

Public Records Practices

After the *San Jose* Decision

League of California Cities Webinar
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City of San Jose v. Superior Court

“[W]e hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act....”



Why We're Here



Background of the San Jose Case



Background of the San Jose Case

Request targeted “emails and text messages ‘sent or received on private electronic devices used by’ the mayor, two city council members and their staffs.”



Background of the San Jose Case

- Trial Court victory for requestor.
- Appellate Court victory for the City.



Background of the San Jose Case

During oral argument, the California Supreme Court justices were particularly concerned about preserving public employees' privacy.



Background of the San Jose Case

Ruling in favor of the requestor: “[W]e hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act....”



What this Webinar Will and Will Not Do

Will: Explore issues surrounding the *San Jose* decision including the decision's scope, how to conduct searches, and suggested best practices and policies.

Will Not: Resolve all outstanding questions. Ultimately, case law and/or legislation will provide additional guidance.

Guidance for Searches

- In response to a CPRA request for “correspondence” related to a particular topic, should the local agency clarify whether the requester is seeking public records from a personal account or device?
- A CPRA request for “correspondence” probably includes a request for records on personal phones or devices.

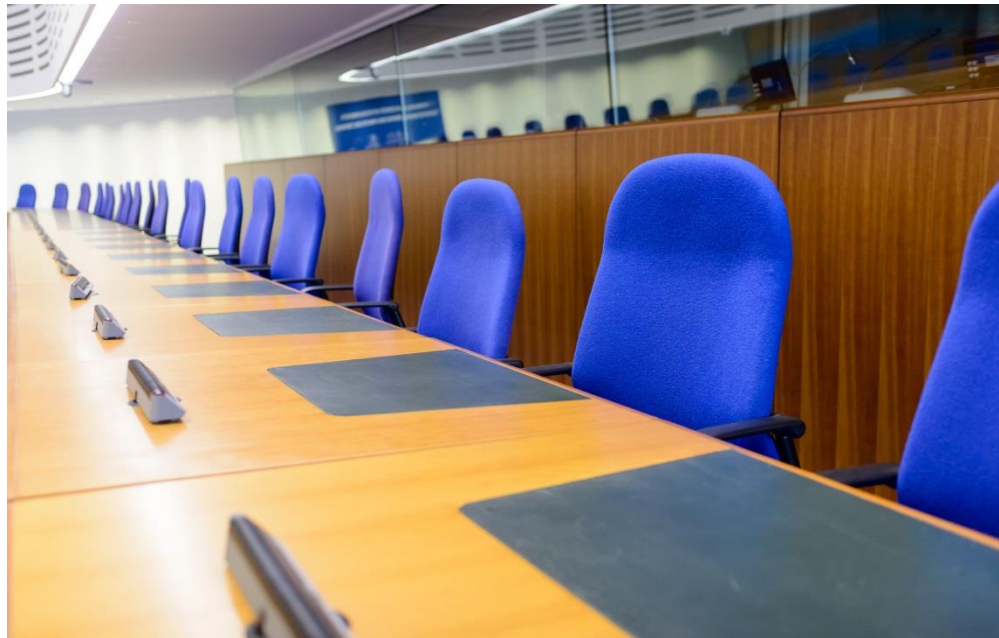
Guidance for Searches

- When a CPRA request for local agency correspondence, such as emails, is received, does the local agency have to automatically request that public employees and officials search their personal accounts or devices?
- A CPRA request for correspondence probably includes requests for records on personal accounts or devices.**



