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# Public Records Act And The Price Of Privacy: Part 2

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In part 1 of this two-part series we discussed how the City of San Jose v. Superior Court (Smith) will forever change the nature of public service. In part 2, we will offer practical suggestions to respond to this change.

Yes we know the way from San Jose, but it's not as simple as just using the telephone. The City of San Jose v. Superior Court (Smith) will forever change the nature of public service. Luckily, there are some practical suggestions that can be offered to respond to this sea change.

For quite some time, my colleagues and I have been anticipating the San Jose decision. The public discourse in favor of "transparency," whether real or politically expedient, caused sufficient concern for us to advise public sector clients to be leery of their reflexive responses on either email or text messages. As we all know, work email is subject to civil discovery and smarter lawyers than I have advised clients to not put something on email they would not want on the front page of the New York Times.

However, the San Jose decision potentially exposes text messaging and social media posts to the same scrutiny. Although the state Legislature could not have conceived of Instagram, Facebook, Snapchat and Kik in 1968 when they drafted the Public Records Act, the Supreme Court is fully mindful of our evolving means of communication. In a rare departure from judicial restraint, the court offered some assistance in how to comply with this new mandate. This assistance is appreciated and gratifying in that it comports with the advice my colleagues and I have been providing public sector clients. The court offers the following suggestions to state and local agencies:

- Conduct reasonable searches — The court reiterated that searches need only be, "reasonably calculated to locate responsive documents" (American Civil Liberties Union of Northern California v. Superior Court (2011) 202 Cal App 4th 55, 85). The court did not specifically address whether the collection of mobile devices would be required.

- Develop internal agency policies for conducting searches — Developing standardized protocols for PRA searches creates agency standards, consistency and requester expectations.

- Communicate the scope of the information requested — Upon receipt of a PRA request, the responsible party should communicate the request to the persons/departments that are reasonably likely to retain the documents requested.

- The agency may reasonably rely on employees to search their own personnel files, accounts and devices for responsive materials — The court suggests that individuals can be relied upon to search their own devices for public records, perhaps not relinquishing them.

- Training — Federal courts interpreting the Freedom of Information Act have approved individual employees conducting their own searches so long as they have been properly trained to do so (Ethyl Corp. v. United States Environmental Protection Agency (4th Cir. 1994) 25 F. 3d 1241, 1247). Our office is provided training in PRA interpretation, compliance, exemptions and litigations throughout the state of California.

- Affidavit — Public employees who withhold public records from their employer must submit an affidavit with facts sufficient to show the information is not a public record under the PRA so long as the affidavit gives the requester sufficient factual basis to determine whether the material is indeed nonresponsive (Nissen v. Pierce County (Wn. 2015) 183 Wn.2d 863). The showing required in this affidavit is not unlike PRA response best practices.

- Technology Policies — The court suggested that state and local agencies adopt technology policies to reduce the likelihood of public records being held on private accounts. This may reduce privacy violations. Our office has drafted technology policy for public entities that reflect this desire (see also 44 U.S.C. §2911 (a) [prohibiting use of personal electronic accounts for official business unless messages or copying or forwarded to an official account]; 34 CFR §1236.22 (b)).

There are additional common-sense measures that both agencies and employees can take to protect against privacy violations:

- Notice — Immediately notify governing board members of this new legal mandate as they are the most immediately and directly affected. Also, notify staff of the new mandate so they can modify their work habits accordingly. Our office has provided clients with notice letter templates for this purpose.

- Disclaimers — Much like with confidential emails, which include confidentiality provisions, writing that is subject to the PRA should include disclaimers related to the exemptions and Government Code §6254. For example, preliminary memorandums should be stamped "DRAFT" and include language related to Government Code §6254 (a).

- Custodian of Records — Publicly identify a custodian of record or person responsible or applied to Public Records Act requests. This will disincentivize requesters from sending requests directly to specific public employees.

- Use the telephone — Although this advice may seem trite and counterintuitive to modern communication, it was the means of public communication available when the Legislature drafted the Public Records Act in 1968. The Legislature at least subconsciously envisioned that day-to-day communications among government officials would take place in large part on the telephone. Telephonic communication does not create a writing unless it is automatically transcribed by software. Sometimes the old ways are best.

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