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## MEMORANDUM

TO: Honorable Edwin M. Lee, Mayor  
Honorable Members, Board of Supervisors  
Honorable Naomi Kelly, City Administrator  
Department Heads  
Members of Boards and Commissions  
Board and Commission Secretaries

FROM: Paul Zarefsky <sup>PZ</sup>  
Deputy City Attorney

DATE: March 24, 2017

RE: New California Supreme Court Case: Public Records on Personal Electronic Devices

In the City Attorney's *Good Government Guide* (<https://www.sfcityattorney.org/wp-content/uploads/2015/07/GoodGovtGuide-2014-09-03.pdf>), we have long advised that "while courts have not definitively resolved the issue, City officials and employees, in an abundance of caution, should assume that work they perform for the City on personal computers or other personal communications devices may be subject to disclosure under the public records laws." (*Good Government Guide*, 85.) The California Supreme Court now has definitively resolved this issue. In *City of San Jose v. Superior Court* ("*San Jose*"), --- Cal.4th ---, 214 Cal.Rptr.3d 274, decided March 2, 2017, the Court ruled that communications on personal electronic devices ("PEDs") of City employees and officials may be public records subject to disclosure under the California Public Records Act ("CPRA").

In this memorandum we review the *San Jose* decision and explore its main ramifications for City employees, officials, and departments. Before getting into details, we emphasize the core legal premise that underlies the decision. As the California Constitution makes clear, California has a system of open government embodied in the public's right of access to records of public business, prescribed in the CPRA and safeguarded in the California Constitution. (Cal. Const., Art. I, § 3(b).) The public's ability to monitor government, a hallmark of a robust democracy, would be undermined if employees and officials could shield records of public business simply by using PEDs. A ruling that messages communicated exclusively on PEDs are not public records would create a debilitating loophole that, in the Court's words, "would allow evasion of CPRA simply by the use of a personal account.... [G]overnment officials could hide their most sensitive, and potentially most damning, discussions in such accounts. The City [of San Jose]'s interpretation 'would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private.'" (*San Jose*, 214 Cal.Rptr.3d at 286-87; citation omitted.)

Accordingly, the *San Jose* decision forecloses the possibility that government employees and officials may avoid public records laws by doing the public's business in private, ensuring that records of public business on PEDs will be as accessible to the public as other types of

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electronic records on the government's own devices. We interpret the decision in light of that guiding principle.

**SUMMARY**

1. Communications on PEDs or personal accounts (usually referenced in this memorandum as "writings on PEDs") involving the conduct of the public's business may be public records subject to disclosure. Such writings include, but are not limited to, emails on personal computers and text messages on personal cell phones. And they include not only messages written by City employees and officials on PEDs, but also messages received. (Pages 3-4 of this Opinion.)
2. Not all communications on PEDs are public records. Only a "writing containing information relating to the conduct of the public's business"—that is, a writing that itself serves, or is intended to serve, a City purpose and that involves a matter over which the official or employee has work responsibility—is a public record. If the writing serves an essentially private function, it is not a public record. If it contains primarily personal information, with only incidental references to City business, it is very likely not a public record. Beyond these general principles, a number of factors, including content, context, and intended recipients, determine whether the writing is a public record. (Pages 4-8 of this Opinion.)
3. As a general rule, City departments will satisfy their duty to search for records on an employee's or official's PED in response to a public records request by entrusting the employee or official to conduct the search and retrieve responsive records. This process will require the department to notify the employee or official of the public records request and acquaint the employee or official with the standards for determining both whether a writing on a PED is a public record and, in some instances, whether it is responsive to the request. In a court proceeding concerning the request, the employee or official must be prepared to testify under oath or submit a statement under penalty of perjury, describing the search conducted on the PED and explaining the types of writings on the PED that were not provided to the requester because of not being responsive public records. (Pages 8-10 of this Opinion.)
4. The Board of Supervisors could adopt legislation prescribing rules regarding use of PEDs to conduct City business. Absent a contrary ordinance, City departments may adopt such rules or policies. Before the Board adopts any legislation regarding use of PEDs for City purposes, or a department issues new or amended rules or policies on that issue, it should consult with this Office and the Department of Human Resources on potential legal and employment-related issues. Such legislation, rules, or policies may require notice to City unions, and possibly meet and confer, if they change or set new terms and conditions of City employment. (Pages 10-11 of this Opinion.)
5. The *San Jose* decision does not change the exemptions from disclosure for public records or the rules governing withholding or redaction of public records. Here, a record on an employee's or official's PED is no different from the identical record on a computer or other

