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Public Records Act And The Price Of Privacy: Part 1

Law360, New York (March 10, 2017, 11:44 AM EST) --
In part 1 of this two-part series we'll discuss how the City of San Jose v. Superior Court (Smith) will forever change the nature of public service. In part 2, we will offer practical suggestions to respond to this change.


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On March 2, 2017, the California Supreme Court sent not shockwaves, but a tsunami throughout California. In a decision that will impact everyone who owns a smartphone and receives a public paycheck, the court ruled that public employees' personal accounts may be subject to the Public Records Act (PRA). Justice Carol Corrigan, writing for a unanimous court, reflected populist cynicism about government, while placing great faith in the trustworthiness of private citizens. While the decision could be characterized as "Jeffersonian," it will immediately change the way we conduct business as public institutions and private people.

The Court's Decision: Statutory Interpretation or Ideology?

To fully understand the decision's implications, we must first examine the lower courts' reasoning. In the trial court, the requestor asked for "any and all voicemails, emails or text messages sent or received on the private electronic devices used by Mayor Chuck Reed, members of the City Council and their staff ..." The PRA 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 requestor argued that agencies "can only act through their officers and employees. The trial court agreed and stated "[T]here is nothing in the PRA that explicitly excludes individual officials from the definition of public agency." The appellate court reversed, concluding that it is the agency, not the individual members of the public agency that is subject to the PRA. The court held that the agency cannot "use" or "retain" a message that is not linked to a city server or account.

The lower courts' antithetic reasoning underscores the fundamental policy questions the court confronted: Are officials and agencies indistinguishable? And, if agencies can only act through officials, is every act of an official an act of an agency? Civics taught us that the answers are "no." An agency acts collectively, no single official acts alone. Moreover, all employee writings or ruminations are not endorsed or adopted by an agency. Becoming a public employee creates a diminished privacy expectation, but does it obliterate the line between public action and private thought? The court addressed these issues and ultimately agreed with the trial court.

Initially, the court acknowledged the traditional PRA framework, but relied heavily on the much debated Proposition 59, which amended the California Constitution to provide "a statute … shall be broadly

construed if it furthers the people's right of access, and narrowly construed if it limits the right to access." This sets the tone for further analysis. The court rejected the' appellate court's reasoning holding that, "if an agency employee prepares a writing that substantively relates to the conduct of the public business, that writing would satisfy the act's definition of public record." The agency need not own the writing if it was "prepared by" an employee. Finally, after much analysis, the court essentially held that public employees and public entities are one in the same. "A disembodied governmental agency cannot prepare, own, use or retain any record. Only human beings who serve in agencies can do those things."

Unforeseen Policy Implications of the Decision

Unlike the appellate court, which discounted policy argument, the court entertained policy discussions. Much like the U.S. Supreme Court in Riley v. California, 134 S. Ct. 2473 - 2014, the court began by recognizing the rapidly changing technological landscape, stating "However, the ease and immediacy of electronic communications has encouraged a commonplace tendency to share fleeting thoughts and random bits of information, with varying degrees of import, often to broad audiences. As a result, the line between official communication and electronic aside is now sometimes blurred."

While this tenancy has become the scourge of public attorneys, there are policy reasons for separating the agency from the individual, other than acute embarrassment, such as the burden of compliance on the agency and official, the effect on citizens' privacy rights, and the specter of public officials concealing information.

Expanded Mandate Will Overwhelm Public Agencies

The court's mandate could have catastrophic results. Agencies are required to diligently search all writings, emails and files for responsive documents. They must respond within 10 days; creating the additional burden to identify, obtain, search and analyze documents on personal devices, accounts and networks retained by employees would be entirely impractical and frustrate the purposes of the PRA.

First, agencies must search personal devices and accounts, they must compile, maintain and update a list of these devices and accounts. This includes personal computers, tablets, laptops, smartphones, private email and social networking accounts. This would require employee consent and appreciable time and labor. Alternatively, as the court suggested, entities can trust that their employees retain all documents on their personal devices. This additional layer of accountability may lead to mistakes and increased legal challenges by suspicious requesters. Ultimately, if the agency is accountable for compliance, it will be "policing" personal devices and accounts.

Next, the agency must collect all arguably responsive documents from those private devices and accounts. Again, this would either require an agency to collect documents or require each employee to identify and provide all responsive writings. This raises even more issues. What if the employee does not consent? What if the person is no longer employed? What if the employee does not correctly identify responsive writings? What if the employee does not comply on time? What if the employee deletes responsive writings? What if the device is corrupted or destroyed? Will the employee be subject to discipline if any of the aforementioned eventualities occur? The administrative problems and legal questions are almost endless.

Finally, each writing must be reviewed to determine whether it is a "public record" and/or subject to an exemption. This is a laborious, yet critical component of each response. If the agency releases an

exempt document, the exemption is waived. This is particularly important when it comes to citizens' privacy rights and employees' personnel records.

