O'Boyle v. Town of Gulf Stream

Court of Appeal of Florida, Fourth District

October 24, 2018, Decided

No. 4D17-2725

Reporter
257 So. 3d 1036 *; 2018 Fla. App. LEXIS 15247 **; 43 Fla. L. Weekly D 2386; 2018 WL 5291287

MARTIN E. O'BOYLE and ASSET ENHANCEMENT, INC., Appellants, v. TOWN OF GULF STREAM, SCOTT MORGAN, JOHN C. RANDOLPH, ROBERT A. SWEETAPPLE, and JOANNE O'CONNOR, Appellees.

Prior History: [1]** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 50-2015-CA-001737-XXXX-MB.

Martin E. O'Boyle & Asset Enhancement v. Town of Gulf Stream, 2017 Fla. Cir. LEXIS 18029 (Fla. Cir. Ct., Aug. 1, 2017)

Core Terms

public record, records, trial court, e-mails, bills, text message, employees, copies, moot, in-camera, texts, inspection, redacted, subject to disclosure, entity's, costs

Case Summary

Overview

HOLDINGS: [1]-The dismissal of appellants' claims under the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., was reversed and the case remanded to the trial court for it to conduct an in-camera inspection of the disputed text messages sent to and from the town's mayor to determine whether any qualify as public records; [2]-The court held to comply with the dictates of the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession-such as e-mails-by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester.

Outcome
Judgment affirmed in part; reversed in part; case remanded to trial court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] Standards of Review, De Novo Review

A motion to dismiss tests whether the plaintiff has stated a cause of action. An appeal of a trial court's ruling on a motion to dismiss is an issue of law subject to de novo review. The trial court's decision regarding a motion to dismiss is limited to a consideration of the allegations within the four corners of the complaint, and such allegations must be viewed in the light most favorable to the non-moving party. Likewise, the determination of whether something is a public record is a question of law subject to de novo review and is determined on a case-by-case basis.

Administrative Law > Governmental Information > Freedom of Information > Methods of Disclosure

HN2[] Freedom of Information, Methods of Disclosure

The right of access to public records is a cornerstone of our political culture, therefore, the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., must be liberally construed in favor of access, and all exemptions must be limited to their stated purpose.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN3[] Methods of Disclosure, Public Inspection

Art. I, § 24(a), Fla. Const., grants every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The Act implements this important constitutional tenet, and declares: It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency. *§ 119.01(1), Fla. Stat. (2017)*. Public custodians must allow a requested

record to be inspected and copied by 'any person desiring to do so, at any reasonable time, and under reasonable conditions. *§ 119.07(1)(a), Fla. Stat. (2016)*.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

HN4 **Freedom of Information, Enforcement**

To set forth a cause of action under the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., a party must prove they made a specific request for public records, the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner. Public records include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. *§ 119.011(12), Fla. Stat. (2017)*.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN5 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

An elected official's use of a private cell phone to conduct public business via text messaging can create an electronic written public record subject to disclosure. However, for that information to indeed be a public record, an official or employee must have prepared, owned, used, or retained it within the scope of his or her employment or agency. An official or employee's communication falls within the scope of employment or agency only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests. Therefore, not all written communications sent or received by public officials or employees of a government agency are public records subject to disclosure upon request under the Act. The reach of the Act is to those records related to the employee or official's public responsibilities. For instance, employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record in the usual case.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN6[] Freedom of Information, Defenses & Exemptions From Public Disclosure

The Florida Supreme Court has agreed with the Second District that based on the plain language of § 119.011(1), Fla. Stat., private or personal e-mails simply fall outside the current definition of public records. Not all e-mails transmitted or received by public employees of a government agency are public records pursuant to the Act by virtue of their placement on a government-owned computer system.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN7[] Freedom of Information, Defenses & Exemptions From Public Disclosure

To comply with the dictates of the Public Records Act, § 119.01, Fla. Stat. (2017) et seq., the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession-such as e-mails-by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. Where specified communications to or from individual state employees or officials are requested from a governmental entity-regardless of whether the records are located on private or state accounts or devices-the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper request. The ability of public officials and employees to use cell phones to conduct public business by creating and exchanging public records-text messages, e-mails, or anything else-is why a process must be available to offer the public a way to obtain those records and resolve disputes about the extent of compliance. Without such a process, the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level.

Administrative Law > ... > Freedom of Information > Enforcement > Judicial Review

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

HN8[] Enforcement, Judicial Review

When judicial intervention is requested to test the adequacy of the entity's response under the Public Records Act, § 119.01, Fla. Stat. (2017) et seq., the court can make the requisite

determination of relevance and privilege as to any contested record. And like pre-trial discovery conducted in the context of litigation, the text messages or other records that may ultimately be produced will be narrowly confined to those found to be relevant and non-privileged.

Administrative Law > Governmental Information > Freedom of Information > Methods of Disclosure

HN9 **Freedom of Information, Methods of Disclosure**

The purpose of both *Art. I, § 24(a), Fla. Const.*, and the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN10 **Methods of Disclosure, Record Requests**

The Florida Court of Appeal acknowledges that the public's statutory right to public records does not extinguish an individual's constitutional and statutory rights in private information. But it does not read *Art. I, § 24(a), Fla. Const.*, or the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., as a zero-sum choice between personal liberty and government accountability.

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

HN11 **Justiciability, Mootness**

An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A moot case generally will be dismissed. But there are at least three instances where an otherwise moot case will not be dismissed: (1) when questions of great public importance are raised, (2) when issues are likely to recur, or (3) if collateral legal consequences that affect the rights of a party flow from the issue to be determined.

Counsel: Robert Rivas of Sachs Sax Caplan, P.L., Boca Raton, (withdrawn as counsel after filing brief), and Jonathan R. O'Boyle of The O'Boyle Law Firm, P.C., Deerfield Beach, for appellants.

Hudson C. Gill and Jeffrey L. Hochman of Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for appellees Town of Gulf Stream, Scott Morgan, John C. Randolph, and Joanne O'Connor.

Therese A. Savona and Kathryn L. Ender of Cole, Scott & Kissane, P.A., Miami, for appellee Robert A. Sweetapple.

Judges: KLINGENSMITH, J. TAYLOR and KUNTZ, JJ., concur.

Opinion by: KLINGENSMITH

Opinion

[*1039] KLINGENSMITH, J.

Appellants Martin E. O'Boyle and Asset Enhancement, Inc., ("Asset") appeal the trial court's dismissal of their Complaint to Enforce Florida's Sunshine and Public Records Laws and for Declaratory and Injunctive Relief against the Town of Gulf Stream ("the Town") and other affiliated individuals (collectively, "appellees").[1] We find the trial court properly dismissed the Sunshine Law claims, as well as the claims arising from alleged public meeting violations under *Chapter 286, Florida Statutes*, and affirm **[**2]** on those issues without further comment. However, we reverse the dismissal of appellants' claims under the Public Records Act, and remand for further proceedings.

In their complaint, Asset and O'Boyle alleged separate Public Records Act violations regarding two public records requests: (1) for copies of bills and payments sent to the Town for services rendered by the Town's attorney; and (2) for copies of text messages sent or received by the Town's Mayor since the time of his appointment. Asset alleged that the Town produced illegitimately redacted copies of the bills and payments. In another claim, O'Boyle asserted that the Town produced "a cherry picked" selection of texts which painted O'Boyle "in a negative light." After another records request that produced additional, previously unseen texts, O'Boyle insisted that the initial release was incomplete and that the Town and Mayor deliberately concealed records from the public.

Appellants alleged that the Town violated *Article I, section 24 of the Florida Constitution* and *Chapter 119, Florida Statutes ("the Public Records Act" or "the Act")*. They requested the trial court order the Town and others to allow the inspection, copying, and photographing of the requested records after a hearing held pursuant to *section 119.11, Florida Statutes* (2017). **[**3]** They then filed a Motion for Mandatory In-Camera Inspection of Record asking that the court review the redacted legal bills to determine if they fell within the "work product" exception of the Public Records Act, as the Town claimed. A week later, the Town turned over the bills and payment records at issue without any redactions.

Appellees each filed a motion to dismiss, and the trial court held a hearing on the parties' motions. The court dismissed the complaint and granted ten days for amendment. Instead of amending, appellants requested **[*1040]** that a final judgment be entered, and the trial court obliged.

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[1] Appellants filed their complaint against several other defendants, including the Town's mayor, and two of the Town's attorneys.

HN1[] "A motion to dismiss tests whether the plaintiff has stated a cause of action." Bell v. Indian River Mem'l Hosp., 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). An appeal of a trial court's ruling on a motion to dismiss is an issue of law subject to *de novo* review. *See id.* The trial court's decision regarding a motion to dismiss is limited to a consideration of the allegations within the four corners of the complaint, and such allegations must be viewed in the light most favorable to the non-moving party. *See id.* Likewise, "[t]he determination of whether something is a public record is a question of law subject to *de novo* review and is determined on a case-by-case **[**4]** basis." Bent v. State, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010); *accord* State v. City of Clearwater, 863 So. 2d 149, 151 (Fla. 2003); Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Jud. Cir., 840 So. 2d 1008, 1013 (Fla. 2003).

HN2[] The right of access to public records is a "cornerstone of our political culture," Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 124 (Fla. 2016) (further citation omitted); therefore, the Public Records Act "must be liberally construed in favor of access, and all exemptions must be limited to their stated purpose." Palm Beach Cty. Sheriff's Office v. Sun-Sentinel Co., LLC, 226 So. 3d 969, 972 (Fla. 4th DCA 2017).

HN3[] "Article I, Section 24(a) of the Florida Constitution grants '[e]very person . . . the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf.'" *Id.* (alterations in original). The Act "implements this important constitutional tenet, and declares: 'It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.'" *Id.* (quoting § 119.01(1), Fla. Stat. (2017)); *accord* Rasier-DC, LLC v. B&L Serv., 237 So. 3d 374, 376 (Fla. 4th DCA 2018). "Public custodians must allow a requested record to be inspected and copied by 'any person desiring to do so, at any reasonable time, [and] under reasonable conditions.'" *Id.* (alterations in original) (quoting § 119.07(1)(a), Fla. Stat. (2016)).

HN4[] To set forth a cause of action under the Act, a party must "prove they made a specific request for public records, **[**5]** the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner." Grapski v. City of Alachua, 31 So. 3d 193, 196 (Fla. 1st DCA 2010). "Public records" include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. (2017); *accord* Braddy v. State, 219 So. 3d 803, 820 (Fla. 2017).

In line with these authorities, we consider the requests for the text messages and the attorney bills and payments separately.

Text Messages as Public Records

This is an action against a municipality to obtain records that, while potentially related to the Town's public business, are in the exclusive control of one of their elected officials. HN5[] An

elected official's use of a private cell phone to conduct public business via text messaging can create an electronic written public record subject to disclosure. However, for that information to indeed be a public record, an official or employee must have prepared, **[*1041]** owned, used, or retained it within the scope of his or her employment or agency. An **[**6]** official or employee's communication falls "within the scope of employment or agency" only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests.

Therefore, not all written communications sent or received by public officials or employees of a government agency are public records subject to disclosure upon request under the Act. *See City of Clearwater, 863 So. 2d at 150*. The reach of the Act is to those records related to the employee or official's public responsibilities. For instance, "employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary." *See Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45, 54 (Wash. 2015)*. None of these examples would result in a public record in the usual case.

Illustratively, in *City of Clearwater*, a Times Publishing Company ("Times") reporter requested copies of all e-mails sent or received over the City's network by two City employees throughout the course of a year. *863 So. 2d at 150*. The employees sorted their e-mails into private and public categories, and the City released the "public" emails **[**7]** to the reporter. *Id.* However, Times filed an action asserting it was entitled to *all* emails on the City's computers. *Id. at 150-51*. The trial court ordered all e-mails to be obtained, preserved, and secured from destruction. *Id.* After a final hearing, the trial court denied Times' requests for a writ of mandamus and permanent injunctive relief. *Id.* On appeal, the Second District affirmed the lower court's order, but did so without prejudice to Times seeking an in-camera review of all e-mails, while also ruling that "private" e-mails were outside the Act's scope. *Id.*

On review, ***HN6***[↑] the Florida Supreme Court agreed with the Second District that "[b]ased on the plain language of *section 119.011(1)*, . . . 'private' or 'personal' e-mails 'simply fall[] outside the current definition of public records.'" *Id. at 153* (alteration in original) (quoting *Times Publ'g Co. v. City of Clearwater, 830 So. 2d 844, 847 (Fla. 2d DCA 2002)*). The Court concluded that not "all e-mails transmitted or received by public employees of a government agency are public records pursuant to [the Act] by virtue of their placement on a government-owned computer system." *Id. at 150* (alteration in original); *accord Butler v. City of Hallandale Beach, 68 So. 3d 278, 280-81 (Fla. 4th DCA 2011)*.

HN7[↑] To comply with the dictates of the Act, the governmental entity must proceed as it relates to text messaging no differently than it would **[**8]** when responding to a request for written documents and other public records in the entity's possession—such as e-mails—by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. Where specified communications to or from individual state employees or officials are requested from a governmental entity—regardless of whether the records are located on private or state accounts or devices—the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper

request. The ability of public officials and employees to use cell phones to conduct public business by creating and exchanging public records—text messages, e-mails, or anything else—is why a process must be available to offer the public a way to obtain those records and resolve disputes **[*1042]** about the extent of compliance. Without such a process, the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level.

HN8[⬆] When judicial intervention is requested to **[**9]** test the adequacy of the entity's response, the court can make the requisite determination of relevance and privilege as to any contested record. And like pre-trial discovery conducted in the context of litigation, the text messages or other records that may ultimately be produced will be narrowly confined to those found to be "relevant" and "non-privileged."

Strong public policy reasons also support the conclusion that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act. ***HN9***[⬆] The purpose of both *Article I, section 24* and Chapter 119 is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device.

HN10[⬆] We acknowledge that the public's statutory right to public records does not extinguish an individual's constitutional and statutory rights in private information. But we do not read *Article I, section 24* or the Public Records Act as a zero-sum choice between personal liberty and government accountability. Accordingly, the Town's reasons for its lack of disclosure, whether for reasons related to relevancy, **[**10]** the application of possible privileges, or otherwise, necessitates a judicial review of the available communications to identify those which are subject to disclosure and any defenses to allegations of noncompliance. Such review would ensure that a meaningful determination of relevancy and privilege can be made, disputes can be expeditiously resolved, and all legitimate privacy concerns safeguarded.

Clearly, some of the text messages reviewed by the trial court during this process could include personal or private information, and some could be the subject of legitimate claims of privilege. Deciding which ones may remain private was the very purpose of the protocol ratified by the Supreme Court's *City of Clearwater* decision—review these communications in-camera and afford an opportunity to raise objections to protect against disclosure of irrelevant, privileged, or otherwise non-discoverable materials. To avoid that process altogether, assuming the scope of the request was reasonable, it would have been incumbent on appellees to show some controlling authority that the Public Records Act did not apply, or otherwise prohibited, the submission of the text messages to the court for an **[**11]** in-camera review. No such showing was made here.

Regardless of whether any of the texts are ultimately deemed subject to disclosure, each element of O'Boyle's public records claim as stated in the complaint regarding the text messages was sufficiently pled. *See* *Grapski, 31 So. 3d at 196*; *Brandon, 141 So. 2d at 279*. First, O'Boyle stated in the complaint that a *specific request* was made for all texts over a certain period of time. *See* *Grapski, 31 So. 3d at 196*. Second, the Town *received the request* because it responded with a release of certain texts deemed to be public records. *See id.* Third, the

requested public records *texts existed*, as was evident by their release and inclusion as an exhibit with the complaint. *See id.* Fourth, O'Boyle complained that a later response by the Town revealed *several additional texts that were not released upon the first request*, leading to the belief that there may be more available. *See id.*

Whether O'Boyle's individual claim proceeds further may depend on the outcome **[*1043]** of that in-camera review. But for now, we reverse the dismissal on this count of appellants' complaint and remand for the trial court to conduct an in-camera inspection of the disputed text messages sent to and from the Town's Mayor to determine whether any qualify **[**12]** as public records.

Production of Redacted Attorney Bills

Following Asset's public records request for attorney billing records, the Town responded by citing work product privilege and only provided redacted copies of the requested records. After appellants filed a motion for in-camera review, but before the dismissal hearing began, the Town acquiesced and provided Asset with a complete set of unredacted billing records. As a result, the Town asserts this issue on appeal is now moot and should be dismissed. We disagree.

HN11[⬆] "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992)*. "A moot case generally will be dismissed." *Id.* But there are at least three instances where an otherwise moot case will not be dismissed: (1) when questions of great public importance are raised, (2) when issues are likely to recur, or (3) "*if collateral legal consequences that affect the rights of a party flow from the issue to be determined*." *Id.* (emphasis added)*; accord Paul Jacquin & Sons, Inc. v. City of Port St. Lucie, 69 So. 3d 306, 308 (Fla. 4th DCA 2011)*.

We find the case of *Cookston v. Office of Pub. Def., 204 So. 3d 480 (Fla. 5th DCA 2016)*, to be analogous. There, Cookston filed a petition for writ of mandamus seeking the trial court to compel the production of correspondence from the Public **[**13]** Defender's Office ("PDO") and an assistant public defender pursuant to the Act. *Id. at 481*. He also petitioned for costs. *Id.* The trial court found the petition for writ of mandamus moot because the PDO provided the requested documents to Cookston in full shortly after it was filed. *Id.* On appeal, the Fifth District held, "Cookston's petition was not moot because the court did not determine whether he was entitled to reasonable costs of enforcement pursuant to section 119.12." *Id.* The matter was reversed and remanded for the trial court to determine whether the PDO's delay in providing the records entitled Cookston to an award of costs. *Id.; accord* Mazer v. Orange Cty., 811 So. 2d 857, 858-60 (Fla. 5th DCA 2002).

Similar to *Cookston* and *Mazer*, Asset requested records and, after filing a claim with the trial court, the records were provided in their requested form. *See Cookston, 204 So. 3d at 481*; Mazer, 811 So. 2d at 858-60. While it was argued in *Cookston* and *Mazer* that the issues were rendered moot, the appellate court held that collateral legal consequences affecting the rights of a party still existed—namely, the issuance of fees and costs based on improperly refused,

completed, or delayed records requests. *See Cookston, 204 So. 3d at 481*; *Mazer, 811 So. 2d at 860*; *Godwin, 593 So. 2d at 212*.

Like those cases, we find this claim was not moot due to the presence of collateral issues yet to be decided **[**14]** by the trial court—specifically, a determination whether the Town's initial redactions of the bills were proper, and whether any reasonable attorney's fees, costs, and expenses, should be awarded. We therefore reverse and remand for a determination of those issues.

Affirm in part; reverse in part; and remand for further proceedings consistent with this opinion.

TAYLOR and KUNTZ, JJ., concur.

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Sinclair Media III v. City of Cincinnati

Court of Claims of Ohio

April 15, 2019, Filed

Case No. 2018-01357PQ

Reporter
2019-Ohio-2624 *; 2019 Ohio Misc. LEXIS 216 **

SINCLAIR MEDIA III, Inc. D/B/A WKRC-TV, Requester v. CITY OF CINCINNATI, Respondent

Subsequent History: Modified by, in part, Adopted by, in part, Objection overruled by, in part, Objection sustained by, in part, Motion denied by, Judgment entered by *Sinclair Media III, Inc. v. City of Cincinnati, 2019-Ohio-2623, 2019 Ohio Misc. LEXIS 218 (Ohio Ct. Cl., May 20, 2019)*

Core Terms

text message, records, public record, public office, requester, email, messages, electronic, Media, employees, overly broad, ambiguous, documents, correspondence, asserts, employment status, public official, cell phone, disclosure, recommend, retention, city council member, person responsible, motion to dismiss, communications, definitions, decisions, includes, revision

Case Summary

Overview

HOLDINGS: [1]-In requesting text messages from city council members and other officials in which an official's employment status was discussed, the complaint asserted a claim for items created, received by, or coming under the jurisdiction of the city; [2]-Complaint sufficiently asserted that the records were presumptively "kept by" officials; [3]-In seeking enforcement of a public records request for the withheld text messages, the complaint stated a claim under *R.C. 149.43* and *R.C. 2743.75*; [4]-Request was not ambiguous or overly broad; [5]-City's proposed exclusion of all personal account/device content from the definition of "public record" in *R.C. 149.43(A)* would undermine the purposes of the Public Records Act; [6]-Having denied the request by raising the defense of overbreadth, the city's failure to provide information and invite revision was a per se violation of *§ 149.43(B)(2)*.

Outcome

The special master recommended that the court issue an order for respondent to disclose the text messages filed under seal.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Public Information

HN1[] **Governmental Information, Public Information**

The purpose of Ohio's Public Records Act is to expose government activity to public scrutiny, which is absolutely necessary to the proper working of a democracy. Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance. Further, the people's right to know includes not merely the right to know a governmental body's final decision on a matter, but the ways by which those decisions were reached.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN2[] **Freedom of Information, Enforcement**

The public's right to access records of public officials is construed broadly. The broad language used in *R.C. 149.43* manifests the General Assembly's intent to jealously protect the right of the people to access public records. The courts are acutely aware of the importance of the right provided by Ohio's Public Records Act and the vulnerability of that right when the records are in the hands of public officials who are reluctant to release them. Therefore, the Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Administrative Law > Governmental Information > Public Information

HN3[] **Freedom of Information, Enforcement**

As long as there is a set of facts consistent with a complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. However, a party does not state a claim under the Ohio Public Records Act when the request is for documents that are not public records.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN4[] Freedom of Information, Enforcement

As used in the Public Records Act, "records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in R.C. 1306.01, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. R.C. 149.011(G). This definition includes an electronic record as defined in R.C. 1306.01(G). "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means. Text messages -- a short message sent electronically usually from one cell phone to another -- easily meet the first part of the three-part definition, as an electronic record. The second part is met whenever the message is created or received by or comes under the jurisdiction of any public office. Since a public office cannot function without the employees and agents who work in that office, this includes text messages created or received by public employees in their official capacity. A text message completes the definition of "records" if it satisfies the third requirement -- to document the organization, functions, etc. of the office. Finally, a record is a public record where it is "kept by" a public office. R.C. 149.43(A)(1).

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN5[] Freedom of Information, Enforcement

Ohio case law uniformly accepts text messages as potential records subject to the Public Records Act if they are (1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of the state agencies, (3) which serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. R.C. 149.011(G).

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN6[] Freedom of Information, Enforcement

The Ohio Public Records Act provides that in adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under R.C. 109.43. R.C. 149.43(E)(2). The Model Public Records Policy provided to public offices by the Attorney General states, in part, that records in the form of e-mail, text messaging, and instant messaging, including those sent and received via a hand-held communications device, are to be treated in the same fashion as

records in other formats, such as paper or audiotape. Public record content transmitted to or from private accounts or personal devices is subject to disclosure. All employees or representatives of this office are required to retain their e-mail records and other electronic records in accordance with applicable records retention schedules.

Governments > State & Territorial Governments > Employees & Officials

HN7 **State & Territorial Governments, Employees & Officials**

A political subdivision acts through its employees. It is undeniable that the state can only act through its employees and officers.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN8 **Freedom of Information, Enforcement**

Records may be obtained from a public office or from a person responsible for public records. R.C. 149.43(B)(1). The "person responsible" may be a person within the public office or, under some circumstances, a private entity.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN9 **Freedom of Information, Enforcement**

The ownership of a transmission device or storage location does not by itself exclude stored items as public records. E-mail messages created or received by an individual in her capacity as a public official that document her work-related activities constitute records subject to disclosure under R.C. 149.43 regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN10 **Freedom of Information, Enforcement**

The statutory definition of public records is broadly inclusive and does not categorically exclude any physical locations, custodians, or storage devices, regardless of ownership, as places

where public records may be found or "kept." The Ohio Supreme Court has ruled repeatedly that mere possession of otherwise public records by a third party does not prevent disclosure of the records under R.C. 149.43.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > Governmental Information > Public Information

HN11 **Freedom of Information, Enforcement**

It is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue. A request that is ambiguous or overly broad may be denied. R.C. 149.43(B)(2). Determination of whether an office has properly denied a request as ambiguous or overly broad is based on the facts and circumstances in each case.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN12 **Enforcement, Burdens of Proof**

Claims under R.C. 2743.75 are determined using the standard of clear and convincing evidence.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > Governmental Information > Freedom of Information > Enforcement

HN13 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

Because the initial explanation for denial shall not preclude a public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an enforcement action, R.C. 149.43(B)(3), a public office is permitted to plead the defense of overbreadth. However, the public office becomes subject to mandatory statutory obligations at that point. Following denial for ambiguity or overbreadth, a public office shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties. § 149.43(B)(2). This requirement remains vital even after enforcement litigation has commenced where the proceedings include mandatory court mediation.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

HN14[] **Freedom of Information, Enforcement**

R.C. 149.43(B)(2) does not require a public office to rewrite the request for the requester, but the office should convey relevant information to support revision of the request. Options include, but are not limited to: offering to discuss revision with the requester, providing the requester with a copy of the office's records retention schedule, and providing an explanation of how office records are maintained and accessed. A public office may inform the requester if all or some of the requested records have already been compiled in agency reports, in litigation, or for any other reason, and are thus readily identified and available.

Judges: [1]** JEFFERY W. CLARK, Special Master.

Opinion by: JEFFERY W. CLARK

Opinion

REPORT AND RECOMMENDATION

[*P1] On May 6, 2018, Reporter Angenette Levy made a public records request on behalf of requester Sinclair Media III, Inc. d/b/a WKRC-TV (Sinclair Media) to respondent City of Cincinnati's City Solicitor Paula Boggs-Muething:

> This is an open records request for all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed. * * *
> We are also requesting any messages in which votes on Black's employment are discussed and attempts to sway other members of council. I am also requesting any text messages involving the so-called "Gang of 5" in which Harry Black's employment is discussed — including any text messages in which race is discussed.
> The text messages we are requesting are between March 1 and April 12, 2018.

(Complaint, Exh. A.) On May 25, 2018, Levy re-sent the request to the City Solicitor's Chief Counsel, Roshani Hardin. Hardin responded, "We will get that item assigned and provide you with the responsive documents." (*Id.*) On July 17, 2018, Levy sent a follow-up inquiry. (*Id.* at 1.) The City did not respond further.

[*P2] On October 11, 2018, Sinclair **[**2]** Media filed this action under *R.C. 2743.75*, alleging denial of access to public records in violation of *R.C. 149.43(B)*. Following unsuccessful mediation, the City filed a combined response and motion to dismiss (Response) on December 17, 2018. On February 13, 2018, the City filed a supplemental response and documents. On February 19, 2019, Sinclair Media filed a reply. On March 22, 2019, the City filed a second supplemental response. The City has filed 132 pages of withheld text messages under seal.