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electronic device belonging to the City. The possible exemptions are the same, and they apply equally to public records on PEDs. (Page 11 of this Opinion.)

6. Also, the *San Jose* decision does not change records retention requirements. A record on an employee's or official's PED is no different from the identical record on an electronic device belonging to the City. Records retention and destruction policies apply equally to public records on PEDs. But there is no requirement that employees or officials keep the records on PEDs, even if they must be retained, so long as they appropriately transfer those records onto City devices where they will be retained. (Pages 11-12 of this Opinion.)

7. A public records request need not specify that it seeks records on employees' or officials' PEDs for such records to be covered by the request. As a general rule, assume that a public records request includes such records. There may be instances where the wording or context of a request will make clear that such records are not covered by the request. In some instances, where the intent of the requester is unclear, the department may contact the requester to obtain clarification. (Page 12 of this Opinion.)

**ANALYSIS****I. COMMUNICATIONS ON PEDs MAY BE PUBLIC RECORDS**

In *San Jose*, a member of the public sought public records including specifically emails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staffs. The City of San Jose refused to produce records of such communications exclusively made through private cell phones or private email accounts because the City did not own or control those phones or accounts. The trial court ordered disclosure. But the Court of Appeal reversed, finding that such records are not public records. The California Supreme Court then reversed the Court of Appeal, holding that "when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act.... A city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account." (*San Jose*, 214 Cal.Rptr.3d at 278, 290.)

We highlight three of the foundational principles of the decision that inform our analysis about how the City must implement it.

First: Writings by an agency's officials and employees involving the conduct of the public's business on PEDs are attributable to the agency: "A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can.... When employees are conducting agency business, they are working for the agency and on its behalf.... A writing prepared by a public employee conducting agency business has been 'prepared by' the agency ..., even if [it] is prepared using the employee's personal account." (*San Jose*, 214 Cal.Rptr.3d at 283; citations omitted.)

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Second: A writing's location does not limit its status as a public record: "[F]ederal courts have remarked that an agency's public records 'do not lose their agency character just because the official who possesses them takes them out the door.' .... [D]ocuments otherwise meeting [the] definition of 'public records' [likewise] do not lose this status because they are located in an employee's personal account. A writing retained by a public employee conducting agency business has been 'retained by' the agency within the meaning of [the definition of 'public record'] even if the writing is retained in the employee's personal account." (*San Jose*, 214 Cal.Rptr.3d at 285; citation omitted.)

Third: The definition of a public record presents a different question from the nature of an agency's duty to search for the record. Whether a writing is a public record is determined by the statutory definition; by contrast, the existence, scope, and nature of the duty to search for public records in response to a request is, in general, measured by a reasonableness standard. (*Compare* sections A and B of the *San Jose* decision, addressing definitional issues, 214 Cal.Rptr.3d at 279-88, with section C, addressing the duty to search for responsive records. *Id.* at 288-90.)

## **II. DETERMINING WHEN A WRITING ON A PED IS A PUBLIC RECORD**

Having concluded that communications on an employee's or official's PED can be a public record, the Court in *San Jose* then addressed how to determine whether a particular writing on a PED is a public record subject to disclosure. The Court approached this issue on two levels—substantive (how to determine whether a communication on a PED is a public record) and procedural (how to go about searching for and producing the public record).

