



AGENDA
EXECUTIVE COMMITTEE MEETING
FRIDAY, JUNE 2, 2017 – 9:00 A.M.
OMNITRANS
1700 WEST FIFTH STREET
SAN BERNARDINO, CA 92411

The meeting facility is accessible to persons with disabilities. If assistive listening devices or other auxiliary aids or Limited English Proficiency services are needed in order to participate in the public meeting, requests should be made through the Board Secretary at least three (3) business days prior to the Committee Meeting. The Board Secretary’s telephone number is 909-379-7110 (voice) or 909-384-9351 (TTY). If you have comments about items on the agenda or other general concerns and are not able to attend the meeting, please mail them to Omnitrans at 1700 West Fifth Street, San Bernardino, California, Attention Board Secretary. Comments may also be submitted by email to BoardSecretary@omnitrans.org.

THIS MEETING IS AVAILABLE BY TELECONFERENCE AT THE FOLLOWING LOCATION AND WILL BE CONDUCTED IN ACCORDANCE WITH GOVERNMENT CODE SECTION 54953(B).

CITY OF CHINO HILLS, 14000 CITY CENTER DRIVE, CHINO HILLS, CA 91709

THIS LOCATION IS ACCESSIBLE TO THE PUBLIC AND MEMBERS OF THE PUBLIC MAY ADDRESS THE COMMITTEE FROM THIS TELECONFERENCE LOCATION.

A. CALL TO ORDER

B. ANNOUNCEMENTS/PRESENTATIONS

1. Next Committee Meeting: July 7, 2017 – 9:00 a.m.
Omnitrans Metro Facility

C. COMMUNICATIONS FROM THE PUBLIC

This is the time and place for the general public to address the Board for items that are not on the agenda. In accordance with rules applicable to meetings of the Executive Committee, comments on items not on the agenda and on items on the agenda are to be limited to a total of three (3) minutes per individual.

D. POSSIBLE CONFLICT OF INTEREST ISSUES

N/A

E. DISCUSSION ITEMS

- | | |
|---|----|
| 1. Approve Executive Committee Minutes – February 3, 2017 and Special Executive Committee Minutes – February 15, 2017 | 2 |
| 2. Recommend to the Board of Directors, Revised Fiscal Year 2017-2018 Annual Budget | 8 |
| 3. Review New Policy - Electronic Communications | 10 |

F. BOARD BUSINESS

There is no Closed Session scheduled.

G. REMARKS AND ANNOUNCEMENTS

H. ADJOURNMENT



1700 W. Fifth St.
San Bernardino, CA 92411
909-379-7100
www.omnitrans.org

ITEM # E1

**EXECUTIVE COMMITTEE MEETING
MINUTES
FEBRUARY 3, 2017**

A. CALL TO ORDER

The Executive Committee Meeting was called to order by Chair Sam Spagnolo at 9:00 a.m., Friday, February 3, 2017 at the Omnitrans Administrative Offices.

COMMITTEE MEMBERS ATTENDING

Mayor Pro Tem Sam Spagnolo, City of Rancho Cucamonga – Board Chair
Council Member Ron Dailey, City of Loma Linda – Board Vice Chair
Council Member Ed Graham, City of Chino Hills – via Teleconference
Council Member Penny Lilburn, City of Highland
Council Member John Roberts, City of Fontana
Council Member Alan Wapner, City of Ontario – via Teleconference

OTHERS ATTENDING

Haviva Shane, General Counsel

OMNITRANS STAFF ATTENDING

P. Scott Graham, CEO/General Manager
Vicki Dennett, Senior Executive Assistant to CEO/General Manager

B. ANNOUNCEMENTS/PRESENTATIONS

Next Committee Meeting: Friday, March 3, 2017, 9:00 a.m.
 Omnitrans Metro Facility

C. COMMUNICATIONS FROM THE PUBLIC

There were no communications from the public.

D. POSSIBLE CONFLICT OF INTEREST ISSUES

There were no Conflict of Interest Issues.

