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ASSIGNED TO
JUDGE E. Bradley Nelson
FOR ALL PURPOSES

FILED/ENDORSED
Clerk of the Superior Court

MAY 21 2020

By J. Abueg
DEPUTY CLERK

13 SUPERIOR COURT OF CALIFORNIA
14 COUNTY OF SOLANO

14 Oakland Privacy,

15 Solange Echeverria, and

16 Daniel H. Rubins,

17 Plaintiffs,

19 v.

20 City of Vallejo,

21 Defendant.

Case No. FCS054805

Petition for Writ of Mandate
and
Complaint for Equitable Relief
(Gov. Code § 53166; Code. Civ. Pro.
§ 526a)

Judge:
Department:

1. This suit arises out of the City of Vallejo’s decision to purchase and operate a surveillance device that will allow its police department to intercept and re-route cell-phone signals in order to locate a specific cell phone or to identify all cell phones in a particular area.
2. The Legislature has recognized that these surveillance devices can pose serious risks to the privacy rights protected by the Fourth Amendment and the California Constitution; it has therefore mandated that governmental entities must follow specific procedures before they acquire or operate them.
3. For example, before a city acquires one of these devices, its city council must adopt a binding usage and privacy policy at a regularly scheduled meeting, with the usual requirements of notice to the public and an opportunity for members of the public to comment on the proposed policy. *See* Government Code § 53166(c)(1).¹ This policy must contain a number of specific provisions to protect personal privacy, including a description of who is authorized to use the equipment and access data it obtains. § 53166(b)(2)(A).
4. The policy must additionally ensure that the use of the equipment complies with all applicable law. § 53166(a)(2). Thus, the policy must require that the police obtain a search warrant before using this surveillance technology, unless a specific statutory exception to this requirement applies. *See* Penal Code § 1546.1.
5. Vallejo has failed to comply with these statutory requirements. Its City Council failed to adopt or even review a privacy policy when it voted to authorize the police to spend more than \$750,000 to purchase one of these devices; instead, it simply took the empty step of authorizing its Chief of Police to create a privacy policy in a closed-door process that was not required to – and did not – include any public participation or comment.
6. Not surprisingly, this closed process resulted in a policy that fails to comply with some of the substantive requirements required by state law, including the requirements that the policy identify all personnel who are authorized to use the technology or access information obtained

¹ All statutory references are to the Government Code unless otherwise indicated.

1 from it. In addition, the policy authorizes warrantless use of the surveillance device in
2 circumstances where state law forbids it.

- 3 7. Plaintiff Oakland Privacy raised these concerns with the City both before and after the City
4 Council voted to authorize the purchase. At that Council meeting, which was held by
5 videoconference because of the COVID-19 emergency, two letters from Oakland Privacy
6 detailing these concerns were read aloud. After the meeting, Oakland Privacy sent an additional
7 detailed letter asking the Council to hold another meeting where it could review and approve the
8 privacy policy, as required by § 53166. The Vallejo City Attorney wrote back to assert that
9 § 53166 does not require the Council to adopt or approve any policy, and that the City's past and
10 proposed actions are perfectly lawful.
- 11 8. Because the City has rebuffed its repeated attempts to resolve the matter without litigation,
12 Oakland Privacy and two of its members who live in Vallejo bring this suit for mandamus and
13 injunctive relief. Plaintiffs do not seek to prohibit the City from acquiring or using this
14 technology; they ask only that the City do so in accordance with the specific California statutes
15 enacted to ensure that it is used responsibly and in accordance with the constitutional protections
16 of privacy and prohibitions against unreasonable searches.

17 **1. Parties²**

- 18 9. Plaintiff Oakland Privacy is a citizens' coalition that works to defend the right to privacy and
19 enhance public transparency and oversight regarding the use of surveillance techniques and
20 equipment in the greater San Francisco Bay Area region. The organization has written use
21 policies and impact reports for a variety of surveillance technologies, conducted research and
22 investigations, and developed frameworks for the implementation of surveillance technologies
23 that respect civil rights, privacy protections, and community control. Oakland Privacy has
24 approximately 200 members, at least one of whom lives and pays taxes in Vallejo.

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28 ² This combined Petition and Complaint refers to the parties as Plaintiff and Defendant under Code
of Civil Procedure § 1063.

10. Plaintiff Solange Echeverria is a freelance journalist with a longstanding interest in protecting civil liberties and working for governmental transparency. She is a member of Oakland Privacy who lives and pays taxes – including sales and personal-income taxes – in Vallejo.

11. Plaintiff Daniel H. Rubins is a resident of Vallejo who has long been active in fighting for transparency in that City's government. He has filed numerous public-records requests with the City in the last 12 months and frequently engages in productive conversation with City officials to improve the City's public records, open data, and other policies. He is co-founder and CEO of Legal Robot, a company that provides automatic legal document review using artificial intelligence, and executive director of the non-profit Legal Tech Foundation, which uses technology to provide free legal services to the low-income and underserved communities. Both organizations are based in Vallejo. Rubins owns real property in Vallejo and pays taxes – including real-property, sales, and personal-income taxes – in that City. He is a member of Oakland Privacy.

12. Plaintiffs bring this case because of their shared interest in ensuring that Vallejo comply with the law, and also as taxpayers and as parties requesting mandamus relief to ensure that the City follow the law in this matter relating to the public interest.

13. Defendant City of Vallejo is a municipal corporation, organized under the laws of California. The Vallejo City Council is the City's legislative body. The City maintains an Internet website, <https://www.cityofvallejo.net/>. Vallejo is funded in part by sales and property taxes and by money it receives from the State, some of which is derived in part from personal income taxes paid by Californians who live in Vallejo and the rest of the State.

2. Jurisdiction, Venue, and Joinder

14. This Court has jurisdiction under Article VI section 10 of the California Constitution.

15. Venue is proper in this Court: the Defendant resides in, and the acts and omissions complained of herein occurred in, Solano County. *See* Code Civ. Proc. §§ 393(b), 394, 395(a).

3. Summary of Governing Law

16. Government Code § 53166, enacted in 2015 as SB 741, requires cities and other local agencies to follow certain procedures before they acquire or operate cellular-communications interception technology, which is defined to include devices such as the cell-site simulator at issue in this case.

17. Every local agency that operates this technology must implement a usage and privacy policy to ensure that its use “complies with all applicable law and is consistent with respect for an individual’s privacy and civil liberties.” § 53166(a)(2). This policy must include the “authorized purposes for using cellular communications interception technology and for collecting information using that technology,” a “description of the job title or other designation of the employees who are authorized to use, or access information collected through the use of, cellular communications interception technology,” and other provisions designed to protect privacy and civil liberties. § 53166(b)(2).

