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California Supreme Court Issues Decision on Use of Private Email

By Ernest Galvan and Jenny S. Yelin

It is difficult to get through a single news cycle these days without reading about a public official using private means to communicate regarding public business. The New York Times recently reported that when Vice President Mike Pence was governor of Indiana, he used a private AOL email account in addition to his government account for communications related to his official duties. Despite his intense criticism of Hillary Clinton during the 2016 Presidential Campaign regarding her use of a private email server when she was Secretary of State, the Vice President apparently used his AOL account to discuss topics such as Indiana's response to terrorist attacks. According to the New York Times, last summer, his account was hacked, and all of his contacts received an email requesting money because he and his wife were stranded in the Philippines. *See* "Mike Pence Used Private Email as Governor, News Report Says," New York Times, March 2, 2017. Chicago's Mayor Rahm Emanuel recently settled an open records lawsuit about his use of personal email for public business.

Public officials may turn to private email and messaging services to evade public scrutiny of potentially embarrassing information. In California at least, avoiding public disclosure just became much more difficult. On March 2nd, the California Supreme Court held in *City of San Jose v. Superior Court*, No. S218066, --- P.3d ---, 2017 WL 818506 (Cal. March 2, 2017), that communications sent through personal email are subject to disclosure under the California Public Records Act (CPRA) if the communications concern public business.

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The court held that if a writing related to the conduct of public business is *prepared by* a public employee, it constitutes a public record even if it is not transmitted through or stored on or in government-owned servers or accounts. *City of San Jose*, 2017 WL 818506, at *4-6. As such, writings sent from and to private accounts are disclosable public records, unless they fall into one of the CPRA's statutory exceptions. *Id.*, at *9, 11. Because all of the documents at issue in the case were communications that are retained by the sending or receiving device—emails and text messages—the court did not consider whether public officials could communicate through services that immediately delete messages after they are read without running afoul of the CPRA.

These emerging technologies, in the mold of the photo sharing service Snapchat, which had its very successful Initial Public Offering last week, pose a thorny issue for open government advocates. The Washington Post has reported that officials in the Trump White House use a service called Confide, which encrypts messages and immediately deletes them, leaving no record of the communication. *See* Upheaval is now standard operating procedure inside the White House, Washington Post, Feb. 13, 2017. How can the public hold officials accountable for their actions if there is no archive of how they conduct public business?

The *City of San Jose* opinion suggests that in California, public officials cannot use this type of fleeting message technology to discuss matters relating to the conduct of public business. Under the court's logic, it is not material that these communications would not be stored by the government somewhere; the fact that they are "prepared by" public officials makes them public records. *City of San Jose*, 2017 WL 818506, at *4-6. Because the CPRA mandates that public records be available to inspection at any time by any person, it would be illegal for officials to "prepare" records without having them archived.

It is possible that in a future case, government employees may argue that communications sent through platforms like Confide are immune from disclosure under the CPRA because unlike emails and text messages, they do not even constitute "writings" under the CPRA's definition of that term: "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov't Code §6252(g).

It is somewhat of an open question whether fleeting messages would be considered to be recorded "upon any tangible thing," since they are intentionally not recorded anywhere. Yet as the court recognized in *City of San Jose*, the California Constitution instructs that any ambiguity in statutory language should be interpreted in favor of requiring disclosure. *City of San Jose*, 2017 WL 818506, at *1 (citing Cal. Const., art. I, §3(b)(1)). It would run directly counter to the reasoning in the case if officials could simply transfer their method of communicating from private emails and text messages to encrypted, fleeting messages just to avoid the reach of disclosure under the CPRA. The court emphasized that the rationale of the CPRA is to allow the public to determine whether government officials are acting in the public's best interest, and shielding the "most sensitive, and potentially damning discussions" from disclosure would defeat the Act's purpose. *Id.*, at *8.

Similarly, government entities are unlikely to succeed in arguing that such communications are not disclosable because they are not "owned, used, or retained" by the government, or indeed by anyone. In *City of San Jose*, the court noted that if a government employee "retains" a communication, even if it is retained in his or her personal email account, it should be considered in the constructive possession of the government employer. *Id.*, at *6. The court rejected the notion that the government could avoid disclosure by transferring custody of a document to a private entity not bound by the CPRA. *Id.*, at *7. Messages regarding public business that are sent through a platform such as Confide are presumably transferred to a private entity before they are erased, because they must exist long enough for the recipient to read them. Under the logic of *City of San Jose*, then, they are still "public records" and an official sending such messages knowing they will be erased would violate section 6270 of the CPRA, which prohibits a state or local agency from "sell[ing], exchang[ing], furnish[ing], or otherwise provid[ing] a public record … to a private entity in a manner that prevents" the government from producing the record pursuant to a CPRA request. Cal. Gov't Code §6270(a).

As usual, technology is changing more quickly than the law. But it is fairly clear that California government officials cannot resort to using technology that erases their communications when they discuss public business. If public employees wish to avoid having their communications become discoverable, they may want to resort to the most old-fashioned of means: speaking face to face.

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