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#Not in My Backyard, Granny: The Discoverability of a Public Official's Private Electronic Messaging

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#Not in My Backyard, Granny: The Discoverability of a Public Official's Private Electronic Messaging Activity in Land Use Litigation

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50. As the woman approached the podium, it was obvious to everyone in the room she was upset and eager to voice her opinion. She laid her notes on the slanted surface of the lectern and organized them before speaking. When she finally looked up from the notes, her eyes met the five city officials who sat in front of her. Each official was seated in a high-backed leather chair, behind a long wooden desk that formed a somewhat semi-circle surrounding the lectern where the woman stood. After a few tense moments, the woman began speaking:

City councilmen, you simply can't approve this project. Think of what it will do to our neighborhood. If you allow this developer to build this monstrosity of a building in our neighborhood, it is going to ruin everything we have worked so hard for.

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51. At this statement, one city official leaned forward, removing his glasses and looking intently at the woman as she continued.

City councilmen, think of what is going to happen if you approve this project, if you allow this nursing home to be built in our backyards. We are going to have the stigma of being a retirement community, rather than the up-and-coming neighborhood. Our children won't be able to play in the streets because they will have to fear that an old person driving a car to the nursing home will not see them and hit them. We will have old people in bathrobes walking on our sidewalks in the middle of the day; imagine what that is going to do to our home value.

52. At this the city official who previously leaned forward asked the woman: "so what would you have us do instead?" To which the woman replied: "Allow the nursing home to be built, just not in our neighborhood, not in one of the most expensive residential neighborhoods in town."

53. An hour later, after the city hall hearing room emptied and the free coffee, orange juice, and cookies were consumed or discarded, the city official who had listened intently to the woman, questioning her as she spoke at the lectern, packed his things and headed for his car. On the way, he pulled his phone out of his pocket and tapped with his finger a small app icon with a blue background and a white "F." Before reaching his car, the official typed in the name of one his fellow city councilmen — his friend on Facebook — tapped the "Message" button, and began to type in the small white space of his Facebook account: "They were right!!! Nursing homes don't belong in one of our up-and-coming neighborhoods." The official scanned what he typed, and before pulling the driver-side handle on his car, hit the small blue button that read "Send."

I. Introduction

54. All fifty states have enacted legislation requiring public access to documents and conversations that result in government actions. Indeed,

Effective self-governance requires that the citizenry be well informed. In addition to self-governance, open government laws contribute to a less corrupt, more efficient government.²

² Sandra F. Chance & Christina M. Locke, *Struggling with Sunshine: Analyzing the Impact of Technology On Compliance with Open Government Laws Using Florida As a Case Study*, 21 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 3 (2011).

55. Both federal and state statutes govern public access to records. On the federal side, the Freedom of Information Act (“FOIA”) was enacted in 1966 and allows the public to access certain non-confidential federal records.³ Each of the states on the other hand have adopted their own distinct “sunshine law” (or open access law) governing the public’s right to access governmental records.⁴

56. In the more than half a decade since the passage of FOIA and the bevy of similar state laws that followed, numerous amendments have been made at the federal and state level to adapt to shifts in technology and different means of communication.⁵ Despite these adaptations:

Technologies such as the internet, cellphones and laptop computers were not contemplated when many government entities formulated their laws governing access to records and meetings.⁶

57. As these technologies advance, they pervade the everyday lives of not only common citizens, but also elected officials both in their personal and official capacities. This raises the question of whether use of technology on private devices by public officials while in their official capacity should be considered “public records,” thereby making those private electronic messages accessible by the public under sunshine laws.⁷

58. Some local governments and states have implemented laws and policies as to the discoverability of a public official’s private email used for “official business.”⁸ What courts must currently decide is whether a public official’s electronic messages on a private device — whether text messages, emails, social media posts, and social media messages, and whether in typeface, picture, or audio format — are discoverable in a civil action. This is a difficult task because, while “[e]verything a government employee says that relates to official business is treated as part of the public

3 The Freedom of Information Act, 5 U.S.C. § 552 (2012).

4 *State Sunshine Laws*.

5 See generally Matthew D. Bunker *et al.*, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 *Fla. St. U. L. Rev.* 543 (1993).

6 Sandra F. Chance & Christina M. Locke, *Struggling with Sunshine: Analyzing the Impact of Technology On Compliance with Open Government Laws Using Florida As a Case Study*, 21 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 3 (2011).

