As a matter of proper business decorum, the Board of Directors respectfully request that all cell phones be turned off or placed on vibrate. Also, to prevent any potential distraction of the proceeding, we request that side conversations be taken outside the meeting room.

AGENDA
REGULAR BOARD MEETING
THREE VALLEYS MUNICIPAL WATER DISTRICT

Wednesday, May 3, 2017 at 8:00 AM

The mission of Three Valleys Municipal Water District is to supplement and enhance local water supplies to meet our region's needs in a reliable and cost-effective manner.

Item 1 – Call to Order — **Kuhn**

Item 2 – Pledge of Allegiance — **Kuhn**

Item 3 – Roll Call — **Executive Assistant**

- ☐ Bob Kuhn, Division IV – President
- ☐ David De Jesus, Division II – Vice President
- ☐ Brian Bowcock, Division III – Secretary
- ☐ Joe Ruzicka, Division V – Treasurer
- ☐ Dan Horan, Division VII – Director
- ☐ Carlos Goytia, Division I – Director
- ☐ John Mendoza, Division VI - Director

Item 4 – Additions to Agenda *(Government Code Section 54954.2(b)(2)* — **Kuhn**

Additions to the agenda may be considered when two-thirds of the Board members are present (or all members if less than two-thirds are present), determine a need for immediate action, and the need to take action came to the attention of TVMWD subsequent to the agenda being posted; this exception requires a degree of urgency. *The Board shall call for public comment prior to voting to add any item to the agenda after posting.*

Item 5 – Reorder Agenda — **Kuhn**

Item 6 – Public Comment *(Government Code Section 54954.3)* — **Kuhn**

Opportunity for members of the public to directly address the Board on items of public interest that is within the subject matter jurisdiction of TVMWD. The public may also address the Board on items being considered on this agenda. TVMWD requests that all public speakers complete a speaker's card and provide it to the Executive Assistant.

We request that remarks be limited to five minutes or less.

Item 7 – Board Presentations

Item 7A – San Gabriel Valley Economic Partnership

Mr. Jeff Allred, President and CEO and Ms. Regina Wang, Director of Communications and Marketing will be in attendance to share information regarding programs and services available from the Partnership.

Item 7B – Southern California Water Committee

Mr. Charley Wilson, Executive Director will be attendance to share information regarding SCWC's 2017 Communication Plan.

Item 8 – General Manager's Report — Hansen

Item 8.A – Administration staff will provide brief updates on existing matters under their purview and will be available to respond to any questions thereof.

8.A.1 – Making Water Use Conservation a California Way of Life Update [enc]

The Board will be provided an update on current water use efficiency legislation strategies under consideration and their impact on long range planning framework.

8.A.2 – Legal Update California Public Records Act, Supreme Court Ruling [enc]
Mr. Steve Kennedy will provide the Board with an update on the potential impacts to TVMWD based upon this ruling.

Item 8.B – Engineering-Operations staff will provide brief updates on existing matters under their purview and will be available to respond to any questions thereof.

8.B.1 – Project Summary Update [enc]

The Board will review a summary update of ongoing projects.

Item 8.C – Finance-Personnel staff will provide brief updates on existing matters under their purview and will be available to respond to any questions thereof.

8.C.1 – California Municipal Treasurers Association's (CMTA) Investment Policy Certification [enc]

The Board will receive information regarding TVMWD's success in completing CTMA's Investment Policy Certification Program.

Item 9 – Closed Session — Kuhn

9.A – Conference with Legal Counsel – Existing Litigation

Pursuant to Government Code Section 54956.9(d)(1)

San Diego County Water Authority v. Metropolitan Water District of Southern California

State of California Court of Appeal, First Appellate District, Division Three, Case Nos. A146901 and A148266

9.B – Conference with Legal Counsel – Existing Litigation

Pursuant to Government Code Section 54956.9(d)(1)
Chino Basin Municipal Water District v. City of Chino, et.al.
San Bernardino County Superior Court, Case No. RCV51010

Item 10 – Report Out Of Closed Session **Kuhn**

Item 11 – Future Agenda Items **Kuhn**

Item 12 – Adjournment

Board adjourned to May 17, 2017 Regular Board Meeting at 8:00 AM.

American Disabilities Act Compliance Statement

Government Code Section 54954.2(a)

Any request for disability-related modifications or accommodations (including auxiliary aids or services) sought in order to participate in the above agendized public meeting should be directed to the TVMWD's Executive Assistant at (909) 621-5568 at least 24 hours prior to meeting.

Agenda items received after posting

Government Code Section 54957.5

Materials related to an item on this agenda submitted after distribution of the agenda packet are available for public review at the TVMWD office located at, 1021 East Miramar Avenue, Claremont, CA, 91711. The materials will also be posted on the TVMWD website at www.threevalleys.com.

Three Valleys MWD Board Meeting packets and agendas are available for review on its website at www.threevalleys.com. The website is updated on Sunday preceding any regularly scheduled board meeting.

Item 7A – BOARD PRESENTATION

SAN GABRIEL VALLEY ECONOMIC PARTNERSHIP

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Item 7B – BOARD PRESENTATION

SOUTHERN CALIFORNIA WATER COMMITTEE

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Staff Report/Memorandum

To: TVMWD Board of Directors

From: Richard W. Hansen, General Manager

Date: April 5, 2017

Subject: Making Water Use Conservation a California Way of Life Update

☐	**For Action**	☐	**Fiscal Impact**	☐	**Funds Budgeted**
☒	**Information Only**	☐	**Cost Estimate:**	**$**	

Discussion:

The Governor declared the California Drought Emergency over on April 4, 2017. However, he charged five (5) State agencies with implementing numerous items included in a Plan written by the five State agencies. The Plan, "Making Water Conservation a California Way of Life" implementing Executive Order B-37-16 was just released in April.

The five agencies, collectively referred to as the "EO Agencies", are the Department of Water Resources, the State Water Resources Control Board, the California Public Utilities Commission, the California Department of Food and Agriculture, and the California Energy Commission. They were charged with implementing the Executive Order's four inter-related objectives: 1) using water more wisely, 2) eliminating water waste, 3) strengthening local drought resilience, and 4) improving agricultural water use efficiency and drought planning.

