GENERAL OFFICE MEMORANDUM 19-046

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOSEPH P. ESPOSITO
Chief Deputy District Attorney

SUBJECT: APPLICABILITY OF CALIFORNIA PUBLIC RECORDS ACT TO PUBLIC BUSINESS CONDUCTED ON PERSONAL CELL PHONE OR EMAIL ACCOUNTS

DATE: APRIL 4, 2019

This General Office Memorandum is to advise employees of the potential California Public Records Act (CPRA) ramifications of conducting, transmitting or communicating public business via their personal cell phone or email accounts.

In *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, the California Supreme Court held that a government "employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account." Accordingly, the use of your personal cell phone or email accounts to send or receive communications related to public business may subject your personal cell phone or email accounts to the disclosure requirements set forth in the CPRA.

In *City of San Jose*, a citizen filed a CPRA request seeking several public records including, "emails and text messages 'sent or received on private electronic devices used by' the mayor, two city council members, and their staffs." The California Supreme Court agreed that the citizen was entitled to the communications sent through personal cell phone and email accounts provided the communications related in some *substantive way* to the conduct of the public's business. While this standard does not apply to every piece of information the public may find interesting, or to communications containing no more than incidental mentions of public business, the court made it clear that a writing retained by a public employee conducting public business, and contained in the public employee's personal cell phone or email account, has been "retained by" the public agency in which he or she is employed. (*Id.*, at pp. 618-619, 623).

The *City of San Jose* ruling directly affects all personnel in this office who have used personal email and personal cell phone accounts to text, as well as receive, communications and correspondence from colleagues, other justice system partners, or members of the public to discuss a myriad of justice system issues such as subpoenaing witnesses, trial and preliminary hearing schedules or issues, law and motion proceedings, or office policy guidelines.

In some situations, an employee may communicate public business via their personal cell phone or email accounts alongside personal conversations or irrelevant observations. The entirety of

these conversations may be subject to disclosure pursuant to an appropriately drafted CPRA request if a determination is made that the issues discussed relate in some *substantive way* to the conduct of the public's business.

As the California Supreme Court observed,

> [r]esolution of the question of whether a writing in a personal account is a public record will involve an examination of several factors, including the content itself; the context in or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment. (*City of San Jose*, *supra*, 2 Cal.4th at p. 618.)

Moreover, the court provided guidance for public agencies attempting to determine whether or not a writing contained in an employee's private account is a public record:

> First, agencies may develop their own internal policies for conducting searches but "the scope of an agency's search for public records 'need only be reasonably calculated to locate responsive documents;'" it does not have to conduct extraordinarily extensive or intrusive searches.
>
> Second, an agency receiving a request for public records held in employees' nongovernmental accounts should communicate the request to the employees in question. The agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material if the employees have been properly trained in how to distinguish between personal and public records.
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> Third, "an agency employee who withholds a document identified as potentially responsive may submit an affidavit providing the agency, and a reviewing court, with a sufficient factual basis upon which to determine whether contested items were 'agency records' or personal materials." (*Id.*, at 627-628).

This guidance, as summarized above, represents the court's reasoned judgment on the best way to strike the balance between a citizen's right to access a public agency's CPRA responsive documents and the privacy rights of its employees. By following this suggested guidance, a public agency has performed an adequate search. (*City of San Jose*, *supra*, 2 Cal.4th at p. 629).

Accordingly, all District Attorney personnel (hereafter "Identified Employee") directly receiving a CPRA request for materials contained on the Identified Employee's personal electronic account or device, shall immediately notify the Special Assistant (SA) to the Assistant District Attorney for Administration so the request may be uploaded to the LADA Public Records Database (PRD); should the SA receive the request directly from the requestor, the SA shall forward the request to the Identified Employee for handling, after first uploading the request in the PRD.

The Identified Employee shall then search his or her personal files, electronic accounts and devices for all responsive material.

If, as a result of this search, the Identified Employee identifies responsive material and believes this responsive material should be withheld, the Identified Employee shall submit an affidavit (see attached template) providing the Office, and if necessary, a reviewing court, with sufficient facts upon which to determine whether the questioned responsive material is a public record subject to disclosure or a personal record. The Identified Employee shall preserve the responsive material for a period of three years.

If the Identified Employee determines that he or she does not possess any material responsive to the request, the Identified Employee shall submit an affidavit explaining that he or she has no documents responsive to the CPRA request. The attached "Affidavit" may also be used for this purpose.

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Attachment

ATTACHMENT

AFFIDAVIT OF [NAME]

1. I, [NAME], declare:

2. I am employed by the Los Angeles County District Attorney's (LADA) Office as a [Deputy District Attorney, Witness Coordinator, LOSA 1], and I have served in this role since [DATE]. I make the following statements herein on the basis of my own personal knowledge.

3. On [DATE], I received a California Public Records Act (CPRA) request submitted by [REQUESTER'S NAME] seeking the following from the LADA's Office:

[QUOTE REQUEST]

4. I understand that it is my responsibility to search my personal files, devices, and accounts for records potentially responsive to the request, and after receiving the CPRA request, I began to conduct my personal search on [DATE].

5. As a result of this search [I located no material responsive to the request] *or* [material potentially responsive to the request was located, and I delivered this potentially responsive material to [NAME OF THE INDIVIDUAL YOU FORWARDED THE DOCUMENTS TO] on [DATE] for review].

6. The remaining records in my personal files, devices, and accounts are personal, not relating to the conduct of the public's business, and are therefore nonresponsive to the CPRA request and are being withheld.

7. I conducted the search of my personal files, devices, and accounts in good-faith and searched all personal accounts likely to contain records potentially responsive to the request.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that I executed this Affidavit on _____, 20___, in Los Angeles County, California.

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