E. DISCUSSION ITEMS

1. Approve Executive Committee Minutes – December 7, 2016

M/S (Graham/Lilburn) that approved the Executive Committee Minutes of December 7, 2016. Roll call vote was taken and the motion was unanimous by Members present.

2. Receive and File Governance Structure and Liability Review presented by Omnitrans Legal Counsel

General Counsel Haviva Shane reviewed the Governance Structure and Liability Review specifically as it relates to liability of the member agencies. It is her understanding that the Joint Powers Agreement (JPA) was recently amended due to concerns from the member agencies regarding the Redlands Passenger Rail Project (RPRP) and other rail projects Omnitrans will be operating and the potential risk to the member agencies.

Ms. Shane explained that under the JPA there are two types of liability; 1) Contractual Liability and 2) Tort Liability. She stated that in her opinion, the JPA covered the member agencies from any contractual liability to the full extent possible. Ms. Shane further explained that in regards to the Tort liability, by law, all member agencies in the JPA could be subject to liability incurred by Omnitrans in the event that Omnitrans' insurance could not sufficiently cover the damages. Ms. Shane defined Tort liability as "an injury caused due to negligent or wrongful acts." She stated that this scenario, although highly unlikely, was the only situation where the member agencies would be at risk of any liability.

Member Dailey arrived at 9:06 a.m.

Ms. Shane explained that Omnitrans was working with San Bernardino County Transit Authority (SBCTA) to ensure that Omnitrans has sufficient insurance coverage once the rail operations begin. She noted that the Fast Act for rail accidents capped the passenger liability at \$295 million. Ms. Shane explained that the only way for the member agencies to be exempt from any liability is to change the structure from a JPA and create legislation to form a Special District.

The Board engaged in a discussion regarding the pros and cons of operating as a JPA versus a Special District.

Member Wapner expressed his support for pursuing legislation to form a Special Transit District. He suggested that Omnitrans Legal Counsel work with SBCTA's Department of Government Affairs to seek legislative authority since SBCTA has already gone through the process.

The Board discussed a potential "Spot Bill" that may be available.

Ms. Shane stated that some language had been previously drafted for Omnitrans on this subject that perhaps could be updated in order to move the legislation forward if the Board so desires.

The legislative calendar was discussed and the consensus was to seek a sponsor while concurrently work on the language of the potential legislation. The item will then be brought back before the Executive Committee prior to being presented to the full Board.

F. BOARD BUSINESS

There was no Closed Session.

G. REMARKS AND ANNOUNCEMENTS

Member Wapner had previously expressed interest in the idea of forming a Rail Subcommittee to work on the implementation of the RPRP. He asked that this item be added to the next Executive Committee agenda for discussion.

H. ADJOURNMENT

The Committee adjourned at 9:30 a.m. The next Executive Committee Meeting is scheduled Friday, March 3, 2017, at 9:00 a.m., with location posted on the Omnitrans website and at the Omnitrans San Bernardino Metro Facility.

Prepared by:

Araceli Barajas, Executive Staff Assistant

ITEM # E1

**SPECIAL EXECUTIVE COMMITTEE MEETING
MINUTES
FEBRUARY 15, 2017**

A. CALL TO ORDER

The Executive Committee Meeting was called to order by Chair Sam Spagnolo at 9:06 a.m., Wednesday, February 15, 2017 at the Omnitrans Administrative Offices.

COMMITTEE MEMBERS ATTENDING

Mayor Pro Tem Sam Spagnolo, City of Rancho Cucamonga – Board Chair
Council Member Ron Dailey, City of Loma Linda – Board Vice Chair
Council Member Penny Lilburn, City of Highland
Council Member John Roberts, City of Fontana
Council Member Alan Wapner, City of Ontario

COMMITTEE MEMBERS ABSENT

Council Member Ed Graham, City of Chino Hills

OTHERS ATTENDING

Haviva Shane, General Counsel
Kevin Kane, Victor Valley Transit Authority
Otis Greer, San Bernardino County Transit Authority
Nancy Strickert, San Bernardino County Transit Authority
Louis Vidaure, San Bernardino County Transit Authority
Andrea Zureick, San Bernardino County Transit Authority

OMNITRANS STAFF ATTENDING

P. Scott Graham, CEO/General Manager
Vicki Dennett, Senior Executive Assistant to CEO/General Manager

B. ANNOUNCEMENTS/PRESENTATIONS

Next Committee Meeting: Friday, March 3, 2017, 9:00 a.m.
 Omnitrans Metro Facility

C. COMMUNICATIONS FROM THE PUBLIC

There were no communications from the public.