Attached is a coalition comment letter that the district joined, expressing our overall support as well as detailing key areas for the legislature to consider in the process of adopting new legislation implementing the Governor's EO. Many items in this Plan will impact current legislation and has spurred numerous new legislative items. Two charts describing what is currently known about these impacts and the interactions between the Plan and current and proposed legislation is also attached, along with a brief Legislative Analyst Office (LAO) overview of the State's Water Conservation efforts. Until legislation is passed and details finalized, the true impacts of the Plan on legislation and conservation activities are unknown.

Strategic Plan Objective:

3.3 – Be accountable and transparent with major decisions

3.5 – Ensure that all the region's local government policy makers understand TVMWD's role in the delivery of water

April 24, 2017

VIA EMAIL: Committee Secretary Chinook Shin, Chinook.Shin@asm.ca.gov

The Honorable Eduardo Garcia
Chair, Assembly Water, Parks and Wildlife Committee
State Capitol, Room 4140
Sacramento, CA 95814

Re: Comments on Proposed Legislation to Implement Executive Order B-37-16, "Making Water Conservation a California Way of Life"

Dear Chair Garcia,

The undersigned agencies appreciate this opportunity to submit comments on legislation currently under review by the Assembly Water, Parks and Wildlife Committee to implement the Governor's Executive Order B-37-16, "Making Water Conservation a California Way of Life"

Water resource management in California faces unprecedented challenges from climate change and a growing population. The Chino Groundwater Basin region, located primarily in the western end of San Bernardino County, is at the cutting edge of these challenges, as our region lies in the interior hotter area of southern California and is one of the fastest growing areas of the State.

Collectively, our agencies have worked hard to develop a robust portfolio of local, drought-resilient water supplies that also help us reduce our dependence on imported water. Over the past 15 years, we have invested nearly five hundred million dollars in ratepayer and state/federal funding to develop over 100,000 acre-feet of new water supplies from recycled water, groundwater desalination, storm water capture and recharge, and improved water efficiency. We also did our part to achieve the Governor's mandated reductions in residential water use during the drought. The success of our collective work is underscored by the fact that the Chino Basin is one of the only regions in the State in which groundwater supplies increased between 2013 and 2016.

In December 2016, we supported and offered suggestions to improve the state agency draft report, "Making Water Conservation a California Way of Life, Implementing Executive Order B-37-16." The final report incorporates many of our requested changes, including recognition of drought-resilient supplies, local use of state data, and an ongoing stakeholder process.

Consistent with our previous comments to the Administration, as you consider legislation to implement the Governor's order we request that each of the following elements be included in bills forwarded to the Assembly floor.

1. **Explicitly recognize the value of all locally developed, drought resilient, and hydrologically independent water supplies in the water shortage contingency plans.** Development of local water supplies that are not impacted by droughts should be deemed fully reliable under all historical drought hydrology and plausible climate change impacts. These supplies include not only recycled water, potable reuse, and ocean desalination, but also treatment/reuse of contaminated groundwater and designated storage accounts in sustainably managed groundwater basins. Suppliers that have developed these types of supplies should be recognized for their advanced planning and investments, and these water supplies should not be subject to reductions under shortage conditions.

2. **Build upon existing long-term water efficiency standards set under the authorized regulatory processes and supported by the Legislature.** Use of landscape budgets with efficiency standards to establish outdoor targets has been authorized by the Legislature since 1992, and these requirements have been updated twice (as recently as 2015) through Department of Water Resources regulatory proceedings on the state's Model Water Efficiency Landscape Ordinance. Similarly, the Legislature in 2015 directed the State Water Resources Control Board to adopt performance standards for reducing urban water losses due to leaks (SB 555). Consistent with the State's final report, these existing efficiency standards should be used as the starting point for setting and/or updating future statewide water efficiency standards.

3. **Avoid overlap between existing and future compliance targets.** Consistent with the State's final report, maintain the requirement under SB X7-7 for water suppliers to meet the existing statutory 20 percent urban water use reduction goal by 2020, and require compliance with newly adopted urban water use targets in 2025. This avoids the confusion of overlapping regulatory requirements.

4. **Ensure compliance requirements recognize variations in local conditions.** Compliance with water use efficiency requirements must recognize the diversity of water supply conditions and uses across the State. We support customized water efficiency targets based on statewide standards and local water supplier control over their actions to achieve the efficiency targets. We also support regional collaboration in assisting individual agencies' efforts in achieving compliance.

5. **Ensure that appropriate considerations be given to water supplier targets based upon unique local conditions.** An adjustment process for unique circumstances such as seasonal increases in the population served, use of swamp coolers, and provision of water for horses and other livestock in areas served by water suppliers, is appropriate to customize efficiency-based targets to local conditions.

6. **Clearly affirm that water rights under the framework are protected consistent with existing law.** Legislation should include explicit language that maintains protection of rights to conserved water.

Finally, we are encouraged that the Legislature is considering all of the bills related to this important area of public policy through the regular policy committee process, as initiated by your Committee hearing on April 25.

Thank you for the opportunity to provide comments on this important legislation.

Sincerely,

Eunice Ulloa, Executive Director
Chino Basin Water Conservation District

Benjamin Lewis, Jr., General Manager Foothill Dist.
Golden State Water Company

Rad Bartlam, City Manager
City of Chino Hills

P. Joseph Grindstaff, General Manager
Inland Empire Utilities Agency

Chad Blais, Public Works Director
City of Norco

Todd Corbin, General Manager
Jurupa Community Services District

Linda Lowry, City Manager
City of Pomona

Mark Kinsey, General Manager
Monte Vista Water District

Martin Thouvenell, Interim City Manager
City of Upland

Scott Burton, Utilities General Manager
Ontario Municipal Utilities Company

Martin Zvirbulis, General Manager
Cucamonga Valley Water District

Charles Moorrees, General Manager
San Antonio Water Company

Josh Swift, General Manager
Fontana Water Company

Richard Hansen, General Manager
Three Valleys Municipal Water District

Update on the Executive Order B-37-16 "Making Water Conservation a Way of Life for California" (Pl
How current legislation will be impacted by Pl

