sup>9</sup> We define “internal union communications” [\*\*\*25] to mean those communications sent only between or among HEA members and leadership, involving union business or activities, including contract negotiation, grievance handling, and voting. Any e-mail involving these topics that is sent to the district is no longer purely between or among HEA members and leadership and, therefore, does not fall under this category.

holding is consistent with *HN12* the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees . . ." *MCL 15.231(2)*. See *Walloon*, 163 Mich App at 730 (holding that the purpose of FOIA "must be considered in resolving ambiguities in the definition of public record"). The release of e-mail involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.

#### IV. CONCLUSION

This is a difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people's imaginations) at the time the statute was enacted and that has the capacity to make "transparent" far more than the drafters of the statute could have dreamed. When the statute was adopted, [\*247] personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained. Thus, we conclude that *HN13* the statute was not intended to render all personal e-mails public records simply because they are cap-

tured by the computer system's storage mechanism as a matter of technological convenience.

Accelerating communications technology has greatly increased tension between the value [\*\*\*26] of governmental transparency and that of personal privacy. As we stated at the outset, the ultimate decision on this [\*\*506] important issue must be made by the Legislature and we invite it to consider the question. However, on the basis of the statute adopted in 1977, the technology that existed at that time, and the caselaw available to us, we conclude that the trial court erred in its conclusion that all e-mails captured in a government e-mail computer storage system, regardless of their purpose, are rendered public records subject to FOIA.<sup>10</sup>

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question being involved.

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald

/s/ Douglas B. Shapiro

---

<sup>10</sup> Although the question is not before us, we note that an e-mail transmitted in performance of an official function would appear to be a public record under FOIA.

---

**EXHIBIT E**

# Porter County Chapter of Izaak Walton League, Inc. v. United States Atomic Energy Com.

United States District Court for the Northern District of Indiana, Hammond Division  
August 13, 1974  
Civ. A. No. 72 H 251

Reporter: 380 F. Supp. 630; 1974 U.S. Dist. LEXIS 7174

PORTER COUNTY CHAPTER OF the IZAAK WALTON LEAGUE OF AMERICA, INC., et al., Plaintiffs, v. UNITED STATES ATOMIC ENERGY COMMISSION and United States of America, Defendants

## Case Summary

### Procedural Posture

Defendant Government moved for summary judgment in action instituted by plaintiffs to compel production of various agency records pursuant to the Freedom of Information Act, 5 U.S.C.S. § 552.

### Overview

Plaintiffs sued defendant Government, seeking to compel production of various agency records pursuant to the Freedom of Information Act (the Act), 5 U.S.C.S. § 552. Defendant Government moved for summary judgment. The court granted defendant Government's motion, finding that the documents requested by plaintiffs were exempt from mandatory production under the Act. The court found that the documents were clearly an integral part of the defendant Government's deliberative processes and that such documents would not be available by law to a party other than an agency in litigation with the agency. Accordingly, the documents were clearly within the scope of exemption under the Act.

### Outcome

The court granted defendant Government summary judgment, finding that the documents requested by plaintiffs were exempt from mandatory production.

**Judges:** **[\*\*1]** Allen Sharp, District Judge.

**Opinion by:** SHARP

## Opinion

**[\*631]** FINDINGS OF FACT AND CONCLUSIONS OF LAW

ALLEN SHARP, District Judge.

### I. Background

1. On October 6, 1972, plaintiffs instituted this action to compel production of various agency records pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The complaint charged the Atomic Energy Commission (AEC) with not making available various documents which plaintiffs allegedly needed in connection with an AEC licensing proceeding involving an application of the Northern Indiana Public Service Company for a permit authorizing construction of a nuclear plant in Porter County, Indiana. Plaintiffs had intervened in that proceeding and were opposed to the issuance of a construction permit.<sup>1</sup> Plaintiffs requested a Court order directing release of the records and a temporary injunction deferring a hearing in the licensing proceeding pending the Court's consideration of the merits of the complaint.

**[\*\*2]** 2. On October 10, 1972, the Court denied plaintiffs' request for a temporary restraining order against the start of the administrative hearing, primarily on the ground that plaintiffs had not demonstrated they would suffer irreparable injury if the hearing began as scheduled. The Court postponed for subsequent consideration the merits of plaintiffs' Freedom of Information Act claims relating to withheld documents.

