



# **Email and E-Records Retention Issues under the Public Records Act**

**Wednesday, May 8, 2013 Opening General Session; 1:00 – 2:45 p.m.**

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**League of California Cities City Attorneys' Conference May, 2013**

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### **I. Introduction**

In this era of ubiquitous and rapidly evolving electronic information systems and devices, and continuously expanding approaches and means for exchanging electronic information, government agencies at all levels have become increasingly reliant on electronic communications technologies to carry out the public's business, via everything from emails to new social media programs and platforms sometimes referred to as Web 2.0 technologies. Local agencies are considering and utilizing new electronic information technology as their capabilities, budgets, missions, and constituencies may permit or require. At the present state of governmental use of electronic information systems, it seems beyond debate that email communications have become indispensable for all agencies, large and small alike. Many communications formerly made in letter or memo form or by telephone or facsimile are now transmitted as emails, frequently with electronic attachments and with embedded links to information available on the web in a broad range of media. Any government agency that has experienced a temporary interruption in its email capabilities has been confronted with how pervasive and essential email communications have become to conducting agency business, including for communications with internal staff, elected and appointed decision makers, citizens, rate payers, bargaining units, litigants, the courts, other government agencies, contractors, bidders, the press, and others. It does not appear that social media have supplanted local agency reliance on email communications, or the public's increasing reliance on email to contact government. The volume of email messages transmitted to and from and maintained in local agency systems continues to increase.

The purpose of this paper is to discuss the current legal requirements applicable to local agency retention and production of emails, as well as some of the legal, practical and policy implications of local agency email retention and production practices. While focused on emails in particular, this paper also has application to most other forms of electronic communications retained and used by local agencies.

## **II. Legal Requirements for Retaining Emails**

### **a. Records Retention Legal Authority**

The title of this paper, “Email and E-Records Retention Issues under the Public Records Act,” is misleading in one respect, because the legal requirements for retention of local agency records, including emails and other electronic records, are not contained in the Public Records Act. The Public Records Act is not a records retention law. It is a records disclosure law.<sup>1</sup> The law governing retention of most types of local agency records, including emails, and destruction of such records, and establishing penalties for violations, is contained elsewhere.<sup>2</sup>

### **b. Records Retention Requirements**

The general records retention law applicable to city emails and most other types of city records is actually a records destruction law.<sup>3</sup> It provides as follows:

Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required.

This section does not authorize the destruction of:

- (a) Records affecting the title to real property or liens thereon.
- (b) Court records.
- (c) Records required to be kept by statute.
- (d) Records less than two years old.
- (e) The minutes, ordinances, or resolutions of the legislative body or of a city board or commission.

This section shall not be construed as limiting or qualifying in any manner the authority provided in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed.<sup>4</sup>

The general city records destruction/retention statute permits department heads to destroy records with approval of the legislative body and consent of the city attorney, without copying the records, after they are no longer required, subject to specified exceptions. Records regarding real property title and liens, and court records, and minutes, ordinances and resolutions must be retained indefinitely. Records subject to other statutory retention requirements must be kept in accordance with those requirements. All other records subject to the statute must be kept for two years.

City records custodians may destroy original city records without legislative body approval or city attorney consent if the records are accurately and legibly duplicated in a trusted medium that does not permit additions, deletions or changes to the original document and is as accessible to the public as the original records were.<sup>5</sup> City and city and county department heads may also destroy recordings of routine video monitoring, as defined, after one year, and recordings of telephone and

radio communications, as defined, after 100 days, upon legislative body approval and agency attorney consent, except that records that are evidence in any claim filed or pending litigation must be preserved until the claim or litigation is resolved.<sup>6</sup> City legislative bodies may establish procedures for destroying duplicate records that are less than two years old; however, video recordings must be retained for at least 90 days.<sup>7</sup>

**c. Penalties for Unauthorized Records Destruction**

Destruction, theft or alteration of public records, including emails, is subject to statutory penalties including imprisonment and fines. Public officers with custody of records, maps, books, or court papers or proceedings who willfully steal, remove, secrete, destroy, mutilate, deface, alter or falsify any part of such records or permit any other person to do so are subject to imprisonment pursuant to section 1170(h) of the Penal Code for two, three or four years.<sup>8</sup> Every person not an officer who commits the same prohibited acts is subject to imprisonment pursuant to section 1170(h) of the Penal Code, or imprisonment in a county jail not exceeding 1 year, or a fine not exceeding \$1,000.00, or both fine and imprisonment.<sup>9</sup> The statutes establishing penalties for destruction of public records do not refer to the records destruction/retention statutes. Since the records destruction/retention statutes expressly permit destruction of particular public records, presumably the penalties for records destruction apply not to all records destruction, but instead to unauthorized destruction of public records, or public records destruction other than as permitted by law.