Purpose of the Public Records Act

[*P3] ***HN1***[⬆] The purpose of the Public Records Act "is to expose government activity to public scrutiny, which is absolutely necessary to the proper working of a democracy." *State ex rel. WHIO-TV-7 v. Lowe, 77 Ohio St.3d 350, 355, 1997- Ohio 271, 673 N.E.2d 1360 (1997)*. "Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance." *Kish v. Akron, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 16*. Further,

> the people's right to know includes 'not merely the right to know a governmental body's final decision on a matter, but the ways by which those decisions were reached.' *See State ex rel. Gannett Satellite Information Network v. Shirey (1997), 78 Ohio St.3d 400, 404, 1997 Ohio 206, 678 N.E.2d 557*, *citing White, 76 Ohio St.3d at 419, 667 N.E.2d 1223*.

Id. at ¶ 26. ***HN2***[⬆] The public's right to access records of public officials is construed broadly:

> The broad language used in *R.C. 149.43* manifests the General Assembly's **[**3]** intent to jealously protect the right of the people to access public records. We are acutely aware of the importance of the right provided by the act and the vulnerability of that right when the records are in the hands of public officials who are reluctant to release them.

Rhodes v. New Phila., 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 21. Therefore, the Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. *State ex rel. Glasgow v. Jones, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13*.

Motion to Dismiss

[*P4] The City moves to dismiss on the grounds that, 1) text messages of council members on personal, privately-paid cell phones are not records of the City and are not kept by the City, and, 2) the request is in part overly broad and therefore improper. (Response at 2.) In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the claimant can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor. *State ex rel. Findlay Publ. Co. v. Schroeder, 76 Ohio St.3d 580, 581, 1996-Ohio 361, 669 N.E.2d 835 (1996)*. ***HN3***[⬆] As long as there is a set of facts consistent with the complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. *York v. Ohio State Hwy. Patrol, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991)*. However, a party does not state **[**4]** a claim under the Public Records Act when the request is for documents that are not public records. *State ex rel. Steffen v. Kraft, 67 Ohio St.3d 439, 1993- Ohio 32, 619 N.E.2d 688 (1993)*.

Text Messages as Public Records

HN4[⬆] As used in the *Public Records Act*:

> "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

R.C. 149.011(G). This definition of records includes "an electronic record" as defined in section 1306.01 of the Revised Code:

> "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

R.C. 1306.01(G). Text messages - "a short message sent electronically usually from one cell phone to another"[1] - easily meet the first part of the three-part definition, as an "electronic record." The second part of the definition is met whenever the message is created or received by or comes under the jurisdiction of any public office. Since "a public office cannot function without the employees and agents who work in that office," State ex rel. Plunderbund Media, L.L.C. v. Born, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988, ¶ 20, this includes text messages **[**5]** created or received by a public employee in their official capacity. A text message completes the definition of "records" if it satisfies the third requirement — to document the organization, functions, etc. of the office. Finally, a "record" is a "public record" where it is "kept by" a public office.[2]

[*P5] The City asserts that text messages on personal, privately-paid cell phones are categorically excluded from the definitions of records and public records. Sinclair Media asserts that text messages, like other text media, are records and public records whenever they satisfy the terms of the statutory definitions. ***HN5***[⬆] Ohio case law uniformly accepts text messages as potential records. In Glasgow, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 20, the Supreme Court stated:

> The requested e-mail messages, *text messages*, and correspondence are "records" subject to the Public Records Act if they are "(1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of the state agencies, (3) which serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." State ex rel. Dispatch Printing Co. v. Johnson, 106 Ohio St.3d 160, 2005 Ohio 4384, 833 N.E.2d 274, P 19; R.C. 149.011(G).

(Emphasis added.) The Court resolved the status of the particular text **[**6]** messages in *Glasgow* on their failure to meet the third part of the definition:

> The evidence is uncontroverted that Jones's text messages do not document work-related matters. They are therefore not records subject to R.C. 149.43. Johnson, 106 Ohio St.3d 160, 2005 Ohio 4384, 833 N.E.2d 274, P 25. In so holding, we need not decide the issue of

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[1] *Merriam-Webster Online Dictionary* (2019), https://www.merriam-webster.com/dictionary/text_message (accessed Apr. 12, 2019).

[2] "Public record" means records kept by any public office. R.C. 149.43(A)(1).

whether text messages could generally constitute items subject to disclosure under the Public Records Act.

Id. at ¶ 25. In all subsequent reported decisions, requests for text messages have been reviewed without any question that they are public records if they meet the statutory definitions: *State ex rel. Kesterson v. Kent State Univ., Slip Opinion No. 2018-Ohio-5110*; *State ex rel. Parisi v. Dayton Bar Ass'n Certified Griev. Comm., 2017-Ohio-9394, 103 N.E.3d 179 (2nd Dist.)*; *State ex rel. Philbin v. Cleveland, 8th Dist. Cuyahoga No. 104106, 2017-Ohio-1031*; *State ex rel. Cmty. Journal v. Reed, 2014-Ohio-5745, 26 N.E.3d 286, ¶ 4 (12th Dist.)*; *State ex rel. Davis v. Metzger, 5th Dist. Licking No. 12-CA-36, 2013-Ohio-1699*; *State ex rel. Sinchak v. Chardon Local Sch. Dist., 11th Dist. Geauga No. 2012-G-3078, 2013-Ohio-1098, ¶ 6*; *Narciso v. Powell Police Dep't, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590, ¶ 32-33*. Thus, as with paper, voicemail, fax, email, or any other means by which office communications are recorded, employee text messages can be public records. *Cincinnati Enquirer v. Cincinnati, Ct. of Cl. No. 2018-01339PQ, 2019-Ohio-969, ¶ 6-8*, including text messages on personal accounts and devices. *Id. at ¶ 10-15*. The City cites no case to the contrary.

[*P6] The implicit acceptance by Ohio courts of text messages as potential public records is consistent with express holdings in other states. *See* *Toensing v. A.G., 2017 Vt. 99, 206 Vt. 1, 178 A.3d 1000* (public **[**7]** records in private text messaging accounts); *City of San Jose v. Superior Court, 2 Cal.5th 608, 214 Cal. Rptr. 3d 274, 389 P.3d 848 (2017)* (text messages on private electronic devices used by city officials); *Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45, ¶ 11-34 (2015)* (text messages on employee's cell phone); *Denver Publ. Co. v. Bd. of Cty. Commrs., 121 P.3d 190 (Colo.2005)* (text messages on county system); *O'Boyle v. Town of Gulf Stream, 257 So.3d 1036 (Fla.App.2018)* (elected official's use of private cell phone to conduct public business via text messaging); *City of Champaign v. Madigan, 2013 IL App (4th) 120662, 992 N.E.2d 629, 372 Ill. Dec. 787 (Ill.App.2013)* (text messages between city council members' personal electronic devices during public meetings).

[*P7] ***HN6***[↑] The Ohio Public Records Act provides that "[i]n adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under *section 109.43 of the Revised Code*." *R.C. 149.43(E)(2)*. The Model Public Records Policy provided to public offices by the Attorney General states, in part:

> ELECTRONIC RECORDS
> Records in the form of e-mail, text messaging, and instant messaging, including those sent and received via a hand-held communications device, are to be treated in the same fashion as records in other formats, such as paper or audiotape.
>
> Public record content transmitted to or from private accounts or personal devices is subject to disclosure. All employees or representatives of this office are required to retain their e-

mail records and **[**8]** other electronic records in accordance with applicable records retention schedules.[3]

[*P8] As to the sufficiency of Sinclair Media's complaint in setting forth a claim for items that meet the definitions of "records" and "public record," the City concedes that the responsive text messages meet the first and third parts of the definition of "records" as 1) "electronic records" that 3) "serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G); (Response at 4; Second Supp. Response.) The City argues only that text messages residing on a public official's personally owned device cannot meet the second part of the definition as "created or received by or coming under the jurisdiction of any public office."[4] The City makes the related argument that text messages on a personal device are not "kept by" the public office as required by R.C. 149.43(A)(1). *Id.*

A Public Office Creates, Receives, and Maintains Records Through Its Employees and Officers

[*P9] The City first asserts that text messages between city councilpersons cannot be records because items created, received, or kept by a *public official* are not thereby created, received, or kept by the **[**9]** *public office*. However, it is individual human beings in an office who create, receive, and maintain the office's records of its official actions.

> We have held and it is well recognized that ***HN7***[↑] a political subdivision acts through its employees. In Spires v. Lancaster (1986), 28 Ohio St.3d 76, 28 OBR 173, 502 N.E.2d 614, we stated, "It is undeniable that the state can only act through its employees and officers." *Id. at 79, 28 OBR 173, 502 N.E.2d 614*, quoting Drain v. Kosydar (1978), 54 Ohio St.2d 49, 56, 8 O.O.3d 65, 374 N.E.2d 1253.

Elston v. Howland Local Sch., 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 19. ***HN8***[↑] Records may be obtained from the public office or from a "person responsible for public records." R.C. 149.43(B)(1). The "person responsible" may be a person within the public office, State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ., 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 40, or, under some circumstances, a private entity. State ex rel. Cincinnati Enquirer v. Krings, 93 Ohio St.3d 654, 657, 2001- Ohio 1895, 758 N.E.2d 1135 (2001). I find that in requesting "text messages from Cincinnati city council members [and other officials] in which [an official]'s employment status is discussed" (Complaint at 1; Exh. A, p. 2) the complaint asserts a claim for items created, received by, or coming under the jurisdiction of the City of Cincinnati.

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[3] https://www.ohioattorneygeneral.gov/Files/Government-Entities/Model-Public-Records-Policy .aspx (accessed Apr. 12, 2019). See R.C. 149.351(A) for records retention requirements.

[4] Although the City offers only the bare assertion that the devices used were "personal, privately-paid cell phones," Sinclair Media offers no persuasive argument to the contrary.

Public Records Can Exist on Private Accounts and Personal Devices

[*P10] The City next asserts that text messages on personal, privately-paid-for cell phones are not "created or received by" or "kept by" the City. (Response at 3.) However, ***HN9***[↑] the ownership of a transmission device or storage location does not by itself exclude **[**10]** stored items as records. As conceded by the public official in *Glasgow, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 23*:

> [E]-mail messages created or received by her in her capacity as state representative that document her work-related activities constitute records subject to disclosure under *R.C. 149.43* regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages.

Accord *Cincinnati Enquirer v. Cincinnati, Ct. of Cl. No. 2018-01339PQ, 2019-Ohio-969, ¶ 13-15*. The special master is aware of no Ohio holding to the contrary.

[*P11] The City's proposed exclusion of all personal account/device content from the definition of "public record" would undermine the purposes of the Public Records Act, allowing public officials to conceal office correspondence with impunity. Official documents sent from a home fax machine, email exchanged through private accounts or devices, files created on a personal computer, and documents typed on persona stationary would be excluded from the definition under this reasoning. If private storage created a categorical exclusion, public records located in an official's home office, personal laptop, personal email account, car trunk, briefcase, or other privately-paid-for information receptacle could be concealed from public **[**11]** scrutiny. However, I find instead that ***HN10***[↑] the statutory definition of public records is broadly inclusive and does not categorically exclude any physical locations, custodians, or storage devices, regardless of ownership, as places where public records may be found or "kept." The Supreme Court has ruled repeatedly that mere possession of otherwise public records by a third party does not prevent disclosure of the records under *R.C. 149.43*. *See* *State ex rel. Carr v. Akron, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 36-37* and cases cited therein, where the Court contrasts the potential quasi-agency of private third parties holding public records with the implicit responsibility of "employees and agents" over office records in their possession. I find that in requesting text messages from Cincinnati city council members that discuss a city official's employment status, the complaint sufficiently asserts that the records were presumptively "kept by" officials for the City of Cincinnati.

[*P12] I conclude that in seeking enforcement of a public records request for the withheld text messages the complaint states a claim under *R.C. 149.43* and *R.C. 2743.75* upon which relief may be granted. I recommend that the motion to dismiss on this ground be denied.

Ambiguous and Overly Broad Request [12]**

[*P13] The City asks the court to dismiss the complaint, in part, as overly broad. ***HN11***[↑] It is "the responsibility of the person who wishes to inspect and/or copy records to identify with

reasonable clarity the records at issue." *State ex rel. Zidonis v. Columbus State Community College, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21*. A request that is ambiguous or overly broad may be denied. *R.C. 149.43(B)(2)* provides:

> If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request.

Determination of whether an office has properly denied a request as ambiguous or overly broad is based on the facts and circumstances in each case, *Id. at ¶ 26*.

Sinclair Media's request is for:

> all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed. * * *
>
> We are also requesting any messages in which votes on Black's employment are discussed and attempts to sway other members of council. I am also requesting any text messages **[**13]** involving the so-called "Gang of 5" in which Harry Black's employment is discussed — including any text messages in which race is discussed.
>
> The text messages we are requesting are between March 1 and April 12, 2018.

The City asserts that the request is for every text message sent by council members, rather than just those sent between them, and demands a search through their text messages for any "in which Black's employment status" is discussed. (Response at 5.)

[*P14] In *State ex rel. Kesterton v. Kent State Univ., Slip Opinion at 2018-Ohio-5110*, the Court found a request for "[a]ll records regarding [a student]'s departure from the University (including all communications such as emails, text messages, voicemails, etc.)" to be an overly broad request for information, rather than reasonably identifying the records sought. *Id. at ¶ 28-30*. However, other requests that were limited "temporally, by subject matter, and in all but one instance, by the specific employees concerned," were found not overly broad. *Id. at ¶ 23-27*. The Court noted that "a request for e-mails sent or received by a specific individual regarding a specific topic during a reasonably short time period is not the type of **[**14]** request that we have previously found to constitute impermissible research," *citing* *State ex rel. Morgan v. New Lexington, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30, 33-35*. *Id. at ¶ 26*.

[*P15] Sinclair Media's request is limited to a reasonably short period of six weeks. The subject matter is limited to Black's employment status. The request seeks only text messages, rather than all communications, and is limited to texts from city council members, the mayor, and Black. The middle paragraph of the request appears only to emphasize the requester's interest in any subset of responsive messages that discuss votes and race. It thus does not expand the overall request, and is mere surplusage. Further, even if the middle paragraph were found to be a separate request that is ambiguous or overly broad on its specific terms, it would be severable from the remaining, properly framed request presented by the first and third paragraphs.

[*P16] I find under the facts and circumstances of this case that the request was not improperly ambiguous or overly broad. I therefore recommend that the motion to dismiss on this ground be denied, and the matter determined on the merits.

Application of Law to the Evidence

[*P17] ***HN12***[⬆] Claims under *R.C. 2743.75* are determined using the standard of clear and convincing evidence. *Hurt v. Liberty Twp., 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.)*. Review **[**15]** of the evidence in this case confirms that the requested text messages meet the definitions of "records" and "public record." The text messages reviewed *in camera* appear on their face to have been sent or received by the named city councilpersons and employees. The City represents that the text messages are al responsive to the request, and were retrieved from the named correspondents either directly, or by a vendor's forensic efforts. (Supp. Response.) I find clear and convincing evidence that these items were created or received by, or come under the jurisdiction of, the City, and were kept by the City through its council members and employees.

[*P18] Further, the City's policies anticipate that employees will create records using non-City wireless/mobile/electronic devices. Its access agreement for employees using such devices includes the following:

> 2. The User agrees to utilize City email and City internet access in accordance with the Electronic Mail/Messaging Systems, Internet Access and Employee Responsibilities sections of the City's IT Security Policy.
>
> 3. The User acknowledges that any email sent to or from the Non-City wireless device via the City's email network is subject to public **[**16]** records laws.
>
> 4. The User acknowledges there is not a guarantee of privacy for any device connected to the City's data network.[5] ETS is not aware of any ways that Non-City email accounts and internet access through the vendor-provided browsers are accessible, filtered, or documented through City systems. Nevertheless, public records laws in this area are unclear. The Non-City wireless device is being used at least in part for City business and is connected to City networks, the User and the device MAY be subject to public records laws.

(Hardin Aff. Exh. 4, Sect. 4.0, ¶ 2-4.) The City identifies no functional or legal distinction between employee email, listed as records in its retention schedules (Hardin Aff. Exh. 1, p. 14, 64, 100), and text messages. Indeed, many series in the City's schedules broadly list "Electronic" in the Media Type column. (*Id., passim*.) As relevant examples, Retention Schedule 17-019 for Correspondence records of Mayor/City Council/Clerk of Council lists media types "Paper/Electronic" (*Id.*, p. 77), and Citywide Retention Schedule 99-3 for "Official Correspondence email messages — Messages that deal with * * * personnel matters" requires retention on "Magnetic Disk." (*Id.*, p. 32.)

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[5] "[W]e have not authorized courts or other records custodians to create new exceptions to *R.C. 149.43* based on a balancing of interests or generalized privacy concerns." *State ex rel. WBNS TV, Inc. v. Dues, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 31*.

[*P19] The City **[**17]** notes that not every message or piece of paper possessed by a public official is a record under the jurisdiction of their public office. (Response at 4.) *See* State ex rel. Cincinnati Enquirer v. Ronan, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. For example, portions of documents that constitute personal information or otherwise fail to meet the definition of "record" need not be disclosed. Mohr v. Colerain Twp, Ct. of Cl. No. 2018-01032PQ, 2018-Ohio-5015, ¶ 9-12. However, the City has abandoned this defense for the text messages here. (Second Supp. Response.) The special master further notes that text messages, instant messaging, email, and other forms of electronic correspondence are often managed under a *Transient Records* schedule that provides for disposal after a short period, or when no longer of administrative value. (E.g., Hardin Aff. Exh. 1, p. 32, Citywide Schedule 99-1 *Transitory email messages*; AG Series No. 561-OAG-09 *Transient Material*.[6]) Like paper correspondence, email disposed of prior to a public records request need not be produced, Glasgow, 119 Ohio St.3d 391, 396, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 24, fn. 1, unless it was disposed of improperly. State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs., 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961. Moreover, public offices are only required to retain records that are *necessary* to document the activities of the office. R.C. 149.40. However, the City does not assert that any of these text messages were properly **[**18]** disposed of prior to Sinclair Media's request.

[*P20] Based on the pleadings, admissions, and evidence in this case, I find that all the text messages filed with the court under seal are public records subject to disclosure under R.C. 149.43 and R.C. 2743.75.

Failure to Provide Required Information and Opportunity to Revise

[*P21] In responding to Sinclair Media, the City neither denied the request (Supp. Response) nor provided information as to the manner in which its records are maintained and accessed. ***HN13***[⬆] Because the initial explanation for denial "shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an" enforcement action, R.C. 149.43(B)(3), the City was permitted to plead the defense of overbreadth. However, the City became subject to mandatory statutory obligations at that point. Following denial for ambiguity or overbreadth, a public office

> shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

R.C. 149.43(B)(2). This requirement remains vital even after enforcement **[**19]** litigation has commenced where, as here, the proceedings include mandatory court mediation.

[*P22] ***HN14***[⬆] The statute does not require the office to rewrite the request for the requester, but the office should convey relevant information to support revision of the request. Options include, but are not limited to: offering to discuss revision with the requester, *Zidonis, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861 at ¶ 4-5, 40*, providing the requester with a copy of

[6] Search at https://apps.das.ohio.gov/rims/Search/PublicSearch.asp (accessed Apr. 10, 2019).

the office's records retention schedule, *Id. at ¶ 36*, and providing an explanation of how office records are maintained and accessed. *Id. at ¶ 35*. A public office may inform the requester if all or some of the requested records have already been compiled in agency reports, in litigation, or for any other reason, and are thus readily identified and available.[7]

[*P23] Having denied the request by raising the defense of overbreadth, the failure of the City to provide information and invite revision constitutes a *per se* violation of *R.C. 149.43(B)(2)*. *State ex rel. ESPN v. Ohio State Univ., 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 10-11*. As in *ESPN*, Sinclair Media does not ask that respondent be ordered to inform it of the way the City maintains its records, and thus fails to state a claim for relief for this violation. *Id. at ¶ 12-15*. In future requests, the parties are encouraged to utilize the tools provided **[**20]** by *R.C. 149.43(B)(2) through (7)* to resolve concerns over ambiguity or overbreadth prior to litigation. *See State ex rel. Morgan v. Strickland, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 15-20*.

Conclusion

[*P24] Upon consideration of the pleadings and attachments, I recommend that the court issue an order for respondent to disclose the text messages filed under seal.

[*P25] *Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1)*.

JEFFERY W. CLARK

Special Master

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[7] An existing compilation of records is a "record" separate and apart from its component records. *State ex rel. Cincinnati Post v. Schweikert, 38 Ohio St.3d 170, 527 N.E.2d 1230 (1988)*; *Kish v. City of Akron, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811*, paragraph one of the syllabus.

Better Gov't Ass'n v. City of Chi. Office of Mayor

Appellate Court of Illinois, First District, Third Division

August 5, 2020, Decided

No. 1-19-0038

Reporter
2020 IL App (1st) 190038 *; 169 N.E.3d 1066 **; 2020 Ill. App. LEXIS 522 ***; 446 Ill. Dec. 209 ****

BETTER GOVERNMENT ASSOCIATION, Plaintiff-Appellee, v. THE CITY OF CHICAGO OFFICE OF MAYOR and THE CITY OF CHICAGO DEPARTMENT OF PUBLIC HEALTH, Defendants-Appellants.

Prior History: [*1]** Appeal from the Circuit Court of Cook County. No. 17 CH 5181. Honorable Michael T. Mullen, Judge, presiding.

Disposition: Affirmed.

Core Terms

public body, e-mail, personal account, public business, records, communications, public record, text message, requests, defendants', summary judgment, circuit court, pertaining, exemption, public official, council member, disclosure, inquire, electronic, redactions, reasons, adequacy, presumed, cases

Case Summary

Overview
HOLDINGS: [1]-Under the Freedom of Information Act, defendants public agencies were required to inquire of defendants public officials whether the officials used personal e-mail and text message accounts for public business because the e-mails and text messages were public records, under *5 ILCS 140/2(c)* (2016), as they pertained to public business and had a requisite connection to a public body since sufficient evidence established a reason to believe the officials used the accounts to conduct public business; [2]-The agencies did not perform an adequate search for the records because they conducted no inquiry based on the erroneous position that the accounts could not contain public records.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Freedom of Information, Enforcement**

Freedom of Information Act cases are typically and appropriately decided on motions for summary judgment. Summary judgment is appropriate only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *735 ILCS 5/2-1005(c)* (2018). Summary judgment is a drastic means of disposing of litigation that should be granted only where the right of the moving party is clear and free from doubt. Where the parties file cross-motions for summary judgment, they agree that there is only a question of law involved and invite the court to resolve the litigation based solely on the record. A reviewing court may affirm a trial court's ruling on a motion for summary judgment on any basis in the record, regardless of the reasoning employed by the trial court. A trial court's ruling on cross-motions for summary judgment is reviewed de novo.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

HN2[] **Freedom of Information, Enforcement**

A reviewing court's analysis in a Freedom of Information Act (FOIA or Act) case is guided by the clear purpose of FOIA, which is to open governmental records to the light of public scrutiny. Specifically, FOIA has been enacted to effectuate the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of the Act. *5 ILCS 140/1* (2016). *5 ILCS 140/1* (2016) explains that such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest. Accordingly, FOIA is to be construed liberally to promote the public's access to governmental information.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > ... > Freedom of Information > Enforcement > Judicial Review

HN3[] Enforcement, Burdens of Proof

Under the Freedom of Information Act, public records are presumed to be open and accessible. Thus, when a public body receives a proper request for information, it must comply with the request unless one of the narrow statutory exemptions applies. If a party seeking disclosure challenges the public body's denial of a request in a trial court, the public body has the burden of proving that the records in question are exempt. To meet this burden and to assist the court in making its determination, the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN4[] Freedom of Information, Compliance With Disclosure Requests

5 ILCS 140/2(c) (2016) defines public records as all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. Accordingly, there are two criteria a record must satisfy in order to qualify as a public record under the Freedom of Information Act. First, the record must pertain to public business rather than private affairs. Second, the record must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN5[] Freedom of Information, Compliance With Disclosure Requests

The Illinois Freedom of Information Act defines a public body as all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of the State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof. *5 ILCS 140/2(a)* (2016).

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN6[] **Freedom of Information, Compliance With Disclosure Requests**

To qualify as public records under the Freedom of Information Act, it is sufficient that communications were either prepared for, used by, received by, or in the possession of a public body. *5 ILCS 140/2(c)* (2016).

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Governments > Legislation > Interpretation

HN7[] **Freedom of Information, Enforcement**

The general assembly has expressed a clear intent that the Freedom of Information Act (FOIA) be interpreted to promote the public's access to information, even when applied in situations where advances in communication technology may outpace the terms of FOIA. *5 ILCS 140/1* (2016). The growing use of personal e-mail accounts and text messages by public officials for public business presents such a situation. Allowing public officials to shield information from the public's view merely by using their personal accounts rather than their government-issued ones would be anathema to the purposes of FOIA.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN8[] **Freedom of Information, Compliance With Disclosure Requests**

Communications sent and received from public officials' personal accounts may be public records subject to the Freedom of Information Act.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN9[] **Freedom of Information, Compliance With Disclosure Requests**

Because the legislature has declined to amend the Freedom of Information Act in a relevant way, it may be presumed that the legislature has acquiesced to a holding that personal account communications are at least sometimes public records.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN10 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The Freedom of Information Act (FOIA) exempts from disclosure any information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. *5 ILCS 140/7(1)(c)* (2016). Private information such as the financial information, personal telephone numbers, personal e-mail addresses, and home addresses of public officials also remains exempt. *5 ILCS 140/2(c-5)*, *(7)(1)(b)* (2016). Moreover, any of the statutory exemptions listed in *5 ILCS 140/7* (2016) may still apply. Only those communications that pertain to public business are potentially subject to disclosure in the first place. No information concerning officials' private lives need be disclosed to FOIA officers. Officials can also avoid any personal account disclosure by simply refraining from the use of personal accounts to conduct public business.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN11 **Freedom of Information, Compliance With Disclosure Requests**

The Freedom of Information Act generally gives a public body five business days to either comply with or deny a records request. *5 ILCS 140/3(d)* (2016).

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Delays

HN12 The Freedom of Information Act (FOIA) contemplates situations in which the production of requested records may require additional efforts for a variety of reasons. *5 ILCS 140/3(e)* (2016). In these situations, a public body is entitled to an extension of five additional business days. FOIA also expressly allows a requester and a public body to agree on an extended deadline of their choosing. *5 ILCS 140/3(e)* (2016).

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > ... > Freedom of Information > Enforcement > Judicial Review

HN13 **Freedom of Information, Enforcement**

If public officials prove incalcitrant to a public records request, the Freedom of Information Act provides that a trial court may help enforce disclosure through its contempt powers. *5 ILCS 140/11(g)* (2016).