18. Before a city acquires this type of device, its legislative body must adopt a resolution that both authorizes the city to acquire the technology and sets forth the usage and privacy policy. § 53166(c)(1). This must occur at a regularly scheduled meeting held in compliance with the Brown Act. *Id.* This means that the legislative body must provide the public with notice that it will be taking up the resolution, conduct all of its discussions regarding the policy in public, provide an opportunity for members of the public to comment on the proposed resolution, and conduct a public vote on it. *See* Gov. Code § 94953 et seq.

19. A city that maintains a website must post its usage policy on that website. § 53166(b)(2).

20. Penal Code § 1546.1 requires a governmental entity to obtain a search warrant or other court order before it accesses electronic-device information by means of electronic communication with the device (which is how cell-site simulators operate), unless one of the statutory exceptions applies. These statutory exceptions include circumstances where the owner provides consent or is under criminal-justice supervision, the device is lost or stolen, or where “the government entity, in good faith, believes that an emergency involving danger of death or *serious* physical injury to any person requires access.” *Id.* § 1546.1(c) (emphasis added). There is no exception

1 for threatened non-serious injury. When invoking this provision, law enforcement must apply for
2 an appropriate warrant within three days of obtaining the information. *Id.* § 1546.1(h).

3 **4. Factual Background**

4 21. The surveillance device that Vallejo is acquiring goes by a number of different names including
5 cell-site simulator, cellular-site simulators, and, perhaps most commonly, Stingray, a brand
6 name. Although the companies that produce them and the agencies that use them keep the
7 technical details secret, the basics are widely known.

8 22. Section 610.4 of the Vallejo Police Department's existing usage and privacy Policy ("the
9 Policy"), posted on its website and attached as Exhibit A to this Complaint, describes this
10 technology as follows:

11 23. "Cellular site simulators, as governed by this Policy, function by transmitting as a cell tower. In
12 response to the signals emitted by the simulator, cellular devices in proximity of the simulator
13 identify it as the most attractive cell tower in the area and thus transmit signals to the simulator
14 that identifies the device in the same way that they would a networked tower...."

15 24. The Policy explains that this can be used to locate a known cellular device: "A cellular site
16 simulator receives signals and uses an industry-standard unique identifying number assigned by a
17 device manufacturer or cellular network provider to distinguish between the incoming signals
18 until the targeted device is located. Once the cellular site simulator identifies the specific cellular
19 device for which it is looking, it will obtain the signaling information relating only to that
20 particular phone, rejecting all others."

21 25. The Policy also acknowledges that the devices can be used to identify all the cellular devices
22 within the simulator's range ("[T]he cellular site simulator will obtain signaling information
23 from all devices in the simulator's target vicinity."). If law-enforcement then obtains information
24 from providers about who owns the phones, this would allow the police to determine the
25 identities of the owner of every cell phone that was in a particular area over a particular time
26 span. Although the Policy states that this aspect of the technology will be used only for the
27 purpose of locating persons in need of help in what it calls a "mass-casualty event," it
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1 confusingly states this in its discussion of the technology, § 610.4. The reality is that this
2 technological capability *can* be used in a variety of situations that have nothing to do with
3 emergencies, although the Policy properly seems to prohibit it.

4 26. Although the City's Policy states that "[c]ellular site simulator technology does not capture nor
5 receive any content such as text messages, voicemails, applications, multimedia messages, etc.,"
6 "does not have the capability of listening to phone calls," and that "these devices do not capture
7 the content of calls or messages," this is untrue. As the U.S. Department of Justice has explained,
8 "cell site simulators/triggerfish and similar devices may be capable of intercepting the contents
9 of communications and, therefore, such devices must be configured to disable the interception
10 function, unless interceptions have been authorized by a [wiretap] order."³

11 27. The Policy tacitly acknowledges this by stating that devices "employed by the Vallejo Police
12 Department shall not capture emails, texts," and other communications contents, and, more
13 generally, that they shall not be used to collect the contents of any communications.

14 28. A true copy of this Policy is attached to this Complaint as Exhibit A

15 29. The agenda for the March 24, 2020, the Vallejo City Council meeting included the following
16 item: PURCHASE AGREEMENT WITH KEYW CORPORATION FOR RADIO
17 FREQUENCY DETECTOR/CELL SITE SIMULATOR; RESOLUTION AUTHORIZING
18 PURCHASE AND IMPLEMENTATION OF POLICY.

19 30. As the Council staff report for this agenda item explained, the purpose of this proposal was to
20 allow the City to "purchase a radio frequency detector/cellular site simulator, including a vehicle
21 and installation in an amount not to exceed \$766,018 and adopt a resolution authorizing the
22 Chief of Police to acquire the equipment and implement a usage and privacy policy." Purchase of
23 a special vehicle and installation was required because the "device is a main frame computer
24 which must be mounted inside of a vehicle." This report described the equipment as "operat[ing]

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26 1. ³ United States Department of Justice Electronic Surveillance Manual (June 2005), available at
27 <https://www.justice.gov/sites/default/files/criminal/legacy/2014/10/29/elec-sur-manual.pdf>.
28 Current federal Department of Justice policy requires Department's devices to be configured so
as not to capture content. See Department of Justice Policy Guidance: Use of Cell-Site Simulator
Technology (2015), available at <https://www.justice.gov/opa/file/767321/download>.

1 by detecting, triangulating and measuring cellular phone radio frequencies,” allowing it to
2 “locate persons” “in minutes.” This equipment therefore works by accessing electronic-device
3 information by means of electronic communication with the device.

4 31. The staff report asserted that “In accordance with California Penal Code 1546.1 and the Vallejo
5 Police Department Lexipol Policy, the radio frequency detector/cellular site simulator is only to
6 be used in conjunction with a valid search warrant duly issued by a judge.”

7 32. The agenda also included a redacted purchase contract and copy of a half-page proposed
8 resolution. This resolution noted that the City’s police department wished to purchase the
9 equipment for use in a variety of situations. It also asserted – erroneously – that Government
10 Code § 51366(c) would allow the City to acquire the equipment if the City Council approved the
11 purchase and provided “authorization to implement a compliant usage and privacy policy.” It
12 further stated that the “chief of Police has directed the creation of a usage and privacy policy for
13 the deployment of the equipment that complies with state and federal law,” without giving any
14 additional information about this policy. The agenda did not include a copy of the proposed
15 usage and privacy policy.

16 33. In response to the notice of this agenda item, Oakland Privacy sent a letter to the City Council.
17 The letter raised a number of concerns with the purchase, including the fact that the measure was
18 to be adopted “without prior publication, for public comment and input, of a use and privacy
19 policy.” It asked, rhetorically, “how will the City Council know if the technology is being
20 properly utilized in conformance with a policy that doesn’t yet exist?” The letter therefore asked
21 that the Council delay purchasing the technology until it could be discussed at a further meeting,
22 with a usage policy that could be reviewed. A true copy of this letter is attached to this
23 Complaint as Exhibit B.

