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TO: COUNCIL MEMBERS, DIRECTORS, COMMISSIONERS, BOARD MEMBERS & EMPLOYEES

FROM: DEBORAH MALL, WELLINGTON LAW OFFICES

RE: COMMUNICATIONS SENT OR RECEIVED ON A PUBLIC OFFICIAL'S PERSONAL ELECTRONIC DEVICE COULD BE SUBJECT TO SEARCH AND DISCLOSURE UNDER THE PUBLIC RECORDS ACT

DATE: March 10, 2017

Our office has always cautioned on the use of personal electronic devices to send or receive communications related to the agency's business, because the public official's personal device could be subject to a search if a California Public Records Act ("PRA") request was made for the information stored there. This is especially true when the personal electronic device is used to send and receive information during a public meeting, which gives the appearance that the communication concerns the agenda item.

We had to amend that advice in 2014 when the California Court of Appeal in *City of San Jose v. Superior Court (Smith)*, found that communications by the mayor, city council members and staff city employee concerning public business on a personal account, such as email, phone or computer, were not subject to disclosure under the PRA because they were not "prepared, owned, used, or retained" by the public agencies. However, we then noted that the *San Jose* decision was up on appeal to the California Supreme Court and could be over-turned.

Last week the Supreme Court unanimously reversed the Court of Appeal, holding that **a city official's communications about public business are not excluded from the PRA just because they are sent, received, or stored in a personal account. Communications sent or received on an official's personal device concerning the public's business can now be subject to a search and disclosure under the PRA.**[1]

[1] "The Court emphasized the PRA's purpose is to provide public access to "the conduct of the people's business" and the California Constitution's mandate to broadly construe statutes providing for access to public information. In reaching its decision, the Court focused on the definition of a "public record" under the PRA and explained that "a public record has four aspects. . . (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, *or* (4) owned, used, or retained by any state or local agency." Writings include electronic communications and "must relate in some substantive way to the conduct of the public's business" to meet this test. The Supreme Court disagreed with the Court of Appeal on the meaning of "prepared by any state or local agency." State and local agencies can only act through their individual officials and employees, so when individual employees are conducting public business, they are acting on the agency's behalf. Thus, writings relating to the public's business prepared by agency employees are public records, regardless of whether the employee prepared the record on a personal or agency account. The Court explained that the location where the writing is stored is irrelevant; a writing does not lose its status as a public record merely because it is stored in an employee's personal account.

(It is noted that the Supreme Court only discussed employees' e-mails on a personal device, because San Jose had previously disclosed all of the city council members' e-mails pursuant to a newly adopted policy. However, city attorneys are clear that the same analysis applies to e-mails related to the public agency's business on all "public officials' personal devices. "Public officials for the purposes of this advisement include all council members, board members, commission members, committee members, directors and employees.)

The good news is that the Supreme Court also weighed in about the public official's privacy concerns and gave advice as to how to search personal devices in response to a PRA request. The public agency does not have to take extraordinary measures such as seizing personal devices. Rather, it can develop its own internal policies for conducting searches and request and "reasonably rely on their public officials to search *their own* files, accounts, and devices for responsive material." Public officials can be trained to search for and segregate public from private records. Public officials can submit affidavits to show that they searched their devices, in good faith, and disclosed any responsive public record.

Public officials should remain vigilant about their use of their personal electronic devices. It is recommended that public officials only use official accounts for communications related to the public agency's business. If the Agency has not established official e-mail accounts, those accounts should be established. Further, communications regarding the public agency's business on a personal account should be copied or forwarded to the agency for the appropriate filing as a public record. Texts concerning public business should be preserved as permitted and should also be sent to the public agency for filing. Finally, communicating with the public via personal devices, at a public meeting, is discouraged as it gives the appearance of impropriety and could target the official for a PRA request. It is noted that many of you use personal devices to view agenda material or take notes, at meetings. The agency may want to establish a public policy which disallows use of e-mails, texting, etc. at public meetings. Many agencies provide electronic devices at meetings to avoid the appearance of impropriety. You may want to consider whether that expense is warranted.

The Supreme Court also addressed policy concerns implicated by its decision. Because there is no law requiring public employees to only use government accounts for public business, government employees could simply hide any communications from disclosure by using their personal account. This would be incompatible with the purposes of the PRA. Moreover, the Court explained privacy concerns would still be considered because the PRA exempts many documents from disclosure and even has a catchall exemption to balance privacy concerns. The focus in determining whether a communication is a public record should always be on the content of the record – not its location or the medium of the communication."