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Justin D. Bigelow
Nahal Hamidi Adler

San Francisco
415 788-6336
Los Angeles
213 627-6336
San Diego
619 239-6336
Goldfarb & Lipman LLP

THE PERSONAL COULD BE PUBLIC: CALIFORNIA SUPREME COURT HOLDS THAT E-COMMUNICATIONS ABOUT PUBLIC BUSINESS ON PRIVATE DEVICES AND ACCOUNTS MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT

The California Supreme Court has weighed in on a closely watched case involving the scope of the California Public Records Act (the CPRA) and its applicability to communications on personal accounts about public issues by public employees. In *City of San Jose v. Superior Court*, No. S218066 (March 2, 2017), the Court held in a unanimous opinion that when city employees use personal accounts to communicate about public business, the writings are subject to disclosure under the CPRA. In reaching this conclusion, the Court rejected the City's argument that communications made using personal accounts on personal devices are not "public records" under the CPRA.

BACKGROUND

In 2009, a private party 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 other elected officials and their staffs. The targeted documents related to planned redevelopment projects in downtown San Jose. The requests included emails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staff. The City disclosed communications made using City telephone numbers and email accounts, but refused to disclose communications made using personal accounts.

The requesting party sued the City, arguing that the CPRA's definition of "public records" includes all communications about official business, regardless of whether the communications occur via official or personal accounts. The City argued that communications made through personal accounts are not public records because they are not within the public entity's custody or control. The trial court agreed with the requesting party and ordered disclosure, but the Court of Appeal disagreed, concluding that the private communications were not public records and therefore not subject to disclosure under the plain language of the CPRA.

THE SUPREME COURT'S DECISION

The Supreme Court reversed and remanded the Court of Appeal's decision. After reciting familiar rules of statutory interpretation, the Court emphasized that in CPRA cases there is an overarching "constitutional imperative" to broadly construe laws that further people's right of access and to narrowly construe laws that limit the right of access. The Court repeatedly invoked this constitutional standard to reject several of the City's arguments.

The Court structured its legal analysis around the CPRA's definition of "public records." Under the CPRA, "public records" include "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." The Court's analysis touched upon every aspect of this definition, but focused on two particular aspects: that the material be *prepared* by a state or local agency or *owned, used, or retained* by a state or local agency.

In considering whether the communications on private devices and accounts were "prepared by" the City, and as a result, are public records under the CPRA, the Court reasoned that the term "local agency" must logically include the governmental entity itself as well as the individual officials and staff members conducting the agency's affairs. In rejecting the City's argument that the CPRA itself does not expressly include local government employees within the "public records" definition, the Court noted that the CPRA does not exclude them either. Rather, the Court reasoned, if the Legislature intended that the CPRA apply to "state officials" but not local employees, one would expect to see that distinction throughout the CPRA itself. Seeing no such evidence, the Court concluded that materials "prepared by" City employees constitute materials prepared by the City itself.

Perhaps even more significantly, the Court concluded that communications such as text messages and emails on private devices and accounts should be considered writings "owned, used or retained" by the City. To hold otherwise, according to the Court, would allow public officials to "shield communications about official business simply by directing them through personal accounts."

THE DECISION'S IMPLICATIONS

The clearest implication of the *San Jose* decision for public agencies is that CPRA requests may now include emails, text messages, or other electronic data sent or received on private electronic devices using

private accounts by public employees. This includes private devices like smart phones, tablets, and laptops, and covers communications made using private email accounts, text messaging, and other non-government messaging applications.

However, this does not mean that public agencies must now subject employees to intrusive searches of their private devices and accounts in order to comply with the CPRA. In an effort to "strike the balance between privacy and disclosure," the Supreme Court noted that an agency's first step after receiving a CPRA request should be to communicate the request to the employees in question. Importantly, the Court states that the agency "may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material."

In short, public agencies still have wide latitude in determining what search method is required and adequate. For example, agencies may still develop their own internal policies about searching for and gathering public records from personal devices and accounts. The Supreme Court's instruction is simply that privacy concerns do not require *categorical* exclusion of documents in personal accounts from CPRA coverage. Rather, privacy concerns should be addressed on a case-by-case basis.

Lastly, public agencies remain free to adopt policies aimed at reducing the likelihood of public records being held on employees' private accounts. Such policies could make it easier for agencies to gather and produce public records in a manner that complies with the CPRA and the Supreme Court's new instructions.

For more information on this case or any of the issues discussed above, please contact Celia W. Lee, Daniel S. Maroon, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

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