24 34. On March 24, 2020, the Vallejo City Council took up the item.

25 35. During the public-comment period when the item was taken up, the vice mayor read Oakland
26 Privacy’s letter (Exhibit B) into the record.

36. A separate written comment from Oakland Privacy member Mike Lacabe was also read into the record; this comment, too, expressed concern that the Council did not have a usage-and-privacy policy before it, emphasizing that “it is critical that the public and the City Council ... be able to create the policies that will govern the device.”

37. The Vallejo Chief of police and a police captain then spoke. The Chief stated in response to what he characterized as a “comment that we don’t have an existing policy” that “we do have an existing policy.” The Chief further asserted that the policy would “be set forth ... when this [resolution] is approved.”

38. In response to a question from the mayor about whether the City would be violating Fourth Amendment rights and whether a search warrant would be required to use the technology, the Chief assured the Council that the device “can only be used with a search warrant.... We cannot utilize this without a search warrant that’s approved by a judge.”

39. A Vallejo police captain then told the Council that the use and privacy policy would “be put online immediately before purchase” so that Council members could view it.

40. After this presentation, three Council members stated that the Chief had addressed their concerns or questions about the item. The Council then voted to enact the draft resolution.

41. Specifically, the Council’s minutes report as follows: “Moved by Vice Mayor Sunga and carried unanimously to authorize the City Manager to execute the agreement between the City and KeyW Corporation to purchase a radio frequency detector/cellular site simulator, including a vehicle and installation in an amount not to exceed \$766,018 and adopt a resolution authorizing the Chief of Police to acquire the equipment and implement a usage and privacy policy.”

42. The resolution did not contain any privacy and usage policy. When it took this vote, neither the Council nor the public had access to any privacy and usage policy.

43. A true copy of this Resolution is attached as Exhibit C to this Complaint.

44. On March 27, Oakland Privacy again emailed the City raising its concerns with the resolution authorizing the acquisition and use of the cell-site simulators. The letter explained that the resolution failed to comply with SB 741, codified as Government Code § 53166, because this

1 law “requires that the use policy for the equipment be available to the public, which it does not
2 seem to be, and posted conspicuously on the agency's website, which it is not.” It further
3 explained that this law “also requires that the City Council that oversees the agency receive,
4 review and formally approve of the use policy by resolution or ordinance, prior to acquisition.”
5 Because the City had failed to do any of this, Oakland Privacy asked that the City post its policy
6 on its website, that the Council place it on the agenda for a future meeting, and that the City
7 postpone the purchase until it had complied with these legal requirements. A true copy of this
8 letter from Oakland Privacy to the City is attached as Exhibit D to this Complaint.

9 45. On March 31, 2020, The Vallejo City Attorney responded to this letter, setting forth the City’s
10 position that “[t]here is nothing in Government Code § 53166 which requires that the usage and
11 privacy policy be presented to the City Council for its consideration and approval.” Instead, it is
12 the City’s position that “Section 53166 requires only that the City Council authorize such a
13 policy, which, in this case, it did.” A true copy of this letter from the City Attorney to Oakland
14 Privacy is attached as Exhibit E to this Complaint.

15 46. The City Attorney’s letter further stated that the Chief of Police “has prepared a usage and
16 privacy policy” and that the City would provide a copy to Oakland Privacy “when it is in final
17 form, which should be later this week.” Finally, the letter stated that the “City will not have
18 possession of the cell site simulator until June at the earliest.”

19 **5. The City’s existing privacy and usage Policy is inconsistent with what the Chief of Police**
20 **told the Council it would contain and violates State law, both in its substance and in how it**
21 **was adopted.**

22 47. Sometime after the March 24 meeting, the City posted a “cell site simulator usage and privacy”
23 policy, dated April 2, 2020, on its website, at
24 <https://www.cityofvallejo.net/common/pages/DisplayFile.aspx?itemId=16619943>. A true copy
25 of this Policy is attached as Exhibit A to this Complaint.

26 48. This Policy states that its “purpose is to set guidelines and requirements pertaining to cellular site
27 simulator technology usage and privacy.” Although much of the Policy is consistent with the law
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1 and with the way the Chief of Police described the policy to the City Council, some parts of it are
2 not.

3 49. For example, the Policy allows the police to use the technology without first obtaining a warrant
4 “for an identified exigency,” which “is defined as an imminent threat of death or bodily injury.”
5 But the Penal Code does not allow law enforcement to use this technology without first obtaining
6 a warrant whenever there is a threat of bodily injury; instead, it allows the police to do so only
7 when there is a threat of “an emergency involving danger of death or *serious* physical injury.”
8 Penal Code § 1541.1(c)(6) (emphasis added).

9 50. This exception is also inconsistent with the Chief’s representation to the Council that, under the
10 Policy, the City “cannot utilize this without a search warrant that’s approved by a judge.”
11 Although the Policy requires the police department to *apply* for a warrant within 72 hours after a
12 warrantless search, it plainly allows use of the device without a warrant whenever there is a
13 threat of bodily injury.

14 51. Because the Council did not have a copy of the actual policy before it when it voted to authorize
15 the acquisition of the cell-site simulator, it had no way of knowing that the policy would
16 authorize the use of this device without prior judicial approval.

17 52. If Defendant had followed the procedure mandated by § 53166 the Council would have been
18 able to understand the precise contours of the Policy before voting to allow the police department
19 to acquire and operate this technology. If the Council agreed that the police should have this
20 authority, it could have voted to approve the Policy as written. If, however, councilmembers’
21 Fourth Amendment concerns meant that they wanted to prevent this technology from being used
22 without a prior judicial authorization, the Council could have amended the policy to require a
23 warrant in this situation before voting to approve it.

24 53. In addition, the Policy fails to comply with the requirement that it identify all of the personnel
25 who are authorized to use cell-site simulators or to access information collected by them. *See*
26 § 53166(b)(2)(A) (“The usage and privacy policy” must provide “[a] description of the job title
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1 or other designation of the employees who are authorized to use, or access information collected
2 through the use of, cellular communications interception technology.”).

3 54. Although the City’s Policy states that the simulator “shall be operated and maintained by Vallejo
4 Police Department Crime Reduction Team (CRT) detectives,” it expressly allows the Chief of
5 Police or his designee to authorize *other* personnel to use it, without any limitation or
6 requirement that the Policy be amended to show that these persons have been authorized to use
7 the equipment or access the data. Policy § 610.6 (“Personnel shall be specifically trained in such
8 technology *and authorized for its use* by the Chief of Police or his designee. Such personnel shall
9 be limited to designated detectives unless otherwise authorized.”) (emphasis added).

