

Daily Journal

www.dailyjournal.com

FRIDAY, MARCH 3, 2017

COVER STORY

Court: Government cannot shield private devices' data

By Kevin Lee
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Government officials cannot shield messages held on their private devices from a California Public Records Act request, the state Supreme Court unanimously held Thursday in a landmark decision for open government supporters.

The high court overturned the 6th District Court of Appeal, which held in 2014 that the state's public records law does not compel disclosure when public officials communicate using private cellphones or email accounts.

Karl Olson, a lawyer who represented various journalism groups and First Amendment advocates in support of petitioner and record requester Ted Smith, said he was "totally psyched" by the opinion.

"Every city attorney and county counsel in the state of California has either already read this opinion or will read it today," said Olson, a partner at Ram, Olson, Cereghino & Kopczynski LLP in San Francisco.

The city of San Jose argued that the state's public records law did not apply to a public official's messages held on a personal email account or device, even if those messages contained information related to the public interest.

Supreme Court Justice Carol A. Corrigan rejected the city's stance in a 24-page opinion. *City of San Jose v. Superior Court (Smith)*, 2017 DJDAR 1896.

"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," Corrigan wrote.



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James McManis, an attorney with McManis Faulkner in San Jose, won a state Supreme Court decision that public officials' messages on private devices are subject to Public Records Act requests.

James McManis, the lead counsel for Smith, said the high court reached "exactly the right result."

"If public officials don't like having to look at their private devices for stuff, then don't do the public's business on them," said McManis, a longtime trial lawyer at McManis Faulkner in San Jose, who won his first case before the state Supreme Court. "The public's business is going to be available to the public."

Trial courts must decide, on a case-by-case basis, whether a public records request compels a government official to reveal messages or records held on a personal device, Corrigan wrote. Such messages or records must be disclosed if it pertains to the public interest.

"Whether a writing is sufficiently related to public business will not always be clear," Corrigan wrote. "For example, depending 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 [a public record]," Corrigan continued.

The opinion outlines several factors for courts to consider in deciding whether a privately held message is tied to public business, including the content and purpose of the message, the audience for the message and whether the message was prepared within the scope of government or public agency duties.

Ruthann G. Ziegler, a principal at Meyers Nave Riback Silver & Wilson PLC who represents public agencies, said trial courts will have to grapple with close questions of whether a public employee's privately held message is sufficiently tied to public business.

"I think it will be very challenging," said Ziegler, who has followed the case but is not involved. "Where's the bright line about

complaining about someone versus sexual harassment or complaining about someone versus creating an inappropriate work environment?"

The city of San Jose also argued that requiring agencies or governments to look through a public employee's personal device is comparable to searching the public employee's home for documents, an unreasonable invasion of privacy.

"Searches can be conducted in a manner that respects individual privacy," Corrigan wrote, downplaying the city's concerns. Corrigan suggested that governments and agencies could require employees to use work-issued devices and email accounts solely for public business to avoid having their personal devices reviewed for public records.

San Jose City Attorney Rick Doyle said the municipal government will implement policies that conform to the high court's public records decision.

Doyle said it will be labor-intensive to ensure that public officials and employees are properly disclosing messages from privately held devices.

"I can say with certainty that we have the ability to get everything on a government computer," Doyle said. "We can't give the same assurance for a personal device."

Petitioner Smith sued San Jose in 2009 after the city declined to disclose communications sent or received on private electronic devices of various public officials and their staff that were related to downtown development.

McManis and Doyle anticipated that the dispute will return to Santa Clara County Superior Court to decide whether the messages requested by Smith must be revealed.