### **A. The Standard for Determining if the Writing is a Public Record**

A public record is "a writing *containing information relating to the conduct of the public's business* prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Cal. Gov. Code § 6252(e); emphasis added.) As we discuss in our *Good Government Guide*, the definition of a "writing" is expansive, going beyond traditional typed or handwritten writings to, for example, emails, voicemail messages and other recordings, and text messages. (*Good Government Guide*, 84.) And so too is the definition of what "relates to the conduct of the public's business," though it has limits.

In the *San Jose* decision the Court extends these two elements of the definition of a public record to information on an employee's or official's PED. In doing so, the Court recognizes that records on PEDs that discuss City business are not necessarily public records. The Court's opinion sets forth the following guidance for applying the "containing information" standard, highlighted above, to writings on employees' and officials' PEDs, to aid in determining whether such writings are public records:

Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an email to a spouse complaining "my coworker is an idiot" would likely not be a public record.

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Conversely, an email to a superior reporting the coworker's mismanagement of an agency project might well be. Resolution of the question, particularly when writings are kept in personal accounts, will often 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 ....

[T]o qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records. For example, the public might be titillated to learn that not all agency workers enjoy the company of their colleagues, or hold them in high regard. However, an employee's electronic musings about a colleague's personal shortcomings will often fall far short of being a "writing containing information relating to the conduct of the public's business."

We recognize that this test departs from the notion that "[o]nly purely personal" communications "totally void of reference to governmental activities" are excluded from CPRA's definition of public records. While this conception may yield correct results in some circumstances, it may sweep too broadly in others, particularly when applied to electronic communications sent through personal accounts.

(*San Jose*, 214 Cal.Rptr.3d at 281 and n.4; citations omitted.)

While this guidance helps, inevitably ambiguity exists in a multi-factor approach, especially where as here the relative weight given each factor is unclear and the range of scenarios evaluated under the approach may be vast. To keep this approach in perspective, we emphasize that the ultimate purpose of the test is to determine whether the writing on the employee's or official's PED was in itself the conduct of City business, in light of the underlying principle that employees or officials may not use PEDs to avoid public records laws.

#### 1. The "Scope of Work" Test

A "scope of work" test, broadly understood, may guide the analysis of whether writings on employees' and officials' PEDs are public records: Did the writing serve, or was it designed to serve, a work purpose—not necessarily exclusively, but at least in part? In other words, was the writing communicated as part of the employee's or official's conduct of City business? The Court states that "[g]enerally any 'record ... kept by an officer because it is *necessary or convenient to the discharge of his official duty* ... is a public record.' (*Braun v. City of Taft*

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(1984) 154 Cal.App.3d 332, 340; see *People v. Purcell* (1937) 22 Cal.App.2d 126, 130.)” (*San Jose*, 214 Cal.Rptr.3d at 281; emphasis added.) The term “convenient” here indicates that the writing was part of work performed by the employee or official for the City, even if not required or solicited. Performance of work would include not only sending but also receiving information on the PED.

That a writing on a PED pertains to some aspect of City business will not alone render the writing a public record. Whether the writing pertains to an aspect of City government for which the employee or official is responsible or has a role is a necessary condition to meeting the scope-of-work test. For example, a comment on a PED by a Municipal Transportation Agency employee concerning the City’s affordable housing policies would not be a public record, absent special circumstances showing a nexus between the comment and the employee’s work. The presence or absence of such a nexus will usually turn on the customary responsibilities of the employee or official. But the nexus inquiry should not be rigid or formalistic, as courts likely would recognize the broad scope of work responsibilities of certain employees and officials, and also recognize work responsibilities voluntarily assumed. Still, without a nexus between the work responsibilities or role of the employee or official, and the writing on the PED, there is no public record.

