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## COVER STORY

## High court to mull reach of public records requests



Kevin Lee / Daily Journal

Matthew T. Schechter and Christine E. Peek of McManis Faulkner are representing an environmental activist in a public records lawsuit against the City of San Jose.

By Kevin Lee  
Daily Journal Staff Writer

The state Supreme Court is considering a case that asks whether government officials are required by state law to disclose emails and text messages related to public matters if those communications were never stored on public servers. The dispute, which poses a question of first impression for the justices, has highlighted the national conversation scrutinizing public officials, such as former Secretary of State Hillary Clinton, and their use of personal devices to conduct the people's business.

"In this technology day and age, [public officials] email each other from their cell phones, they use personal Gmail accounts, or Yahoo, they text each other," said Matthew T. Schechter of McManis Faulkner in San Jose. "But they are communicating about government business, City Hall business ... are

those [communications] accessible to the public?"

Schechter and Christine E. Peek are representing environmental activist Ted Smith, who in 2009 requested under the California Public Records Act "voicemails, emails or text messages sent or received on private electronic devices" of then-San Jose Mayor Chuck Reed, city council members and their staff related to downtown San Jose development.

A Santa Clara County judge ruled that the City of San Jose had to comply with Smith's request, but the 6th District Court of Appeal reversed.

The litigants and several interested third parties completed briefing to the Supreme Court in September.

The justices have yet to schedule oral arguments. *City of San Jose v. Superior Court*, S218066.

One of the primary questions posed to the justices is whether a message's content or location

should factor into whether the message is publicly disclosed.

Smith and various third parties claim that under the public records act, government agencies must make communications available upon request if their content is tied to public affairs.

On the other hand, city attorneys claim that communications located and stored on personal devices are not under the purview of government bodies, regardless of their content.

"Records otherwise private do not become 'public records' simply by virtue of public interest in their content," wrote Margo Laskowska, the senior deputy city attorney representing San Jose in the dispute, in a brief.

"There is no indication that the [California Public Records] Act requires City Councilmembers and employees to open their homes so that their personal diaries and correspondence could be inspected for presence of writings that mention the City of San Jose," she added.

Laskowska could not be reached for comment.

To support their position, Smith's legal team cited a Washington Supreme Court decision in August that featured similar public records and private device issues.

In that case, the Washington court authorized personal communications to be subject to public records requests so long as they were related to public business. "Of course, the public's statutory right to public records does not extinguish an individual's constitutional rights in private information," Washington Supreme Court Justice Mary I. Yu wrote in a unanimous opinion. "But we do not read the

[Washington Public Records Act] as a zero-sum choice between personal liberty and government accountability."

In a brief supporting the City of San Jose, the League of California Cities and other advocacy groups have argued that tracking an individual's electronic communications would further sap the already stretched resources of local governments.

"An expanded obligation to reach into private electronic devices and accounts would be infeasible to implement," wrote Shawn D. Hagerty, a San Diego lawyer at Best Best & Krieger LLP.

Peek of McManis Faulkner said government agencies worried about invasions of employees' privacy and a stream of broad public records requests can implement a straightforward solution.

"The city has the ability as the employer to craft policies that control its employees' use of personal devices to conduct their work," Peek said. "It can craft policies that minimize that burden if it so chooses."

Karl Olson, a San Francisco lawyer who is representing media organizations and nonprofit groups as third parties in the case, said a ruling against Smith would limit transparency among public officials.

"There have been a number of examples of public officials who have chosen to use private email devices to conduct public business," Olson said. "A decision for San Jose would issue a grave invitation to public officials to take their conduct of public business off line, do it on their own phones and avoid scrutiny."