**d. California Attorney General Opinion No. 80-1006 - Recordings of City Council Meetings Are Subject to Disclosure and May Be Subject to the Records Destruction/Retention Statutes**

The most helpful authority addressing local agency records production and retention obligations considering both the Public Records Act and the records destruction/retention laws remains Attorney General Opinion No. 80-1006 from 1981.<sup>10</sup> The opinion addresses whether the public has a right to inspect and/or receive copies of tape recordings of city council meetings made by a city clerk to facilitate minutes preparation. Opinion 80-1006 methodically analyzes the records production and records destruction/retention statutes to conclude the following regarding authorized tape recordings a city clerk made of city council meetings to facilitate minutes preparation: Any person has the right to inspect the recording, including the right to listen to the recording on equipment provided by the city. Any person has the right to receive a copy of the tape, including the right to make a duplicate copy on the person's own equipment, (but not to have a transcript made of the recording). The recording may be destroyed at any time if the recording was intended solely to facilitate minutes preparation. However, if the recording was made or kept to preserve its informational content for public reference, it may not be destroyed except as permitted by state law.<sup>11</sup>

Opinion 80-1006 concludes that city council meeting recordings (except recordings of closed sessions) are subject to disclosure, reasoning as follows: First, recordings of city council meetings constitute writings containing information relating to the conduct of the public's business prepared, owned, used or retained by the city, and therefore tape recordings made to facilitate preparation of meeting minutes are public records as defined in the Public Records Act.<sup>12</sup> Second, council meeting recordings made solely to assist in preparing meeting minutes are not protected from

disclosure under the “drafts” exemption in the Public Records Act, because the public interest in withholding the draft does not clearly outweigh the public interest in disclosure.<sup>13</sup> Third, only recordings of city council executive sessions are exempt under the provision in the Public Records Act that provides that records that are exempt from disclosure or prohibited from being disclosed under federal or state law are also exempt from disclosure under the Public Records Act.<sup>14</sup> Fourth, the public’s right to inspect council meeting recordings includes the right to listen to them using city-provided equipment.<sup>15</sup> Fifth, the public’s right to receive a copy of council meeting recordings includes the right to either receive a duplicate copy of the recording where practical, upon payment of the applicable fee, or where that is not practical, the right to duplicate the recording on requester-provided equipment.<sup>16</sup>

Opinion 80-1006 concludes that if city council meeting recordings are intended solely to assist in preparing the minutes, they may lawfully be destroyed at any time, but that if the purpose of the recordings is to preserve their informational content for public reference, they may only be destroyed as authorized by law.<sup>17</sup> The opinion applies the records destruction/retention statutes, summarized above, to reach this conclusion, reasoning as follows: First, the definition of “public records” in the Public Records Act is expressly limited to that chapter, and since the Public Records Act was enacted after the records destruction/retention statutes, that means the Legislature chose not to adopt within the Public Records Act the meaning of “records” as developed in the case law concerning the destruction/retention statutes.<sup>18</sup> Second, based on applicable case law, records subject to the records destruction/retention law constitute an objective, lasting indication of a writing, event or other information which is in the custody of a public officer and is kept either because a law requires it to be kept, or because it is necessary or convenient to the discharge of the public officer’s duties, and was made or retained for the purpose of preserving its informational content for future reference.<sup>19</sup> Third, a city clerk’s city council meeting recordings clearly are an objective, lasting indication of an event in the custody of a public officer. Fourth, whether such recordings may be destroyed at any time that is convenient for the public officer or whether they may only be destroyed when permitted by the records destruction/retention statutes depends upon the purpose for making the recordings. If they are made solely to assist in preparing minutes, they are not a “record” covered by the records destruction/retention statutes and therefore may be destroyed in the public officer’s discretion, because they were not made or retained for the purpose of preserving their informational content for future reference. However, if the recordings are instead made or retained for preserving their informational content for public reference, they may only be destroyed as permitted under the records destruction/retention statutes.

The common-sense result of the analysis of local agency records destruction discretion in Opinion 80-1006 is that local agency records that are an objective, lasting indication of a writing, event or other information in the custody of a public officer that are required to be kept by law must be kept as required, in accordance with the general retention requirement of 2 years or any applicable requirement prescribing a longer or shorter retention time. If local agency records that are an objective, lasting indication of a writing, event or other information in the custody of a public officer are kept because necessary or convenient to the discharge of the public officer’s duties, and the records were made or are retained to preserve their informational content for future reference, then they can only be destroyed as permitted by law, in accordance with the general retention requirement of 2 years or any applicable requirement prescribing a longer or shorter retention requirement. If the records are an objective, lasting indication of a writing, event or other

information in the custody of a public officer, but are not kept to preserve their informational content for future reference, but instead for a more limited or temporary purpose (such as to serve as a reference for meeting minutes preparation), then the records are not subject to the records destruction/retention laws, because they only apply to records that are required to be kept by law or are intended to serve as a future reference. Such records not subject to the records destruction/retention laws may be destroyed at any time once they have served or are no longer needed for their intended purpose. Under this analysis, local agency officials are able to create records intended to serve temporary or short term purposes (as long as they are not otherwise required to be retained by law) without becoming obligated to retain them longer term, or to obtain authorization to destroy them.

**e. Analysis of Legal Requirements for Production and Destruction of Emails**

It is helpful to apply the analysis employed in Opinion No. 80-1006 to the production and destruction of local agency emails. As can be seen in the following discussion, much of the analysis in Opinion No. 80-1006 is applicable to local agency emails, notwithstanding changes in the Public Records Act since 1981.