7 See generally Haleigh Jones, *Public Officials’ Facebook “Likes”: The Case for Leaving Regulation of Official “Likes” to the Torches and Pitchforks of Constituents*, 18 *SMU Sci. & Tech. L. Rev.* 263 (2015); see also Matthew D. Bunker *et al.*, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 *Fla. St. U. L. Rev.* 543 (1993).

8 See *Fla. Att’y Gen. Op. AGO 2009–19* (Apr. 23, 2009).

record,” how are courts supposed to decide which private messages are related to “official business” and which are personal in nature — and does it matter?⁹

59. Moreover, state laws granting access to public records may conflict with the Constitution and privacy protections under federal statutory law.¹⁰ Thus courts must consider not only the ramifications with regard to a state’s sunshine law when analyzing the discoverability of a public official’s private electronic messaging activity, but also the federal ramifications of such decisions.¹¹

60. Despite the private obstacles courts must face when deciding whether or not to allow discovery of this type of messaging activity, it is also important to ask whether the discoverability of this material is a good thing in the first place. Do we want public officials using private text messages and social media for official business? Some have argued social media and private electronic messaging platforms can become a persuasive tool in the decision-making process of local governments (e.g. in land use regulation).¹² This is important because, while a public official’s use of social media can be a positive tool with regard to shaping a municipalities’ land use decisions, these private electronic messaging platforms can also serve as a vehicle to promote the implementation of discriminatory land use regulation decisions.

61. At their core, social media and private electronic communication messages by and between public officials are *ex parte* communications.¹³ Thus, those communications may be admissible and serve as evidence of discrimination in civil actions where a party claims it was denied a requested use of its property based on discriminatory animus by the city officials deciding the issue.¹⁴ In this context, it would appear that, if private electronic messaging activities by public officials are discriminatory in nature as to the approval of certain land uses, then those activities would need to be discoverable in civil actions.

62. To address this debate, this Article will attempt to propose solutions to the following three discussion topics:

1. Are private electronic messages of a public official a “public record” if used for “official business”?

9 Haleigh Jones, *Public Officials’ Facebook “Likes”: The Case for Leaving Regulation of Official “Likes” to the Torches and Pitchforks of Constituents*, 18 *SMU Sci. & Tech. L. Rev.* 263, 272–74 (2015).

10 U.S. Const. amends. I, IV; 18 U.S.C. § 2707 (2002).

11 See generally Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 *Minn. L. Rev.* 1137 (2002).

12 See generally Julie A. Tappendorf, *To Tweet or Not to Tweet: Use of Social Networking in Land Use Planning and Regulation*, 34(5) *Zoning & Planning L. Rep.* 1 (2011).

13 See generally Julie A. Tappendorf, *To Tweet or Not to Tweet: Use of Social Networking in Land Use Planning and Regulation*, 34(5) *Zoning & Planning L. Rep.* 1 (2011).

14 Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 *Elder L.J.* 187, 200–203 (2002).

2. Does allowing a party to discover those communications violate a public official's constitutional rights or rights to privacy under federal law?
3. Should we allow parties to discover an official's private electronic messages in certain land use actions at the risk of deterring and negating the benefits that private electronic messaging platforms — *i.e.* social media — can offer?

63. To answer these discussion topics, Part II of this article outlines which electronic communications of public officials are in fact “public records,” thereby causing them to be governed by a state’s open access law.¹⁵ Part III discusses how and why courts should allow private citizens to discover pertinent private electronic communications by public officials concerning land use decisions of local governments.¹⁶ Part IV analyzes the justifications for allowing private citizens to discover private electronic messages in certain actions, despite the protections of the Constitution and federal statutory law.¹⁷ Part V briefly provides the steps governments should take to ensure discovery of private electronic communications is allowed, yet not abused. And Part VI concludes that, because private electronic messaging has become such an integral part of our society, public officials must be mindful of what they communicate as “official business.”

