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LEGAL ALERT

From: Olivarez Madruga, LLP

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Subject: California Supreme Court Ruling Regarding the Disclosure of Emails and Text Stored on Personal Devices and Accounts

On March 2, 2017, the California Supreme Court issued an opinion in the matter of *City of San Jose v. Superior Court (Smith)*, holding that communications by public agency employees regarding agency business through personal email accounts, cell phones and computers, may be subject to disclosure under the California Public Records Act (Gov. Code section 6250 et seq.) ("Records Act").

The decision arises from a records request submitted to the City of San Jose seeking, among other things, emails and text messages sent or received on personal electronic devices used by elected City officials and staff regarding a development project. Although the City agreed to produce records maintained on its servers, as well as those transmitted to or from private devices using City-maintained accounts, the City did not produce communications from personal electronic accounts that were stored exclusively on personal devices or servers asserting, among other things, that such records were not in the possession of the City and could not be obtained without potentially intruding upon the privacy rights of others.

The requestor filed for declaratory relief in Superior Court, claiming that communications relating to City business but maintained on private devices were also subject to production regardless of where they are stored. Although the Superior Court ruled in favor of the requestor, the Court of Appeal later reversed the Superior Court ruling on the grounds that the requested

electronic communications were not public records because they were not "prepared, owned, used, or retained" by the City.

The California Supreme Court ("Court") reversed the Court of Appeal decision, holding that a city employee's communications about public business are not excluded from the Records Act simply because they are sent, received, or stored in a personal account.[1] According to the Court, writings relating to the public's business prepared by agency employees are public records, regardless of whether the employee prepared the record on an agency device or account or on a personal device or account. The Court explained that the location where the writing is stored is irrelevant and that a writing does not lose its status as a public record simply because it is stored in an employee's personal device. In reaching its decision, the Court observed that the purpose of the Records Act is to provide public access to "the conduct of the people's business." The Court also made note of the California Constitution's mandate to broadly construe statutes providing for access to public information.

In its decision, the Court goes on to observe that existing law does not require that public employees only use government accounts for public business. The Court reasoned, therefore, that a rule that excluded records concerning public business from the reach of the Records Act simply because they are stored on private devices or accounts would incentivize public employees to simply hide such communications from disclosure by using their personal devices and accounts. This would undermine the Records Act transparency objectives.

As to privacy concerns, the Court noted that statutory exemptions to disclosure established under the Records Act, including a catch-all exemption, may still be invoked on a case-by-case basis, depending on the specific nature and content of the communication in question.

Anticipating concerns about precisely how a public agency might go about locating and retrieving public records maintained in the personal devices and accounts of employees, the Court offered the following guidance:

1. Searches do not need to be extraordinarily extensive or intrusive. The scope of an agency's search for public records need only be reasonably calculated to locate responsive records.

2. Public agencies should develop policies addressing the conduct of public agency business using personal devices and accounts. This could take the form of a policy restricting public agency employees from transacting or discussing City business on personal devices or accounts.

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[1] The Court arrived at its decision by first breaking-down the definition of a "public record" under the Records Act. To qualify as a potentially disclosable *"public record,"* the record in question must be: "(1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, *or* (4) owned, used, or retained by any state or local agency." Writings include electronic communications and "must relate in some substantive way to the conduct of the public's business" to meet this test.

3. Another strategy could involve having the public agency communicate to an employee that a request for records containing certain types of information has been made. The public agency may then "reasonably rely" on the employee to search his or her personal files, accounts, and devices for responsive communications. The employee could then execute an affidavit confirming that he or she conducted a reasonable search of his or her personal devices and accounts and the search either yielded no records responsive to the request, or that all or some of the records in the employee's possession were not sufficiently related to public agency business as to warrant disclosure. "So long as the affidavits give the requestor and the trial court a sufficient factual basis to determine that the withheld material is indeed nonresponsive, the agency has performed an adequate search under the [Records Act]."

The Court also observed that under the Records Act, if it is alleged that public records have been improperly withheld, pursuant to Government Code section 6259 "the Court shall order the officer or person charged with withholding the records" to disclose the records or show cause in court why they should not be produced. If the Court concludes "the official's decision to refuse disclosure is not justified," it can order "the public official to make the record public." If the Court finds "that the public official was justified in refusing" disclosure, it must "return the item to the public official without disclosing its content."

The Court's decision received somewhat greater media attention than is ordinarily the case for matters of this type. Accordingly, it is quite possible the decision will result in a surge of requests in the coming weeks and months by interested members of the public anxious to avail themselves of the rights spelled-out in the decision. It will therefore be important for local public agencies to review and update existing policies, especially along the lines suggested by the Court. Local public agencies may also wish to provide training to employees and officials to better prepare them to distinguish between records that squarely concern public agency business versus records that may make incidental mention of work but which do not really rise to the level of a disclosable public record.

We are happy to discuss this matter further with you. Please feel free to contact us if you have any questions.