As we noted earlier, the Court considers a writing on a PED prepared by an employee or official to be a record of the public agency, rather than a private record of the individual, because “[w]hen employees *are conducting agency business*, they are *working for the agency and on its behalf*.... A writing prepared by a public employee *conducting agency business* has been ‘prepared by’ the agency ..., even if the writing is prepared using the employee’s personal account.” (*San Jose*, 214 Cal.Rptr.3d at 283; emphasis added, citations omitted.) Similarly, “a writing retained by a public employee *conducting agency business* has been ‘retained by’ the agency within the meaning of [the definition of ‘public record’] even if the writing is retained in the employee’s personal account.” (*Id.* at 285; emphasis added.)

Unless the statutory term “information relating to the conduct of the public’s business” is understood to be limited to information that was communicated as part of an employee’s or official’s conduct of City business, that term would be in sharp tension, if not outright conflict, with the “conducting agency business” rationale behind the Court’s conclusion that a writing on an employee’s or official’s PED is a writing of the agency. Courts have a duty to harmonize potentially conflicting parts of a statute where possible. (*Acqua Vista Homeowners Association v. MWI, Inc.* (2017) 7 Cal.App.5th 1129, 1140; *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468.) Harmonization is accomplished here by recognizing scope-of-work, in the broad sense discussed above, as the basic test for whether a writing on a PED is “information relating to the conduct of the public’s business.”

## 2. The “Primarily Personal” Test

If it is unclear whether a communication is a public record under the scope-of-work test, it becomes important to assess a closely related question: whether the writing is primarily

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personal in nature. In its *San Jose* opinion, the Court rejects “the notion that ‘[o]nly *purely* personal’ communications ‘totally void of reference to governmental activities’ are excluded from CPRA’s definition of public records.” (*San Jose*, 214 Cal.Rptr.3d at n.4; emphasis added, citation omitted.) Rather, “communications that are *primarily* personal, containing no more than *incidental* mentions of agency business, generally will not constitute public records.” (*Id.* at 281; emphasis added.) “[T]o qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public’s business.” (*Id.*) It is unlikely, though possible, that a primarily personal writing on an employee’s or official’s PED could also be a writing that was in itself the conduct of City business.

### 3. Relevant Factors

The Court identifies several factors to consider in determining whether a writing on an employee’s or official’s PED is “information relating to the conduct of the public’s business.” The factors identified are “the content [of the writing] 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.” (*San Jose*, 214 Cal.Rptr.3d at 281.) This list is not exclusive or comprehensive. Other more specific factors, likely subsumed under these generally stated factors, also may be relevant. For example, if the writing on the PED has been prepared or received by an employee or official in the exercise of a discrete function that is not City business, the writing would not be a public record. An employee who is a union representative may prepare and receive communications on a PED in that role. Though many of these writings will pertain to City business, they do not involve the conduct of City business; rather, they involve the conduct of union business. Therefore, they would generally not be public records.

The last factor stated by the Court, “act[ing] within the scope of ... employment,” is more significant than just one of several factors. Because “*conduct[ing] the public’s business in private*” is the danger the Court intends to avoid through its decision, it stands to reason that scope-of-work, in the broad sense discussed above, is the ultimate factor in determining whether a writing on an employee’s or official’s PED is a public record. (*San Jose*, 214 Cal.Rptr.3d at 287; emphasis added, citation omitted.) But circumstances likely will arise where it will be difficult to assess this factor independently of other factors that point toward a writing on a PED being a private communication or, conversely, a public record. There will be other circumstances where it is so clear that a writing is prepared or received by an employee or official in the course of working for the City that it will be easy to determine that the writing is a public record.

### 4. Illustrative Examples

In addition to stating factors that are relevant to determining whether a writing on an employee’s or official’s PED is “information relating to the conduct of the public’s business,” the Court provides examples that may help in making that determination. It notes that “an email to a superior reporting [a] coworker’s mismanagement of an agency project might well be [a

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public record, but] an employee's electronic musings about a colleague's personal shortcomings will often fall far short of being a 'writing containing information relating to the conduct of the public's business.'" (*San Jose*, 214 Cal.Rptr.3d at 281.) The first example seems much more likely to be the conduct of public business. It is a "report" (a more formal communication than "musings") to a superior (not typically a sounding board for purely personal matters) about "mismanagement of an agency project (more closely connected to City work than "a colleague's personal shortcomings"). We can also suggest why the second example would often "fall far short" of being a public record. "Musings" are not typically a means of engaging in City business, and comments on "a colleague's personal shortcomings," if disclosed, would likely serve more to "titillate" the public (the Court's terminology) than to provide useful information regarding governmental policies or processes.

