Written Comments on the Case of *In the Matter of the Constitutionality of Section 2 of Article 5 of the Access to Public Information Law*

A Submission from the Association of the Bar of the City of New York at the Request of Fundación ProAcceso

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CASE NO. 2153-11-INA

In the Matter of the Constitutionality of Section 2 of Article 5 of the Access to Public Information Law (No. 20,285)

WRITTEN COMMENTS OF

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

I. Introduction And Statement Of Interest

Public access to information as to governmental communications and process is a cornerstone of a functioning democracy contributing meaningfully to public oversight of government, freedom of the press and less corrupt government. Due to the importance of these issues and because the experience and law of one sovereign nation may serve as a useful point of reference to another sovereign nation, the Association of the Bar of the City of New York respectfully provides this submission as to the laws and practices of the United States of America on these matters in the hope that it might be of assistance to the Constitutional Tribunal of the Republic of Chile in its deliberations in this case, which concerns a request under Chile's freedom of information laws for access to certain e-mails sent to and from Chilean government e-mail addresses. This submission provides an overview of how U.S. freedom of information laws have been interpreted as to electronic communications. The purpose of these laws is to promote the fundamental principle that citizens have a right to access their government's public documents (while balancing the government's ability to operate and privacy of governmental employees). Although there is variation in transparency laws across the fifty states and the U.S. federal government (each of which has sovereignty as to access to information as to its own government), there is a strong presumption in favor of disclosure and a clear trend in favor of

public disclosure of government communications involving official business, whether or not those communications are in electronic or physical form and made to or from government computer systems.

As governments, like citizens, increasingly rely on new media to communicate, it is important that the freedom of information ("FOI") principles that have applied to traditional paper documents are maintained. As one Florida state legal opinion has put it: "It is the nature of the record created rather than the means by which it is created which determines whether it is a public record."[1] Concededly, e-mail is different from the traditional business file of correspondence or memoranda because a government employee's e-mail files will likely contain personal items as well as business items. But the principle articulated here – that e-mails sent by or received from government employees should be reviewed in response to a FOI request and those containing content in "the nature" of public business should be disclosed – allows the protection of personal privacy while preserving the public's right to have access to governmental communications about public business.

The Association of the Bar of the City of New York is an independent, professional organization comprised of more than 23,000 members. Founded in 1870 partially in connection with the good government movement in New York City, which sought to address corruption in the New York City government, the Association has a long-standing commitment to freedom of information in the United States and abroad. Open and honest government is the hallmark of a functioning democracy, and it can only be achieved through the free exchange of information between the government and its citizens.

[1] Advisory Legal Opinion – AGO 2008-07, Florida Office of the Attorney General, February 26, 2008.

II. Public Access To Government Information Is Critical For Government Transparency And Accountability

Like their Chilean counterpart, U.S. freedom of information laws are pro-disclosure laws that embody the fundamental principle that citizens have a right to access public documents of their government, while balancing the government's ability to conduct the business of the people. The U.S. federal government and each of its fifty constituent states have each enacted open records or freedom of information laws providing for access to government documents.

a. Freedom Of Information Act

The U.S. federal statute, called the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, was signed into law on July 4, 1966. Since then, FOIA has proved increasingly popular as a means for the public to obtain access to government records. "Any person" can file a FOIA request, including U.S. citizens, foreign nationals, organizations, associations, and universities. According to the U.S. Department of Justice, federal agencies received 2,404,869 individual FOIA requests for fiscal year 2008 through fiscal year 2011.[2] In order to gain access to federal agency information under FOIA, a requester must simply make a written request under the Act. Most federal agencies now accept FOIA requests electronically, including by internet, e-mail or fax.

Upon taking office in 2009, President Barack Obama issued two memoranda addressing government transparency and FOIA. The President announced that his administration was "committed to creating an unprecedented level of openness in Government," and pledged that the Administration would work with the public "to ensure the public trust and establish a

[2] U.S. Department of Justice, "FOIA Data At A Glance," available at: http://www.foia.gov/index.html.

system of transparency, public participation, and collaboration."[3] Addressing FOIA's purpose, President Obama stated: "A democracy requires accountability, and accountability requires transparency."[4] He quoted the famous dictum of Justice Louis Brandeis that "sunlight is said to be the best of disinfectants."[5] President Obama set a clear presumption for the administration of FOIA: "In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."[6]

b. State Open Records Laws

Similarly, each of the U.S. states has enacted laws governing public access to governmental records. These statutes are sometimes referred to as "open records laws." Like the federal FOIA, open records laws of the states aim to provide a basis for broad disclosure. For example, New York's Freedom of Information Law ("FOIL") explicitly states: "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government."