This mandate will hamper the public's ability to obtain timely information, compromise privacy and increase public expense. With more documents involved, the compliance process is necessarily prolonged. With more private source documents, the chances of disclosing personal, private and sensitive information multiplies exponentially. Finally, under the PRA agencies suffer monetary penalties for inadequate compliance. The increased document universe will bring a corresponding increase in litigation and taxpayer-paid sanctions.

Expanded Mandate May Become Unjust for Employees

If the Supreme Court's decision is interpreted that public employees and public agencies are synonymous, did the court inadvertently shift compliance responsibility to employees? If so, what does that mean?

Under the court's reasoning, the "human beings" and the agency for which they work are indistinguishable. Each employee could be treated as an agency; therefore they would be individually responsible for the myriad of PRA requirements. Employees can be sued individually for failure to produce records or misapplication of an exemption. Employees would then need legal representation, at taxpayer expense, because they are acting within the "scope of employment." This will create circumstances in which the employee's interests conflict with those of the agency and/or other employees. This will cause inconsistent and conflicting exemption assertions and plain chaos regarding the PRA production, duplication, inspection and cost provisions. Keep in mind that this legal morass will be over and above the existing agency responsibilities.

A Chilling Effect on Policy Discourse and Public Service

If public employees are now the functional equivalent of public agencies, most written communications by and with public officials will be subject to public scrutiny. This will discourage communicating with public officials and even entering public service.

Private citizens must communicate with their representatives. Formerly, we communicated through conversations and letters. Now, we communicate through text and email. Regardless, we expect that our private communications will remain private. Citizens will be less likely to communicate with public officials if the mere act of communicating makes their private thoughts public. Although the Brown Act has long held that communications between an official and a constituent are not public meetings, under the trial court's reasoning, notes of those interactions become public record. This will further discourage participation in the democratic process.

Furthermore, officials have the right to have private conversations with other officials. Under the Brown Act, conversations among a minority of officials are private. Officials also have the right to be candidates and offer ideas as politicians. Our democratic system recognizes that standing elected officials have the right to communicate their views using their own time and resources. The court's viewpoint would greatly complicate this long-standing principle by rendering virtually every communication, even those with campaign staff, subject to PRA scrutiny.

Finally, public employees understand they have a diminished expectation of privacy, and even less while using public resources. However, employees should not expect to surrender all privacy rights when they

choose to serve. The PRA, Brown Act and California Constitution protect individual rights. Talented people will be less inclined to choose public service if they are required to expose their private writings to agency and/or public scrutiny. This will deal a severe blow to the body politic.

Mere Possibility of Nondisclosure can't Justify Privacy Infringement

The recent presidential election taught us that the mere specter of public officials concealing information is critical, but it is a "straw man" in this case. The trial court presumed government would secrete information, opining “a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own.” By contrast, the appellate court relied on Evidence Code §664 to presume that public officials are performing their official duties absent of affirmative evidence to the contrary. The court summarily rejected that notion stating, "It is no answer to say … that we must presume public official's conduct public business and the public's best interest. The Constitution neither creates nor requires such an optimistic presumption." And yet we ask ourselves why faith and institutions are at an all-time low.

While the public interest in transparency is undeniable, the issue is whether the chance that government may conceal information is so great as to take citizens’ privacy rights. The court presumed that officials will hide information and interpreted the statute to prevent such abuses, focusing on what might happen. The appellate court simply requested proof. Ask yourself, which approach is more congruous with notions of due process and “innocent until proven guilty”?

Preventing public fraud is a noble endeavor, however, it is not the primary purpose of the PRA. There is an exhaustive statutory rubric unanimously to prevent fraud, corruption and self-dealing. (See Fair Political Practices Act, Political Reform Act, Government Code Section 1090 et seq., Government § 84308, Penal Code §68, Prohibitions against Gifts of Public Funds, Misuse of Public Fund, Doctrine of Incompatible Offices, Government Code § 1099 etc.). These laws can be asserted by law enforcement or the public. Some carry discovery rights that are far more invasive than the PRA. Public officials cannot hide wrongdoing on their private devices or private accounts if they are subject to a criminal investigation or civil discovery, regardless of the PRA. The difference is, in those circumstances, innocent citizens’ private information will most likely remain private; whereas disclosure of private information obtained through the PRA is often publicized with destructive consequences.

Conclusion

Although, the court’s reasoning is quite sound, many public institutions and employees will feel betrayed at the court’s perceived willingness to take an expedient path to further “transparency,” while simultaneously requiring employees to learn, interpret and comply with the PRA. It may be easy to capitalize on cynicism and presume our public officials are always hiding something, but there is a price for that cynicism: our privacy. And what do we get for our privacy? Not much.

The majority of public business is done through public means, so we will not be receiving much more information. There are already laws ensuring public accountability. Expanding public records to personal devices will create an overwhelming burden on the underfunded agencies, taxpayers and employees. Finally, making personal thoughts on personal devices subject to PRA scrutiny is nothing less than a privacy intrusion. But, the law is the law. Fortunately, many predicted this decision and have been preparing for its repercussions. Our public institutions will make it work, we always do.

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