D. POSSIBLE CONFLICT OF INTEREST ISSUES

E. DISCUSSION ITEMS

1. Status of Legislative Efforts Regarding Spot Bill and Review of Draft Omnitrans Special Transit District Legislation

General Counsel Haviva Shane presented this item. At the last Executive Committee Meeting held on February 3, 2017, the Committee discussed the idea of Omnitrans creating special legislation to form a Transit District or some type of legislative entity as a way to protect the member entities in the Joint Powers Agreement (JPA) from any liability incurred by Omnitrans. The direction from the Committee was to seek a sponsor for a Spot Bill while concurrently work on the language for the potential legislation.

Ms. Shane stated that after the Committee's comments, she revised a previously drafted legislation prepared for Omnitrans by Best Best & Krieger (BB&K). She also stated that BB&K's lobbyist was able to get Assemblymember Marc Steinorth to support the Spot Bill and "Put across the desk" if the Board chooses to move in that direction. She added that someone will need to author the bill; however the February 17, 2017 deadline could still be met.

Director Wapner suggested taking a bipartisan approach and perhaps Assemblymember Marc Steinorth and Assemblymember Freddie Rodriguez co-author the bill.

The Committee engaged in a discussion regarding San Bernardino County Transportation Authority's (SBCTA) concern with Omnitrans operating as a Special District with taxation authority as it may conflict with SBCTA efforts to proposed tax measures.

P. Scott Graham mentioned that the Amended JPA currently provides Omnitrans the taxation authority.

Director Wapner stated that the primary focus is to relieve the member agencies from liability that could affect them through the JPA, especially with Omnitrans getting ready to take on the Operation and Maintenance of the Redlands Passenger Rail Project (RPRP). He recommended that the draft legislation language be simplified.

Chair Spagnolo recommended that the draft legislation be moved forward to the Board for discussion at their March meeting. The committee agreed and the item would be presented to the Board in March.

F. BOARD BUSINESS

There was no Closed Session.

G. REMARKS AND ANNOUNCEMENTS

There were no remarks or announcements.

H. ADJOURNMENT

The Committee adjourned at 8:29 a.m. The next Executive Committee Meeting is scheduled Friday, March 3, 2017, at 9:00 a.m., with location posted on the Omnitrans website and at the Omnitrans San Bernardino Metro Facility.

Prepared by:

Araceli Barajas, Executive Staff Assistant

ITEM # E2

DATE: June 2, 2017

TO: Board Chair Sam Spagnolo and Members of the Executive Committee

THROUGH: P. Scott Graham, CEO/General Manager

FROM: Maurice Mansion, Treasury Manager

SUBJECT: REVISED FISCAL YEAR 2017-2018 ANNUAL BUDGET

FORM MOTION

Recommend to the Board of Directors approval of the Revised Fiscal Year 2017-2018 Annual Budget replacing the \$554,434 Low Carbon Transit Operation Program (LCTOP) funding with Local Transit Funds (LTF).

The Fiscal Year 2017-2018 Annual Budget was reviewed by the Administrative and Finance Committee at its April 13, 2017 meeting, and approved by the Board of Directors at its May 3, 2017 meeting with the exception of the LCTOP funds.

BACKGROUND

Omnitrans' original FY 2017 – 2018 operating budget presented to the Administrative and Finance Committee, and subsequently the Board of Directors included \$854,435 in LCTOP funds from the California Department of Transportation (Caltrans) for FY 2015 - 2016.