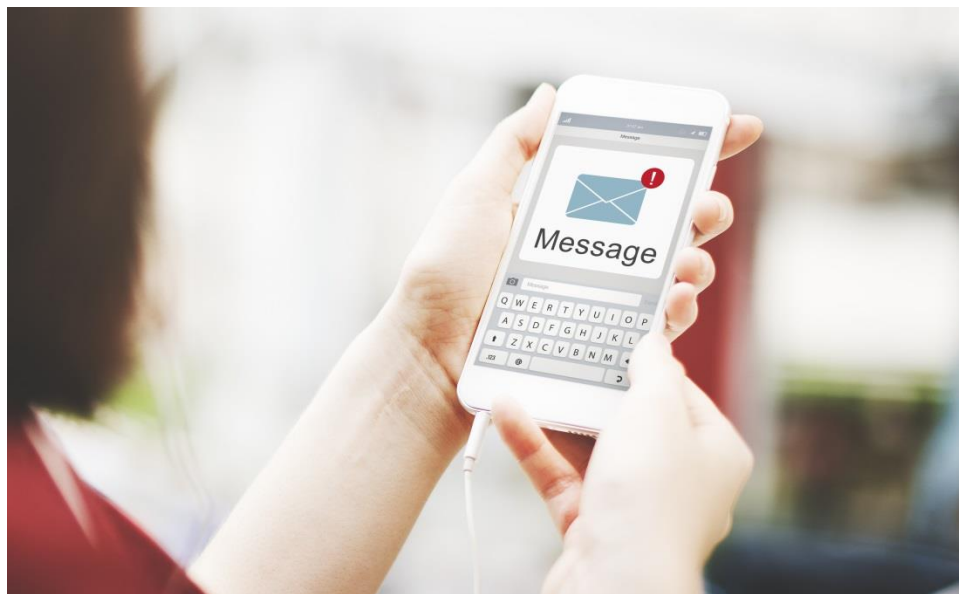
Guidance for Searches

The *San Jose* decision likely applies to public officials.



Guidance for Searches

The *San Jose* decision likely applies to text messages.



Guidance for Searches

“‘Public records’ includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics....”

– Gov. Code § 6252(e), [emphasis added]

Guidance for Searches

“‘Writing’ means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

– Gov. Code § 6252(g)

Guidance for Searches

The *San Jose* decision likely applies to social media messages.



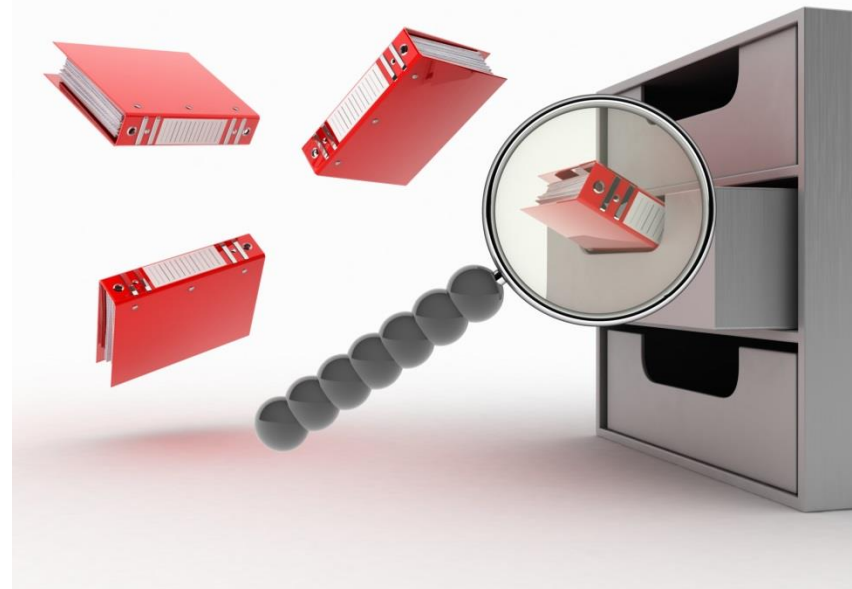
Guidance for Searches

Former public employees and officials are very likely subject to the San Jose decision.



Guidance for Searches

Local agencies are obligated to conduct searches that are “reasonably calculated” to locate responsive records and disclose records that the local agencies can find with “reasonable effort.”



Guidance for Searches

“As to requests seeking public records held in employees’ nongovernmental accounts, an agency’s first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material.”

Guidance for Searches

An example of an email for the custodian of records to send to a public employee in response to a PRA request:

“Dear Public Employee Senior Planner,

We recently received a PRA request for all correspondence related to the City’s new marijuana ordinance. The PRA request seeks correspondence between all employees in the Community Development Department between June 1, 2016 and July 1, 2016 regarding the ordinance. Can you please check your City inbox during those dates to see if you have responsive records? Also, under the *San Jose* case and new City policy, please check your personal accounts or devices (*e.g.*, Gmail, Yahoo, etc.) if you have records relating to the marijuana ordinance on your personal accounts. This request does not seek correspondence that is personal in nature but only records that relate to City business (*e.g.*, City marijuana ordinance). If you have any questions about whether a record is personal or City business, please contact me.

