City of Biggs

Agenda Item Staff Report
for the Regular City Council Meeting:
March 14, 2017

TO: Honorable Mayor and Members of the City Council

FROM: Mark Sorensen, City Administrator

SUBJECT: California Public Records Act and recent court decisions (informational)

RECOMMENDATION:
Consider the California Public Records Act and recent court decisions. Direct Staff.

BACKGROUND from League of California Cities:

California Supreme Court Finds City Employee Communications on Personal Electronic Devices and Accounts May be Subject to Disclosure under California Public Records Act where Communications Pertain to Public Business

Court Further Clarifies that Cities May Reasonably Rely on City Employees to Search Personal Accounts and Devices for Communications Regarding Public Business

March 3, 2017
The California Supreme Court issued a unanimous decision Thursday, March 2 in *City of San Jose v. Superior Court (Smith)*, holding that city employee communications pertaining to public business may be subject to disclosure under the California Public Records Act (CPRA) even if stored on a personal electronic device or in a personal account inaccessible by the city.

The case arose from a CPRA request local resident Ted Smith filed with the city of San Jose. Smith sought various records, including voicemails, emails, or text messages regarding city business, sent or received on private electronic devices by the mayor, certain members of the San Jose City Council, and their staff. The city disclosed

responsive records accessible through city equipment or servers (i.e. a city email account), but did not disclose records accessible only through a private account (i.e. a personal email account).

San Jose took the position that records accessible only through a private account did not meet the definition of public records under the CPRA because they were not "prepared, owned, used, or retained" by the city. The California Supreme Court disagreed. The Court held "that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account."

Nonetheless, the Court noted that an agency's search for public records "need only be reasonably calculated to locate responsive documents" and affirmed that agencies "may develop their own internal policies for conducting searches."

The Court also addressed employee privacy concerns raised by local government associations, including the League, in friend-of-the-court briefs, by clarifying that cities may reasonably rely on city employees to search their own personal accounts and devices for communications regarding public business.

The Court offered guidance to cities on how to administer such searches, noting that other state and federal courts have approved of allowing public employees to conduct their own searches and segregate public records from personal records, so long as they had been trained to distinguish between the two.

The League will be working with its Public Records Act committee to provide additional guidance to our members in light of this decision.

The League wishes to thank Shawn Haggerty and HongDao Nguyen of Best, Best & Krieger for drafting the League's friend-of-the-court brief in this case.

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CALIFORNIA PUBLIC RECORDS ACT

California Supreme Court: Public Officials' and Employees' Communications on Private Devices and Accounts May be Public Records Subject to Disclosure

On March 2, the California Supreme Court decided a landmark case concerning the California Public Records Act ("CPRA," Government Code §§ 6250 *et seq.*), which is expected to have wide-ranging administrative, operational and financial impacts on public agencies. The issue concerned whether e-mails and text messages, sent or received on private electronic devices or personal accounts used by public officials and their staffs, were subject to production under the CPRA. The Court held that such communications, if they relate to the conduct of public business, are subject to the CPRA and may be public records subject to disclosure. (*City of San Jose v. Superior Court (Smith)* (March 2, 2017, S218066).)

Meyers Nave attorneys Ruthann G. Ziegler and Nicholaus W. Norvell prepared an analysis of the Court's decision below. Ruthann and Nick will provide additional information about the decision and its impact on public agencies during a webinar on March 9 hosted by the California Special Districts Association. (Please click here to register for the webinar.)

Case Analysis

Under the CPRA, a public record includes "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Section 6252 (e).) According to the Court, communications such as e-mails and text messages on private devices and accounts can qualify as public records if their contents relate to the conduct of public business.

The Court acknowledged that it may be difficult to draw the line between public records and personal information on private devices and accounts. The Court indicated that distinguishing the difference would involve several factors, including: (1) the content of the communication itself; (2) the context of, or purpose for, the communication; (3) the person to whom the communication was directed; and (4) whether the communication "was prepared by an employee acting or purporting to act within the scope of his or her employment." As an example, the Court explained that, depending on the precise context, an e-mail to a spouse complaining about a co-worker would not be a public record. On the other hand, an e-mail to a supervisor about a co-worker's performance might be a public record.

The Court held that records which otherwise "meet CPRA's definition of 'public records' do not lose this status because they are located in an employee's personal account." Furthermore, "a writing prepared by a public employee conducting agency business has been 'prepared by' the agency within the meaning of" the CPRA, regardless of whether the writing is prepared using the employee's personal account.

In reaching this significant decision, the Court addressed important privacy concerns raised by the City and other parties interested in the case. First, if a record contains both public and private information, the Court reassured public agencies that they can redact information that is exclusively personal or otherwise exempt from disclosure under the CPRA.

Second, and more significantly, the City and interested public agencies were concerned with how they can locate responsive records on private devices and accounts without violating public officials' or employees' privacy rights. Relying on federal and state court decisions in similar cases, the Court offered "guidance" on how California public agencies can conduct searches that are reasonably calculated to locate responsive documents, even if those documents are contained on private devices or accounts.

Specifically, the Court provided several suggestions for public agencies in this area. "Federal courts applying FOIA [Freedom of Information Act; the federal equivalent of CPRA] have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two." The Court noted that, for federal employees and public agency employees in other states, if an employee "withholds a document identified as potentially responsive," he or she may "submit an affidavit providing the agency, and a reviewing court, 'with a sufficient factual basis upon which to determine whether contested items were agency records' or personal materials." The Court indicated that this type of process could meet an agency's duty to produce responsive records while also protecting individual privacy interests of officials and employees.

In addition, the Court noted that California public agencies might consider adopting policies to reduce the possibility of public records being located on private devices or accounts. For example, federal statutes and regulations require some federal employees to use their official agency accounts for all communications relating to public business or copy their official agency accounts on all public business communications conducted on private accounts.

This decision will undoubtedly have a significant impact on how California's public agencies handle CPRA requests. Agency representatives should consult with legal counsel about this decision, both for purposes of complying with CPRA obligations and determining whether to adopt or update internal records policies.

Meyers Nave attorneys are available to provide advice to public agencies on all issues related to the California Public Records Act, including this decision. The Court's complete decision is available here.