Another example the Court gives touches on family relations: Depending on the context, an email to a spouse complaining 'my coworker is an idiot' would likely not be a public record." (*San Jose*, 214 Cal.Rptr.3d at 281.) Communications on a PED with a spouse or other family member who is not a City employee or official typically would not be made for the purpose of conducting City business. As the Supreme Court of Washington stated when addressing this issue, "employees do not generally act within the scope of employment when they text their spouse about working late." (*Nissen v. Pierce County* (2015) 183 Wash.2d 863, 879, 357 P.3d 45, 54.) And using a spousal communication to insult a coworker typically would not render the communication a public record.

The Supreme Court of Washington supplied another example of a writing on an employee's or official's PED that would likely not be a public record: "[Employees do not] typically act within the scope of employment by creating or keeping records purely for private use like a diary." (*Nissen, supra*, 183 Wash.2d at 879, 357 P.3d at 54.) Though this example is not mentioned in the *San Jose* opinion, a court likely would consider the example to be consistent with that opinion. Other extensive writings "purely for private use" would also likely not be public records. For example, a City employee's lengthy email on a personal computer, to an old friend across the country who plays no role in the conduct of City business, recounting the employee's career working for the City, would typically not be a public record.

These examples provide useful guidance in deciding cases where there is a reasonable argument that the writing on an employee's or official's PED is truly a private communication. But the examples do not suggest that in every instance of a writing on an employee's or official's PED that mentions City business it will be debatable whether the writing is a public record. The examples should not obscure the reality that, given the seemingly frequent use of PEDs to conduct City business, in many instances there will be no question that the writing on a PED of an employee or official involves the conduct of City business and is therefore a public record.

### **B. The Process for Producing Records on PEDs**

The Court in *San Jose* also addresses the process for determining whether a writing on a City employee's or official's PED is a public record. In its decision the Court is mindful of



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privacy concerns that presumably would arise from mandating that a public agency review writings on PEDs to determine if they are public records. (*San Jose*, 214 Cal.Rptr.3d at 288.) And it recognizes that the duty to search for records in response to a public records request “do[es] not require that agencies undertake extraordinarily extensive or intrusive searches.” (*Id.*; citations omitted.) Rather, the duty to search for public records is governed by a “reasonable effort” standard. (*Id.*, citing *California First Amendment Coalition v. Superior Court* (1998) Cal.App.4th 159, 166.) “In general, the scope of an agency’s search for public records ‘need only be reasonably calculated to locate responsive documents.’” (*Id.*, citing *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 85; *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1420.)

In light of these principles, the Court endorses a search process approved by courts in other jurisdictions, including the Supreme Court of Washington: placing on employees and officials, rather than some other person within the agency, the responsibility to search for, locate, and review, potentially responsive writings on their PEDs. (*San Jose*, 214 Cal.Rptr.3d at 289; *Nissen, supra*, 183 Wash.2d at 884-87, 357 P.3d at 56-58.) In such a system, the employee or official decides, at least as an initial matter, whether writings on the PED are public records. (*San Jose*, 214 Cal.Rptr.3d at 289.) This process avoids the need for someone else in the City department to search for responsive records by going through all the writings (or all the writings within a certain time frame) on an employee’s or official’s PED, and thus reduces privacy concerns that inhere in a system in which writings on PEDs can be public records. And it places primary responsibility for the records search on the person best able to conduct the search: the employee or official most knowledgeable about the records, which reside on that employee’s or official’s PED. (*Cf. Nissen, supra*, 183 Wash.2d at 887, 357 P.3d at 58 (because of the terseness of text messages, the employee or official on whose cell phone they reside may be needed to place them in context to determine if they are public records).)

