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California Supreme Court Rules that Texts and Emails on Personal Devices May Be Considered Public Records

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The California Supreme Court recently held in *City of San Jose v. Superior Court*, California Supreme Court Case No. S218066, that public employees' digital messages existing in private electronic devices (*e.g.*, smartphones and computers) or in personal messaging accounts (*e.g.*, Gmail and Hotmail) are presumptively open to public disclosure under the California Public Records Act, Government Code section 6250 *et seq.* (the CPRA), if they concern "the conduct of public business."

What Messages Are Potentially Subject to Disclosure?

Under the Court's holding, digital messages constitute public records subject to disclosure under the CPRA if they are written by a public employee, and they substantively relate to public business. If these two requirements are met, a message is a public record even if it exists in a single public employee's device or account and is not maintained or controlled by the public agency. Such messages are deemed by the Court to be "retained by" the agency.

Looking ahead, the challenge of applying the Court's holding for lower courts and agencies will be how to determine whether a message "sufficiently" relates to public business to make it a public record subject to the CPRA—a determination the Court admitted "will not always be clear." To provide guidance, the Court offered several factors for lower courts and agencies to consider:

- Content: What is the subject matter of the message?
- Context: For what purpose was the message written?
- Audience: Whom was the message written for or directed to?
- Capacity: Was the author acting or purporting to act within the scope of employment?

What Does the Court's Holding Mean for Public Agencies?

Under the CPRA, agencies must conduct a "reasonably calculated" search into employees' personal devices and accounts to "locate responsive documents" that relate to public business. Inevitably, such searches will tread on employee privacy concerns—issues the Court found must "be addressed on a case-by-case basis."

How Should Agencies Respond?

To help avoid sensitive, costly, and labor-intensive case-by-case review of employee texts and emails, public agencies should consider updating or reinforcing their existing policies to prohibit employees from using their personal devices or accounts for work-related communications—a type of policy the Court recommended to "reduce the likelihood of public records being held in employees' private accounts."

What Does the Court's Holding Mean for Private Parties?

For private parties communicating with public agencies, those parties should be aware that any communication that they have with a public agency, including staff, may be subject to disclosure under the CPRA, including emails and text messages, and even if those text messages are sent to private accounts. Private parties should accordingly be very careful to manage such communications with potential disclosure in mind.

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