Omnitrans' FY2015 – 2016 LCTOP project fund allocations and current balances are as follows:

	<u>Allocation</u>	<u>Spent</u>	<u>Balance</u>
1. Freeway Express Service Exp. (Rte. 208)	\$ 300,000	\$0	\$300,000
2. Omnitrans Rte. 290 Pilot Program Exp.	\$ 591,285	\$591,285	\$0
3. Ontario Airport Shuttle Service Pilot	<u>\$ 554,435</u>	\$0	<u>\$554,435</u>
Total	<u>\$1,445,720</u>		<u>\$854,435</u>

After discussions with the San Bernardino County Transportation Authority (SBCTA) staff, it was determined since the Rte. 290 Pilot Program Expansion was implemented and in service, the \$554,435 in LCTOP funding for the Ontario Airport Shuttle should be used to continue the project. Staff was unaware at the time that a reallocation through SBCTA was required to redirect the funds. Consequently, Omnitrans will utilize the existing LTF for the Rte 209 expansion.

RECOMMENDATION

Recommend to the Board of Directors approval of the Revised Fiscal Year 2017-2018 Annual Budget replacing the \$554,434 LCTOP funding with LTF.

PSG:MM

ITEM # E3

DATE: June 2, 2017

TO: Executive Committee Chair and Members of the Executive Committee

THROUGH: P. Scott Graham, CEO/General Manager

FROM: Haviva Shane, General Counsel

**SUBJECT: NEW POLICY:
ELECTRONIC COMMUNICATIONS**

FORM MOTION

Provide direction to Omnitrans' General Counsel Haviva Shane regarding proposed electronic communications policy, and forward policy to Administrative and Finance Committee for review.

BACKGROUND

The California Supreme Court issued a decision in *City of San Jose v. Superior Court* on March 2, 2017 holding that electronic communications stored on the private, nongovernmental accounts of local agency officials could be considered "public records" and subject to disclosure under the Public Records Act ("the Act").

The court held that when an official or employee of a local agency owns, uses or retains communications that qualify as a "public record" on their private devices, that activity is attributable to the agency. (Thus, an e-mail sent to a local agency official or employee and used or retained by the official or employee, even though not prepared by an official or employee, can be a "public record.") The court rejected the idea the agency had to have actual or constructive possession of the communication. The court concluded that a public record does not lose its status as such because it is located in an employee's personal account, and that a writing has been "retained" by the agency even if the writing is located in the employee's personal account.

The court held that a communication can be a "public record" at the instant that it is prepared by or received and used or retained by a local agency official or employee and its location or where it is found has no effect on its status as a "public record."

The court's recognition that electronic communications can constitute "public records" and its further guidance that such a determination is made at the moment the record is prepared, used or retained by a local agency official or employee implicates an agency's public records disclosure and retention obligations and policies.

DISCUSSION

In its opinion, the court discussed policies local agencies might consider to ensure compliance with the Act given its decision. One potential policy is requiring an official or employee who has no responsive records or who refuses to disclose “contested” records to provide an affidavit to permit the agency, and a court should litigation ensue, to determine, whether there is a sufficient factual basis to withhold documents. For example, either the documents are non-responsive or exempt from disclosure under the Act. Such an affidavit would include information on the nature and extent of the search conducted, the results of the search and the nature of the records found that are “contested” and specification the exemption(s) from disclosure under the Act.

The court also urged local agencies to adopt policies to “reduce the likelihood of public records being held in an employee’s private account.” The court wrote: “For example, agencies might require that employees use or copy their governmental accounts for all communications touching on public business” (as required by federal agency employees to ensure compliance with FOIA).

General Counsel’s office has provided a draft policy aimed at addressing concerns raised by the *San Jose* case. The draft policy is included with this agenda item for consideration and discussion by the Executive Committee. As currently drafted, the policy pertains only to staff. However, the court’s decision also implicates records held on devices of the legislative body. Therefore, General Counsel also suggests discussion of whether all or parts of the policy should also apply to Board members.

