

Email and E-Records Retention Issues
Under the Public Records Act

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Areas Covered

- Records Retention Requirements
- Penalties for Unauthorized Records Destruction
- Records Destruction/Retention Law and the Public Records Act
- Local Agency Policy Discretion on Email Destruction/Retention
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Records Retention Requirements

The CPRA is not a records retention law. It is a records disclosure law.

Los Angeles Police Dept. v. Superior Court (1977) 65 C.A.3d 661, 668

Records Retention Requirements

The records retention law for city emails and most other types of city records is actually a records destruction law.

With approval of the legislative body by resolution and written consent of the city attorney, department heads may destroy records under their charge without making a copy after the records are no longer required.

Gov't. Code §34090

Records Retention Requirements

The records destruction/retention law governing cities does not authorize destruction of:

- Records affecting real property title or liens
- Court records
- Records required to be kept by statute
- Records less than 2 years old
- Minutes, ordinances or resolutions of the legislative body or a city board or commission

Gov't. Code §34090

Records Retention Requirements

City records custodians may destroy original records without approval if the records are first duplicated in a trusted medium.

Gov't. Code §34090.5

Records Retention Requirements

City department heads may destroy after 100 days video, telephone and radio recordings that are not evidence regarding a claim or litigation, with legislative body and city attorney approval.

Gov't. Code §34090.6

Records Retention Requirements

City legislative bodies may adopt procedures for destroying duplicate records less than two years old, but video records must be kept for at least 90 days.

Gov't. Code §34090.7

Penalties for Unauthorized Records Destruction

Public officers with custody of records who willfully steal or damage them are subject to imprisonment for up to 3 years. Persons who are not officers are subject to a fine of up to \$1,000 and 1 year imprisonment.

Gov't. Code §§6200, 6201

Records Destruction/Retention Law and the Public Records Act

Emails relating to the conduct of the public's business that are prepared, owned, used or retained by a local agency are public records subject to disclosure under the Public Records Act unless an exemption applies.

Gov't. Code §§6252, 6253

Records Destruction/Retention Law and the Public Records Act

The definitions in the Public Records Act of writings making up public records, of public records, and of local agencies subject to the Public Records Act are all limited to the Public Records Act. They do not apply to the records destruction/retention statutes.

Gov't. Code §6252, 64 Cal.Ops.Atty.Gen. 317 (1981)

Records Destruction/Retention Law and the Public Records Act

Case law defines records subject to the records destruction/retention statutes as objective, lasting indications of a writing, event or other information which is in the custody of a public officer and kept either because a law requires keeping it, or because it is necessary or convenient to the discharge of the public officer's duties, that were made or retained for the purpose of preserving their informational content for future reference.

64 Cal.Ops.Atty.Gen. 317 (1981), *People v. Pearson* (1952) 111 C.A.2d 9, *People v. Tomalty* (1910) 14 C.A.2d 9

Policy Discretion on Email Destruction

Arguably, emails and other electronic records not made or retained to preserve their content for future reference and not subject to special retention statutes need not be kept for 2 years, and can be destroyed when no longer needed.

Can emails not prepared by a local agency be deemed not intended for future reference and subject to destruction after less than 2 years?

64 Cal.Ops.Atty.Gen. 317 (1981)

Risk of Local Agency Email Destruction

Some open government advocacy groups have argued local agencies must retain emails for at least 2 years, because there is no statutory definition of public records subject to the destruction/retention statutes that may exclude some records.

No reported case expressly addresses how long local agency emails must be retained.

Local agency email destruction policies that provide for destruction of records less than 2 years old may face legal challenge.

"Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>

Local Agency Official Emails

No reported California case addresses treatment of emails relating to the conduct of the public's business on agency officials' personal devices and accounts.

Local Agency Official Emails

In 2007, the trial court in the *Tracy Press* case ruled that individual officials are not "local agencies" as defined in the Public Records Act and that officials' emails sent or received on their own devices and accounts related to the conduct of the public's business are not public records prepared, owned, used or retained by a local agency.

