

First Supplement to Memorandum 2017-21

Public Records Practices

Memorandum 2017-21¹ describes a recent California Supreme Court decision — *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017) — which held that emails and text messages sent by a public official using a private account can be public records, subject to disclosure under the California Public Records Act (“CPRA”). The memorandum discusses ways in which the Commission might adjust its practices to minimize complications if it were to receive a request for such records.

At its June meeting, the Commission began its consideration of the memorandum, but decided to postpone making any decisions until a future meeting. The Commission also directed staff to prepare a supplement to the memorandum, to discuss the fact that a request for such records could involve the records of *former* Commission members.

FORMER COMMISSIONERS

Compliance with a public records request would be more difficult if the request encompasses the private email or text messages of a former Commissioner. In that situation, the staff would need to reach out to the former Commissioner and ask that he or she search for work-related email and text messages and produce any that are relevant to the subject of the request. This would impose a burden on those who are no longer agency officials.

Memorandum 2017-21 set out a number of different approaches for the Commission to consider. Below, the staff discusses how each of those alternatives would apply to former Commissioners.

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.

The discussion that follows focuses on email only. The practical difficulties involved in storing or forwarding text messages would be considerable. **The staff strongly recommends that Commissioners not use text messaging for Commission-related business.**

Official Commissioner Email Addresses

One possibility would be for the Commission to issue official clrc.ca.gov email addresses to all Commissioners, for use in conducting Commission business.

Going forward, this would simplify the process of searching former Commissioner records in response to a CPRA request. Because the staff would have direct access to the accounts (through the email server) the staff could conduct any necessary searches.

When a Commissioner leaves office, the account could be terminated and the content archived on the Commission's server.

This would not entirely obviate the need to contact former Commissioners. The staff would still need to inquire whether Commissioners had ever used their private accounts for Commission-related communications (unless the Commission were to adopt and strictly follow a rule prohibiting the use of private email for Commission business).

Forwarding

Commissioners could adopt a policy of forwarding all Commission-related private email to the staff. These messages could then be stored on the Commission's server.

Going forward, that approach would simplify the process of searching the email of former Commissioners. The staff would conduct the necessary searches.

However, the staff would still need to contact former Commissioners to inquire if they have any relevant messages that hadn't been forwarded.

Segregation

Rather than forwarding Commission-related email, Commissioners could archive them in a separate location on their own devices. Then, if the Commission receives a CPRA request that encompasses such records, Commissioners could conduct their own searches.

After a Commissioner leaves office, there are two ways that this approach could be addressed:

- (1) On leaving office, a Commissioner could forward all of the Commission-related messages to the staff for archiving on the Commission's server. The staff could then conduct any necessary searches of those records.
- (2) Former Commissioners could retain their records on their own devices. If the Commission receives a CPRA request, the former Commissioners would need to conduct their own searches.

Do Nothing

The Commission could make no change to its existing practice. If the Commission were to receive a CPRA request that encompasses former Commissioners' private communications, the staff would need to contact the former Commissioners and ask that they produce the relevant records.

Respectfully submitted,

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