II. Are Private Electronic Messages “Public Records”?

64. In the United States, there is no universal open records statute. Rather, states regulate the accessibility of public records through their own open records statutes — through legislation, interpretations of legislation by courts, and of the opinions of attorneys general. States differ when deciding what is considered a public record and how these records are accessed. Inevitably, a debate has arisen as to whether or not information stored in government officials’ and employees’ privately owned “computers, laptops, cell phones, PDAs, smart phones, and other personal electronic communication devices in conjunction with their work” should be subject to open access laws.¹⁸

15 Sandra F. Chance & Christina M. Locke, *Struggling with Sunshine: Analyzing the Impact of Technology On Compliance with Open Government Laws Using Florida As a Case Study*, 21 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 3 (2011).

16 See generally *Nissen v. Pierce Cty.*, 183 *Wash. 2d* 863 (Wash. 2015).

17 See generally Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 *Energy L.J.* 1 (2011).

18 Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials’ Personal Electronic Devices Subject to State Open Records Laws?* 19 *Comm. L. & Pol’y* 293, 296 (2014) (citing *Okl. Att’y Gen. Op.* 09–12 (2009)).

65. Particularly contentious is the question of whether information stored on a server used for a government officials' or employees' private email or social media account should be subject to open access laws.¹⁹ Critics of government officials who oppose classifying and disclosing personal emails used in the course of their duties as public records have pointedly asked:

If you're not attempting to hide your communications from the public, then why use private e-mail accounts to conduct public business? If I were going to set up a system to try to circumvent the public records law, this is how I would do it.²⁰

66. In tackling this debate, a good place to start is how states define what a "public record" is. For instance, in Florida, "public records" are defined as:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.²¹

67. In Delaware, a "public record" is defined as information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.²²

68. The two definitions are similar on their face; however, unlike Florida, which only sets forth a broad and general codified definition of what a public record is, Delaware goes a step further by stating what is not considered a public record.²³ Indeed, Delaware has made it clear that "[e]mails received or sent by members

19 Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* 19 *Comm. L. & Pol'y* 293–97 (2014). See also Nicole Rodriguez, *Investigation: Are Officials Inadvertently Breaking Records Law Online?* *TCPalm* (Dec. 16, 2016).

20 Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* 19 *Comm. L. & Pol'y* 293–97 (2014), citing Benjamin Niolet & Michael Bieseker, *Aide: Easley Wanted E-mail Messages Deleted*, *McClatchy D.C. Bureau* (Feb. 4, 2010). See also Nicole Rodriguez, *Investigation: Are Officials Inadvertently Breaking Records Law Online?* *TCPalm* (Dec. 16, 2016).

21 Fla. Stat. § 119.011(12) (2016). See also N.C. Stat. § 132–1 (2016), Neb. Stat. § 84–712.01 (2016).

22 Del. Stat. §10002(l) (2016).

23 Del. Stat. §10002(l) (2016).

of the Delaware General Assembly or their staff” are not public records.²⁴ Even more telling of Delaware’s legislative intent is the following exception from public records:

Any communications between a member of the General Assembly and that General Assembly member’s constituent, or communications by a member of the General Assembly on behalf of that General Assembly member’s constituent, or communications between members of the General Assembly.²⁵

69. Reading Delaware’s statute in whole, it would seem to any disinterested observer that a government officials’ private email — and, for that matter, *any* email sent or received by a government official — is not subject to a public records request. Delaware is, however, somewhat of an anomaly in the realm of open access laws, because it:

consistently ranks among the bottom nationwide when it comes to government transparency and accountability. . . . [T]he Center for Public Integrity slapped an F rating on Delaware in a state-by-state analysis based on public access to information, legislative accountability, ethics enforcement and other facets.²⁶

70. Many states are beginning to deem government officials’ private communications as public records when those communications are used for “official business.”²⁷ Illinois, for example, asks “whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government.”²⁸ In Virginia, the state has observed that official business encompasses “those matters over which the public governmental body has supervision, control, jurisdiction, or advisory power.”²⁹

71. Most recently, the California Supreme Court unanimously ruled in *City of San Jose v. Superior Court* that government employees could not shield from the public work-related emails that were either sent from, or maintained on, private devices

24 Del. Stat. §10002(l)(16) (2016).

25 Del. Stat. §10002(l)(19) (2016).

26 Margie Fishman and James Fisher, *Why Delaware Government Documents Stay Hidden*, [Delaware Online](#) (Mar. 19, 2016).

27 *Fla. Att’y Gen. Op. AGO 2009–19* (Apr. 23, 2009); Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials’ Personal Electronic Devices Subject to State Open Records Laws?*, [19 Comm. L. & Pol’y 293, 303–304](#) (2014).