Tracy Press v. City of Tracy (2007) San Joaquin County Superior Court Case no. CV029588

Local Agency Official Email

The *Tracy Press* trial court ruling is consistent with the definitions and structure of the Public Records Act, the authority wielded by individual Council members, and the realities of public agency information systems.

Local Agency Official Emails

The *Tracy Press* trial court ruling is consistent with the Public Records Act definitions and structure because in the statute, agencies are defined as collective bodies, and the disclosure obligations specified in the Public Records Act apply to agencies, not individuals.

Gov't. Code §§6252, 6253, subds. (a), (b), 6259, subd. (d)

Local Agency Official Emails

The *Tracy Press* trial court ruling is consistent with the realities of local agency information systems because city staff are unable to search for, retrieve, redact, copy, transmit, or store records on council members' private accounts and devices that have not been transmitted to city devices or systems.

Local Agency Official Emails

The *Tracy Press* trial court ruling is consistent with council members' authority because in most cities (except those with "strong mayor" governments), absent a delegation of authority, individual council members typically cannot act for or bind the city.

Local Agency Official Emails

In 2013, the trial court in the *Smith v. San Jose* case ruled that messages related to the conduct of the public's business sent on officials' private devices and accounts are "prepared, owned, used or retained" by a public agency because the definition of "public agency" in the Public Records Act includes individual officials.

Smith v. San Jose (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427

Local Agency Official Emails

The trial court ruling in *Smith v. San Jose* raises problems for local agencies: it revises a key Public Records Act definition, appears to disregard recent case law regarding expectations of privacy of public officials in their electronic communications, and seems to ignore practical difficulties involved in producing private council member emails.

Smith v. San Jose (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427

Local Agency Official Emails

The trial court ruling in *Smith v. San Jose* revises the definition of “public agency” in the Public Records Act relying on authorities not related to the Public Records Act. The Public Records act distinguishes between bodies with obligations or rights regarding public records, and individuals with obligations or rights regarding public records.

Smith v. San Jose (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427

Local Agency Official Emails

The trial court ruling in *Smith v. San Jose* concludes it is doubtful city officials could claim an expectation of privacy in their communications related to the public’s business. The ruling does not discuss the *Quon* case, which implied public officials may have a reasonable expectation of privacy in their electronic communications.

City of Ontario v. Quon (2010) 130 S.Ct. 2619, 2624

Local Agency Official Emails

The trial court ruling in *Smith v. San Jose* concluded that the city did not make a showing regarding the burden of collecting and reviewing council member emails.

Substantial agency burdens may result from a requirement to obtain records not maintained by an agency. The agency will be unable to verify if the possessor has provided all the responsive records. If a records possessor does not comply with an agency request, and the party seeking records from the agency files suit, it is the agency that will incur litigation costs and be exposed to attorneys' fees liability under the Public Records Act.

Gov't. Code §6259, subd. (d)

Concluding Thoughts

The records destruction/retention law applicable to cities appears to permit the creation of temporary records and destruction of such records when they are no longer needed.

However, some open government advocacy groups insist that city records, including emails, must be kept at least 2 years. Such groups may be ready to litigate this question.

64 Ops.Cal.Atty.Gen. 317 (1981)

Concluding Thoughts

New, relatively low-cost hardware and software systems capable of storing and efficiently searching very large quantities of electronic records may make local agency policies requiring purging emails less than 2 years old unnecessary.

Concluding Thoughts

No reported California case has ruled on whether public official emails addressing public business on private accounts and devices are public records.

Concluding Thoughts

Although it may seem counterintuitive, the conclusion that emails relating to the public's business sent on public officials' personal devices and accounts are not public records subject to the Public Records Act is well supported by the Public Records Act definitions and structure, the nature of the authority of most local agency officials, and the realities of government information systems.

Concluding Thoughts

The conclusion that emails relating to the public's business sent on public officials' personal devices and accounts are public records is not well supported by the Public Records Act definitions and structure, the nature of the authority of most local agency officials, and the realities of government information systems.

If this view prevails, it will present significant difficulties for local agencies, including requiring them to seek information from third parties in response to requests, and exposing them to litigation costs, including attorneys' fees, when third parties are uncooperative.

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