Enacted	Item (In Effect/Current)	Legislation?	Status	What Is It?	Details	Retail Water Providers Impacted?	Wholesale Water Providers Impacted?
2017	***Making Water Conservaton a Way of Life for California - Executive Order B-37-16***	No	Executive Order - Working Plan	Five State agencies charged with creating an implementation plan (EO Agencies): Dept. of Water Resources, Dept. of Food & Agriculture, Energy Commission, State Water Resources Control Board, Public Utilities Commission	10 Executive Order Items to be IMPLEMENTED within 3 categories: USE WATER MORE WISELY; ELIMINATE WATER WASTE; STRENGHEN LOCAL DROUGHT RESISTANCE. *Many of the needed actions and recommendations in this report cannot be implemented without new or expanded authorities. This document describes the additional steps and legislative authority that will be needed. The actions and recommendations herein, together with existing State programs and activities related to conservation and water use efficiency, represent a statewide framework for making conservation a California way of life. (Pg. 1-10)*	Yes. Many aspects of the plan will impact retail water providers. Monthly water use reporting to remain in effect.	Yes. Providing information on water supplies. Water loss reporting required.
2016	State Groundwater Management Act "SGMA"	Yes	In Effect	Empowers local agencies to adopt groundwater management plans that fit the local resources.	Plan and SGMA complement each other	Yes, if they manage or pull from any groundwater basins. Primarily Reporting	Yes, if they manage or pull from any groundwater basins. Primarily Reporting
2015	SB 555 - Minimizing Water Loss	Yes	In Effect	Water loss audits	Minor changes may be necessary to this legislation to fit the Plan	Yes. Annual water loss audits.	Yes. Annual water loss audits.
2009	SBX 7-7 "20 x 2020"	Yes	In Effect	Per capita water use reduction of 20% by 2020	Changes will be necessary to implement items outlined in the Plan. New targets to be developed by State and will be published in May 2021. New targets developed using new methodology that takes in to account prior investments, like recycled water systems, and use of State-provided aerial imagery to assign outdoor landscapes water budgets.	Yes. New conservation target methodologies. New reporting dates. Permanent water waste restrictions.	No.
1992	AB 325 MWELO (Model Water Efficiency Landscaping Ordinance)	Yes	Updated every 3 years (2015)	Landscape ordinance requiring new landscapes to be water efficient - meeting the geographic area's evapotranspiration rate (Et). Plans submitted to Cities' Planning Departments.	Changes will be necessary to implement items outlined in the Plan.	Yes, if they are a part of a city or otherwise approve landscaping plans. Will state-provided aerial imagry be used to implement changes?	No.

Update on the Executive Order B-37-16 "Making Water Conservation a Way of Life for California" (Plan)
How PROPOSED legislation will be impacted by Plan

Legislation (PROPOSED)	Status	Description	Fits in Plan How?	Impacts Retail Water Providers?	Impacts Wholesale Water Providers?
AB 869 Rubio - Sustainable Water Use and Demand Reduction - Recycled Water	Proposed	Requires recycled water within the service area of an urban retail water supplier or its urban wholesale water supplier for either nonpotable or potable use or that replenishes a groundwater basin and supplements the groundwater supply available to an urban retail water supplier be excluded from the calculation of any urban water use target or reduction in urban per cpaita water use. Bill states that for these purposes recycled water use is an efficient use of water and requires recycled water use to be considered equivalent to other water use efficiency measures.	Use Water More Wisely, Strengthen Drought Resistance HOW will that equivalency be determined?	Yes. Those with recycled water supplies can count this towards their water use efficiency efforts.	Yes. Those with recycled water supplies can count this towards their water use efficiency efforts. (Only if they are the supplier of this supply, assumedly.)
AB 968 Rubio - Urban Retail Water Use - Water Efficiency Targets	Proposed	Water Efficiency Target by 2025. Aerial imagery (to develop targets based on irrigable land) to be provided by State to water agencies by 2019. If State does not provide imagery by 2019, Plan deadline to be extended.	Use Water More Wisely, Strengthen Drought Resistance HOW will the water budgets be determined and when will they be re-evaluated? New owners? Annually? New landscape permits with every change?	Yes. Conservation targets will be set using aerial photography and measuring irrigable land and applying Et relative to the plant materials.	No.
A.B. No. 1000 Friedman – Water conservation: certification	Proposed	State Energy Resources Conservation and Development Commission to establish design and construction standards and energy and water conservation design standards that increase efficiency in the use of energy and water for new residential and new nonresidential buildings to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy. The commission shall certify innovative water conservation and water loss detection and control technologies that meet both of the following criteria: (a) The technology increases the energy efficiency of the system affected. (b) The technology is cost effective.	Use Water More Wisely, Strengthen Drought Resistance. No DIRECT impact to water agencies, but new equipment & devices will have to "fit" in to some sort of criteria, assumedly	Indirectly. When designing programs promoting water use efficiency products/devices. No reporting or other requirements.	Indirectly. When designing programs promoting water use efficiency products/devices. No reporting or other requirements.
A.B. No. 1323 Weber - Sustainable water use and demand reduction: stakeholder workgroup	Proposed	This bill would require the Department of Water Resources to convene a stakeholder workgroup with prescribed representatives invited to participate, including, among others, representatives of the department and the State Water Resources Control Board, no later than February 1, 2018. The bill would require the stakeholder workgroup to develop, evaluate, and recommend proposals for establishing new water use targets for urban water suppliers and to examine and report to the Governor and the Legislature by December 31, 2018, as specified. The bill would require all expenses for the stakeholder working group to be the responsibility of the nonstate agency stakeholders. The bill would repeal its provisions on January 1, 2022.	Use Water More Wisely, Strengthen Drought Resistance No DIRECT impact, but targets will be set with potentially limited input from water agencies that will be required to meet those targets.	Indirectly. This workgroup to would establish those water use targets, retailers would then have to meet them.	No.
A.B. No. 1654 Rubio - Water shortage: urban water management planning	Proposed	Shortage planning, reporting. Sources of water to be reported annually by June 15th.	Use Water More Wisely, Strengthen Drought Resistance. Additional reporting when retailers are already reporting MONTHLY water use data.	Yes. Annual reporting of "health" of water supply for coming year.	Yes. Annual reporting of "health" of water supply for coming year.
A.B. No. 1667 Friedman - Agricultural Water Management Planning	Proposed	Agricultural water supply reporting.	Use Water More Wisely, Strengthen Drought Resistance	No.	Yes, if they supply water to agricultural districts.
A.B. No. 1668 Friedman - Water conservation: guidelines	Proposed	Urban Water Management Plans to include drought risk assessments.	Use Water More Wisely, Strengthen Drought Resistance Similar to AB 1654?	Yes. Additional reporting to be included in their 5-year UWMP	Yes. Additional reporting to be included in their 5-year UWMP
A.B. No. 1669 Friedman - Urban water use efficiency	Proposed	State to adopt long term water conservation standards by May 2021. Increased fines/penalties	Use Water More Wisely, Strengthen Drought Resistance	Yes. Additional leverage to impose fines/fees. Additional reporting will probably be a component.	No.

