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Clerk of the Superior Court
NOV 23 2020
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DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

DEPARTMENT FOUR

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OAKLAND PRIVACY, et al., Plaintiff, vs. CITY OF VALLEJO. Defendants.	Case Number: FCS054805 **ORDER GRANTING PEREMPTORY WRIT OF MANDATE**

Petitioners OAKLAND PRIVACY, SOLANGE ECHEVERRIA, and DANIEL H. RUBINS petition the court for a writ of mandate compelling Respondent CITY OF VALLEJO to refrain from operating any cellular-communications technology, as defined in Government Code section 53166[1], until the Vallejo City Council adopts a resolution or ordinance authorizing a usage and privacy policy per that statute at a publicly-noticed regularly scheduled meeting that accepts commentary from members of the public and features public voting on a manifest proposed policy. Respondent argues that section 53166 only requires it to authorize its chief

[1] Further undesignated statutory references are to the Government Code.

of police to create a policy, as it did in this case, rather than authorize any particular policy at a public meeting.

The court issued an Alternative Writ of Mandate on September 11, 2020, and set a show cause hearing for October 1, 2020. At that hearing Plaintiff/Petitioner was represented by attorney Michael Risher; Defendant/Respondent by attorney Katelyn Knight. After listening to the arguments of counsel, the court took the matter under submission.

A writ of mandate is an extraordinary equitable remedy to which there is no absolute right; the decision whether to grant a writ lies within the sound discretion of the court. (*McDaniel v. San Francisco* (1968) 259 Cal.App.2d 356, 360-361.) One of the chief considerations of the court in the exercise of that discretion is the promotion of the ends of justice. (*Id.* at p. 361.)

This writ concerns the requirements of section 53166 with regard to the creation of a usage and privacy policy governing a local agency's use of cellular-communications technology. That code section states in most relevant part at subdivision (c)(1): "a local agency shall not acquire cellular communications interception technology unless approved by its legislative body by adoption, at a regularly scheduled public meeting held pursuant to the Ralph M. Brown Act [citation omitted], of a resolution or ordinance authorizing that acquisition and the usage and privacy policy required by this section."

The first step in statutory construction is of course the plain words of the statute; if the words are clear and unambiguous, there is no need for resort to other indicia of legislative intent such as legislative history. (*Hale v. S. Cal. Ipa Medical Group* (2001) 86 Cal.App.4th 919, 924.) Section 53166 commands a legislative body to approve at a regularly scheduled public meeting a resolution or ordinance authorizing two things: one, an agency's acquisition of a device, and two, "the usage and privacy policy required by this section." Subdivision (b) describes "the usage and privacy policy required by this section" as one the local agency

operating the interception technology must implement "to ensure that the [varied application of the technology] complies with all applicable law and is consistent with respect for an individual's privacy and civil liberties." Subdivision (b)(2) lists further particular minimum requirements for an adequate policy, such as, *inter alia*, descriptions of the job titles of persons permitted to use the technology and the length of time gathered information will be retained.

The reasonable reading of the statute as a whole is that it is the local agency that must implement a privacy policy that the local legislative body authorized. That subdivision (c)(1) requires authorization of "the" policy supports that the local legislative body's task is to submit for commentary and vote upon a particular extant policy. Had our Legislature intended for the local legislative body to simply authorize the creation of "a" policy the statute could easily have been made to read "authorizing the creation of a policy" or the like. The legislative body must authorize something for the local agency to implement, though it does not matter what entity drafted the policy to begin with. This conforms to the normal relationship of legislative and executive arms of the government in the United States. Nonetheless, there is enough ambiguity that it is worth investigating legislative history to clear matters up.

Respondent notes that the first draft of the bill that would enact section 53166 contained the following language that is not present in the final version: "The resolution or ordinance shall set forth the policies of the local agency as to the circumstances when cellular communications interception technology may be employed, and usage and privacy policies, which shall include, but need not be limited to, how data obtained through use of the technology is to be used, protected from unauthorized disclosure, and disposed of once it is no longer needed." (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 2/27/15).) From this Respondent concludes that the bill actually as enacted did not intend for the resolution to describe the policy to be used. This ignores the clear arc of the bill's development through amendments, chronicled in the dutifully-updated legislative digest.

The Legislative Digest is relevant to interpreting a statute's meaning because it is reasonable to infer that all members of the Legislature considered it when voting on the proposed statute. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 at fn. 9.) The Digest is printed as a preface to every bill considered by the Legislature, to assist the Legislature in its consideration of pending legislation. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169.) Digest summaries are "entitled to great weight." (*Id.* at p. 1170.) It is reasonable to presume that amendments are made with the intent and meaning expressed in the Legislative Counsel's Digest. (*Ibid.*)