3. On March 16, 1973, plaintiffs filed a motion to compel production of withheld documents for *in camera* inspection. Defendants opposed that motion and moved for dismissal of this action pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56. Accompanying defendants' motion was an affidavit of Mr. Lee V. Gossick, Assistant Director of Regulation of the Atomic Energy Commission, dated March 30, 1973, and an affidavit of Mr. Raymond F. Fraley, Executive Secretary of the Advisory Committee on Reactor Safeguards (ACRS), dated March 30, 1973. These affidavits discussed the documents requested by plaintiffs, the records produced in response to plaintiffs' request, the documents, **[\*\*3]** or portions of documents, withheld from production, and the reasons for withholding. As explained in a subsequent affidavit of Mr. Fraley, dated December 21, 1973, defendants subsequently furnished plaintiffs various additional materials, or portions thereof.

4. On December 27, 1973, the Court heard oral argu-

<sup>1</sup> In response to plaintiffs' document request, the AEC produced over 11,500 pages of records.

ment on the aforesaid motions, and determined *inter alia* that (Order dated December 28, 1973):

a. The Government's Motion would be treated as a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure;

[\*632] b. All parties would have until January 31, 1974, to file any supplemental material they wished to bring to the Court's attention in regard to the said Motion for Summary Judgment; and

c. The Government should submit, by January 31, 1974, all requested materials and documents remaining in dispute, for *in camera* inspection by the Court.

5. Pursuant to paragraph "b" of the Court's decision, plaintiffs for the first time responded to the Government's Motion, on January 31, 1974. The Government submitted the records in dispute for the Court's *in camera* review by letter dated January 25, 1974.

## II. [\*\*4] Documents In Issue

6. Plaintiffs' document request included essentially all internal records of the AEC and of the Advisory Committee on Reactor Safeguards (ACRS), concerning the proposed "Bailly" nuclear power plant, as well as assorted documents on various related reactors. (Gossick affidavit, par. 7; Fraley affidavit, par. 7).

7. As stated, the Government furnished plaintiffs over 11,500 pages of records in response to this request, despite its expressed belief that much of the material was exempt from mandatory disclosure under the exemption provisions of the Freedom of Information Act, 5 U.S.C. § 552(b). The Government objected to disclosure of two categories of documents, which it withheld *in toto*; in addition, the Government made certain deletions from the 11,500 released pages. The categories of documents withheld are:

a. Various papers containing legal advice, prepared by counsel for the AEC's Regulatory Staff (seven pages);

b. Assorted generally untitled, undated and un-circulated handwritten personal notes of AEC and Argonne National Laboratory personnel (about 90 pages).

The Government contended that these documents

were exempt [\*\*5] from mandatory production pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

With reference to the deletions made in produced documents, the Government contended that the deleted material was exempt pursuant to exemptions 4 and 5 of the Act, 5 U.S.C. §§ 552(b)(4), 552(b)(5). Both the records withheld *in toto* and the deletions in produced documents were discussed and explained in the aforementioned Government affidavits. All withheld documents, together with copies of all portions of documents deleted from materials provided to plaintiffs, were submitted to and reviewed by the Court *in camera*.

### A. Legal Advice Prepared By Counsel

8. In the course of its extensive review of any construction permit application, the AEC's Regulatory Staff often must rely on the advice of counsel. For example, counsel needs to evaluate the legal adequacy of many documents submitted by an applicant or prepared by the Regulatory Staff, such as Environmental Statements prepared pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332, or Safety Evaluations prepared pursuant to the Atomic Energy Act, 42 U.S.C. § 2011 et seq.<sup>2</sup> Questions [\*\*6] on matters such as the Freedom of Information Act and AEC discovery practices also arise. While much of this advice is presented orally, written communication is frequently necessary. In the present case, seven pages of such legal advice were included within the records requested by plaintiffs.

[\*633] 9. On the basis of its review of the documents in issue, as well as the affidavit of Mr. Gossick and the complete record in this case, the Court finds that disclosure of lawyers' advice to clients, and the precedent which such disclosure might present, [\*\*7] would severely impede lawyer-client communications within a governmental agency. Materials containing such advice, such as the records here in issue, would not be available by discovery in ordinary litigation.

### B. Uncirculated Handwritten Personal Notes

10. In executing their responsibilities relating to the AEC's health and safety and environmental reviews, individual AEC staff members frequently prepare assorted handwritten materials for their own use. Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records," nor is

<sup>2</sup> Counsel's advice and recommendations in this case with respect to the staff's draft environmental statement are repeated in a subsequent note from Mr. James Henry, Projects Manager, to Mr. A. Giambusso, Deputy Director for Reactor Projects. While this note was furnished to plaintiffs, the lawyers' advice and recommendations were deleted. The Court's findings and conclusions concerning counsel's advice apply equally to the deleted material in this note.

there any indication in the record that anyone other than the author exercises any control over such documents.