The fact that emails relating to the conduct of the public's business that are prepared, owned, used or retained by local agencies are public records is even clearer now than under the version of the Public Records Act in effect in 1981.<sup>20</sup> The definition of writings that constitute public records now expressly includes "transmitting by electronic mail."<sup>21</sup> Some emails may satisfy the requirements of the "drafts" exemption, the deliberative process privilege exemption, or of other exemptions, depending on their content. However, absent an applicable exemption, 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 the Public Records Act and to disclosure by inspection, or by the agency providing copies upon payment of the duplication cost or an applicable statutory fee, or by both inspection and copying.<sup>22</sup> Local agencies must produce all such non-exempt emails or non-exempt portions of otherwise exempt emails in accordance with the Public Records Act on request.<sup>23</sup>

Because the Public Records Act is a records disclosure statute rather than a records destruction or retention statute, it is necessary to analyze the records destruction/retention statutes to determine whether emails relating to the conduct of the public's business and that are prepared, owned, used or retained by local agencies may be destroyed at any time, or only as permitted by the destruction/retention statutes.<sup>24</sup> The definitions in the Public Records Act of local agencies subject to the Act, of writings comprising public records, and of public records are all expressly limited to the Public Records Act chapter in the Government Code.<sup>25</sup> The general records destruction/retention statutes applicable to most city records, including most emails, do not define the records to which they apply. Case law defines records subject to the records destruction/retention statutes applicable to cities 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, and that were made or retained for the purpose of preserving their informational content for future reference.<sup>26</sup> Emails relating to the conduct of the public's business and that are prepared, owned, used or retained by local agencies clearly are an objective, lasting indication of a writing or

other information in the custody of a public officer. There appears to be no statute that expressly requires keeping all local agency emails, although depending on their contents, some emails may be subject to special records destruction or retention statutes requiring keeping them for a specified time. Therefore, at least some and perhaps most emails relating to the conduct of the public's business and that are prepared, owned, used or retained by local agencies may be subject to destruction at any time, unless they are made or retained for the purpose of preserving their informational content for future reference, or are subject to special records retention requirements.

**f. Local Agency Policy Discretion on Email Destruction/Retention**

It is possible to conclude based on the reasoning in Opinion No. 80-1006 that local agencies retain discretion concerning destruction of emails relating to the conduct of the public's business that are prepared, owned, used or retained by the agency and that are not made or retained to preserve their informational content for future reference and that are not subject to special records retention requirements.<sup>27</sup> Arguably, such records may be destroyed when no longer necessary or convenient. However, the analysis in Opinion No. 80-1006 focused on agency-created records, namely, city council meeting recordings made to assist the city clerk in preparing meeting minutes. With respect to such agency-created records, it is probably possible to determine whether their purpose is solely to assist in minutes preparation, or whether they are also intended to preserve their informational content for future reference.

Distinguishing between emails intended to be kept as informational references, and emails intended only for temporary use, for purposes of records destruction, may be difficult regarding emails owned, used or retained, but not prepared, by a local agency. The primary purpose of some emails owned, used, or retained, but not prepared by a local agency (such as emails received by the agency from outside the agency) may be evident from the email itself. For example, it may be clear from an email request for production of agency records under the Public Records Act that its primary purpose is the production of the requested records. However, requesters of public records not infrequently want to create a record of their request, to which they may refer in later communications. It seems unlikely that local agencies will generally be able to obtain for records destruction purposes information regarding the purpose of emails owned, used, or retained, but not prepared by the agency. If so, the discretion that exists regarding destruction of local agency records under the reasoning in Opinion No. 80-1006 would seem applicable primarily to agency-created records. Based on that logic, emails owned, used, or retained but not prepared by local agencies, such as emails received from outside the agency, may need to be retained and only destroyed as permitted by the records destruction /retention statutes. This would require retaining emails sent to the agency from outside for two years (or longer, if a longer retention statute applies or there are pending matters involving the emails). However, it may be that local agency published policies or regulations may assist in addressing the purpose of emails generated or received by the agency for purposes of email destruction/retention. For example, local agency email policy information on websites, records request forms and other easily accessible locations may specify that emails created or received by the agency are deemed not intended for retention for later reference unless the creator of the record, an authorized official, or applicable law requires otherwise.



**g. Local Agency Risk from Email Destruction/Retention Policies**

Some open government advocacy entities have opposed practices by some agencies to routinely delete agency electronic communications that are less than 2 years old and that the agency no longer requires. CalAware is on record as threatening the city of Lake Forest with litigation over a proposal to destroy emails every 90 days.<sup>28</sup> CalAware analysis of government agencies' records retention obligations discusses the prohibitions against stealing, defacing, destroying or altering records in the custody of public officers (discussed above).<sup>29</sup> The CalAware analysis notes that the statutory prohibitions against records destruction do not include a specific intent requirement, that exempt status of records is not a defense against the prohibition, and that the prohibition applies to records not required by law to be created or maintained.<sup>30</sup> The CalAware analysis acknowledges the records retention statute (discussed above) that permits destruction of records older than 2 years if another retention statute requiring a longer retention does not apply.<sup>31</sup> However, it appears that the CalAware position is that all local agency emails must be retained for at least 2 years, and that earlier destruction may be subject to criminal penalties.<sup>32</sup> The CalAware position on government records retention is critical of agencies that periodically purge emails because they are transitory or are drafts exempt from the Public Records Act.<sup>33</sup>

The CalAware analysis concludes that the general records destruction/retention statute applicable to cities includes no definition of "public records" subject to the statute, which could exclude some records from the retention requirements.<sup>34</sup> Notably, the CalAware analysis does not mention Opinion 80-1006, and the definition of "public records" subject to the records destruction/retention laws that can be derived from the case law.<sup>35</sup> Accordingly, it appears that CalAware's position is that local agency officials may not create temporary records, and that all agency records must be retained for at least 2 years. The CalAware reasoning is inconsistent with and does not discuss Attorney General Opinion 80-1006 (even though the CalAware analysis considers authorities discussed in the opinion). Although Opinion 80-1006 gives support for the ability of local agencies to create temporary records and destroy them before 2 years have elapsed, and the reasoning in that opinion appears consistent with the statutes and case law on which it relies, there is no reported case specifying how long local agency emails must be kept. Therefore, local agencies should be aware that policies providing for destruction of emails less than 2 years old may face legal challenge.

