



City of Long Beach

Working Together to Serve

Office of the City Attorney

Memorandum

DATE: April 7, 2017

To: Honorable Mayor and City Councilmembers

FROM: Charles Parkin, City Attorney *CP*
Patrick H. West, City Manager *P.H.W.*

SUBJECT: Proposed Policy Regarding Use of Private Electronic Devices to Conduct City Related Business

On March 6, 2017, the City Attorney's office sent a memo to the Mayor and Councilmembers advising that a recent California Supreme Court decision (*City of San Jose v. Superior Court* (2 Cal. 5th 208 (2017))) has held that communications regarding the conduct of public business are subject to disclosure in a Public Records Act request, even though the communication is sent or received from a city official's privately owned account or device.

In light of the *San Jose* decision, the City Attorney's office and the City Manager's office have developed the attached draft policy in order to guide City elected and appointed officials, board and commission members, and unrepresented City employees in regard to the use of privately owned devices or accounts when conducting City business. The proposed policy establishes protocols for the use of private devices and reminds City officials that records or communications retained on such devices are subject to disclosure in the event of a Public Records Act request. The policy also provides advice as to "best practices" to be employed by City officials when they receive or send communications regarding City business on their private devices, clarifies the types of documents/communications that should be retained by City officials when they are transmitted electronically, and which types of communications are not required to be retained in the ordinary course of City business.

It is important to note that the attached policy is a reflection of new state law as set forth in the Supreme Court decision in the *San Jose* case. This new statement of the law is applicable to the Mayor and City Council and makes clear that communications made by an elected official on his or her personal electronic device or account are subject to a Public Records Act request and that the elected official and their staff are required to produce responsive documents if a Public Records Act request is made. This policy will go into effect immediately for elected officials and all unrepresented employees.

It is anticipated that the draft policy will be adopted by the City Manager for all other employees after all appropriate administrative procedures and meet and confer

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processes are followed as an "Administrative Regulation (AR) " that would be applicable to all employees and officials directly responsible to the City Manager. As with most adopted AR's, it will be requested that elective offices and other independent offices, boards and commissions also comply with the policy.

If you should have any questions regarding the attached policy or the *San Jose* decision, please do not hesitate to contact the City Attorney or the City Manager's office.

JCP:MJM:kjm

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Attachment

cc: Laura Doud, City Auditor
Doug Haubert, City Prosecutor
Tom Modica, Assistant City Manager
Anitra Dempsey, Interim Deputy City Manager
All Department Directors
Rebecca Jimenez, Assistant to the City Manager
Andrew Vialpando, Assistant to the City Manager

POLICY REGARDING USE OF PRIVATE ELECTRONIC DEVICES TO CONDUCT CITY RELATED BUSINESS

Background and Purpose

The City hereby adopts the following policy regarding the conduct of business via electronic communications sent or received by all current employees of any Department or office directly responsible to the City Manager. In the interest of uniformity and completeness, and to adhere to State law, it is requested that elective offices and other independent offices, commissions, boards and departments also comply with this policy.

Specifically, this policy is adopted in light of the California Supreme Court case of City of San Jose v. Superior Court (2 Cal. 5th 208 (2017)), which held that a city employee's communications related to the conduct of public business do not cease to be public records under the California Public Records Act, simply because they were sent or received using a personal account or personal device.

Existing and emerging electronic communications technologies have become an integral part of the ability of City officials and staff members to efficiently and effectively conduct City business. Such technology has the potential to enhance communications with the public and provide a higher level of service to the Long Beach community. However, with such technology in the work environment, the City must ensure it continues to meet its legal obligations with respect to transparency in the conduct of the people's business, including in the area of public records disclosure and retention requirements. To that end, the following protocol will be followed.

Definitions

For purposes of this policy, the following definitions apply:

"City" means the City of Long Beach, and includes all of the City's Departments, Offices, Boards and Commissions.

"City Official" means an elected or appointed official, any employee of the City, or any appointed board or commission member of the City.