11. On the basis of its review of the documents in issue, as well as the Gossick affidavit and the entire record in this case, the Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual [\*\*8] staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. Even if the records were "agency records," their disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. Such notes would not be available by discovery in ordinary litigation.

### C. Deleted Material In Produced Documents

12. As noted in paragraph 7, above, various deletions were made on about fifty of the approximately 11,500 pages furnished to plaintiffs. These deletions were contained in documents of the Commission's Regulatory Staff and in documents of the aforementioned Advisory Committee on Reactor Safeguards. In Regulatory Staff documents, two types of information were deleted: a) confidential commercial information, and b) staff opinions, recommendations and advice. No confidential commercial information was identified in the requested documents of the ACRS, and only opinions, recommendations, and advice of individuals, and other material inextricably intertwined with this advisory committee's decision-making processes, were deleted [\*\*9] from ACRS materials.

#### 1. Confidential Commercial Information

13. In connection with its responsibilities to protect the public health and safety, the AEC requires all applicants for a construction permit to file an extensive application, generally consisting of several volumes. This application is extensively reviewed by the AEC Regulatory Staff and the Advisory Committee on Reactor Safeguards. Both in this original application and in the course of subsequent correspondence and discussions during the staff's review, a great deal of technical, commercial, and financial information is submitted by the applicant, the manufacturer of the proposed facility, or suppliers of specific components. While most of this information is made public, together with most other material relating to an application, some constitutes privileged commercial or financial information, whose disclosure would cause substantial harm to the competitive position of the submitting company, and is supplied by the company only pursuant to an understanding that it will be kept confidential. (The parties referred to such material as "proprietary.")

14. About fourteen pages of disputed material were [\*\*10] deleted, in whole or in part, because the informa-

tion was found to be "proprietary." Most of these [\*\*634] pages, essentially all in chart form, related to the Bailly plant "Off-Gas System," to be built by the General Electric Company; in addition, part of one AEC inspector's report was deleted because it contained a complete listing of all reactor pressure vessels then in fabrication by Combustion Engineering, Inc., including estimated delivery dates. Defendants submitted to this Court letters received by AEC from each of these companies, as well as from counsel for Northern Indiana Public Service Company, asserting that the information was proprietary and requesting continued confidential treatment thereof. The letters had previously been supplied to plaintiffs in connection with their role in the AEC licensing proceedings on the Bailly plant. In this Court, plaintiffs did not challenge any of the statements made in any of the letters.

15. Defendants did not automatically accept the companies' assertions that the information was proprietary. Each assertion was reviewed by the AEC staff, which determined that the assertion was made in accordance with normal company procedures [\*\*11] having a rational basis, and that the information involved is in fact customarily held in confidence and is not customarily made available to the public. The Staff experts further concluded that each claim was not unreasonable, and that the information should be accorded protection. (Gossick affidavit, paras. 12, 17). On the basis of the entire record -- and with no evidence to the contrary -- this Court accepts the defendants' determinations with respect to the proprietary information.

16. Defendants stated, and plaintiffs did not disagree, that plaintiffs, as parties to the AEC licensing proceeding, could have received access to the "proprietary" information in issue pursuant to an appropriate protective arrangement prohibiting further dissemination. (Gossick affidavit, para. 13). Thus, at stake here was not plaintiffs' own access to the information, but rather whether the Government must make the material publicly available, without any restrictions whatsoever. In addition to what has already been said, the Court believes that unrestricted release of such private commercial information would tend to adversely affect the Government's own ability to gain access to similar [\*\*12] information in the future. Ultimately, such release could seriously affect the thoroughness of AEC review of license applications, and have an adverse impact on public health and safety.

17. The remaining proprietary information here at issue consisted of detailed plant security information; specifically, information concerning various nuclear reactor licensees' control and accounting procedures for safeguarding licensed nuclear material, or detailed measures for the physical security of a licensed facility. The Court agrees, and no contrary evidence was suggested, that "release of such information could facilitate attempts at sabotage, diversion of nuclear material, or other attacks

upon nuclear power facilities, to the obvious detriment of public health and safety." (Gossick affidavit, par. 18).

### 2. Opinions And Recommendations Of Individual Staff Members

18. As stated above (par. 8, fn. 2), the lawyers' opinions and advice in issue in part were summarized in a note from a Regulatory Staff official to his supervisor. This summary was deleted from the note before that document was released. In addition, three other brief passages were deleted from the thousands [\*\*13] of Regulatory Staff pages produced. Each of these passages was clearly an opinion or recommendation of the individual author. Both the documents and Mr. Gossick's affidavit establish that these opinions or recommendations were all part of the agency's deliberative, policy-making, and decisional processes involved in executing its important health, safety, and environmental responsibilities.