**III. (Still) Emerging Issue – Agency Officials' Emails on Their Own Accounts and Devices**

For now, no reported case in California addresses whether emails relating to the conduct of the public's business sent or received by public agency officials on their private devices using their private accounts are public records subject to the Public Records Act. At least two California trial court rulings have reached this issue, with opposite results.

**a. The Trial Court Ruling in *Tracy Press v. City of Tracy***

The first such case, from 2007, involved a petition brought by the *Tracy Press* against the City of Tracy, the City Council, and a City Council member for emails between the city council member and Lawrence Livermore Laboratory officials.<sup>36</sup> The emails were sent and received using the

council member's home computer and her private email account.<sup>37</sup> The City of Tracy denied the *Tracy Press* request for the emails. The trial court ruled for the City, the City Council and the council member. *Tracy Press* appealed, but the appellate court dismissed the appeal because *Tracy Press* failed to name the council member as a respondent on appeal, and the court ruled the council member was an indispensable party.<sup>38</sup>

The trial court in the *Tracy Press* case determined that the city council member was not a "local agency" as defined in the Public Records Act.<sup>39</sup> Based on that determination, the court concluded that the council member emails sought by *Tracy Press* were not public records prepared, owned, used, or retained by a local agency.<sup>40</sup> The trial court also concluded that Proposition 59, which incorporated the public's right to access public records into Article I of the California Constitution, did not expand the definitions of "local agency" or "public records" in the Public Records Act.<sup>41</sup> Based on its analysis, the court noted:

[i]n the absence of a clear legislative intent to expand the existing definitions of "public record" and "local agency" to cover the writings sought in this action, the court will forgo the Petitioner's invitation to rewrite the applicable legislative enactments.<sup>42</sup>

The trial court's reasoning in the *Tracy Press* case is consistent with the definitions and structure of the Public Records Act, the authority wielded by city councils and city council members, and the practical realities of managing local agency electronic information systems. The reasoning by the *Tracy Press* trial court is consistent with the definitions and structure of the Public Records Act because it accurately applies the definitions contained in the Public Records Act that govern what records of what entities are subject to disclosure under the Act. The key definition of "public records" covers

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.<sup>43</sup>

The definition of "local agency" covers

a county; city, whether general law or charter; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivision (c) and (d) of section 54952.<sup>44</sup>

For purposes of the Public Records Act, a council member is not a local agency, because local agencies are defined as collective bodies (corporations, boards, commissions, bodies) and not their individual members. The "local agency" definition includes no single official, only various government bodies. The emails sought from the council member's personal computer and her personal email account are not public records subject to the Public Records Act because although some of the personal emails may relate to the conduct of the public's business, they have not been prepared, owned, used or retained by a local agency (only by the council member). Of course, emails sent from or to a council member's private computer and account from a city computer and

account that relate to the conduct of the public's business would be public records, because they would be prepared, owned, used or retained by a local agency. However, there was no indication in the *Tracy Press* case that the emails sought had been sent from or to city accounts.

The trial court's reasoning in the *Tracy Press* case is also consistent with other sections of the Public Records Act that make clear that the disclosure obligations under the Act apply to agencies rather than individual officials. Following are a few samples of provisions throughout the Public Records Act that indicate that the records disclosure duties established in the Act are duties of agencies rather than individual officers. For example, public records are open to inspection at all times during the office hours of state or local agencies.<sup>45</sup> Also, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable.<sup>46</sup> As well, costs and fees awarded to successful petitioners seeking an order to disclose public records must be paid by the public agency and are not a personal liability of public officials.<sup>47</sup>

The trial court reasoning in the *Tracy Press* case is also consistent with the nature of the authority wielded by most city council members. City council action typically requires action of a quorum of the body as a whole. Absent a delegation of authority by the city council, and except in the case of mayors of charter cities that have voter-approved "strong mayor" forms of government, individual city council members typically lack the power to act for or bind the city.<sup>48</sup> This remains true concerning individual council member communications on city business. Absent a delegation of authority, communications of individual council members are not communications on behalf of the whole city council. Such communications are not communications of the local agency, even though they may be subject to other laws affecting local agencies, like the Brown Act.

Perhaps most importantly, the trial court reasoning in the *Tracy Press* case conforms not only to the definitions of the records and bodies subject to the Public Records Act, but also to the realities of managing local agency electronic information systems. Emails sent on council members' personal communications devices and accounts that are not sent from or to city systems are not subject to city control. City staff are unable to search for, retrieve, review, redact, copy, transmit, or store such records unless and until they are transmitted to city systems. The definition of public records subject to local agencies' transparency obligations is broad enough to cover any kind of record, in any form (that now exists or is later created), that relates to the conduct of the public's business, and that is possessed by a public agency. The definition of records subject to the Public Records Act is not so broad as to cover records not prepared, owned, used, or retained by local agencies.

