Blogs
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California Land Use & Development Law Report

Public Employees' Personal E-mail and Text Messages May be Subject to Disclosure under the Public Records Act

The California Supreme Court has held that information relevant to public business contained in emails or text messages stored on private electronic devices of government officials is subject to disclosure under the Public Records Act. *City of San Jose v. Superior Court (Smith)*, No. S218066 (Calif. Supreme Court, March 3, 2017). The California Public Records Act (Government Code sections 6250 *et seq*.) establishes a presumptive right of access to any records created or maintained by government agencies that relate to the public's business. Every such record must be disclosed unless a statutory exception is shown. The Act sets out a variety of exemptions, many of which are designed to protect individual privacy, and also includes a catchall provision exempting disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." [caption id="attachment_4541" align="aligncenter" width="666"]
City hall of San Jose, California, USA City Hall, San Jose, California[/caption] The Act was adopted in 1968, long before the Legislature could have envisioned that public agencies would communicate via cell phones and e-mail. Over the last two decades, agencies have almost uniformly maintained that communications sent or received by a public official on a personal account (e.g., a cell phone or e-mail account) are private, not public, records and hence are not subject to disclosure under the Act. The City of San Jose offered this same response to a Public Records Act request by a member of the public (Smith) who requested emails and text messages "sent or received on private electronic devices used by" the mayor, members of the City Council, and their staffs. The California Supreme Court ruled unanimously that the requested records were subject to disclosure under the Act. At the outset, the court rejected the blanket notion that records generated or retained on personal accounts are not subject to the Public Records Act. Citing both the constitutional policy favoring broad access to records involving the public's business and the clear legislative intent of the Act, the court held that the right to inspect public records cannot be thwarted simply because such records are not created or maintained on a governmental account. However, the court carefully characterized the decision as involving only the "narrow" legal issue of whether writings concerning public business are beyond the scope of the Act "merely because they were sent or received using a nongovernmental account." The court recognized the difficulty in determining whether particular e-mails or text messages from non-governmental accounts are sufficiently related to the public's business to fall within the scope of the Act. For example, the court noted that "depending on context, an email to a spouse complaining 'my coworker is an idiot' would likely not be a public record," but an "an email to a superior reporting the coworker's mismanagement of an agency project might well be." The court eschewed adoption of a general rule, stating that these communications should examined in light of several factors, including "the content itself; the context in, or purpose for which it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment." In addition to these factors, the court advised that communications that include "no more than incidental mentions of agency business generally will not constitute public records." The court was wary of the effect of its decision on the privacy of public officials and staff, and emphasized that the Act's exemptions from disclosure would apply to any writings from personal accounts, and that purely private information not otherwise subject to disclosure can be redacted. Finally, the Court provided guidance to agencies on how to conduct record searches involving personal accounts. Observing that agencies were free to develop their own internal policies for records searches, the court recommended that such policies incorporate two features: (1) requests for records should be communicated to employees, and agencies should then "reasonably rely" on employees to search their own accounts and devices for responsive material; and (2) agencies should adopt policies designed to reduce the likelihood of public records being contained in private accounts. While

City of San Jose settles the broad legal question of the applicability of the Act to personal accounts, it leaves much to be determined. Whether a given communication on a private device is sufficiently connected to public business to be subject to disclosure depends, according to the court, entirely on content and context. The court declined to establish any kind of "safe harbor" rule for public agencies that adopt and implement policies for records searches, stating that the question whether the content of specific communications renders them subject to disclosure must "await resolution in future proceedings."

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