Item 8.A.1

LAO
LEGISLATIVE ANALYST'S OFFICE

April 25, 2017

Overview of State's Water Conservation Efforts

L E G I S L A T I V E A N A L Y S T ' S O F F I C E

Presented to:
Assembly Committee on Water, Parks, and Wildlife
Hon. Eduardo Garcia, Chair

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LEGISLATIVE ANALYST'S OFFICE

Key Statewide Water Conservation Efforts in California

☑ Water Conservation Act of 2009 Set Statewide Water Use Reduction Goal

- Chapter 4 of 2009 (SB7X 7, Steinberg) mandated a 10 percent reduction in per capita urban water use by 2015, and a 20 percent reduction by 2020.
- State agencies developed the *20 x 2020 Plan* to guide progress towards that goal. Water agencies were required to develop usage targets in their urban water management plans, using one of four allowable methodologies.

☑ Recent Drought Led State to Impose Mandatory Urban Usage Reductions

- In 2014, Governor's emergency drought proclamation called for a 20 percent *voluntary* reduction in urban water usage compared to 2013 pre-drought levels.
- In 2015, Governor's executive order *required* a 25 percent statewide reduction in potable urban water use compared to 2013 levels. State Water Resources Control Board (SWRCB) established temporary water conservation standards for water agencies ranging from 4 percent to 36 percent depending on previous usage.
- In 2016, SWRCB modified requirements, allowing agencies to establish local conservation standards if they could self-certify they had adequate supplies to withstand a "stress test" of three additional years of drought.
- SWRCB also passed emergency regulations (1) requiring monthly reporting of urban water use and (2) prohibiting certain water use, including hosing-down sidewalks and running sprinklers during rainstorms.

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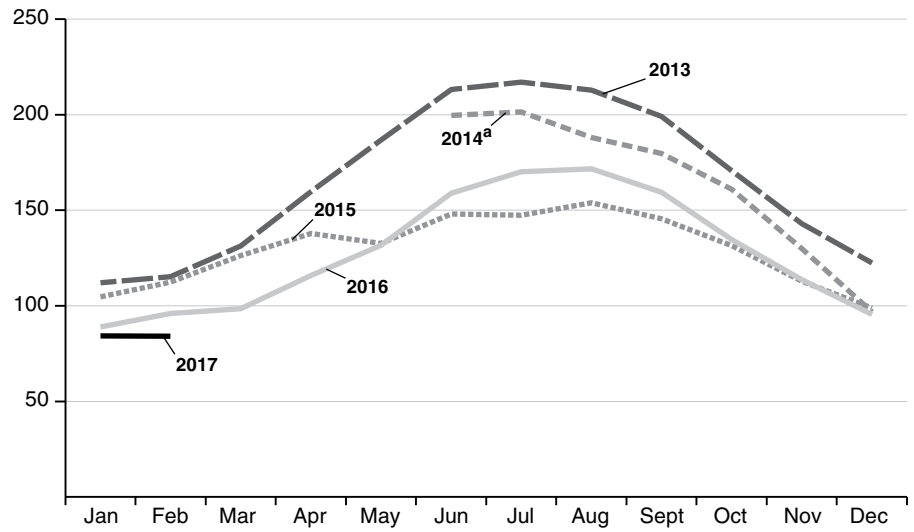
Summary of Urban Water Use Rates

Recent Urban Water Use Levels

Average Per Capita Use Per Day in Gallons



[a] Only partial year data available for 2014.

Urban Water Usage Rates Currently Below 20 x 2020 Targets

- *20 x 2020 Plan* established statewide target of 179 gallons per capita per day (GPCD) by 2015 and 159 GPCD by 2020. (The 2005 baseline was 199 GPCD.)
- In 2015, statewide usage rates averaged 133 GPCD.

Administration Recently Released Plan for Ongoing Conservation Efforts

☑ Governor's 2016 Executive Order Directed Agencies to Develop Long-Term Statewide Conservation Plan

- *Making Water Conservation a California Way of Life* report finalized in April 2017.

☑ Would Enact Certain Components Through Existing Authority

- Changes to be implemented through regulations include (1) making monthly water use reporting requirements and prohibitions on certain wasteful practices permanent, (2) reducing water supplier leaks and water losses, and (3)certifying innovative technologies for water conservation and energy efficiency.

☑ Proposes Budget Trailer Bill Language to Authorize Other Changes

- ***New Urban Water Use Standards.*** Requires SWRCB to adopt (1) regulations establishing new long-term efficiency standards by May 2021 and (2) emergency regulations establishing interim standards before then. Specific targets would be set at the local level.
- ***New Urban Water Plan Requirements.*** Adds new requirements to urban water management plans, including a risk assessment for droughts lasting five or more years, a water shortage contingency plan, and an annual water budget forecast.
- ***New Agricultural Water Plan Requirements.*** Adds new requirements to agricultural water management plans, including a drought plan and annual water budget. Also expands reporting requirements to suppliers providing water to between 10,000 and 25,000 irrigated acres. (Previous threshold was 25,000 acres.)

