Cell Phones and Public Records

by Gregory J. Rolen

California prides itself on its dedication to open government. Agencies and boards at the state, county, and local level must conduct their business in public. (See Cal. Gov't Code §§ 54950–9963, commonly known as the Brown Act.) In addition, the California Public Records Act (CPRA) sets forth that public records must be available to all Californians, stating "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Cal. Gov't Code §§ 6250–6270.) (Unless otherwise indicated, all section references are to the Government Code.)

Though these concepts sound straightforward, there are subtleties in the law, not the least of which is the question of just what constitutes a public record.

A landmark case from the heart of Silicon Valley raises that very issue in the context of smartphones used by public officials and employees. In *City of San Jose v. Superior Court* (169 Cal. Rptr. 3d 840 (2014)) the court of appeal concluded last March that information retained by an official on a private device using a private account was not, "prepared, owned, used, or retained" by a government agency; therefore it was not a public record. Public officials breathed a collective sigh of relief. However, their outlook was quickly tempered when the California Supreme Court granted review of this important and hotly contested decision. (See *San Jose*, 173 Cal. Rptr. 3d 46 (2014); the case is pending as No. S218066.)

Even before the state Supreme Court agreed in June to take the case, commentators accurately predicted that the issue was ripe for higher review. Indeed, the court of appeal obliquely invited legislative amendments when it commented: "Whether such a duty [to produce messages stored on personal electronic devices] better serves public policy is a matter for the Legislature, not the courts, to decide. In addition, it is within the province of the agency to devise its own rules for disclosure of communications related to public business." (169 Cal. Rptr. 3d at 856.) Although both sides had made policy arguments supporting their positions, the court sidestepped the discussion, stating, "None of the parties' policy-based arguments informs our analysis. …" (169 Cal. Rptr. 3d at 847.) The policy arguments focused on two issues that impact virtually every aspect of CPRA practice: the burden of compliance, and the effect on privacy rights.

The *San Jose* Decision

A full understanding of the *San Jose* case requires analysis of the conflicting opinions issued by the trial and appellate courts. The facts are simple enough: The requester, Ted Smith, asked for all writings concerning the city of San Jose that were contained on the private electronic devices of the mayor, city council, and the staff. The CPRA defines "public records" as any writing related to the public's business if it is "prepared, owned, used or retained by the state or local agency." The requester argued that because local agencies can act only through their officers and employees, public officials are indistinguishable from their agencies. The trial court adopted this reasoning and observed that "[t]here is nothing in the [CPRA] that explicitly *excludes* individual officials from the definition of public record." (169 Cal. Rptr. 3d at 843 (emphasis added).)

The court of appeal reversed, holding that agencies, not their individual members, are subject to the public records act. The court noted that the city of San Jose cannot "use" or "retain" an electronic message that is not linked to a city server or a city account. Therefore, personal writings on private devices were not necessarily public records subject to the public records statute.

The reasoning of the trial and appellate courts in the *San Jose* case underscores fundamental policy questions. What would the practical implications be if employees' writings on private devices were designated public records? What would happen if a public official became indistinguishable

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from a public agency? What would happen if agency employees were required to search private devices? Could the law still balance the principles of transparency, efficiency, and privacy? How could requesters, employers, agencies, and courts ensure compliance? Will the CPRA or other statutes need to be amended? To explore these issues one must first understand the statutory scheme.

Purpose and Intent

As noted at the outset, the CPRA and the Brown Act are the twin pillars of open government in California. The CPRA's purpose is to give the public access to information that allows them to see how their government is functioning. The core precept is that public records shall be provided unless there is a legal basis to withhold them. The Legislature's intent was to balance the public's right to access against other competing interests. Accordingly, the exemptions contained in the statute are based primarily on governmental efficiency and individual privacy. As such, a record may be withheld when "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." (§ 6255.)

