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CLIENT ALERT

California Supreme Court: Public Agencies May Need to Disclose Government Communications on Private Devices

On March 2, 2017, the California Supreme Court unanimously held that electronic communications related to public business may be subject to disclosure by state and local agencies under the California Public Records Act ("CPRA") – even if those communications are stored solely on a personal, private device.

In light of this ruling, it is important for public agencies and private entities doing business with public agencies to understand that communications transmitted using personal devices may be subject to public disclosure.

The California Supreme Court's Opinion

In June 2009, Ted Smith, a San Jose resident, sent a CPRA request to the city seeking records relating to the redevelopment of San Jose's downtown area. Four of those requests sought "voicemails, emails or text messages sent or received on private electronic devices" used by the city's mayor or members of the city council. The city refused to disclose records stored on the individuals' private electronic devices using their private accounts, arguing that they were not public records within the meaning of CPRA.

Smith filed a lawsuit arguing that he was entitled to the withheld documents. The Superior Court of Santa Clara County agreed with Smith, but the Sixth District Court of Appeal reversed. The Court of Appeal held that the term "public records" includes only records prepared, used or retained by the city council as a whole, *not* individual officials or employees. Under the Court of Appeal's reading of CPRA, the city had no obligation to disclose records that were stored on private devices using private accounts.

The California Supreme Court unanimously held that government employees' communications concerning official business may be subject to disclosure under CPRA even if the communications were sent on private devices using private accounts. Reversing the Court of Appeal, the California Supreme Court looked to the statutory language and the important policy interest of openness in government. The court cautioned that the communication still needs to be sufficiently related to public business in order to be subject to disclosure under CPRA. Communications that are primarily personal will generally not be subject to disclosure under CPRA even if they contain passing mention of agency business. However, the court clearly rejected the city's position that all communications sent via personal accounts were *not* subject to disclosure under CPRA. Lastly, the court provided guidance for conducting searches for documents located in personal accounts. The court held that agencies can reasonably rely on employees to search their own personal accounts for responsive materials. The court also discussed a procedure by which employees who withhold potentially responsive communications could submit a detailed affidavit explaining the factual basis for withholding.

Implications for Private Entities Doing Business With State or Local Agencies

Private entities doing business with California state, county or city agencies may have assumed, until now, that text messages and emails sent or received using a public employee's personal cell phone or email accounts were not subject to CPRA disclosure. However, in light of the court's ruling, if the content relates to government business, all of the following communications could potentially be disclosable under CPRA:

- Text messages or instant messages sent or received by a public employee on a personal cell phone, including messages sent through personal social media accounts like Facebook Messenger.

- Emails sent or received by a public employee from a personal email account, such as Gmail.
- Documents stored solely on a public employee's personal computer or mobile device.
- Voicemail messages received by a public employee on a personal cell phone or landline.

While the high court's ruling has expanded the "locations" subject to CPRA requests, the typical CPRA exemptions still apply, including exemptions for "official information" privilege, attorney-client privilege, attorney work product, pending litigation and confidential trade secret information. CPRA also includes a catch-all exemption that applies if the public interest in privacy clearly outweighs the public interest in disclosure. When a communication includes both exempt and non-exempt information, the exempt information must be redacted and the non-exempt information disclosed.

While CPRA generally does not require an agency to notify someone before information is disclosed, some agencies have guidelines promising that the agency will give notice before disclosing certain types of information, such as information that the disclosing party has designated as confidential or a trade secret.

Practical Tips

Private entities doing business with state, county or city agencies should assume that its communications with public employees regarding the public agency's business could be subject to CPRA disclosure – even if the public employee uses a personal email account or cell phone for those communications – and should communicate accordingly:

- Use discretion when communicating with public employees about public business.
- Avoid being lulled into a false sense of privacy when communicating with a public employee using her personal cell phone number, personal email account or personal social media messaging service.
- For particularly sensitive topics, use verbal, non-recorded means of communication – a telephone call or in-person meeting.
- Understand the public agency's internal guidelines regarding CPRA disclosure. If the guidelines do not provide for notice to affected parties, consider getting the agency's agreement to provide you with advance notice of any intent to disclose communications that involve you or your company.

Private entities whose information an agency plans to disclose under CPRA may seek a court order preventing or limiting disclosure. They can file a "reverse CPRA" lawsuit against the agency, through a procedure called a "petition for writ of administrative mandate." To block disclosure, it is not enough to show that the information is exempt under the CPRA; agencies generally may disclose even exempt information if they wish to do so. Rather, the party seeking to block disclosure must show that the agency is actually *prohibited* by law from disclosing the information. Further, to ensure that the agency does not disclose the information while the reverse CPRA lawsuit is pending, the individual may need to seek a form of emergency relief, such as a preliminary injunction or a temporary restraining order. A court will generally grant that request only if the party can show both that they are likely to win the case, and that they will suffer irreparable harm if the emergency relief is not granted.

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