LAO LEGISLATIVE ANALYST'S OFFICE

Summary of Eight Water Conservation Bills Before Committee Today

Water Conservation Legislation Before Assembly Committee on Water, Parks, and Wildlife

April 25, 2017 Hearing

Bill number	Author	Version Date	Description
AB 869	Rubio	3/28/2017	Exempts recycled water from conservation requirements under all conditions.
AB 968	Rubio	4/17/2017	Requires new 2025 water use efficiency targets for urban water suppliers. Provides options for the targets, protects water rights, and exempts recycled water.
AB 1000	Friedman	2/16/2017	Requires CEC to certify innovative water conservation and water loss detection and control technologies.
AB 1323	Weber	2/17/2017	Requires DWR to convene a stakeholder workgroup to develop proposals for new long-term water use targets.
AB 1654	Rubio	3/28/2017	Requires new drought shortage response procedures in urban water management plans. Defines emergency supply, and protects water suppliers that comply with the plans from any state action in times of drought.
AB 1667	Friedman	4/18/2017	Requires all agricultural water suppliers report water budgets, have drought plans, and expands efficient water management practices.
AB 1668	Friedman	4/18/2017	Requires new drought shortage response with detailed levels of response. Incorporates climate change, enhances water supply analysis, and strengthens the enforceability of urban water management plans and drought response plans.
AB 1669	Friedman	4/18/2017	Authorizes and requires SWRCB to adopt long-term water use efficiency standards.

Source: Assembly Committee on Water, Parks, and Wildlife staff.
CEC = California Energy Commission, DWR = Department of Water Resources, and SWRCB = State Water Resources Control Board.

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Several Key Questions for Legislature to Consider

☑ **What Are the Water Conservation Goals the State Is Trying to Accomplish?**

☑ **How Should Targets Be Structured to Accomplish Those Goals?**

- How should targets account for regional variation?
- How should progress towards achieving those goals be measured?
- To what extent could other tools or approaches be employed to encourage efficient water use?

☑ **What Role Does the Legislature Want to Play in Developing and Overseeing Water Conservation Policies?**

- Which policies should be adopted through legislation and which through regulations?
- Which decisions should be determined through state policies and which left to local discretion?

☑ **How Can the State Ensure That Efficiencies in Water Use Are Sustainable?**

- What objectives, practices, and policies can realistically be maintained for the long term?

☑ **How Should Potential Uncertainties Be Incorporated Into Water Use Planning?**

- How should water use standards incorporate long-term hydrological forecasts and climate change?

Several Key Questions for Legislature to Consider *(Continued)*

☑ **How Should Alternative Sources of Water Fit Into the State's Overall Water Conservation Approach?**

- How should the state coordinate policies governing new water infrastructure development—such as recycled water and desalination—and water efficiency to achieve its overall water management goals?

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SAN BERNARDINO, CALIFORNIA 92423-3130

April 26, 2017

TO: Board of Directors
THREE VALLEYS MUNICIPAL WATER DISTRICT

FROM: Steven M. Kennedy, General Counsel

RE: Litigation Update – California Public Records Act ("CPRA")
City of San Jose v. Superior Court of Santa Clara County, California Supreme Court Case No. S218066

On March 2, 2017, the California Supreme Court rendered a unanimous decision in the above-referenced case (a copy of which is enclosed herewith) which held that when a public official uses private e-mail or a personal account to communicate about the conduct of public business, those communications may be subject to disclosure under the CPRA.

The case resulted from a request to the City of San Jose under the CPRA seeking certain redevelopment-related records, including written communications sent or received by city officials and employees on their private electronic devices using their private accounts. The City declined to disclose any records made or retained using the individuals' personal accounts and electronic devices, asserting that such records were not covered by the CPRA.

The Supreme Court rejected this argument, finding that an agency has constructive possession of records if it has the right to control the records either directly or through another person. The Court referenced federal cases interpreting the Freedom of Information Act, stating that public records "do not lose their agency character just because the official who possesses them takes them out the door." Consequently, the Court held that "communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission" and "writings about public business are not excluded from the CPRA simply because they have been sent, received, or stored in a personal account."

In rendering its decision, the Supreme Court recognized the need to strike a balance between the public's right to access communications regarding governmental actions and the privacy of public employees and officials. Because the CPRA does not expressly identify any specific statutory methods for conducting a search of the personal devices of public employees and officials, the Court provided some guidance to assist public agencies in complying with the opinion by recommending (1) the training of employees and officials to distinguish between public records and personal documents and the use of affidavits signed under penalty of perjury to verify confirm and the adequacy of their own search of their own devices, and (2) the formal development of internal policies designed to reduce the likelihood of public records being held in private accounts (e.g., requiring employees and directors to use their agency e-mail accounts for all electronic communications concerning public business).

In the next month, District staff and this office will present such a proposed policy and form of declaration to the Board for consideration and potential approval and adoption. In the meantime, it is recommended that any electronic communications from directors regarding District business be conducted only through your District e-mail accounts.

If any member of the Board has any questions or comments, please feel free to address them to me as appropriate.

Enclosure

Filed 3/2/17

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; TED SMITH, Real Party in Interest.	S218066 Ct.App. 6 H039498 Santa Clara County Super. Ct. No. 109CV150427

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

I. BACKGROUND

In June 2009, petitioner Ted Smith requested disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency and the agency's executive director, along with certain other elected officials and their

1 Government Code section 6250 et seq. All statutory references are to the Government Code unless otherwise specified.

staffs.[2] The targeted documents concerned redevelopment efforts in downtown San Jose and included emails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and email accounts but did not disclose communications made using the individuals' personal accounts.

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

II. DISCUSSION

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

Enacted in 1968, CPRA declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§ 6250.) In 2004, voters made this principle part of our Constitution. A provision added by Proposition 59 states: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) Public access laws serve a

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[2] These parties, sued as defendants below and the petitioners here, are collectively referred to as the "City."

crucial function. "Openness in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.' " (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329 (*International Federation*).)

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

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

A. *Statutory Language, Broadly Construed, Supports Public Access*

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

"When we interpret a statute, '[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.] 'Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' " (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166.)

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3 CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552). (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 772.)

