SCHOOLS LEGAL SERVICE

LAW UPDATE
SCHOOL BUSINESS

PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

May 28, 2014

COURT FINDS PRIVATE TEXT AND EMAIL MESSAGES ON PERSONAL ELECTRONIC DEVICES ARE NOT PUBLIC RECORDS

You may be aware of a California Public Records Act case involving the city of San Jose in which a requestor sought email and text messages created or received by city officials or employees on their personal devices using personal accounts. (*City of San Jose et al. v. The Superior Court of Santa Clara County*, 2014 Cal.App. Lexis 293) The trial court had ordered the City to make reasonable efforts to produce the messages. On appeal, the Sixth District Court of Appeals reversed the trial court, indicating that those messages are not public records. In making that ruling, the court found that local public officials and employees (as distinguished from the local agencies that employ them) are not subject to the California Public Records Act ("CPRA"or the "Act"). The court also found that records possessed by officials and employees are not automatically public records.

The court held that had the Legislature wanted the Act to apply to officials or employees of a local agency it would have worded the statute differently, pointing out that the Legislature did in fact include "officers" in the Act's definition of "state agency" but not in its definition of "local agency." The court found this to be an indication of intent not to include local agency officials under the Act. The clear language of the Act requires that in order for a record to be a "public" record it must be "prepared, owned, used, or retained" by a public agency, and this court found the records in question were not prepared, owned, used, or retained by the agency, only by the officials/employees themselves.[1]

[1] It would appear that a record "prepared, owned, used, or retained" on a non-personal device or messaging system would not be protected by this decision. Records pertaining to agency business prepared by an official or employee while on duty and using an office device or office email or messaging system could be argued to have been "prepared, owned, used, or retained" by the local agency.

Accepting for argument only that a local agency could only act through its agents/officials/employees, the court also found that every act by an official or employee would not necessarily be an act of the local agency; and every record prepared, owned, used, or retained by an official or employee would not necessarily be a "public" record, even if it dealt with the business of the agency. Even officials and employees of public agencies have the right of privacy, and the court noted the Constitutional provisions on access to public records are not to be construed to supersede or modify the Constitutional right of privacy.[2]

The *City of San Jose* action brought in many outside parties on both sides of the argument. The City was joined by the League of California Cities, while the requestor was joined by the First Amendment Coalition, California Newspaper Publishers Association, Los Angeles Times Communications, LLC, McClatchy Newspapers, Inc., and the California Broadcasters Association. Given the outside and statewide interests, there is likely to be an appeal.

In any event, the court's ruling leaves open many questions about the use of both personal devices and devices which, while "owned" by an individual, are supported by a stipend from the agency and are required by the agency to be used in connection with official business. The status of email prepared/retained on a personal device via an agency email program is another unanswered question. We currently recommend that if records appear to be "prepared, owned, used, or retained" by the agency, they should be treated as public records regardless of where they are found. Using that same definition, the court found records in the private email and text message systems on private devices were not "prepared, owned, used, or retained" by the City and not subject to production under the Act.

If you have questions concerning this or related issues, do not hesitate to contact our office.

— *William A. Hornback*

———————————————————————

Education Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.

[2]Much of the argument for access was based on language in a 1983 case. The court in the earlier case had relied on a case from 1962, which had in turn relied on a Michigan criminal case from 1910. The court in the Michigan action had created a rule by citing only the Cyclopoedic Law Dictionary definition (apparently of public records) as being "any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." It is interesting to note that the Cyclopoedic Law Dictionary changed it's definition in 1922 to redefine a public record as "a record maintained by public authorities, or open to the inspection of the public."