28 Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials’ Personal Electronic Devices Subject to State Open Records Laws?* [19 Comm. L. & Pol’y 293, 303–304](#) (2014).

29 Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials’ Personal Electronic Devices Subject to State Open Records Laws?* [19 Comm. L. & Pol’y 293, 304](#) (2014).

and through private accounts.³⁰ The court analyzed the statutory definition of a public record under the California Public Records Act (“CPRA”), which is:

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.

72. The court broke the statute down into four aspects, so that a public record 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.³¹

73. Interestingly, at least one state supreme court has ruled that private emails are not public records just because they are stored on government owned computers. In *State v. City of Clearwater*, the court held:

Personal e-mails are not “made or received pursuant to law or ordinance or in connection with the transaction of official business” and, therefore, do not fall within the definition of “public records” that are subject to disclosure by virtue of their placement on a government-owned computer system.³²

74. Addressing the first aspect, the court in *San Jose* easily established that emails were writings through the statutory definition of a “writing” under the CPRA, which encompasses “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile.”³³ Under the second aspect, the court stated 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.”³⁴ Turning to the third aspect, the court found:

[T]he term “local agency” logically includes not just the discrete governmental entities listed [under the CPRA], but also the individual officials and staff members who conduct the agencies’ affairs.³⁵

30 Sudhin Thanawala, *Court: Officials’ Emails on Private Accounts Are Public*, AP (March 3, 2017); *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017).

31 *City of San Jose v. Superior Court*, 389 P.3d 848, 853 (Cal. 2017), citing Cal. Stat. § 6252(e) (2016).

32 *State v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003).

33 *City of San Jose v. Superior Court*, 389 P.3d 848, 857 (Cal. 2017).

34 *City of San Jose v. Superior Court*, 389 P.3d 848, 857 (Cal. 2017).

35 *City of San Jose v. Superior Court*, 389 P.3d 848, 857 (Cal. 2017).

75. Lastly, and perhaps most importantly, it found the fourth aspect satisfied because:

A writing retained by a public employee conducting agency business has been “retained by” the agency within the meaning of [the CPRA], even if the writing is retained in the employee’s personal account.³⁶

76. Concluding that electronic communications contained on a government official’s private account are subject to public records requests, California came into alignment with other states, such as Florida.³⁷ However, the majority of courts have not addressed whether text messages and social media activity fall under the umbrella of electronic communications in an official’s private account.³⁸

77. Legislatures have begun to fill this void by amending current public records laws and regulations.³⁹ Late in 2016, for example, the Texas legislature decided that the use of social media applications may create public records, and should be managed appropriately. Local governments will need to consult the relevant records retention schedule for the minimum retention periods. Similarly, the New Mexico legislature has adopted regulations bringing social media postings and private electronic messages by government officials under the purview of open access laws, so that “any attachments which may be transmitted with the electronic message, including text messages, social media and e-mail . . . are identified as public records.”⁴⁰

78. Thus, lawmakers are beginning to consider what constitutes a public record regarding electronic communications held on either personal devices or online private accounts.⁴¹ But a tough question remains as to whether these communications would be relevant, and therefore admissible, during land use litigation. It is the position of this article that these communications are vital to the parties during land use litigation.

36 *City of San Jose v. Superior Court*, 389 P.3d 848, 857 (Cal. 2017).

37 *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017); see also *Fla. Att’y Gen. Op. AGO 2008–07* (Feb. 26, 2008).

38 See Ross Rinhart, “Friending” and “Following” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence, 22 *S. Cal. Interdisc. L.J.* 781, 781–82 (2013).

39 Tex. Reg. Text, 13 TAC 7.125 (proposed Aug. 26, 2016).

40 N.M. Reg. Text, 1.13.4 (effective Nov. 30, 2015).

41 *City of San Jose v. Superior Court*, 389 P.3d 848, 853 (Cal. 2017); Tex. Reg. Text, 13 TAC 7.125 (proposed Aug. 26, 2016).