10 55. Moreover, the Policy completely fails to identify who is authorized to access information that is
11 collected using the technology. Policy § 610.6.

12 **6. Need for declaratory relief**

13 56. Plaintiffs take the position that that the City may not acquire cellular communications
14 interception technology unless the City Council has approved the usage and privacy policy for
15 this technology.

16 57. As stated in its March 31, 2020, letter to Oakland Privacy, Defendant disagrees and takes the
17 position that it its legislative body need not approve its usage and privacy policy regulating
18 cellular communications interception technology because “[t]here is nothing in Government
19 Code § 53166 which requires that the usage and privacy policy be presented to the City Council
20 for its consideration and approval.”

21 58. Plaintiffs take the position that operation of this equipment is unlawful unless the City Council
22 has approved the actual usage and privacy policy.

23 59. Defendant takes the position that it may lawfully operate cellular communications interception
24 technology even if its City Council did not itself adopt a usage and privacy policy, so long as the
25 Council authorized its police department to create such a policy and the department did so.
26 (“Section 53166 requires only that the City Council authorize such a policy, which, in this case,
27 it did.”).

1 60. Plaintiffs take the position that Vallejo's current use Policy violates § 53166 because it (1) fails
2 to identify the employees who are authorized to access information collected through the use of
3 cellular communications interception technology, (2) fails to adequately describe who is allowed
4 to use the devices, because it allows the Chief of Police or his designee to authorize unspecified
5 personnel to use this technology, without any limitation or requirement that the Policy be
6 amended to identify these persons, and (3) authorizes Defendant to use this technology without
7 prior judicial approval based on a determination that there is an imminent threat of *any* bodily
8 injury, rather than the emergency involving a threat of death or *serious* injury specified by Penal
9 Code § 1546.1.

10 61. Defendant again disagrees and takes the position that the substantive provisions of its current
11 usage and privacy Policy for cellular communications interception technology are consistent
12 with Government Code § 53166.

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14 **Count One**
15 **(Violations of Gov. Code § 53166)**
16 **(All Plaintiffs against Defendant City of Vallejo)**

17 62. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

18 63. Defendant is in the process of acquiring cellular communications interception technology
19 without first adopting a usage and privacy policy at a regularly scheduled, public meeting, in
20 violation of Government Code § 53166(c)(1).

21 64. Defendant's existing usage and privacy policy violates Government Code § 53166 because it
22 allows the Chief of Police or his designee to authorize unspecified personnel to use this
23 technology, without any limitation or requirement that the Policy be amended to show that these
24 persons have been authorized to use the equipment or access the data.

25 65. Defendant's existing usage and privacy policy violates Government Code § 53166 because it
26 fails to specify which personnel may access information collected through the use of the cell-site
27 simulator technology.

28 66. Defendant's existing usage and privacy policy violates Penal Code § 1546.1 because it allows
the City to use a cell-site simulator without first obtaining a warrant whenever there is an

1 imminent threat of bodily injury, rather than the “emergency involving danger of death or
2 *serious* physical injury to any person” specified in the Penal Code.

3 67. Because Defendant lacks a valid usage and privacy policy, any operation of cellular
4 communications interception technology by Defendant will violate Government Code
5 § 53166(b).

6 **Count Two**
7 **(Unlawful expenditure of public funds in violation of Code of Civil Procedure § 526a**
8 **and the common law)**
9 **(All Plaintiffs against Defendant City of Vallejo)**

10 68. Plaintiffs incorporate herein by reference the above allegations and Counts(s), as if set forth in
11 full.

12 69. Plaintiffs have been assessed and have paid taxes that fund Defendant City of Vallejo within one
13 year before the commencement of this action.

14 70. Defendant is and will be expending public funds by preparing to purchase and actually
15 purchasing the cell-site simulator and related equipment, paying the salaries of personnel who
16 will operate the equipment, paying the salaries of personnel who will access information
17 collected through the use of the equipment, and paying maintenance and other costs associated
18 with operating the equipment (including fuel and other expenses associated with the vehicle that
19 houses it).

20 71. For the reasons described in the previous Count(s), these expenditures of public funds are
21 unlawful and should therefore be enjoined and declared unlawful under Code of Civil Procedure
22 § 526a and the common law.

23 **7. Relief requested**

24 Plaintiff requests the following relief:

- 25 1. That the Court declare the following under Code of Civil Procedure § 1060:
26 a. Government Code § 53166(c)(1) prohibits Defendant from acquiring cellular
27 communications interception technology unless its City Council first approves the
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1 actual usage and privacy policy required by that Section at a regularly scheduled
2 public meeting.

- 3 b. Government Code § 53166(b)(2) prohibits Defendant from operating cellular
4 communications interception technology unless its City Council first approves the
5 actual usage and privacy policy required by that Section at a regularly scheduled
6 public meeting.
- 7 c. Defendant's current usage and privacy policy for cellular communications
8 interception technology fails to comply with Government Code § 53166(c)(1)
9 because it was not adopted or approved by the City Council.
- 10 d. Defendant's current usage and privacy policy for cellular communications
11 interception technology violates Government Code § 53166(b)(2)(B) because it fails
12 to include a description of the job title or other designation of the employees who are
13 authorized to access information collected through the use of cellular communications
14 interception technology.
- 15 e. Defendant's existing usage and privacy policy violates Government Code
16 § 53166(b)(2)(B) because it allows the Chief of Police or his designee to authorize
17 unspecified personnel to use this technology, without any limitation or requirement
18 that the Policy be amended to show that these persons have been authorized to use the
19 equipment or access the data.
- 20 f. Defendant's existing usage and privacy policy for cellular communications
21 interception technology fails to comply with Government Code § 53166(c)(1),
22 because it authorizes Defendant to use this technology without prior judicial approval
23 based on a determination that there is an imminent threat of bodily injury, with no
24 requirement that the threatened injury be serious, in violation of Penal Code § 1546.1.
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1 g. Defendant's acquisition of cellular communications interception technology is
2 unlawful because the City has failed to comply with Government Code § 53166.

3 2. That the Court issue a writ of mandate and an injunction prohibiting Defendant from
4 acquiring or operating cellular communications interception technology -- or expending
5 public funds to do so -- unless and until its legislative body approves a usage and privacy
6 policy that complies with Government Code § 53166, by resolution or ordinance passed at a
7 regularly scheduled public meeting.

8 3. That Plaintiff be awarded attorneys' fees and costs under Code of Civil Procedure § 1021.5,
9 Government Code § 53166(d), and any other applicable law.

10 4. That the Court issue other and further relief as the Court deems proper and just.

