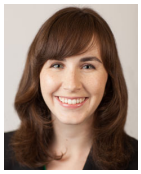
California Supreme Court Case Alert: Public Records on Private Accounts



by Patrick T. Miyaki & Steven D. Miller & Catherine J. Groves

On March 2, 2017, the California Supreme Court determined that when a public employee uses a personal account to communicate about the conduct of public business, the communications are subject to disclosure under the California Public Records Act (CPRA), if those communications are not otherwise exempt from disclosure. In a unanimous opinion, the Court in *City of San Jose v. Superior Court of Santa Clara County* announced that to shield communications from disclosure simply because the communication was conducted on a personal account would impermissibly permit a public agency to evade the CPRA's reach.

In June 2009, an individual requested disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency, the agency's executive director, other elected officials, and staff. The request included emails and text messages sent or received using personal accounts. The City refused to produce electronic communications to or from individuals' personal accounts arguing that such communications were not public records because they were not within the public entity's custody or control.

The Court applied a four-part test to determine whether communications could qualify as "public records" subject to the CPRA despite being sent to or from a private personal account: "It is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, *or* retained by any state or local agency." In applying this test, the Court rejected the argument that only materials in an agency's possession are public records. Rather, the Court held that disclosable public records could exist outside an agency's control because (i) records outside an agency's possession may be "used" by the agency and (ii) a communication "prepared by" an individual officer or employee is "prepared by" the agency itself, given that an agency can only act through individuals.

Transparency and public accountability, the Court concluded, outweigh individual employees' privacy rights. The public must have access to public records so it can verify that government officials are acting responsibly and are held accountable to the public they serve. Otherwise, government officials could hide their most sensitive discussions on private accounts.

Ultimately, the Court concluded that so long as the content of the record relates to the public's business, the Court found insignificant the location of the record – in particular whether it was stored on a public or private account. "[A] document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located."

Public agencies will now need to focus even more sharply on the content of communications in order to determine whether a record is a "public record" subject to disclosure under the CPRA. Agencies may need to produce records stored on personal accounts and on private devices.

Practical Impacts for Public Agencies.

This case will present significant burdens for a public agency seeking to comply with the CPRA. The Supreme Court did not require San Jose to follow any specific procedures. Rather it remanded the case to the lower court to determine what specifically would be required under the facts and circumstances of the situation in San Jose. As a result, while there are some practical next steps for agencies to consider, there are also numerous unknowns.

- The Court suggested new procedures that a public agency could undertake to comply with this new ruling. For example, the Court suggested that an agency could fulfill its responsibilities under CPRA by "reasonably rely[ing] on employees to search their own personal files, accounts, and devices for responsive material" so long as the agency obtained an affidavit from the employee that included facts sufficient to show that any withheld information was not a public record under the CPRA. Obtaining an affidavit from all employees or officials whose records are sought will no doubt be burdensome for a public agency and challenging for its officials and employees. Agencies should develop policies requiring assistance from employees and officials in responding to records requests, and should prepare in advance the form of an affidavit that will satisfy the Court's guidance.

- Of potentially more practical benefit, the Court also appeared to endorse a public agency's effort to minimize the impacts of this decision by adopting policies that would require officials and employees always to use agency accounts for agency business and keep non-agency personal communications segregated on personal accounts (and private devices). An immediate step in response to this landscape-altering decision, therefore, is for any public agency that does not already do so to create official public email accounts for its employees and officials. This has long been prudent advice but now may become a necessity in responding to requests under the CPRA.

- Searching for text messages in response to records requests is likely to become standard operating procedure. Public agencies should anticipate the need for more staff time to respond to records requests that now will involve examination of private accounts.

- Agencies that do not already do so should now consider the pros and cons of providing certain officials and employees with agency-owned devices – if only to make it easier to search for responsive records in response to a records request.

- Public agencies will have to wrestle with some unknown questions not addressed by the Court:

    - Under the Court's content-focused analysis, a continuing challenge, but made more difficult now by the need to examine previously private communications, will be to undergo the case-by-case determination of whether a particular communication in fact relates to the public's business. For example, the Court distinguished between a public employee's complaining to a spouse that "my

coworker is an idiot" (likely not a public record) and the same email to a superior (likely a disclosable public record). Depending on the circumstances, it may be difficult to determine whether a communication between public officials and members of the public on the public official's private email account has "content relating to the conduct of the public's business" rendering it disclosable under this opinion.

- Communications that may already be in the public sphere – for example tweets and social media posts – are likely disclosable records under the content-focused court's ruling. Public agencies may now need to consider how to locate such records in response to CPRA requests.

- How do records retention requirements for public agencies apply to communications from private accounts or on personal devices—in other words, what happens if an agency employee or official deletes emails or text messages that would otherwise have been "public records" under the Court's new standards?

Hanson Bridgett's Government Group is continuing to monitor this case and its aftermath. There is no doubt that this case presents novel questions that will be difficult to answer in the abstract and that will depend on specific facts and circumstances. Even then, some questions may be difficult to answer with certainty until the law evolves. We will keep you posted on developments as they occur.

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