**b. The Trial Court Ruling in *Smith v. San Jose***

The recent superior court case of *Smith v. San Jose* involved a request submitted to the City of San Jose for any communications created or received by the City of San Jose, its redevelopment agency, or any city officials, including the Mayor and city council members, relating to specified persons and entities, and certain downtown issues.<sup>49</sup> The request also sought all electronic information relating to public business sent or received by the Mayor and two named council members using their private electronic devices.<sup>50</sup> The city disclosed all non-exempt records sent

from or received on private devices using city accounts, but declined to disclose records sent from or received on private devices using private accounts.<sup>51</sup>

The court held that the messages relating to the conduct of the public's business sent on private devices using private accounts are subject to disclosure.<sup>52</sup> The court noted that the city is a local agency subject to the Public Records Act, that the emails sent on private devices and accounts are "writings" as defined in the Public Records Act, and that the requested emails relate to the conduct of the public's business.<sup>53</sup> The court concluded that the requested records were "prepared, owned, used, or retained" by the city because the Public Records Act definition of "public agency" includes individual officials.<sup>54</sup> The court argued that the city's interpretation that the requested records are not public records subject to the Public Records Act, because they are not prepared, owned, used or retained by a government agency, as a result of being stored on council members' personal devices and accounts, improperly focuses on where records are stored as a basis for determining whether they are subject to the Public Records Act.<sup>55</sup> The court was doubtful that city officials could claim a reasonable expectation of privacy in their communications regarding the public's business, especially on topics on a public agenda, and noted that exempt personal information could be redacted.<sup>56</sup> The court also noted that the city made no showing regarding the burden of collecting records from private email accounts, and that by resolution adopted in 2010 the San Jose City Council had required city council members and staff to disclose emails from their personal devices and accounts.<sup>57</sup> Accordingly, the court held that communications relating to the conduct of the public's business that are maintained on the private accounts of city officers are "retained" by the agency.<sup>58</sup>

The trial court ruling in the *Smith* case raises a number of concerns regarding the interpretation and scope of the Public Records Act. The *Smith* court ruling appears to be an antipode to the *Tracy Press* case. Instead of applying the definitions in the Public Records Act, the *Smith* case reads new meaning into the Public Records Act definition of "public agency," relying on authorities not related to the Public Records Act. The *Smith* ruling also appears to ignore recent case law regarding public officials' expectation of privacy in their electronic communications, as well as practical difficulties involved in agencies obtaining communications not prepared, owned, used or retained by the agency from third parties.

The court in *Smith* observes that there is nothing in the Public Records Act that explicitly excludes officials from the definition of "public agency."<sup>59</sup> The court also cites authority for the proposition that cities only act and execute their duties through their officers, employees, and agents.<sup>60</sup> However, one of the cited cases preceded enactment of the Public Records Act by 6 years and involved a discovery dispute between private parties regarding whether film the defendant's investigator had made of the plaintiff was discoverable.<sup>61</sup> The focus of the case was whether the film was protected by the attorney client privilege or work product doctrine.<sup>62</sup> The court in the cited case referred to public bodies acting only through their officers and employees to distinguish a prior case involving a claim of privilege by the City of San Francisco regarding employee-generated information.<sup>63</sup> The other case cited in *Smith* to support the court's determination that the definition of "public agency" in the Public Records Act should include individual officials involved a venue dispute in taxpayer litigation brought against the UC Regents.<sup>64</sup> The court in that cited case determined that the UC Regents should be treated as a "public officer" for purposes of the venue statutes.<sup>65</sup> The language quoted in the *Smith* case is quoted in the cited case from a

North Carolina Supreme Court case holding that the term “public officer” as used in venue statutes includes public agencies.<sup>66</sup>

As is clear from the authorities cited in the *Smith* case, the court strayed far from the Public Records Act and its case law to support the proposition that “public agency” as defined in the Public Records Act includes individual officials. While it hardly seems debatable that public agencies act through their officials, that fact does not determine the applicability of the particular duties imposed under the Public Records Act. The provisions of the Public Records Act and the case law construing them determine the applicability of the Act’s duties. The Public Records Act applies to “writings” relating to the conduct of the public’s business prepared, owned, used or retained by any “state agency” or “local agency.”<sup>67</sup> The definitions in the Public Records Act distinguish between bodies that are subject to certain obligations and possess certain rights under the Act, and individuals that are subject to certain obligations and possess certain rights under the Act. The Public Records Act obligates “local agencies” to make “public records” available for inspection by any “person” or to provide copies to any “person.”<sup>68</sup> The Public Records Act gives “members of the public” a right to assistance in locating “public records” and obligates “local agencies” to provide the assistance.<sup>69</sup> The Public Records Act gives individual members or officers of any “state agency” or “local agency” access to “public records” of that agency on the same basis as any other “person.”<sup>70</sup> The Public Records Act authorizes any “person” to seek injunctive or declaratory relief or a writ of mandate to enforce his or her right to inspect or receive a copy of “public records.”<sup>71</sup> The Public Records Act provides that court costs and reasonable attorneys’ fees awarded to successful litigants under the Public Records Act are the responsibility of state and local agencies, not individual officials.<sup>72</sup> The provisions of the Public Records Act distinguish through express language and use of defined terms when rights and obligations established under the Act are those of individuals, and when they are those of government bodies. The Legislature clearly could have, but did not, make the disclosure obligations under the Public Records Act the duty of individual officials rather than government bodies as entities. The disclosure obligations under the Public Records Act apply to writings containing information relating to the conduct of the public’s business that are prepared, owned, used or retained by any state or local agency.<sup>73</sup>

The court in the *Smith* case characterized the city’s insistence that its obligations under the Public Records Act are limited to records prepared, owned, used or retained by the city as an improper focus on where records are stored.<sup>74</sup> However, such requirements for records subject to the Public Records Act are express statutory requirements. It is clear from the face of the Public Records Act that for records to be subject to the Act, it is not enough that the records relate to the conduct of the public’s business; they must also be prepared, owned, used or retained by a state or local agency. If not, they are not subject to the Public Records Act and the disclosure duties imposed on public agencies under the Public Records Act.