11
12 Dated: 5/18/2020

13 By: 
14 Michael T. Risher
15 Attorney for Plaintiff
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8. Verification

I, Michael Katz, am the Research Director and Vice Chair of the board of directors of Oakland Privacy and authorized to verify this Petition as an officer. I have read this Verified Petition for Writ of Mandate and Complaint for Equitable relief in *Oakland Privacy, et al. v. City of Vallejo*. I have personal knowledge that the facts stated in paragraphs 9, 28, 33, and 44-47 of the Petition/Complaint are true. I am informed, and do believe, that the matters stated in the remainder of the Petition/Complaint are true. On these grounds I allege that the matters stated herein are true.

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

DATED: 5/15/2020 at San Leandro, CA


Michael Katz

Exhibit A

Cellular Site Simulator Usage and Privacy

610.1 PURPOSE AND SCOPE

The purpose of this policy is to set guidelines and requirements pertaining to cellular site simulator technology usage and privacy. Any changes to this policy - including authorized uses of the cellular site simulator technology by the Vallejo Police Department - will be made in compliance with California Government Code Section 53166.

610.2 POLICY

It is the policy of the Vallejo Police Department to respect the privacy rights and civil liberties of individuals and to follow the Constitution, particularly the First and Fourth Amendments, the California Constitution, and all applicable laws.

610.3 BASIS FOR POLICY

Government Code § 53166(b) requires all law enforcement organizations that use cellular communications interception technology, including cellular site simulator technology, to:

- (a) Maintain reasonable security procedures and practices, including operational, administrative, technical and physical safeguards, to protect information gathered through the use of cellular communications interception technology from unauthorized access, destruction, use, modification or disclosure.
- (b) Implement a usage and privacy policy to ensure that the collection, use, maintenance, sharing and dissemination of information gathered through the use of cellular communications interception technology complies with all applicable law and is consistent with respect for an individual's privacy and civil liberties. The usage and privacy policy shall be available in writing to the public, and, if the local agency has an internet website, the usage and privacy policy shall be posted conspicuously on that internet website. The usage and privacy policy shall, at a minimum, include all of the following:
 - 1. The authorized purposes for using cellular communications interception technology and for collecting information using that technology
 - 2. A description of the job title or other designation of the employees who are authorized to use or access information collected through the use of cellular communications interception technology
 - 3. A description of how the local agency will monitor its own use of cellular communications interception technology to ensure the accuracy of the information collected and compliance with all applicable laws, including laws providing for process and time period system audits
 - 4. The existence of a memorandum of understanding or other agreement with another local agency or any other party for the shared use of cellular communications interception technology or the sharing of information collected through its use, including the identity of signatory parties

Cellular Site Simulator Usage and Privacy

5. The purpose of, the process for, and restrictions on the sharing of information gathered through the use of communications interception technology with other local agencies and persons
6. The length of time information gathered through the use of communications interception technology will be retained and the process the local agency will utilize to determine if and when to destroy retained information

Members shall use only department-approved devices and usage shall be in compliance with department security procedures, the department's usage and privacy procedures and all applicable laws.

610.4 HOW THE TECHNOLOGY WORKS

Cellular site simulator technology relies on the use of cellular site simulators. Cellular site simulators, as governed by this policy, function by transmitting as a cell tower. In response to the signals emitted by the simulator, cellular devices in proximity of the simulator identify it as the most attractive cell tower in the area and thus transmit signals to the simulator that identifies the device in the same way that they would a networked tower. **Cellular site simulator technology does not capture nor receive any content such as text messages, voicemails, applications, multimedia messages, etc. It does not have the capability of listening to phone calls.**

A cellular site simulator receives signals and uses an industry-standard unique identifying number assigned by a device manufacturer or cellular network provider to distinguish between the incoming signals until the targeted device is located. Once the cellular site simulator identifies the specific cellular device for which it is looking, it will obtain the signaling information relating only to that particular phone, rejecting all others.

When used in a mass casualty event, the cellular site simulator will obtain signaling information from all devices in the simulator's target vicinity for the limited purpose of locating persons in need of assistance or to further recovery efforts. Any information received from the cellular devices during this time will only be used for these limited purposes and all such information received will be purged at the conclusion of the effort in accordance with this policy. A mass casualty incident is a natural disaster such as an earthquake or fire; a terrorist attack; or any event resulting in imminent loss of life or injury.

610.4.1 INFORMATION OBTAINED

By transmitting as a cell tower, cellular site simulators acquire identifying information from cellular devices. As employed by the Vallejo Police Department, this information is limited. Cellular site simulators employed by the Vallejo Police Department will be limited to providing only:

- (a) Azimuth (an angular measurement in a spherical coordinate system)
- (b) Signal strength

Cellular Site Simulator Usage and Privacy

- (c) Device identifier for the target device when locating a single individual or all device identifiers for a mass casualty incident

Cellular site simulators do not function as GPS locators, as they will not obtain or download any location information from the device or its applications.

Cellular site simulators used by the Vallejo Police Department shall not be used to collect the contents of any communication, in accordance with 18 U.S.C. § 3121 (c).

Cellular site simulators employed by the Vallejo Police Department shall not capture emails, texts, contact lists, images or any other data contained on the phone. In addition, the cellular site simulators shall not be used by the Vallejo Police Department to collect subscriber account information (for example, an account holder's name, address or telephone number).

610.5 AUTHORIZED PURPOSES

The authorized purposes for using cellular communications interception technology and for collecting information using that technology are to:

- (a) Locate missing persons
- (b) Locate at-risk individuals
- (c) Locate victims of mass casualty incidents
- (d) Assist in felony investigations
- (e) Apprehend fugitives

610.5.1 LEGAL AUTHORITY

Cellular site simulator technology may only be used by the Vallejo Police Department with a search warrant or for an identified exigency, with a concurrent application for a search warrant. A search warrant application shall be made no later than 72 hours after use in an identified exigency. When using cellular site simulator technology to assist in an investigation, Vallejo Police personnel may only attempt to locate cellular devices whose unique identifiers are already known to law enforcement unless used for a mass casualty incident.

When making any application to a court, members of the Vallejo Police Department shall disclose appropriately and accurately the underlying purpose and activities for which an order or authorization is sought. Search warrants for the use of a cellular site simulator must include sufficient information to ensure that the courts are aware that the technology is being used. An application for the use of a cellular site simulator shall inform the court about how law enforcement intends to address the deletion of data not associated with the target phone.

If cellular site technology is used based on exigency, then the above requirements will be met by applying for a search warrant concurrently with the use of the device whenever possible and no later than 72 hours after use. An exigency is defined as an imminent threat of death or bodily injury.

Cellular Site Simulator Usage and Privacy

610.6 JOB TITLES, DESIGNATIONS AND TRAINING REQUIREMENTS

The Vallejo Police Department's cellular site simulator shall be operated and maintained by Vallejo Police Department Crime Reduction Team (CRT) detectives. Personnel shall be specifically trained in such technology and authorized for its use by the Chief of Police or his designee. Such personnel shall be limited to designated detectives unless otherwise authorized.