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[3] Barack Obama, *Memorandum For The Heads of Executive Departments And Agencies*, (undated) available at: http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

[4] *Id*.

[5] *Id*.

[6] *Id*.

N.Y. Public Officers Law § 84. Similarly, an Oklahoma court once noted: "If an informed citizenry is to meaningfully participate in government or at least understand why government acts affecting their daily lives are taken, the process of decision making as well as the end results must be conducted in full view of the governed." *Oklahoma Ass'n of Municipal Attorneys v. State*, 577 P.2d 1310, 1313-14 (1978).

III. Both The Federal And State Transparency Laws Provide For Access To E-mail Communications

The essence of FOI laws, whether federal or state in the United States, is that the public enjoys a presumptive right of access to governmental records. The term "records" has been defined broadly in FOI statutes, in the United States, to encompass electronic communications. This reflects both the underlying purpose of FOI laws – to give the public access to documents made and maintained by government – and also the reality that public affairs are increasingly conducted through electronic means. The fact that an e-mail about governmental affairs may be informal and short and may not fully reflect the positions of an agency does not alter its fundamental nature: It is a record created or received by government and therefore should be presumptively available to the public.

The inclusion of e-mail in federal FOIA has been recognized by the federal courts. *See*, *e.g.*, *Yonemoto v. Dep't of Veterans Affairs*, 2012 WL 130339, at *3 (9th Cir. Jan. 18, 2012) (reversing and remanding a lower court decision holding that a number of requested e-mails sent to and from government e-mail address were not subject to disclosure under FOIA).

Likewise, the dominant trend in state law is to grant freedom of information access to e-mails that discuss public business. Accordingly, many of the states' statutes explicitly provide for access to e-mails written to or by government officials. *See*, *e.g.*,

California's Government Code Section 6252 (defining "writing" covered by California's Public Records Act to include e-mail); Maine's Freedom of Access Act (including in the definition of "public records" any "mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension"), 1 M.R.S.A. Section 402(3); New Jersey's Open Public Records Act (including in its definition of a "government record" any information "stored or maintained electronically"), N.J.S.A. 47:1A-1.1; Ohio's Revised Code Section 149.011(A) and Section 149.43(A) (providing that e-mail be treated in the same way as other paper records under the open records law); Oregon's Public Records Law (providing that e-mails and electronic files be treated the same as paper files and documents under the Public Records Law), ORS 192.410(4)(a); Vermont's Annotated Statute (including e-mail in the definition of "public record"), 1 V.S.A. Section 317(b) (Cum. Supp. 2008).

While other states' open records statutes many not explicitly address e-mail, those statutes typically contain definitions broad enough to include e-mail and have often been interpreted to include e-mails maintained by government agencies that discuss government business.[7] FOIL, for example, defines the term "record" expansively to include:

> any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

[7] No state has specifically excluded e-mail from the range of records subject to transparency laws.

FOIL Section 86(4). New York's Committee on Open Government, which is authorized by statute to interpret FOIL,[8] has issued advisory opinions holding that e-mail communications are included in the statute's definition of "record." For example, in a case involving a request for access to the e-mails of school board members and school district employees, the Committee on Open Government advised that "e-mail communications between or among board members or district employees fall within the scope of the Freedom of Information Law." Advisory Opinion FOIL-AO-17045, Department of State of the State of New York, Committee on Open Government, March 17, 2008. *See also* Advisory Opinion FOIL-AO-15893, Department of State of the State of New York, Committee on Open Government, April 6, 2006[9]; *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454 (2007) ("FOIL does not differentiate between records stored in paper form or those stored in electronic format."); *Babigian v. Evans*, 104 Misc. 2d 140 (Sup. Ct. N.Y. Cnty. 1980) ("information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form.").[10]

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[8] FOIL created the Committee on Open Government, which is responsible for providing oversight and advisory functions in connection with FOIL, among other statutes. FOIL directs the Committee on Open Government to furnish advice to agencies, the public and the news media in the form of written or oral advisory opinions. In addition, the Committee on Open Government is directed to issue regulations and report its observations and recommendations to the Governor and the Legislature of New York state on an annual basis. *See* Department of State of the State of New York, The Committee on Open Government, available at: http://www.dos.state.ny.us/coog/right_to_know.html.

