CLIENT NEWS BRIEF

It's An E-World: Governing in the Electronic Age

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Technology often outpaces the law. Lozano Smith attorneys have emphasized this point at numerous presentations on technology legal issues over the past decade. Occasionally, the Legislature tries to catch up with changes in technology: in 2015, such legislative changes focused on school districts, which now must enact new policies on several fronts, as discussed below. However, the law on many other local government issues remains unsettled, and is not likely to be clarified by legislative action any time soon. Lozano Smith's Technology & Innovation Practice Group was formed to help our clients navigate these murky legal waters for all California public agencies. This news brief summarizes some of the many challenging issues we are tackling in 2015.

Email, the Public Records Act and the Retention of Records. Public agencies often struggle with how to identify public records to be retained, as well as how and whether to preserve emails, and for how long. The California Public Records Act imposes obligations for managing and disclosing public records on all state and local agencies, but retention issues are proliferating. These issues are of particular public interest at the moment due to attention being paid to use of personal email accounts by prominent national political candidates.

As we previously reported in CNB No. 21 (2014), an appellate court ruled last year that public agency emails sent and received on personal devices and using personal accounts are not subject to disclosure under the California Public Records Act. The opinion in *City of San Jose v. Superior Court* (2014) 225 Cal. App. 4th 475 reversed a trial court ruling that such emails were subject to disclosure if they concerned public agency business, even when a public agency employee or official was using his or her personal account on a personal device. The case has been appealed to the California Supreme Court, and a ruling is likely in 2015. Lozano Smith is watching this case closely and will provide a news brief on the opinion when it comes down.

When it comes to record retention for school districts, regulations dating from the 1970s (before the advent of personal computers and, of course, email) govern how long to retain documents, including electronic documents. As discussed in detail in CNB No. 63 (2012), those regulations appear to require that some emails be retained indefinitely, and the California Department of Education has not pursued revisions to the regulations to make them current. To help educational agencies better evaluate their options for determining what email to retain and for how long, Lozano Smith has created "School District Email Retention", which discusses possible policy solutions. A copy of this document can be obtained by contacting any of the authors identified below.

Cities and other local governmental agencies face their own records retention issues; many such agencies are turning to digital records to store security, library, police, and traffic data, along with many other uses. Of particular concern lately is the retention and storage of video images, including images from security and traffic cameras and police body and car cameras. Lozano Smith attorneys have developed the unique retention and management protocols these records require.


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Contracting for Cloud Services. As summarized in CNB No. 78 (2014), school districts are now subject to three bills regarding technology services and student privacy that were passed by the California Legislature last year, two of which became effective as of January 1, 2015 (the third, affecting vendors of technology services, will not go into effect until January 1, 2016). Assembly Bill (AB) 1584 enacted new Education Code section 49073.1, requiring that educational agencies enact board policies governing new contracts with third parties for digital storage, management, and retrieval of pupil records (including cloud-based storage) or digital educational software related to pupil records. Education Code section 47603.1 also requires that such contracts contain nine provisions designed to protect student privacy.

Also effective on January 1, 2015, AB 1442 enacted Education Code section 49073.6, which places requirements on an educational agency when considering a program to gather or maintain student information obtained from social media. Such an agency must first conduct a public meeting on the issue and notify students and parents of the opportunity to comment on the program. If the program is enacted, the educational agency must adhere to certain privacy safeguards set out in the statute. Although this statute appears to have been drafted to target an agency's widespread monitoring of its students' social media activities, the statute may also apply to incidental review of social media – for instance, when a particular student's alleged misconduct may be reflected on his or her social media account.

Lozano Smith attorneys can assist with model policy documents and contractual terms for compliance with these new laws. In addition, as reported in CNB No. 32 (2014), Lozano Smith attorneys Michael Smith and Manuel Martinez were contributors to the National School Boards Association's Council of School Attorneys publication, "Cloud Computing and Student Privacy: A Guide for School Attorneys". While the COSA Guide is not generally available to non-COSA members, our attorneys are available to provide similar guidance to our school district and municipal clients.

Purchasing and Installing Technology. Many school districts and public libraries are in the process of purchasing technology upgrades to assist in the implementation of the Common Core State Standards. Such projects are often funded by the federal E-rate program. When making such purchases, it is important to navigate both the federal E-rate rules and state laws regarding the purchase of goods and services by California public agencies. For school districts, one little-explored option is to use the "competitive negotiation" procedures set out in Public Contract Code section 20118.2. That statute permits a school district to purchase "computers, software, telecommunications equipment, microwave equipment, and other related electronic equipment and apparatus" using the detailed request for proposal procedures set out in the statute. This statute cannot be used for construction or "for the procurement of any product that is available in substantial quantities to the general public".

Lozano Smith has also taken the lead in developing contracts for public agency shared acquisition, website design and management, and data management services by and between municipalities. This cutting edge undertaking presents cost-effective, immediate functionality to the user groups.

Finally, public agencies should carefully consider whether their technology installation contracts are governed by prevailing wage laws. As reviewed in CNB No. 43 (2014), sweeping changes to prevailing wage law now require, among other things, that contractors on public works projects register with the Department of Industrial Relations. Where a contract calls for significant installation on public property, it may be subject to these requirements.

Lozano Smith's Technology & Innovation Practice Group can offer guidance on these and many other technology legal issues facing local public agencies. If you are attending the CASBO Annual Conference next week, you can catch Lozano Smith partners Harold Freiman and Devon Lincoln presenting on Technology Legal Issues on Wednesday, April 1 beginning at 1:45. Also, in the coming year, our clients will begin to receive our new quarterly publication on law and technology for public agencies. If you have questions on a technology legal issue, please contact one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.

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