"City Business" means information relating to the conduct of the public's business or communications concerning matters within the subject matter of the City's jurisdiction. Resolution of the question of what information or communication constitutes "city business" will involve an examination of several factors, including: (a) the content itself; (b) the context in, or purpose for which the communication was written; (c) the audience to whom it was directed; (d) the purpose of the communication; and (e) whether a writing was prepared by a City official acting or purporting to act within the scope of his or her City employment.

"Electronic communication" includes any and all electronic transmission or any record thereby created, regardless of the manner in which the record has been stored. "Electronic

communications” include e-mails, texts, voicemails, and also include communications on or within commercial applications (apps) such as Facebook Messenger, Twitter, Snap Chat, WhatsApp, etc.

“Electronic messaging account” means any account that creates, sends, receives or stores electronic communications.

“City Records Coordinator” means that person or persons assigned by the City Manager with the responsibility to coordinate the process of gathering records and responding to Public Records Act requests made to the City or its officials.

Policy/Protocols

1. City officials will typically be assigned a City electronic messaging account, such as an email account.
2. To the extent feasible, City issued accounts shall be used to conduct City business. Limited use of a private device for public business is permissible, but not encouraged. Regardless of whether the device is public or private, electronic communications regarding City business that are created, sent, received or stored on an electronic messaging account, may be subject to the Public Records Act.
3. To the extent a City official has in the past used private, non-City electronic messaging accounts or devices, they will be asked to locate any such electronic communications on those non-City accounts or devices and provide the communications to the City’s Records Coordinator in the event a Public Records Act request is made seeking the communication(s).
4. The City electronic account(s), along with access to the City’s account server, are solely for the City and City official’s use to conduct City business and should not be used for personal business or political activities. Incidental personal use of City’s electronic messaging accounts or City owned electronic devices by City officials is permissible, though not encouraged. Political activities are expressly prohibited.
5. If a City official receives an electronic message regarding City business on his/her personal electronic messaging account or device, or circumstances require such person to conduct City business on a personal account or device, the City official is strongly encouraged to either: (a) copy (“cc”) any communication from the City official’s personal electronic messaging account or device to his/her City electronic messaging account; or (b) forward the electronic communication to his/her City account as soon as feasible after the original creation or transmission of the electronic communication.
6. City officials shall endeavor to ask persons sending electronic communications regarding City business to a personal account or device to instead utilize the City official’s City electronic messaging account, and likewise shall endeavor to ask a person sending an electronic communication regarding non-City business to use the City official’s personal or non-City electronic messaging account.

7. City officials do not have an expectation of privacy in the content of any electronic communication sent or received on a City account or communication utilizing City servers. If a City official has a City provided electronic device, including a personally owned device for which the City pays a stipend or otherwise reimburses the City official, the City official will be requested to provide communications regarding City business from that personally owned device or account if the City receives a Public Records Act request for the communication(s). Although City officials do have an expectation of privacy regarding non-City related communications and material (i.e., personal communication, personal photos, private information) that are maintained on their personal devices/accounts, or those devices for which the City pays a stipend or otherwise reimburses the City official, City officials understand that electronic communications regarding City business that are created, sent, received or stored on an electronic messaging account, may be subject to the Public Records Act, even if created, sent, received, or stored on a personal account or personal device.
8. In the event a Public Records Act request is received by the City's Records Coordinator that seeks electronic communications of City officials, the request will be provided to the applicable City official(s) whose electronic communications are sought and the City official will be provided with an estimate of the time within which the Records Coordinator intends to provide any responsive electronic communications to the requesting party.
9. It shall be the duty of each City official receiving a request for records from the Records Coordinator that seeks electronic communications of City officials to conduct a good faith search of his/her City owned account or device and personal electronic messaging accounts and devices for responsive electronic communications involving City business. The City official shall then promptly transmit any responsive electronic communications to the City's Records Coordinator or department designee in sufficient time to enable the City to adequately review and provide any disclosable electronic communications to the requesting party.
10. In the event a City official does not possess, or cannot with reasonable diligence recover responsive electronic communications from the City official's private electronic messaging account or device, each City official shall so notify the Records Coordinator or the Coordinator's department designee via email or other written communication.
11. It shall be the responsibility of the Records Coordinator, in consultation with the City Attorney, to determine whether a particular electronic communication, or any portion of that electronic communication, is exempt from disclosure. To that end, the responding City official shall provide the Records Coordinator with all responsive electronic communications, and, if in doubt, shall err on the side of caution and should "over produce." If an electronic communication involved both public business and a personal communication, the responding City official may redact the personal communication portion of the electronic communication prior to transmitting the electronic communication to the Records Coordinator. The responding City official shall provide facts sufficient to show that the information is "personal business" and