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN14 **Freedom of Information, Compliance With Disclosure Requests**

The adequacy of a public body's search for public records requested pursuant to the Freedom of Information Act (FOIA) is judged by a standard of reasonableness and depends upon the facts of each case. The crucial issue is not whether relevant documents may exist, but whether the agency's search was reasonably calculated to discover the requested documents. Although a public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are reasonably likely to contain responsive records. Whether a particular search was reasonable depends on the specific facts and must be judged on a case-by-case basis.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN15 **Enforcement, Burdens of Proof**

When a public body determines that there are no records responsive to a Freedom of Information Act request, it bears the initial burden of demonstrating the adequacy of its search. An agency typically satisfies this burden by submitting reasonably detailed affidavits setting forth the type of search it performed and averring that all locations likely to contain responsive records were searched. Only once the agency has submitted such an affidavit does the burden shift to the requester to produce countervailing evidence that the search was not adequate.

Counsel: Mark A. Flessner, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Ellen Wight McLaughlin, Assistant Corporation Counsel, of counsel), for appellants.

Joshua Burday, Matthew Topic, and Merrick Wayne, of Loevy & Loevy, Chicago, for appellee.

Judges: JUSTICE COBBS delivered the judgment of the court, with opinion. Justices McBride and Howse concurred in the judgment and opinion.

Opinion by: COBBS

Opinion

[*P1] [1069] [****212]** This matter arises from two *Freedom of Information Act (FOIA) (5 ILCS 140/1 et seq. (West 2016))* requests submitted by plaintiff, the Better Government Association (BGA) to defendants, the City of Chicago Office of Mayor (Mayor's Office) and the City of Chicago Department of Public Health (CDPH). The BGA's requests sought records related to the discovery of lead in the drinking water at Chicago Public Schools (CPS). Defendants appeal from an order of the circuit court directing them to inquire whether relevant records exist in certain of their officials' personal text messages and e-mail accounts.

Defendants primarily argue that these communications are not subject to FOIA because they lack **[***2]** the requisite nexus to a public body. For the following reasons, we affirm the circuit court's order.

[*P2] I. BACKGROUND

[*P3] The BGA is a not-for-profit watchdog corporation dedicated to "protect[ing] the integrity of the political process in Chicago." On June 7, 2016, the BGA submitted FOIA requests to both the Mayor's Office and CDPH, requesting "[a]ny and all communication *** between Public Health Commissioner Julie Morita and anybody in the mayor's office and press office from April 1, 2016 to today." The BGA subsequently narrowed its requests to "anything related to lead and CPS" involving Eileen Mitchell, Adam Collins, Kelley Quinn, or Mayor Rahm Emanuel in the Mayor's Office and "any and all communication" between Morita and CPS officials Forest Claypool, Doug Kucia, Jason Kierna, Emily Bittner, or Michael Passman. In response, defendants produced some records and redacted or withheld others under various exemptions in *section 7(1)* of FOIA (*id. § 7(1)*).

[*P4] On April 11, 2017, the BGA filed a complaint in the circuit court, claiming that defendants violated FOIA by improperly redacting or withholding nonexempt records and by failing to inquire whether the personal text messages and e-mails of the officials **[***3]** named in the requests contained **[****213]** **[**1070]** responsive records. The complaint alleged that the Mayor's Office was aware that its officials named in the request had used their personal e-mail accounts to discuss public business. In their amended answer, defendants contended that their redactions and withholdings were proper. The Mayor's Office also admitted that the four officials named in the request used their personal e-mail accounts for public business but maintained that it had no obligation or ability to search those accounts for responsive records.

[*P5] On August 21, 2017, the BGA filed a motion for partial summary judgment on the grounds that some of defendants' redactions were improper. In response, defendants argued that they were entitled to summary judgment because they conducted a reasonable search for records and made only appropriate redactions.

[*P6] Following a hearing on the parties' cross-motions for summary judgment, the circuit court entered an order requiring defendants to submit supplemental affidavits about the nature of their searches. The court also required defendants to provide unredacted copies of the records they produced for *in camera* review. In response to defendants' supplemental **[***4]** briefing, the BGA produced evidence that Collins, Quinn, and Mayor Emanuel had communicated about public business via text message.

[*P7] After a second round of argument, the court found that defendant's redactions were proper. However, the court also found that defendants did not perform a reasonable search because they failed to include the personal text messages and e-mails of the relevant officials. Consequently, the court ordered defendants to "make inquiries as required to email custodians and supply affidavits from custodians regarding same" within 28 days. The court later granted

defendants' motion to stay the order and included a finding that the order was appealable under *Illinois Supreme Court Rule 304(a)* (eff. Mar. 8, 2016). This appeal followed.

[*P8] II. ANALYSIS

[*P9] ***HN1***[↑] "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush, 601 F. Supp. 2d 6, 12 (D.D.C. 2009)*. Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *735 ILCS 5/2-1005(c)* (West 2018). Summary judgment is a drastic means of disposing of litigation that should be granted only **[***5]** where the right of the moving party is clear and free from doubt. *Lewis v. Lead Indus. Ass'n, 2020 IL 124107, ¶ 15*. Where, as here, the parties file cross-motions for summary judgment, they agree that there is only a question of law involved and invite the court to resolve the litigation based solely on the record. *Ill. Ins. Guar. Fund v. Priority Transp., 2019 IL App (1st) 181454, ¶ 53, 438 Ill. Dec. 401, 146 N.E.3d 155*. A reviewing court may affirm a circuit court's ruling on a motion for summary judgment on any basis in the record, regardless of the reasoning employed by the circuit court. *Kainrath v. Grider, 2018 IL App (1st) 172270, ¶ 19, 426 Ill. Dec. 302, 115 N.E.3d 1224*. A circuit court's ruling on cross-motions for summary judgment is reviewed *de novo*. *Schroeder v. Sullivan, 2018 IL App (1st) 163210, ¶ 25, 422 Ill. Dec. 893, 104 N.E.3d 460*.

[*P10] A. FOIA's Applicability to Personal Text Messages and E-mail Accounts

[*P11] The ultimate issue in this appeal is the adequacy of defendants' search for records. **[****214]** **[**1071]** The BGA maintains that the search was inadequate because, at least with respect to the named officials' personal text messages and e-mail accounts, defendants performed no search at all. As they did in the circuit court, defendants contend that they were not required to search their officials' personal accounts because the communications in those accounts are not subject to FOIA. The threshold issue thus becomes whether text messages and e-mails sent from a public officials' personal accounts can qualify as **[***6]** public records under FOIA. For the reasons that follow, we conclude that they can.

[*P12] ***HN2***[↑] Our analysis is guided by the clear purpose of FOIA, which is "'to open governmental records to the light of public scrutiny.'" *Stern v. Wheaton-Warrenville Community Unit School District 200, 233 Ill. 2d 396, 405, 331 Ill. Dec. 12 (2009)* (quoting *Bowie v. Evanston Community Consolidated School District No. 65, 128 Ill. 2d 373, 378, 538 N.E.2d 557, 131 Ill. Dec. 182 (1989)*). Specifically, FOIA was enacted to effectuate "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." *5 ILCS 140/1* (West 2016). *Section 1* of FOIA explains that "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.* Accordingly, FOIA is to be construed liberally to promote the public's access to governmental information. *In re Appointment of Special Prosecutor, 2019 IL 122949, ¶ 25, 432 Ill. Dec. 638, 129 N.E.3d 1181*.

[*P13] *HN3*[↑] Under FOIA, "public records are presumed to be open and accessible." *Id.* Thus, when a public body receives a proper request for information, it must comply with the request unless one of the narrow statutory exemptions applies. *Illinois Education Ass'n v. Illinois State Board of Education, 204 Ill. 2d 456, 463, 791 N.E.2d 522, 274 Ill. Dec. 430 (2003)*. If the party seeking disclosure **[***7]** challenges the public body's denial of a request in a circuit court, the public body has the burden of proving that the records in question are exempt. *Id. at 464*. "To meet this burden and to assist the court in making its determination, the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." (Emphasis omitted.) *Baudin v. City of Crystal Lake, 192 Ill. App. 3d 530, 537, 548 N.E.2d 1110, 139 Ill. Dec. 554 (1989)*.

[*P14] Here, defendants do not argue that a statutory exemption applies to their officials' personal text messages and e-mails but rather that the records sought do not qualify as "public records" within the meaning of FOIA in the first place. *HN4*[↑] *Section 2(c)* of the FOIA defines "public records" as:

> "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control **[**1072]** **[****215]** of any public body." **[***8]** *5 ILCS 140/2(c)* (West 2016).

Accordingly, there are two criteria a record must satisfy in order to qualify as a public record under FOIA. First, the record must pertain to public business rather than private affairs. *City of Danville v. Madigan, 2018 IL App (4th) 170182, ¶ 19, 421 Ill. Dec. 792, 101 N.E.3d 774*. Second, the record must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body. *Id.*

[*P15] Defendants do not necessarily contest that their officials' personal text messages and e-mail accounts contain records pertaining to public business. Nor do defendants dispute that the Mayor's Office and CDPH are public bodies under FOIA. Rather, the crux of defendants' argument is their contention that the individual officials named in the BGA's requests are not themselves public bodies. Thus, defendants conclude that those officials' personal e-mails and text messages are not public records because they were neither prepared for, used by, received by, possessed by, nor controlled by a public body.

[*P16] *HN5*[↑] FOIA defines a "public body" as:

> "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, **[***9]** cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof." *5 ILCS 140/2(a)* (West 2016).

[*P17] The only Illinois case to examine the interplay between "public records" and "public bodies" as those terms relate to personal communications of public officials is the Fourth District's opinion in *City of Champaign v. Madigan, 2013 IL App (4th) 120662, 992 N.E.2d 629, 372 Ill. Dec. 787*, a case upon which defendants rely. There, the FOIA requester sought electronic communications relating to public business that were sent and received by individual city council members on their personal devices during city council meetings. *Id. ¶ 4*. On appeal, the City of Champaign argued that those communications were not "public records" under FOIA because the individual city council members were not themselves public bodies. *Id. ¶ 30*. The Fourth District agreed that the individual city council members were not public bodies under FOIA, reasoning that a single council member could not conduct public business alone because "a quorum of city council members is necessary to make binding decisions." *Id. ¶ 40*.

[*P18] As **[***10]** an example, the court explained that an e-mail from a constituent received by a lone council member on the member's personal device would not be subject to FOIA because no public body was involved. *Id. ¶ 41*. The court went on to say, however, that such an e-mail would become a public record if it was forwarded to enough council members to constitute a quorum. *Id.* This is so because at that point the e-mail is "'in the possession of a public body,'" *i.e.* the city council with sufficient numbers to conduct business and make binding decisions. *Id.* The court employed the same logic in holding that the messages the members sent and received on their personal devices during official city council meetings were public records subject to FOIA because they were necessarily sent at a time when the individual members were acting collectively as a public body. *Id. ¶ 42*. The court noted that "[t]o hold otherwise would allow members of a public body, convened as a public body, to subvert *** FOIA requirements **[****216]** **[**1073]** simply by communicating about city business during a city council meeting on a personal electronic device." *Id. ¶ 43*. Consequently, the court held that any messages pertaining to public business **[***11]** sent or received by council members' personal devices during council meetings should be provided to the city's FOIA officer for review and any nonexempt material provided in turn to the FOIA requester. *Id.*

[*P19] Defendants argue that *City of Champaign* shows that the communications requested by the BGA lack the requisite nexus to a public body. We reach the opposite conclusion. Although we agree with defendants that the individual officials identified in the requests are not themselves public bodies under FOIA, this does not mean that their communications about public business cannot be public records. ***HN6***[⬆] Instead, it is sufficient that the communications were either prepared for, used by, received by, or in the possession of a public body. *5 ILCS 140/2(c)* (West 2016); *City of Danville, 2018 IL App (4th) 170182, ¶ 19*. As noted, *City of Champaign* held that communications on the personal account of a member of a public body come into the possession of that body when the communications are sent or received at a time when the body is conducting public business. Applying this principle to the facts of that case, the court concluded that the city council was capable of conducting public business only when a quorum of council members was involved. By contrast, **[***12]** as defendants conceded at oral argument, the officials in question here are not limited by a quorum requirement. Rather, defendants—through their individual officials such as those named in the requests at issue—can function as public bodies without any official meeting having been convened. For example, the mayor and the director of CDPH can make unilateral decisions that are binding on their

respective public bodies. See *Dumke v. City of Chicago, 2013 IL App (1st) 121668, ¶ 10 n.2, 994 N.E.2d 573, 373 Ill. Dec. 804* (the mayor of Chicago is the city's chief executive officer responsible for, *inter alia*, directing city departments and appointing department heads). Thus, under *City of Champaign*, the e-mails and text messages from those officials' personal accounts are "in the possession of" a public body within the meaning of FOIA. It is also reasonable to conclude that, at a minimum, many such communications are prepared for or eventually used by the public body. Accordingly, the communications that pertain to public business from the named officials' personal accounts are subject to FOIA.

[*P20] This conclusion comports with the goals of governmental transparency and accountability underlying FOIA and with our supreme court's instruction to construe FOIA liberally in order to further **[***13]** these goals. See *Special Prosecutor, 2019 IL 122949, ¶ 25*. ***HN7***[⬆] Indeed, the General Assembly expressed a clear intent that FOIA be interpreted to promote the public's access to information, even when applied in situations where advances in communication technology may outpace the terms of FOIA. *5 ILCS 140/1* (West 2016) ("To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption."). As the *City of Champaign* court recognized, the growing use of personal e-mail accounts and text messages by public officials for public business presents such a situation. Allowing public officials to shield information from the public's view merely by using their personal accounts rather than their government- **[****217]** **[**1074]** issued ones would be anathema to the purposes of FOIA.

[*P21] Although only persuasive authority, our analysis also aligns with those of the few federal courts that have considered the issue under the federal FOIA. See *Special Prosecutor, 2019 IL 122949, ¶ 55* ("Due to the similarity of the statutes, Illinois courts often look to federal case law construing **[***14]** the federal FOIA for guidance in construing FOIA."). For example, in *Brennan Ctr. for Justice v. United States DOJ, 377 F. Supp. 3d 428, 436 (S.D.N.Y. 2019)*, the United States District Court for the Southern District of New York ruled that the Department of Justice was required to ask two of its officials if there were responsive records in their personal e-mail accounts where there was evidence that the officials used their personal accounts for public business. In so ruling, the court stated that it would be inconsistent with the purposes of the federal FOIA to allow the "widespread use of personal devices for official work" to "shunt critical and sensitive information away from official channels and out of public scrutiny." *Id.* Similarly, in *Competitive Enterprise Institute v. Office of Science & Technology Policy, 827 F.3d 145, 150, 423 U.S. App. D.C. 503 (D.C. Cir. 2016)*, the Court of Appeals for the District of Columbia Circuit also held that documents maintained on an official's private e-mail account were government records subject to FOIA. The court reasoned that:

> "The Supreme Court has described the function of [the federal] FOIA as serving 'the citizens' right to be informed about what their government is up to.' [Citation]. If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an **[***15]** account in another domain, that purpose is hardly served." *Id.*

[*P22] Additionally, several of the supreme courts of our sister states have reached similar results. See *Toensing v. AG of Vt., 206 Vt. 1, 2017 VT 99, ¶ 20, 178 A.3d 1000* ("Strong public policy reasons support the conclusion that electronic information stored on private accounts is subject to disclosure under [Vermont's FOIA]."); *City of San Jose v. Superior Court, 2 Cal. 5th 608, 214 Cal. Rptr. 3d 274, 389 P.3d 848, 859 (Cal. 2017)* ("The whole purpose of [California's FOIA] is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny."); *Cheyenne Newspapers, Inc. v. Board of Trustees of Laramie County School District Number One, 2016 WY 113, ¶ 3, 384 P.3d 679 (Wyo. 2016)* ("Because school board members use their personal email addresses to conduct school board business, the request required a search and retrieval of emails from personal email accounts of the board members as well as from the School District's computer system."); *Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45, 49 (Wash. 2015)* (*en banc)* ("We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone.").

[*P23] ***HN8***[⬆] In line with the foregoing case law and the text of FOIA, we hold that communications sent and received from public **[***16]** officials' personal accounts may be "public records" subject to FOIA. In reaching this conclusion we acknowledge but reject each of the several reasons offered by defendants as to why our interpretation is inconsistent with the legislature's intent in enacting FOIA.

[*P24] **[**1075]** **[****218]** First, defendants observe that the *City of Champaign* court suggested that the legislature should expressly clarify whether it "intends for communications pertaining to city business to and from an individual city council member's personal electronic device to be subject to FOIA in every case." *City of Champaign, 2013 IL App (4th) 120662, ¶ 44*. In light of this signal, defendants interpret the legislature's failure to expand the definitions of a public body and public record under FOIA as an indication that the legislature did not intend for the contents of an official's personal accounts to be subject to disclosure. However, defendants' logic cuts both ways: if the legislature intended for officials' personal accounts to never be subject to FOIA, it could have amended FOIA after *City of Champaign*. ***HN9***[⬆] Because the legislature has declined to amend FOIA in a way relevant here, we may presume that the legislature has acquiesced to *City of Champaign*'s holding that personal account **[***17]** communications are at least sometimes public records. See *Ready v. United/Goedecke Services, Inc., 232 Ill. 2d 369, 380, 905 N.E.2d 725, 328 Ill. Dec. 836 (2008)* ("[W]here the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent.").

[*P25] Second, defendants greatly exaggerate the privacy implications of our ruling. Defendants assert that affirming the circuit court's order would "require public bodies to search their employees' private accounts—and potentially their homes and other private locations—in response to almost any FOIA request for communications about public business." Yet the order before us imposes no such requirements. Instead, defendants will merely be required to ask a limited number of officials whether their personal accounts contain responsive records. This approach poses almost no invasion on the privacy interests of public officials and has been persuasively endorsed by several courts. See *Brennan Center, 377 F. Supp. 3d at 435-36*; *City*

of San Jose, 389 P.3d at 860; *Nissen, 357 P.3d at 57-58*. If the officials in question have not used their personal accounts to conduct public business, they can so state. Indeed, the BGA concedes that this simple step may well end the litigation because "if the City were to show through legally admissible affidavits **[***18]** following a reasonable search by the relevant employees that no responsive private-account communications exist, case law as it currently stands would often absolve the City of any further responsibility absent a showing to the contrary by BGA."

[*P26] We further observe that our interpretation of FOIA in no way affects the privacy safeguards that have long been in place. ***HN10***[⬆] For example, FOIA exempts from disclosure any information "that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." *5 ILCS 140/7(1)(c)* (West 2016). "Private information" such as the financial information, personal telephone numbers, personal e-mail addresses, and home addresses of public officials also remains exempt. *Id. §§ 2(c-5)*, *(7)(1)(b)*. Moreover, any of the statutory exemptions listed in *section 7* of FOIA may still apply. We also reiterate that only those communications that pertain to public business are potentially subject to disclosure in the first place. No information concerning the officials' private lives need be disclosed to defendants' FOIA officers. Officials can also avoid any personal account disclosure in the future by simply **[***19]** refraining from the use of personal accounts to conduct public business.

[*P27] **[**1076]** **[****219]** Defendants next observe that ***HN11***[⬆] the FOIA generally gives a public body five business days to either comply with or deny a records request. See *id. § 3(d)*. Defendants' argue that this deadline "cannot be reconciled" with a requirement that they inquire into their officials' personal accounts. However, defendants have shown no reason why they would be unable to ask a handful of their officials whether their private accounts contained responsive records within five business days. ***HN12***[⬆] Additionally, FOIA contemplates situations in which the production of requested records might require "additional efforts" for a variety of reasons. *Id. § 3(e)*. In these situations, the public body is entitled to an extension of five additional business days. *Id.* FOIA also expressly allows the requester and the public body to agree on an extended deadline of their choosing. *Id.* Thus, we find nothing in the statutory disclosure deadlines inconsistent with our interpretation of FOIA.

[*P28] Finally, defendants raise concerns about the ability of a public body to compel its officials to turn over responsive records contained in their personal accounts. However, **[***20]** there is no indication that the officials in this case will be unwilling to comply with a court order. ***HN13***[⬆] Additionally, if the officials prove incalcitrant, FOIA provides that the circuit court may help enforce disclosure through its contempt powers. *Id. § 11(g)* ("In the event of noncompliance with an order of the court to disclose, the court may enforce its order against any public official or employee so ordered or primarily responsible for such noncompliance through the court's contempt powers.").

[*P29] In sum, we hold that the e-mails and text messages sought by the BGA are public records under FOIA because they pertain to public business and share the requisite connection to a public body. This conclusion is entirely consistent with both the letter and purpose of the statute.

[*P30] B. Adequacy of Defendants' Search

[*P31] Having determined that the e-mails and text messages in question are generally subject to FOIA, we now turn to the ultimate question on appeal, which is the adequacy of defendants' search for responsive records. ***HN14***[⬆] The adequacy of a public body's search is "judged by a standard of reasonableness and depends upon the facts of each case." *Maynard v. Central Intelligence Agency, 986 F.2d 547, 559 (1st Cir. 1993)*. "The crucial issue is not whether relevant documents **[***21]** might exist, but whether the agency's search was reasonably calculated to discover the requested documents." (Internal quotation marks omitted.) *Id.* Although a public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are "reasonably likely to contain responsive records." *Judicial Watch, Inc. v. United States DOJ, 373 F. Supp. 3d 120, 126 (D.D.C. 2019)*. Whether a particular search was reasonable depends on the specific facts and must be judged on a case-by-case basis. *Rubman v. United States Citizenship & Immigration Services, 800 F.3d 381, 387 (7th Cir. 2015)*

[*P32] ***HN15***[⬆] When a public body determines that there are no records responsive to a request, it bears the initial burden of demonstrating the adequacy of its search. *Evans v. Federal Bureau of Prisons, 951 F.3d 578, 584, 445 U.S. App. D.C. 361 (D.C. Cir. 2020)*. An agency typically satisfies this burden by submitting reasonably detailed affidavits setting forth the type of search it performed and averring that all locations likely to contain responsive records were searched. *Id.* Only once the agency has submitted such an affidavit does the burden shift to the requester to produce countervailing evidence **[****220]** **[**1077]** that the search was not adequate. *Bayala v. United States Department of Homeland Security, 264 F. Supp. 3d 165, 172 (D.D.C. 2017)*.

[*P33] Here, the BGA's requests sought communications from the relevant officials' personal text messages and e-mail accounts. The BGA also presented some initial evidence **[***22]** that the officials in question used their personal accounts for public business. However, defendants conducted no inquiry into these accounts based on their erroneous position that the accounts could not contain public records within the meaning of FOIA. Thus, defendants' search was not reasonably calculated to capture all sources where responsive records were likely to exist.

[*P34] Even so, defendants maintain that they were not obligated to inquire about the personal accounts of their officials because the BGA did not show that the accounts were likely to contain responsive records. In support, defendants rely on two federal district court cases, *Hunton & Williams LLP v. U.S. Environmental Protection Agency, 248 F. Supp. 3d 220 (D.D.C. 2017)*, and *Wright v. Admin. for Children & Families, (U.S. HHS), No. 15-218, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293 (D.D.C. Oct. 11, 2016)*.[1] In both of these cases, the court held that an agency was not required to further inquire into the personal accounts of their officials where the requester merely speculated that the officials might have used their accounts for public

[1] We note that both cases cited by defendants support the proposition that FOIA extends to public officials' personal e-mails and text messages. See *Hunton, 248 F. Supp. 3d at 237*; *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *7-8*.

business. *Hunton, 248 F. Supp. 3d at 238*; *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *9*. However, both cases are distinguishable for two reasons. First, the question in those cases was whether the requesters overcame the presumption of a good faith search where the agencies carried their initial burdens. *Hunton, 248 F. Supp. 3d at 238 n.17* (agencies' search presumed adequate where they inquired into some of their **[***23]** employees' personal accounts and submitted declarations attesting that a further search was not likely to be fruitful because all work was done through agency accounts); *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *8* (presuming officials complied with a federal law requiring them to ensure that any communications related to government business done via their personal accounts were also preserved on agency systems). Here, no such presumption exists because defendants have admittedly performed no inquiry into their officials' personal accounts based on an erroneous interpretation of FOIA. Additionally, defendants never contested in the circuit court that the officials named in the request used their personal accounts for public business. Although on appeal defendants contend that at least CDPH Director Morita only used her government-issued account, there is nothing in the record from Morita to support this proposition. Second, the BGA produced precisely the kind of evidence of personal account usage that was lacking in *Hunton* and *Wright*. *Hunton, 248 F. Supp. 3d at 237* (suggesting evidence that a specific private e-mail address had been used for agency business is sufficient to require a search); *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *9* (same). Indeed, defendants have admitted that the named officials in the Mayor's **[***24]** Office used their personal e-mail accounts for public business. The BGA has also submitted evidence that some of the named officials have communicated about public business via text messages. This evidence was sufficient to require defendants to at least ask its officials whether they used their personal accounts for public business.

[1078]** **[****221]** **[*P35]** III. CONCLUSION

[*P36] In sum, we hold that communications pertaining to public business within public officials' personal text messages and e-mail accounts are public records subject to FOIA. The BGA submitted sufficient evidence to establish a reason to believe that defendants' officials used their personal accounts to conduct public business. Defendants' refusal to even inquire whether their officials' personal accounts contain responsive records was therefore unreasonable under the facts of this case. Accordingly, we affirm the order of the circuit court directing defendants to inquire whether the relevant officials used their personal accounts for public business.

[*P37] Affirmed.

End of Document

City of San Jose v. Superior Court

Supreme Court of California

March 2, 2017, Filed

S218066

Reporter
2 Cal. 5th 608 *; 389 P.3d 848 **; 214 Cal. Rptr. 3d 274 ***; 2017 Cal. LEXIS 1607 ****; 45 Media L. Rep. 1389; 2017 WL 818506

CITY OF SAN JOSE et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; TED SMITH, Real Party in Interest.

Subsequent History: Reported at *City of San Jose v. Superior Court, 2017 Cal. LEXIS 1749 (Cal., Mar. 2, 2017)*

Prior History: [**1]** Superior Court of Santa Clare County, No. 109CV150427, James P. Kleinberg, Judge. Court of Appeal, Sixth Appellate District, No. H039498.

City of San Jose v. Superior Court, 225 Cal. App. 4th 75, 169 Cal. Rptr. 3d 840, 2014 Cal. App. LEXIS 293 (Cal. App. 6th Dist., Mar. 27, 2014)

Core Terms

public record, personal account, public business, disclosure, employees, writings, records, communications, documents, local agency, privacy, agencies, electronic, exemptions, public official, disclose, argues, e-mail, obligations, public access, searches, stored, official business, right to privacy, public agency, state agency, messages, italics, entity, files

Case Summary

Overview

HOLDINGS: [1]-In a case in which a citizen requested disclosure of 32 categories of public records from a city, the Supreme Court held that a city employee's writings about public business are not excluded from disclosure under the California Public Records Act simply because they have been sent, received, or stored in a personal account; [2]-A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of *Gov. Code, § 6252, subd. (e)*, even if the writing is prepared using the employee's personal account; [3]-A document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located; [4]-If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.