The first version of S.B. 741 was brief, containing far fewer subdivisions than the final version but still expressing the definition of "cellular communications interception technology" and stating (in separate subdivisions) that a local agency could not use such technology without an authorizing resolution, that the resolution shall be adopted at a regularly scheduled public meeting affording public comment and set forth a privacy policy including certain minimum features, and that the policy shall be posted on the agency's web site. The May 19, 2015 amendment to S.B. 741 shuffled around the language in new subdivisions, added many new minimum policy features, and provided for civil actions for persons harmed by violations of the proposed statute. (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 5/19/15).) It created the now-familiar subdivision stating that the local agency shall implement a policy containing certain minimum features and edited the statement that there must be a resolution setting forth a policy to read that the policy shall be "as required by [the new descriptive section]." The next amendment, on June 24, 2015, adjusted the minimum requirements and removed the subdivision containing the exact language that the resolution "shall set forth the policies." (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 6/24/15).) This language was instead compressed into the first form of another now-familiar subdivision, stating as then amended that there must be "adoption, at a regularly scheduled public meeting with an

opportunity for public comment, of a resolution or ordinance authorizing that acquisition or use [of technology] and the usage and privacy policy required by this section." It is fair to say that the policy-setting language was compressed and retained, rather than discarded as Respondent argues, because the removed subdivision also contained the public meeting requirement that the Legislature very obviously did not intend to delete. The May version had one subdivision for the requirement that use be authorized by resolution and one subdivision for the requirement that the resolution set forth the policy. The June version had one subdivision containing both provisions. Subsequent amendments only added a reference to the Ralph M. Brown Act and an exception for county sheriffs. (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 8/17/15 and 8/31/15).)

The clear reach of the amendments is to clarify the minimum requirements for an acceptable privacy policy and any refining or rephrasing language. The Legislature transferred the minimum policy requirements' descriptors out of the same paragraph as the setting requirement and updated the setting requirement to reference the new location while combining it with acquisition authorization for brevity. At no point during any of these amendments did the Digest, which was dutifully amended to align with the changes, ever remove the statement that the bill "would require that the resolution or ordinance set forth the policies." Most significantly, in the course of the June amendment that ostensibly removed the policy-setting requirement, that quoted Digest sentence was also amended – but only to change the words "agency as described above in (1), (2), and (3)" to "agency" in keeping with shuffled definitions. (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 6/24/15).) There was clearly no intent to change the nature of the sentence, nor the policy-setting requirement sentence that was present in the final version of the Digest. (S.B. 741, 2015-2016 Leg. Sess. (Cal. 2015) (introduced 10/8/15).)

Respondent had a duty to obey section 53166 by passing a resolution or ordinance specifically approving a particular privacy policy governing the usage of the Stingray device it purchased. Respondent breached that duty by simply delegating creation of the privacy policy to its police department without an opportunity for public comment on the policy before it was adopted. Because any such policy's principal purpose is to safeguard, within acceptable limitations, the privacy and civil liberties of members of the public whose cellular communications are intercepted, public comment on any proposed policy before it is adopted also has a constitutional dimension.

In light of the court's ruling, because Respondent's current privacy policy was not approved by resolution or ordinance at a regularly scheduled public meeting pursuant to the Ralph M. Brown Act, its exact provisions are not material to the court's decision.

The petition is granted. A writ of mandate shall issue prohibiting Respondent and its officers, agents, and employees from operating any cellular-communications technology, as defined in Government Code section 53166, unless and until the Vallejo City Council adopts a resolution or ordinance that (1) authorizes a specific usage and privacy policy regarding that technology and (2) which meets section 53166's requirements. Said adoption must take place at a publicly-noticed, regularly scheduled meeting that accepts commentary from members of the public and features public voting by Respondent's City Council members on the actual usage and privacy policy it intends to adopt.

Dated: 11/17/2020

E. BRADLEY NELSON
Judge of the Superior Court

SOLANO COUNTY COURTS
STATE OF CALIFORNIA
600 Union Avenue, Fairfield, CA

CERTIFICATE AND AFFIDAVIT OF MAILING NO. FCS054805

I, Jackie Lindsey, certify under penalty of perjury that I am a Judicial Assistant of the above-entitled Court and not a party to the within action; that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; that I served the attached documents as follows:

☒ **By Mail:** by causing to be placed a true copy thereof in an envelope which was then sealed and postage fully prepaid on the date shown below; and that this document was deposited in the United States Postal Service on the date indicated. Said envelopes were addressed to the attorneys/parties and any other interested party as indicated below.

☐ **By Email:** by causing a true copy of said document(s) to be transmitted via e-mail to each of the parties at the email addresses listed below.

☐ **By Facsimile:** by causing a true copy of said document(s) to be transmitted via facsimile to the facsimile numbers listed below. A transmission report was properly issued by the sending facsimile machine, and the transmission was reported as complete and without error.

Document Served: ORDER GRANTING PEREMPTORY WRIT OF MANDATE

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on Nov 23, 2020 at Fairfield, California.

Jackie Lindsey
Judicial Assistant II / Deputy Clerk

SERVICE LIST
OAKLAND PRIVACY, ET AL. vs. CITY OF VALLEJO
FCS054805

MICHAEL T. RISHER, ESQ.
LAW OFFICE OF MICHAEL T. RISHER
2081 CENTER STREET, #154
BERKELEY, CA 94704

ABENICIO CISNEROS, ESQ.
LAW OFFICE OF ABENICIO CISNEROS
2443 FILLMORE ST. #380-7379
SAN FRANCISCO, CA 94115

KATELYN M. KNIGHT, ESQ.
DEPUTY CITY ATTORNEY
CITY OF VALLEJO – CITY ATTORNEY'S OFFICE
555 SANTA CLARA STREET
VALLEJO, CA 94590