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MEMORANDUM OF LAW

DATE: April 4, 2017

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: California Supreme Court Decision: *City of San Jose v. Superior Court* (*Smith*)

INTRODUCTION

On March 2, 2017, the California Supreme Court (Supreme Court or Court) in *City of San Jose v. Superior Court* (*Smith*), 214 Cal. Rptr. 3d 274 (2017) (*San Jose* or *San Jose* decision) determined that the California Public Records Act (CPRA) applies to records created or received by public officers and employees on private electronic devices and accounts, including electronic mail (email) and text messages. The Court considered the language of the CPRA and the policy interests it serves, and concluded that "[e]mployees' communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission." *San Jose*, 214 Cal. Rptr. 3d at 279. The *San Jose* decision is binding on the City of San Diego (City), as discussed in this Memorandum.

This Memorandum provides general guidance on the *San Jose* decision. This Office is presently working with Human Resources Department staff to review and update the City's administrative regulations to incorporate the *San Jose* decision. This Office is also able to assist with drafting City Council (Council) policies or ordinances, as directed by the full Council. However, before proceeding with a Council policy or ordinance that may trigger collective bargaining issues, this Office recommends that the City's management team seek instructions from the Council in closed session, in accordance with California Government Code (Government Code) section 54957.6(a).

DISCUSSION

I. THE SUPREME COURT HOLDS THAT RECORDS ON PERSONAL DEVICES OR ACCOUNTS MAY BE SUBJECT TO DISCLOSURE UNDER THE CPRA.

When an officer or employee for a state or local government agency in California uses a personal electronic account or device to conduct public business, the writings on that personal account or device are within the definition of public records and may be subject to disclosure under the CPRA. *San Jose*, 214 Cal. Rptr. 3d at 278. The CPRA, which is set forth at Government Code sections 6250 through 6276.48, requires the City to provide public access to records relating to the conduct of public business unless there is an express exemption, such as the exemptions for legally privileged documents or confidential personnel records. *See* Cal. Gov't Code §§ 6253-6253.1 (general disclosure requirements); Cal. Gov't Code §§ 6254-6255 (exemptions defined).

The *San Jose* decision involved a request by a citizen, Ted Smith, for public records from the City of San Jose concerning redevelopment efforts in the city's downtown area, including emails and text messages "sent or received on private electronic devices used by" the mayor, two councilmembers, and their staff members. *San Jose*, 214 Cal. Rptr. 3d at 278. The city did not disclose any communications conducted via the individuals' personal accounts, asserting the communications were not public records because they were not within the public entity's custody or control. *Id*. Mr. Smith filed a lawsuit, seeking the requested records and asserting that communications on private devices fell within the CPRA's definition of public records. The trial court ordered disclosure of the records. *Id.* The city sought a writ of mandate, which the Court of Appeal issued, reversing the trial court order. *Id*. Mr. Smith then sought review before the Supreme Court, which was granted. The Supreme Court reversed the judgment of the Court of Appeal and issued the *San Jose* decision, applying the CPRA to records on private devices and accounts under specified circumstances. *Id*.

In reaching its decision, the Court examined the language of the CPRA and the policy interests it serves. *Id*. at 279. The Court defined a public record as "(1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, *or* (4) owned, used, or retained by any state or local agency." *Id*. at 280. The Court explained that the definition of a "writing" under the CPRA includes electronic mail and "every other means of recording upon any tangible thing any form of communication or representation . . . and any record, thereby created, regardless of the manner in which the record has been stored." *Id*. (citing Cal. Gov't Code § 6252(g)). Therefore, electronic communications, including email, text messages, and communications in other electronic platforms, are writings under the CPRA.

