Court of Appeal Says Communications on Personal Communicating Devices are Exempt from Disclosure under Public Records Act

03.31.2014 | By Stanley S. Taylor

Reversing a Superior Court ruling that had caused quite a splash a few months ago, in *City of San Jose v. Superior Court* (H039498, March 27, 2014), the Sixth District of the Court of Appeal has held that communications to and from a public meeting on private communications devices or private email accounts are not subject to being produced under the California Public Records Act (Cal. Govt. Code, § 6250 et seq.).

Background

The case arose out of a records request to the City of San Jose asking for emails or text messages on private electronic devices of the Mayor, City Council and members or staff, regarding City matters. The City refused. The requester then filed an action for declaratory relief in the Superior Court, and was successful in obtaining summary judgment determining that the City should have produced the records. The Public Records Act defines "public records" to include those of a "local agency." The Superior Court concluded that the City acted through its individual officers and employees, who should therefore be included within the meaning of "agency."

The City, its mayor and council members filed a mandate petition in the Court of Appeal, seeking to overturn the Superior Court ruling. A writ procedure was necessary, because the ruling could not be "appealed" under a part of the Public Records Act meant to expedite decisions on these matters, appeal being a slower process.

Court of Appeal Decision

Although the Court of Appeal acknowledged the public policy favoring the openness of public processes, it also discussed the counterbalancing right of individuals to privacy. Much of the opinion is taken up by the Courts discussion of the balance between those competing issues. In the end, however, the Court simply

concluded that these communications were not public records, using a traditional definitional analysis of the term "public records."
The key language is that of California Government Code section 6252, subdivision (e): "public records" are constituted by "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency...." The Court concluded that the plain meaning of this provision referred to government entities as a whole, not their individual members. A writing not accessible to the City cannot be said to fall within the definition, it determined.

The Court hinted that in some circumstances there might be a different result. For example, if in a public meeting a legislative body were to communicate electronically with enough other members to form a quorum, then that might be a problem. However, the Sixth District said the question of when a privately transmitted communication made during a meeting becomes an agency record subject to disclosure was not presented, as the request at issue was much broader.

What is Next?
One distinction not especially parsed by the Court was a comparison of communications sent on personal electronic devices, versus those sent on agency owned computers, but using a private email account. The Court's ruling seemed to say neither had to be disclosed, although it was not clear from the factual exposition in the opinion whether the underlying requests for records covered the latter category. Caution would probably dictate that public officials not rely on the decision to exempt private messages on public facilities.

In the end, while the Court throughout acknowledged the public policy arguments on both sides of the issue, it decided the matter purely on the definitional question and left it to the Legislature or the agencies themselves to set different standards, if any of them felt the balance was not correctly struck by the existing state of the law.

The Court discussed at length another recent California decision, *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, which held that the University had no obligation to try to obtain records not held by the University, but which might arguably be in the University's constructive possession because of being held by an agent. Otherwise the *San Jose* opinion discusses a number of out-of-state decisions, illustrating the developing nature of this area of law, in view of the rapidly evolving way people communicate. Indeed, there is still time for the records requester here to petition the California Supreme Court to take the case. Since this is an issue of broad public interest, the Supreme Court might be interested.

Meanwhile, attorneys to public entities and officials still need to be cautious in how they advise their clients, as we have likely not heard the last word on the issue from the courts, and it is also possible that the matter will be of interest to the Legislature.

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