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California Ruling Exempts Personal Devices From Open Records Laws - Will It Stand?

A California appeals court ruled last month that emails and other forms of electronic communication about public business are not subject to the state's Public Records Act if they're conducted on a private computer or device. But the decision's impact on government transparency policies may cause aftershocks well beyond the Golden State's borders.

The 6th District Court of Appeal in San Jose's March 27 opinion gives elected officials and government employees a free pass to conduct public business in secret on their own devices. And with other states grappling with data retention and transparency issues, the decision could serve as a model to pull back on open government efforts over the last several years.

Peter Scheer, executive director of the First Amendment Coalition, a nonprofit group that advocates for free speech and open government, explained that public records laws are built on a presumption that when writing or communicating about government business, that speech is public record. There are exemptions that address policy considerations that justify confidentiality at times, but it's generally accepted that government communications can be requested by the average citizen.

"This goes way beyond that," Scheer said, referring to the 6th District's decision. "This simply creates a whole new parallel channel of communication which is totally untouched and unregulated and is outside of the freedom of information system and rules we have."

The 6th District Court of Appeal's ruling overturned a lower court decision that would have enabled a citizen to obtain messages sent on private devices through private accounts of the San Jose mayor and city council members. The California Supreme Court may take up the case, but if it doesn't, the 6th District's decision would stand, creating a precedent for similar situations in the future.

Emily Shaw, national policy manager for the Sunlight Foundation, a nonprofit organization that favors government transparency, agreed with Scheer and felt the court's decision was troublesome. She added that in every state's public records law, private devices are either subject to records requests, or the states haven't yet ruled on the issue. The California ruling puts the state in an entirely separate category, which could lead to big problems down the road.

"If California leads the way in saying that using private hardware means that the public no longer has access to those records, then it will be a very serious reduction in the amount of substantive information that people can access through the state's public records law," Shaw said. "Not necessarily because it's not happening already and we just have difficulty in capturing it, but it would … create a big loophole."

Chuck Thompson, general counsel and executive director of the International Municipal Lawyers Association, said the situation in California was hard to judge because all states have slightly different open records laws. But he said the appeals court decision "does seem to conflict" with the laws other states have on the books.

TECHNOLOGY OUTPACING THE LAW

Many state public records laws were written based on written communications – documents before, or at the very outset of, the digital age. For years it was generally accepted that verbal discussions occur every day in local and state government offices that aren't entered into the public record.

But as technology has advanced and somewhat blurred the lines of communication, some have proposed that serious changes need to be considered. Thompson noted that in the past, people who requested a public document would get a copy of that document – not the fingerprints on the original document, but a copy of the original. Now, however, people ask for the metadata associated with an electronic document, which has spurred debate on whether government agencies need to archive and release that information as well.

Texting is another example of a means of communication that has polarized public records discussion. Maine Gov. Paul LePage has been scrutinized over the past few weeks for outlawing text messaging as a means to do state business. While state employee text messages in Maine about public business are subject to the state's Freedom of Access Act, the messages aren't stored by state servers and almost impossible to recover.

The decision to ban texting was made after a former employee of the Maine Center for Disease Control and Prevention was allegedly told by supervisors to use texts to communicate because they couldn't be obtained to fulfill public-records requests. But not everyone believes that was the right move.

One state CIO who wished to remain anonymous, told *Government Technology* last week that while text messaging was "writing," it arguably had more in common with telephone calls and verbal conversations made by public officials every day that aren't entered into the public record. For states – and local governments – that allow texting, the idea that text messages should be retained for public records requests comes with a potentially huge expense.

Thompson believes there are a number of additional issues that states need to consider that could become public record law nightmares. He pointed to cloud storage and the federal communications storage laws and how they may impact future public requests for information.

For now, however, government agencies and municipal attorneys are left waiting to see if the California Supreme Court steps in to tackle the private device question.

"I think it will take up the issue [but] it might not take up this case, because it may want to wait and see if other courts of appeal in California decide the issue differently," Scheer said. "But I do think that the issue ultimately will be decided in the state supreme court."

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