Memorandum 2017-21

Public Records Practices

At the Commission's[1] April 2017 meeting, the Executive Director noted that the California Supreme Court had recently decided an important case addressing the scope of the California Public Records Act ("CPRA") — *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017). The Executive Director indicated that the staff would prepare a memorandum discussing the holding in that case and how it might affect Commission operations.[2] That discussion follows.

CITY OF SAN JOSE V. SUPERIOR COURT

In *City of San Jose*, the petitioner had made a CPRA request to the city, seeking the disclosure of records relating to certain topics. The petitioner specifically requested emails and text messages that were sent or received on private electronic devices used by the mayor, two city council members, and their staffs. The city provided emails and text messages that were sent or received using city accounts and telephone numbers, but did not provide communications made using the individual's personal accounts and telephone numbers.

The petitioner sought declaratory relief. The trial court granted summary judgment and ordered disclosure of the communications made using personal accounts and telephone numbers. The Court of Appeal issued a writ of mandate directing the trial court to vacate its order and grant summary judgment to the City. The California Supreme Court reversed, holding that "when a city employee uses a personal account to communicate about the conduct of public

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (April 2017), p. 2.

business, the writings may be subject to disclosure under the California Public Records Act.[3]

The Court's decision was based on a close textual analysis of the CPRA. Its holding was buttressed by the constitutional mandate that "the right of access to information concerning the conduct of the people's business," (including "the writings of public officials and agencies") be construed broadly:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.[4]

The Court began by analyzing the CPRA's definition of "public records:"

> "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.[5]

The Court concluded that an email or text message sent by a public official or employee using a private communication service is a "writing"[6] that is "prepared by" a state or local agency:

> A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of section 6252(e), even if the writing is prepared using the employee's personal account.[7]

If such a writing contains "information relating to the conduct of the public's business" it is a public record for the purposes of the CPRA and is subject to disclosure. On that point, the Court explained:

> Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an e-mail to a spouse complaining "my coworker is an idiot" would likely not be a public record. Conversely, an e-mail to a superior reporting the coworker's mismanagement of an agency project might well be. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an

3. *City of San Jose*, 2 Cal. 5th at 614.
4. Cal. Const. art. I, § 3(b).
5. Gov't Code § 6252(e).
6. *City of San Jose*, 2 Cal. 5th at 617-18.
7. *Id.* at 619-22.

> employee acting or purporting to act within the scope of his or her employment. Here, the City claimed all communications in personal accounts are beyond the reach of CPRA. As a result, the content of specific records is not before us. Any disputes over this aspect of the "public records" definition await resolution in future proceedings.
>
> We clarify, however, that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records.[8]

So, while there may be circumstances where it is difficult to determine whether a writing sent or received using a personal communication service is a public record, it is clear that such a writing *can* be a public record.

The Court recognized that the application of the CPRA to communications made using personal communication services could infringe on the privacy rights of public officials and employees. The Court suggested a way around that problem: An agency that receives a CPRA request for records stored on employees' personal devices should communicate that request to the employees in question. The agency should then rely on the employees to search their own communication services and devices for responsive material.[9]

The Court noted that federal courts applying the Freedom of Information Act have approved this general approach, as has the Washington State Supreme Court applying its state's version of the CPRA.[10] In Washington, an employee who withholds personal records must provide an affidavit stating facts sufficient to show why the withheld records are not public records.[11]

The Court also suggested that agencies could adopt policies to reduce the likelihood that public records are held on private communication services or devices:

> Further, agencies can adopt policies that will reduce the likelihood of public records being held in employees' private accounts. "Agencies are in the best position to implement policies that fulfill their obligations" under public records laws "yet also preserve the privacy rights of their employees." … For example,

8. *Id.* at 618-19.
9. *Id.* at 627-28.
10. *Id.*
11. *Id.*

> agencies might require that employees use or copy their government accounts for all communications touching on public business. Federal agency employees must follow such procedures to ensure compliance with analogous FOIA requests. (See 44 U.S.C. § 2911(a) [prohibiting use of personal electronic accounts for official business unless messages are copied or forwarded to an official account]; 36 C.F.R. § 1236.22(b) (2016) [requiring that agencies ensure official e-mail messages in employees' personal accounts are preserved in the agency's recordkeeping system]; Landmark Legal Foundation v. Environmental Protection Agency (D.D.C. 2015) 82 F.Supp.3d 211, 225–226 [encouraging a policy that official e-mails be preserved in employees' personal accounts as well].)
>
> We do not hold that any particular search method is required or necessarily adequate. We mention these alternatives to offer guidance on remand and to explain why privacy concerns do not require categorical exclusion of documents in personal accounts from CPRA's "public records" definition.[12]

Practices of the type suggested by the Court are discussed below.