Training requirements for the above employees include completion of training by the manufacturer of the cellular communications interception technology or appropriate subject matter experts as identified by the Vallejo Police Department. Such training shall include and follow applicable State and Federal laws. Detectives assigned to CRT at the time of the approval of this policy shall be trained by the manufacturer regarding use of the cellular site simulator. Prior to its use by subsequent detectives assigned to CRT, those detectives shall receive instruction by persons who were trained by the manufacturer.

610.7 AGENCY MONITORING AND CONTROLS

The Vallejo Police Department will monitor its use of cellular site simulator technology to ensure the accuracy of the information collected and compliance with all applicable laws, including laws providing for process and time period system audits. Prior to approving use of the cellular site simulator, the Investigations Division Commander or their designee shall ensure that the proposed use complies with all applicable laws and this policy. The Investigations Division Commander or their designee shall annually review all deployment logs for compliance with applicable laws and policy, and shall conduct any further audits required by law. The Investigations Division Commander, or their designee, shall ensure that process and time period system audits are conducted in accordance with law and this policy.

610.7.1 DEPLOYMENT LOG

Prior to deployment of the technology, the use of a cellular site simulator by the Vallejo Police Department must be approved by the Investigations Division Commander or their designee. Each use of the cellular site simulator device requires the completion of a log by the user. The log shall include the following information at a minimum:

- (a) The name and other applicable information of each user
- (b) The reason for each use
- (c) The results of each use including the accuracy of the information obtained

610.7.2 ANNUAL REPORT

The Cellular Site Simulator Program Coordinator shall provide the Chief of Police with an annual report that contains all of the above information. The report shall also contain the following information for the preceding 12-month period:

- (a) The number of times cellular site simulator technology was used
- (b) The number of times the Vallejo Police Department used the cellular site simulator for another agency

Cellular Site Simulator Usage and Privacy

- (c) The number of times the equipment was deployed:
 - 1. To make an arrest or attempt to make an arrest
 - 2. To locate an at-risk person
 - 3. To aid in search and rescue efforts
 - 4. For any other reason
 - 5. The effectiveness of each deployment

610.8 INTER-AGENCY COOPERATION

Any request from an outside agency to use the Vallejo Police Department's cellular site simulator must be approved by the Investigations **Bureau** Commander or their designee. Prior to the device being used on behalf of the requesting agency, there must be a written agreement between the requesting agency and the Vallejo Police Department. The requesting agency must agree to adhere to this policy, which shall be provided to them. The cellular site simulator will be operated by trained members of the Vallejo Police Department. No outside agency members shall operate the cellular site simulator.

Upon approval, the cellular site simulator will be utilized for the requesting agency pending availability and only under the following incidents:

- (a) Mass casualty incidents
- (b) Abductions (including kidnappings for ransom)
- (c) Persons missing under suspicious circumstances
- (d) Assault on a peace officer
- (e) Homicide
- (f) Attempted homicide
- (g) Fugitive apprehension
- (h) Violent sexual crimes
- (i) At-risk persons

Should there be simultaneous requests from outside agencies to utilize the cellular site simulator, the Investigations Bureau Commander or their designee will determine which agency incident has priority.

610.9 SHARING OF INFORMATION

The Vallejo Police Department will share information gathered through the use of cellular site simulator technology with other law enforcement agencies that have a right to know and a need to know the information requested. A right to know is the legal authority to receive information pursuant to a court order, statutory law or case law. A need to know is a compelling reason to request information such as direct involvement in an investigation.

Cellular Site Simulator Usage and Privacy

Information will be shared only with agencies in accordance with a lawful purpose and limited to a court order, search warrant or identified exigency on the part of the agency. The Vallejo Police Department will not share information outside of the legal parameters necessary for the lawful purpose. All requests for information shall be reviewed by the Cellular Site Simulator Program Coordinator or other individual as designated by the Chief of Police.

The agency with which the information is shared ("recipient agency") shall be designated as the custodian of such information. The recipient agency shall be responsible for observance of all conditions of the use of the information including the prevention of unauthorized use, retention of information and destruction of information.

610.10 RETENTION AND DISPOSAL OF INFORMATION

The Vallejo Police Department may keep captured data as evidence for use in a felony criminal investigation only when specifically authorized in a search warrant and in accordance with applicable state laws regarding search warrants and electronic information. The storage of this information shall be documented in a Vallejo Police Department crime report.

In all other circumstances where it is not specifically authorized by a search warrant, the Vallejo Police Department shall destroy all information intercepted by the cellular site simulator equipment as soon as the objective of the information request is accomplished in accordance with the following:

- (a) When the cellular site simulator equipment is used to locate a known cellular device, all data shall be deleted upon locating the cellular device and no fewer than once daily for a known cellular device
- (b) When the cellular site simulator equipment is used in a search and rescue operation, all data must be deleted as soon as the person or persons in need of assistance have been located, and in any event no less than once every ten days
- (c) Prior to deploying the cellular site simulator equipment for a subsequent operation, ensure the equipment has been cleared of any previous operational data
- (d) No data derived or recorded by cellular site simulator software or equipment will be stored on any server, device, cloud-based storage system or in any capacity

Exhibit B



March 23, 2020

VIA EMAIL

Mayor Bob Sampayan, Vice Mayor Hermie Sunga and Honorable Members of the Vallejo City Council: Hakeem Brown, Pippin Dew, Robert McConnell, Katy Miessner, Rosanna Verder-Aliga

Re: Proposed Purchase of Cell Site Simulator

Dear Mayor Sampayan and Honorable Members of the Council,

We write to ask you to deny the proposed purchase of a Cell Site Simulator, as proposed on your March 24 agenda, as it is not in the best interests of the Vallejo community.

Oakland Privacy is a citizens' coalition that works regionally to defend the right to privacy and enhance public transparency and oversight regarding the use of surveillance techniques and equipment. We were instrumental in the creation of the first standing municipal citizens' privacy advisory commission in the City of Oakland, and we have engaged in privacy enhancing legislative efforts with several Northern California cities and regional entities. As experts on municipal privacy reform, we have written use policies and impact reports for a variety of surveillance technologies, conducted research and investigations, and developed frameworks for the implementation of equipment with respect for civil rights, privacy protections and community control.

A Cell Site Simulator will not help the Vallejo community weather the COVID-19 pandemic, while spending \$400,000 on obtaining isolation facilities and medical equipment, or providing bridge money to local small businesses which might otherwise be forced into bankruptcy, or otherwise helping the most needy in the community may well be a more pressing concern.

The staff report fails to note that use of a cell site simulator can interfere with cell phone service for cell phones within the device's vicinity. Given the current coronavirus situation, the potential for disruption of cell phone service when people are attempting to call 911 or their doctor is something about which the City Council and public should be aware.