[9] It is important to note, however, notwithstanding that e-mail communications fall under the definition of "record," they may still be withheld from the public in whole or in part depending on whether they fall under the scope of the statute's exceptions. This brief discusses such exceptions in greater detail in Section V below.

[10] The Florida Office of the Attorney General made the same point in an advisory opinion stating: "It is the nature of the record created rather than the means by which it is created which determines whether it is a public record. Thus, an e-mail created by a public official in connection with the transaction of official business is a public record whether it is created on a publicly or privately owned computer." Advisory Legal Opinion – AGO 2008-07, Florida Office of the Attorney General, February 26, 2008. The Florida public records law, Fla. Stat. §

Concededly, e-mail files present an FOI issue not found with traditional governmental files of correspondence or memoranda: the presence of personal e-mails interspersed with the private communications of the governmental employees. But those U.S. courts that have faced the issue have generally adopted a balanced approach that recognizes an employee's right to privacy with the public's right to access. Simply stated, while the vast majority of FOI requests are transacted directly between government and citizens, in the case that a controversy exists, the courts have typically looked at the nature of each e-mail in the relevant electronic files and held that those dealing with public affairs are subject to FOI laws.

For example, *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007) involved a freedom of information request by a newspaper in connection with the investigation of a County Manager who improperly purchased sniper rifles and other equipment with county funds. The county released 706 e-mails relevant to the issue, but withheld others on the grounds that they were "personal or confidential." *Id*. at 420. On appeal, the Arizona Supreme Court examined the issue of whether e-mails on a government system are accessible to the public. The Court recognized that the public records law creates a strong presumption in favor of disclosure and that "many e-mails generated or retained on a government computer system are public records because they relate to government business." *Id*. at 422. However, the Court also acknowledged that not every single e-mail on a government computer system is automatically a public record, because some documents could relate solely to personal matters and therefore not reflect any government activity. *Id*. Thus, for example, personal items such as "a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's

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119.011 (2008) defines "public records" broadly, and the advisory opinion confirmed that "e-mail messages made or received by agency employees or officials in connection with official business are public records and are subject to disclosure in the absence of an exception."

report card" should not be subject to disclosure.[11] *Id*. at 421. The Court held that the proper process for a court to determine whether a disputed document is a public record or is purely "personal or confidential" is to perform an in-camera review by the judicial authority of the disputed documents. *Id*. at 422. Importantly, the Court clearly concluded that documents possessing "the requisite nexus with official duties that is required of all public records" should be disclosed. *Id*. at 423.

A similar approach was taken under federal law in *Media Research Center v. U.S. Department of Justice*, where the plaintiffs brought a claim against the U.S. Department of Justice ("DOJ") seeking e-mails between former Solicitor General Elena Kagan and members of her staff. 2011 WL 4852224 (D.D.C. Oct. 13, 2011). While the government produced a number of e-mails, the court agreed with the DOJ that Kagan could withhold e-mail correspondence that was "used for a purely personal objective" even though it was created through the use of a government e-mail system, because it was "not relied upon by the [DOJ] in carrying out its business." *Id.*

We would note, however, that in some states the courts have been willing to go further and find that even personal e-mails are subject to disclosure if they are on governmental computer systems. The California Superior Court in *Holman v. City of San Diego*, 2003 WL 21509055 (Cal. App. July 2, 2003), examined whether certain e-mails in the possession of the City of San Diego should be released pursuant to a news magazine's request for documents in connection with a story on the mayor's former press secretary. The City resisted disclosure on the basis that allowing access would invade the privacy interests of the parties who sent or received the e-mails. The court weighed those privacy interests against the public interest served

[11] Section V, below, discusses exemptions to disclosure in greater detail.

by disclosure, and held that the e-mails should be disclosed. *Id*. at *7. In reaching this conclusion, the Court noted that "numerous courts have concluded, in various contexts, that persons who use e-mail to communicate do not have any reasonable expectation of privacy in those communications" and that "e-mails retained by any local agency become government records." *Id*. at *7.

The Nevada District Court took a similar position with respect to a request for e-mails generated by the Clark County School Board of Trustees. *Gray v. Clark Cnty. Sch. Dist.*, No. A543861 (Nev. Dist. Ct. Feb. 12, 2009) (trial order). The Court held that "transitory and personal e-mails created or received by [public] employees and/or officials, and stored or kept within a public or governmental computer system may be deemed to 'public records' subject to open review if they were made in the performance of a public duty. An example of such a communication that may be open to public review could be stored transitory e-mails between two government officials who agree to meet for dinner off-site to discuss [school board] business." *Id*. at 7.