not “public business”. In the event a question arises as to whether or not a particular communication, or any portion of it, is a public record or purely a personal communication, the City official should consult with the Records Coordinator or the City Attorney, as necessary. In the event a City official redacts part of a communication before transmitting it to the Records Coordinator because it is in the nature of a personal communication, rather than a City business communication, the City official should retain a copy of the communication in an un-redacted form in the event of a court order or litigation regarding the matter.

12. City officials understand that electronic communications regarding City business may be subject to the City’s official records retention policies, even if those electronic communications are or were created, sent, received or stored on a City official’s personal electronic messaging account or device. In some circumstances, it is a crime in the State of California to willfully destroy, alter or falsify a public record that is required to be kept by the City for official City business purposes. As such, unless the City official has cc’d/transmitted electronic communications involving City business in accordance with paragraph 5, above, that City official must retain all electronic communications regarding City business, in accordance with the City’s adopted records retention policies, regardless of whether such electronic communication is originally sent or received on a personal electronic messaging account or device.
13. Not all documents or other types of communications are public records that are required to be retained by the City or a City official for records retention purposes. Typically, a public record that is required to be kept will be a document or communication which constitutes an objective lasting indication of a writing, event, or other information that is in the custody of the City official and should be kept/retained because the law requires it to be kept (e.g., final copies of ordinances or resolutions in the custody of the City Clerk); or because it is necessary to the discharge of the City official’s duties and was made or retained for the purpose of preserving its informational content for future reference (e.g., final executed copies of contracts, leases, permits, insurance policies); or final original copies of documents that are described or set forth in the record retention schedule of the City official’s department (e.g., personnel files maintained in either the Human Resources Department or within the City official’s own department.).
14. Typically, transitory information that is of a temporary or brief duration, not meant to be kept for future reference and whose value is comparatively short-lived, including, but not limited to, texts, instant messaging, voice mail, or email messages are not the types of documents required to be retained by the City or a City official. However, transitory communications may be subject to a Public Records Act request if they involve City business, and the City official elects to retain the communication on their City owned or privately owned devices or accounts. If a City official is unsure whether a particular record is a City record for retention purposes, the City official should contact the City’s Records Coordinator, his or her immediate supervisor, or the City Attorney’s office.

15. City practice is to retain electronic messages maintained on City email accounts for a period of thirty (30) days after an employee separates from City Service. For elected officials, Executive Management, Department Heads, and Bureau Managers electronic messages will be maintained for a one (1) year period following separation unless unusual circumstances dictate a longer period. As a reminder, and in accordance with existing City policies, the City email system is to be used as a convenient and efficient method of communicating transitory information in electronic format and not for the storage of City records that are required to be kept in accordance with the City's records retention policies, the Municipal Code or State law. Documents that are meant to be maintained as City records should be transferred from City email or personal accounts or devices to the appropriate Department or City electronic or "hard copy" record keeping system, as appropriate. Electronic messages that may be involved in litigation should be maintained beyond the thirty (30) days after an employee separates from City service.
16. Failure of a City official to abide by this policy, may result in one or more of the following:
- Disciplinary action, up to and including termination (for employees);
 - Removal from office (for commissioners or board members);
 - Censure (for commissioners, board members or elected officials);
 - Revocation of electronic device privileges (including revocation of the device, stipend or reimbursement);
 - Judicial enforcement against the City official directly, by the party making the Public Records Act request;
17. This policy does not waive any exemption from disclosure that may apply under the California Public Records Act.