DOWNEYBRAND

MEMORANDUM

To: Board of Trustees, American River Flood Control District

From: David Aladjem and Joy Peng

Date: July 11, 2017

Re: Summary of California Supreme Court's Decision: *City of San Jose v. Superior Court of Santa Clara County*

Introduction

On March 2, 2017, the California Supreme Court issued a decision on the question of whether communications on public agency matters are subject to disclosure under the California Public Records Act (PRA) if they were sent or received using a nongovernmental account. *City of San Jose v. Superior Court of Santa Clara County* (Mar. 2, 2017 S218066) __ Cal.5d. __, No. 109CV150427. The Court concluded that such communication *is* subject to disclosure. (*Id.* at p.3.) The decision clarifies what was an area of uncertainty in the law, specifically whether public officials who conduct official business on personal devices, are subject to the Public Records Act and must produce records (e-mails, texts and other writings) relating to official business.

Discussion

In June 2009, the City of San Jose (City) received a PRA request for public records of the redevelopment efforts in downtown San Jose. (*Id.* at p. 1.) The request included, among other things, emails, and text messages sent or received on private electronic devices used by the mayor, two city council members, and their staffs. (*Id.* at p. 2.) The City disclosed the communications from government accounts, but not personal accounts. (*Id.*) The requestor sued for declaratory relief, arguing that public records under the PRA include all communications on public agency business, regardless of how they are created, communicated, or stored. (*Id.*)

Public records are subject to disclosure upon request unless an exception is shown under PRA. (Govt. Code, §§ 6253, 6254.) Public records are defined as "(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." (*City of San Jose*, *supra*, __ Cal.5d __ [p. 5].) The Supreme Court elaborated on that simple definition as follows:

- First, writings include email, text messaging, and other electronic platforms. (*Id.* at p. 6.)

- Second, the writing must relate substantively to public agency business to qualify as public records. (*Id.* at pp. 6–7.) For example, a database of documents may be considered a private database overall, but certain documents within may relate to public business, and thus be considered public records. (*Id.* at p. 8.)

- Third, with respect to the preparer, though the statutory provisions only included employees in the definition of state agency and not local agency, the Court held that employees of local agencies also fall under the PRA. (*Id.* at p. 10.)

- Fourth, records on agency matter are subject to disclosure if they are in the agency's actual or constructive possession. (*Id.*) For example, an agency has a duty to disclose a consultant's records if it has a contractual right to the records. (*See id.* at p. 13.) Thus, whether a document is public record or confidential does not turn on its location. (*Id.* at pp. 13–14, 15.)

In sum, a public agency's employees' communications on public agency business remain public records even if they were sent from a private account. (*Id.* at p. 15.) To avoid infringing on privacy rights, the Court noted that personal information unrelated to public agency business or otherwise exempt can be redacted from disclosure. (*Id.* at pp. 16–17, citing Govt. Code, § 6253, subd. (a).) Any privacy concern should be addressed on a case-by-case basis. (*Id.* at p. 17.)

In order to balance privacy and disclosure for a response to a PRA request, agencies may develop policies such as:

- Providing the scope of the information requested to the custodians of its records, and requesting the employee to search through their own personal files, accounts and devices for the responsive material. (*Id.* at p. 19.)

- Requiring its employees who withhold personal records from their employer to submit an affidavit that provides sufficient factual basis to show that the information withheld is not a public record under the PRA. (*Id.*)

- Requiring its employees to only use or copy their government account for all public agency businesses thereby eliminating the privacy and disclosure arguments entirely. (*Id.* at p. 20.)

Conclusion

The Court interpreted the PRA statutory provisions broadly, and held that a city employee's writings regarding public agency business are not categorically exempt from the PRA merely because they were sent, received, or stored in a personal account.

cc: Tim Kerr

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