Outcome
Judgment of court of appeal reversed; case remanded.

LexisNexis® Headnotes

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Constitutional Law > Substantive Due Process > Privacy

HN1[] **Methods of Disclosure, Public Inspection**

Enacted in 1968, the California Public Records Act (CPRA), *Gov. Code, § 6250 et seq.*, declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in California. *Gov. Code, § 6250*. In 2004, voters made this principle part of the California Constitution. Public access laws serve a crucial function. Openness in government is essential to the functioning of a democracy. Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. However, public access to information must sometimes yield to personal privacy interests. When enacting CPRA, the legislature was mindful of the right to privacy, *§ 6250*, and set out multiple exemptions designed to protect that right. Similarly, while the California Constitution provides for public access, it does not supersede or modify existing privacy rights. *Cal. Const., art. I, § 3, subd. (b)(3)*.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN2[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The California Public Records Act (CPRA), *Gov. Code, § 6250 et seq.*, establishes a basic rule requiring disclosure of public records upon request. *Gov. Code, § 6253*. In general, it 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. Every such record must be disclosed unless a statutory exception is shown. The CPRA also includes a catchall provision exempting disclosure

if the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure. *Gov. Code, § 6255, subd. (a)*.

Governments > Legislation > Interpretation

HN3[] **Legislation, Interpretation**

When a court interprets a statute, its fundamental task is to determine the legislature's intent so as to effectuate the law's purpose. The court first examines the statutory language, giving it a plain and commonsense meaning. The court does not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. Furthermore, the court considers portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Constitutional Law > State Constitutional Operation

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN4[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

Given the strong public policy of the people's right to information concerning the people's business, *Gov. Code, § 6250*, and the constitutional mandate to construe statutes limiting the right of access narrowly, *Cal. Const., art. I, § 3, subd. (b)(2)*, all public records are subject to disclosure unless the legislature has expressly provided to the contrary.

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN5[] **Governmental Information, Recordkeeping & Reporting**

The California Public Records Act, Gov. Code, § 6250 et seq., defines the term "public record" to include any 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. Gov. Code, § 6252, subd. (e). Under this definition, a public record has four aspects. It is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency.

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN6[] Governmental Information, Recordkeeping & Reporting

To qualify as a public record, a writing must contain information relating to the conduct of the public's business. Gov. Code, § 6252, subd. (e). Generally, any record kept by an officer because it is necessary or convenient to the discharge of his official duty is a public record.

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN7[] Governmental Information, Recordkeeping & Reporting

To qualify as a public record under the California Public Records Act, Gov. Code, § 6250 et seq., 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. Gov. Code, § 6252, subd. (e).

Administrative Law > Governmental Information > Recordkeeping & Reporting

Governments > Legislation > Interpretation

HN8[] Governmental Information, Recordkeeping & Reporting

Broadly construed, the term "local agency," for purposes of the California Public Records Act, Gov. Code, § 6250 et seq., logically includes not just the discrete governmental entities listed in Gov. Code, § 6252, subd. (a), but also the individual officials and staff members who conduct the agencies' affairs. It is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf. The judiciary presumes the legislature was aware of these settled

principles. A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of *Gov. Code, § 6252, subd. (e)*, even if the writing is prepared using the employee's personal account.

Governments > Legislation > Interpretation

HN9 **Legislation, Interpretation**

In statutory drafting, the term "includes" is ordinarily one of enlargement rather than limitation. The statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN10 **Methods of Disclosure, Public Inspection**

When it is alleged that public records have been improperly withheld, *Gov. Code, § 6259, subd. (a)*, of the California Public Records Act (CPRA), *Gov. Code, § 6250 et seq.*, directs that the court shall order the officer or person charged with withholding the records to disclose the records or show cause why they should not be produced. If the court concludes the public official's decision to refuse disclosure is not justified, it can order the public official to make the record public. *§ 6259, subd. (b)*. If the court finds that the public official was justified in refusing disclosure, it must return the item to the public official without disclosing its content. *§ 6259, subd. (b)*. The legislature's repeated use of the singular word "official" in *§ 6259* indicates an awareness that an individual may possess materials that qualify as public records. Moreover, the broad term "public official" encompasses officials in state and local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN11 **Methods of Disclosure, Public Inspection**

Records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. An agency has constructive possession of records if it has the right to control the records, either directly or through another person.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN12[] **Methods of Disclosure, Public Inspection**

An agency's actual or constructive possession of records is relevant in determining whether it has an obligation to search for, collect, and disclose the material requested. *Gov. Code, § 6253, subd. (c)*. It is a separate and more fundamental question whether a document located outside an agency's walls, or servers, is sufficiently owned, used, or retained by the agency so as to constitute a public record. *Gov. Code, § 6252, subd. (e)*.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN13[] **Methods of Disclosure, Public Inspection**

Documents otherwise meeting the definition of "public records" under the California Public Records Act, *Gov. Code, § 6250 et seq.*, 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 *Gov. Code, § 6252, subd. (e)*, even if the writing is retained in the employee's personal account.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN14[] **Methods of Disclosure, Public Inspection**

A city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN15 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

Beyond the definition of a "public record," the California Public Records Act, Gov. Code, § 6250 et seq., itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda, Gov. Code, § 6254, subd. (a), personal financial data, Gov. Code, § 6254, subd. (n), personnel and medical files, Gov. Code, § 6254, subd. (c), and material protected by evidentiary privileges, Gov. Code, § 6254, subd. (k). Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it clearly outweighs the public interest in disclosure. Gov. Code, § 6255, subd. (a). This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. The analysis, as with other exemptions, appropriately focuses on the content of specific records rather than their location or medium of communication.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN16 **Methods of Disclosure, Public Inspection**

Unless a records request is overbroad or unduly burdensome, agencies are obliged to disclose all records they can locate with reasonable effort. Reasonable efforts do not require that agencies undertake extraordinarily extensive or intrusive searches, however. In general, the scope of an agency's search for public records need only be reasonably calculated to locate responsive documents.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > Governmental Information > Public Information

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN17 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

A city employee's writings about public business are not excluded from disclosure under the California Public Records Act, Gov. Code, § 6250 et seq., simply because they have been sent, received, or stored in a personal account.

Headnotes/Summary

Summary

[*608] CALIFORNIA OFFICIAL REPORTS SUMMARY

Pursuant to the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*), a citizen requested disclosure of 32 categories of public records from a city. The targeted documents concerned redevelopment efforts and included e-mails and text messages sent or received on private electronic devices used by city officials. The city disclosed communications made using city telephone numbers and e-mail accounts, but did not disclose communications made using the officials' personal e-mail accounts. The citizen sued for declaratory relief, arguing CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated, or stored. The superior court granted the citizen's motion for summary judgment and ordered disclosure. (Superior Court of Santa Clara County, No. 109CV150427, James P. Kleinberg, Judge.) However, the Court of Appeal, Sixth Dist., No. H039498, issued a peremptory writ of mandate directing the superior court to vacate the order granting the citizen's motion for summary judgment and to enter a new order denying that motion and granting the city's motion for summary judgment.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the case for further proceedings. The court held that 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. A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of *Gov. Code, § 6252, subd. (e)*, even if the writing is prepared using the employee's personal account. A document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located. If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny. The city's interpretation of CPRA 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. (Opinion by Corrigan, J., expressing the unanimous view of the court.)

[*609]

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Exemptions—Privacy.

Enacted in 1968, the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in California (*Gov. Code, § 6250*). In 2004, voters made this principle part of the California Constitution. Public access laws serve a crucial function. Openness in government is essential to the functioning of a democracy. Implicit in the

democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. However, public access to information must sometimes yield to personal privacy interests. When enacting CPRA, the Legislature was mindful of the right to privacy, and set out multiple exemptions designed to protect that right. Similarly, while the California Constitution provides for public access, it does not supersede or modify existing privacy rights (*Cal. Const., art. I, § 3, subd. (b)(3)*).

CA(2)[] **(2)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Exemptions—Public Interest.

The California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) establishes a basic rule requiring disclosure of public records upon request (*Gov. Code, § 6253*). In general, it 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. Every such record must be disclosed unless a statutory exception is shown. The CPRA also includes a catchall provision exempting disclosure if the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure (*Gov. Code, § 6255, subd. (a)*).

CA(3)[] **(3)**

Statutes § 29—Construction—Language—Legislative Intent—Plain Meaning.

When a court interprets a statute, its fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. The court first examines the statutory language, giving it a plain and commonsense meaning. The court does not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other **[*610]** aids, such as the statute's purpose, legislative history, and public policy. Furthermore, the court considers portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

CA(4)[] **(4)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Exemptions—Public Policy.

Given the strong public policy of the people's right to information concerning the people's business (Gov. Code, § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2)), all public records are subject to disclosure unless the Legislature has expressly provided to the contrary.

CA(5)[] (5)

Records and Recording Laws § 2—Definitions—Public Record.

The California Public Records Act (Gov. Code, § 6250 et seq.), defines the term "public record" to include any 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. Gov. Code, § 6252, subd. (e). Under this definition, a public record has four aspects. It is (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency.

CA(6)[] (6)

Records and Recording Laws § 2—Public Record—Conduct of Public's Business—Discharge of Official Duty.

To qualify as a public record, a writing must contain information relating to the conduct of the public's business (Gov. Code, § 6252, subd. (e)). Generally, any record kept by an officer because it is necessary or convenient to the discharge of his official duty is a public record.

CA(7)[] (7)

Records and Recording Laws § 2—Public Record—Conduct of Public's Business—Personal Communications.

To qualify as a public record under the California Public Records Act (Gov. Code, § 6250 et seq.) 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 (Gov. Code, § 6252, subd. (e)).

[*611] CA(8)[] (8)

Records and Recording Laws § 2—Public Record—Conduct of Public's Business—Writing Prepared by Public Employee—Personal Account.

Broadly construed, the term "local agency," for purposes of the California Public Records Act (*Gov. Code, § 6250 et seq.*), logically includes not just the discrete governmental entities listed in *Gov. Code, § 6252, subd. (a)*, but also the individual officials and staff members who conduct the agencies' affairs. It is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf. The judiciary presumes the Legislature was aware of these settled principles. A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of *Gov. Code, § 6252, subd. (e)*, even if the writing is prepared using the employee's personal account.

CA(9)[] **(9)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Public Official—Refusal to Disclose.

When it is alleged that public records have been improperly withheld, *Gov. Code, § 6259, subd. (a)*, part of the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*), directs that the court order the officer or person charged with withholding the records to disclose the records or show cause why they should not be produced. If the court concludes the public official's decision to refuse disclosure is not justified, it can order the public official to make the record public (*§ 6259, subd. (b)*). If the court finds that the public official was justified in refusing disclosure, it must return the item to the public official without disclosing its content. The Legislature's repeated use of the singular word "official" in *§ 6259* indicates an awareness that an individual may possess materials that qualify as public records. Moreover, the broad term "public official" encompasses officials in state and local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

CA(10)[] **(10)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Actual or Constructive Possession.

Records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. An agency has constructive possession of records if it has the right to control the records, either directly or through another person.

[*612] ***CA(11)***[] **(11)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Actual or Constructive Possession.

An agency's actual or constructive possession of records is relevant in determining whether it has an obligation to search for, collect, and disclose the material requested (*Gov. Code, § 6253, subd. (c)*). It is a separate and more fundamental question whether a document located outside an agency's walls, or servers, is sufficiently owned, used, or retained by the agency so as to constitute a public record (*Gov. Code, § 6252, subd. (e)*).

CA(12) **(12)**

Records and Recording Laws § 2—Definitions—Public Record—Personal Account.

Documents otherwise meeting the definition of "public records" under the California Public Records Act (*Gov. Code, § 6250 et seq.*) 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 *Gov. Code, § 6252, subd. (e)*, even if the writing is retained in the employee's personal account.

CA(13) **(13)**

Records and Recording Laws § 2—Public Record—Conduct of Public's Business—Personal Account.

A city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account.

CA(14) **(14)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Exemptions.

Beyond the definition of a "public record," the California Public Records Act (*Gov. Code, § 6250 et seq.*) itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda (*Gov. Code, § 6254, subd. (a)*), personal financial data (*Gov. Code, § 6254, subd. (n)*), personnel and medical files (*Gov. Code, § 6254, subd. (c)*), and material protected by evidentiary privileges (*Gov. Code, § 6254, subd. (k)*). Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it clearly outweighs the public interest in disclosure (*Gov. Code, § 6255, subd. (a)*). This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. The analysis, as with other exemptions, appropriately focuses on the content of specific records rather than their location or medium of communication.

CA(15) **(15)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Reasonable Effort.

Unless a records request is overbroad or unduly burdensome, agencies are obliged to disclose all records they can locate with reasonable effort. Reasonable efforts do not require that **[*613]** agencies undertake extraordinarily extensive or intrusive searches, however. In general, the scope of an agency's search for public records need only be reasonably calculated to locate responsive documents.

CA(16)[] **(16)**

Records and Recording Laws § 12—Inspection of Public Records—Disclosure—Exemptions—Personal Account.

In a case in which a citizen requested disclosure of 32 categories of public records written by city officials, but the city did not disclose communications made using the individuals' personal e-mail accounts, the Supreme Court held that a city employee's writings about public business are not excluded from disclosure under the California Public Records Act (*Gov. Code, § 6250 et seq.*) simply because the writings have been sent, received, or stored in a personal account.

[Cal. Forms of Pleading and Practice (2016) ch. 470C, Public Records Act, § 470C.11; 2 Witkin, Cal. Evidence (5th ed. 2012) Witnesses, § 293 et seq.]

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Sheriffs' Association, Rialto Professional Firefighters, International Association of Firefighters, Local 3688, AFL-CIO, Vallejo Police Officers' Association, Elk Grove Police Officers Association, Ontario Police Officers' Association, Placer County Deputy Sheriffs' Association, Federated University Police Officers' Association and Los Angeles Airport Peace Officers' Association as Amici Curiae on behalf of Real Party in Interest.

Jack Cohen as Amicus Curiae on behalf of Real Party in Interest.

Ram, Olson, Cereghino & Kopczynski, Karl Olson; Juan F. Cornejo; Jeffrey D. Glasser; and James W. Ewert for California Newspaper Publishers Association, Los Angeles Times Communications LLC, McClatchy Newspapers, Inc., Hearst Corporation, First Amendment Coalition, Society of Professional Journalists, Californians Aware and the Reporters **[****3]** Committee for Freedom of the Press as Amici Curiae on behalf of Real Party in Interest.

Michael T. Risher, Matthew T. Cagle, Christopher J. Conley; Peter Bibring, Peter Eliasberg; David Loy; and Jennifer Lynch for American Civil Liberties Union Foundation of Northern California, Inc., American Civil Liberties Union of Southern California, Inc., American Civil Liberties Union of San Diego & Imperial County, Inc., and Electronic Frontier Foundation as Amici Curiae on behalf of Real Party in Interest.

Judges: Opinion by Corrigan, J., expressing the unanimous view of the court.

Opinion by: Corrigan

Opinion

[851] [***278] CORRIGAN, J.**—Here, we hold 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 (CPRA or Act; *Gov. Code, § 6250 et seq.*). [1] We overturn the contrary judgment of the Court of Appeal.

I. BACKGROUND

In June 2009, petitioner Ted Smith requested disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency and the agency's executive director, along with certain other elected officials and their **[*615]** staffs. [2] The targeted documents concerned redevelopment efforts **[****4]** in downtown San Jose and included e-mails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and e-mail accounts but did not disclose communications made using the individuals' personal accounts.

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[1] *Government Code section 6250 et seq.* All statutory references are to the Government Code unless otherwise specified.

[2] These parties, sued as defendants below and the petitioners here, are collectively referred to as the "City."

Smith sued for declaratory relief, arguing CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated, or stored. The City responded that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The trial court granted summary judgment for Smith and ordered disclosure, but the Court of Appeal issued a writ of mandate. At present, no documents from employees' personal accounts have been collected or disclosed.

[852]** II. DISCUSSION

This case concerns how laws, originally designed to cover paper documents, apply to evolving methods of electronic communication. It requires recognition that, in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained **[****5]** workplace.

HN1[↑] ***CA(1)***[↑] **(1)** Enacted in 1968, CPRA declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (*§ 6250*.) In 2004, voters made this principle part of our Constitution. A provision added by Proposition 59 states: "The people have the right of access to information concerning the conduct **[***279]** of the people's business, and, therefore, … the writings of public officials and agencies shall be open to public scrutiny." (*Cal. Const., art. I, § 3, subd. (b)(1)*.) Public access laws serve a crucial function. "Openness in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.'" (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 328–329 [64 Cal. Rptr. 3d 693, 165 P.3d 488]* (*International Federation*).)

However, public access to information must sometimes yield to personal privacy interests. When enacting CPRA, the Legislature was mindful of the **[*616]** right to privacy (*§ 6250*), and set out multiple exemptions designed to protect that right. (*Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal.4th 278, 288 [64 Cal. Rptr. 3d 661, 165 P.3d 462]* (*Commission **[****6]** on Peace Officer Standards*); see *§ 6254*.) Similarly, while the Constitution provides for public access, it does not supersede or modify existing privacy rights. (*Cal. Const., art. I, § 3, subd. (b)(3)*.)

CPRA and the Constitution strike a careful balance between public access and personal privacy. This case concerns how that balance is served when documents concerning official business are created or stored outside the workplace. The issue is a narrow one: Are writings concerning the conduct of public business beyond CPRA's reach merely because they were sent or received using a nongovernmental account? Considering the statute's language and the important policy interests it serves, the answer is no. Employees' communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission.

A. *Statutory Language, Broadly Construed, Supports Public Access*

HN2[⬆] ***CA(2)***[⬆] **(2)** CPRA establishes a basic rule requiring disclosure of public records upon request. (*§ 6253*.) [3] In general, it 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." (*Sander v. State Bar of California (2013) 58 Cal.4th 300, 323 [165 Cal. Rptr. 3d 250, 314 P.3d 488]*, italics added.) Every such record "must be disclosed **[****7]** unless a statutory exception is shown." (*Ibid*.) *Section 6254* sets out a variety of exemptions, "many of which are designed to protect individual privacy." (*International Federation, supra, 42 Cal.4th at p. 329*.) The Act also includes a catchall provision exempting disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." (*§ 6255, subd. (a)*.)

HN3[⬆] ***CA(3)***[⬆] **(3)** "When we interpret a statute, '[o]ur fundamental task … is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is **[***280]** clear, courts must generally follow **[**853]** its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative **[*617]** history, and public policy.' [Citation.] 'Furthermore, we consider portions of a statute in the context of the entire statute **[****8]** and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.'" (*Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 165–166 [158 Cal. Rptr. 3d 639, 302 P.3d 1026]*.)

CA(4)[⬆] **(4)** In CPRA cases, this standard approach to statutory interpretation is augmented by a constitutional imperative. (See *Sierra Club v. Superior Court, supra, 57 Cal.4th at p. 166*.) Proposition 59 amended the Constitution to provide, "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be *broadly* construed if it furthers the people's right of access, and *narrowly* construed if it limits the right of access." (*Cal. Const., art. I, § 3, subd. (b)(2)*, italics added.) ***HN4***[⬆] "'Given the strong public policy of the people's right to information concerning the people's business (*Gov. Code, § 6250*), and the constitutional mandate to construe statutes limiting the right of access narrowly (*Cal. Const., art. I, § 3, subd. (b)(2)*), "all public records are subject to disclosure unless the Legislature has *expressly* provided to the contrary."'" (*Sierra Club, at p. 166*.)

CA(5)[⬆] **(5)** We begin with ***HN5***[⬆] the term "public record," which CPRA defines to include "any 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." (*§ 6252, subd. (e)*; hereafter **[****9]** "public records" definition.) Under this definition, a public record has four aspects. It is (1) a writing, (2) with content relating to the

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[3] CPRA was modeled on the *federal Freedom of Information Act (FOIA) (5 U.S.C. § 552)*. (*San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 772 [192 Cal. Rptr. 415]*.)

conduct of the public's business, which is (3) prepared by, *or* (4) owned, used, or retained by any state or local agency.

1. *Writing*

CPRA defines a "writing" as "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." (*§ 6252, subd. (g)*.) It is undisputed that the items at issue here constitute writings.

In 1968, creating a "writing" could be a fairly involved process. Typically, a person would use an implement to type, or record words longhand, or would dictate to someone else who would write or type a document. Writings were generally made on paper or some other tangible medium. These writings were physically identifiable and could be retrieved by examining the physical repositories where they were stored. Writings **[****10]** exchanged with people outside **[*618]** the agency were generally sent, on paper, through the mail or by courier. In part because of the time required for their preparation, such writings were fairly formal and focused on the business at hand.

Today, these tangible, if laborious, writing methods have been enhanced by electronic communication. E-mail, text messaging, and other electronic platforms, permit writings to be prepared, exchanged, and stored more quickly and easily. However, **[***281]** the ease and immediacy of electronic communication 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 an official communication and an electronic aside is now sometimes blurred. The second aspect of CPRA's "public records" definition establishes a framework to distinguish between work-related and purely private communications.

2. *Relating to the Conduct of the Public's Business*

CA(6)[↑] **(6)** The overall structure of CPRA, with its many exemptions, makes clear that not **[**854]** everything written by a public employee is subject to review and disclosure. ***HN6***[↑] To qualify as a public record, a writing must "contain[] **[****11]** information relating to the conduct of the public's business." (*§ 6252, subd. (e)*.) Generally, 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 (1984) 154 Cal.App.3d 332, 340 [201 Cal. Rptr. 654]*; see *People v. Purcell (1937) 22 Cal.App.2d 126, 130 [70 P.2d 706]*.)

Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an e-mail to a spouse complaining "my coworker is an idiot" would likely not be a public record. Conversely, an e-mail 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. Here, the City claimed all communications in personal accounts are beyond the reach of CPRA. As a result, the content of specific records is not before us. Any disputes over this aspect of the "public records" definition await resolution in future proceedings. **[****12]**

CA(7)[⬆] **(7)** We clarify, however, that *HN7*[⬆] to 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 **[*619]** 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." (*§ 6252, subd. (e)*.) [4]

Coronado Police Officers Assn. v. Carroll (2003) 106 Cal.App.4th 1001 [131 Cal. Rptr. 2d 553] demonstrates the intricacy of determining whether a writing is related to public business. There, police officers **[***282]** sought access to a database of impeachment material compiled by public defenders. The attorneys contributed to the database and used its contents in their work. (*Id. at p. 1005*.) However, their representation of individual clients, though paid for by a public entity, was considered under case law **[****13]** to be essentially a private function. (*Id. at pp. 1007–1009*; see *Polk County v. Dodson (1981) 454 U.S. 312, 321–322 [70 L. Ed. 2d 509, 102 S. Ct. 445]*.) Accordingly, the *Coronado* court concluded the database did not relate to public business and thus was not a public record. (*Coronado, at pp. 1007–1009*.) The court was careful to note that not all documents related to the database were private, however. Documents reflecting policy decisions about whether and how to maintain the database might well relate to public business, rather than the representation of individual clients. (*Id. at p. 1009*.) Content of that kind would constitute public records. (*Ibid*.)

3. *Prepared by Any State or Local Agency*

The City focuses its challenge on the final portion of the "public records" definition, which requires that writings be "prepared, owned, used, or retained by any state or local agency." (*§ 6252, subd. (e)*.) The City argues **[**855]** this language does not encompass communications agency employees make through their personal accounts. However, the broad construction mandated by the Constitution supports disclosure.

A writing is commonly understood to have been prepared by the person who wrote it. If an agency employee prepares a writing that substantively relates to the conduct of public business, that writing would appear to satisfy the Act's **[****14]** definition of a public record. The City urges a contrary conclusion **[*620]** when the writing is transmitted through a personal account. In

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[4] 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. (Assem. Com. on Statewide Information Policy, Final Rep. (Mar. 1970) 1 Assem. J. (1970 Reg. Sess.) p. 9; see *San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 774*.) 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.

focusing its attention on the "owned, used, or retained by" aspect of the public records definition, however, it ignores the "prepared … by" aspect. (§ 6252, subd. (e).) This approach fails to give "'significance to every word, phrase, sentence, and part'" of the Act. (*Sierra Club v. Superior Court, supra, 57 Cal.4th at p. 166*.)

The City draws its conclusion by comparing the Act's definitions of "local" and "state" agency. Under CPRA, "'*Local agency*' includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to *subdivisions (c)* and *(d) of Section 54952*." (*§ 6252, subd. (a)*, italics added.) The City points out that this definition does not specifically include individual government officials or staff members, whereas individuals *are* specifically mentioned in CPRA's definition of "*state agency*." According to that definition, "'State agency' means every state office, *officer*, department, division, bureau, board, and commission or other **[****15]** state body or agency, except those agencies provided for in *Article IV (except Section 20* thereof) or *Article VI of the California Constitution*." [5] (*§ 6252, subd. (f)(1)*, italics added.) The City contends this **[***283]** difference shows the Legislature intended to exclude individuals from the local agency definition. If a local agency does not encompass individual officers and employees, it argues, only writings accessible to the agency as a whole are public records. This interpretation is flawed for a number of reasons.

CA(8)[↑] **(8)** The City's narrow reading of CPRA's local agency definition is inconsistent with the constitutional directive of broad interpretation. (*Cal. Const., art. I, § 3, subd. (b)(2)*; see *Sierra Club v. Superior Court, supra, 57 Cal.4th at p. 175*.) ***HN8***[↑] Broadly construed, the term "local agency" logically includes not just the discrete governmental entities listed in *section 6252, subdivision (a)* but also the individual officials and staff members who conduct the agencies' affairs. It is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. (*Suezaki v. Superior Court (1962) 58 Cal.2d 166, 174 [23 Cal. Rptr. 368, 373 P.2d 432]*; *Alvarez v. Felker Mfg. Co. (1964) 230 Cal.App.2d 987, 998 [41 Cal. Rptr. 514]*; see *United States v. Dotterweich (1943) 320 U.S. 277, 281 [88 L. Ed. 48, 64 S. Ct. 134]*; *Reno v. Baird (1998) 18 Cal.4th 640, 656 [76 Cal. Rptr. 2d 499, 957 P.2d 1333]*.) A disembodied governmental agency **[*621]** cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf. (See, e.g., *California Assn. of Health Facilities v. Department of Health Services (1997) 16 Cal.4th 284, 296–297 [65 Cal. Rptr. 2d 872, 940 P.2d 323]*; cf. **[****16]** *Competitive Enterprise Institute v. Office of Science & Technology Policy (D.C. Cir. 2016) 827 F.3d 145, 149* [reaching the same conclusion for federal FOIA requests].). We presume the Legislature was aware of these settled principles. (See *People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 199 [96 Cal. Rptr. 2d 463, 999 P.2d 686]*.) A writing prepared by a public employee conducting agency business has been "prepared

[5] Article IV establishes the Legislature, and *article VI* establishes the state's judiciary. (*Cal. Const., arts. IV*, *VI*.) These branches of government are thus generally exempt from CPRA. (See *Sander v. State Bar of California, supra, 58 Cal.4th at p. 318*; *Copley Press, Inc. v. Superior Court (1992) 6 Cal.App.4th 106, 111 [7 Cal. Rptr. 2d 841]*.)

by" the agency within the meaning of section 6252, subdivision (e), even if the writing is prepared using the employee's personal account.

