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Public Records Do Not Include E-mails and Text Messages to or from Public Officials, if on Private Electronic Devices and Accounts

March 31, 2014, by [Nicholaus W. Norvell](#), [Ruthann G. Ziegler](#)

On March 27, 2014, a California Court of Appeal held that when officers and employees of a public agency use private accounts and personal electronic devices to send or receive messages, the messages do not qualify as "public records" under the California Public Records Act ("CPRA"), even when the messages concern public agency business. (*City of San Jose v. Superior Court (Smith)* (Mar. 27, 2014, H039498).)

In 2009, Ted Smith filed a request with the City of San Jose seeking public records related to downtown redevelopment. The request sought several categories of records, including "voicemails, emails or text messages sent or received on private electronic devices" used by the Mayor and Council members. When the City objected to this aspect of the request, Smith sought a court order for disclosure of the messages under the CPRA.

In 2013, the trial court ordered the Mayor and City Council members to turn over e-mails, voicemails, and text messages sent or received on private electronic devices and related to downtown redevelopment.

Smith argued that unless private messages related to the public agency are made available under the CPRA, public officials could avoid public scrutiny while conducting the public's business. Others, such as the League of California Cities, argued that disclosure of these messages is impractical because the public agency has no access to the messages.

In *City of San Jose v. Superior Court*, the Court of Appeal reversed the trial court's order, relying on the CPRA's definition of "public records," which are writings relating to the public's business "prepared, owned, used, or retained" by a state or local agency. (Government Code § 6252(e).) The court concluded that because a public agency cannot access or control messages on private accounts or devices, the agency itself cannot prepare, own, use or retain them.

The court acknowledged that the decision might result in public officials using private accounts or devices to conduct public business. However, the court noted that the Legislature is best equipped to address this issue, as well as the practicality and privacy concerns involved in disclosing records from private accounts and devices.

It is likely this case is not the end of the matter; Smith will probably request a hearing before the Supreme Court, which the Court has the discretion to grant or deny. The Legislature may also take up the appellate court's invitation to address this matter.