Records Act Requests

The CPRA applies to state and local agencies. (§ 6252(f).) It grants all "persons" the right to receive or inspect records. "Persons" include corporations, businesses, and LLCs. (§ 6252(c).) The requester may have a pending lawsuit—or be planning one—against the agency. However, the requester's intent is not a justification for withholding records. A person may make a request orally, in writing, in person, via email, or over the telephone. (*Los Angeles Times v. Alameda Corridor Transp. Auth.*, 88 Cal. App. 4th 1381 (2001).) Even if the request is made anonymously, it must describe an identifiable record so that the agency can determine what is being requested. (§ 6253(b).) If the request is unclear or overbroad, the agency must help the requester reformulate it to be clearer and more specific. (*State Bd. of Equalization v. Superior Court*, 10 Cal. App. 4th 1177 (1992).) Regardless of the request's propriety, the agency must respond no later than 10 calendar days from receipt of the request. The response time may be extended by an additional 14 days if the records are voluminous or remotely located. (§ 6253(c)(1–4).) However, it is important to note that the agency need not produce records within this time period; it need only respond to the request. Moreover, although some records requests also include questions passed to the governmental agency, the CPRA only requires a reply pertaining to records. (See § 6252(a), (e).)

Agency Response

The agency must make a reasonable effort to locate the records. It should at the very least contact the person or persons who are most likely to be in possession of the responsive items. However, the agency need not perform a needle-in-a-haystack search through copious material. (*California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 166 (1998).) If the request is overbroad or burdensome, an agency may withhold documents because the public interest in withholding outweighs the public interest in disclosure. (*ACLU Found. v. Deukmejian*, 32 Cal. 3rd 440 (1982).) An agency cannot recover costs incurred to search, review, or respond to a records request. However, the agency may charge, or waive, duplication fees before providing copies. (§ 6253(d).)

The agency must respond to the request in writing. The agency may disclose records, withhold records, or disclose redacted records. An agency may withhold a record if numerous redactions render the document unintelligible. The written response must state the statutory basis for withholding. If an agency discloses an otherwise exempt record, the disclosure may constitute a waiver of many CPRA exemptions for future requests for the same information. (§ 6254.5; 86 Ops. Cal. Att'y Gen. (2003)). Although there are waiver exceptions—such as disclosure to an interested public entity or agent—public agency counsel should conscientiously assert all relevant exemptions.

Exemptions

Many grounds for withholding records are enumerated in the statute. Although these exemptions are both specific and general in nature, the courts construe them narrowly. The most common exemptions are:

- **Privileged records.** An agency need not release "records, disclosure of which is exempted or prohibited pursuant to Federal or State law, including, but not limited to provisions of the Evidence Code related to privilege." (§ 6254(k).) As such, public records exemptions include attorney-client communications and attorney work product. Billing entries that reveal an attorney's impressions, opinions, or strategy are exempt. Retainer agreements may fall within the attorney-client privilege. The attorney-client privilege is perpetual, and counsel must assert the privilege on the agency's behalf. Only the agency's governing board may waive it. (Cal. Bus. & Prof. Code § 6149; Cal. Evid. Code § 952–955.)

- **Pending litigation.** An agency need not disclose "[r]ecords pertaining to pending litigation to which the public agency is a party, or claims made pursuant to [the California Government Claims Act], until the pending litigation or claim has been finally adjudicated or otherwise settled." (§ 6254(b).) This exemption applies to documents prepared by any person, or at the agency's direction, for litigation. Consequently, an incident report prepared primarily in anticipation of litigation would be exempt. (*Fairley v. Superior Court*, 66 Cal. App. 4th 1414 (1998).)

Oftentimes, CPRA requests are made in lieu of traditional discovery. The fact that a litigant may also be able to obtain the documents through discovery is not grounds for withholding them. (*Wilder v. Superior Court*, 66 Cal. App. 4th 77 (1998).) The pending litigation exemption does not cover documents submitted by the public (i.e., tort claims), and it lapses once the litigation is resolved.

