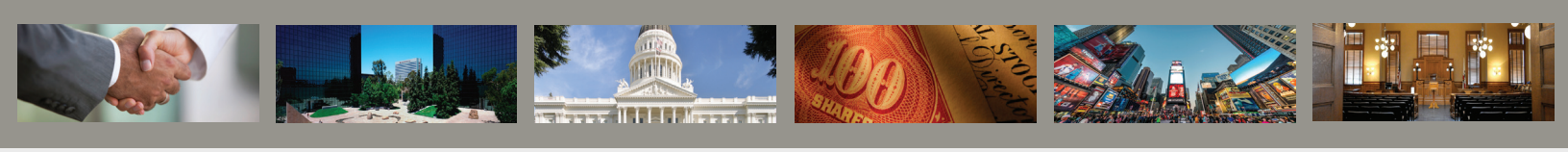

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CASE UPDATE

***CA Supreme Court Rules that Texts and E-mails on Personal Devices May be Considered Public Records: City of San Jose v. Superior Court*, California Supreme Court Case No. S218066 (March 2, 2017)**

In a significant change to how the California Public Records Act (the "Act") has been historically construed, the California Supreme Court has held that electronic messages (*e.g.*, emails and text messages) on personal devices and personal accounts are subject to disclosure under the Act if they are related to substantive public business.

The Act creates "a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency," which must be disclosed unless an exception applies. Under this definition, the Court held that even though electronic messages stored on personal devices and personal accounts are not owned or maintained by a public agency in traditional sense, because they are prepared by a public employee, they qualify as public records if they relate to public business. In fact, even though the messages on personal accounts may only be in the possession of a single employee rather than the agency itself, under a broad interpretation of the Act, the Court held that messages on personal accounts are nonetheless "retained by" the public agency.

The key issue moving forward will be determining whether or not a personal electronic message is sufficiently related to public business, which the Court admits "will not always be clear." In the Court's example, an email to a spouse complaining that a coworker "is an idiot" would likely not be a public record, but an email to a superior reporting a coworker's poor work would be. To make this determination, courts must examine 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." Ultimately, a writing must be substantively related to the conduct of public business to be subject to the Act.

In response to concerns about public employees' privacy, the Court reasons that such concerns "can and should be addressed on a case-by-case basis," and are not sufficient to stop all searches of private devices and accounts. The Court also includes some guidance about how public agencies should conduct searches of private devices/accounts, indicating the scope of an agency's search for public records "need only be reasonably calculated to locate responsive documents."

In light of this ruling, public agencies should examine their existing policies, and consider a policy that prohibits employees from using personal electronic devices or personal email accounts for work-related communications, which is in line with a policy proposed by the Supreme Court as a means to comply with an agency's obligations to search for records when requested. Such a policy would avoid the challenging practical issues involved in examining personal text messages/emails, and determining if they qualify as sufficiently related to substantive public business under the foregoing factors on a "case-by-case" basis.

Please contact your Rutan attorney for further guidance.