III. The Use and Effectiveness of Public Records in Land Use Actions

79. At its core, the zoning of land involves the division of land by local governments and municipalities so as to define the physical dimensions of the land along with the permissible use of that land by its owners.⁴² It has long been the law of the United States that local governments are provided broad discretion when determining what use of the land is appropriate and how it should be zoned, provided that discriminatory practices are not employed against protected classes of citizens.⁴³

80. Sometimes, community residents try to prevent a particular land use near their homes. Put more simply, neighbors of a community might not want a business or organization moving into their community based purely on the aspects of that business or organization. The term coined by the courts for this exclusionary tactic by a community is “NIMBY” — an acronym for “Not in My Backyard.”⁴⁴

81. NIMBY reactions have been used against the elderly to attempt to block construction of nursing homes and assisted living facilities.⁴⁵ Recognizing that some communities engage in these discriminatory practices, courts have become wary of local governments who deny nursing homes’ and assisted living facilities’ applications for building permits.⁴⁶ Yet exclusionary zoning via discriminatory practices persist as local townships and municipalities continue to exclude elderly care facilities through impermissible use of zoning laws.⁴⁷

82. To succeed in a discriminatory housing action against a local city or municipality, a party must show that the city’s reason for preventing the development of protected-class housing was a pretext for discriminatory decisionmaking.⁴⁸ Courts can make this determination by comparing a city’s decision to the evidence in the

42 Kristine Nelson Fuge, *Exclusionary Zoning: Keeping People in Their Wrongful Places Or a Valid Exercise of Local Control?* 18 *Hamline J. Pub. L. & Pol’y* 148, 150 (1996).

43 *Wentworth v. Hedson*, 493 F. Supp. 2d 559, 565 (E.D.N.Y. 2007). See generally Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2012); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44 Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 *Elder L.J.* 187, 196 (2002).

45 Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 *Elder L.J.* 187, 200–203 (2002).

46 *Urban Farms, Inc. v. Borough of Franklin Lakes*, 431 A.2d 163, 166–68 (N.J. Super. App. Div. 1981).

47 See Todd C. Frankel, *Disputes Over Senior Housing Reflect “Not in My Backyard” Worries*, *St. Louis Post-Dispatch* (Aug. 3, 2013); see also James M. Berklan, *Scorned Nuns Brew Up a NIMBY Lawsuit, McKnight’s* (Feb. 4, 2016).

48 *Valley Hous. LP v. City of Derby*, 802 F. Supp. 2d 359, 387–88 (D. Conn. 2011).

record and the zoning ordinance governing the city's decision,⁴⁹ or by examining the individual actions of commissioners in charge of granting building permits.⁵⁰ Courts have held public records are useful and vital tools to determine the motivation of zoning commissions.⁵¹

83. For example, during land use litigation in Florida in 2015, city officials were found to have withheld personal and private electronic messages that would constitute public records. In the middle of this litigation, a Florida state judge denied that the municipality had committed any public records violations by ruling that none of the commissioner's personal emails were either public records or available.

84. However, upon a subsequent, and accidental, production of previously unproduced personal emails, the judge ordered a new trial because, had those emails been produced in the first place, "[t]he emails would have met the parameters of [the plaintiff]'s original public-records request."⁵² The city's refusal to produce emails, and its denial of their status as public records, has cost the local municipality and its tax payers hundreds of thousands of dollars in litigation costs, regardless of whether it is ultimately successful.⁵³ Nearly a year after a new trial was granted, an arbitrator found that the commissioners did hide their private emails concerning official business of the county, held that a public records claim was ripe, and ordered that attorney's fees pursuant to Florida Sunshine laws were appropriate along with injunctive relief.⁵⁴

85. This pending litigation against a Florida municipality shows that commissioners' activity on private devices and private accounts can implicate open access laws, thereby creating a large amount of liability for a city if it does not comply with public records requests.⁵⁵ And, as noted above, courts have forgone for decades the broad discretion normally afforded to municipalities regarding land use decisions when there is evidence that those decisions are based on discriminatory animus.⁵⁶

49 See generally *Urban Farms, Inc. v. Borough of Franklin Lakes*, 431 A.2d 163 (N.J. Super. App. Div. 1981).

50 See *Valley Hous. LP v. City of Derby*, 802 F. Supp. 2d 359, 387–88 (D. Conn. 2011).

51 See *Blagden Alley Association v. D.C. Zoning Commission*, 590 A.2d 139 (D.C. 1991); *Shepherdstown Observer, Inc. v. Maghan* 700 S.E.2d 805 (W. Va. 2010).