19. In conducting a thorough review, it is essential that Staff members be able freely to communicate with each other. Disclosure of internal communications [\*635] such as were here deleted can hamper the candid exchange of views and the ultimate policy-making process. Such opinions and recommendations would not be available by discovery in ordinary litigation.

### 3. Deletions In Documents Of The Advisory Committee On Reactor Safeguards (ACRS)

20. The ACRS was established in 1957 by Congress with specific safety review and advisory functions, to assure "that any features of new reactors would be as safe as possible." (H.R.Rep.No.435, 85th Cong., 1st Sess., at 24). *HNI* The Act requires the Committee to "review safety studies and facility license applications referred to it and [\*\*14] . . . make reports thereon. . . . advise the Commission with regard to the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards, and . . . perform such other duties as the Commission may request." (42 U.S.C. § 2039)

21. The Committee is authorized a maximum of 15 members appointed by the Atomic Energy Commission for terms of 4 years each. All members are scientists or engineers who are eminently qualified in various fields needed to conduct a nuclear safety review. Insofar as is relevant here, the Committee's primary objective with respect to any nuclear license application is to issue the collective report to the AEC required by the Atomic Energy Act. It accomplishes this task by initially appointing a subcommittee, generally consisting of 4 or 5 ACRS members, for each application. The subcommittee is used to insure that sufficient information is developed for a full ACRS decision and that any new or novel aspects of a proposed reactor design warranting special consideration are identified. The subcommittee member-

ship is supplemented by consultants in those areas where a special problem or novel aspect of the reactor design [\*\*15] requires particular expert knowledge. On the basis of the subcommittees' groundwork, the full Committee meets to discuss the application and formulate a report to the AEC. The report itself becomes a part of the public record concerning the license application in issue.

22. The Committee's report is always a collegial document, reflecting the collective view of the Committee as a whole. In cases where members wish to express reservations to the majority view, separate views of individual members are appended to the report. It was the Committee's strongly expressed view that "its effectiveness -- indeed, the ability to carry out its advisory function -- is in large measure based on two factors: its substantial independence in giving safety advice, and the ability to carry out its collegial operation on a confidential basis where necessary." (Fraley affidavit, par. 6). To assure fully informed decisionmaking and proper assessment of all relevant safety considerations in the important area of nuclear power, it is important that this view be accommodated insofar as permitted by law.

23. The ACRS withheld no records *in toto* in response to plaintiffs' broad document request. [\*\*16] On various released materials, however, the Committee deleted certain passages, containing personal opinions, recommendations, or advice of individual Committee members or staff members, or other material directly reflecting the Committee's deliberations in evaluating the Baily plant application. In addition to minutes of meetings of the ACRS and its subcommittees, the materials containing deletions were all generated as part of the Committee's decisionmaking processes relating to the issuance of a report on the Baily application. (For example, the Committee deleted from its "Background Memorandum" material summarizing how and why the Committee's final report came to include particular conclusions.)

24. Disclosure of such deleted material would impede free and candid Committee consideration of an application, with potential adverse effect on public health and safety. Especially in view of [\*636] the difficulty of distinguishing between "purely factual," and advisory or deliberative material, it is noteworthy how little was deleted by the Advisory Committee before the records were released. In this connection, Mr. Gossick's affidavit concerning Regulatory Staff records [\*\*17] applies equally well to the Committee's deletions: ". . . the marshalling and highlighting of factual material is itself often a reflection of personal opinion and advice. In combining, emphasizing and discussing certain facts while omitting or minimizing others, individual staff members in essence are expressing their own personal views concerning the relative importance of these facts -- views which may or may not be shared by other persons involved in the overall decisionmaking process." (Gossick

affidavit, par. 15). The material deleted would not be available by discovery in ordinary litigation.

25. As already noted, the Court considered the complete record, including the disputed records themselves in reaching its conclusions in this case. In expounding on its findings, the Court finds it unnecessary to discuss each particular deletion in every contested document. The findings expressed for groups of documents apply equally to the particular deletions in that group. Finally, none of the documents can be further divided to meaningfully produce additional material, without endangering the confidentiality of the properly withheld information.