The purchase of this expensive tracking device is being put forward without a requirement to report on a regular basis about how the technology was used and whether the use of the technology achieved the goals. How will the City Council know if the technology is being properly utilized in conformance with a policy that doesn't yet exist? As surveillance experts, we always advise the City Council be presented with the usage policy for new equipment at the time of approval of the purchase.

Beyond the immediate national crisis, we believe there is no pressing need for Vallejo to purchase its own Cell Site Simulator. The Alameda County District Attorney, the Oakland Police Department and the Fremont Police Department all share one Cell Site Simulator without any problem - it has been used a total of eight times in three years.

The combined populations of Oakland and Fremont alone are more than five times that of the City of Vallejo: it seems a waste of taxpayer funds to purchase equipment which will likely be used so infrequently.

Cell site simulators pose profound civil liberties issues. While we are not opposed to using the technology in limited circumstances, under warrant, to locate and apprehend those posing a significant risk to the community, the potential for abusing this powerful tool is high. Cell site simulators have the ability to eavesdrop on calls and text messages, limited not by hardware but by software configuration, which can easily be modified.

Finally, the City Council should not be approving the purchase of any surveillance equipment, let alone a piece of hardware costing \$766,000,

- on a consent calendar;
- at a meeting where there will be little or no public participation;
- without prior publication, for public comment and input, of a use and privacy policy;
- without a requirement for reporting back annually on the use of the equipment, as is now being done in Oakland, so as to gauge the appropriateness and effectiveness of the technology.

We ask you to delay the purchase of this item until it can be discussed on an action calendar, at a meeting the public can attend, with adequate notice to the public, with a prepared draft usage policy for review and with an annual reporting requirement.

Thank you for your consideration.

Sincerely,

James P. Massar
Mike Katz Lacabe
Tracy Rosenberg
Members, and on behalf of, Oakland Privacy
4799 Shattuck Avenue
Oakland, CA 94609
<https://oaklandprivacy.org>

Exhibit C

RESOLUTION NO.

**AUTHORIZING THE CHIEF OF POLICE TO ACQUIRE CELL SITE SIMULATOR
EQUIPMENT AND TO IMPLEMENT A USAGE AND PRIVACY POLICY COMPLIANT WITH
GOVERNMENT CODE SECTION 51366**

WHEREAS, the City of Vallejo Police Department, seeks to purchase a radio frequency detector/cell site simulator equipment ("equipment") from KeyW Corporation; and

WHEREAS, the equipment can be used in connections with investigations related to locating missing persons, locating at-risk individuals, locating victims of mass casualty incidents, assisting in felony investigations and apprehending fugitives; and

WHEREAS, Government Code section 51366(c) allows a public agency to acquire the equipment upon approval by the City Council for the purchase and upon authorization to implement a compliant usage and privacy policy; and

WHEREAS, the Chief of Police has directed the creation of a usage and privacy policy for the deployment of the equipment that complies with state and federal law; and

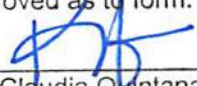
WHEREAS, the equipment will enhance public safety by reducing violent crimes and protecting life in the community.

NOW, THEREFORE, BE IT RESOLVED the City Council hereby authorizes the Chief of Police to acquire the equipment; and

BE IT FURTHER RESOLVED the City Council hereby authorizes the Chief of Police to implement a usage and privacy policy related to the equipment that complies with state and federal law.

Approved as to form:

By:



Claudia Quintana
City Attorney

Exhibit D



March 27, 2020

VIA EMAIL

Mayor Bob Sampayan, Vice Mayor Hermie Sunga and Honorable Members of the Vallejo City Council: Hakeem Brown, Pippin Dew, Robert McConnell, Katy Miessner, Rosanna Verder-Aliga

Re: Follow-Up Letter On Purchase of Cell Site Simulator

Dear Mayor Sampayan and Honorable Members of the Vallejo City Council,

Thank you for accepting our letter and reading it into the record at your March 24 meeting. We regret that the public health situation prevented us from attending and commenting in person.

Having viewed the meeting online, we have two further pieces of information that we'd like to convey to you:

- 1) **The statement made during the meeting that cell phone simulators do not interfere with the cellular phone traffic of untargeted phones in the vicinity is incorrect.** They can and they do, as the Department of Justice disclosed in 2015. Here are some links for your review.

<https://www.justice.gov/opa/file/767321/download>

“An application or supporting affidavit should inform the court that the target cellular device (e.g., cell phone) and other cellular devices in the area might experience a temporary disruption of service from the service provider”.

<https://www.wired.com/2015/03/feds-admit-stingrays-can-disrupt-cell-service-bystanders/>

“But a court filing recently uncovered by the ACLU suggests another reason for the secrecy: the fact that stingrays can disrupt cellular service for any phone in their vicinity—not just targeted phones—as well as any other mobile devices that use the same cellular network for connectivity as the targeted phone.”

- 2) **Your process on March 24 was not compliant with state law**

2016 State of California Legislation (then called [Senate Bill 741 authored by Senator Jerry Hill](#)) set up requirements for the acquisition of cell site simulators by public agencies. SB 741 requires that the use policy for the equipment be available to the public, which it does not seem to be, and posted conspicuously on the agency's website, which it is not. SB 741 also requires that the City Council that oversees the agency receive, review and formally approve of the use policy by resolution or ordinance, prior to acquisition.

SECTION 1.

Article 11 (commencing with Section 53166) is added to Chapter 1 of Part 1 of Division 2 of Title 5 of the Government Code, to read:

Article 11. Cellular Communications Interception

53166.

(a) For purposes of this article, the following terms have the following meanings:

(1) "Cellular communications interception technology" means any device that intercepts mobile telephony calling information or content, including an international mobile subscriber identity catcher or other virtual base transceiver station that masquerades as a cellular station and logs mobile telephony calling information.

(2) "Local agency" means any city, county, city and county, special district, authority, or other political subdivision of the state, and includes every county sheriff and city police department.

(b) Every local agency that operates cellular communications interception technology shall do both of the following:

(1) Maintain reasonable security procedures and practices, including operational, administrative, technical, and physical safeguards, to protect information gathered through the use of cellular communications interception technology from unauthorized access, destruction, use, modification, or disclosure.

(2) Implement a usage and privacy policy to ensure that the collection, use, maintenance, sharing, and dissemination of information gathered through the use of cellular communications interception technology complies with all applicable law and is consistent with respect for an individual's privacy and civil liberties. **This usage and privacy policy shall be available in writing to the public, and, if the local agency has an Internet Web site, the usage and privacy policy shall be posted conspicuously on that Internet Web site.** The usage and privacy policy shall, at a minimum, include all of the following:

(A) The authorized purposes for using cellular communications interception technology and for collecting information using that technology.

