DATA ON GOVERNMENT OFFICIALS PERSONAL DEVICES NOW SUBJECT TO PUBLIC RECORDS ACT

Author(s): Trainor Fairbrook

The California Supreme Court recently settled a nearly decade-long dispute that centered on the collision of 1960s era government transparency laws with the technological advancements of the last half-century. In a decision with broad implications for government entities and those who end up in litigation with them, the Supreme Court found that government actors cannot shield communications about government business from disclosure by using back channels, like personal emails and texts. (City of San Jose v. Superior Court (2017) 2 Cal.5th 608.)

In 2009, Ted Smith served a Public Records Act Request on the City of San Jose that included a demand for any relevant communications sent or received on City officials' personal emails or cell phones. At the time, San Jose took the position that it had no obligation to retrieve emails or text messages that concerned government business if they were sent or received on a personal device or account. That position was common among municipalities at the time and persisted in many of them up until the decision this article discusses.

Commonly, litigants who are challenging city or county decisions will use a Public Records Act ("PRA") request as a form of early discovery that is often more cost-effective and fruitful than the procedures under the Discovery Act. In fact, I had this same issue, also in 2009, in a Public Records Act Request that I sent in a case involving the City of Pleasanton's attempt to revoke a duly issued building permit after demolition was done and construction was started. At the time, it was unclear whether my demand, like Mr. Smith's, was actually effective as against communications on sitting City Councilmembers' personal phones. Luckily for my client, Pleasanton agreed to withdraw the offending actions and pay most of what it cost to right the wrong. Unluckily for Mr. Smith, San Jose was willing to go all the way to the California Supreme Court on the issue.

The decision spans 28 pages, thoroughly discussing the elements of the Public Records Act and

the policy reasons for its conclusions. Behind that substantial discussion lies a few simple principles, in the author's view. First, the City's position that an elected or appointed official could send the same email from an office account or a personal account and one would be disclosable and the other not, was indefensible. As the Supreme Court observed, that approach would elevate the form of the communication over its substance and frustrate the Public Records Act's policy of providing all citizens of California with full and unfettered access to information about how their government representatives conduct the people's business.

Second, and more broadly, the fact that data relevant to the issues in a lawsuit is generated or stored on a personal device or account is unlikely to be a successful defense to an otherwise valid obligation to disclose, in the author's view. The modern reality is that personal devices and accounts are now routinely used to conduct official business, both in the private and the public sector. The Court brushed aside the argument those communications were not under the control or custody of the employer for purposes of its disclosure obligations under the PRA. That logic should hold equally as against a private employer, leaving ever less room to argue that relevant data on personal devices isn't subject to discovery in civil litigation generally.

After the decision, private litigants now have defined and expanded rights to access data relevant to their disputes with municipalities in California. More broadly, businesses who receive preservation letters or other notice of impending litigation should also take the case as a warning that efforts to identify and preserve relevant data need to include employees' or agents' personal email accounts and personal devices. As a result, a workplace policy confining work-related communications and exchanges to employer-controlled accounts and devices should also be discussed with counsel. The costs and disruptions of expanding data capture in early litigation to include several additional accounts and devices for each involved person may warrant the burdens that such a policy would impose. It may also help mitigate exposure to overtime claims for off-hours work by hourly employees.