IV. E-mails To Or From Government Officials Using Private E-mail Addresses May Also Be Subject To Public Scrutiny Under Certain Circumstances

It is increasingly common for public officials to conduct government affairs using personal e-mail accounts and cell phones. Faced with requests for e-mails from the private accounts of governmental employees, several states have determined that communications prepared in connection with official duties – whether from a personal or government address – are public records and must be accessible to the public. As with e-mails on governmental systems, the touchstone of the analysis has been whether the e-mail involves public business.

In one advisory opinion, for example, the New York Committee on Open Government addressed whether a town councilman's use of a private e-mail address to conduct official business shielded his e-mails from disclosure. *See* Advisory Opinion FOIL-AO-15893, Department of State of the State of New York, Committee on Open Government, April 6, 2006. The Committee noted that documentary materials need not be in the physical possession of an agency to constitute agency records. As long as they are prepared, kept or filed for an agency, they constitute "agency records." Quoting the New York Court of Appeals (New York State's highest court), the opinion stated:

> The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons.

Id., quoting *Westchester-Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 581 (1980). The Committee advised that "e-mail is merely a means of transmitting information," and "must be treated in the same manner as traditional paper records for the purpose of" FOIL, regardless of whether the e-mail is held in a public or private e-mail account.

In another advisory opinion, the Committee addressed whether a school board's policy of considering "most" e-mail of individual Board members to be outside the definition of a "public record." Advisory Opinion FOIL-AO-17045, Department of State of the State of New York, Committee on Open Government, March 17, 2008. The Committee rejected the school board's policy, noting that "e-mail kept, transmitted or received by a school board member or school district employee in relation to the performance of his or her duties is subject to the [FOIL], even if the official uses his/her private e-mail address and his/her own computer." When government officials communicate with one another in writing "in their capacities as

government officials, any such communications constitute agency records that fall within the framework of [FOIL]." *Id.*

Attorneys General of other states have issued similar advisory opinions.[12] Florida's Attorney General, for example, has stated: "It is the nature of the record created rather than the means by which it is created which determines whether it is a public record. Thus, an e-mail created by a public official in connection with the transaction of official business is a public record whether it is created on a publicly or privately owned computer." Advisory Legal Opinion – AGO 2008-07, Florida Office of the Attorney General, February 26, 2008. Oklahoma's Attorney General stated that electronic communications that otherwise qualify as "records" are subject to Oklahoma's Open Records Act. Advisory Opinion 2009 OK AG 12, May 13, 2009. The Attorney General noted:

> the broad definition of the term "record" makes no distinction based on who owns or pays for a communication device and the services associated with it; rather, the [Open Records Act] concentrates on who creates, receives, controls, or possesses a record … and the context in which it was created or received by those persons … . Thus, a communication that meets the definition of a record under the [Open Records Act] is subject to disclosure regardless of whether it is created or received on a publicly or privately owned personal electronic communication device, unless some provision of law allows it to be kept confidential.

Id.

[12] Though most authorities have found that the content of the e-mail, not its source, determines whether it is subject to disclosure, a minority of state opinions and court decisions hold the view that e-mail communications made on privately held computers and stored on privately held servers cannot constitute "public records." *See*, *e.g.*, Opinion 2002-001, Kansas Attorney General, January 3, 2002, available at: http://ksag.washburnlaw.edu/opinions/2002/2002-001.htm ("[I]f a specific e-mail communication is not made, maintained or kept by the city, but rather is exclusively made, maintained or kept only by the individual city commission members, it is not a 'public record.'"); *Tracy Press, Inc. v. Superior Ct.*, 164 Cal. App. 4th 1290 (2008) (refusing to review a lower court decision that the e-mails of an individual town councilmember that were not prepared, owned, used or retained by the local agency were not "public records" subject to California's Public Records Act).

A court in *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Cmwlth. 2011), adopted the same approach. In remanding the case to the town's records officer for a factual determination of the character of the e-mails, the court noted:

> [R]egardless of whether the Supervisors herein utilized personal computers or personal e-mail accounts, if two or more of the Township Supervisors exchanged e-mails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township, the Supervisors may have been acting as the Township, and those e-mails could be "records" "of the Township." As such, any e-mails that meet the definition of "record" under the RTKL, even if they are stored on the Supervisors' personal computers or in their personal e-mail accounts, would be records of the Township.

Id. at 872-73.