52 Lidia Dinkova, *Newly Discovered Emails Prompt New Trial in Lake Point's Lawsuit Against Martin County*, [TCPALM](#) (Apr. 29, 2016).

53 Barbara Clowdus, *Commissioner's Emails Uncovered in Lake Point Case*, [Martin County Currents](#) (Mar. 21, 2016).

54 Barbara Clowdus, *Lake Point's Court Fight Over Public Records Ends ... Almost*, [Martin County Currents](#) (Feb. 24, 2017).

55 Lidia Dinkova, *Newly Discovered Emails Prompt New Trial in Lake Point's Lawsuit Against Martin County*, [TCPalm](#) (Apr. 29, 2016).

56 *Valley Hous. LP v. City of Derby*, 802 F. Supp. 2d 359, 387–88 (D. Conn. 2011).

86. Thus, a government official's private communications — whether through email, text, or social media — may prove to be at the forefront of evidence linking zoning decisions by local governments with discriminatory NIMBY actions.⁵⁷ Yet constitutional and privacy concerns remain, and might suggest that elected government officials and government employees should be shielded from disclosing private communications. However, the following Part of this article will discuss why constitutional and privacy concerns do not — and should not — shield all private electronic communications by government officials.

IV. The Right to Privacy

87. Actions to force disclosure of public records have been highly scrutinized as a result of the protections contained within the First Amendment of the United States Constitution and the federal Privacy Act.⁵⁸ Normally, speech made in a public forum (especially political speech) is afforded the greatest amount of protection under the First Amendment.⁵⁹

88. However, as an employee of the government, a public official is not afforded First Amendment protection for private communications in the furtherance of official business concerning the government in which they serve.⁶⁰ Further, courts are beginning to find that clarity and transparency of local government is paramount, and local officials are no longer allowed to claim that private messages should be afforded protection under the First Amendment.⁶¹

89. As noted above, the California Supreme Court ruled in *San Jose v. Superior Court* that government employees could not refuse to turn over private text messages, contained on private cell phones, when those text messages related to official

57 Lidia Dinkova, *Newly Discovered Emails Prompt New Trial in Lake Point's Lawsuit Against Martin County*, [TCPalm](#) (Apr. 29, 2016).

58 Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution* 86 [Minn. L. Rev.](#) 1137, 1201–03 (2002). (“In a series of cases, the Supreme Court has held that the First Amendment mandates that certain government proceedings be open to the public.”), citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (Press-Enterprise I); *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (Press-Enterprise II). Additionally, the court in *Nissen* found that the Fourth Amendment to the United States' Constitution did not shield discovery of public records. *Nissen v. Pierce Cty.*, 183 Wash. 2d 863, 883 (Wash. 2015).

59 See generally *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

60 Morgan Watkins, *Text Messages As Public Records: A New Set of Issues*, [The Gainesville Sun](#) (Mar. 10, 2013).

61 Christopher Cadelago & Ryan Lillis, *Government Officials Can't Use Private Devices to Hide Texts and Emails, Court Rules*, [The Sacramento Bee](#) (Mar. 2, 2017).

government business.⁶² Indeed, this seems to highlight the trend among states and their highest courts.⁶³ For example, in 2015, in *Nissen v. Pierce County*, the Washington Supreme Court found private text messages of government employees were subject to Washington's open access law for public records, and that public officials do not enjoy a constitutional right of privacy in such records.⁶⁴ The court derived this rule from the Supreme Court of the United States' 1977 decision in *Nixon v. Administrator of General Services* in which the Court held that:

public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.⁶⁵

90. Subsequently, in *San Jose*, the California Supreme Court held that:

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."⁶⁶

91. Washington is not alone in applying the Supreme Court's precedent from *Nixon* to electronic communications of government employees. In 2007, the Supreme Court of Idaho found in *Cowles Publishing Company v. Kootenai County Board of County Commissioners* that seemingly private electronic communications between a government employee and her supervisor were public records, and as such, the government employees "had no reasonable expectation of privacy in them." The court in *Cowles* noted the federal Constitution protects an individual's zone of privacy, "include[ing] an individual's interest in having certain personal matters remain private." However, private messages deemed public records are not personal matters, and, thus, are not afforded such protections under the First Amendment.⁶⁷

92. Therefore, as noted above in the previous Parts of this Article, both courts and legislatures are slowly beginning to view private electronic messages of government officials as public records, thereby subjecting those private messages to open access laws. Nowhere is this trend of open access to private electronic communications

62 *City of San Jose v. Superior Court*, 389 P.3d 848, 853 (Cal. 2017).