[856]** The City also fails to explain how its proposed requirement that a public record be "accessible to the agency as a whole" could be practically interpreted. Even when documents were stored in filing cabinets or ledgers, many writings would not have been considered accessible to all agency employees, regardless of their level of responsibility or involvement in a particular project.

Moreover, although employees are not specifically mentioned in the local agency definition, nothing in the statutory language indicates the Legislature meant to *exclude* these individuals from CPRA obligations. The City argues the omission of the word "officer" from the local agency definition reflects a legislative intent that CPRA apply to individuals who work in *state* agencies but *not* employees in local government. The City offers no reason why the Legislature would draw such an arbitrary **[****17]** distinction. If it intended to impose different disclosure obligations on state and local agencies, one would expect to find this difference highlighted throughout the statutory scheme, particularly when the obligations relate to a "fundamental and necessary right of every person in this state." (§ 6250.) Yet there is no mention of such an intent anywhere in the Act. Indeed, under the City's logic, CPRA obligations would potentially extend only to state *officers*, not necessarily state *employees*. The distinction between tenured public officers and those who hold public employment has long been recognized. **[***284]** (See *In re M.M. (2012) 54 Cal.4th 530, 542–544 [142 Cal. Rptr. 3d 869, 278 P.3d 1221]*.) Considering CPRA's goal of promoting public access, it would have been odd for the Legislature to establish different rules for different levels of state employment. Contrary to the City's view, it seems more plausible that the reference to "every state … officer" in the state agency definition (§ 6252, subd. (f)) was meant to extend CPRA obligations to elected state officers, such as the Governor, Treasurer, or **[*622]** Secretary of State, who are not part of a collective governmental body nor generally considered *employees* of a state agency. [6]

CA(9)[↑] **(9)** The City's position is further undermined by another **[****18]** CPRA provision, which indicates that public records can be held by individual officials and need not belong to an agency as a whole. ***HN10***[↑] When it is alleged that public records have been improperly withheld, section 6259, subdivision (a) directs that "the court shall order the officer or person charged with withholding the records" to disclose the records or show cause why they should not be produced. If the court concludes "the public official's decision to refuse disclosure is not justified," it can order "the public official to make the record public." (§ 6259, subd. (b).) If the court finds "that the public official was justified in refusing" disclosure, it must "return the item to the public official without disclosing its content." (*Ibid*.) The Legislature's repeated use of the

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[6] In one respect the local agency definition is worded more broadly than the state agency definition. Section 6252, subdivision (a) states that the term local agency "includes" a county, city, or one of several other listed entities. ***HN9***[↑] In statutory drafting, the term "includes" is ordinarily one "of enlargement rather than limitation." (*Ornelas v. Randolph (1993) 4 Cal.4th 1095, 1101 [17 Cal. Rptr. 2d 594, 847 P.2d 560]*.) "The 'statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.'" (*Flanagan v. Flanagan (2002) 27 Cal.4th 766, 774 [117 Cal. Rptr. 2d 574, 41 P.3d 575]*.) By contrast, the definition of "state agency" is couched in more restrictive language: "'State agency' *means* every state office, officer … ," and other listed entities. (§ 6252, subd. (f), italics added.)

singular word "official" in section 6259 indicates an awareness that an individual may possess materials that qualify as public records. Moreover, the broad term "public official" encompasses officials in state *and* local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

4. *Owned, Used, or Retained by Any State or Local Agency*

CPRA encompasses writings prepared *by* an agency but also writings it owns, uses, **[****19]** or retains, regardless of authorship. Obviously, an agency engaged in the conduct of public business will use and retain a variety of writings related to that business, including those prepared by people outside the agency. These final two factors of the "public records" definition, use and retention, thus reflect **[**857]** the variety of ways an agency can possess writings used to conduct public business.

As to retention, the City argues "public records" include only materials in an agency's possession or directly accessible to the agency. Citing statutory arguments and cases limiting the duty to obtain and disclose documents possessed by others, the City contends writings held in an employee's personal account are beyond an agency's reach and fall outside CPRA. The argument fails.
[*623]

CA(10)[↑] **(10)** Appellate courts have generally concluded HN11[↑] records related to public business are subject to disclosure if they are in an agency's actual *or constructive* possession. (See, e.g., Board of Pilot Commissioners v. Superior Court (2013) 218 Cal.App.4th 577, 598 [160 Cal. Rptr. 3d 285]; **[***285]** Consolidated Irrigation Dist. v. Superior Court (2012) 205 Cal.App.4th 697, 710 [140 Cal. Rptr. 3d 622] (*Consolidated Irrigation*).) "[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person." (Consolidated Irrigation, at p. 710.) For example, in *Consolidated Irrigation*, a city **[****20]** did not have constructive possession of documents in files maintained by subconsultants who prepared portions of an environmental impact report because the city had no contractual right to control the subconsultants or their files. (Id. at pp. 703, 710–711.) By contrast, a city had a CPRA duty to disclose a consultant's field survey records because the city had a contractual ownership interest and right to possess this material. (See Community Youth Athletic Center v. City of National City (2013) 220 Cal.App.4th 1385, 1426, 1428–1429 [164 Cal. Rptr. 3d 644] (*Community Youth*).)

HN12[↑] CA(11)[↑] **(11)** An agency's actual or constructive possession of records is relevant in determining whether it has an obligation to search for, collect, and disclose the material requested. (See § 6253, subd. (c).) It is a separate and more fundamental question whether a document located outside an agency's walls, or servers, is sufficiently "owned, used, or retained" by the agency so as to constitute a public record. (See § 6252, subd. (e).) In construing FOIA, federal 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." (Competitive Enterprise Institute v. Office of Science and Technology Policy, supra, 827 F.3d at p. 149.)
CA(12)[↑] **(12)** We likewise hold that HN13[↑] documents otherwise meeting CPRA's definition of "public records" do not lose this status because they are located in an employee's personal account. A writing **[****21]** retained by a public employee conducting agency business has been

"retained by" the agency within the meaning of section 6252, subdivision (e), even if the writing is retained in the employee's personal account.

The City argues various CPRA provisions run counter to this conclusion. First, the City cites section 6270, which provides that a state or local agency may not transfer a public record to a private entity in a manner that prevents the agency "*from providing the record directly* pursuant to this chapter." (Italics added.) Taking the italicized language out of context, the City argues that public records are only those an agency is able to access "directly." But this strained interpretation sets legislative intent on its head. The statute's clear purpose is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside CPRA because it is no longer in the agency's possession. **[*624]** Furthermore, section 6270 does not purport to excuse agencies from obtaining public records in the possession of *their own employees*. It simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure **[****22]** requirements.

Next, the City relies on section 6253.9, subdivision (a)(1), which states that an agency must make a public record available "in any electronic format in which *it holds* the information" (italics added), and on section 6253, subdivision (a), which requires that public records be available for inspection "during … office hours." These provisions do not assist the City. They merely address the mechanics of how public records must be disclosed. They do not **[***286]** purport to define or limit what constitutes a public record in the **[**858]** first place. Moreover, to say that only public records "in the possession of the agency" (§ 6253, subd. (c)) must be disclosed begs the question of whether the term "agency" includes individual officers and employees. We have concluded it does.

Under the City's interpretation of CPRA, a document concerning official business is only a public record if it is located on a government agency's computer servers or in its offices. Indirect access, through the agency's employees, is not sufficient in the City's view. However, we have previously stressed that a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located.

In Commission on Peace Officer Standards, supra, 42 Cal.4th at pages 289 to 290, a state agency argued certain employment information **[****23]** was exempt from disclosure under CPRA because it had been placed in confidential personnel files. In considering a Penal Code provision that deems peace officer personnel records confidential, we rejected an interpretation that made confidentiality turn on the type of file in which records are located, finding it "unlikely the Legislature intended to render documents confidential based on their location, rather than their content." (Commission on Peace Officer Standards, at p. 291.) Although we made this observation in analyzing the scope of a CPRA exemption, the same logic applies to the Act's definition of what constitutes a public record in the first place. We found it unlikely "the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in" a certain type of file. (Commission on Peace Officer Standards, at p. 291.) Likewise, there is no indication the Legislature meant to allow public officials to shield communications about official business simply by directing them through personal accounts. Such an expedient would gut the public's presumptive right of access (Sander v. State Bar of

California, supra, 58 Cal.4th at p. 323), and the constitutional imperative to broadly construe this right (*Cal. Const., art. I, § 3, subd. (b)(2)*).
[*625]

CA(13)[⬆] **(13)** In light of these principles, and considering *section 6252, subdivision (e)* in the context **[****24]** of the Act as a whole (see *Smith v. Superior Court (2006) 39 Cal.4th 77, 83 [45 Cal. Rptr. 3d 394, 137 P.3d 218]*), we conclude ***HN14***[⬆] a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account. Sound public policy supports this result.

B. *Policy Considerations*

Both sides cite policy considerations to support their interpretation of the "public records" definition. The City argues the definition reflects a legislative balance between the public's right of access and individual employees' privacy rights, and should be interpreted categorically. Smith counters that privacy concerns are properly addressed in the case-specific application of CPRA's exemptions, not in defining the overall scope of a public record. Smith also contends any privacy intrusion resulting from a search for records in personal accounts can be minimized through procedural safeguards. Smith has the better of these arguments.

The City's interpretation would allow evasion of CPRA simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts **[****25]** were **[***287]** categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City'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." (Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* (2014) *19 Comm. L. & Pol'y 293, 322*.)

It is no answer to say, as did the Court of Appeal, that we must presume public officials conduct official business in the public's best interest. The Constitution neither creates nor requires such an optimistic presumption. Indeed, the rationale behind the Act is that it is **[**859]** for the *public* to make that determination, based on information to which it is entitled under the law. Open access to government records is essential to *verify* that government officials are acting responsibly and held accountable to the public they serve. (*CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651 [230 Cal. Rptr. 362, 725 P.2d 470]*.) "Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*Ibid*.) The whole purpose of CPRA is to ensure transparency **[****26]** in government activities. If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.
[*626]

The City counters that the privacy interests of government employees weigh against interpreting "public records" to include material in personal accounts. Of course, public employees do not forfeit all rights to privacy by working for the government. (*Long Beach City Employees Assn. v. City of Long Beach (1986) 41 Cal.3d 937, 951 [227 Cal.Rptr.90, 719 P.2d 660]*.) Even so, the

City essentially argues that the contents of personal e-mail and other messaging accounts should be categorically excluded from public review because these materials have traditionally been considered private. However, compliance with CPRA is not necessarily inconsistent with the privacy rights of public employees. Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review. (See § 6253, subd. (a).)

CA(14)[⬆] **(14)** Furthermore, a crabbed and categorical interpretation of the "public records" definition is unnecessary to protect employee privacy. Privacy concerns can and should be addressed on a case-by-case **[****27]** basis. (See *International Federation, supra, 42 Cal.4th at p. 329*.) ***HN15***[⬆] Beyond the definition of a public record, the Act itself limits or exempts disclosure of various kinds of information, including certain types of preliminary drafts, notes, or memoranda (§ 6254, subd. (a)), personal financial data (§ 6254, subd. (n)), personnel and medical files (§ 6254, subd. (c)), and material protected by evidentiary privileges (§ 6254, subd. (k)). Finally, a catchall exemption allows agencies to withhold any record if the public interest served by withholding it "clearly outweighs" the public interest in disclosure. (§ 6255, subd. (a).) This exemption permits a balance between the public's interest in disclosure and the individual's privacy interest. (*International Federation, at pp. 329–330*; *BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 755–756 [49 Cal. Rptr. 3d 519]*.) The analysis here, as with other exemptions, appropriately focuses on the *content* of specific records rather than their location or medium of communication. (See **[***288]** *Commission on Peace Officer Standards, supra, 42 Cal.4th at p. 291*.) [7]

The City also contends the search for public records in employees' accounts would itself raise privacy concerns. In order to search for responsive **[*627]** documents, the City claims agencies would have to demand the surrender of employees' electronic devices and passwords to their personal accounts. Such a search would be tantamount to invading employees' homes and rifling through their filing cabinets, **[****28]** the City argues. It urges no case has extended CPRA so far.

Arguments that privacy interests outweigh the need for disclosure in CPRA cases have typically focused on the sensitive content of the documents involved, rather than the intrusiveness **[**860]** involved in searching for them. (See, e.g., *International Federation, supra, 42 Cal.4th 319*; *Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272 [48 Cal. Rptr. 3d 183, 141 P.3d 288]*.) Assuming the search for responsive documents can also constitute an unwarranted invasion of privacy, however, this concern alone does not tip the policy balance in the City's favor. Searches can be conducted in a manner that respects individual privacy.

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[7] While admitting it invoked no CPRA exemptions in the proceedings below, the City nevertheless asks us to decide that messages in employees' personal accounts are universally exempt from disclosure under *section 6255*. This issue has not been preserved and is beyond the scope of our grant of review. It also appears impossible to decide on this record. Answering threshold questions about whether employees have a reasonable expectation of privacy (see *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 35 [26 Cal. Rptr. 2d 834, 865 P.2d 633]*), or whether their messages are covered by the "deliberative process" privilege (*Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1339–1344 [283 Cal. Rptr. 893, 813 P.2d 240]*) would require a fact-intensive review of the City's policies and practices regarding electronic communications, if not the contents of the challenged documents themselves. The record here is insufficient.

C. *Guidance for Conducting Searches*

The City has not attempted to search for documents located in personal accounts, so the legality of a specific kind of search is not before us. However, the City and some amici curiae do highlight concerns about employee privacy. Some guidance about how to strike the balance between privacy and disclosure may be of assistance.

CA(15)[⬆] **(15)** CPRA requests invariably impose some burden on public agencies. ***HN16***[⬆] Unless a records request is overbroad or unduly burdensome, agencies are obliged to disclose all records they can locate "with reasonable effort." (*California First Amendment Coalition v. Superior Court (1998) 67 Cal.App.4th 159, 166 [78 Cal. Rptr. 2d 847]*.) Reasonable efforts do not require that agencies undertake extraordinarily **[****29]** extensive or intrusive searches, however. (See *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 453 [186 Cal. Rptr. 235, 651 P.2d 822]*; *Bertoli v. City of Sebastopol (2015) 233 Cal.App.4th 353, 371–372 [182 Cal. Rptr. 3d 308]*.) In general, the scope of an agency's search for public records "need only be reasonably calculated to locate responsive documents." (*American Civil Liberties Union of Northern California v. Superior Court (2011) 202 Cal.App.4th 55, 85 [134 Cal. Rptr. 3d 472]*; see *Community Youth, supra, 220 Cal.App.4th at p. 1420*.)

CPRA does not prescribe specific methods of searching for those documents. Agencies may develop their own internal **[***289]** policies for conducting searches. Some general principles have emerged, however. Once an agency receives a CPRA request, it must "communicate the scope of the information requested to the custodians of its records," although it need not use the **[*628]** precise language of the request. (*Community Youth, supra, 220 Cal.App.4th at p. 1417*.) As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material.

Federal courts applying FOIA have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two. (See *Ethyl Corp. v. U.S. Environmental Protection Agency (4th Cir. 1994) 25 F.3d 1241, 1247*.) A federal employee who withholds a document identified **[****30]** as potentially responsive may submit an affidavit providing the agency, and a reviewing court, "with a sufficient factual basis upon which to determine whether contested items were 'agency records' or personal materials." (*Grand Central Partnership, Inc. v. Cuomo (2d Cir. 1999) 166 F.3d 473, 481*.) The Washington Supreme Court recently adopted this procedure under its state public records law, holding that employees who withhold personal records from their employer "must submit an affidavit with facts sufficient to show the information is not a 'public record' under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA." (*Nissen v. Pierce County (2015) 183 Wn.2d 863, 886 [357 P.3d 45, 57]*.) We agree with Washington's high court that this procedure, when followed in good faith, strikes an appropriate balance, allowing a public agency "to fulfill its responsibility to search for and disclose public records

without unnecessarily treading on the constitutional rights of its employees." (*Id., 357 P.3d at p. 58*.)

Further, agencies can adopt policies that will reduce the likelihood of public records **[**861]** being held in employees' private accounts. "Agencies are in the best position to implement **[****31]** policies that fulfill their obligations" under public records laws "yet also preserve the privacy rights of their employees." (*Nissen v. Pierce County, supra, 357 P.3d at p. 58*.) For example, agencies might require that employees use or copy their government accounts for all communications touching on public business. Federal agency employees must follow such procedures to ensure compliance with analogous FOIA requests. (See *44 U.S.C. § 2911(a)* [prohibiting use of personal electronic accounts for official business unless messages are copied or forwarded to an official account]; *36 C.F.R. § 1236.22(b) (2016)* [requiring that agencies ensure official e-mail messages in employees' personal accounts are preserved in the agency's recordkeeping system]; *Landmark Legal Foundation v. Environmental Protection Agency (D.D.C. 2015) 82 F.Supp.3d 211, 225–226* **[*629]** [encouraging a policy that official e-mails be preserved in employees' personal accounts as well].)

We do not hold that any particular search method is required or necessarily adequate. We mention these alternatives to offer guidance on remand and to explain why privacy concerns do not require categorical exclusion of documents in personal accounts from CPRA's "public records" definition. If the City maintains the burden **[***290]** of obtaining records from personal accounts is too onerous, it will have an opportunity to so establish in **[****32]** future proceedings. (See *Connell v. Superior Court (1997) 56 Cal.App.4th 601, 615–616 [65 Cal. Rptr. 2d 738]*; *State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177, 1188 [13 Cal. Rptr. 2d 342]*.)

D. *Conclusion*

CA(16)[↑] **(16)** Consistent with the Legislature's purpose in enacting CPRA, and our constitutional mandate to interpret the Act broadly in favor of public access (*Cal. Const., art. I, § 3, subd. (b)(2)*), we hold that ***HN17***[↑] 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.

DISPOSITION

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Werdegar, J., Chin, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

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Brumfield v. Vill. of Tangipahoa

Court of Appeal of Louisiana, First Circuit

December 20, 2021, Decision Rendered

DOCKET NUMBER 2021 CA 0082

Reporter
340 So. 3d 221 *; 2021 La. App. LEXIS 1969 **; 2021 0082 La.App. 1 Cir. 12/20/21); 2021 WL 5998540

CHARLES BRUMFIELD, JR. VERSUS THE VILLAGE OF TANGIPAHOA, RICKY COLEMAN, DEBORAH CYPRIAN, AND SHELIA MARTIN

Subsequent History: Decision reached on appeal by, Costs and fees proceeding at *Brumfield v. Vill. of Tangipahoa, 2023 La. App. LEXIS 357 (La.App. 1 Cir., Mar. 6, 2023)*

Prior History: **[**1]** APPEALED FROM THE 21st JUDICIAL DISTRICT COURT, DIVISION E TANGIPAHOA PARISH, LOUISIANA. DOCKET NUMBER 2019-0002159. HONORABLE BRENDA BEDSOLE RICKS, JUDGE.

Disposition: AFFIRMED IN PART; VACATED IN PART.

Core Terms

public record, trial court, records, Ordinance, amended judgment, email, ordering, text message, assessing, writ of mandamus, mandamus, attorney's fees, telephonic, Barroom, costs, motion for a new trial, civil penalty, new trial, requestor, custody, notice, phone, public official, public body, arbitrarily, sanctions, donation, meetings, Clarify, vacate

Case Summary

Overview

HOLDINGS: [1]-In a suit under the Public Records Law, the trial court erred in failing to grant a new trial to one alderman who was not served with the order setting the court date and who had not waived her right to contest the lack of service; [2]-As for the remaining aldermen, because email, texts, or other telephonic records regarding ordinances and meetings were public records under *La. Rev. Stat. § 44:1A(2)(a)*, the aldermen had the duty under *La. Rev. Stat. § 44:35A* to timely respond to the public records request, and as they had not proven that they did so, the trial court properly assessed a civil penalty against each of them under *La. Rev. Stat. § 44:35E(1)*.

Outcome

Affirmed in part; vacated in part.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[] Appeals, Appellate Briefs

A judgment denying a motion for new trial is interlocutory and generally not appealable. La. Code Civ. Proc. Ann. art. 2083C; However, the Louisiana Supreme Court has directed appellate courts to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well, when it is clear from the appellant's brief that he intended to appeal the merits of the case.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN2[] Appellate Jurisdiction, Final Judgment Rule

Generally, a judgment granting a mandamus is a final, appealable judgment. However, as with any other valid, final judgment, a judgment granting a mandamus must be definite and certain; it must specify the precise thing to be done or prohibited and must define the duty to be done with sufficient particularity as to leave nothing to the exercise of discretion or judgment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] Standards of Review, Abuse of Discretion

A new trial shall be granted when the verdict or judgment appears clearly contrary to the law and evidence. La. Code Civ. Proc. Ann. art. 1972(1). An appellate court reviews a trial court's ruling on a motion for new trial under an abuse-of-discretion standard. This standard is highly deferential, but a court necessarily abuses its discretion if its ruling is based on an erroneous view of the law.

Civil Procedure > ... > Service of Process > Methods of Service > Mail

Civil Procedure > ... > Pleadings > Service of Process > Methods of Service

HN4[] **Methods of Service, Mail**

Other than in certain circumstances, every pleading subsequent to the original petition shall be served on the adverse party. La. Code Civ. Proc. Ann. art. 1312. If a pleading or order sets a court date, service shall be made by registered or certified mail, by sheriff as provided in La. Code Civ. Proc. Ann. art. 1314, or by commercial carrier. La. Code Civ. Proc. Ann. art. 1313C.

Civil Procedure > Judgments > Enforcement & Execution > Discovery of Assets

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

Civil Procedure > Judgments > Enforcement & Execution > Garnishment

HN5[] **Enforcement & Execution, Discovery of Assets**

La. Code Civ. Proc. Ann. art. 1312 provides that service on the adverse party need not be made of a motion for petition for appeal, of a petition for the examination of a judgment debtor, of a petition for the issuance of garnishment interrogatories in the execution of a final judgment, or of any pleading not required by law to be in writing.

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Void Judgments

HN6[] **Pleadings, Service of Process**

A judgment rendered against a defendant who has not been served with process as required by law, and who has not waived objection to jurisdiction, is an absolute nullity. La. Code Civ. Proc. Ann. arts. 1201A and 2002A(2). An absolutely null judgment may be challenged at any time, by rule, or by any other method.

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN7 **Governmental Information, Freedom of Information**

The right of access to public records is guaranteed by the Louisiana Constitution and the Public Records Law. La. Const. art. XII, § 3; La. Rev. Stat. Ann. § 44:1 et seq. Any person may obtain a copy of any public record, in accordance with the Public Records Law, except as otherwise provided by that or other specific law. La. Rev. Stat. Ann. § 44:31(B). These constitutional and statutory rights of access to public records should be construed liberally, and any doubt must be resolved in favor of the public's right to see. Providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees. La. Rev. Stat. Ann. § 44:31(A). The custodian is the public official or head of any public body having custody or control of a public record, or his specifically authorized representative. La. Rev. Stat. § 44:1A(3). The term public body includes any instrumentality of state, parish, or municipal government. § 44:1A(1).

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Delays

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

HN8 The custodian of the record shall present it to any person of the age of majority who so requests. La. Rev. Stat. Ann. § 44:32A. While the record generally must be made available immediately, the Public Records Law recognizes that some reasonable delay may be necessary to compile, review, and when necessary, redact, or withhold certain records that are not subject to production. La. Rev. Stat. Ann. §§ 44:328; 44:33; 44:35A. The law is clear, however, regarding the custodian's statutory duties to timely respond to the requestor by: (1) immediately presenting a public record that is immediately available, or if not immediately available, certifying such to the requestor and fixing a time within three days for the exercise of the right, La. Rev. Stat. Ann. § 44:338(1); (2) notifying the requestor within three days of each request of any questions by the custodian as to whether a record is a public record, La. Rev. Stat. Ann. § 44:32D; or (3) within five days of each request, providing a written estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of the request. La. Rev. Stat. Ann. § 44:35A.

Administrative Law > Governmental Information > Freedom of Information

Governments > Local Governments > Administrative Boards

Governments > Local Governments > Mayors

HN9 **Governmental Information, Freedom of Information**

A village's legislative powers are vested in and exercised by a board of aldermen, and that board's authority includes the power to enact and enforce ordinances and to call meetings, at

which the mayor presides. La. Rev. Stat. Ann. §§ 33:362; 33:405; 33:406. As a municipality, the village is a public body and its public records are subject to production under the Public Records Law. La. Rev. Stat. Ann. §§ 33:361; 44:1A(1)5 & (2)(a). As a public official, an alderman may be the custodian of a public record if he has custody or control of the public record. La. Rev. Stat. Ann. § 44:1A(3). And, if an alderman has a record in his custody or control, regardless of physical form, and that record includes information having been used in the performance of any business conducted under the authority of the laws of this state, then that record may qualify as a public record, unless excepted by the Louisiana Constitution or the Public Records Law. § 44:1A(2)(a).

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

HN10 **Governmental Information, Freedom of Information**

In Shane, the Louisiana Supreme Court interpreted the definition of a "public record" to include an email, if that email is used in the performance of any work, duty, or function of a public body, under the authority of state or local law. Text messages present unique challenges in the context of the Public Records Law, specifically relating to the logistics of retention, production, and possession of text messages as public records. However, as instructed by the court, one should liberally construe the constitutional and statutory rights of access to public records and resolve any doubt in favor of the public's right to see. Thus, under Shane's reasoning, a "public record" would also include a text message, if that text message is used in the performance of any work, duty, or function of a public body, under the authority of state or local law. Otherwise, a public official could evade the law simply by communicating about sensitive public matters through a personal device and routinely escaping public scrutiny.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > Governmental Information > Freedom of Information

HN11 **Freedom of Information, Compliance With Disclosure Requests**

If a public official uses his personal cell phone to send text messages related to the performance of his public duties, then he is the custodian with custody of those public records under the Public Records Law, and, even if he has a reason for not being able to produce those records, or claims a constitutional or statutory exception to production, he has a constitutional and statutory duty under the Public Records Law to timely respond to a public records request requesting those public records.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > Governmental Information > Freedom of Information

HN12 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The legislature anticipated that public entities would often use the records of private individuals in the conduct of the entities' business, work, duties, or functions, thus falling into the broad definition of "public record." Notwithstanding, such records may be subject to one of the many exceptions set forth either in the Louisiana Constitution or the Public Records Law.

