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California Supreme Court: Personal Emails and Texts May be Subject to PRA Requests

On March 2, 2017, the California Supreme Court unanimously held that when a public employee or official uses a personal account to communicate about the conduct of public business, the communication may be subject to disclosure under the California Public Records Act ("PRA"). (*City of San Jose v. Superior Court of Santa Clara County* (S218066, March 2, 2017).) In effect, this means that if an agency employee or official discusses public agency business on his or her personal email account, cell phone, computer or other electronic means, the agency may be required to disclose those communications.

Practical Pointers

Q. What does this decision mean for school districts?

A. The decision by the California Supreme Court means that if a district employee or official is conducting district business on his or her personal email account, cell phone, computer or by other electronic means or devices, such records might be responsive to a PRA request.

This is a significant decision that likely raises many questions for public agencies, including:

When does a communication on a private account become a "public record"?
A key aspect of the Court's holding was that, when determining whether a writing constitutes a "public record," what matters most is the *content* of the writing, and not necessarily how and where the writing is stored. The Court stated that incidental mentions of agency business are insufficient to make a writing a public record. At a minimum, the writing must relate in some substantive way to the conduct of the public's business. The Court acknowledged that this will not always be clear, and it is not so broad as to include "every piece of information the public may find interesting." For example, this generally does not include communications that are primarily personal.

Whose personal accounts could contain "public records"?
The Court clarified that *any* employee or official may create a "public record," even if the writing is prepared and maintained on his or her private account. For public school districts, for example, this would include school board members, administrators, teachers, classified employees and any other employee who prepares a writing that substantively relates to the district's business.

How should public agencies search for records not in their possession?
Perhaps the most difficult question raised by this decision is how agencies should search for public records on private accounts. The Court noted that a public record retained by a public employee or official is "retained by" the agency itself, even if located on the employee's or official's personal account. In other words, the agency has "constructive" possession of the record. Must the agency then search an employee's or official's personal account to comply with a PRA request?

In short, no. The Court clarified that the agency need only make a "reasonable effort" to locate public records on a private account, and each agency may develop its own policies that respect individual privacy. The Court did not go further by providing a legal standard for addressing privacy concerns, instead stating that these issues should be considered on a case-by-case basis.

The Court also provided guidance on how agencies may search for records. For example, the Court indicated that, after communicating the request to the employees in question, an agency may reasonably rely on those employees to search their own personal accounts for responsive material. Agencies could also require employees to submit an affidavit confirming that any material withheld was not responsive to the request.

What should public agencies do in response to this decision?

At a minimum, public agencies should immediately review—and if necessary revise—their policies and practices related to employees' and officials' use of electronic communication to conduct agency business, as well as records retention policies and PRA response protocols. Agencies should also ensure all employees and officials are trained on these policies, including how to distinguish personal records from public records.

Agencies may also consider adopting policies that require employees and officials to use their public agency accounts when conducting agency business, thereby reducing the likelihood that public records will be on private accounts.

Finally, when reviewing these policies and procedures, agencies should keep in mind the Court's underlying policy consideration, that public agencies may not evade the PRA by communicating through personal accounts. To do so, the Court explained, could allow employees and officials to "hide their most sensitive, and potentially damning, discussions in such accounts."

If you have any questions regarding this decision and how it affects your agency, please call one of our six offices.

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