Please forward your documents to the City Clerk’s office by July 30, 2017 or confirm that you have no responsive public records on your personal accounts or devices by that date. We will review any records you forward to us to determine whether any applicable PRA exemptions or privileges apply. Thank you.

Signed,

City Clerk”

Guidance for Searches

“Factors” a local agency may consider when deciding whether a record is public or personal:

- **Content.**
- **Context/Purpose.**
- **Audience.**
- **Scope.**



Each record must be reviewed on a case-by-case basis to determine whether it is a public or personal record.

Guidance for Searches

“[T]o qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public’s business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting.

Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records. For example, the public might be titillated to learn that not all agency workers enjoy the company of their colleagues, or hold them in high regard. However, an employee’s electronic musings about a colleague’s personal shortcomings will often fall far short of being a ‘writing containing information relating to the conduct of the public’s business.’” (*Citing* Gov. Code § 6252, subd. (e); emphasis added.)

Hypothetical #1

To: Sister@aol.com
From: Publicemployee1@yahoo.com
Date: March 1, 2017

Subject: Vacation next week

Hey Sis,

Hope all is well with you and the fam. Looking forward to my trip out there next week. Do you have a bed I can crash on, or should I book a room? I'm busy at work, as usual. Working on a Walmart deal for the City. It would be nice to get some more tax revenue in the coffers.

Signed,

Your sis.



Hypothetical #2

To: Publicemployee2@gmail.com
From: Publicemployee1@yahoo.com
Date: July 20, 2017

Subject: Party for Fred

Hi Public Employee #2,

Can you help me plan a going away party for Fred? His last day is July 30. I'm so bummed he's leaving the city, but I heard he'll be getting a fantastic pay bump. Also, can you get me the Walmart deal points by the end of the week? Thanks.

Signed,

Public Employee #1



Hypothetical #3

To: Publicemployee2@cityaccount.gov
From: Publicemployee1@yahoo.com
Date: August 1, 2017

Subject: Help!

Public Employee #2,

I'm meeting with Walmart's rep this afternoon and wanted to know if you could sit in on the meeting. They're driving a hard bargain, and I got wind that they won't agree to make the traffic fixes off of Main Street that the Council won't budge on. I'm worried that this condition will kill the project and it will be my neck. I could use your help with this. Also—thanks for helping with Fred's party last week. The send-off video staff made for him was hilarious.

Signed,

Public Employee #1



Guidance for Searches

The *San Jose* court suggested the use of “affidavits” for individuals who withhold documents from their personal accounts or devices. However, the court does not *require* the use of affidavits.



Guidance for Searches

Public records on personal accounts or devices should be kept in accordance with the local agency's retention schedules.



Best Practices and Policies

Make the public employees and officials aware of the decision, and let them know that public records on their personal accounts or devices may be subject to the CPRA.



Best Practices and Policies

Update the local agency's CPRA policy.

- Be clear to public employees and officials that public records on their personal accounts or devices may be subject to the CPRA.
- Include a requirement that prohibits or minimizes the use of personal accounts and devices for public business.
- If possible, give all public employees and officials an agency email account.

Best Practices and Policies

Update the local agency's CPRA policy.

- Require public employees and officials to forward or “cc” correspondence on their personal accounts and devices to an agency account or server.
- Have a “cut-off” period when all public records from personal accounts and devices must be forwarded to the local agency's server.

Best Practices and Policies

Update the local agency's CPRA policy.

- Have an auto-message on public official's personal accounts that directs public business to the official's agency email account.
- Have a plan in place for former public employees and officials to disclose all of the public records on their personal accounts or devices before they leave the agency.

Best Practices and Policies

- Train local agency employees and officials in the “factors” for distinguishing between a personal and public record. Instead of a stand-alone training, consider adding it to another training (*e.g.*, AB 1234) session.
- Consider enforcement options.

Best Practices and Policies

Document the local agency's efforts!



Thank you for attending.

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