POSSIBLE PRACTICES

Note of Caution

Before discussing how to address the possibility of a CPRA request for communications made by Commissioners or staff on personal communication services or devices, it is worth noting that it is very unusual for the Commission to receive a CPRA request. To the staff's recollection, the Commission has received fewer than ten CPRA requests in the last 20 years. This suggests that the potential problems associated with such requests are likely to be modest. For that reason, any response to *City of San Jose* should probably also be modest (to avoid imposing a disproportionate burden or inflexibility on Commissioners and staff).

Scope of Issue

It is worth taking a moment to define the scope of the issue — to what extent are personal communication services used to conduct Commission business?

- **As a matter of policy, the staff does not use personal communication services to conduct Commission business.** If the staff needs to send work-related email, official Commission email accounts are used. In the rare instance where a personal email account is used accidentally or as a work-around for an interruption of the Commission's official email service or in a

12. *Id.* at 628-29.

similar situation, all such messages are eventually forwarded to the official accounts for retention. Thus, the disclosure of such records does not require any search of personal communication services or devices.

- **When Commissioners communicate with staff by email, all such messages are either sent from or received by the staff's official email accounts.** Thus, all of those records are already in the agency's official accounts; there is no need to search personal communication services or devices for such records.
- **It is possible that a Commissioner will send or receive Commission-related email to or from a person other than a member of the Commission's staff.** This appears to be the only scenario in which a personal communication service or device would need to be searched for material in response to a CPRA request.

Official Commissioner Email Addresses

One obvious way to address the third scenario noted above — Commissioners using personal email accounts to conduct Commission business with a third party — could be minimized if Commissioners were issued official Commission email accounts.

While that approach has obvious advantages, it would also have two shortcomings. First, there would be some hassle involved in establishing and maintaining separate email accounts on all devices used by Commissioners.

Second, it seems inevitable that the solution would not be a complete fix — some Commission-related communications would still be made on Commissioner's personal accounts. A Commissioner might do so by error or necessity. Or, more likely, a third party would send email to a Commissioner's personal account, not realizing that an official account had been established.

The latter point could perhaps be minimized by advertising Commissioner addresses on the Commission's website. That approach would have its own disadvantages. Spammers often "scrape" the Internet for viable addresses to build their mailing lists. Any posting of addresses on the website would increase the likelihood of Commissioners being targeted for fraud. Moreover, publicizing Commissioner email addresses would increase the likelihood of ex parte lobbying of Commissioners, which could bring its own problems.

In light of the issues noted above, the staff believes that establishing official Commissioner email accounts would be a disproportionate response to the

situation. It strikes us as the type of problematic "solution" cautioned against at the outset of this discussion.

Forwarding

A relatively simple solution would be for Commissioners to forward to the staff copies of any Commission-related communications made using personal communication services. Those communications would then be stored in the Commission's official accounts, where they could be readily searched without requiring the involvement of individual Commissioners.

The only potential downside that the staff can see is that Commissioners would need to disclose the content of the forwarded communications to the staff. While such communications could be subject to disclosure under the CPRA, there may be situations in which a Commissioner would have reason to minimize the disclosure of a communication (absent legal compulsion to disclose). For example, a person may have sent a Commissioner an email that breaches a confidentiality requirement, and the Commissioner may wish to avoid any unnecessary expansion of that breach.

Segregation

Another possibility would be for Commissioners to routinely separate Commission-related email, by moving those messages to a folder created for that purpose. Then, if there is a CPRA request, the Commissioner could either forward the content of the folder to staff for searching or conduct the search himself or herself.

The main advantage of this approach is that it would not require the routine disclosure of the content of Commissioner emails to the staff.

The main disadvantage is that it would place the burden of conducting any search on the Commissioners. However, as noted at the outset, the actual burden of CPRA requests has historically been quite modest and will probably remain so.

Do Nothing

Finally, Commissioners could make no change to their existing practices. If the Commission were to receive a CPRA request for communications stored on personal devices, Commissioners would need to conduct a search for responsive materials on all of their personal communication services and devices.

This would be the most onerous approach to follow *if a CPRA request for communications on Commissioner's personal services and devices were actually received.* It would be the least onerous approach if such requests are never received (or received very infrequently). As noted above, the likelihood that the Commission will receive many CPRA requests seems low.

CONCLUSION

The Commission needs to decide how it would like to address the issues discussed in this memorandum. It might be sufficient for the Commission to make an informal decision, without adding a formal rule to the Handbook of Practices and Procedures. It might also be appropriate to leave the issue up to individual Commissioners, with each taking whatever approach strikes the best balance between the burden involved and the likelihood of any future burden resulting from the need to search for records in response to a CPRA request.

Whatever the Commission decides, the staff will include a reminder of the issue in the annual memorandum that describes applicable open government laws.

Respectfully submitted,

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