The court in *Smith* concluded that it is doubtful that city officials could claim a reasonable expectation of privacy in their communications concerning the public benefit. That is a somewhat surprising conclusion in the absence of any discussion of a recent U.S. Supreme Court ruling addressing whether Sergeant Quon of the City of Ontario may have a reasonable expectation of privacy protected under the 4<sup>th</sup> Amendment in text messages on his city-issued pager.<sup>75</sup> Without deciding whether the sergeant was entitled to 4<sup>th</sup> Amendment protection, the Court concluded that,

assuming he was, a warrantless review of the sergeant's text message transcripts to determine whether the city-provided pager minutes were insufficient, or whether the minutes were being consumed by personal business, was reasonable because it was for non-investigatory, work-related purposes or for the investigation of work-related misconduct, and the measures used were reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.<sup>76</sup> Although leaving much undecided, the *Quon* case clearly implies that public agency officials may have a reasonable expectation of privacy in their electronic communications, even where the communications are on a city-provided, city-funded pager. In the case of a council member's use of his or her private electronic communications device and account, the expectation of privacy is presumably greater. Although the *Smith* court notes that exempt council member emails can be redacted and not produced, reviewing the council member's emails for those responsive to a request, redacting exempt emails and exempt portions of emails, and production of the non-exempt, responsive emails would require reviewing all of the council member's private emails on their private device and account.<sup>77</sup> That would be a more invasive search than that considered in the *Quon* case. The decision in the *Smith* case appears to ignore the privacy interests the *Quon* case suggests would be implicated in review and disclosure of private emails of public officials.

The *Smith* court concluded that the city did not make a showing regarding the burden of collecting and reviewing council members' private emails.<sup>78</sup> However, a substantial burden may be involved in obtaining records not maintained by or directly accessible to a public agency. The agency must request the records from the possessor, and will not be in a position to verify whether all responsive records have been provided absent the cooperation of the possessor. Also, if a possessor declines to cooperate with a local agency regarding a pending request, it is the agency that will be subject to an award of fees and costs, not the uncooperative official.<sup>79</sup>

The *Smith* court discussed "sunshine" policies of the city requiring disclosure of private emails, noting that public entities could require council members and staff to disclose such communications.<sup>80</sup> Interestingly, the court does not appear to directly consider whether the city's policies make subject to disclosure public officials' electronic communications that otherwise may not be. Except as otherwise prohibited by law, public agencies are free to establish for themselves disclosure requirements in excess of the minimum transparency imposed by the Public Records Act.<sup>81</sup> The city's Policy no. 0-33 on public records includes a provision stating that

[r]ecords available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics, *and, in addition, any recorded and retained communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network.*<sup>82</sup>

However, the court did not expressly conclude that disclosure of the requested council member emails sought from their private devices was a requirement of the city's public records policy. It appears that the *Smith* court refers to the city's sunshine policies to show obtaining emails from private accounts may not be burdensome.<sup>83</sup>

#### **IV. Conclusion**

Destruction and retention of local agency emails is not governed by the Public Records Act, and is instead addressed in other statutes.<sup>84</sup> The California Attorney General has opined that public records not required to be retained by law, such as recordings of city council meetings made to aid in minutes preparation, and that are not intended to be retained for later reference, may be destroyed at any time.<sup>85</sup> Applying the Attorney General's reasoning, the records destruction/retention statutes applicable to most city records, including emails, can be read to permit some discretion regarding destruction and retention of emails and other records not subject to special retention statutes and not intended to be retained for later reference. Such discretion should permit local agencies to create temporary records not required to be retained by law, including some emails, that are subject to destruction at any time that the records have served or are no longer needed for their intended purpose. Nonetheless, no statute or reported case expressly authorizes destruction of local agency records such as emails that are not expressly required to be retained by statute and are not intended to be retained for later reference. Also, some open government advocacy entities appear prepared to challenge local government email destruction/retention policies that permit destruction of emails less than 2 years old.<sup>86</sup> Consequently, agencies that adopt policies permitting destruction of agency emails that are less than 2 years and that are not otherwise required to be retained by law may face legal challenge, despite the legal support for the lawfulness of such policies.

Some agencies may wish to evaluate the use of hardware and software systems that are capable of storing and efficiently searching vast amounts of electronic information, including emails, as a means for complying with the Public Records Act requirements applicable to mails. Such systems may potentially obviate the need for policies providing for purging of some agency emails less than 2 years old in order to address agency data storage limitations and the time required and other difficulties involved in searching through very large quantities of electronic records, such as emails. Accompanying the presentation of the main ideas discussed in this paper at the 2013 City Attorneys' conference will be a demonstration of approaches for using currently-available electronic records storage and searching software and hardware to assist local agencies in maintaining transparency of non-exempt electronic records in accordance with the Public Records Act. Effective storage and searching capabilities for local agency emails and other electronic records may help facilitate timely production in response to records requests while avoiding excessive staff time needed to search for and locate responsive records, and potential agency liability due to failure to locate and produce non-exempt, responsive records. At the present time, when the legal requirements for retention of local agency emails are not completely clear, and policies intended to address the challenges involved with managing, searching and reviewing large amounts of local agency electronic records have been threatened with litigation, it may be that advances in systems for storing and efficiently searching large amounts of agency electronic records offer a practical solution for some agencies.

