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Client Alert Commentary

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California Supreme Court: Government Communications on Private Accounts Are Public

Recent decision points to the original intent of the California Public Records Act in the evolving debate over government transparency.

Key Points:

- California Supreme Court rules that emails and text messages sent or received on public officials' private devices are subject to disclosure under the California Public Records Act, which had originally been designed to cover paper documents.
- Opinion emphasizes the crucial function of public access laws and the expanded scope of employment-related activity in the digital age.

On March 2, 2017**,** the California Supreme Court held that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA) in connection with the case *City of San Jose v. Superior Court (Smith)*, S218066.

Background and Prior Proceedings

In June 2009, petitioner Ted Smith (Smith) requested disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency and the agency's executive director, along with certain other elected officials and their staff (collectively, the City). The requested disclosure concerned redevelopment efforts in downtown San Jose and included emails and text messages "sent or received on private electronic devices used by" the City. The City did not disclose communications using individuals' personal accounts.

Smith sued for declaratory relief, arguing CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated or stored. The City responded that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The trial court granted summary judgment for Smith and ordered disclosure, but the Court of Appeal reversed the trial court's ruling.

Opinion

The Supreme Court recognized that in applying the CPRA, which was originally designed to cover paper documents, a court should recognize "that in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace."[1] The Court further emphasized the crucial function of public access laws, noting that "openness in government is essential

to the functioning of democracy."[2] However, the Court also acknowledged that public access to information must sometimes yield to personal privacy interests.

Definition of Public Record

The Court initially noted that statutory language, broadly construed, supports public access to such documents. The Court looked to statutory intent, beginning with the CPRA's definition of "public record," which is: (1) a writing; (2) with content relating to the conduct of the public's business; (3) prepared by or (4) owned, used or retained by any state or local agency.[3] The CPRA defines "writing" as any tangible form of communication or representation, "regardless of the manner in which the record has been stored."[4] Neither party disputed that the documents at issue were writings, but the Court noted writings are more informal today than when the CPRA was enacted.[5]

Relating to the Conduct of the Public's Business

The second aspect of "public record," relating to the conduct of the public's business, establishes a framework to distinguish between work-related and purely private communications. The CPRA clarifies that not everything written by a public employee is subject to review and disclosure.[6] However, whether a writing is sufficiently related to public business will not always be clear. Resolution of this question will involve a fact-based examination of several factors, including 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. Because the City did not produce any of the contested documents, disputes over this aspect of the public records definition will be resolved in future proceedings[7].

However, the Court clarified that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. While this standard is broad, according to the Court, it is "not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records."[8] In using this test, the Court departed from the previous test that "[o]nly purely personal" communications "totally void of reference to governmental activities" are excluded from the CPRA's definition of public records.[9]

Prepared by Any State or Local Agency

Concerning the final portion of the public records definition, requiring that writings be "prepared, owned, used, or retained by any state or local agency,"[10] the City argued the legislature intended to exclude individuals from the local agency definition because individuals are specifically mentioned in the CPRA's definition of "state agency," but not "local agency." However, the Court determined that the broad construction mandated by the Constitution supported disclosure, and the term "local agency" logically includes individual officers and staff members who conduct the agencies' affairs.[11]

The Court also rejected the City's argument that its proposed requirement that a public record be "accessible to the agency as a whole" because many writings are not accessible to all agency employees, regardless of their level of responsibility or involvement in a particular project.[12]

Owned, Used or Retained by Any State or Local Agency

The final two factors of the public records definition pertain to use and retention, reflecting the variety of ways an agency can possess writings used to conduct public business.[13] The City argued that public records include only materials in an agency's possession or directly accessible to the agency, and that writings held in an employee's personal account are beyond an agency's reach and fall outside the CPRA. The Court rejected this argument, noting that appellate courts have "generally concluded records

related to public business are subject to disclosure if they are in the agency's actual *or constructive* possession."[14] Relying on federal Freedom of Information Act (FOIA) cases, the Court concluded that documents otherwise meeting the CPRA's definition of public records do not lose this status because they are located in a personal account.[15] Therefore, a writing retained by a public employee conducting agency business has been "retained by" the agency within the meaning of CPRA section 6252(e), even if the writing is retained in the employee's personal account.

