A large green graphic at the top of the page, consisting of several overlapping, semi-transparent geometric shapes (triangles and quadrilaterals) in various shades of green, creating a layered, architectural effect.

CALIFORNIA PUBLIC RECORDS ACT

June 7, 2017

San Mateo County Harbor District

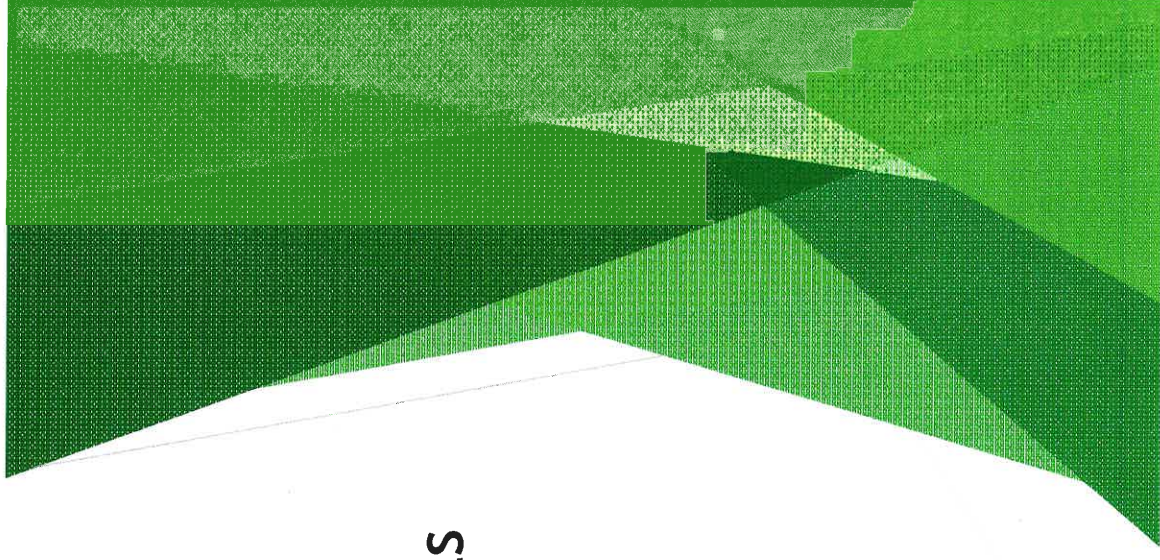
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California Constitution Article 1, Section 3

The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

San José v. Superior Court (3/2/17)

Request sought “voicemails, emails and texts messages sent or received on private electronic devices” of officials and employees.

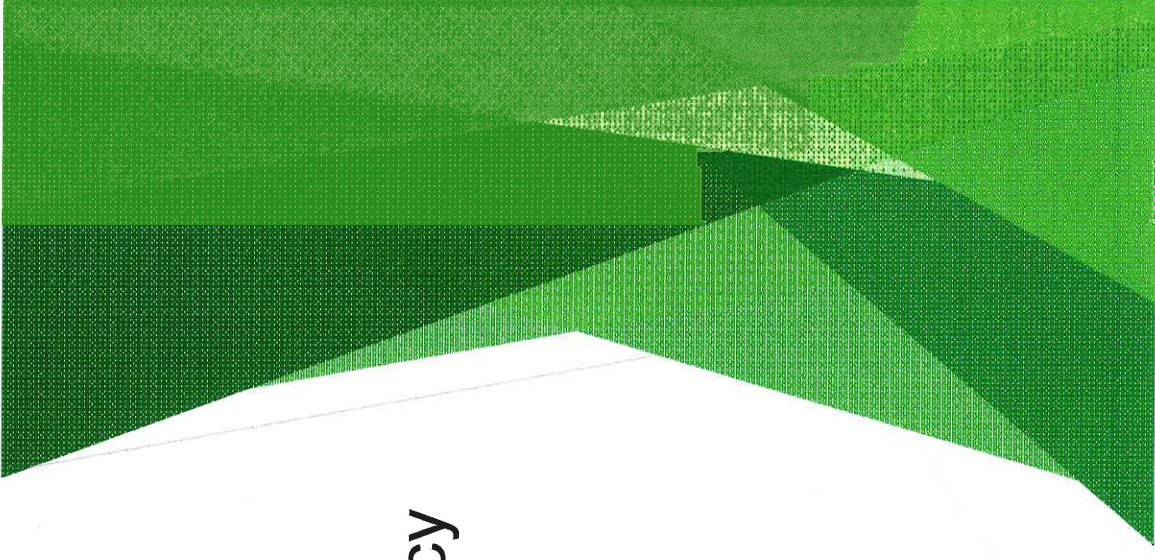


City's Position

“Since the City does not prepare, own, use or retain any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records.”