• **Public-interest exemption.** The CPRA permits withholding a record if the agency can demonstrate that the public interest in withholding it clearly outweighs the public interest in disclosure. (§ 6255.) It is the *public's* interest in nondisclosure that must predominate, not the agency's.

This exemption is based on a fact-specific balancing test. The exemption is open-ended, with the purpose of addressing circumstances not contemplated by the Legislature, including burdensome requests, privacy rights, and governmental efficiency.

• **Deliberative process.** The public-interest exemption incorporates a judicially recognized deliberative process privilege. Derived from the federal Freedom of Information Act (FOIA, 5 U.S.C. § 552)), the privilege protects the decision-making process of government officials. This privilege is based on the notion that an uninhibited exchange of ideas and opinions is necessary to good government, and that such frank discussion may be inhibited if subjected to public scrutiny. (See *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991).) The privilege therefore allows withholding of documents that reveal not only thoughts, but also facts that may reveal thoughts.

In the *Times Mirror* case, the California Supreme Court applied this analysis to uphold nondisclosure of information contained in Gov. George Deukmejian's calendar because it could reveal his decision-making processes and influences. (*Times Mirror*, 53 Cal. 3d at 1344.)

• **Drafts.** The CPRA also expressly protects "preliminary drafts, notes, or inter-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." (§ 6254(a).) Based on the FOIA "memorandums exemption" (5 U.S.C. § 552(b)(5)), this rule exists to promote an exchange of ideas. It usually applies to notes and writings generated *before* a decision is made. To invoke the exemption an agency must satisfy several elements, including that the item in question is a preliminary writing; that it is not retained in the ordinary course of business; and that the public interest in withholding the item clearly outweighs the public interest in disclosure. (*Citizens for a Better Gov't v. Dep't of Food and Agric.*, 171 Cal. App. 3d 704 (1985).)

For an agency to withhold a record, it is the *public*'s interest in nondisclosure that must predominate, not the agency's.

• **Personnel records.** A public agency need not disclose "personal, medical, or similar files the disclosure of which constitute an unwarranted invasion of personal privacy." (§ 6254(c).) This exemption is consistent with the legislative purpose of protecting privacy. It allows nondisclosure based on other state and federal privacy statutes, including the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA). The courts focus on the records' content, not their location, and balance the person's privacy interest against the public interest in disclosure.

However, personal privacy rights are anything but absolute. Regarding public employee discipline, the courts have allowed nondisclosure of "trivial or groundless charges" but require disclosure if "there is reasonable cause to believe the complaint is well founded." (*Bakersfield City Sch. Dist. v. Superior Court*, 118 Cal. App. 4th 1041 (2004).) Public employees do not have a reasonable expectation of privacy in their names and salary information. (*Int'l Fed'n of Prof'l and Technical Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 314 (2007).) Additionally, contracts between state agencies and public employees must be disclosed. (§ 6254.8.)

CPRA Litigation

CPRA litigants should pay special attention to all of their written communications. Each party should convey reasonableness and a cooperative attitude. The request, response, and related correspondence concerning focusing the request, assisting the requester, and disclosing time lines may become critical components of the court record. To quickly resolve disputes, the CPRA provides for a truncated judicial process. Any person may file a request for injunctive relief or a writ of mandate to obtain or inspect records. (§ 6258.) The CPRA does not specify a filing deadline, but the courts apply equitable limitations principles such as laches. An agency may not seek declaratory relief to determine whether disclosure is required. (*Filarsky v. Superior Court*, 28 Cal. 4th 419 (2002).)

The trial judge will set a briefing schedule. After a hearing, the court may review records *in camera*. (§ 6259(a).) If the court finds the agency's withholding unjustified, it will order disclosure. If the court determines a withholding is justified, the record(s) will be returned to the public agency with a supporting order. (§ 6259(b).) If the lawsuit prompts disclosure, the requester—as the prevail-

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1. A public agency must answer all questions contained in a written request submitted under the California Public Records Act (CPRA).