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

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

1. *Writing*

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

In 1968, creating a "writing" could be a fairly involved process. Typically, a person would use an implement to type, or record words longhand, or would

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

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

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

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

Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an email to a spouse complaining "my coworker is an idiot" would likely not be a public record. Conversely, an email to a superior reporting the coworker's mismanagement of an

agency project might well be. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment. Here, the City claimed all communications in personal accounts are beyond the reach of CPRA. As a result, the content of specific records is not before us. Any disputes over this aspect of the "public records" definition await resolution in future proceedings.

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

Coronado Police Officers Assn. v. Carroll (2003) 106 Cal.App.4th 1001 demonstrates the intricacy of determining whether a writing is related to public

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[4] We recognize that this test departs from the notion that "[o]nly purely personal" communications "totally void of reference to governmental activities" are excluded from CPRA's definition of public records. (Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) appen. p. 9; see *San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at p. 774.) While this conception may yield correct results in some circumstances, it may sweep too broadly in others, particularly when applied to electronic communications sent through personal accounts.

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

3. *Prepared by Any State or Local Agency*

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

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

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

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

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5 Article IV establishes the Legislature, and article VI establishes the state's judiciary. (Cal. Const., arts. IV, VI.) These branches of government are thus generally exempt from CPRA. (See *Sander v. State Bar of California*, *supra*, 58 Cal.4th at p. 318; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111.)

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

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

Moreover, although employees are not specifically mentioned in the local agency definition, nothing in the statutory language indicates the Legislature meant to *exclude* these individuals from CPRA obligations. The City argues the omission of the word "officer" from the local agency definition reflects a legislative intent that CPRA apply to individuals who work in *state* agencies but *not* employees in local government. The City offers no reason why the Legislature would draw such an arbitrary distinction. If it intended to impose different disclosure obligations on state and local agencies, one would expect to find this difference highlighted throughout the statutory scheme, particularly when the

obligations relate to a "fundamental and necessary right of every person in this state." (§ 6250.) Yet there is no mention of such an intent anywhere in the Act. Indeed, under the City's logic, CPRA obligations would potentially extend only to state *officers*, not necessarily state *employees*. The distinction between tenured public officers and those who hold public employment has long been recognized. (See *In re M.M.* (2012) 54 Cal.4th 530, 542-544.) Considering CPRA's goal of promoting public access, it would have been odd for the Legislature to establish different rules for different levels of state employment. Contrary to the City's view, it seems more plausible that the reference to "every state . . . officer" in the state agency definition (§ 6252, subd. (f)) was meant to extend CPRA obligations to elected state officers, such as the Governor, Treasurer, or Secretary of State, who are not part of a collective governmental body nor generally considered *employees* of a state agency.[6]

The City's position is further undermined by another CPRA provision, which indicates that public records can be held by individual officials and need not belong to an agency as a whole. When it is alleged that public records have been improperly withheld, section 6259, subdivision (a) directs that "the court shall order the officer or person charged with withholding the records" to disclose the records or show cause why they should not be produced. If the court concludes "the public official's decision to refuse disclosure is not justified," it can order "the public official to make the record public." (§ 6259, subd. (b).) If the court

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6 In one respect the local agency definition is worded more broadly than the state agency definition. Section 6252, subdivision (a) states that the term local agency "includes" a county, city, or one of several other listed entities. In statutory drafting, the term "includes" is ordinarily one "of enlargement rather than limitation." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101.) "The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' " (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774.) By contrast, the definition of "state agency" is couched in more restrictive language: " 'State agency' *means* every state office, officer . . .," and other listed entities. (§ 6252, subd. (f), italics added.)

finds "that the public official was justified in refusing" disclosure, it must "return the item to the public official without disclosing its content." (*Ibid.*) The Legislature's repeated use of the singular word "official" in section 6259 indicates an awareness that an individual may possess materials that qualify as public records. Moreover, the broad term "public official" encompasses officials in state *and* local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

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

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

As to retention, the City argues "public records" include only materials in an agency's possession or directly accessible to the agency. Citing statutory arguments and cases limiting the duty to obtain and disclose documents possessed by others, the City contends writings held in an employee's personal account are beyond an agency's reach and fall outside CPRA. The argument fails.

Appellate courts have generally concluded records related to public business are subject to disclosure if they are in an agency's actual *or constructive* possession. (See, e.g., *Board of Pilot Comrs. for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577, 598; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 710 (*Consolidated Irrigation*).) "[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person." (*Consolidated Irrigation*, at p. 710.) For example, in *Consolidated Irrigation*, a city did not have constructive possession of documents in files maintained by subconsultants who prepared portions of an environmental impact report because

the city had no contractual right to control the subconsultants or their files. (*Id.* at pp. 703, 710-711.) By contrast, a city had a CPRA duty to disclose a consultant's field survey records because the city had a contractual ownership interest and right to possess this material. (See *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1426, 1428-1429 (*Community Youth*).)

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

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

purport to excuse agencies from obtaining public records in the possession of *their own employees*. It simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure requirements.

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

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

In *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at pages 289 to 290, a state agency argued certain employment information was exempt from disclosure under CPRA because it had been placed in confidential personnel files. In considering a Penal Code provision that deems peace officer personnel records confidential, we rejected an interpretation that made confidentiality turn on the type of file in which records are located, finding it "unlikely the Legislature intended to render documents confidential based on their location, rather than their content." (*Commission*, at p. 291.) Although we made this observation in analyzing the scope of a CPRA exemption, the same logic applies to the Act's

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

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

B. *Policy Considerations*

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

The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially

damning, discussions in such accounts. The City's interpretation "would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private." (Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) 19 Comm. L. & Pol'y 293, 322.)

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

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

a statutory exemption, can be redacted from public records that are produced or presented for review. (See § 6253, subd. (a).)