The Court rejected the city's argument that the CPRA distinguishes between the type of account – city-owned or controlled or personal – used to prepare or transmit a communication. The Court concluded that it does not matter that a writing is not accessible to a public agency through its servers or in its offices. *Id*. at 285-286. If the writing is prepared by a public employee conducting agency business, then it is "prepared by" the agency within the meaning of the CPRA (specifically, Government Code section 6252(e)), regardless of the fact that the employee used a personal device or account. *Id*. at 283.

The Court stated: "We . . . hold that documents otherwise meeting CPRA's definition of 'public records' do not lose this status because they are located in an employee's personal account." *Id*. at 285. Stated similarly, "a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account." *Id*. at 286. If the Court were to conclude otherwise, then "government officials could hide their most sensitive, and potentially damning, discussions in such accounts. . . . If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny." *Id*. at 287.

The Court also explained, however, that not everything written by a public employee is subject to disclosure under the CPRA. The Court recognized that there is a distinction between work-related and purely private communications, and that communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records. *Id*. at 281. A public record is "kept by an officer because it is necessary or convenient to the discharge of his official duty." *Id*. at 281 (quoting *Braun v. City of Taft*, 154 Cal. App. 3d 332, 340 (1984)). Stated similarly, a public record is one "prepared by a public employee conducting agency business." *Id*. at 283. "The writing must relate in some substantive way to the conduct of the public's business." *Id*. at 281. Although the Court did not define "substantive," it did offer examples: "[D]epending on the context, an email to a spouse complaining 'my coworker is an idiot' would likely not be a public record. Conversely, an email to a superior reporting the coworker's mismanagement of an agency project might well be." *Id*.

The Court said that writings in personal accounts must be examined in response to a request for records under the CPRA, looking at the content, context, and purpose of the writing; the audience to whom the writing was directed; and whether the writing was prepared by an employee acting within the scope of his or her employment. *Id*. The Court explained that the analysis of records must focus on their content rather than their location or medium of communication.

II. THE COURT ALSO STATES THAT PRIVACY RIGHTS OF OFFICERS AND EMPLOYEES IN THEIR PERSONAL DEVICES AND ACCOUNTS MUST BE CONSIDERED ON A CASE-BY-CASE BASIS.

The Court acknowledged that "public employees do not forfeit all rights to privacy by working for the government." *Id*. at 287 (citing *Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal. 3d 937, 951 (1986)). The Court said that privacy concerns should be addressed on a case-by-case basis; personal information not related to the conduct of public business or records expressly exempt from disclosure can be redacted from records that must be disclosed. *Id*. (citing Cal. Gov't Code § 6253(a)). For example, there are statutory exemptions for preliminary drafts, notes, or memoranda (Cal. Gov't Code § 6254(a)); personal financial data (Cal. Gov't Code § 6254(n)); personnel and medical files (Cal. Gov't Code § 6254(c)); and material protected by evidentiary privilege (Cal. Gov't Code § 6254(k)). There is also a "catchall exemption" that allows agencies to withhold any record if the public interest served by withholding it "clearly outweighs" the public interest in disclosure. Cal. Gov't Code § 6255(a). *San Jose*, 214 Cal. Rptr. 3d at 287.

The Court offered some guidance for conducting searches for records on private devices or accounts: the scope of an agency's search for public records must be "with reasonable effort" and "reasonably calculated to locate responsive documents." *San Jose*, 214 Cal. Rptr. 3d at 288 (citing *California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 166 (1998); *American Civil Liberties Union v. Superior Court*, 202 Cal. App. 4th 55, 85 (2011)).