Administrative Law > ... > Freedom of Information > Sanctions Against Agencies > Damages

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

HN13 **Sanctions Against Agencies, Damages**

The trial court shall award reasonable attorney fees and other costs of litigation to a requestor who prevails in his public records suit. La. Rev. Stat. § 44:35(D)(1). Further, the trial court may award the requestor actual damages if the court finds: (1) the custodian arbitrarily or capriciously withheld the requested record, or (2) arbitrarily or unreasonably failed to provide the notice required by La. Rev. Stat. § 44:32D. And, if the trial court finds the latter, i.e., that the custodian arbitrarily or unreasonably failed to provide the notice required by La. Rev. Stat. § 44:32D, it is only then that the trial court may also award the requestor civil penalties. La. Rev. Stat. § 44:35E(1); We use an abuse-of-discretion standard to review a trial court's award of civil penalties pursuant to § 44:35E(1).

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN14 **Enforcement, Burdens of Proof**

The custodian has the burden of proving that a public record is not subject to production. La. Rev. Stat. § 44:31B(3).

Civil Procedure > Appeals > Record on Appeal

HN15 **Appeals, Record on Appeal**

Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. Thus, the appellate court cannot consider documents that, even if physically placed in the record, were not formally admitted into evidence.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > Sanctions > Misconduct & Unethical Behavior

HN16 **Appeals, Appellate Briefs**

La. Ct. App. Unif. R. 2-12.2C prohibits language in briefs that includes the use of vile, obscene, obnoxious, or offensive expressions, and insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution. Any violation of this prohibition shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned. Nevertheless, Rule 2-12.2C does not provide for the imposition of sanctions. And, the ability to impose sanctions under La. Code Civ. Proc. Ann. art. 863 is limited to the trial court.

Counsel: William D. Aaron, Jr., DeWayne L. Williams, Courtney H. Payton, New Orleans, Louisiana, Attorneys for Defendants/Appellants, Ricky Coleman, Debrah Cyprian, and Shelia Martin.

Latoia Williams-Simon, Vanessa R. Williams, Amite, Louisiana, Attorneys for Plaintiff/Appellee, Charles Brumfield Jr.

Judges: BEFORE: McDONALD, LANIER, AND WOLFE, JJ.

Opinion by: McDONALD

Opinion

[*224] [Pg 2] **McDONALD, J.**

In this suit for a writ of mandamus, the trial court signed an amended judgment granting the writ, ordering the Village of Tangipahoa and three of its aldermen to produce certain public records,

assessing a penalty to each alderman for violations of the Louisiana Public Records Law, and awarding the plaintiff costs and attorney fees. The aldermen appealed. After review, we vacate the amended judgment as to one alderman and affirm the amended judgment as to two aldermen.

FACTUAL AND PROCEDURAL HISTORY

On or about July 1, 2019, Charles Brumfield Jr. submitted a public records request (PRR) to the Village of Tangipahoa, and to three of its aldermen, Ricky **[**2]** Coleman, Debrah Cyprian,[1] and Shelia Martin (defendants). Generally, Mr. Brumfield sought access to public records related to "public meetings held on the 'Barroom Closing Ordinance' and the 'Business Closing Ordinance,' as well as donations, payments or gifts provided by members of the community under contract with the Village to public officers of the Village." On July 16, 2019, Mr. Brumfield filed a petition for writ of mandamus against the defendants, alleging they had failed to timely respond to his PRR. He sought a judgment ordering the defendants to produce the requested records, awarding him damages, and assessing the defendants with penalties, costs, and attorney fees.

The trial court held a hearing on the matter on March 9, 2020, at which Mr. Brumfield was represented by counsel and the defendants appeared *pro se*, with the Village of Tangipahoa appearing through Mayor Trashica Robinson. At the end of the hearing, the trial court orally ruled that Mr. Coleman, Ms. Cyprian, and Ms. Martin (the Aldermen) arbitrarily and capriciously failed to comply with Mr. Brumfield's PRR and that each was liable for a penalty of $14,000. The trial court also awarded Mr. Brumfield costs and **[**3]** $3,500 in attorney fees. The trial court stated that the Aldermen could "purge" themselves of the fines by "providing full and complete public records" to Mr. Brumfield's attorney **[*225]** by noon on March 13, 2020. Although the trial court stated that it [Pg 3] would sign a judgment conforming to its ruling, the record contains no contemporaneous written judgment memorializing the March 9, 2020 oral ruling and/or making the writ peremptory. *See* La. C.C.P. art. 3866.

On March 18, 2020, Mr. Brumfield filed a "Motion to Clarify Judgment," alleging the Aldermen had still not complied with his PRR and asking the trial court to "clarify judgment, ordering that the civil penalties assessed be executed, or in the interim, for the [Aldermen] to show cause as to why the penalties should not be assessed."

On June 1, 2020, the trial court held a hearing on the "Motion to Clarify Judgment," and on that same date, the trial court signed a judgment granting "the Writ of Mandamus," assessing a $14,000 penalty against each of the Aldermen, and ordering that the defendants were solidarily liable for costs and $3,500 in attorney fees. The Aldermen filed a motion for new trial, and after a hearing, the trial court signed a judgment, **[**4]** on September 21, 2020, denying the motion. The Aldermen appealed from the judgment denying their motion for new trial. The Village of Tangipahoa did not appeal.

[1] The petition names "Deborah Cyprian" as a defendant. The proper spelling of Ms. Cyprian's first name is "Debrah."

APPELLATE JURISDICTION

HN1[⬆] At the outset, we note that a judgment denying a motion for new trial is interlocutory and generally not appealable. *See* *La. C.C.P. art. 2083C*; *Doctors for Women Medical Ctr., LLC v. Breen, 19-0582 (La. App. 1 Cir. 5/11/20), 303 So.3d 667, 671*. However, the Louisiana Supreme Court has directed appellate courts to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits as well, when it is clear from the appellant's brief that he intended to appeal the merits of the case. *Leisure Rec. & Entm't, Inc. v. First Guar. Bank, 19-1698 (La. App. 1 Cir. 2/11/21), 317 So.3d 809, 816-17*. Here, the circumstances indicate the Aldermen intended to appeal from the June 1, 2020 judgment granting the writ of mandamus and assessing them with penalties, as well as from the September 21, 2020 judgment denying their motion for new trial. Thus, we review the appeal accordingly.

The June 1, 2020 judgment grants a writ of mandamus. ***HN2***[⬆] Generally, a judgment granting a mandamus is a final, appealable judgment. *Children's Hospital v. Schnauder, [Pg 4] 18-1328 (La. App. 1 Cir. 1/10/19), 2019 La. App. LEXIS 27, 2019 WL 162248*. However, as with any other valid, final judgment, a judgment granting a mandamus must be definite and certain; it must specify the precise thing to be done or prohibited and must define the duty to be **[**5]** done with sufficient particularity as to leave nothing to the exercise of discretion or judgment. *See* 55 *CJ.S. Mandamus* §421 (June 2021), *citing* *Freeman v. Gregoire, 171 Wash.2d 316, 323, 256 P.3d 264 (2011)*. In accord with this legal precept, on August 10, 2021, we issued an interim order to the parties, noting that the June 1, 2020 judgment appeared to lack appropriate decretal language disposing of and/or dismissing Mr. Brumfield's claims. *See* *La. C.C.P. arts. 1911* and *1918*. Specifically, we noted that the June 1, 2020 judgment granted a writ of mandamus, but did not specify to whom the mandamus was directed, nor did it specify what precise action was to be performed by the person to whom the mandamus was directed. We remanded this matter to the trial court ordering that it sign an amended judgment correcting the noted deficiencies. *Brumfield v. Village of Tangipahoa, et al.*, 2021 CA 0082 (La. App. 1 **[*226]** Cir. 8/10/21) (unpublished order).[2]

The trial court signed an "Amended Judgment" on September 20, 2021, which was added to the appellate record, and which pertinently states:

> **IT IS ORDERED, ADJUDGED AND DECREED** that the Writ of Mandamus by Petitioner, Charles Brumfield, and directed to Defendants, Village of Tangipahoa, Alderman Ricky Coleman, Alderwoman [Debrah] Cyprian and Alderwoman Shelia Martin is granted.
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Defendant Village **[**6]** of Tangipahoa submit to Petitioner, Charles Brumfield, all minutes of meetings related to the "Business Closing Ordinance" and the "Barroom Closing Ordinance," as well as the contractual agreement between the Village of Tangipahoa and Leo Perry (Hoppin' Harley's).

[2] This court's interim order also ordered the clerk of court to supplement the appellate record with the March 9, 2020 hearing transcript.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Alderman Ricky Coleman submit to Petitioner Charles Brumfield all email, text and other telephonic records wherein a quorum was reached and the topic related to: (1) the "Business Closing Ordinance" and the "Barroom Closing Ordinance" and (2) the Special Meeting of the Village of Tangipahoa Council held on June 28, 2019.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Alderwoman Shelia Martin submit to Petitioner Charles Brumfield all email, text and other telephonic records wherein a quorum [Pg 5] was reached and the topic related to: (1) the "Business Closing Ordinance" and the "Barroom Closing Ordinance" and (2) the Special Meeting of the Village of Tangipahoa Council held on June 28, 2019.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Alderwoman [Debrah] Cyprian submit to Petitioner Charles Brumfield all email, text and other telephonic records **[**7]** wherein a quorum was reached and the topic related to: (1) the "Business Closing Ordinance" and the "Barroom Closing Ordinance" and (2) the Special Meeting of the Village of Tangipahoa Council held on June 28, 2019. Additionally, Defendant Alderwoman Cyprian is ordered to submit any and all email, text or telephonic records wherein the Defendant Alderwoman solicited a gift donation from Leo Perry (Hoppin' Harley's) and a copy of the check related to the gift-donation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that civil penalties are assessed personally against Defendants Ricky Coleman, [Debrah] Cyprian and Shelia Martin in the amount of Fourteen thousand dollars ($14,000.00) each for their arbitrary and capricious failure to tender the public records for over one-hundred forty (140) business days after Petitioner's submission ($100 per day assessed for each of the 140 days) pursuant to *Louisiana Revised Statutes ... 44:35(B)* and *(E)(1)-(2)*.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Village of Tangipahoa, Ricky Coleman, Shelia Martin and [Debrah] Cyprian are liable, in solido, for all costs of litigation through the judgment, including all court costs and attorney's fees pursuant to *Louisiana Revised Statutes ... 44:25(D)(1)* and *(E)(2)* in the amount of thirty-five **[**8]** hundred dollars ($3500.00)[.]

[*227] On appeal, the Aldermen contend the trial court erred by denying the new trial as to Ms. Martin, because she was not served with notice of the June 1, 2020 hearing on Mr. Brumfield's "Motion to Clarify Judgment," which resulted in the June 1, 2020 judgment. The Aldermen also contend the trial court erred in assessing a penalty against them for failing to produce records that do not exist or that they do not possess.

DENIAL OF MOTION FOR NEW TRIAL

We first address whether the trial court erred by denying Ms. Martin's motion for new trial, based on Mr. Brumfield's failure to serve Ms. Martin with notice of the June 1, 2020 hearing. ***HN3***[↑] A new trial shall be granted when the verdict or judgment appears clearly contrary to the law and evidence. *La. C.C.P. art. 1972(1)*. We review a trial court's ruling on a motion for new trial under

an abuse-of-discretion standard. *Myles v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par., 17-1014 (La. App. 1 Cir. 4/6/18), 248 So.3d 545, 561*. This standard is highly deferential, but a court necessarily abuses its [Pg 6] discretion if its ruling is based on an erroneous view of the law. *LCR-M Ltd. P'ship. v. Jim Hotard Prop., L.L.C, 13-0483 (La. App. 4 Cir. 10/9/13), 126 So.3d 668, 675*.

HN4[⬆] Other than in circumstances not at issue here,[3] every pleading subsequent to the original petition shall be served on the adverse party. *La. C.C.P. art. 1312*. If a pleading or order sets a court date, **[**9]** service shall be made by registered or certified mail, by sheriff as provided in *La. C.C.P. art. 1314*, or by commercial carrier. *La. C.C.P. art. 1313C*. In this case, the trial court signed an order on April 6, 2020, setting the June 1, 2020 hearing on Mr. Brumfield's "Motion to Clarify Judgment." Thus, because the April 6th order set a court date, service of the order on all adverse parties was required under *La. C.C.P. art. 1313C*.

It is undisputed that Shelia Martin was not served with notice of the April 6th order setting the June 1st court date. Mr. Brumfield's counsel conceded such at the hearing on the motion for new trial and in his appellate brief. Further, contrary to Mr. Brumfield's position, Ms. Martin did not waive her right to contest the lack of service. The record shows that Ms. Martin was neither present nor represented by counsel at the June 1st hearing; thus, she did not make an appearance. Nor did she waive her right to contest the lack of service by failing to file a declinatory exception of insufficiency of service of process. ***HN6***[⬆] A judgment rendered against a defendant who has not been served with process as required by law, and who has not waived objection to jurisdiction, is an absolute nullity. *See La. C.C.P. arts. 1201A* and *2002A(2)*; *Butler v. Sandberg, 18-0917 (La. App. 1 Cir. 10/23/19), 289 So.3d 638, 641*. An absolutely null **[**10]** judgment may be challenged at any time, by rule, or by any other method. *In re J.E T., 16-0384 (La. App. 1 Cir. 10/31/16), 211 So. 3d 575, 581*; *Hebert v. Hebert, 96-2155 (La. App. 1 Cir. 9/19/97), 700 So.2d 958, 959*. Thus, the trial court abused its discretion by failing to grant Ms. Martin a new trial on this basis. Accordingly, as to Ms. Martin, we vacate the Amended Judgment as an absolute nullity. *Brown v. Terrebonne Par. Sher. Off., 17-1305 (La. App. 1 Cir. 4/13/18), 249 So.3d 864, 869*; *Kingdom Bldrs. Comm. **[*228]** [Pg 7] Dev. Corp. v. La. Bd. of Elem. & Sec. Educ., 17-0695 (La. App. 1 Cir. 11/1/17), 233 So.3d 94, 96-97*.

PUBLIC RECORDS LAW

We next address the contention of the remaining Aldermen, Mr. Coleman and Ms. Cyprian, that the trial court erred in assessing a penalty against them for failing to produce records that do not exist or that they do not possess. Mr. Brumfield argues that the Aldermen cannot now contest what records the trial court ordered them to produce, because the Aldermen did not appeal the June 1, 2020 judgment. We reject this argument. As earlier noted, the June 1, 2020 judgment granted a writ of mandamus, but it did not specify to whom the mandamus was directed, nor did

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[3] ***HN5***[⬆] *Louisiana Code of Civil Procedure article 1312* provides that service on the adverse party need not be made of a motion for petition for appeal, of a petition for the examination of a judgment debtor, of a petition for the issuance of garnishment interrogatories in the execution of a final judgment, or of any pleading not required by law to be in writing.

it specify what precise action was to be performed by the person to whom the mandamus was directed. It is the Amended Judgment that, for the first time, specifically directs certain persons, *i.e.*, the Village of Tangipahoa and the Aldermen, to produce certain records.[4] And, on appeal, the parties have addressed the records that the Amended Judgment **[**11]** mandates the Aldermen to produce. As earlier noted, the circumstances indicate the Aldermen intended to appeal the merits of the trial court's mandamus order. Thus, in the interest of justice, we review the Amended Judgment insofar as it orders the Aldermen to produce specific records and assesses penalties against Mr. Coleman and Ms. Cyprian. *See* La. C.C.P. art. 2164; Wheeler v. La. Peace Officer Standards & Training Council 17-1335 (La. App. 1 Cir. 6/3/20), 305 So.3d 387, 393, n.10.

HN7[⬆] The right of access to public records is guaranteed by the Louisiana Constitution and the Public Records Law. La. Const. art. XII, §3; La. R.S. 44:1, et seq. Any person may obtain a copy of any public record, in accordance with the Public Records Law, except as otherwise provided by that or other specific law. La. R.S. 44:31(B); Shane v. Par. of Jefferson, 14-2225 (La. 12/8/15), 209 So.3d 726, 735. These constitutional and statutory rights of access to public records should be construed liberally, and any doubt must be resolved in favor of the public's right to see. Shane, 209 So.3d at 735. [Pg 8] Providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees. La. R.S. 44:31(A). The "custodian" is the public official or head of any public body having custody or control of a public record, or his specifically authorized representative. La. R.S. 44: 1A(3). The term "public body" includes any instrumentality of state, parish, or municipal government. La. R.S. 44: 1A(1).

HN8[⬆] The **[**12]** custodian of the record shall present it to any person of the age of majority who so requests. La. R.S. 44:32A. While the record generally must be made available "immediately," the Public Records Law recognizes that some reasonable delay may be necessary to compile, review, and when necessary, redact, or withhold certain records that are not subject to production. La. R.S. 44:32(B); 44:33; 44:35A; Krielow v. LSU Bd. of Suprs., 19-0176 (La. App. 1 Cir. 11/15/15), 290 So. 3d 1194, 1202; Par. of Ascension v. Wesley, 19-0364 (La. App. 1 Cir. 12/12/19), 291 So.3d 730, 733; Roper v. City of BR/Parish of EBR, 16-1025 (La. App. 1 Cir. 3/15/18), 244 So. 3d 450, 459. The law is clear, however, regarding the custodian's statutory duties to timely respond to the requestor by: (1) immediately presenting a public record **[*229]** that is immediately available, or if not immediately available, certifying such to the requestor and fixing a time within three days for the exercise of the right, La. R.S. 44:33(B)(1); (2) notifying the requestor within three days of each request of any questions by the custodian as to whether a record is a public record, La. R.S. 44:32D; or (3) within five days of each request, providing a written estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of the request. La. R.S. 44:35A; Par. of Ascension, 291 So.3d at 735.

[4] At the March 9, 2020 hearing, Mayor Robinson testified that, to her knowledge, the Village of Tangipahoa produced responsive records to Mr. Brumfield's counsel.

Applicability of the Public Records Law to the Aldermen and to the Requested Records

The Village of Tangipahoa is a Lawrason Act municipality and the mayor is its chief executive officer. *La. R.S. 33:321, et seq.*; *33:361*; *33:362B* **[**13]** . ***HN9***[⬆] The Village's legislative powers are vested in and exercised by a board of aldermen, and that board's authority includes the power to enact and enforce ordinances and to call meetings, at [Pg 9] which the mayor presides. *La. R.S. 33:362*; *33:405*; *33:406*. As a municipality, the Village is a "public body" and its "public records" are subject to production under the Public Records Law. *See La. R.S. 33:361*; *44:1A(1)*[5] & *(2)(a)*.[6] As a public official, an alderman may be the "custodian" of a public record if he has "custody or control" of the public record. *See La. R.S. 44: 1A(3)*; *see Roper, 244 So.3d at 464-66* (noting that City of Baton Rouge/Parish of East Baton Rouge Metropolitan Council members searched their private devices and email accounts after receiving a PRR and finding these officials individually liable for penalties as custodians who failed to timely respond to a PRR). And, if an alderman has a record in his custody or control, "regardless of physical form," and that record includes "information ... having been used ... in the ... performance of any business ... conducted ... under the authority of the ... laws of this state ...," then that record may qualify as a "public record," unless excepted by the Louisiana Constitution or the Public Records Law. *See La. R.S. 44:1(A)(2)(a)*.

HN10[⬆] In *Shane*, the Louisiana Supreme Court interpreted the definition of a "public record" to include an email, if that email is used in the performance of any work, duty, or function of a public body, under **[*230]** the authority of state or local law. *Shane, 209 So.3d at 735-36*.[7] We have found no Louisiana case directly holding a text message would [Pg 10] also be included in the definition of a "public record." And, we acknowledge that text messages present unique challenges in the context of the public records law, specifically relating to the logistics of

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[5] The Public Records Law, La. R.S. 44:1(A)(1) defines a "public body" as:

> [A]ny branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function, or an affiliate of a housing authority.

[6] The *Public Records Law, La. R.S. 44: 1A(2)(a)*, defines a "public record" as:

> All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, **[**14]** work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records", except as otherwise provided in this Chapter or the Constitution of Louisiana.

[7] Note, however, that the Louisiana Attorney General has opined that "e-mails of a purely personal nature received or transmitted by a public employee which have no relation to any function of a public office are not 'public records' as described by the *Public Records Act*." *Shane, 209 So.3d at 746* (*Johnson, CJ., concurring*, and citing to *La. Att'y Gen. Op. No. 10-0272, 2011 La. AG LEXIS 280 (April 13, 2011)*).

retention, production, and possession of text messages as public records. *See, generally*, Vera, Helen, "'*Regardless of Physical Form Legal and Practical Considerations Regarding the Application of State Open-Records* ***[**15]*** *Law to Public Business Conducted by Text Message*, "32 SPR Comm. Law. 24, 24-25 (2017). However, as instructed by the *Shane* court, we should liberally construe the constitutional and statutory rights of access to public records and resolve any doubt in favor of the public's right to see. *Shane, 209 So.3d at 735*. Thus, we hold that, under *Shane's* reasoning, a "public record" would also include a text message, if that text message is used in the performance of any work, duty, or function of a public body, under the authority of state or local law. *Accord City of San Jose v. Superior Court, 2 Cal.5th 608, 625, 214 Cal. Rptr. 3d 274, 389 P.3d 848, 858 (2017)* (under California law, concluding a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account); *Toensing v. AG of Vt. 206 Vt. 1, 13, 178 A.3d 1000, 1007 (2017)* (concluding Vermont's public records law's definition of public record does not exclude otherwise qualifying records on the basis that they are located in state employee's private account); *Nissen v. Pierce County, 183 Wash.2d 863, 881, 357 P.3d 45, 55-56 (2015)* (concluding Washington's public records law reached records "prepared, owned, used, or retain[ed]" by state employees in the course of their jobs, including the work product of public employees found on their personal cell phones, such as text messages). Otherwise, a public official could evade the law **[**16]** simply by communicating about sensitive public matters through a personal device and routinely escaping public scrutiny. *See City of San Jose, 2 Cal.5th at 625*.

HN11[⬆] It follows then that, if a public official uses his personal cell phone to send text messages related to the performance of his public duties, then he is the "custodian" with "custody" of those "public records" under the Public Records Law, and, even if he has a reason for not being able to *produce* those records, or claims a constitutional or [Pg 11] statutory exception to production,[8] he has a constitutional and statutory **[*231]** duty under the Public Records Law to timely *respond* to a PRR requesting those "public records."

The Amended Judgment herein orders the Aldermen to produce "all email, text[,] and other telephonic records wherein a quorum was reached and the topic related to: (1) the "Business Closing Ordinance" and the "Barroom Closing Ordinance," and (2) the Special Meeting of the Village of Tangipahoa Council held on June 28, 2019." Because the Aldermen have the statutory authority to enact and enforce ordinances and to hold meetings under *La. R.S. 33:362A* and *33:405-406*, any records related to Village of Tangipahoa ordinances and meetings would be **[**17]** "public records" subject to production. And, each Alderman is the "custodian" of any such email or text message on his/her personal cell phone as he/she has custody/control of

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[8] ***HN12***[⬆] The legislature anticipated that public entities would often use the records of private individuals in the conduct of the entities' business, work, duties, or functions, thus falling into the broad definition of "public record." Notwithstanding, such records may be subject to one of the many exceptions set forth either in the Louisiana Constitution or the Public Records Law. *Shane, 209 So.3d at 740 & 740, n.10* (*e.g., see La. R.S. 44:1(A)(2)(b)*, B; *La. R.S. 44:2*; *La. R.S. 44:3*; *La. R.S. 44:3.1*; *La. R.S. 44:3.2*; *La. R.S. 44:3.3*; *La. R.S. 44:3.4*, *La. R.S. 44:35*; *La. R.S. 44:36*; ***La. R.S. 44:4***; La. R.S. 44:4.18, C; *La. R.S. 44:5*; *La. R.S. 44:7*; *La. R.S. 44:10*; *La. R.S. 44:11*; *La. R.S. 44:12*; *La. R.S. 44:13*; *La. R.S. 44:15*; *La. R.S. 44:16*; *La. R.S. 44:17*; *La. R.S. 44:18*; *La. R.S. 44:19*; *La. R.S. 44:20*; *La. R.S. 44:21*; *La. R.S. 44:21.1*; *La. R.S. 44:22*; *La. R.S. 44:22.1*; *La. R.S. 44:23*; *La. R.S. 44:23.1*.)

that phone. *See* Roper, 244 So.3d at 464-66. Thus, we find no error in the trial court's determination that an email, text, or other telephonic record regarding the above ordinances or meeting constituted a "public record." As such, when they received Mr. Brumfield's PRR for the above records, the Aldermen had the statutory duty to timely respond to Mr. Brumfield's PRR by: (1) immediately presenting a public record that was immediately available, or if not immediately available, certifying such to Mr. Brumfield and fixing a day and time within three days for the exercise of the right, La. R.S. 44:33B(1); (2) notifying Mr. Brumfield within three days of the request of any questions by the Aldermen as to whether a record was a public record, La. R.S. 44:32(D); or (3) within five days of the request, providing a written estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of the request. La. R.S. 44:35(A); Par. of Ascension, 291 So.3d at 735.

[Pg 12] The Amended Judgment also orders Ms. Cyprian to produce "all email, text[,] or telephonic records wherein [she] solicited a gift **[**18]** donation from Leo Perry (Hoppin Harley's) and a copy of the check related to the gift-donation." At the March 9, 2020 hearing, Ms. Cyprian admitted that, in 2019, she asked "Mr. Harley" to make a donation to her church, Quinn Chapel Church, where she served as church secretary. Ms. Cyprian also presented a copy of a $500 check payable to Quinn Chapel AME Church to the trial court and Mr. Brumfield's counsel. Given Ms. Cyprian's admissions, Mr. Brumfield's writ of mandamus for records of this nature, and the Amended Judgment ordering such, are arguably moot. *See* Roper, 244 So.3d at 461-62. Nevertheless, whether moot or not, Mr. Brumfield's claims for monetary relief under La. R.S. 44:35, specifically the penalty discussed below, are distinct causes of action that would not be rendered moot. Roper, 244 So.3d at 462, n.7.

Penalties under the Public Records Law

We now address whether the trial court properly assessed a penalty against Aldermen Coleman and Cyprian.

