

# CLIENT NEWS BRIEF

## California Appellate Court Rules that Public Records Act Does Not Apply to Electronic Communications Sent on Personal Devices to Personal Accounts

What happens when elected officials and government employees communicate using their personal electronic devices and private accounts? If these messages relate to government business, are they subject to public disclosure under the California Public Records Act (CPRA) (Gov. Code §§ 6250 *et seq.*)?

In the first published appellate court decision in California addressing this issue, the court on March 27, 2014, ruled that private communications sent on personal devices that are not stored on a public agency's servers are not subject to the CPRA. (*City of San Jose v. Superior Court* (March 27, 2014, Case No. H039498).) While this case provides important guidance, it still remains subject to potential appeal, and leaves a number of questions unanswered.

The *San Jose* case started when a member of the public made an extensive CPRA request to the City of San Jose. That request included a demand for certain emails and text messages sent or received on "private electronic devices" used by the Mayor, City Council, and City staff. The City produced such messages if they were sent or received from private electronic devices using City accounts, but took the position that such emails and text messages sent or received using personal devices and personal accounts were not governed by the CPRA. The requesting party sued, and last year, the trial court ruled that all such responsive emails and texts had to be produced under the CPRA, even if they were sent or received on personal devices using personal accounts. The trial court reasoned that any other result would mean "a public agency could easily shield information from public disclosure simply by storing it on equipment that it does not technically own." (For more details regarding the superior court case, *Smith v. San Jose* (March 19, 2013, No. 1-09-CV-150427), please see our previous Client News Brief dated [April 2013, No. 17.](#))

The appellate court reversed the trial court decision. The appellate court received extensive arguments from free speech and media organizations in support of the trial court's public policy reasoning. Countervailing policy arguments from the City and the California League of Cities contended the trial court's ruling was impractical, and violated privacy protections. While the appellate court acknowledged these various policy arguments, it concluded the entire matter could be determined solely based on the express language of the CPRA. Because section 6252, subdivision (e), of the CPRA defines "public records" as communications "prepared, owned, used, or retained" by the public agency, the court concluded the requested emails and texts were not governed by the CPRA. The court thus distinguished between a public agency as the holder of public documents and its individual elected officials and employees. The court observed as a practical matter that "the City cannot, for example, 'use' or 'retain' a text message sent from a council member's smartphone that is not linked to a City server or City account."

While the court did acknowledge concerns about abuses resulting from the ability of an elected official or public employee to address public business on personal devices and accounts, the court concluded this was a policy issue to

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be resolved by the Legislature. As explained by the court: “That city council members may conceal their communications on public issues by sending and receiving them on private devices from private accounts is a serious concern; but such conduct is for our lawmakers to deter(mine) with appropriate legislation.”

The original plaintiff in this case still has the option to appeal the court’s ruling, or to seek de-publication, modification or a rehearing of the matter. Based on the coalition of free speech and media entities that supported the plaintiff, and the novelty of the issues being considered, this chapter may not yet be closed. Media reports have already quoted the plaintiff’s legal team as planning to seek review of the appellate court’s decision by the California Supreme Court. The court’s decision could also be read as an invitation for the Legislature to revisit this issue. Based on the strong public policy in favor of public disclosure, and the interest of the media and free speech groups in keeping records public, it would not be surprising to see attempts at legislation that would effectively reverse the court’s decision. We will continue to monitor this case and report on its progress should there be an appeal or modification, or legislation proposed to address the issue.

While the *San Jose* case gives guidance regarding the treatment of electronic documents under the CPRA, there are many questions left to be answered. One such question is whether a writing must both be sent to or from a personal device and be sent or received from a personal account to escape application of the CPRA. The City of San Jose had elected to produce electronic communications that were sent to or from personal devices but on City provided or owned devices, so those types of communications were not at issue before the court. Some may argue the court of appeal’s decision supports the notion that the CPRA would not apply if the communications were either on personal devices or were on personal accounts. This stems from the following statement in the court’s decision: “We conclude that the Act does not require public access to communications between public officials using exclusively private cell phones or email accounts.” (Emphasis added.) However, there are multiple other instances in which the court either directly or indirectly made it seem that the CPRA applies unless the materials were on a personal device and on a personal account. This includes references to communications “sent or received by public officials and employees on their private devices using their private accounts.”

Another issue left open is what impact a local agency’s policies and practices regarding personal emails and devices would have on a future court’s review of the CPRA issue. The court observed that “it is within the province of the agency to devise its own rules for disclosure of communications related to public business.” In this case, the City of San Jose had a policy addressing the disclosure of private communications, but this policy did not appear to factor into the court’s interpretation of state law. The implication remains that local agencies could expand on the public’s access to agency records.

It is important to note that the court in *San Jose* limited its ruling to communications exchanged between devices and accounts that are exclusively private. The court did not address several other situations such as whether communications are disclosable under the PRA when: (1) communications are exchanged between a government issued device and a private device; or (2) communications exchanged between private devices where employees receive a stipend from their employing agency to offset the expenses of using their private device for public business.

In light of the court’s ruling regarding personal devices and email accounts and the various questions that remain, it would be prudent for public agencies to review their policies and practices regarding personal devices, and to establish clearly defined and consistent electronic communication practices. One issue not affected by the court’s decision is the presumption that electronic communications sent or received in government accounts and/or on government devices may constitute public records.

Attorneys at Lozano Smith have been asked by school districts for model policies governing the retention and disposal of emails for educational agencies. In response to this demand, Lozano Smith created an informative document entitled “School District Email Retention.” The document sets forth certain policy options for addressing the complexities raised by the retention of emails and other electronic communications. It offers possible options for

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adding to existing school board policies and administrative regulations on retention of district records and on employee use of technology. If you would like a copy of "School District Email Retention," please contact Harold Freiman ([hfreiman@lozanosmith.com](mailto:hfreiman@lozanosmith.com)), or Manuel Martinez ([mmartinez@lozanosmith.com](mailto:mmartinez@lozanosmith.com)).

Issues regarding the *San Jose* case and electronic communications under the CPRA will be addressed by Lozano Smith partner [Harold Freiman](#) at the upcoming [California Association of School Business Officials 2014 Annual Conference & California School Business Expo](#) in Sacramento during his presentation "Technology Legal Issues." The [workshop](#) on April 3, 2014 will cover the latest technology and legal issues that school districts face in today's world.

If you have any questions regarding the *San Jose* decision or CPRA requests in general, or if we can be of assistance in reviewing or developing your policies regarding electronic communications and retention, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

**ALERT 4/6/15:** The appellate court's decision has been appealed to the California Supreme Court, which has yet to rule in the matter. As a result, the appellate court decision is not binding at this time.