The Court explained that the CPRA does not prescribe specific methods of searching for documents, and agencies may develop their own internal policies for conducting searches. *Id*. at 288-289. However, some general principles are applicable. Once an agency receives a CPRA request, it must communicate the scope of the information requested to the custodian of records, or the employee in question, if the request is for public records held in an employee's nongovernmental accounts. *Id*. at 289. The agency may "reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material." *Id*. (italics in original). The Court explained, though, that individual employees conducting their own searches and segregating public records from personal records must be properly trained in how to distinguish them. *Id*. (citing *Ethyl Corp. v. U.S. Environmental Protection Agency*, 25 F.3d 1241, 1247 (4thCir. 1994)). The Court suggested applying the principle sanctioned by federal courts and the Washington Supreme Court of requiring employees who withhold personal records to submit an affidavit that sets forth a sufficient factual basis so that a reviewing court may determine whether withheld material is nonresponsive and the agency's search has been adequate. *Id*. The Court also suggested adopting policies "that will reduce the likelihood of public records being held in employees' private accounts." *Id*. For example, an agency could prohibit the use of personal electronic devices and accounts for public business unless messages are copied and retained in a format that is accessible to the agency or forwarded to agency accounts or servers. *Id*.

III. IMPLEMENTATION OF THE *SAN JOSE* DECISION.

The *San Jose* decision is binding on the City, without any further action of the Council. *See* Cal Gov't Code § 6253(a); *Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal. 4th 59, 67 (2014). It is the duty of the Mayor to ensure that this controlling state law is enforced. *See* San Diego Charter § 28.

To ensure compliance, this Office recommends that the City educate all City officers and employees on the details and scope of the *San Jose* decision through a Citywide communication and by training the CPRA liaisons in each department, who should then train their respective department's employees. The Human Resources Department issued a Citywide notice on March 24, 2017. *See* Attachment A.

This Office is presently working with the Human Resources Department staff to incorporate the *San Jose* decision into the City's administrative regulations that cover electronic records. The administrative regulations should be updated to state that public records include any writings relating to City business that have been sent, received, or stored on personal electronic devices or accounts. The administrative regulations should also mandate that any City officer or employee required to respond to a request for records under the CPRA search City accounts *and* their own personal files, accounts, and devices for responsive records. Employees with questions

about whether a personal record is responsive should discuss the matter with trained staff, such as the CPRA liaison in their respective departments. Further, the City may consider *prohibiting* officers and employees from using personal electronic devices and accounts for public business *unless* electronic communications are copied and retained in accordance with established records retention schedules or forwarded to the City's email server for storage. This prohibition would require compliance with the Meyers-Milias-Brown Act (MMBA), the state collective bargaining law binding on the City, before it is implemented.

This Office also recommends requiring those officers and employees, who must search personal devices or accounts to respond to a specific records request, to complete an affidavit (or statement of compliance) that sets forth that the officer or employee searched all private devices and accounts for responsive records and provided responsive records to the City. Any determination to exempt records from disclosure should be made in consultation with the City's CPRA liaisons and this Office. Use of this affidavit or statement of compliance will require collective bargaining under the MMBA before it is applied to those employees represented by one of the City's recognized employee organizations.

The City presently authorizes stipends to reimburse certain eligible employees for City business use of a personal mobile device under the employee's commercial service plan, as an alternative to issuance of a City-owned cell phone. *See* San Diego Admin. Reg. 90.25. The City may consider modifying or repealing this "bring your own device" policy to make it easier to monitor compliance under the new *San Jose* rules. However, this administrative regulation already mandates that employees receiving the stipend, which covers only a portion of the individual employee's monthly bill, comply with applicable records retention requirements. The regulation requires that work-related text messages be transferred to "an organized and secure system for City records," and that employees comply with the CPRA "for business-related usage." *Id*. at § 4.3.4. Also, San Diego Administrative Regulation 90.66, the Mobile Device Policy, at section 4.8, currently states:

> Users should be aware that City information on City and employee owned mobile devices may be subject to the California Public Records Act (Government Code sections 6250, *et seq*.). Employees must comply with public records requests related to City data on City or employee owned mobile devices.

This regulation should be expanded to clearly include those employees who do not receive a City stipend, but choose to use personal devices or accounts to engage in City business.