63 Andrew Greene, Valerie Hughes & Tobias Piering, *Work-Related Text Messages on Personal Cell Phones Are Public Records Says WA Supreme Court*, *JD Supra* (Sept. 2, 2015).

64 *Nissen v. Pierce Cty.*, 183 Wash. 2d 863, 880–81, 882 (Wash. 2015).

65 *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

66 *City of San Jose v. Superior Court*, 389 P.3d 848, 860 (Cal. 2017).

67 *Cowles Publishing Company v. Kootenai County Board of County Commissioners*, 159 P.3d 896, 902 (Idaho 2007); compare *State v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003).

more applicable than to the private electronic communications of public officials concerning land use regulation. Accordingly, legislatures from each state should begin implementing various laws, regulations, and policies allowing the public to access these private communications without abuse of such access.

V. Moving Forward

93. Providing the public access to private electronic messages created by public officials is imperative because, as the court in *Nissen* stated, electronic messages through private devices:

are fast becoming an indispensable fixture in people’s private and professional lives. . . . Yet the ability of public employees to use cell phones to conduct public business by creating and exchanging public records — text messages, e-mails, or anything else — is why [a state’s open access law] must offer the public a way to obtain those records.⁶⁸

94. Seemingly, without clear legislation and guidance from courts, we are hindering the people’s mandate to have “full access to information concerning the conduct of government on every level.”⁶⁹

95. Accordingly, in response to the *Nissen* court’s call to action, there are various methods by which legislatures could require public officials to provide greater access to private electronic communications. One method is for states to adopt a public access law into their constitutions, and expressly provide that the right to privacy is waived for those records.⁷⁰ Another is for legislatures to codify private electronic communications — text messages, emails, private social media postings/messages — as public records when used for official business by a government employee.⁷¹ But perhaps the most expeditious and unencumbering method to amend open access laws is to adopt local government policies that address and govern the use of private electronic messages by public officials.

As these new technologies pervade the everyday activities of government officials and citizens alike, new policies (and sometimes laws) must be developed to ensure transparency. The closed doors that might have aided public officials in holding secret meetings in the past have now been replaced by electronic communications.⁷²

68 *Nissen v. Pierce Cty.*, 183 Wash. 2d 863 ¶¶ 35, 36 (Wash. 2015).

69 *Nissen v. Pierce Cty.*, 183 Wash. 2d 863 ¶ 36 (Wash. 2015).

70 Fla. Const. art. 1, § 23.

71 See also H.R. 2455, 79th Leg. (Or. 2017).

72 *Nissen v. Pierce Cty.*, 183 Wash. 2d 863, 879 (Wash. 2015); see also Sandra F. Chance & Christina

96. By taking these steps, states can retain their commitment to open access and transparent government, all the while ensuring technology advances do not shield public officials from disclosing public records in the form of private electronic communications.

VI. Conclusion

97. As private electronic messages become more ingrained in our everyday lives, states and the federal government must work diligently to provide open access to documents that could be considered public records. Otherwise, they are likely not only to run afoul of the public's right to those documents, but also to allow public officials to shield what would otherwise be a public record under the guise of private communications.⁷³

98. Such records can be pivotal factors in determining the outcome of land use litigation where unlawful discrimination is alleged. As technology advances, debates will continue over what constitutes a public record. One thing that will (hopefully) not change is the public's right to access public records documenting how government decisions are made, thereby ensuring "granny" will always have a place to stay in our communities.

M. Locke, *Struggling with Sunshine: Analyzing the Impact of Technology On Compliance with Open Government Laws Using Florida As a Case Study*, 21 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 3 (2011). Despite this shift to adopt procedures, and relative ease in doing so, agencies are reluctant, even those that "[i]n a department all about following rules and procedures." Mark Binker & Kelly Hinchcliffe, *Texts Are Public Records but Access to Them Remains Tricky*, *AP* (Mar. 13, 2017).

⁷³ Mark Binker & Kelly Hinchcliffe, *Texts Are Public Records but Access to Them Remains Tricky*, *AP* (Mar. 13, 2017); see Fla. Const. art. 1, § 24(a); see also Cal. Const. art. 1, § 3(b)(1).