### III. Conclusions Of Law

[\*\*18] 1. The Freedom of Information Act (FOIA), 5 U.S.C. § 552, is a broadly conceived statute which seeks to permit public access to much previously-withheld official information. Subsection (b) of the statute, containing specific categories of records exempt from the Act's mandatory disclosure provisions, "is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *EPA v. Mink*, 410 U.S. 73, 80, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119 (1973). The records and portions of records withheld in this case clearly fall within exemptions 4 and 5 of the Act.

#### Exemption 4

2. Exemption 4 of the Act, *HN2* 5 U.S.C. § 552(b)(4), exempts all

"trade secrets and commercial or financial information obtained from a person and privileged or confidential".

The Senate Report on the Act describes the purpose of this section as follows:

"This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by [\*\*19] the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. \* \* \*

S.Rep.No.813, 89th Cong., 2d Sess. 9 (1964). The House Report adds:

"It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has

obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." H.R.Rep.No.1497, 89th Cong., 2d Sess. 10 (1964).

3. The exemption "has a dual purpose. It is intended to protect interests of both the Government and the individual [supplying the information]." *National Parks and Conservation Assoc. v. Morton*, 162 U.S. App. D.C. 223, 498 F.2d 765, 767 (D.C. Cir. 1974). *HN3* It covers information which is "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. *Getman v. NLRB*, 146 U.S.App.D.C. 209, 450 F.2d 670, 673 (1971), quoting *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802 (S.D.N.Y.1969), appeal dismissed, 436 F.2d 1363 [\*\*20] (2d Cir. 1971)." *Id.*, at p. 766. See [\*\*637] also *Sterling Drug, Inc. v. FTC*, 146 U.S.App.D.C. 237, 450 F.2d 698, 709 (1971).

4. Applying these criteria, the Government's deletions in this case pursuant to exemption 4 were clearly appropriate. (Findings of Fact 13-17). Indeed, the AEC took special efforts to assure that private claims that information is "proprietary" were properly justified and reviewed, 10 C.F.R. 2.790(b), and that even properly privileged information could be made available to persons having an appropriate need therefor. (Finding of Fact 16).

#### Exemption 5

5. Exemption 5 of the Act, *HN4* 5 U.S.C. § 552(b)(5), exempts all

"inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

6. The Courts have recognized that:

"the Congress intended that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.

The basis of Exemption (5), as of the privilege which [\*\*21] antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view -- a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind;

Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal." *Ackerly v. Ley*, 137 U.S.App. p.D.C. 133, 420 F.2d 1336, 1341 (1969).

See also *EPA v. Mink*, *supra*; *Freeman v. Seligson*, 132 U.S.App.D.C. 56, 405 F.2d 1326, 1339 (1968) [5 U.S.C. § 552(b)(5) was enacted as "a clear expression of congressional policy to hold the line on disclosure of materials of this sort."]; *International Paper Company v. FPC*, 438 F.2d 1349, 1355 (2d Cir. 1971).

7. The documents and portions of documents here in issue -- lawyers' advice, opinions and recommendations of individual staff members, opinions of ACRS members, summaries of the internal deliberations of the Committee, etc. -- are clearly an integral part of the Government's deliberative processes. Such documents [\*\*22] "would not be available by law to a party other than an agency in litigation with the agency."<sup>3</sup> Accordingly, they are clearly within the scope of exemption 5.

8. Minutes of meetings of the ACRS have already been considered under the FOIA by the Seventh Circuit, as well as by the United States District Court for the Northern District of Illinois. *Comey et al. v. AEC et al.*, D.C.N-

.D.Ill., Civ. No. 72 C 1744; on appeal, 7th Cir., 481 F.2d 1407. While not reaching the question of whether ACRS minutes are *per se* exempt from disclosure, the Court of Appeals reviewed forty pages of such minutes which had been released with deletions, as in this case. Except for two brief deletions, the Court specifically concluded that "the parts excised by the government from the forty pages were properly found [\*\*23] by the district court to be within exemption 5." (unreported slip opinion, p. 6, July 27, 1973, see 481 F.2d 1407 (1973); see also July 10, 1973 District Court order in same case, not appealed, holding that deletions in other ACRS records such as are here in issue are exempt from production pursuant to exemption 5.)

#### [\*638] IV. Conclusion

On the basis of the foregoing Findings of Fact and Conclusions of Law, and the record demonstrating that there is no genuine issue as to any material fact and that the Government is entitled to judgment as a matter of law, the Government's motion for summary judgment is granted. An appropriate order was entered on June 26, 1974.

<sup>3</sup> With respect to the uncirculated handwritten notes discussed in paragraphs 10 and 11, *supra*, the Court separately and in addition concludes they are not "agency records" within the scope of 5 U.S.C. 552(a)(3).