Citing various CPRA provisions, the City also argued that an agency must be able to directly access a record in order for that record to be classified as "public." The Court rejected this argument based on its interpretation that the statute intended to prevent agencies from evading their disclosure duty. Specifically, the statute prevented agencies from transferring custody of a record to a private holder and then arguing the record falls outside the CPRA because it is no longer in the agency's possession.[16] Further, the Court stressed that a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located.[17]

Policy Considerations

In addition, the Court addressed policy considerations advanced by the parties, determining that sound public policy supported the Court's holding.[18] The City argued the definition reflected a legislative balance between the public's right of access and individual employees' privacy rights and should be interpreted categorically. Smith countered that privacy concerns are properly addressed in the case-specific application of the CPRA's exemptions, not in defining the overall scope of the public records, and any privacy intrusion can be minimized through procedural safeguards.[19] The Court found Smith's arguments persuasive, noting that the City's interpretation would allow evasion of the CPRA simply by the use of a personal account.

Further, the Court noted that the Constitution does not create or require a presumption that public officials conduct official business in the public's best interest, as the Court of Appeal concluded. Instead, "[t]he whole purpose of CPRA is to ensure transparency in government activities," and as such, the Court refused to categorically exclude the content of personal email and other messaging accounts from public review because such materials have traditionally been considered private.[20] Additionally, any personal information or information under a statutory exemption may be redacted from public records that are produced or presented for review.[21]

Guidance for Conducting Searches

The City argued the search for public records in employees' accounts would be tantamount to invading employees' homes and rifling through their filing cabinets, raising privacy concerns.[22] The Court noted that the requirement to disclose all records the City can locate "with reasonable effort" does not require that an agency undertake extraordinarily extensive or intrusive searches.[23] While the CPRA does not prescribe specific methods of searching for documents, the Court noted that general policies have emerged requiring the agency to communicate the scope of the information requested to the custodians of its records, including employees.[24] The Court observed that the agency may rely on these employees to search their own personal files, accounts and devices for responsive material.[25]

The Court noted that federal courts applying FOIA have allowed individual employees to conduct their own searches, so long as they have had sufficient training to distinguish between personal and public records.[26] In turn, the federal employee withholding a document identified as potentially responsive may submit an affidavit to the agency and a reviewing court "with sufficient factual basis upon which to determine whether contested items were 'agency records' or personal materials."[27] The Court agreed with the Washington Supreme Court, which recently adopted the federal procedure in its own public records

law, stating that “this procedure … strikes an appropriate balance” between governmental transparency and privacy concerns.”[28]

The Court did not hold that any particular search is required or necessarily adequate, but instead mentioned alternatives to offer guidance on remand and to explain why privacy concerns do not require categorical exclusion of documents in personal accounts.

Conclusion

After the case after the matter is remanded, the Court of Appeal will likely determine the test or policies to determine whether a search of personal accounts is adequate for the purposes of the Public Records Act.

The California Supreme Court’s opinion leaves a number of still unresolved issues. However, the specific question of whether nongovernmental accounts are shielded completely from the scope of the CPRA has been resolved.

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Endnotes

[1] *City of San Jose* at p. 2.

[2] *Id*. at p. 3; *citing International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 328-29 (2007) ("*International Federation*").

[3] *City of San Jose* at p. 5.

[4] *Id*.

[5] *Id*. at p. 6.

[6] *Id*. at p. 6.

[7] *Id*. at p. 7.

[8] *City of San Jose* at p. 7.

[9] *Id*. at p. 7, fn. 4; *citing* Assem. Statewide Information Policy Com., Final Rep. (Mar. 1970).

[10] *City of San Jose* at p. 8; CPRA § 6252(e).

[11] *Id*. at pp. 9-10; *citing Suezaki v. Superior Ct.*, 58 Cal.2d 166, 174 (1962) (a governmental agency, like a corporation, can only act through its individual officers and employees).

[12] *City of San Jose* at p. 10.

[13] *City of San Jose* at p. 12.

[14] *Id*. (emphasis in original).

[15] *Id*. at p. 13.

[16] *City of San Jose* at p. 13.

[17] *Id*. at p. 14.

[18] *City of San Jose* at p. 15.

[19] *Id*.

[20] *City of San Jose* at p. 16.

[21] *Id*. at pp. 16-17.

[22] *City of San Jose* at p. 18.

[23] *Id*.

[24] *Id*. at p. 19.

[25] *Id*.

[26] *Id*.

[27] *Id*.; *citing Ethyl Corp. v. U.S. Environmental Protection Agency*, 25 F.3d 1241, 1247 (1994).

[28] *Id*. at pp. 19-20; *citing Nissen v. Pierce County*, 357 P.3d 45, 58 (2015).