CLIENT NEWS BRIEF

A Trial Court Holds that Public Officials Must Disclose Communications Concerning Agency Business From Their Private Electronic Accounts in Response to a Public Records Act Request (UPDATED)

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Last month, in *Smith v. City of San Jose* (March 19, 2013, No. 1-09-CV-150427), a Santa Clara County Superior Court judge ruled that voicemails, text messages, emails, and other electronic communications relating to City business, sent and received by San Jose City officials from their private electronic devices, are subject to disclosure under the California Public Records Act. (Gov. Code §§ 6250 *et seq.*)

The overall principle of the Public Records Act is that all records prepared, owned, used, or retained by a public agency that deal with public business are open to public inspection and subject to disclosure, unless a statutory exemption applies. The court concluded that nondisclosure of business communications from the private accounts of both elected officials and agency staff would go against the spirit of the Public Records Act, since personal devices could be used as a tool to subvert the public process and keep public records hidden in personal accounts.

In *Smith*, environmental activist Ted Smith sued the City of San Jose, the San Jose Redevelopment Agency, and several San Jose City officials (collectively, "the City") claiming a violation of the Public Records Act. Smith made a written request seeking "(a)ny and all voicemails, emails or text messages sent or received on private electronic devices" used by the Mayor, Council members and their staff, relating to a downtown redevelopment project and other City business. Smith's request was later bolstered when the City Council unanimously passed a resolution which made "any . . . communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network" subject to disclosure under the Public Records Act.

Despite their adopted resolution, the City only disclosed communications sent from and received by electronic devices using City accounts in response to Smith's Public Records Act request and refused to disclose communications from the officials' private accounts. The City argued that a communication, even if related to public business, is not a "public record" under the Public Records Act when it is not in the agency's possession. The City also argued that individual city officers are not included in the Public Records Act's definition of a "public agency." In addition, the City cited privacy concerns and contended that disclosure would impose the onerous burden on public agencies of expanding the scope of their searches for public records into the homes and personal devices of their employees and officials.

The court rejected all of the City's arguments and ruled that communications sent to or received from City officials on their private electronic devices regarding public business are public records regardless of their storage location or format. The court stated that it is unlikely the


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legislature intended to render documents confidential based on their location, rather than their content. Under the City's interpretation of the Public Records Act, a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own. In regards to the phrase "prepared, owned, used, or retained," the court explained that a city executes its public duties through its officers and agents. Thus, a communication relating to the conduct of the public's business that is maintained on the private accounts of City officials falls within the definition of "retained" by the City. Also, regardless of where a record is retained, if it is drafted by a City official, it falls within the plain meaning of "prepared." Likewise, any record that is "used" by an official to execute a public duty falls within the scope of the Public Records Act, even if it is not "prepared, owned, or retained" by the agency.

The court disagreed with the argument that disclosure of communications from private accounts would constitute an invasion of privacy because "it is doubtful that City officials and agents can claim a reasonable expectation of privacy over their communications concerning the public benefit." The court pointed out that any personal information that falls within an exception to the Public Records Act can be redacted and withheld. The Public Records Act acknowledges that there will be some burden in complying with a records request, and the only question is whether the burden is so onerous that it clearly outweighs the public's interest in disclosure. The City failed to demonstrate in this instance that collecting records from the private accounts of the City officials was unduly burdensome.

Although *Smith* is a trial court decision and thus not binding in other jurisdictions, or on other parties, it has now been appealed by the City of San Jose and has the potential of establishing new law for the entire state of California. *Smith* is currently the only California case of which we are aware where a court expressly concluded that public officials must disclose communications concerning the public's business from their personal electronic devices and email accounts. While a California Court of Appeal previously rejected a newspaper's lawsuit seeking access to a councilmember's private email account, it did so due to a technical issue, and stopped short of providing definitive guidance. (See *Tracy Press, Inc., v. Superior Court* (2008) 164 Cal.App.4th 1290.)

It is important to note that *Smith* might be limited to its particular facts, which include the City resolution requiring disclosure of communications regarding City business by public officials from personal devices, and the City's failure to demonstrate a burden of collecting the records from private accounts. The court may have ruled differently had it been confronted with different facts. California courts, however, overwhelmingly favor transparency and disclosure of public information, consistent with a 2004 initiative in which California voters made access to public records a fundamental Constitutional right.

In light of the unsettled nature of the law regarding personal devices and email accounts, it may be prudent for public agencies to implement policies that establish clearly defined and consistent electronic communication practices by its public officials.

If you have any questions regarding the *Smith* decision or Public Records Act requests in general, or if we can be of assistance in reviewing or developing your policies regarding electronic communications, please feel free to contact one of our eight offices located statewide. You can also visit our website, follow us on Facebook, or download our Client News Brief App.