ELECTRONIC COMMUNICATIONS POLICY

POST SAN JOSE

Background and Purpose

The Omnitrans Board of Directors as the legislative body of Omnitrans hereby adopts the following policy regarding the conduct of Omnitrans' business via electronic communications by employees. Specifically, this policy is adopted in light of the City of San Jose case, which held that a city employee's communications related to the conduct of public business do not cease to be public records under the California Public Records Act, simply because they were sent or received using a personal account or personal device.

Existing and emerging electronic communications technologies have become an integral part of the ability of Authority staff members to efficiently and effectively conduct Authority business. Such technology has the potential to enhance communications with the public and provide a higher level of service to the citizens of the Authority. However, with such technology in the work environment, the Authority must ensure it continues to meet its legal obligations with respect to transparency in the conduct of the people's business, including in the area of public records disclosure and retention requirements. To that end, the following protocol will be followed.

Definitions

For purposes of this policy, the following definitions apply:

“Authority” means the Omnitrans Joint Powers Authority.

“Authority employee” shall mean any employee of the Authority.

“Authority business” shall be construed broadly to mean information relating to the conduct of the public's business or communications concerning matters within the subject matter of the Authority's jurisdiction, including, but not limited to, pending or potential Authority projects, past or prospective Authority agenda items, or Authority budgets or expenditures involving Authority funds. Resolution of the question will involve an examination of several factors, including: (a) the content itself; (b) the context in, or purpose for which, it was written; (c) the audience to whom it was directed; (d) the purpose of the communication; and (e) whether the writing was prepared by an Authority employee acting or purporting to act within the scope of his or her employment.

“Electronic communications” includes any and all electronic transmission, and every other means of recording upon any tangible thing in any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. Without limiting the nature of the foregoing, “electronic communications” include e-mails, texts, voicemails, and also include communications on or within commercial applications (apps) such as Facebook Messenger, Twitter, WhatsApp, etc.

“Electronic messaging account” means any account that creates, sends, receives or stores electronic communications.

Policy/Protocols

1. All Authority employees shall be assigned an Authority electronic messaging account.
2. Authority accounts shall be used to conduct Authority business. Authority employees shall not use personal accounts for the creation, transmission or storage of electronic communications regarding Authority business.
3. All Authority employees shall, within 15 days following the adoption of this policy, search all private, nongovernmental electronic messaging accounts to which they have user access and locate any electronic communications that might constitute a “public record”, because it involved “Authority business”, as set forth above. All such communications shall be forwarded to the Authority employee’s Authority-provided account. To the extent the Authority employee believes that any part of such communications contain personal matter not related to the conduct of the public’s business, the Authority employee shall provide a declaration, as set forth in paragraphs 10 and 11, below.
4. The Authority account, along with the attendant access to the Authority’s account server, are solely for the Authority and Authority employee’s use to conduct Authority business and shall not be used for personal business or political activities. Incidental use of Authority electronic messaging accounts for personal use by Authority employees is permissible, though not encouraged.
5. If an Authority employee receives an electronic message regarding Authority business on his/her non-Authority electronic messaging account, or circumstances require such person to conduct Authority business on a non-Authority account, the Authority employee shall either: (a) copy (“cc”) any communication from an Authority employee’s personal electronic messaging account to his/her Authority electronic messaging account; or (b) forward the associated electronic communication to his/her Authority account no later than 10 days after the original creation or transmission of the electronic communication.
6. Authority employees shall endeavor to ask persons sending electronic communications regarding Authority business to a personal account to instead utilize the Authority employee’s account, and likewise shall endeavor to ask a person sending an electronic communication regarding non-Authority business to use the Authority employee’s personal or non-Authority electronic messaging account.
7. Authority employees understand they have no expectation of privacy in the content of any electronic communication sent or received on an Authority account or communication utilizing Authority servers. Authority provided electronic devices, including devices for which the Authority pays a stipend or reimburses the Authority employee, are subject to Authority review and disclosure of electronic communications regarding Authority business. Authority employees understand that

