CLIENT NEWS BRIEF

California Public Records Act Applies to Private Accounts

March 2017
Number 11

Emails, text messages and other written communications sent to or from a public official's private account may be subject to disclosure under the California Public Records Act (CPRA), the California Supreme Court ruled unanimously in a highly anticipated decision published on March 2, 2017. (*City of San Jose et al. v. Superior Court* (March 2, 2017, No. S218066) ___ Cal.5th ___ <http://www.courts.ca.gov/opinions/documents/S218066.PDF>.)

The court held that the public has a right under the CPRA to access texts, emails and other records discussing public business regardless of whether the records were created, received by or stored in a private account. "If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device," the court wrote, "sensitive information could routinely evade public scrutiny."

This case had its origin in a 2009 lawsuit against the City of San Jose, its redevelopment agency and several city officials. The plaintiff in that case, a community activist, claimed that the city's failure to provide certain records regarding a downtown redevelopment project and other city business violated the CPRA. The city had provided certain records, but declined to provide voicemails, emails and text messages that were sent and received by city officials on personal devices using personal accounts. In 2013, a trial court judge ruled against the city, finding that communications sent to or received from city officials regarding public business are public records regardless of what device or account was used to create and deliver them. (See 2013 Client News Brief No. 17.)

The city appealed the decision, and in 2014, the Sixth District Court of Appeal reversed the decision. The appellate court ruled that the CPRA's definition of public records as communications "prepared, owned, used, or retained" by a public agency did not include messages sent or received on individual city officials' and employees' private devices and accounts. (See 2014 Client News Brief No. 21.) Distinguishing between a public agency as the holder of public documents and its individual elected officials and employees, the appellate court held that, as a practical matter, the city could not use or retain a message sent from an individual council member's phone that was not linked to a city server or account. While acknowledging the potential for abuses, the court determined that it is up to the Legislature to decide whether to require public agencies to police officials' private devices and accounts.

The community activist then appealed to the California Supreme Court, where the case languished for nearly three years before the high court overturned the appellate decision.

In its ruling, the Supreme Court disagreed with the appellate court because records "prepared" on private devices could still qualify as public records. The high court observed that the agency itself is not a person who can create, send and save communications; rather, any such communication would come from


Harold M. Freiman
Partner
Walnut Creek Office
hfreiman@lozanosmith.com


Manuel F. Martinez
Partner
Walnut Creek Office
mmartinez@lozanosmith.com

Lozano Smith
ATTORNEYS AT LAW

or be received by an individual. As such, the city's elected officials and employees were in essence acting as the city, and to the extent that their emails pertained to city business, they were public records.

The court did narrow the type of records that are subject to disclosure, holding that records containing conversations that are primarily personal in nature are not subject to disclosure under the CPRA. The court also acknowledged that determining whether particular communications constitute public records is a heavily fact-specific process, and decisions must be made on a case-by-case basis. This will create challenges for public agencies as they attempt to follow the reasoning of this decision.

The court also addressed the practical challenges around retrieving records from personal accounts, including ways to limit the potential for invading personal privacy. For guidance, the court offered examples of methods for retrieving records from personal accounts including procedures adopted by federal courts applying the Freedom of Information Act and followed by the Washington Supreme Court under that state's records law that allow individuals to search their own devices for responsive records when a request is received and to submit an affidavit regarding potentially responsive documents that are withheld. The court also discussed adoption of policies that would prohibit the use of personal accounts for public business, unless messages are copied and forwarded to an official government account. While these methods were offered as examples, the court did not endorse any specific approach.

The opinion did not address a host of other practical issues, such as how public agencies should proceed when employees refuse or fail to provide access to records contained in their private accounts.

The decision means that public agencies must now carefully consider how to retrieve business-related public records that may be located in employees' and officials' personal accounts. One approach is to create new policies that address the decision. However, public agencies should consider the implications such policies may have on issues such as collective bargaining, records retention, acceptable use policies and other policies concerning technology.

Lozano Smith attorneys can provide a wide array of CPRA services, including preparing policies to address this opinion, responding to CPRA requests, analyzing documents and assisting in related litigation. Lozano Smith has a model email retention policy, and is in the process of reviewing and updating this and other model policies to reflect the impact of this decision. In order to receive our existing retention policy, which addresses individual employees' obligations in relation to electronic communications, or to request our upcoming board policy to address the court's decision, you may also email Harold Freiman at hfreiman@lozanosmith.com or Manuel Martinez at mmartinez@lozanosmith.com. We will also be producing webinars about the *City of San Jose* case and electronic records under the CPRA.

For more information on the *City of San Jose* opinion or about the California Public Records Act application to personal technology in general, please contact the authors of this Client News Brief or an attorney at 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.