Even text messages have been held to fall within the scope of FOI laws when they involve public business. For example, in late 2007, allegations surfaced that the mayor of the city of Detroit, Michigan, was involved in a scandal concerning his conduct, including allegedly having a romantic relationship with a staff member. The mayor had previously denied the affair under oath, but the local press discovered that the mayor's text messages proved there was a relationship. A local newspaper sought disclosure of the text messages. In *Detroit Free Press v. City of Detroit,* 744 N.W.2d 667 (Mich. 2008), the state Supreme Court held that the text messages were "public records" within the definition of Michigan's Freedom of Information Act. *Id*. The mayor, Kwame Kilpatrick, subsequently pleaded guilty to two felony counts of obstruction of justice in September, 2008. The case, which cost Detroit taxpayers over $8 million, led to the ouster of Mr. Kilpatrick as mayor and a Pulitzer Prize for the Detroit Free Press.[13]

[13] *See also Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008) (holding that plaintiff had the right to seek discovery of certain text messages and that the defendant city could not argue that the text messages were outside their control because it had an ongoing relationship with the

V. E-mails That Are Public Records May Be Precluded From Public Access If They Fall Within A Recognized Exemption[14]

It is important to note that the inclusion of e-mails as records subject to FOI laws does not mean that every e-mail about public business will ultimately be subject to disclosure. Public access can still be precluded if the e-mail falls under one of the various exemptions recognized by the state and federal freedom of information laws.[15] Although the number and types of these exemptions vary from state to state, most states and federal laws generally recognize exemptions for privacy of personal information as well as medical records and similar information, the active investigative files of law enforcement agents, and e-mails that may be

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third party text message service provider, and "there is no question that … at least some of the SkyTel text messages satisfy the statutory definition of 'public records,' insofar as they capture communications among City officials or employees 'in the performance of an official function.'") (citations omitted).

[14] Where a requested document contains information that is subject to disclosure as well as information that falls within a valid exemption, courts in the United States have embraced the practice of redacting the information that is not subject to disclosure and ordering the disclosure of the remainder. *See*, *e.g.*, *Yonemoto v. Dep't of Veterans Affairs*, 2012 WL 130339, at *4 (9th Cir. January 18, 2012) ("An agency may withhold only that information to which the exemption applies, and so must provide all 'reasonably segregable' portions of that record to the requester."); *Gannett Vermont Publishing Incorporated v. City of Burlington*, No. 628-9-07 (Vt. Super. Ct., Washington Cnty., Oct. 6, 2008) (upholding decision to redact certain information under personal privacy and attorney-client confidentiality exemptions); *Griffis v. Pinal County*, 156 P.3d 418, 422 (Ariz. 2007) (ordering the trial court to perform an in camera review of documents purported to contain personal information to determine what parts could properly be redacted under the exemption for personal information).

[15] An agency withholding or redacting public records that are otherwise subject to disclosure must prepare a *Vaughn* index (*Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) that identifies each withheld document, describes its contents to the extent possible, and gives a particularized explanation of why each document falls within the claimed exemption. *See*, *e.g.*, *Yonemoto v. Dep't of Veterans Affairs*, 2012 WL 130339, at *10 (9th Cir. January 18, 2012). The *Vaughn* index need not "disclose facts that would undermine the very purpose of its withholding," but it "should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection." *Id.*

subject to legal privileges such as the attorney-client privilege (which protects the confidentiality of communications between lawyers and their clients).

CONCLUSION

The Association of the Bar of the City of New York has summarized in this submission how U.S. federal and state freedom of information laws have been interpreted, and how the U.S. regime's purpose is to promote the fundamental principle that citizens have a right to access public documents of their government while balancing the government's ability to conduct the business of the people and the legitimate privacy concerns of government employees. As discussed in this submission, the U.S. federal and state transparency laws vary to some degree throughout the country, but there is a strong presumption in favor of disclosure and a clear trend in favor of public disclosure of government communications involving official business, whether or not those communications are made to or from government computer systems. We respectfully ask the Constitutional Court of Chile to recognize similar principles and procedures. The result will help establish a fair and balanced framework governing access to information in Chile and will highlight the Constitutional Court's recognition of the importance of access to information as a foundation for a democratic and honest government.

The Republic of Chile has developed regional, as well as global, reputation of being a government committed to democratic institutions and good governance. It has served as an example for sound markets, development of a mandatory private pension scheme which has led to the growth of domestic capital markets and creating greater social security and a society that respects the rule of law. In today's world, countries learn from the experiences of other sovereign nations. In this case, Chile has the opportunity to become a leading example in the region of the fundamental benefits that are made possible from robust transparency laws.

Dated: New York, New York, U.S.A.
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