Published on *The National Law Review* https://natlawreview.com

Messages on Government Officials' Personal Devices and Private Accounts Not Subject to California Public Records Act

Article By:

General Employment Litigation Practice Group Jackson Lewis

City of San Jose public officials' communications sent and received on their personal electronic devices using private accounts need not be disclosed as they are not public records under the California Public Records Act ("CPRA"), the California Court of Appeal has ruled unanimously. City of San Jose v. Super. Ct. (Smith), No. H039498 (Cal. Ct. App. Mar. 27, 2014).

The CPRA defines "public records" to include any writing relating to the public's business if it is "prepared, owned, used, or retained by any state or local agency." In 2009, activist Ted Smith submitted a CPRA request to the City seeking 32 categories of public records about a downtown redevelopment project. The City complied with all but four categories, which asked for "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. The City had disclosed records sent or received on private electronic devices using these *public officials' City accounts*, but it refused Smith's request for communications sent or received on these individuals' personal electronic devices using their private accounts (e.g., a message sent from a private gmail account using the person's own smartphone or other electronic device). The City took the position that these items were not public records within the meaning of CPRA. Smith then sued the City, its council members, and the Mayor under the CPRA seeking communications sent and received on the officials' personal electronic devices on their private accounts.

The trial court granted summary judgment to Smith, finding the CPRA extends to any official communication, regardless of where the record originated or how it is stored. The City appealed. The League of California Cities filed a friend-of-the-court brief in support of the City.

The Court of Appeal found in favor of the City. The Court ruled that, under the CPRA, communications "prepared, owned, used, or retained" by individual City officials on their personal electronic devices using private accounts were not equivalent to communications "prepared, used, owned, or retained" by the City. It said CPRA does not require public access to communications between public officials using private cell phones or e-mail accounts exclusively.

However, the Court acknowledged that the possibility that city council members can conceal their communications on public issues by sending and receiving the communications on their private devices from private accounts is a "serious concern," but it declined to reconstruct or rewrite the

plain language of the CPRA. Instead, the Court considered this concern, as well as the “legal and practical impediments attendant to the extra task of policing private devices and accounts,” would be best addressed by the Legislature and local agencies, not the courts.

Counsel for Smith has said his client will seek California Supreme Court review of this decision.

National Law Review, Volumess IV, Number 90