Deputy City Attorney Greg Wheeler reviewed the proposed “Bring Your Own Device”(BYOD) policy [hereinafter “the Policy”] and finds it is in compliance with the state Inspection of Public Records Act, N.M. Stat. Ann.  1978, §§ 14-2-1 *et seq*.

I have reviewed the Policy and find that it comports with the federal Stored Communications Act, 18 U.S.C. §§ 2701-12 (2013), and in no way violates the Federal Wiretap Act, 18 U.S.C. §§ 2501-22 (2013), nor the state Interfering with Communications law, N.M. Stat. Ann. 1978 § 30-12-1.  The Policy appears to conform to all federal and state statutory and case law.  Therefore, it is approved.

That said, it must be noted the law concerning electronic communications and privacy is fast changing and ever growing.  The policy alone may not be enough to protect the City against liability for stolen or leaked private or confidential information due an employee’s failure to follow this policy, or responsibility for complying with discovery requests and court ordered disclosures.

See, William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 50 (2008) (describing the merger of personal and work-related electronic communications); Elaine Ki Jin Kim, *Comment, The New Electronic Discovery Rules: A Place for Employee Privacy?*, 115 YALE L.J. 1481, 1485 (2006)); see also Matthew J. Schwartz*, CIOs See Smartphones as Data Breach Time Bomb*, INFORMATIONWEEK (Nov. 19, 2010, 12:35 PM),

*http://* [*www.informationweek.com/hardware/handheld/cios-see-smartphones-as-data-breach-time/228300244*](http://www.informationweek.com/hardware/handheld/cios-see-smartphones-as-data-breach-time/228300244)

(last visited April 25, 2013).

Additionally, I note that governmental employers like the City is unlike a private employer in regards to the employee’s privacy.  The United States Supreme Court's interpretation of privacy issues involving employees, especially public employees under the Fourth Amendment, has been anything but consistent.  Compare, e.g., O'Connor v. Ortega, 480 U.S. 709 (1987) to City of Ontario v. Quon, \_\_\_U.S.\_\_\_, 130 S. Ct. 2619 (2010).  Employee privacy law has been growing in a kind of roller coaster fashion with ups and downs as far as recognizing privacy rights, but the trend is generally towards the increase of privacy rights.  See, e.g., Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL'Y 609, 616 (2009) (quoting Matthew W. Finkin, *Information Technology and Workers' Privacy: The United StatesLaw*, 23 COMP. LAB. L. & POL'Y J. 471, 474 (2002)) (citing **AM. MGMT. ASS'N ET AL., ELECTRONIC POLICIES AND PRACTICES: SUMMARY OF KEY FINDINGS** 1 (2001), available at http://[www.epolicyinstitute.com/survey2001Summary.pdf](http://www.epolicyinstitute.com/survey2001Summary.pdf)).  What the future holds is hard to predict.

Thx

John E. DuBois

Assistant City Attorney

505.768.3312