UNIVERSITY OF CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

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SUMMARY

Two recent rulings address significant issues related to the California Public Records Act (PRA). One court upheld the University's ability to protect scholarly research data and researcher communications. Another court concluded that the City of San Jose was required to disclose city-related communications even though they were sent on employees' private devices.

If you have any questions regarding the issues raised by these two cases, please contact:

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RECENT CALIFORNIA PUBLIC RECORDS ACT CASES MAY SIGNIFICANTLY AFFECT THE PROTECTION OF EMPLOYEES' COMMUNICATIONS

Two recent cases under the California Public Records Act (PRA) have resulted in rulings that may have a significant effect on the University's ability to protect its employees' electronic communications. In a significant victory for the University and its researchers, the University successfully protected unpublished data and researchers' communications from public release, providing greater assurance that the University's interest in promoting scholarly research will be weighed heavily against public disclosure in the court's future analyses of PRA exemptions. But in a second case involving the City of San Jose, messages on personally-owned devices were found to be subject to disclosure.

In a case handled by attorneys in the Office of the General Counsel, *The Humane Society of the United States v. The Superior Court of Yolo County*, the California Court of Appeal affirmed that records relating to the funding, preparation, and publishing of a UC Davis research study were exempt from disclosure under the PRA. The Humane Society filed a petition to compel disclosure of some 3100 pages of documents, including email correspondence between researchers, held by the University's Agricultural Issues Center (AIC). The AIC had recently published a study on the projected economic effects of the Prevention of Farm Animal Cruelty Act, a state ballot proposition.

After an *in camera* review of the documents, the trial court found that none of the records showed that the egg or poultry industries had improperly influenced the study. Relying on the PRA's "catch-all" exemption, which provides for a "balancing test" between the public's right to know and the public's interest in University confidentiality, the court protected all but 28 pages of the records from disclosure. Specifically, the court held that the public interest in promoting research on important social issues "clearly outweighed" any benefit the public might receive from gaining access to the remaining documents.

Upholding the trial court decision, the Court of Appeal emphasized that disclosing scholarly research communications would have a chilling effect on the candid and objective analysis of controversial social issues in the academic setting—and that such analysis benefits the public. In applying the PRA's balancing test, the Court gave special consideration to two particular features of the research community's methodology. First, academic researchers often send brief, informal emails containing "midstream thinking" that the public could easily misunderstand if read out of context. Second, academic studies like the AIC's are exposed to extensive peer review and scrutiny prior to publication, so public disclosure is not needed to ensure their objectivity.

In reaching its decision, the Court relied heavily on the declaration of the Director of the AIC, who testified about the harm that the release of such data and communications would have on the ability of the Center

to carry out its mission, which depends on the cooperation of community advisors, research collaborators, and farms who provide highly confidential financial data. The Court found the declaration sufficiently authoritative to conclude that the risk of harm to the scholarly research process was not merely speculative, but rather was a real harm that must weigh heavily against public disclosure.

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In a second case, *Smith v. City of San Jose*, the Santa Clara Superior Court ruled that communications sent or received by city officials or staff on Personal Digital Assistant (PDA) devices—including text messages, emails and voicemails on employees' personal accounts—are not exempt from PRA disclosure if they concern city business.

"[T]he Santa Clara Superior Court ruled that communications sent or received by city officials or staff on Personal Digital Assistant (PDA) devices—including text messages, emails and voice-mails on employees' personal accounts—are not exempt from PRA disclosure if they concern city business."

The communications at issue in the case were text messages delivered to a City Council member's personal wireless account shortly after a meeting of the San Jose City Council and Redevelopment Agency Board. The purpose of the meeting was to discuss a proposal to award millions of dollars in contracts for downtown San Jose redevelopment projects. The messages clearly related to the City's business.

The City argued that the messages were not "public records" for the purposes of the PRA—that is, records "prepared, owned, used, or retained" by a public agency—because they were neither stored on the City's computers nor accessible to the City. But the court noted that city business can *only* be carried out by its individual officers and employers, rather than by the city as an entity. The court further stated that it would be "absurd" if a public agency could shield information from public disclosure simply by storing it on equipment it does not technically own. Instead, the court relied on a 1983 case, *San Gabriel Tribune v. Superior Court*, in ruling that any record a public officer keeps "as necessary or convenient to the discharge of his official duty" is a "public record" for the purposes of the PRA.

Smith will be appealed and is not currently binding on the University of California. But the case may signal how other courts are likely to treat private communications of public agency officials in the future, and experts do not anticipate that the Court of Appeal for the Sixth District will overturn the ruling.