City's Position

Agency obligations under Public Records Act
must give way to employee and official Privacy
rights



Supreme Court's Holding

- ▶ “Here, we 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.”
- ▶ Undoubtedly applies to officials as well as “employees.”

Supreme Court Reasoning — Relies on the Traditional 4- Part Test

A Public Record is defined 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

(Gov. Code, § 6252, subd. (e).)

(1) A Writing — No Change In Law

“Writing” as defined in the Public Records Act includes any form of communication on electronic devices, including e-mails, texts and voicemails



(2) Relating To Public Business — No Change in law

- ▶ “Content relating to the conduct of the public’s business”
- ▶ The writing “must relate in some substantive way to the conduct of public’s business.”
- ▶ Satisfying this prong of the 4-part test requires judgment. But same as current practice.

(3) Prepared by a State or Local Agency **— No Change in law**

- ▶ A disembodied governmental agency cannot prepare a record. Only the human beings who serve in agencies can do these things.
- ▶ If an agency employee or official prepares a writing that substantively relates to the conduct of public business, that writing is a public record.
- ▶ Electronic communications prepared by public agency officials and employees are “prepared” by the agency as that term is used in the Act.

(4) Owned, Used, or Retained... New interpretation of “retained”

The court found that a writing has been retained by an agency even if the writing is located in an official's or employee's personal account.

Summary of Supreme Court Decision

Where the record resides does not matter.

What matters is whether a record relates in some substantive way to the conduct of public's business. (Same analysis required for all records)

Summary of Supreme Court Decision—Privacy

- ▶ Implication is the PRA trumps individual privacy rights -- public employees and officials give up some First Amendment protections as a condition of public service
- ▶ Privacy rights can be protected by training
- ▶ Privacy rights can be protected by avoiding issue in first place—not using personal accounts

How To Tell If A Record Relates To The Public Business

Same Analysis Agencies have always performed. Multiple Factors—no one is controlling:

- ▲ Content
- ▲ Context
- ▲ Purpose
- ▲ Audience
- ▲ Whether author was acting within the scope of employment in preparing or receiving the communication

Is This Email a Public Record?

To: StaffX@gmail.com

From: Commissioner@smharbor.com

I'd like to meet with you a bit later this week—I know you are still recovering from surgery and imagine the pain meds are still making you groggy. Enjoy it while you can!! I'm trying to understand all of our new public records act requests and want to consider whether the new Supreme Court case indicates that we should be adopting a new Public Records Act policy.

Is This Email a Public Record?

To: Mayor@gmail.com

From: ReElectCommissioner@gmail.com

It was great to see you at Charlie's graduation. Such an accomplishment. I'm looking forward to seeing you at the conference next week. I am going to be seeking re-election and would like to chat with you about endorsing my campaign—in particular since you know I am planning on voting for Item X at the next Commission meeting later this month and doing everything I can to make sure that Item X happens. I know you are planning on gathering before the meeting to discuss the item with concerned members of the public and think that it is great that you are supporting what the District is trying to do. By the way, please respond to this gmail email account so that I can keep my campaign separate from my work for the District.

Location Doesn't Matter — What's the District to Do? Three Steps

- ▶ Court says agency must make “reasonable efforts” to locate records—even when out of its control.
- ▶ No Intrusive searches of private servers.
- ▶ Agency can rely on employee or official.
- ▶ (1) “As to requests seeking public records held in employees’ nongovernmental accounts, an agency’s first step should be communicate the request to the employees in question.”
- ▶ (2) “The agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.”

(Step 3) Court Assumes Employees and Officials Now Have an Obligation to Disclose

The court proposed a mechanism for employees and officials who elect to withhold a document

— Provide an affidavit providing the agency and a reviewing court “a sufficient factual basis upon which to determine whether contested items were agency records or personal materials.”

— Practice under FOIA and Washington State Law

Court imagines scenarios only where officials and employees conduct thorough searches of personal accounts to assist in response — as District now does with records within its control.

Legal Unknowns and Practical Solutions

Unknown

Unknown how lower courts will react to non-disclosure

Unknown how specific the “affidavit” process must be in the event of non-disclosure

Solutions

Don't use personal accounts for official business.

Only use official accounts for official business

Cooperate with request for records on personal accounts