- electronic communications regarding Authority business that are created, sent, received or stored on an electronic messaging account, may be subject to the Public Records Act, even if created, sent, received, or stored on a personal account or personal device.
8. In the event a Public Records Act request is received by the Authority seeking electronic communications of Authority employees, the Senior Executive Assistant to the CEO/General Manager (“Executive Assistant”) shall promptly transmit the request to the applicable Authority employee(s) whose electronic communications are sought. The Executive Assistant shall communicate the scope of the information requested to the applicable Authority employee, and an estimate of the time within which the Executive Assistant intends to provide any responsive electronic communications to the requesting party.
 9. It shall be the duty of each Authority employee receiving such a request from the Executive Assistant to promptly conduct a good faith and diligent search of his/her personal electronic messaging accounts and devices for responsive electronic communications. The Authority employee shall then promptly transmit any responsive electronic communications to the Executive Assistant. Such transmission shall be provided in sufficient time to enable the Executive Assistant to adequately review and provide the disclosable electronic communications to the requesting party.
 10. In the event an Authority employee does not possess, or cannot with reasonable diligence recover, responsive electronic communications from the Authority employee’s electronic messaging account, the Authority employee shall so notify the Executive Assistant, by way of a written declaration, signed under penalty of perjury. In addition, an Authority employee who withholds any electronic communication identified as potentially responsive must submit a declaration under penalty of perjury with facts sufficient to show the information is “personal business” and not “public business” under the Public Records Act. The form of the declaration is attached hereto as Attachment A.
 11. It shall be the duty of the Executive Assistant, in consultation with the Authority’s Legal Counsel, to determine whether a particular electronic communication, or any portion of that electronic communication, is exempt from disclosure. To that end, the responding Authority employee shall provide the Executive Assistant with all responsive electronic communications, and, if in doubt, shall err on the side of caution and should “over produce”. If an electronic communication involved both public business and a personal communication, the responding Authority employee may redact the personal communication portion of the electronic communication prior to transmitting the electronic communication to the Executive Assistant. The responding Authority employee shall provide facts sufficient to show that the information is “personal business” and not “public business” by declaration. In the event a question arises as to whether or not a particular communication, or any portion of it, is a public record or purely a personal communication, the Authority employee should consult with the Executive Assistant or Legal Counsel. The responding Authority employee shall be required to sign a declaration, in a form acceptable to Legal Counsel, attesting under penalty of perjury, that a good faith and diligent search was conducted and that any electronic communication, or portion

thereof, not provided in response to the Public Records Act request is not Authority business.

12. Authority provided AB 1234 (ethics) training should include a discussion of the impacts of the City of San Jose case and this policy. Such training should include information on how to distinguish between public records and personal records. Authority employees who receive AB 1234 training from other providers should actively solicit training from the alternative provider on the impacts of the City of San Jose case.
13. Authority employees understand that electronic communications regarding Authority business are subject to the Authority's records retention policy, even if those electronic communications are or were created, sent, received or stored on an Authority employee's personal electronic messaging account. It is a felony offense to destroy, alter or falsify a "public record". As such, unless the Authority employee has cc'd/transmitted electronic communications in accordance with paragraph 5 above, that Authority employee must retain all electronic communications regarding Authority business, in accordance with the Authority's adopted records retention policy, regardless of whether such electronic communication is originally sent or received on a personal electronic messaging account.
14. Failure of an Authority employee to abide by this policy, following its adoption, may result in one or more of the following:
 - Disciplinary action, up to and including termination;
 - Censure (for elected employees);
 - Revocation of electronic device privileges (including revocation of stipend or reimbursement);
 - Judicial enforcement against the Authority employee directly, by the requesting party; and
 - If this policy is adopted by way of ordinance, such penalty as is provided for violation of Authority ordinance.
15. This policy does not waive any exemption to disclosure that may apply under the California Public Records Act.

