LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL

21800 Cactus Avenue, Riverside, CA 92518
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

March 2017

USING PERSONAL DEVICES TO COMMUNICATE WORK INFORMATION MAY OPEN THEM TO PUBLIC INSPECTION

By: Michael P. Stone, Esq.

The eagerly anticipated decision by the California Supreme Court on whether communications about government matters sent through a public official's personal email account are subject to disclosure under the Public Records Act (PRA) was issued on March 2, 2017 (City of San Jose v. Superior Court, No. S218066). In holding that the PRA covers communications on an employee's personal device or account, the Court affirmed that under the California Constitution, people have a right to access such information held by the government. Recognizing that, in today's environment, not all employment-related activity occurs during a conventional workday or in an employer-maintained workplace, the Court held the public's right to information must be balanced against individual privacy rights.

This firm been inundated with questions about what this decision might mean for officers who use their personal phones for work related business, either as required by department policy, or by personal preference.

When this case was argued, it was feared that agencies would demand the surrender of employees' electronic devices and passwords to their personal accounts, in order to search for documents subject to disclosure under the PRA. To allay such fears, the Supreme Court offered some guidance about how to strike the balance between individual privacy and disclosure.

For requests seeking public records held in employees' non-governmental accounts or devices, the Supreme Court noted that 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."

The Supreme Court also noted that agencies should adopt policies that will reduce the likelihood of public records being held (solely) in employees' private accounts. For example, it was suggested "agencies might require that employees use or copy their government accounts for all communications touching on public business." Employees of federal agencies are currently prohibited from using their personal electronic accounts for official business unless those messages are copied or forwarded to an "official" account. This is an excellent suggestion which should be adopted by all officers - even if their agency does not have a policy requiring them to do so. If such action is taken, then there will be no need for an officer (or his or her department) to search through their personal accounts or devices, because

any work-related communications will already be on their agency account.

Nothing in the Court's decision permits a department to engage in a "fishing expedition" - allowing it to troll an officer's personal accounts and devices searching for work related material. If, following the Supreme Court decision, your agency requests, or even requires, that you turn over your personal phone or other electronic device - it is unlikely such request relates to a search for PRA material. In that case, it is probably you who is under investigation, and your union representative or an attorney should immediately be contacted for advice on how to proceed.

These are only a few answers to a few questions. Shortly, we will issue a supplemental opinion memo based on further research and analysis. Until then, please send us your questions and we will include those concerns in our supplemental opinion.

Stay Safe!

Michael P. Stone *is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney.*