



**CITY of CALABASAS**

**CITY COUNCIL AGENDA REPORT**

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**DATE:** SEPTEMBER 1, 2020

**TO:** HONORABLE MAYOR AND COUNCILMEMBERS

**FROM:** SCOTT H. HOWARD, CONTRACT CITY ATTORNEY  
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COLANTUONO HIGHSMITH & WHATLEY, PC

**SUBJECT:** AMENDMENT TO THE CITY COUNCIL PROTOCOLS ADOPTING A CITY  
POLICY REGARDING THE CITY COUNCIL'S USE OF ELECTRONIC  
COMMUNICATIONS

**MEETING  
DATE:** SEPTEMBER 9, 2020

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**SUMMARY RECOMMENDATION:**

Staff recommends City Council consider adopting an amendment to the City Council protocols regarding the City Council's use of electronic communications.

**REPORT:**

**CALIFORNIA PUBLIC RECORDS ACT**

The California Public Records Act ("CPRA") requires disclosure of public records upon request. A public record "includes [1] any writing [2] containing information relating to the conduct of the public's business [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The CPRA is interpreted broadly to promote the public's access to government information.

## SUPREME COURT'S RULING

In March 2017, the California Supreme Court published its decision in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608 ("San Jose Decision") concluding the CPRA applies to electronic communications that City officials and employees send on private devices from private accounts. The Court analyzed the statute's definition of "public record" and held, "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." (*Id.* at p. 629.) "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." (*Id.* at p. 625.)

The Court acknowledged electronic communications on private devices and servers blur the line between personal and public business. The Court clarified that an electronic communication does not become a public record just because the public finds it interesting. At a minimum, the communication must relate in some substantive way to the conduct of the public's business. "Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records." (*Id.* at pp. 618-619.)

Whether a communication is subject to the CPRA turns on factors "including (1) the content itself, (2) the context in, or purpose for which, it was written, (3) the audience to whom it was directed, and (4) whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment." (*Id.* at p. 618.) The City Attorney's Office concludes that both electronic mail and text messages may potentially be disclosable public records. For example, an email to a spouse complaining about a coworker would likely not be a public record, whereas an email to a superior reporting a coworker's mismanagement would be. Comparably, a constituent's email to a councilmember concerning a City-related matter, regardless of the constituent's expectation of privacy, is likely a public record. In contrast, phone logs and voicemails are not disclosable public records as phone logs are protected by the deliberative process privilege (*Rogers v. Superior Court of Los Angeles, City of Burbank* (1993) 19 Cal.App.4th 469, 479) and voicemails are ephemeral documents not intended to be retained in the ordinary course of business.

## RECORDS RETENTION

State law requires the City to retain public records for a specific period of time. The City adopted a revised records retention schedule on June 12, 2019, listing different types records, how long each type must be stored, and under what statute. Under the revised records retention schedule, emails must be retained for at least two years.

## CITY'S CURRENT PRACTICE

The City's current, uncodified practice is to allow the use of personal accounts for electronic communications only if the electronic communications are stored for a minimum of two years and the account holder agrees to search the account (or allow the City to do so) when necessary to comply with records requests. Searches of personal accounts may be conducted by the owner, if he or she has undergone CPRA training to be able to identify a public record, or City staff. The existing practice has a number of shortcomings, including that it is more cumbersome and invasive because searches in response to records requests may capture both relevant/public and irrelevant/private documents.

## NEIGHBORING CITIES' CURRENT PRACTICES

Staff reviewed the current electronic communication policies of three neighboring cities: (1) Malibu, (2) Westlake Village, and (3) Hidden Hills. The City of Malibu's electronic communication policy requires councilmembers who are provided a city-issued device to use that device for city business and avoid using their personal devices. Emails from third parties must be forwarded to a councilmember's city-issued email address and persons contacting a councilmember should be advised of the preference for all city business to be done through the councilmember's email account.

The City of Westlake Village has no formal electronic communication policy. Some councilmembers use personal devices to conduct city business, and other councilmembers use city-issued devices. Similarly, the City of Hidden Hills has no such formal policy. Councilmembers are only provided a city-issued email address, and Hidden Hills does not offer its councilmembers city-issued devices.

## CITY ELECTRONIC MAIL ACCOUNTS

In Calabasas, the City issues an electronic mail account to each City Councilmember at the start of his or her term. These official email addresses are routinely searched upon the City Clerk's receipt of a public records request under the CPRA. Limiting the City Council's use of electronic mail communication to the City-issued email addresses may facilitate the search for records responsive to requests under the CPRA and avoids the need for potentially invasive searches of City Councilmembers' personal accounts, as those accounts will no longer be used for City business and thus not contain public records.

On August 11, 2020, the Commission Procedures/Council Protocols City Council Subcommittee met to discuss whether to restrict the use of personal devices and retain text messages. The Subcommittee advised staff to prepare an amendment to the City Council Protocols regarding the City Council's use of electronic

communications, which includes the use of city-issued electronic mail addresses and devices. The proposed amended City Council protocols provide the City Council with two options regarding the use of City-issued devices, reflecting a split recommendation from the Commission Procedures/Council Protocols Subcommittee as to text messages.

**Emails.** The Commission Procedures/Council Protocols Subcommittee unanimously recommends that the City Council adopt a policy requiring all Council Members to use City-provided email accounts for City business. This is included as Item #16 on Page 11 of the proposed amended City Council protocols. If adopted, the City would then respond to any future California Public Records Act request for electronic mail communications by searching the applicable Councilmember's official electronic mail address.

**Text Messages.** The Commission Procedures/Council Protocols Subcommittee has a split recommendation as to text messages. The first option is for the City to provide each Council Member with a telephone and then require that all text messages related to City business be sent and received through that City device and account. If adopted, this approach means that the City would then respond to any future California Public Records Act request for text messages by searching the applicable Councilmember's official device and account. The second option is for the City to offer Council Member's a choice – either receive a City device, then records searches proceed as per Option One, or else continue to allow Council Member's to use their personal devices for City related text messages. If a Council Member chose to use their personal devices for City related text messages, then the City would respond to a records request by asking the Council Member to search their device and provide any responsive, non-exempt records. The two options are reflected within as Item #17 on Page 12 of the proposed amended City Council protocols. In evaluating the options, staff recommends that the City Council consider Option One, if the Council goal is to reduce the time and costs incurred in responding to public records requests. Whether to adopt Option One or Option Two is a policy decision for the City Council.

**Fiscal Impact.** Council Members are already provided City email accounts, thus requiring exclusive use of those accounts for City business would not incur any additional costs. Providing Council Members a City-issued telephone for City related calls, emails, and text messages would incur some additional costs, estimated to be \$250 per month for five telephone lines, plus an additional approximately \$2,500 in one time costs to purchase five telephones, which can be accommodated within the present budget.

**ATTACHMENT:**

Proposed Amended City Council Protocols