HN13[↑] The trial court shall award reasonable attorney fees and other costs of litigation to a requestor who prevails in his public records suit. La. R.S. 44:35(D)(1). Further, the trial court may award the requestor actual damages if the court finds: (1) the custodian arbitrarily or capriciously withheld the requested record, **[**19]** or (2) arbitrarily or unreasonably failed to provide the notice required by La. R.S. 44:32D. Roper, 244 So.3d at 460. And, if the trial court finds the latter, *i.e.*, that the custodian arbitrarily or unreasonably failed to provide the notice required by La. R.S. 44:32D, it is only then that the trial court may also award the requestor civil **[*232]** penalties. La. R.S. 44:35E(1); Roper, 244 So.3d at 460; *see also* Stevens v. St Tammany Par. Govt, 17-0959 (La. App. 1 Cir. 7/18/18), 264 So.3d 456, 463 & 465. We use an abuse-of-discretion standard to review a trial court's award of civil penalties pursuant to La. R.S. 44:35E(1). Roper, 244 So.3d at 466.

[Pg 13] At the March 9, 2020 hearing on the merits of Mr. Brumfield's PRR, Mr. Coleman and Ms. Cyprian testified.[9] Mr. Coleman admitted that he was aware of the Public Records Law, that he received Mr. Brumfield's PRR, and knew he had to respond. Although Mr. Coleman testified that he did respond to Mr. Brumfield, he admitted that he did not have documentation to prove that he responded. He explained that he did not produce any phone records, because he did not have any, as they had been deleted. He further explained that he does not communicate via email. He admitted that he did not inform Mr. Brumfield that any potentially responsive text messages had been deleted from his phone. Ms. Cyprian similarly testified that she received Mr. Brumfield's PRR regarding "barrooms **[**20]** and business ordinances" and the alleged donation and admitted that Mr. Brumfield's PRR cited to the Public Records Law and set forth applicable deadlines for a response and the possibility of penalties. She further admitted that she did not respond to the PRR.[10]

Regardless of whether either Aldermen actually had custody of any of the records Mr. Brumfield requested, the Public Records Law required that they timely respond to his PRR. *See* La. R.S. 44:35A; Par. of Ascension 291 So.3d at 735. Mr. Coleman failed to prove his assertion that he timely responded to Mr. Brumfield's PRR by introducing evidence of such. Ms. Cyprian plainly admitted that she did not respond to Mr. Brumfield's PRR. **HN14**[↑] The custodian has the burden of proving that a public record is not subject to production. La. R.S. 44:31B(3). Because Mr. Coleman and Ms. Cyprian did not carry their burdens of proof, we find the trial court did not abuse its discretion in assessing a civil penalty against each of them under La. R.S. 44:35E(1), as the record shows they arbitrarily and unreasonably failed to timely provide the notice required by [Pg 14] La. R.S. 44:32(D). Roper, 244 So.3d at 466; Stevens, 264 So.3d at 463, 465.[11]

Request for Sanctions Against the Aldermen

In his appellate brief, Mr. Brumfield contends this court should impose sanctions **[*233]** against the Aldermen for lodging "scandalous **[**21]** and frivolous accusations" that Mr. Brumfield and his attorney brought this suit against the Aldermen as a "conspiracy of political retribution." According to Mr. Brumfield, the Aldermen's brief is "rife with insulting and offensive allegations, calling [Mr. Brumfield] and his counsel 'unconscionable,' and accusing them of 'improperly using

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[9] At the beginning of the hearing, Ms. Martin requested that the hearing be continued, because the Aldermen then had no attorney present to represent them. Mr. Brumfield's counsel opposed the request. The trial court denied the continuance.

[10] Mr. Brumfield personally submitted the July 1, 2019 PRR at issue. The record indicates that Latoia Williams-Simon, Mr. Brumfield's counsel, submitted additional, separate PRRs to the Aldermen. At the March 9, 2020 hearing, Ms. Cyprian testified that she responded to one of the PRRs she received, stating it "could have been lately" that she responded, but she did not state who sent the PRR to which she responded.

[11] In their brief, the Aldermen argue that they presented evidence showing that they informed Mr. Brumfield that they did not have email threads and text messages responsive to his PRR. The alleged "evidence" referenced by the Aldermen consists of documents attached to a memorandum they filed in support of their motion for new trial. **HN15**[↑] However, documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. Foster v. Bias, 19-1674 (La. App. 1 Cir. 9/28/21), 2021 La. App. Unpub. LEXIS 168, 2021 WL 4438758, *3. Further, no evidence was introduced at the hearing on the motion for new trial. Thus, this court cannot consider documents that, even if physically placed in the record, were not formally admitted into evidence. *Id.*

the courts,' 'seeking punitive measures,' 'malicious exuberance,' and 'committing unethical and illegal conduct.'"

HN16[↑] *Rule 2-12.2(C) of the Uniform Rules of the Courts of Appeal* prohibits language in briefs that includes the use of vile, obscene, obnoxious, or offensive expressions, and insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution. *W&T Offshore, L.L.C v. Texas Brine Corp., 17-0574 (La. App. 1 Cir. 5/10/18), 250 So.3d 970, 976-77*, *rev'd in part on other grds*, *18-0950 (La. 6/26/19), 319 So.3d 822* (*per curiam*). Any violation of this prohibition shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned. *URCA Rule 2-12.2C*. Nevertheless, *Rule 2-12.2(C)* does not provide for the imposition of sanctions. And, the ability to impose sanctions under *La. C.C.P. art. 863* is limited to the trial court. *Hornot v. Cardenas, 10-1569 (La. App. 1 Cir. 3/25/11), 2011 La. App. Unpub. LEXIS 174, 2011 WL 1103151, *5* (unpublished). Therefore, Mr. Brumfield's request for sanctions is not properly before **[**22]** this court.

CONCLUSION

For reasons stated herein, we vacate the September 20, 2021 Amended Judgment in part and affirm it in part. We vacate the Amended Judgment insofar as it: [Pg 15] 12 (1) orders Shelia Martin to produce any records to Charles Brumfield, (2) assesses a $14,000 civil penalty against Shelia Martin, and (3) orders that Shelia Martin is liable, in solido, with any other party for all costs and attorney fees. In all other respects, we affirm the Amended Judgment. We assess appeal costs one-half to Ricky Coleman and one-half to Debrah Cyprian.

AFFIRMED IN PART; VACATED IN PART.

End of Document

Toensing v. AG of Vt.

Supreme Court of Vermont

October 20, 2017, Filed

No. 17-090

Reporter
2017 VT 99 *; 206 Vt. 1 **; 178 A.3d 1000 ***; 2017 Vt. LEXIS 122 ****; 45 Media L. Rep. 2630; 2017 WL 4700508

Brady C. Toensing v. The Attorney General of Vermont

Subsequent History: Decision reached on appeal by *Toensing v. AG of Vt., 2019 Vt. LEXIS 50 (Apr. 26, 2019)*

Prior History: **[****1]** On Appeal from Superior Court, Chittenden Unit, Civil Division. Robert A. Mello, J.

Toensing v. AG of Vt., 2017 Vt. Super. LEXIS 112 (Vt. Super. Ct., Feb. 8, 2017)

Disposition: Reversed and remanded for further proceedings.

Core Terms

public record, records, private account, email, employees, personal account, state employee, communications, documents, stored, agency business, disclosure, requester, searching, privacy, public records request, quotation, exempt, public agency, individual employee, electronic, nonpublic, agencies, Vermont, cases, files, conducting a search, requested records, public business, disclose

Case Summary

Overview

HOLDINGS: [1]-The definition of "public record" in *Vt. Stat. Ann. tit. 1, § 317*, part of the Vermont Access to Public Records Act, included records that were stored in private accounts, provided that the record otherwise qualified as a public record by having been produced or acquired in the course of public agency business; [2]-Here, where plaintiff specifically sought specified communications to or from individual state employees or officials regardless of whether the records were located on private or state accounts, the Office of the Attorney General's obligation to conduct a reasonable search included asking those individual employees or officials to provide any public records stored in their private accounts that were responsive to plaintiff's request.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN1[] **Governmental Information, Freedom of Information**

The Vermont Access to Public Records Act's definition of "public record" includes digital documents stored in private accounts, but emphasize that it extends only to documents that otherwise meet the definition of public records.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[] **Entitlement as Matter of Law, Appropriateness**

When reviewing a trial court's grant of summary judgment, the appellate court applies the same standard as the trial court. Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Vt. R. Civ. P. 56(a)*.

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN3[] **Governmental Information, Freedom of Information**

Records produced or acquired in the course of agency business are public records under the Vermont Access to Public Records Act, regardless of whether they are located in private accounts of state employees or officials or on the state system.

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN4[] **Governmental Information, Freedom of Information**

The Vermont Access to Public Records Act's definition of "public record" includes digital documents stored in private accounts, but it extends only to documents that otherwise meet the definition of public records.

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN5[] **Governmental Information, Freedom of Information**

The definition of "public record" in the Vermont Access to Public Records Act does not exclude otherwise qualifying records on the basis that they are located in private accounts.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

When construing a statute, the goal is to effectuate the intent of the legislature. The court first looks to the statute's language because it presumes that the legislature intended the plain, ordinary meaning of the adopted statutory language.

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN7[] **Governmental Information, Freedom of Information**

The Vermont Access to Public Records Act (PRA) defines "public records" as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." *Vt. Stat. Ann. tit. 1, § 317(b)*. The Vermont Supreme Court previously described this definition as sweeping. The determinative factor in the question of what constitutes a public record is whether the document at issue is produced or acquired in the course of agency business. The PRA does not define "public record" in reference to the location or custodian of the document, but rather to its content and the manner in which it was created.

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation

HN8 **Governmental Information, Freedom of Information**

The Vermont Access to Public Records Act represents a strong policy favoring access to public documents and records. The legislature expressly mandated that it is in the public interest to enable any person to review and criticize government decisions even though such examination may cause inconvenience or embarrassment, and the court construes the statute in light of this purpose. Vt. Stat. Ann. tit. 1, § 315(a).

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN9 **Freedom of Information, Compliance With Disclosure Requests**

A Vermont Access to Public Records Act provision acknowledges that a state agency may need additional time to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request. Vt. Stat. Ann. tit. 1, § 318(a)(5)(A). "Other establishments" is an undefined term, but this provision suggests that in some circumstances a public record may be located outside of the public agency itself.

Governments > Legislation > Interpretation

HN10 **Legislation, Interpretation**

Statutes should be construed with others as part of one system.

Administrative Law > Governmental Information > Freedom of Information

HN11 **Governmental Information, Freedom of Information**

The purpose of the Vermont Access to Public Records Act is to ensure that citizens can review and criticize government actions. Vt. Stat. Ann. tit. 1, § 315(a).

Governments > Legislation > Interpretation

HN12 **Legislation, Interpretation**

The court favors interpretations of statutes that further fair, rational consequences, and it presumes that the legislature does not intend an interpretation that would lead to absurd or irrational consequences.

Administrative Law > Governmental Information > Freedom of Information

HN13 **Governmental Information, Freedom of Information**

The Vermont Access to Public Records Act gives effect to the philosophical commitment to accountability reflected in Article 6 of the Vermont Constitution. Vt. Const. ch. I, art. 6.

Administrative Law > Governmental Information > Freedom of Information

HN14 **Governmental Information, Freedom of Information**

If communications sent through personal accounts were categorically excluded from the state public records law, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. Wide access to records created in the course of agency business is crucial to holding government actors accountable for their actions. Exempting private accounts from the Vermont Access to Public Records Act (PRA) 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. Thus, the PRA applies to public records that are stored in private accounts.

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > Governmental Information > Public Information

HN15 **Governmental Information, Freedom of Information**

In order to qualify as a public record, a document must have been produced or acquired in the course of public agency business. Vt. Stat. Ann. tit. 1, § 317(b). The Vermont Supreme Court's holding that records located in private accounts may be public records does not mean that the Vermont Access to Public Records Act purports to reach anything other than public records—those "produced or acquired in the course of public agency business"—that are located in private accounts.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN16 **Freedom of Information, Compliance With Disclosure Requests**

The Vermont Access to Public Records Act does contemplate that an individual at the agency will assume ultimate responsibility for the gathering of relevant records, identification of exemptions, and disclosure to the requester. *Vt. Stat. Ann. tit. 1, § 318(a)(2)* (requiring custodian to certify any exemptions claimed by identifying records withheld and basis for denial); *§ 318(a)(4)* (requiring custodian to certify in writing when requested record does not exist).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > Governmental Information > Freedom of Information

HN17 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The Vermont Access to Public Records Act aims to uphold the accountability of the public servants to whom Vermonters have entrusted our government. The statute clearly asserts the legislature's interest in enabling any person to review and criticize the decisions of government officers even though such examination may cause inconvenience or embarrassment. *Vt. Stat. Ann. tit. 1, § 315(a)*. It recognizes that providing for free and open examination of public record promotes values of constitutional significance. *Vt. Const. ch. I, art. 6*. But the legislature has also recognized that all people have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Any discussion of requiring, or even allowing, a public agency to "search" the private email accounts of its employees would trigger privacy concerns of the highest order.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN18 **Freedom of Information, Compliance With Disclosure Requests**

In response to a public records request, a public agency must undertake a reasonable search to identify and disclose responsive, nonexempt public records. In the absence of any evidence suggesting that an employee is conducting agency business through personal accounts, an agency may reasonably rely on the representations of its employees. In fact, agencies likely rely on their employees' representations routinely in the context of searches of agency records. That is, an agency's search of its own records may take the form of individual employees or officials searching their paper or digital files in their agency account or office, providing responsive records to the custodian of records, and representing that their search is complete. In cases in which governing policies prohibit the conduct of public business on personal accounts and there is no evidence that employees or officials have used their personal accounts to conduct public business, the Vermont Supreme Court declines to impose a higher burden on them when searching their personal files than applies to their search of records accessed through agency accounts or hard copies located in agency files.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN19[] **Freedom of Information, Compliance With Disclosure Requests**

In the absence of any evidence suggesting that an employee is conducting agency business through personal accounts, an agency responding to a request under the Vermont Access to Public Records Act may reasonably rely on the representations of its employees. In fact, agencies likely rely on their employees' representations routinely in the context of searches of agency records. That is, an agency's search of its own records may take the form of individual employees or officials searching their paper or digital files in their agency account or office, providing responsive records to the custodian of records, and representing that their search is complete.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN20[] **Freedom of Information, Compliance With Disclosure Requests**

In Vermont Access to Public Records Act cases in which governing policies prohibit the conduct of public business on personal accounts and there is no evidence that employees or officials have used their personal accounts to conduct public business, the Vermont Supreme Court declines to impose a higher burden on them when searching their personal files than applies to their search of records accessed through agency accounts or hard copies located in agency files.

Headnotes/Summary

Summary

Appeal by plaintiff in Vermont Access to Public Records Act case. Superior Court, Chittenden Unit, Civil Division, *Mello*, J., presiding. *Reversed and remanded*.

Headnotes

VERMONT OFFICIAL REPORTS HEADNOTES

VT1.[] 1.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act's definition of “public record” includes digital documents stored in private accounts, but it extends only to documents that otherwise meet the definition of public records.

VT2.[] 2.

Records > Right to Inspect > Generally

Records produced or acquired in the course of agency business are public records under the Vermont Access to Public Records Act, regardless of whether they are located in private accounts of state employees or officials or on the state system.

VT3.[] 3.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act does not exclude otherwise qualifying records that are located in private accounts of state employees or officials.

VT4.[] 4.

Records > Right to Inspect > Generally

The definition of "public record" in the Vermont Access to Public Records Act does not exclude otherwise qualifying records on the basis that they are located in private accounts.

VT5.[] 5.

Statutes > Generally > Legislative History or Intent

When construing a statute, the goal is to effectuate the intent of the Legislature. The Court first looks to the statute's language because it presumes that the Legislature intended the plain, ordinary meaning of the adopted statutory language.

VT6.[] 6.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act (PRA) defines "public records" as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." The Court previously described this definition as sweeping. The determinative factor in the question of what constitutes a public record is whether the document at issue is produced or acquired in the course of agency **[**2]** business. The PRA does not define "public record" in reference to the location or custodian of the document, but rather to its content and the manner in which it was created. *1 V.S.A. § 317(b)*.

VT7. 7.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act represents a strong policy favoring access to public documents and records. The Legislature expressly mandated that it is in the public interest to enable any person to review and criticize government decisions even though such examination may cause inconvenience or embarrassment, and the Court construes the statute in light of this purpose. *1 V.S.A. § 315(a)*.

VT8. 8.

Records > Right to Inspect > Generally

A Vermont Access to Public Records Act provision acknowledges that a state agency may need additional time to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request. “Other establishments” is an undefined term, but this provision suggests that in some circumstances a public record may be located outside of the public agency itself. *1 V.S.A. § 318(a)(5)(A)*.

VT9. 9.

Statutes > Generally > Construction

Statutes should be construed with others as part of one system.

VT10. 10.

Records > Right to Inspect > Generally

The purpose of the Vermont Access to Public Records Act is to ensure that citizens can review and criticize government actions. *1 V.S.A. § 315(a)*.

VT11. 11.

Statutes > Generally > Avoidance of Absurd or Unjust Results

The Court favors interpretations of statutes that further fair, rational consequences, and it presumes that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences.

VT12. 12.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act gives effect to the philosophical commitment to accountability reflected in Article 6 of the Vermont Constitution. *Vt. Const. ch. I, art. 6*.

VT13. 13.

Records > Right to Inspect > Generally

If communications sent through personal accounts were categorically excluded from the state public records law, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. Wide access to records created in the course of agency business is crucial to holding government actors accountable for their actions. Exempting private accounts from the Vermont Access to Public Records Act (PRA) 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. Thus, the PRA applies to public records that are stored in private accounts.

VT14. 14.

Records > Right to Inspect > Generally

In order to qualify as a public record, a document must have been produced or acquired in the course of public agency business. The Court's holding that records located in private accounts may be public records does not mean that **[**3]** the Vermont Access to Public Records Act purports to reach anything other than public records — those "produced or acquired in the course of public agency business" — that are located in private accounts. *1 V.S.A. § 317(b)*.

VT15. 15.

Records > Right to Inspect > Procedure

Where plaintiff in a Vermont Access to Public Records Act case specifically sought specified communications to or from individual state employees or officials regardless of whether the records were located on private or state accounts, the Office of the Attorney General's obligation to conduct a reasonable search included asking those individual employees or officials to provide any public records stored in their private accounts that were responsive to plaintiff's request.

VT16. 16.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act does contemplate that an individual at the agency will assume ultimate responsibility for the gathering of relevant records, identification of exemptions, and disclosure to the requester. *1 V.S.A. § 318(a)(2)*, *(4)*.

VT17.[] 17.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act aims to uphold the accountability of the public servants to whom Vermonters have entrusted our government. The statute clearly asserts the Legislature's interest in enabling any person to review and criticize the decisions of government officers even though such examination may cause inconvenience or embarrassment. It recognizes that providing for free and open examination of public record promotes values of constitutional significance. But the Legislature has also recognized that all people have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. Any discussion of requiring, or even allowing, a public agency to “search” the private email accounts of its employees would trigger privacy concerns of the highest order. *Vt. Const. ch. 1, art. 6*; *1 V.S.A. § 315(a)*.

VT18.[] 18.

Records > Right to Inspect > Procedure

In response to a public records request, a public agency must undertake a reasonable search to identify and disclose responsive, nonexempt public records.

VT19.[] 19.

Records > Right to Inspect > Procedure

In the absence of any evidence suggesting that an employee is conducting agency business through personal accounts, an agency responding to a request under the Vermont Access to Public Records Act may reasonably rely on the representations of its employees. In fact, agencies likely rely on their employees' representations routinely in the context of searches of agency records. That is, an agency's search of its own records may take the form of individual employees or officials searching their paper or digital files in their agency account or office, providing responsive records to the custodian of records, and representing that their search is complete.

VT20.[] 20.

Records > Right to Inspect > Procedure

In Vermont Access to Public Records Act cases in which governing policies prohibit the conduct of public business on personal accounts and there is no **[**4]** evidence that employees or officials have used their personal accounts to conduct public business, the Court declines to impose a higher burden on them when searching their personal files than applies to their search of records accessed through agency accounts or hard copies located in agency files.

VT21.[] 21.

Records > Right to Inspect > Procedure

In an action under the Vermont Access to Public Records Act where plaintiff sought specified communications regardless of whether they were on private or state accounts, if, in addition to searching its own records as it had done, the Office of the Attorney General (AGO) had policies in place to minimize the use of personal accounts to conduct agency business, provided the specified employees and officials adequate guidance or training as to the distinction between public and nonpublic records, asked them to provide to the AGO any responsive public records in their custody or control, received a response and brief explanation of their manner of searching and segregating public and nonpublic records, and disclosed any nonexempt public records provided, its search would be adequate.

Counsel: *Brady C. Toensing* of *diGenova & Toensing*, Washington, D.C., for Plaintiff-Appellant.

Thomas J. Donovan, Jr., Attorney General, and *Benjamin D. Battles*, Solicitor General, Montpelier, for Defendant-Appellee.

Robert B. Hemley of *Gravel & Shea, P.C.*, Burlington, and *Timothy Cornell* of *Cornell Dolan, P.C.*, Boston, Massachusetts, for Amici Curiae Vermont Journalism Trust, Caledonian-Record Publishing Co., New England First Amendment Coalition, The Vermont Press Association, and Da Capo Publishing, Inc.

Judges: Present: **Reiber, C.J., Skoglund, Robinson, Eaton and Carroll, JJ.**

Opinion by: ROBINSON

Opinion

[*P1] [*1002]** ***VT[1]***[] [1] **Robinson, J.** At issue in this appeal is whether, under the Vermont *Access to Public Records Act* (PRA), a government agency must ask state employees to determine whether they possess public records in digital form in their personal accounts when a requester specifically requests communications between specified state employees and third parties, including records that can be found only in the individual state employee's personal account. We conclude that ***HN1***[] the PRA's definition of “public record” includes digital **[****2]**

documents stored in private accounts, but emphasize that it extends only to documents that otherwise meet the definition of public records. On the facts of this case, the agency was required to ask specified state employees to provide public **[**5]** records from their personal accounts in response to plaintiff's public records request. Accordingly, we reverse and remand.

[*P2] The undisputed facts are as follows. On May 12, 2015, plaintiff Brady Toensing submitted a PRA request to then-Attorney General William Sorrell. Among other things, plaintiff requested responsive records from "January 1, 2012 to present" from eleven employees and officials in the Office of the Attorney General (AGO). In particular, he asked for: "[a]ny and all communications with or documents related to" forty-four individuals and entities and "communications received from or sent to" any email addresses with one of four domain names. Plaintiff's request stated that "[t]hese requests include, but are not limited to, communications received or sent on a private email account … or private text messaging account." Plaintiff submitted a revised request on December 11, 2015, that requested records from "January 1, 2011 to present" **[****3]** from nine state employees and officials and asked for "[a]ny and all communications with and documents related to" twenty-seven individuals and three domain names. Per an agreement with plaintiff, the AGO retained an outside contractor at plaintiff's expense to conduct a search of the State's Microsoft Exchange Enterprise Vault to identify emails responsive to plaintiff's request.

[*P3] The contractor the AGO hired to search for records identified 13,629 responsive emails in the state system, which it consolidated into 1129 email chains. The AGO produced records on a rolling basis from February 5, 2016, through April 28, 2016. The AGO's final response, embodied in a letter from Chief Assistant Attorney General William Griffin, identified the responsive documents the AGO had provided, and described the documents it had withheld on the ground that they were not **[***1003]** public records or were public records exempt from disclosure under the PRA.

[*P4] In May, plaintiff wrote Chief Assistant Attorney General Griffin indicating that during the course of his numerous communications with the AGO, he had emphasized that his request encompassed communications sent to and received from the private accounts of the **[****4]** identified state employees, but that it did not appear that the nine AGO employees had searched for and produced responsive emails and text messages from their personal accounts. He added that, if the AGO was denying his request to the extent it included responsive records and text messages in personal accounts, the AGO should treat his letter as an administrative appeal of that denial.

[*P5] **[**6]** After plaintiff confirmed that the only ground for appeal he was asserting in connection with the AGO's response to the records request was the AGO's refusal "to produce, or even search for, responsive public records that may be kept on private email or text messaging accounts," Deputy Attorney General Susanne Young denied plaintiff's administrative appeal. The denial rested on three bases. First, that the PRA only addresses records generated or received by a public agency, and does not extend to private accounts or electronic devices that are not accessible to the agency. Second, there is no basis to conclude that the Legislature would have expected state agencies to conduct searches of the private accounts of state officials and employees, given the law's attempt to balance the interest of public **[****5]**

accountability against privacy interests. Third, even assuming that an agency may be obligated in some cases to attempt to search a private account, plaintiff did not provide a sufficient justification for his request in this case.

[*P6] Plaintiff filed an action in the superior court seeking declaratory and injunctive relief in connection with the AGO's denial. Among other things, he sought a declaration that responsive records "that are related in any way to the individual's employment at the state agency" are public records subject to release under the PRA, "regardless of whether those records are stored on a government or private account." He further requested a declaration that the PRA "requires a good-faith search for records" and that the AGO must release the requested records "or segregable portions thereof subject to legitimate exemptions." He sought an injunction compelling the AGO "to produce (or order its employees to produce) all records responsive to plaintiff's [PRA] requests, subject to legitimate withholdings." The AGO conceded in its answer that it had declined to search private e-mail or text messaging accounts in response to plaintiff's public records request.

[*P7] In August, **[****6]** the AGO filed a motion for summary judgment, arguing that communications stored on private email and text messaging accounts are not public records under the PRA. If the court determined that information stored in private accounts was subject to the PRA, the AGO argued that an individual who requests public records stored in private accounts should have to show, first, that agency business was conducted using private accounts and, second, that a search of those accounts was **[**7]** necessary to review agency action. In his opposition, plaintiff emphasized that on the record in this case, asking employees to search their own accounts for responsive records, and then disclosing those records, with an index of those withheld on account of exemptions, would be sufficient to meet the State's obligation to conduct a good faith "search" in response to his records request.

[*P8] The trial court granted the AGO's motion in February 2017. The court concluded that the PRA only applies to public **[***1004]** records "of a public agency," and that accordingly "a record must be in the custody or control of the agency to be subject to search or disclosure." The court added that subjecting personal accounts to the PRA would **[****7]** lead to the invasion of the privacy of state employees and officials, and that implementation of such a requirement would raise practical concerns. It acknowledged that allowing state officials and employees to avoid the PRA by communicating through private accounts "is a serious and, frankly, disturbing concern," but determined that it was up to the Legislature to resolve this problem.

[*P9] On appeal, plaintiff argues that communications related to agency business but stored in private accounts are public records subject to the PRA. He argues that the language of the PRA as well as public policy support this position. He also contends that the PRA places the full burden of proving that a search for responsive records was reasonable on the agency conducting the search, and that placing any burden on the requester to make a threshold showing that public records are stored in private accounts before the agency is required to ask employees if they have public records stored on private accounts would be contrary to the language of the statute and legislative intent.