At present, whether, or the extent to which emails related to the conduct of the public's business on public officials' personal devices and accounts are subject to the Public Records Act remains an evolving issue, with no clear guidance in the case law. Careful review of relevant provisions of the Public Records Act suggests that emails related to the conduct of the public's business on public

officials' private devices and accounts may not be subject to the Public Records Act, because the Public Records Act applies to state and local agencies, not to individual officials, and because such emails on private devices and accounts are not prepared, owned, used or retained by a state or local agency.<sup>87</sup> In 2007, a superior court opinion issued in San Joaquin County so held.<sup>88</sup> Also, a recent U.S. Supreme Court ruling suggests that public agency officials may have a protected, reasonable expectation of privacy in their electronic communications.<sup>89</sup> More recently, however, in March of 2013, a superior court in Santa Clara County held the opposite, ruling that the definition of "public agency" in the Public Records Act includes individual public agency officials, and that city officials' emails related to the conduct of the public's business kept on the officials' own devices and accounts are public records subject to the Public Records Act.<sup>90</sup> For now, we continue to await a definitive answer from the courts or the Legislature regarding whether public agency officials' emails and other electronic communications related to the conduct of the public's business on officials' private devices and accounts are subject to the Public Records Act. In the meantime, hopefully the discussion in this paper will assist local agencies in determining for themselves what treatment of agency officials' electronic communications best comports with the government transparency, individual privacy and effective government purposes of the Public Records Act.<sup>91</sup>

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<sup>1</sup> *Los Angeles Police Dept. v. Superior Court* (1977) 65 C.A.3d 661, 668. The role of the Public Records Act in comparison with the law governing California government agency records retention is discussed in Chapter 6 of *The People's Business: A Guide to the California Public Records Act* at page 52, and at page 13 of the supplement, available on-line at <http://www.cacities.org/Resources/Open-Government>. An article entitled "Local Agency Electronic Media Use and California Public Records Law" from the June, 2012 issue of *Western Cities* magazine is also available in the Open Government section of the League of California Cities website. These resources provide additional information related to the topic discussed in this paper.

<sup>2</sup> Gov't. Code §§34090, 34090.5, 34090.6, 34090.7, 6200, 6201, 6203.

<sup>3</sup> Some particular types of records are subject to special retention requirements; e.g., Gov't. Code §832.5(b) requires retaining complaints by members of the public regarding police officers for 5 years. The Secretary of State provides "Local Government Records Management Guidelines" pursuant to Gov't. Code §12236. The guidelines are available online at <http://www.sos.ca.gov/archives/local-gov-program/pdf/records-management-8.pdf>. Exhibit C of the guidelines is a document entitled "Local Agency Records Retention Guidelines" prepared by the City Clerks Association of California. It lists many types of records maintained by local agencies and provides statutory citations for retention requirements applicable to particular types of records.

<sup>4</sup> Gov't. Code §34090.

<sup>5</sup> Gov't. Code §34090.5.

<sup>6</sup> Gov't. Code §34090.6.

<sup>7</sup> Gov't. Code §34090.7.

<sup>8</sup> Gov't. Code §6200.

<sup>9</sup> Gov't. Code §6201.

<sup>10</sup> 64 Ops.Cal.Atty.Gen. 317 (1981).

<sup>11</sup> 64 Ops.Cal.Atty.Gen. 317 (1981).

<sup>12</sup> 64 Ops.Cal.Atty.Gen. 317, 318 (1981).

<sup>13</sup> 64 Ops.Cal.Atty.Gen. 317, 319 (1981).

<sup>14</sup> 64 Ops.Cal.Atty.Gen. 317, 320 (1981), citing Gov't. Code §54957.2.

<sup>15</sup> 64 Ops.Cal.Atty.Gen. 317, 320 (1981), citing Gov't. Code §6253

<sup>16</sup> 64 Ops.Cal.Atty.Gen. 317, 321 (1981), citing former Gov't Code §§6256, 6257, now §6253, subd. (b).

<sup>17</sup> 64 Ops.Cal.Atty.Gen. 317, 327 (1981).

<sup>18</sup> 64 Ops.Cal.Atty.Gen. 317, 323 (1981).

<sup>19</sup> 64 Ops.Cal.Atty.Gen. 317, 326 (1981).