Furthermore, a crabbed and categorical interpretation of the "public records" definition is unnecessary to protect employee privacy. Privacy concerns can and should be addressed on a case-by-case basis. (See *International Federation*, *supra*, 42 Cal.4th at p. 329.) Beyond the definition of a public record, the Act itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda (§ 6254, subd. (a)), personal financial data (§ 6254, subd. (n)), personnel and medical files (§ 6254, subd. (c)), and material protected by evidentiary privileges (§ 6254, subd. (k)). Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it "clearly outweighs" the public interest in disclosure. (§ 6255, subd. (a).) This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. (*International Federation*, at pp. 329-330; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755-756.) The analysis here, as with other exemptions, appropriately focuses on the *content* of specific records rather than their location or medium of communication. (See *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 291.)[7]

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

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

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

C. *Guidance for Conducting Searches*

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

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

(*American Civil Liberties Union of Northern Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 85; see *Community Youth*, *supra*, 220 Cal.App.4th at p. 1420.)

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

Federal courts applying FOIA have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two. (See *Ethyl Corp. v. U.S. Environmental Protection Agency* (4th Cir. 1994) 25 F.3d 1241, 1247.) A federal employee who withholds a document identified as potentially responsive may submit an affidavit providing the agency, and a reviewing court, "with a sufficient factual basis upon which to determine whether contested items were 'agency records' or personal materials." (*Grand Cent. Partnership, Inc. v. Cuomo* (2d Cir. 1999) 166 F.3d 473, 481.) The Washington Supreme Court recently adopted this procedure under its state public records law, holding that employees who withhold personal records from their employer "must submit an affidavit with facts sufficient to show the information is not a 'public record' under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA." (*Nissen v. Pierce County* (Wn. 2015) 183 Wn.2d 863 [357 P.3d 45, 57].) We agree with Washington's high court that this procedure, when followed in

good faith, strikes an appropriate balance, allowing a public agency "to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees." (*Id.*, 357 P.3d at p. 58.)

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

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

D. *Conclusion*

Consistent with the Legislature's purpose in enacting CPRA, and our constitutional mandate to interpret the Act broadly in favor of public access (Cal.

Const., art. I, § 3, subd. (b)(2)), we hold that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account.

DISPOSITION

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

CORRIGAN, J.

WE CONCUR:

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

See last page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion City of San Jose v. Superior Court

Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 225 Cal.App.4th 75
Rehearing Granted

Opinion No. S218066
Date Filed: March 2, 2017

Court: Superior
County: Santa Clara
Judge: James P. Kleinberg

Counsel:

Richard Doyle, City Attorney, Nora Frimann, Assistant City Attorney, and Margo Laskowska, Deputy City Attorney, for Petitioners.

Keith J. Bray, Joshua Rosen Daniels; Dannis Woliver Kelley, Sue Ann Salmon Evans and William B. Tunick for Education Legal Alliance of the California School Boards Association as Amicus Curiae on behalf of Petitioners.

Jennifer B. Henning for California State Association of Counties as Amicus Curiae on behalf of Petitioners.

Best, Best & Krieger, Shawn D. Hagerty and Hong Dao Nguyen for League of California Cities, California Association of Sanitation Agencies and California Special Districts Association Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

McManis Faulkner, James McManis, Matthew Schechter, Christine Peek, Tyler Atkinson and Jennifer Murakami for Real Party in Interest.

Mastagni Holstedt, David E. Mastagni, Isaac S. Stevens and Jeffrey R.A. Edwards for Sacramento Police Officers' Association, Stockton Police Officers' Association, Sacramento County Deputy Sheriffs' Association, Sacramento County Law Enforcement Managers Association, San Bernardino County Public Attorneys Association, Deputy Sheriffs' Association of Alameda County, Statewide University Police Association, Sacramento Area Firefighters, International Association of Firefighters, Local 552, AFL-CIO, Palo Alto Firefighters, International Association of Firefighters, Local 1319, AFL-CIO, San Mateo County Deputy Sheriffs' Association, Rialto Professional Firefighters, International Association of Firefighters, Local 3688, AFL-CIO, Vallejo Police Officers' Association, Elk Grove Police Officers Association, Ontario Police Officers' Association, Placer County Deputy Sheriffs' Association, Federated University Police Officers' Association and Los Angeles Airport Peace Officers' Association as Amici Curiae on behalf of Real Party in Interest.

Counsel:

Jack Cohen as Amicus Curiae on behalf of Real Party in Interest.

Ram, Olson, Cereghino & Kopczynski, Karl Olson; Juan F. Cornejo; Jeffrey D Glasser; and James W. Ewert for California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., Hearst Corporation, First Amendment Coalition, Society of Professional Journalists, Californians Aware and the Reporters Committee for Freedom of the Press as Amici Curiae on behalf of Real Party in Interest.

Michael T. Risher, Matthew T. Cagle, Christopher J. Conley; Peter Bibring, Peter Eliasberg; David Loy; and Jennifer Lynch for American Civil Liberties Union Foundation of Northern California, Inc., American Civil Liberties Union of Southern California, Inc., American Civil Liberties Union of San Diego & Imperial County, Inc., and Electronic Frontier Foundation as Amici Curiae on behalf of Real Party in Interest.

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Staff Report/Memorandum

To: TVMWD Board of Directors

From: Richard W. Hansen, General Manager

Date: May 3, 2017

Subject: Projects Summary Update

☐	**For Action**	☐	**Fiscal Impact**	☐	**Funds Budgeted**
☒	**Information Only**	☐	**Cost Estimate:**	**$**	

Discussion:

Brief status reports for projects are provided below:

Williams/Fulton Hydroelectric Stations Analyses – Project Nos. 58149 / 58150

Frisch Engineering has completed the electrical design of the required improvements for both the Fulton and Williams stations. The design has been sent to SCE for review and staff is awaiting SCE's approval. Delay of SCE approval is impacting the project schedule. Fabrication and construction of the improvements (i.e. electrical equipment) cannot begin until SCE approves the design. Staff anticipates construction of the improvements for the Williams Hydro and Fulton Hydro will be completed in late June and mid-July, respectively. After construction is completed, the improvements need to be tested by an independent third party testing company who will prepare a report for review and approval by SCE. SCE will then schedule an on-site inspection to confirm operation of the improvements and then issue a permission to operate (PTO) notice to the District.