❍ True ❍ False

2. A public agency must respond to a telephone request for public records.

❍ True ❍ False

3. The CPRA requires production of records within a ten-day statutory period.

❍ True ❍ False

4. A public agency may extend the statutory response time line if a request requires a search of voluminous records.

❍ True ❍ False

5. A public agency cannot ignore a CPRA request made by an out-of-state commercial entity.

❍ True ❍ False

6. The California Supreme Court is considering whether email and text messages on a public official's personal cell phone constitute public records.

❍ True ❍ False

7. An agency may not charge a requester any fee when it complies with the CPRA.

❍ True ❍ False

8. An agency must create a new document in response to a CPRA request if it is in possession of relevant data.

❍ True ❍ False

9. An agency may withhold documents without explanation if it has a valid statutory privilege.

❍ True ❍ False

10. An individual member of a governing board may waive the agency's attorney-client privilege if he or she believes disclosure is warranted.

❍ True ❍ False

11. Previous disclosure to the public of a privileged document might constitute a waiver such that the disclosing agency can no longer assert the exemption with regard to that document.

❍ True ❍ False

12. An agency can withhold records based on the attorney-client privilege long after the litigation is completed.

❍ True ❍ False

13. Individual salary information pertaining to a public employee remains confidential under the personnel-records exemption.

❍ True ❍ False

14. A trial court can require disclosure of individual disciplinary files if there is substantial evidence that a public employee committed wrongdoing.

❍ True ❍ False

15. The deliberative mental process of a public official, as reflected in documents, is exempt from disclosure.

❍ True ❍ False

16. Attorneys fees may be awarded to a requester only if a litigant obtains the majority of records sought in a CPRA request.

❍ True ❍ False

17. A public agency may seek injunctive relief to determine whether disclosure of a particular record is required.

❍ True ❍ False

18. To prevent disclosure of records pending an appeal, a public agency must obtain a stay from the court of appeal.

❍ True ❍ False

19. An agency can refuse to comply with a burdensome request based on the public-interest exemption.

❍ True ❍ False

20. An agency must comply with a CPRA request made anonymously.

❍ True ❍ False

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ing party—may recover reasonable attorneys fees. (*Belth v. Garamendi*, 232 Cal. App. 3d 896 (1991).) A party seeking appellate review may petition the court for an extraordinary writ within 20 days of the order's entry. If a party seeks to prevent disclosure of records pending appellate review, the party must obtain a stay from the appellate court. (§ 6259(c).)

If an appellate court accepts the petition, the court will consider the merits of the trial court's order much like a standard appeal. The appellate court's decision is subject to discretionary review by the state Supreme Court. However, trial court rulings on sanctions or attorneys fees are subject to a normal appeal rather than the expedited writ process. (*Butt v. City of Richmond*, 44 Cal. App. 4th 925 (1996).)

The Way to *San Jose*

The appellate court in *San Jose* understandably relied on the CPRA's plain wording rather than on policy concerns. However, now that the California Supreme Court has granted review, those policy concerns may become integral to resolving the pending issue, which potentially ensnares every cell phone held by every public official and public employee in the state.

Indeed, if writings on the personal devices of public employees and officials using personal accounts are held to be public records, every aspect of the CPRA may be affected. This includes the legal definitions of agency and records, as well as searches, requests, responses, waivers, exemptions, timeliness, disclosure, and the balancing of privacy rights and efficient government against the public's right to know.

Whether these practicalities actually inform the high court's analysis remains to be seen. (Opening merits briefs are due this month.) What is clear is that public records practitioners—not to mention public officials and employees who use private cell phones—must keep a close eye on the *San Jose* case as it moves toward oral argument, and an eventual decision.