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- <sup>20</sup> Gov't. Code §6252, subd. (e).
- <sup>21</sup> Gov't. Code §6252, subd. (g).
- <sup>22</sup> Gov't. Code §6252, subds. (d), (g), and §6253, subds. (a), (b).
- <sup>23</sup> Gov't. Code §6253, subd. (a).
- <sup>24</sup> *Los Angeles Police Dept. v. Superior Court* (1977) 65 C.A.3d 661, 668.
- <sup>25</sup> Gov't. Code §6252.
- <sup>26</sup> 64 Ops.Cal.Atty.Gen. 317, 326 (1981), *People v. Pearson* (1952) 111 C.A.2d 9, *People v. Tomalty* (1910) 14 C.A.2d 9.
- <sup>27</sup> 64 Ops.Cal.Atty.Gen. 317, 327 (1981).
- <sup>28</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>29</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>30</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>31</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>32</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>33</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>34</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>35</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>36</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588. The trial court ruling in *Tracy Press* was discussed in an article entitled "Local Agency Electronic Media Use and California Public Records Law," in the June, 2012 edition of *Western City Magazine*, as well as in a paper entitled "Web 2.0 and Electronics – Emerging Public Records Issues" presented at the September, 2010 League of California Cities Annual Conference in San Diego.
- <sup>37</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588.
- <sup>38</sup> *Tracy Press, Inc. v. City of Tracy* (2008) 164 C.A.4<sup>th</sup> 1290, 1295.
- <sup>39</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588, 2. Also see Gov't. Code §6252, subd. (a).
- <sup>40</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588, 3. Also see Gov't. Code §6252, subd. (e).
- <sup>41</sup> A number of appellate cases have held that Proposition 59 preserved all existing statutory and common law exemptions applicable to the Public Records Act. See *Sutter's Place v. Superior Court* (2009) 161 Cal.Ap.4<sup>th</sup> 1370, *BRV, Inc., v. Superior Court* (2006) 143 Cal.Ap.4<sup>th</sup> 742, *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4<sup>th</sup> 759, *International Federation of Professional and Technical Engineers, Local 21-AFL-CIO* (2007) 42 Cal.4<sup>th</sup> 319.
- <sup>42</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588, 3.
- <sup>43</sup> Gov't. Code §6252, subd. (e).
- <sup>44</sup> Gov't. Code §6252, subd. (a).
- <sup>45</sup> Gov't. Code §6253, subd. (a).
- <sup>46</sup> Gov't. Code §6253, subd. (b).
- <sup>47</sup> Gov't. Code §6259, subd. (d).
- <sup>48</sup> See §1.223 concerning the rights and roles of council members, and §1.182 concerning strong mayors in *The California Municipal Law Handbook*, 2012 edition, produced by the League of California Cities and Continuing Education of the Bar.
- <sup>49</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427.
- <sup>50</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 1.
- <sup>51</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 5.
- <sup>52</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.
- <sup>53</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.

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- <sup>54</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.
- <sup>55</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.
- <sup>56</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6,7
- <sup>57</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7.
- <sup>58</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7.
- <sup>59</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.
- <sup>60</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7, citing *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 174 and *Regents of the Univ. of Cal. v. Superior Court* (1970) 3 Cal. 3d 529, 540.
- <sup>61</sup> *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 174.
- <sup>62</sup> *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 174.
- <sup>63</sup> *Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 174.
- <sup>64</sup> *Regents of the Univ. of Cal. v. Superior Court* (1970) 3 Cal. 3d 529.
- <sup>65</sup> *Regents of the Univ. of Cal. v. Superior Court* (1970) 3 Cal. 3d 529, 540.
- <sup>66</sup> *Regents of the Univ. of Cal. v. Superior Court* (1970) 3 Cal. 3d 529, 540.
- <sup>67</sup> Gov't. Code §6252, subd. (e).
- <sup>68</sup> Gov't. Code §6253, subds. (a), (b).
- <sup>69</sup> Gov't. Code §6253.1.
- <sup>70</sup> Gov't. Code §§6252.5, 6252.7.
- <sup>71</sup> Gov't. Code §6258.
- <sup>72</sup> Gov't. Code §6259, subd. (d).
- <sup>73</sup> Gov't. Code §§6252, subds. (a), (e), (f), (g), 6253, subds. (a), (b).
- <sup>74</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6.
- <sup>75</sup> *City of Ontario v. Quon* (2010) 130 S.Ct. 2619, 2624.
- <sup>76</sup> *City of Ontario v. Quon* (2010) 130 S.Ct. 2619, 2632, 2633.
- <sup>77</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 6, 7.
- <sup>78</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7.
- <sup>79</sup> Gov't. Code §6259, subd. (d).
- <sup>80</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7.
- <sup>81</sup> Gov't. Code §6253, subd. (e).
- <sup>82</sup> City of San Jose Council Policy Number 0-33 effective January 27, 2004 and most recently revised by Resolution 76496 on November 27, 2012, italics added.
- <sup>83</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427, 7.
- <sup>84</sup> See, e.g., Gov't. Code §§34090, 34090.5, 34090.6, 34090.7, 6200, 6201, 6203.
- <sup>85</sup> 64 Ops.Cal.Atty.Gen. 317, 327 (1981).
- <sup>86</sup> "Cal Aware: We'll Sue to Stop Mass Email Purging," <http://calaware.org/open-government/calaware-well-sue-to-stop-mass-email-purging>.
- <sup>87</sup> Gov't. Code §6252, subds. (a), (e).
- <sup>88</sup> *Tracy Press v. City of Tracy* (2007) San Joaquin County Superior Court Case no. CV029588.
- <sup>89</sup> *City of Ontario v. Quon* (2010) 130 S.Ct. 2619.
- <sup>90</sup> *Smith v. San Jose* (2013) Santa Clara County Superior Court Case no. 1-09-CV-150427.
- <sup>91</sup> See Cal. Const. Art. I, §3, subd. (b)(5), Gov't. Code §§6250, 6255.