# CITY OF OAKLAND

# Office of the City Attorney

## Legal Opinion

**Date:** November 22, 2011

**Re**: Disclosure of Text and Email Messages under California Public Records Act

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### I. Question

The City Attorney's Office has received requests from time to time for advice regarding the application of the Public Records Act (sometimes referred to as the "Act") to public officials' and employees' email messages and text messages. This opinion explains the Public Records Act's requirements with respect to these types of records.

### II. Brief Answer

The Public Records Act requires disclosure of email and text messages that concern City business unless a particular message or portion of a message is exempt from disclosure under applicable law (e.g. attorney-client privilege, privacy laws).

### III. Analysis

#### A. California Public Records Act

The California Public Records Act requires that public entities disclose information and records "concerning the conduct of the people's business" upon a request by any member of the public. (Cal. Govt. Code §6250, et seq.) The Act defines "public records" as follows:

> "Public records" includes *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* ... (Cal. Govt. Code 6252(e).) (Emphasis added.)

Email and text messages relating to the conduct of the public's business are writings and, therefore, within the Act's definition of "public records" and subject to disclosure upon request by any member of the public.

In addition to emails and texts on city equipment, we have concluded that writings related to the business of a public entity on an official's private computer and cell phone are subject to disclosure under the Act.[1] The Act does not limit the public's right to access writings concerning the public's business to writings on city equipment.

B. Exemptions from Disclosure

The Act identifies specific grounds for public entities to withhold public records. (See, Cal Govt. Code §6254.) The Act declares a strong public policy in favor of disclosure; therefore, "exemptions are construed narrowly, and the burden is on the public agency to show that the records should not be disclosed." *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476 *citing San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 773.)

Examples of exemptions that might apply to requests for text messages and emails are the privacy, attorney-client and "deliberative process privilege" exemptions.

The "deliberative process privilege" protects writings reflecting the deliberative or policy-making process of officials. This exemption arises out of cases interpreting the "catchall" provision of the Act, which authorizes withholding if the "public interest served by not disclosing . . . clearly outweighs the public interest served by disclosure . . ." (Cal. Govt. Code §6255(a).) The key issue for the courts is "whether disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (*Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1143.) [2]

Under the legal standard of review, the courts determine whether the City has demonstrated that the public interest that would be served by withholding the texts/emails clearly outweighs the public interest that disclosure would serve.[3]

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[1] City and County of San Francisco and City of San Jose also take this position.

[2] In *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, the California Court of Appeals held: 1) that applications submitted to the governor for employment on various boards reflected his deliberative process, and 2) that he met the balancing test to withhold because confidentiality was necessary to assure candidates would answer questions on the forms candidly. Also, see, *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, in which the California Court of Appeals held that the phone numbers on council members' telephone bills were exempt from disclosure under the deliberative process privilege because disclosure would have been "the functional equivalent of revealing the substance or direction of the judgment and mental processes of the city council members. Moreover, routine public disclosure of such records would have interfered with the flow of information to the council members and intruded on the deliberative process." *Id.* at 479-480.

[3] Cal. Govt. Code §6255, states

## IV. Conclusion

Email and text messages related to City business on City employees' or City officials' computers and cell phones are public records that are subject to disclosure under the Public Records Act unless an exemption applies. If an employee or official wishes to withhold a message or portion of a message, this Office will advise whether there is a legal basis for doing so.

Very truly yours,

BARBARA J. PARKER
City Attorney

Attorney Assigned:
Doryanna M. Moreno

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(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.
(b) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.