For this process to work reasonably well, the department must take certain initial steps after receiving a public records request and determining that a specific employee or official may have responsive records. The department must notify the affected employees and officials of the public records request. (*San Jose*, 214 Cal.Rptr. at 289.) As with public records requests generally, the department will often know immediately which employees or officials to contact, but in some instances it will have to take reasonable steps to identify those individuals. The department must ensure that the individuals charged with searching their PEDs understand how to determine whether a writing on the PED is a public record. A legally compliant public records response process depends on that understanding. (*Id.*) Departments must ensure that their employees and officials gain the requisite understanding. This Office stands ready to advise both departments and individuals as necessary to aid in that effort. We expect that this memorandum will be a helpful first step in the educational process.

It would also be important, for some but not all public records requests, to provide employees and officials who will be reviewing writings on their PEDs with guidance as to what

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types of records would be considered responsive to the request. The Court in *San Jose* does not address that issue, which was not directly before it. But whether a record is responsive to a request is a central threshold issue encountered in responding to many requests for public records. While resolution of this issue is not always easy, most City departments, and this Office, have considerable experience dealing with the issue. Departments should help the employee or official make this determination, as necessary; and, again, this Office is available to provide advice on this issue to those individuals and to departments.

Under this process, employees and officials have a responsibility to search their PEDs in good faith for responsive records. If a dispute were to get to court, employees and officials might be required to testify under oath or through a declaration under penalty of perjury, describing the search to demonstrate that it was reasonable and to explain their decisions to exclude certain writings as not being responsive public records, sufficiently for the court to judge those issues. (*San Jose*, 214 Cal.Rptr.3d at 289; *Nissen, supra*, 183 Wash.2d at 884-87, 357 P.3d at 56-58.) The City would be held responsible for the judgments of the employee or official. Therefore a department has discretion to require the official or employee to provide the same type of explanation at the time the department is making judgments about responding to the public records request. These explanations need not get into writings on PEDs that bear no relation to City business. Rather, they should address those writings on PEDs that touch upon City business and might be public records.

**C. City Regulation of Use of PEDs for Conducting City Business**

The City could consider legislation, rules, or policies to restrict the use of PEDs to conduct City business, or to set other requirements which, if adopted, could eliminate many of the issues raised by the decision.

For example, the Board of Supervisors could adopt an ordinance that would, City-wide, prohibit, restrict, or discourage use of PEDs for City business, or that would, as appropriate, make distinctions among different components of City government as to these matters. Also, in the absence of a contrary ordinance, a department head or a board or commission overseeing a department could adopt a new rule or policy, or amend an existing rule or policy to: prohibit or discourage the department's employees from using PEDs for City business; require employees sending or receiving City communications on a PED to copy or forward such communications to the employee's City account; or require (or at least request) that email communications on a PED pertaining to City business have an email address distinct from the employee's personal email address. Some of these and other policies could pose practical difficulties and may be difficult to monitor or enforce.

These are simply illustrative examples; there likely are other possibilities, including efforts to supply members of boards and commissions with a City email account to use for City business. This Office is not recommending any particular one of these possibilities, nor can we assess the feasibility of the options; we merely note them as among the policy options that departments, boards, and commissions may consider if they so choose.

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Before the Board adopts legislation to regulate use of PEDs for City business, or City departments adopt or amend rules and policies on such use, we recommend they consult with this Office and the Department of Human Resources about possible legal, labor, and employment issues, including whether such legislation, rules, or policies may require notice to City unions, and possibly meet and confer on matters within the scope of representation.

**III. OTHER ISSUES****A. Withholding or Redacting Public Records on a PED**

The *San Jose* opinion does not address the withholding or redaction of responsive public records on an employee's or official's PED. If a writing on a PED is a public record that is responsive to a request, then—as with any public record—the issue becomes whether the record may or must be withheld or redacted because it is in whole or part exempt from disclosure. The *San Jose* decision does not modify existing law governing exemptions from disclosure for public records.