[*P10] The AGO has shifted its argument on appeal, and no longer contends that records that otherwise fit the definition of public records **[****8]** are not subject to the public records law when they are stored in private accounts. Instead, the AGO maintains that in this case it was not required to take any steps to identify potentially responsive public records found on private accounts of state employees, and that its process for responding to plaintiff's request was sufficient.

[*P11] *HN2*[] When reviewing a trial court's grant of summary judgment, we "apply the same standard as the trial court." *Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 9, 177 Vt. 287, 865 A.2d 350*. Summary **[**8]** judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *V.R.C.P. 56(a)*.

[*P12] *VT[2]*[] [2] On this summary judgment record, we conclude that *HN3*[] records produced or acquired in the course of agency business are public records under the PRA, regardless of whether they are located in private accounts of state employees or officials or on the state system. We further conclude that in this case, where plaintiff specifically seeks specified communications to or from individual state employees or officials, regardless of whether the records are located on private or state accounts, the AGO's obligation to conduct a reasonable search includes asking those individual **[****9]** employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request. We consider each conclusion in turn.

I. The Scope of the PRA

[*P13] *VT[3]*[] [3] *HN4*[] The PRA does not exclude otherwise qualifying records that are located in private accounts of state employees or officials. Our conclusion is based first and foremost on the definition of "public records" in the PRA, the liberal construction to which that statute is subject, and other provisions in the statute that reinforce our understanding. Moreover, the statutory purpose of the PRA supports this interpretation. Persuasive analyses from numerous state and federal courts further buttress our analysis, as do considerations of sound public policy. Although the focus of this appeal is the relationship between the PRA and records located in private accounts of state employees and officials, we note that the definition of public record, **[***1005]** while quite broad, is not so broad as to encompass many of the records sought by plaintiff in this case. For that reason, our holding does not impinge on the reasonable privacy expectations of state employees.

[*P14] *VT[4-6]*[] [4-6] *HN5*[] The definition of "public record" in the PRA does not exclude **[****10]** otherwise qualifying records on the basis that they are located in private accounts. *HN6*[] When construing a statute, our goal is to effectuate the intent of the Legislature. *Wesco, Inc., 177 Vt. 287, 2004 VT 102, ¶ 14, 865 A.2d 350*. We first look to the statute's language because we presume that the Legislature "intended the plain, ordinary meaning of the adopted statutory language." *Id.* *HN7*[] The PRA defines "public records" as "any written or recorded information, regardless **[**9]** of physical form or characteristics, which is produced or acquired in the course of public agency business." *1 V.S.A. § 317(b)*. We have previously described this definition as "sweeping." *Herald Ass'n v. Dean, 174 Vt. 350, 353, 816 A.2d 469, 473 (2002)* (quotation omitted). The "determinative factor" in the question of what

constitutes a public record is "whether the document at issue is 'produced or acquired in the course of agency business.' " *Id. at 354, 816 A.2d at 473* (quoting *1 V.S.A. § 317(b)*). The PRA does not define "public record" in reference to the location or custodian of the document, but rather to its content and the manner in which it was created. Cf. *Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 108, 624 A.2d 857, 862 (1993)* (rejecting argument that documents were exempt from disclosure based on location in confidential disciplinary files because documents must be evaluated "based on their content rather than where they are filed").

[*P15] *VT[7]*[⬆] [7] This construction is consistent **[****11]** with the Legislature's intent that we construe the PRA liberally in favor of disclosure. See *1 V.S.A. § 315(a)* (providing that "the provisions of this subchapter shall be liberally construed"); *Rueger v. Nat. Res. Bd., 2012 VT 33, ¶ 7, 191 Vt. 429, 49 A.3d 112* ("In conducting our analysis, we are mindful that ***HN8***[⬆] the PRA represents a strong policy favoring access to public documents and records." (quotation omitted)). The Legislature expressly mandated that "it is in the public interest to enable any person to review and criticize [government] decisions even though such examination may cause inconvenience or embarrassment," and we construe the statute in light of this purpose. *1 V.S.A. § 315(a)*.

[*P16] *VT[8,9]*[⬆] [8, 9] Our conclusion is further supported by ***HN9***[⬆] a PRA provision that acknowledges that a state agency may need additional time to search for and collect the requested records "from field facilities or other establishments that are separate from the office processing the request." *1 V.S.A. § 318(a)(5)(A)*. "Other establishments" is an undefined term, but this provision suggests that in some circumstances a public record may be located outside of the public agency itself. See *Bud Crossman Plumbing & Heating v. Comm'r of Taxes, 142 Vt. 179, 185, 455 A.2d 799, 801 (1982)* (explaining that ***HN10***[⬆] statutes should be construed with others as part of one system).

[*P17] Other state courts have interpreted similar public records laws to extend **[****12]** to records stored in private accounts. Although **[**10]** these decisions involve different statutes with distinct requirements, they rely on considerations that also apply to the Vermont PRA and their reasoning accordingly adds some persuasive validation to our interpretation of Vermont's public records law. For example, the California Supreme Court in *City of San Jose v. Superior Court* recently reasoned that agencies themselves "cannot prepare, own, use, or retain any record" because "[o]nly the human beings who serve in agencies can do these things." *2 Cal. 5th 608, 214 Cal. Rptr. 3d 274, 389 P.3d 848, 855 (Cal. 2017)*.[1] It concluded that, because an agency "can act only through its individual officers and employees," documents "prepared by a public employee conducting agency business has been 'prepared by' the agency within the meaning of [the PRA] even if the writing is prepared using the employee's personal account." *Id.* The court rejected the argument that documents in personal accounts are beyond the agency's control and therefore not subject to the PRA. It recognized that documents do not lose their ***[***1006]***

[1] The California Supreme Court issued this opinion during the pendency of this appeal. The trial court here relied on the intermediate court of appeal decision, *City of San Jose v. Superior Court, 225 Cal. App. 4th 75, 169 Cal. Rptr. 3d 840 (Ct. App. 2014)*, to support its conclusion that documents stored in private accounts could not be subject to the PRA. The California Supreme Court reversed that opinion on appeal.

status as public records only because " 'the official who possesses them takes them out the door.' " *Id. at 857* (quoting *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145, 149, 423 U.S. App. D.C. 503 (D.C. Cir. 2016))*; see also *Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45, 52-54 (Wash. 2015)* (concluding that records on private **[****13]** cell phones are subject to PRA because agencies "act only through their employee-agents" and therefore "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record prepared, owned, used, or retained by" the agency (quotation omitted)). But see *In re Silberstein, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011)* (concluding with respect to records in individual township commissioner's personal email account that "unless the [records] were produced with the authority of [the township], as a local agency, or were later ratified, adopted or confirmed by [the township], said requested records cannot be deemed public records within the meaning of [the public records law] as the same are not of the local agency" (quotation omitted)).

[*P18] **[**11]** Likewise, federal courts applying the federal Freedom of Information Act (FOIA) have concluded that documents in private accounts may be subject to disclosure under FOIA. See *Rutland Herald v. Vt. State Police, 2012 VT 24, ¶ 68, 191 Vt. 357, 49 A.3d 91* (Dooley, J., concurring in part and dissenting in part) (considering federal court decisions construing FOIA in interpreting analogous provisions in Vermont PRA). In *Competitive Enterprise Institute v. Office of Science & Technology Policy*, the D.C. Circuit considered a FOIA request for records **[****14]** relating to public business located in a private email account maintained by the director of the *Office of Science and Technology. 827 F.3d 145, 423 U.S. App. D.C. 503 (D.C. Cir. 2016)*. The agency declined to produce the record on the ground that the records were "beyond the reach of FOIA" because they were in an account under the control of a private organization. *Id. at 147*. The D.C. Circuit rejected this claim, explaining that records do not lose their agency character just because the official who possesses them takes them out the door. *Id. at 149*. Considering the purpose of FOIA, the court reasoned:

> If a department head can deprive the citizens of their right to know what [the] department is up to by the simple expedient of maintaining … departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hardcopy documents by leaving **[***1007]** them in a file at [the department head's] daughter's house and then claiming that they are under her control.

Id. at 150; see also *Competitive Enter. Inst. v. U.S. Envtl. Prot. Agency, 12 F. Supp. 3d 100, 122 (D.D.C. 2014)* (explaining that agency was not required to disclose employees' personal email addresses since FOIA requesters "can simply ask for work-related emails and agency records found in the specific employees' personal accounts" and "need **[****15]** not spell out the email addresses themselves").

[*P19] In fact, even the federal cases upon which the AGO relies in arguing for a burden-shifting test with respect to an agency's obligation to search for public records stored in private accounts support the conclusion that such records are, in fact, public records. See *Hunton & Williams LLP v. U.S. Envtl. Prot. Agency, 248 F. Supp. 3d 220, 237-38 (D.D.C. 2017)* (noting that agencies **[**12]** performed searches of personal email accounts of individual employees

when specific facts indicated that particular employee had used personal email account for agency business); *Wright v. Admin. for Children & Families, No. 15-218, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *8 (D.D.C. Oct. 11, 2016)* (acknowledging that agency employees' communications on nonagency accounts may constitute "agency records" subject to FOIA). As noted above, the AGO has conceded this point on appeal.

[*P20] *VT[10-12]*[⬆] [10-12] Strong public policy reasons support the conclusion that electronic information stored on private accounts is subject to disclosure under the PRA. *HN11*[⬆] The purpose of the PRA is to ensure that citizens can "review and criticize" government actions. *1 V.S.A. § 315(a)*. That purpose would be defeated if a state employee could shield public records by conducting business on private accounts. See *Wesco, Inc., 177 Vt. 287, 2004 VT 102, ¶ 14, 865 A.2d 350* (*HN12*[⬆] "[W]e favor interpretations of statutes that further fair, rational consequences, and we presume that the Legislature does not **[****16]** intend an interpretation that would lead to absurd or irrational consequences." (quotation omitted)). And we are mindful that *HN13*[⬆] the PRA gives effect to the philosophical commitment to accountability reflected in *Article 6 of the Vermont Constitution*. See *Rutland Herald, 191 Vt. 357, 2012 VT 24, ¶ 39, 49 A.3d 91* (recognizing that PRA is Legislature's means of executing broad principles articulated in *Article 6 of Vermont Constitution*); *Vt. Const. ch. I, art. 6* ("That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.").

[*P21] *VT[13]*[⬆] [13] *HN14*[⬆] "If communications sent through personal accounts were categorically excluded from [the state public records law], government officials could hide their most sensitive, and potentially damning, discussions in such accounts." *City of San Jose, 389 P.3d at 858*. Wide access to records created in the course of agency business is crucial to holding government actors accountable for their actions. Exempting private accounts from the PRA 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." **[****17]** *Id.* (quotation omitted); see also *Nissen, 357 P.3d at 53* ("If the PRA did not capture records individual employees prepare, own, use, or retain in the **[**13]** course of their jobs, the public would be without information about much of the daily operation of government."). For the above reasons, we conclude that the PRA applies to public records that are stored in private accounts.

[*P22] **[***1008]** *VT[14]*[⬆] [14] We emphasize, however, that *HN15*[⬆] in order to qualify as a public record, a document must have been "produced or acquired in the course of public agency business." *1 V.S.A. § 317(b)*. Although this is a broad test, it is far narrower than suggested by plaintiff, and does not reach all records that are responsive to plaintiff's expansive public records request. With reference to nine identified state officials and employees, plaintiff sought "[a]ny and all communications with or documents related to the following individuals." On its face, this request purports to reach many records that are not public, including communications among the identified individuals that were not produced or acquired in the course of agency business. Likewise, throughout his correspondence with the AGO, in his pleadings in this case, and in his brief on appeal, plaintiff appears to **[****18]** seek a judgment that he is entitled to any records "that are related in any way to the individual's employment at the state agency," or that "any records, regardless of where they are stored, which are related in

any way to public business or created as a result of the employee's employment are producible." These statements do not reflect the statutory definition of public records, and our decision today should not be construed to expand the reach of the PRA to reach nonpublic records located in private accounts. See *Herald Ass'n, 174 Vt. at 357, 816 A.2d at 476* (acknowledging that PRA "applies only to records generated in 'the course of agency business' "); cf. *Nissen, 357 P.3d at 54* ("[E]mployees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record … ."). Our holding that records located in private accounts may be public records does not mean that the PRA purports to reach anything other than *public records* — those "produced or acquired in the course of public agency business" — that are **[****19]** located in private accounts.[2]

[*P23] **[**14]** We emphasize this limit to the reach of our holding because nothing in the PRA suggests that the Legislature intended to subject nonpublic communications by state employees or officials to public scrutiny, and any such invasions would raise substantial privacy concerns. State policy on internet use puts state employees on notice that employees with state email accounts must not routinely use personal email accounts to conduct state business without approval from the Secretary of Administration, and specifically notifies employees that "a 'public record' is any record produced or acquired in the course of agency business, *regardless of whether the record resides in a state-provided system or personal* ***[***1009]*** *account*." Electronic Communications and Internet Use, Personnel Policy 11.7, *http://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_11.7_ELECTRONIC_COMMUNICATIONS_AND_INTERNET_USE.pdf* [*https://perma.cc/NP9H-UN23*] (emphasis added). The policy explains, "Any public record contained in a non-state-provided system (email or otherwise) is subject to Vermont's Access to Public Records Act." **[****20]** Treating a record produced or acquired in the course of agency business as a public record, regardless of where situated, does not impinge on the reasonable privacy expectations of state employees who are on notice that they should not generally be conducting public business through private accounts. But suggesting that nonpublic records in private accounts of state employees are subject to public disclosure — or even disclosure to the State itself — would raise a host of concerns about the contractual and potentially constitutional privacy interests of state employees, would not further the public policy of open government, and would expand the PRA beyond its intended purpose.

[15]** II. The AGO's Obligation in Responding to Plaintiff's Request

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[2] In his complaint in this case, and in his brief on appeal, plaintiff highlights a particular email between former Attorney General Sorrell and a registered lobbyist that plaintiff obtained through other channels. He apparently highlights this email in support of a request he made after the December 2015 revised records request for additional emails between Attorney General Sorrell and the individual. In ruling on plaintiff's appeal with respect to the applicability of the PRA to emails found in private accounts, the AGO determined that the private email exchange about a public event after the fact did not constitute agency business. The AGO's analysis did not turn solely on the fact that the email was located in a private account. Although plaintiff references this email exchange in his complaint and brief, we understand him to be doing so as a means of illustrating what he believes to be the perils of categorically excluding emails in private accounts from the definition of public records. We do not understand him to have challenged the AGO's determination that by its nature this email is not a public record.

[*P24] VT[15] [15] We conclude on the record of this case, where plaintiff specifically seeks specified communications to or from individual state employees or officials regardless of whether the records are located on private or state accounts, that the AGO's obligation to conduct a reasonable search includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to plaintiff's request. In reaching **[****21]** this conclusion, we consider the language of the PRA, practical factors, the burden-shifting framework that the AGO advocates, its application to the record of this case, the conflicting interests at stake, and persuasive authority from other states.

[*P25] VT[16] [16] The PRA itself offers few clues as to the specific responsibilities of a state agency in responding to a public records request that may include records located in the personal accounts of state employees or officials. The statute simply provides, "[u]pon request, the custodian of a public record shall promptly produce the record for inspection." 1 V.S.A. § 318(a). It does not describe the process by which the custodian is to gather, review, and disclose the records, although HN16 the statute does contemplate that an individual at the agency will assume ultimate responsibility for the gathering of relevant records, identification of exemptions, and disclosure to the requester. See *id.* § 318(a)(2) (requiring custodian to certify any exemptions claimed by identifying records withheld and basis for denial); § 318(a)(4) (requiring custodian to certify in writing when requested record does not exist); see also Pease v. Windsor Dev. Review Bd., 2011 VT 103, ¶¶ 17-19, 190 Vt. 639, 35 A.3d 1019 (mem.) (concluding that municipal development review board properly responded **[****22]** to public records request through custodian, rather than through individual responses from each DRB member and noting that "a custodian [is] one 'who ha[s] it within their power to release or communicate public records' " (quoting *Mintus v. City of West Palm Beach, 711 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1998)* (per curiam))).

[*P26] As a practical matter, the steps required to reasonably compile requested public records likely vary depending upon the nature of the request. In some cases, centralized electronic searches of agency records in an email system, document management application, or database within **[***1010]** specified parameters may be the primary or even exclusive means of compiling responsive **[**16]** public records. In other circumstances, electronic searching may take place in a decentralized way, with individual employees searching their own state digital accounts. In yet other cases, many of the responsive records will exist only in hard copy, and someone must search through the appropriate file or files. Sometimes the relevant records, whether electronic or hard copy, are likely to be centralized; in others, they may be dispersed among multiple individual systems. And, per the discussion above, in some cases responsive public records may be located outside state accounts **[****23]** or the four walls of the public agency. Because public records requests can take so many forms, it would be impracticable to try to delineate specific steps required to comply with each and every public records request.

[*P27] To fill this void, the AGO urges this Court to adopt a burden-shifting test applied by some federal courts under FOIA. To prevail on summary judgment with respect to a FOIA dispute, the defending agency must show that it has conducted a search "reasonably calculated to uncover all relevant documents." Morley v. C.I.A., 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quotation omitted). The agency need not search "every record system" for the requested documents, but it "must conduct a good faith, reasonable search of those systems of records

likely to possess the requested records." *Hunton & Williams, 248 F. Supp. 3d at 235* (quotation omitted); see also *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *8*. Once the agency has provided the court a reasonably detailed affidavit describing its search, the burden shifts to the FOIA requester to produce "countervailing evidence" suggesting that a genuine dispute of material fact exists as to the adequacy of the search. *Hunton & Williams, 248 F. Supp. 3d at 236* (quotation omitted).

[*P28] As applied to personal email accounts of state employees, the AGO urges us to adopt a presumption that agency records are unlikely to exist **[****24]** on the agency employees' personal accounts. The AGO contends that a requester can satisfy its burden to present "countervailing evidence" as to the adequacy of an agency's search by identifying evidence that a specific private email address has been used for agency business, but that mere speculation that private email accounts were used does not require the agency to perform a search. *Id.*; see also *Wright, 2016 U.S. Dist. LEXIS 140314, 2016 WL 5922293, at *8-9*.

[*P29] *VT[17]*[↑] [17] We recognize the conflicting interests that inform the AGO's analysis. *HN17*[↑] The PRA aims to uphold the accountability of the **[**17]** public servants to whom Vermonters have entrusted our government. The statute clearly asserts the Legislature's interest in enabling "any person to review and criticize" the decisions of government officers "even though such examination may cause inconvenience or embarrassment." *1 V.S.A. § 315(a)*. It recognizes that providing for free and open examination of public record promotes values of constitutional significance. *Id.* (citing *Vt. Const. ch. I, art. 6*). But the Legislature has also recognized that "[a]ll people … have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer." *Id.* Any discussion **[****25]** of requiring, or even allowing, a public agency to "search" the private email accounts of its employees would trigger privacy concerns of the highest order.

[*P30] But we must bear in mind the "search" at issue in this case, which really isn't a "search" at all. Plaintiff has not argued that the AGO should, or even could, compel individual employees to hand over their smartphones or log-in credentials for their personal email accounts in **[***1011]** response to his public records request. He has made the far more modest claim that the AGO should ask the identified employees to turn over any public records responsive to plaintiff's request that are in their personal email or text message accounts.[3] In the context of this case, that request would not intrude at all on the privacy of the nine state officials or employees involved. The AGO would not have incidental access to any nonpublic texts, emails or other documents in the employees' accounts; the only records the employees would be asked to provide to the AGO would be those that are public records responsive to plaintiff's request. And of those, any public records that are subject to exemption from disclosure, in part or as a whole, would be redacted **[****26]** or withheld by the AGO and included in its itemized list of exempt or partially exempt documents. The notion that state employees have a privacy interest

[3] As noted above, plaintiff has actually made a somewhat broader claim about what the AGO should ask of its employees. See *supra*, ¶ 22. The important point for the purpose of the discussion here is that plaintiff has not argued that the AGO should physically search its employees' private accounts but, rather, that the AGO should ask employees to search their own accounts.

in records that are by law public records — those produced or acquired in the course of agency business — is incongruous.

[*P31] **[**18]** Courts in at least two other states have adopted an approach similar to that advocated by plaintiff. In *Nissen*, the Washington Supreme Court considered a request pursuant to that state's public records law for disclosure of text messages sent or received by a prosecutor in his official capacity. *357 P.3d at 49-50*. The court first concluded that Washington's public records law reached records "prepared, owned, used, or retain[ed]" by state employees in the course of their jobs, including the work product of public employees found on their personal cell phones such as text messages. *Id. at 52-53, 55-56*. Considering the mechanics of searching for and obtaining public records stored by or in the control of an employee, the court recognized the competing interests discussed above. The court noted that an individual has no constitutional privacy interest in a *public* record, but recognized that a state employee may have strong constitutional rights in **[****27]** information that is comingled with those public records. *Id. at 56* (describing wealth of personal information accessible through modern mobile devices). On the other hand, the court concluded that the statutory mandate providing for "full access to information concerning the conduct of government on every level" required that the public have some way to obtain public records created and exchanged on personal cell phones. *Id.* (quotation omitted). The court rejected the notion that the public records law created a "zero-sum choice between personal liberty and government accountability," and held that "an employee's good-faith search for public records on his or her personal device can satisfy an agency's obligation under [the public records act]." *Id. at 56-57*.

[*P32] With respect to judicial review of an agency's response to a public records request, the court concluded that "[t]o satisfy the agency's burden to show it conducted an adequate search for records," it would permit employees to submit an affidavit with facts sufficient to show that the information withheld was not a public record. *Id. at 57*. As long as the affidavits "give the requester and the trial court a sufficient factual basis to determine that withheld **[****28]** material is indeed nonresponsive, the agency has performed an adequate search" under the public records law. *Id.* When done in good faith, this procedure, **[***1012]** the court opined, "allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees." *Id.*

[*P33] More recently, the California Supreme Court relied in part on *Nissen* when adopting its own method for searching private **[**19]** accounts. *City of San Jose, 389 P.3d at 860-61*. The court concluded that documents that otherwise meet the California public records act's definition of "public records" do not lose this status because they are located in an employee's personal account and provided guidance for conducting searches in light of the need to balance privacy and disclosure interests. *Id. at 857, 860*. The court acknowledged that California's public records act did not explain how agencies were to search private accounts, but noted that "[s]ome general principles have emerged." *Id. at 860*. It explained that "[a]s to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question" and the agency "may then reasonably **[****29]** rely on these employees to search *their own* personal files, accounts, and devices for responsive materials." *Id.* (emphasis in original). The court noted that federal courts

applying FOIA had approved of this method, as long as the employees have been properly trained in segregating personal and public records, and followed the Washington Supreme Court and federal courts in concluding that as long as the employee provides an affidavit describing the employee's manner of searching in sufficient detail to show that the employee is not withholding public records, the agency's search is adequate. *Id. at 860-61*.

[*P34] We find the reasoning of the California and Washington Supreme Courts persuasive. We conclude that the critical question in this case is whether the AGO conducted a search that was reasonably calculated to uncover all relevant public records. We need not decide whether to formally adopt the burden-shifting advocated by the AGO because we conclude that even with a burden-shifting framework, the AGO's search for responsive public records must be adequate in the first instance. We decline to adopt a legal presumption that, in the absence of specific evidence provided by the requester, no state business **[****30]** has been conducted through private accounts. Instead, we conclude that in this case the AGO's search will be adequate if the specified officials and employees are trained to properly distinguish public and nonpublic records, the agency asks them to in good faith provide any responsive *public* records from their personal accounts, and they respond in a manner that provides reasonable assurance of an adequate search. This might be as simple as an affirmation that the employee, without exception, has not produced or acquired **[**20]** any records in personal accounts in the course of agency business, or that the employee has identified all potentially responsive records through a specified word search, and has segregated and disclosed all records produced or acquired in the course of agency business as opposed to communications of an exclusively personal nature.

[*P35] *VT[18-20]*[⬆] [18-20] We note that plaintiff has advocated a framework that requires an agency to provide a sworn affidavit from each employee who conducts a search of personal accounts for public records in connection with a public records request. We do not adopt this requirement in cases like this in which there is no evidence that an employee has public records **[****31]** in personal accounts. *HN18*[⬆] In response to a public records request, a public agency must undertake a reasonable search to identify and disclose responsive, **[***1013]** nonexempt public records. *HN19*[⬆] In the absence of any evidence suggesting that an employee is conducting agency business through personal accounts, an agency may reasonably rely on the representations of its employees.[4] In fact, agencies likely rely on their employees' representations routinely in the context of searches of agency records. That is, an agency's search of its own records may take the form of individual employees or officials searching their paper or digital files in their agency account or office, providing responsive records to the custodian of records, and representing that their search is complete. *HN20*[⬆] In cases in which governing policies prohibit the conduct of public business on personal accounts and there is no evidence that employees or officials have used their personal accounts to conduct public business, we decline to impose a higher burden on them when searching their

[4] Whether an agency may in its own discretion require its employees to sign an affidavit is not before us. We decide only that under these circumstances the PRA does not require affidavits.

personal files than applies to their search of records accessed through agency accounts or hard copies located in agency files.[5]

[*P36] **[**21]** *VT[21]*[↑] [21] Accordingly, if, in addition **[****32]** to searching the AGO's own records as it has done, the AGO has policies in place to minimize the use of personal accounts to conduct agency business, provides the specified employees and officials adequate guidance or training as to the distinction between public and nonpublic records, asks them to provide to the AGO any responsive public records in their custody or control, receives a response and brief explanation of their manner of searching and segregating public and nonpublic records, and discloses any nonexempt public records provided, its search will be adequate. This approach strikes a balance between protecting the privacy of state workers and ensuring the disclosure of those public records necessary to hold agencies accountable.

[*P37] In light of the above analysis, we direct the AGO to complete an adequate search in response to plaintiff's records requests consistent with our analysis, and remand this case to the trial court for completion of the AGO's response as well as consideration of attorney's fees.

Reversed and remanded for further proceedings.

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[5] We recognize that the cases we have relied upon do impose such a requirement. However, the Washington Supreme Court called for an affidavit in part because its public records statute expressly contemplates judicial review of agency actions taken pursuant to the public records law based solely on affidavits. See *Nissen, 357 P.3d at 57*; *Wash. Rev. Code Ann. 42.56.550(3)* (2017). Moreover, in that case the fact that the prosecutor was conducting official business using his personal cell phone to send and receive text messages was established. We do not address here the burden on an agency to establish an adequate search with respect to public records in the personal accounts of agency employees or officials in cases in which there is evidence of employees or officials conducting public business through personal accounts.