ATTACHMENT A

DECLARATION

[attached on following page]

DRAFT

In the matter of:

California Public Records Act Request
Pursuant to Gov. Code § 6250 *et seq.*

Re: _____

Insert shorthand name of record request, including
request number, if applicable

Requester: _____
Print or type name of requester

Declaration of:

Print or type name of employee

**Regarding Search of Personal Electronic
Messaging Account**

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
OMNITRANS JOINT POWERS AUTHORITY

I, _____ declare:
Print name

1. I received notice of a California Public Records Act (“CPRA”) request regarding a search of my personal electronic messaging account(s).

2. I understand that the CPRA request seeks:

Insert text of CPRA request.

3. I am the owner or authorized user of the following personal electronic messaging account and have the authority to certify the records:

Insert description of personal electronic messaging account(s).

4. I have made a good faith, diligent, thorough, and complete search of the above mentioned personal electronic messaging account(s) for all electronic communications potentially responsive to the above mentioned CPRA request.

5. Any responsive electronic communications discovered, and referenced below, were prepared or used by me in the ordinary course of business at or near the time of the act, condition or event.

6. Any responsive electronic communications discovered, and referenced below, are true

copies of all records described in the above mentioned CPRA request.

Check the applicable box:

- I certify that I do not possess responsive electronic communications.
- I certify that I cannot reasonably recover responsive electronic communications.

Explain efforts to retrieve responsive electronic communications and why you were unable to recover responsive electronic communications.

- I certify that I discovered potentially responsive electronic communications from my personal electronic messaging account, but I am withholding that information because the information is “personal” business. This is for the following reasons:

Describe with sufficient facts why the contested information is personal business and not subject to the CPRA. Attach additional pages, if necessary.

- I certify that I discovered potentially responsive electronic communications from my personal electronic messaging account. I am providing all responsive information. However, some information is nonresponsive and I am withholding that information, because the information is personal business. This is for the following reasons:

Describe with sufficient facts why the contested information is personal business and not subject to the CPRA. Attach additional pages, if necessary.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I have personal knowledge of the facts set forth above.

Executed this ___ day of _____ 20___, in _____, California.

By: _____
Print Name: _____

The Decision of the Supreme Court



City of San Jose case:

When a public official or employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act).

The Court's Reasoning



The court reasoned that communications on private devices are subject to disclosure under the Public Records Act by applying a 4-part test:

“It is (1) a writing, (2) with content relating to the conduct of the public’s business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency?”

The Court's Reasoning (*City of San Jose* case)

1. "Writing" as defined in the Public Records Act certainly includes any form of communication on electronic devices, including e-mails, texts and voicemails..



The Court's Reasoning (*City of San Jose* case)

2. “Content relating to the conduct of the public’s business”: the writing “must relate in some substantive way to the conduct of public’s business.”

Whether a writing is sufficiently related to public business will not always be clear.



The Court's Reasoning (*City of San Jose* case)

4. Is the communication “owned, used or retained by a local agency”? The court held a public record does not lose its status as such because it is located in a personal account. A writing has been retained by the agency even if the writing is located in the public official’s personal account.

This is significant because actual or constructive possession will have no part in the determination of whether the record is indeed a “public record,” just as where the record is found or located no longer matters.

City of San Jose

Legal Ramifications of the Decision

- As to requests seeking public records held in nongovernmental accounts, an agency's first step should be communicate the request to the officials or employees in question.
- The agency may then reasonably rely on these officials or employees to search *their own* personal files, accounts, and devices for responsive material.

City of San Jose

Legal Ramifications of the Decision

An obligation of officials and employees to disclose when required was assumed by the court.

The court proposed a mechanism for public officials and employees who elect to withhold a document--
-provide an affidavit providing the agency and a reviewing court “a sufficient factual basis upon which to determine whether contested items were agency records or personal materials.”

Practice under FOIA and Washington State Law

Setting Policy

- Set standards for communications on private devices---
"Reduce the likelihood of records being held on private devices"
- Employee training as to what can constitute and what is a "public record"
- Policy: Prohibition on Use of Private Devices for Gov. Agency Business and Require Use of Agency Accounts and Devices
- Consider adoption of a policy addressing these and other issues raised by the City of San Jose case