The Williams Hydro improvements are a higher priority since flow passes through this facility on a more consistent basis and therefore more power ($) is generated. SCE has indicated they will work with the District and allow us to revise the expiration of the existing Fulton Q.F. Agreement and start date of the new Agreement so the timing of these occurs after the electrical improvements have been constructed, tested and approved.

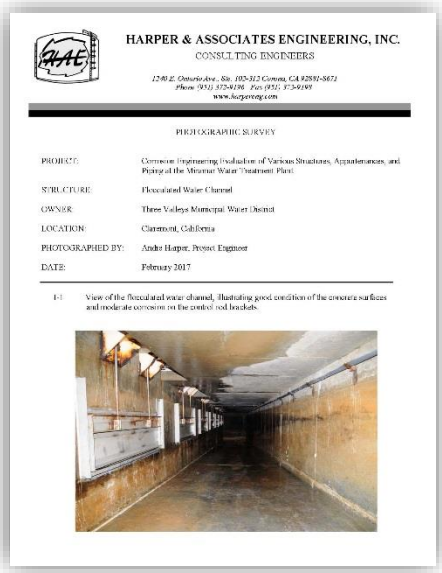
Grand Avenue Well – Project No. 58446

Staff is currently reviewing the recently completed preliminary design report (PDR) that was prepared by the District's engineering consultant. Staff is preparing to reach out to the nearby residents to meet with them and present the purpose and scope of the project within the next couple of weeks. Staff anticipates start of the environmental (CEQA) process will begin in early May and is expected to take approximately three months.

TVMWD Baseline Road Well Project – Project No. 58458
No additional update available.

Leroy's Meter Connection Project – Project No. 58154
A pre-construction meeting is being scheduled with the contractor, CP Construction, and City of La Verne to coordinate the proposed work. Staff continues to work with the city, Southern California Edison, and Los Angeles County Department of Public Works for the appropriate encroachment permits and relocation activities. Staff has also been working with the Leroy Haynes School to minimize impacts. Additionally, local residents will be notified prior to start of field construction. Staff anticipates construction will take place between mid-July to mid-August during the summer break for Leroy Haynes School.

Miramar Water Treatment Plant Structural Inspections
As part of the ongoing program to ensure the reliable operation of its treatment facilities, TVMWD commissioned Harper and Associates to conduct structural inspections of concrete portions of the Miramar Treatment Plant (i.e. rapid mix chamber, flocculation basins, sedimentation basins, prefilter channel, and filter inlet forebay). The inspections were coordinated with the plant's annual shutdown. H&A revisited repairs made in 2012 in the sedimentation basins and checked for leaks between concrete walls in the various areas noted above. The inspection findings were summarized in a report with recommended repairs and estimated costs developed to budget for future repairs. Staff will prioritize the recommendations provided by H&A and develop a strategy to implement the repairs over the coming years.


HARPER & ASSOCIATES ENGINEERING, INC.
CONSULTING ENGINEERS
PHOTOGRAPHIC SURVEY
PROJECT: Corrosion Engineering Evaluation of Various Structures, Appurtenances, and Piping at the Miramar Water Treatment Plant
STRUCTURE: Flocculated Water Channel
OWNER: Three Valleys Municipal Water District
LOCATION: Claremont, California
PHOTOGRAPHED BY: Andre Harper, Project Engineer
DATE: February 2017
1-1 View of the flocculated water channel, illustrating good condition of the concrete surfaces and moderate corrosion on the control rod brackets.

Building Modification – Break Room Renovation – Project No. 58147
The contractor and staff have been working with the contractor and project architect to address questions that arise and move nearer to completion. Major components of the roof, exterior, electrical, plumbing, and drywall finish work are complete. The next phase of work is to install cabinets, wall tile, finish in-wall utilities, then floor tile before installing the suspended ceiling panels. Staff anticipates construction will be completed by May 12, 2017.

Reservoir Effluent Pump Sation Project
Cannon Engineering has been retained to design the reservoir effluent pump station as well as replacement of the existing 30 year old hydropneumatic tank system. The proposed pump station will be located in the reservoir effluent vault and provide potable

water to the administration/operations building as well as pre-lube water to both wells by providing water from the downstream side of the reservoirs. This will provide more flexibility for operations and allow staff to use the finished water reservoirs for additional contact time instead of having the potable water source for the administration building come from the existing hydropnuematic tank. Staff has discussed this with the Department of Drinking Water (DDW) and received positive feedback from them to move forward with implementing these changes.

Cannon Engineering is in the process of preparing the preliminary design report (PDR) which should be completed in a couple of months. The existing hydropnuematic tank may be removed and replaced by adding VFDs to two of the existing 15 HP booster pumps. These potential changes would be more efficient and cost less than installing a new bladder tank.

Strategic Plan Objectives:

1.4 – Capable of delivering 10,000 AFY from local sources in case of drought or catastrophe.
1.5 – Maintain water infrastructure to assure 100% reliability.
2.3 – Manage water infrastructure and staff operations to minimize costs.
3.3 – Be accountable and transparent with major decisions

CALIFORNIA MUNICIPAL TREASURERS ASSOCIATION
Serving California Since 1959

James Linthicum
Three Valleys Municipal Water District
1021 E. Miramar Ave
Claremont, CA 91711

February 8, 2017

Dear James,

Congratulations on your successful completion of the California Municipal Treasurers Association's Investment Policy Certification program.

Your Policy was reviewed by a team of three reviewers from the Investment Policy Certification committee. The Policy received a passing score of 85 or higher based on CMTA's criteria for Investment Policies.

The certificate is enclosed and on behalf of the California Municipal Treasurers Association, I wish to personally thank you for supporting CMTA.

Don't forget this year's CMTA conference will be held at the Marriott, Newport Beach on April 26-28. I am personally looking forward to seeing you there.

Sincerely,

Shaun L. Farrell
Investment Policy Certification Chairperson

California Municipal Treasurers Association

Investment Policy Certification

Issued on 10/9/2016

Three Valleys Municipal Water District

The California Municipal Treasurers Association certifies that the investment policy of the Three Valleys Municipal Water District complies with the current State statutes governing the investment practices of local government entities located within the State of California.

CMTA Over 50 Years of Excellence

Margaret Moggia
President

February 21, 2017
Date