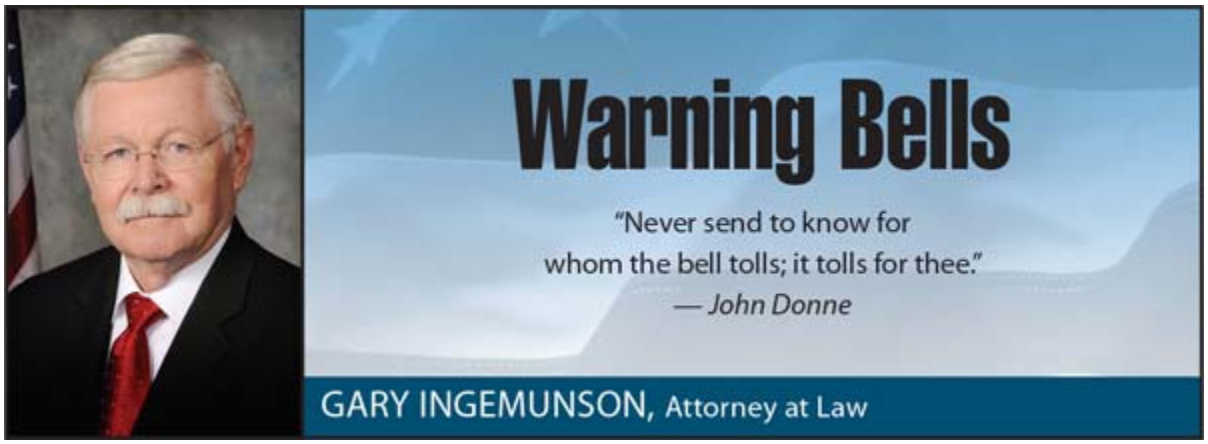

Another reason not to use your personal cellphone for work

On March 2, 2017, the California Supreme Court gave police officers another reason to leave their personal cellphones in the locker when they suit up and head out to the streets. Now your personal cellphone might be subject to a California Public Records Act (CPRA) request along with being subjected to subpoenas for criminal and civil cases.

In 2009, Ted Smith, a community activist in San Jose, thought there might be some shenanigans going on within city government about a proposed downtown development. He filed a public records request for all documents concerning communications between city officials regarding this issue. The city coughed up a bunch of documents but balked when Smith wanted text messages from city employees' private cellphones. Eight years later, we have the California Supreme Court case of *The City of San Jose v The Superior Court of Santa Clara County*, S218066. Ted Smith will get his messages.

This case isn't limited to cellphones. If you use your private iPad, personal computer or any other personally-owned electronic devices for City business, they are also included. Why? According to the Supreme Court, government transparency pretty much trumps employee privacy.

"Openness in government is essential to the functioning of a democracy," the court said. Accountability requires that individuals have access to government files. "Such access permits checks against the arbitrary exercise of official power and secrecy in the political process."

The Supreme Court did recognize that there are privacy rights, even for public employees. As with other clashes of government versus private interests, it becomes a balancing test.

The CPRA is a set of statutes that establishes the disclosure of public records upon request to any member of the public who makes the request in writing. 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. There are exceptions named in the statute, such as medical records, security files, tax information and many other things. However, everything is disclosable that is not protected by statute.

When deciding what is protected, the Supreme Court is bound by an amended California Constitution section that states that courts shall "broadly" construe when the decision furthers the people's right of access and to "narrowly" construe when it limits the right of access. This resulted in the Court's extension of access to personal cellphones.

So what is a "writing" in the 21st century? It was easy to define in the good ole days. It happened on paper. Now it includes electronic communications. So text messages, recordings, emails, etc. all fit the definition of a "writing."

When do your cellphone texts or emails become related to the conduct of the public's business? The court said that to qualify as a public record, it must "contain information relating to the conduct of the public's business…and generally any record kept by an officer because it is necessary or convenient to the discharge of his official duty is a public record." The Supreme Court gives us an example that is specifically helpful to police officers. If you text a spouse that your co-worker is an idiot, that would not be a public record. However, if you text or email a superior reporting a co-worker's mismanagement of an agency project, that might well be a public record subject to release.

A court will look at the content of the writing, the writing's context, the purpose for which it was written, the audience to whom it was directed and whether the writer was acting or purporting to act within the scope of their employment. It must relate in some substantive way to the conduct of the public's business. It does not 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."

Here is the bad news that the Supreme Court declared: "A writing prepared by a public employee conducting agency business has been 'prepared by' the agency within the meaning of section 6252, subdivision (e), <u>even if the writing is prepared using the employee's personal account</u>." Therefore, it is subject to disclosure. Furthermore, the public record does not lose its character just because the official takes it out the door. Being retained by the employee, even if in an employee's personal account, is the same as being retained by the agency.

Be aware that the court will look at content, not whether you were at work or not. So, the issue is not whether you were on duty. The issue is whether you created a public record. You can be at home when you create the text or email that is required to be disclosed.

What happens if a citizen files a CPRA request for emails and texts about a project that you were involved in? Does the Department get to now summon you in and wander through your private cellphone to comply with the search for documents demanded in the CPRA request? "Searches can be conducted in a manner that respects individual privacy," the Court said.

How does the Department do that? The Department is required to disclose all records that they can locate "with reasonable effort." Reasonable efforts, however, do not require extraordinarily extensive or intrusive searches. The Supreme Court gives guidance. The Department should communicate the request to the employee in question. "The agency may then reasonably rely

on these employees to search their own personal files, accounts and devices for responsive material," the Court said. The employees can submit an affidavit with sufficient facts to show that the information they have is not a public record.

Guess what will happen to you if it later turns out that the text or email on your phone was a public record that you did not disclose? Stand by for the ram!

There is an easy way out. *Never* conduct public business on your personal electronic equipment. By the way, if you do have a Department-issued cellphone, recognize that the Department has full access to it. *Never* conduct personal business on Department-issued electronic equipment. If you follow these two rules, for you, the Supreme Court case will be irrelevant.

Be legally careful out there.

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