(B) A description of the job title or other designation of the employees who are authorized to use, or access information collected through the use of, cellular communications interception technology. The policy shall identify the training requirements necessary for those authorized employees.

(C) A description of how the local agency will monitor its own use of cellular communications interception technology to ensure the accuracy of the information collected and compliance with all applicable laws, including laws providing for process and time period system audits.

(D) The existence of a memorandum of understanding or other agreement with another local agency or any other party for the shared use of cellular communications interception technology or the sharing of information collected through its use, including the identity of signatory parties.

(E) The purpose of, process for, and restrictions on, the sharing of information gathered through the use of cellular communications interception technology with other local agencies and persons.

(F) The length of time information gathered through the use of cellular communications interception technology will be retained, and the process the local agency will utilize to determine if and when to destroy retained information.

(c) (1) Except as provided in paragraph (2), 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 (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), of a resolution or ordinance authorizing that acquisition and the usage and privacy policy required by this section.

(2) Notwithstanding paragraph (1), the county sheriff shall not acquire cellular communications interception technology unless the sheriff provides public notice of the acquisition, which shall be posted conspicuously on his or her department's Internet Web site, and his or her department has a usage and privacy policy required by this section.

(d) In addition to any other sanctions, penalties, or remedies provided by law, an individual who has been harmed by a violation of this section may bring a civil action in any court of competent jurisdiction against a person who knowingly caused that violation. The court may award a combination of any one or more of the following:

(1) Actual damages, but not less than liquidated damages in the amount of two thousand five hundred dollars (\$2,500).

(2) Punitive damages upon proof of willful or reckless disregard of the law.

(3) Reasonable attorney's fees and other litigation costs reasonably incurred.

(4) Other preliminary and equitable relief as the court determines to be appropriate.

We hope that the provision of correct information about the capabilities of the equipment was helpful and we encourage you to be very clear with the police department that usage of the equipment can interfere with cellular communications in the impacted area.

We expect the cell site simulator use policy to be publicly posted on the City's website, compliant with Senate Bill 741 in its particulars, and noticed on the next municipal agenda for approval by the City Council of the use policy, and for the purchase to wait until full compliance with state law is achieved. We note that residents of Vallejo have standing to pursue injunctive relief and damages under state law, if there is not municipal compliance.

Sincerely,

James P. Massar
Mike Katz Lacabe
Tracy Rosenberg
Members, and on behalf of, Oakland Privacy
4799 Shattuck Avenue
Oakland, CA 94609
<https://oaklandprivacy.org>

Exhibit E



City Attorney's Office • 555 Santa Clara Street • Vallejo • CA • 94590 • 707.648.4545

March 31, 2020

Oakland Privacy
4799 Shattuck Avenue
Oakland, CA 94609

Dear Messrs. Massar, Lacabe and Rosenberg:

I have been asked to respond to your March 27, 2020 letter in which you allege that the City of Vallejo violated Government Code § 53166 by approving the purchase of a cell site simulator at its March 24, 2020 City Council meeting. You contend that § 53166 requires that the City of Vallejo “receive, review and formally approve” of a use policy for the cell site simulator by resolution. We disagree.

Government Code § 53166 sets forth a process for the acquisition and operation of a cell site simulator by a local agency. The section requires, among other things, that a local agency:

“Implement a usage and privacy policy to ensure that the collection, use, maintenance, sharing and dissemination of information gathered through the use of cellular communications interception technology complies with all applicable law and is consistent with respect for an individual’s privacy and civil liberties. This usage and privacy policy shall be available in writing to the public, and, if the local agency has an Internet Web site, the usage and privacy policy shall be posted conspicuously on that Internet Web site.”
(Government Code § 53166(b)(2))

Further, § 53166 sets forth certain requirements for that policy. (Government Code § 53166(b)(2)(A) et seq.) In addition, in order to acquire a cell site simulator, a local agency must hold a meeting of its legislative body pursuant to the Ralph M. Brown Act and approve “a resolution or ordinance **authorizing that acquisition and the usage and privacy policy** required by this section.” (Government Code § 53166(c)(1)) (emphasis added)

At its March 24, 2020 meeting, the City Council adopted a resolution authorizing the purchase of the cell site simulator. That resolution also authorized the Chief of Police to implement a usage and privacy policy consistent with § 53166. The resolution says:

“BE IT FURTHER RESOLVED the City Council hereby *authorizes the Chief of Police to implement a usage and privacy policy related to the equipment that complies with state and federal law.*” (emphasis added)

There is nothing in Government Code § 53166 which requires that the usage and privacy policy be presented to the City Council for its consideration and approval. In fact, the required contents of the usage and privacy policy are clearly set forth in § 53166. Section 53166 requires only that the City Council authorize such a policy, which, in this case, it did. Words in a state statute are to be given their usual and ordinary meaning. The “plain language” of a statute governs. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) If the legislature had intended that the full usage and privacy policy be presented to the City Council for review and approval as you contend, it most certainly would have said so in the statute. The legislative history of SB741, the bill which created § 53166, supports the City’s position. As originally introduced in February 2015, the bill contained the following language:

“The legislative body of a local agency shall not approve a resolution or ordinance authorizing the acquisition or use of cellular communications interception technology, unless the resolution or ordinance is adopted at a regularly scheduled public meeting of the legislative body at which members of the public are afforded a reasonable opportunity to comment upon the proposed resolution or ordinance. 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 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.”(SB-741 Mobile communications: privacy;

https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160SB741&cversion=20150SB74199INT)

That original language was changed in the final version of SB-741 to read:

“Except as provided in paragraph (2), 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, (Chapter 9 commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), of a resolution or ordinance authorizing that acquisition and the usage and privacy policy required by this section.” (Government Code §53166(c)(1))

Clearly, had the legislature intended to require a local agency to include its proposed usage and privacy policy as part of the adopting resolution, it would not have removed the language in the original version of SB-741 requiring it and replacing it with the more general language in the final bill. The City’s adopted resolution fully complies with the requirements set forth in § 53166 as currently codified.

The Chief of Police has prepared a usage and privacy policy, which will be implemented as Lexipol Policy 610 and which is fully compliant with § 53166. The Chief of Police intends to upload the

Messrs. Massar, Lacabe and Rosenberg

March 31, 2020

Page 3

usage and privacy policy to the Vallejo Police Department web site before the City takes possession of the cell site simulator. The City Attorney's office reviewed and approved the usage and privacy policy to ensure its compliance with state and federal law. I will provide you with a copy of the usage and privacy policy when it is in final form which should be later this week. Also, please be aware that the City will not have possession of the cell site simulator until June at the earliest.

Thank you for sharing your concerns.

Very Respectfully,

Randy J. Risner
Interim City Attorney