Vol. 29 No. 9 **April 1, 2014**

JONES & MAYER

Attorneys at Law
3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police
From: Martin J. Mayer, Esq.

COMMUNICATIONS ON PRIVATE CELL PHONES NOT SUBJECT TO CPRA DISCLOSURE

On March 27, 2014, the California Court of Appeal, Sixth Appellate District, overturned a summary judgment ruling in the case of *City of San Jose v. Superior Court (Smith)*, which had granted declaratory relief to Smith. The Court also ordered summary judgment to be granted to the City.

Smith had asserted the right to inspect specified written communications (including e-mail and text messages) sent or received by public officials and employees, regarding City business, on their private electronic devices using their private accounts.

The Court of Appeal held that "the language of the CPRA [California Public Records Act] does not afford a construction that imposes on the City an affirmative duty to produce messages stored on personal electronic devices and accounts that are inaccessible to the agency, or to search those devices and accounts of its employees and officials upon a CPRA request for messages relating to City business."

The Court stated that "the issue presented is whether those private communications, which are not stored on City servers and are not directly accessible by the City, are nonetheless "public records" within the meaning of the California Public Records Act? We conclude that the Act does not require public access to communications between public officials using exclusively private cell phones or e-mail accounts."

Facts

Smith had submitted a request under the CPRA for various "categories of public records involving specified persons and issues relating to downtown San Jose redevelopment. The City complied with all but four categories of requests, ... These four requests were essentially for '(a)ny and all voicemails, emails or text messages sent or received on private electronic devices used by Mayor Chuck Reed or members of the City Council, or their staff, regarding any matters concerning the City of San Jose, ...'"

"The City disclosed responsive non-exempt records sent from or received on private electronic devices using these individuals' *City* accounts, but not records from those persons' private electronic devices using their private accounts (e.g., a message sent from a private gmail account using the person's own smart phone or other electronic device)." The City argued that those messages were not "public records" as defined in the CPRA.

The CPRA defines "public records" to include any writing relating to the public's business if it is "prepared, owned, used, or retained by any state or local agency." However, Smith argued that "communications prepared, received, or stored on City officials' private electronic devices are public records under the CPRA, since local agencies 'can only act through their officials and employees.' Those officials and employees, he argued, are acting on behalf of the City, and therefore their disclosure obligations are 'indistinguishable' from those of the City."

The Superior Court agreed with Smith, and granted his motion for summary judgment, stating that "there is nothing in the [CPRA] that explicitly excludes individual officials from the definition of 'public agency,' 'and a city is an 'artificial person' 'that can' 'only act through its officers and employees.' Thus, a record that is 'prepared, owned, used, or retained' by an official is 'prepared, owned, used, or retained' by the City."

Furthermore, stated the Superior Court, if the City's "interpretation were accepted, 'a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own." The matter then proceeded to the Court of Appeal.

Discussion

The Court of Appeal stated that an underlying issue for it to decide is whether city officials and employees are "agents" of the municipality? "Smith, joined by representatives of the news media as amici curiae, maintains that individual City officials and employees must be deemed public agencies, thus making their communications public records regardless of what devices and accounts are used to send and receive those messages."

The Court analyzed and discussed the CPRA regarding its purpose and intent and stated that "(t)he CPRA was modeled on the federal Freedom of Information Act (FOIA). Their common purpose 'is to require that public business be conducted 'under the hard light of full public scrutiny,' and thereby 'to permit the public to decide *for itself* whether government action is proper.' For both the FOIA and the Act, 'disclosure, not secrecy, is the dominant objective.'"

"In enacting the CPRA the Legislature expressly declared that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.'" Furthermore, in 2004, California voters passed Proposition 59, "which amended the state constitution to explicitly recognize the 'right of access to information concerning the conduct of the people's business' and to provide that 'the writings of public officials and agencies shall be open to public scrutiny.'"

However, the CPRA recognizes the concern regarding an individual's right of privacy and, therefore, "provides a number of exemptions that 'protect the privacy of persons whose data or documents come into governmental possession.'" In addition, "the right of access declared in article I, section 3(b)(1), of the California Constitution is qualified by the assurance that this right of access does not supersede an individual's right of privacy."

Petitioners' amici, the League of California Cities, argued that communications between public officials, regarding the public's business, are not prohibited as long as it involves communications among less than a majority of the elected officials which occur outside of a public meeting. Furthermore, the League argues, the Superior Court's ruling would require cities to conduct searches of *all* private electronic devices belonging to its officials and/or employees. "(T)hose searches, the League points out, would intrude into private conversations with family members or friends that happen to include some discussion of a public issue."

However, "(t)he media suggest that petitioners' interpretation of 'public records' is unreasonable and arbitrary because it would allow officials to 'conceal evidence of error or malfeasance on a whim by storing information relating to the public's business on their personal accounts or devices. They could also distort the truth by storing only records that tell a favorable tale on accounts or devices owned by a state or local agency."

The Court of Appeal examines many court decisions, cited by both sides, in analyzing the scope of "public records." It notes that "the term 'public records' is defined in section 6252, subdivision (e), [of the CPRA] to include any writing relating to the public's business if it is 'prepared, owned, used, or retained by any state or local ***agency***." (Emphasis added.)

The Court then notes that the CPRA "defines a 'local agency' to include 'a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency' . . . ."

As such, states the Court, "(i)f a 'local agency' and its officials are, as Smith portrayed them below, 'one and the same,' then any writing prepared, owned, used, or retained by the official is deemed that of the agency itself. The statute's definition of 'local agency,' however, does not mention individual members or representatives of any public body; . . . ."

"We therefore cannot agree with Smith that individual city council members and their staff must be considered equivalent to the City for purposes of providing public access to their writings on public business. Because it is the *agency*—here, the City— that must prepare, own, use, or retain the writing in order for it to be a public record, those writings that are not accessible by the City cannot be said to fall within the statutory definition."

The Court acknowledges that "city council members may conceal their communications on public issues by sending and receiving them on their private devices from private accounts [and that] is a serious concern; but such conduct is for our lawmakers to deter with appropriate legislation."

HOW THIS AFFECTS YOUR AGENCY

This appears to be a decision of first impression – one which has not been previously decided by a California court. Therefore, it is not unlikely that Smith and/or the media will attempt to have it reviewed by the California Supreme Court. The decision has also left several questions unanswered.

For example, the Court avoided the issue of whether emails sent on private devices during a public meeting are subject to disclosure under the CPRA? The Court said "(t)he question of when a privately transmitted communication made during a public meeting becomes that of a 'public body' - or in this case, a public 'local agency' - is not presented in this writ proceeding."

The Court also did not clarify what it deems to be an "exclusively private" electronic device. Would it still be considered an "exclusively private" device if the city provides a stipend to the public official or employee to use his or her "personal" cell phone, computer, etc. for public business, in addition to using it for their own private communications? It would seem to be a much more difficult argument to make, that it is an "exclusively private" device, if public money is subsidizing the cost of such an electronic device and it is being used, in part, for city or county business.

One final point – this case addresses only the right to access such devices pursuant to the CPRA. It must be remembered that when peace officers carry personal cell phones on duty, accessing those devices is not done through the

CPRA but, rather, through discovery in the defense of criminal prosecutions. That standard is totally different.

As with all legal issues, it is imperative to confer with your agency's designated attorney for advice and guidance. However, if you wish to discuss this case in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

Information on www.jones-mayer.com is for general use and is not legal advice. The mailing of this Client Alert Memorandum is not intended to create, and receipt of it does not constitute an attorney – client relationship.