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Office of the City Attorney

Memorandum

DATE: March 6, 2017

TO: Honorable Mayor and Members of the City Council

FROM: Charles Parkin, City Attorney
Michael J. Mais, Assistant City Attorney

SUBJECT: LEGAL ALERT
Supreme Court Decision Holds that Communications of Public Officials on Private Devices or Accounts are Subject to the California Public Records Act (CPRA)

On March 2, 2017, a unanimous California Supreme Court ruled that written communications that primarily involve government business made by public officials through private accounts or on private devices are public records under the California Public Records Act (CPRA). The ruling applies to all elected city officials and employees of a public agency such as the City of Long Beach. *(City of San Jose v. Superior Court (Smith) (March 2, 2017, S218066.)*

Background

The *San Jose* case involved the City of San Jose's response to a CPRA request made by a community activist for "[a]ny and all voicemails, emails, or text messages sent or received on private electronic devices used by [the Mayor], members of the City Council, or their staff, regarding any matters concerning the City of San Jose." In responding to the PRA, the City did disclose writings/communications made using City accounts, but refused to provide any communication made using the personal accounts of the City's elected officials or employees. In the following lawsuit, the trial court ruled against the City. However, the California Court of Appeal reversed, and ruled that communications by public officials on purely private accounts or using private devices were not subject to the CPRA. The Court of Appeal reasoned that the communications did not qualify as "public records" because they were not "prepared, owned, used, or retained" by the City.

The recent *San Jose* Supreme Court decision overturned the Court of Appeal's ruling. It held that "[e]mployees' communications about official agency business may be subject to the CPRA regardless of the type of account used in their preparation or transmission." The Court held that a writing that is either prepared or received by a public official or employee that involves agency business or issues is considered to be prepared by the agency under the CPRA's definition of "public record," even if the writing is prepared or retained on a personal device or account. The Court held that records which otherwise "meet CPRA's definition of public records do not lose this status because they are located

in an employee's personal account." The Court wrote: "If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny." The Court also held that a local agency (e.g., the City) has an obligation to direct its officials and employees to search for and produce responsive public records on their personal devices or in their personal accounts.

In reaching this decision, the Supreme Court for the most part rejected the privacy concerns raised by the City of San Jose and the other parties interested in the case. However, the Court did acknowledge that if a particular record/communication contains both private and public information, the public agency has the ability to redact information that is exclusively personal or otherwise exempt from disclosure under the CPRA (e.g., if the communication involved an attorney-client communication or an ongoing criminal investigation).

The Supreme Court indicated that distinguishing the difference between a "public record" and a purely "personal communication" on private accounts or devices may sometimes be difficult. The Court indicated that determining the difference would necessarily involve several factors, including: (1) the content of the communication itself; (2) the context or purpose of the communication; (3) the person to whom the communication was directed; and (4) whether the communication was prepared by an employee acting within the scope of his or her employment. As an example, the Court explained that an email to a spouse complaining about a co-workers abilities generally would not be a public record, while an email to a supervisor about a co-worker's performance might be a public record.

"Takeaways" from the Supreme Court Decision

- It is no longer good practice to use private devices or private accounts to conduct City business. In the event of a PRA request, it will be necessary to cull through all devices or accounts used in order to retrieve responsive communications. Use of multiple electronic devices or non-City accounts or "dot.coms" is likely to make retrieval cumbersome and time consuming.

- Emails, text messages and other written communications sent to or from a public officials' or employees' private account, or on a privately owned device, may be subject to disclosure under the CPRA depending on the content or context of the communication.

- If the City receives a PRA asking for private device or account information the involved official or employee will be asked to search the account or device and provide the communication for review and possible disclosure.

- In the event of litigation over questions regarding whether or not the PRA was thoroughly responded to, it is possible that a Court could issue a court order requiring an actual search of the device or account by a third party.

- In the context of a Federal Freedom of Information Act (FOIA) request, federal statutes, regulations, and court decisions have resulted in policies that require federal employees to use their official agency accounts for all business related communications. In light of the recent *San Jose* case, it is possible that such policies may be forthcoming at either the state or local level.

- To the extent that elected City officials continue to maintain private accounts or use private devices in the conduct of City business, it would be good practice to forward all business related texts or emails to recognized City accounts for ease of search or access in the event of a PRA request.

- Texts sent or received on a private phone or tablet during the course of a public meeting which involve public business would be subject to disclosure if a PRA request were made, unless the communication is otherwise exempt from disclosure pursuant to the provisions of the CPRA.

- In the case of a communication involving both public business and a purely private communication, it would be permissible under the *San Jose* case to redact the private portions of the communication before producing the public portions of the communication.

- If a communication maintained on a private device or in a private account involves City business it is likely that a Court would rule that it must be disclosed unless an exception already recognized under the law exists (e.g., attorney-client communication).

- In the event a question arises as to whether or not a particular communication held on a private device or in a private account is a public record or purely a personal communication, the involved official or employee should contact the City's Records Coordinator or the City Attorney's office.

If you should have any questions regarding this memo or the San Jose case please contact Assistant City Attorney, Michael J. Mais, at extension 82230.

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