If the Council wishes to adopt a Council Policy or codified ordinance, this Office is able to assist in that process. San Diego Municipal Code (SDMC), at Chapter 2, Article 2, Division 26, regarding City records management, presently defines City records and "nonrecords" based on the content of the documents or communications, and not their form. A record is "recorded information of any kind and in any form, created or received by the City that

is evidence of its operations." SDMC § 22.2602.[1] This definition could be modified, in accordance with the *San Jose* decision, to state that City records include those created or received by City officers or employees on personal devices and accounts that relate to the conduct of City business. However, any proposed policy or ordinance should be reviewed for compliance with the MMBA, and any necessary collective bargaining should be completed prior to implementation of the policy or ordinance.

MARA W. ELLIOTT, CITY ATTORNEY

By */s/ Joan F. Dawson*
Joan F. Dawson
Deputy City Attorney

By */s/ Lisa M. DeBolt*
Lisa M. DeBolt
Senior Legal Intern

JFD:LD1:cm
ML-2017-4
Attachment
Doc. No. 1463294_2
cc: Scott Chadwick, Chief Operating Officer
Judy von Kalinowski, Human Resources Director
Hadi Dehghani, Personnel Director
Eduardo Luna, City Auditor
Elizabeth Maland, City Clerk
Andrea Tevlin, Independent Budget Analyst

[1] Records include "electronic documents, electronic databases, electronic mail, correspondence . . . and other documents that have administrative, legal, operational, fiscal, or historical value requiring retention of the record for a specified period of time." *Id.* Records must be maintained pursuant to the established "Records Disposition Schedule" (RDS). SDMC §§ 22.2602, 22.2605, 22.2606. A "nonrecord" is a document that is "not required to be retained in the ordinary course of City business or . . . is a temporary aid and does not appear in the *Records Disposition Schedule*." SDMC § 22.2602. "Nonrecords" include "[e]lectronic mail, instant messages, and voicemail that are not created for the purpose of preserving documentary or information content for future use by the City." *Id.*

From: Employee Notification
Sent: Friday, March 24, 2017 2:01 PM
To: All City Employees <AllCityEmployees@sandiego.gov>
Subject: Notice to all City Officers and Employees

NOTICE TO ALL CITY OFFICERS AND EMPLOYEES WHO USE PERSONAL ELECTRONIC DEVICES AND ACCOUNTS TO COMMUNICATE ABOUT CITY BUSINESS

To All City Officers and Employees:

On March 2, 2017, the California Supreme Court (Supreme Court) issued an opinion in City of San Jose v. Superior Court (Smith)(Case No. S218066), concluding:

- When a government officer or employee in California uses a personal account or device to conduct public business, the writings on that personal account or device are within the definition of public records and may be subject to disclosure under the California Public Records Act (CPRA).
- Officers' or employees' communications about official agency business may be subject to the CPRA regardless of the type of account-- City-owned or controlled or personal -- used to prepare or transmit the communication.
- The writing, including emails and text messages, must relate in some substantive way to the conduct of the City's business to be subject to disclosure under the CPRA.
- This opinion applies to all personal electronic devices, including personal cell phones, tablets, and computers, and personal electronic accounts, including e-mail accounts.

To ensure compliance with this new decision which is binding on the City, any City officer or employee required to respond to a request for records under the CPRA must search City accounts and their own personal files, accounts, and devices for responsive records. Employees with questions about whether a personal record is responsive should discuss the matter with their Department CPRA coordinator and Department Directors.

Employees are reminded to comply with all current Administrative Regulations, including, but not limited to: 85.10 - Records Management, Retention and Disposition; 90.25 - Wireless Communications Services; 90.66 -Mobile Device Security; and 95.20 - Public Records Act Requests and Civil Subpoenas, Procedures for Furnishing Documents and Recovering Costs.

The Human Resources Department will be developing further training and guidance on this new Supreme Court opinion.

Thank you.
Human Resources Department

Supervisors: Please post this message for any employees who do not have access to City e-mail.

Note: This is a broadcast e-mail, please do not reply

ATTACHMENT A