Thus, for example, if a public record on the City's email system would be exempt from disclosure, the same public record in an employee's or official's personal email account would also be exempt. And the Court makes clear that even if some of the information in a record on a PED involves the conduct of City business, any personal information in that record that does not relate to City business may be redacted, even if there is nothing particularly sensitive or confidential about that information. (*San Jose*, 214 Cal.Rptr.3d at 287.)

While the *San Jose* opinion does not change existing exemptions, there may be certain exemptions that frequently come into play with public records on PEDs. For example, such records will often contain personal contact information, such as a personal cell phone number or personal email address, of the employee or official, or of a third party. As we note in our *Good Government Guide*, there is a privacy dimension to personal contact information such as a cell phone number or email address. (*Good Government Guide*, 99-100.)

**B. Retention Requirements for Public Records on a PED**

The *San Jose* opinion does not address records retention requirements. The usual rules govern, and apply equally to public records on PEDs as to public records on City electronic devices. For example, if an email on a City computer need not be retained, the very same email on an employee's or official's computer need not be retained. In general—as with the large majority of electronic records on City devices—most records on PEDs need not be retained for any period of time. (*Good Government Guide*, 112.)

But, as with public records generally, if a public record is on a PED at the time the department receives the request, and the record is responsive to the request, the employee or official must retain it, even if in the absence of the request it could have been deleted. To avoid inadvertent deletion of responsive records on a PED, and to help ensure compliance with public records laws, departments receiving public records requests should quickly notify employees and

**MEMORANDUM**

TO: Honorable Edwin M. Lee, Mayor  
Honorable Members, Board of Supervisors  
Honorable Naomi Kelly, City Administrator  
Department Heads  
Members of Boards and Commissions  
Board and Commission Secretaries

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officials who might have records responsive to the request, and alert them to refrain from deleting potentially responsive records.

Where a record on a PED must be retained, the employee or official may do so by transferring the record to a City device. But in doing so, the information about when the record was sent or received on the PED should be preserved on the City device.

Where a records retention question arises pertaining to records on an employee's or official's PED, the employee or official should review the department's records retention policy to determine whether there is any obligation to retain a specific record. If necessary, the official or employee should consult with responsible department staff and this Office to obtain guidance on the retention question.

**C. Deciding Whether a Request Seeks Records on Employees' or Officials' PEDs**

The *San Jose* opinion does not directly address how to determine whether a public records request includes a request for records on employees' or officials' PEDs. The issue did not arise in *San Jose*, because the requester had specifically requested records on PEDs. While the issue is not free from doubt, a court very likely would conclude that a public records request encompasses all forms of responsive records in all media, even if the request does not specify those forms or media. That already is the general rule. A request for records on a particular subject need not specify subcategories of records or the media in which records are stored. For similar reasons, even if a request for public records does not specify that the records sought include those on officials' or employees' PEDs, it nonetheless encompasses such records.

Some public records requests are intentionally narrowly drawn and confined to certain types of records. If a request, either by its wording or in context, makes clear that the requester is not seeking records on PEDs, such records would not be encompassed within the request. If the request is unclear in this regard, the department could seek clarification from the requester.

**D. Additional Questions**

There are many other issues that may arise in implementing the *San Jose* decision. We may provide further written guidance as particular issues arise. And our Office is available to answer questions employees and officials may have going forward.

**CONCLUSION**

As mentioned above, in this memorandum we provide general guidance as to the meaning and implications of the *San Jose* decision. This memorandum does not cover every issue that might arise from the decision, nor can it address future case law developments that may build on the decision. Further, for any particular public records request, legal requirements often turn on the facts and circumstances regarding that request. As questions arise concerning public records requests encompassing writings on PEDs, we encourage City officials and employees to contact this Office (specifically, the deputy city attorney who advises the

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department, office, board, or commission) for further guidance, in advance of making decisions about how to respond.

P.Z.