

LOCAL AGENCY FORMATION COMMISSION FOR SAN BERNARDINO COUNTY

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DATE: JANUARY 10, 2018 
FROM: KATHLEEN ROLLINGS-McDONALD, Executive Officer
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TO: LOCAL AGENCY FORMATION COMMISSION

SUBJECT: Agenda Item #11: Review and Consideration of Policy Related to
Retention of Electronic Communications

RECOMMENDATION:

Staff recommends that the Commission:

1. Approve the proposed Electronic Communications Policy as included in Attachment #1;
2. Approve the proposed amendment to the Records Retention Policy as included in Attachment #2;
3. Authorize the Executive Officer to establish and remove Email addresses for Commissioners, when applicable, with the County Information Services Department; and,
4. Adopt LAFCO Resolution No. 3258 reflecting the changes to the Policy and Procedure Manual, and direct the Executive Officer to distribute to affected and interested parties and to update the Commission Website.

SUMMARY:

In March 2017, the California Supreme Court ruled in *City of San Jose v. Superior Court*¹ (*City of San Jose*) that electronic messages sent or received on public officials' private devices or in private accounts are subject to disclosure under the California

¹ *City of San Jose v. Superior Court*, Cal. 4th, 214 Cal.Rptr.3d 274. Decided March 2, 2017.

Public Records Act (“PRA”), which had originally been designed to cover paper documents (copy of decision included as Attachment #1 to this report). LAFCO staff recommends that the Commission consider and adopt the proposed Electronic Communications Policy as well as amend its Records Retention Policy. Pursuant to the proposed Electronic Communications Policy, each Commissioner would be assigned a LAFCO Email address.

BACKGROUND:

The PRA requires disclosure of public records, which “includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained” by an agency. This is regardless of physical form or characteristics. Earlier cases determined that voicemails, Emails, and text messages are “writings” under the PRA. *City of San Jose* extended the definition of a “writing” to include “other electronic platforms,” which likely encompasses electronic communication via Email, text, and social media, which must relate in some substantive way to the conduct of the public’s business. Of note, communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records.

However, *City of San Jose* does not mention social media or text messages. LAFCO does not have or maintain any social media accounts or participate on any social media platforms. However, personal social media accounts, as with personal Email accounts and texts, could be subject to the PRA if LAFCO business is conducted on such accounts.

The court did acknowledge the inherent balance that must be struck between the public’s rights of access and an individual employee’s or official’s right of privacy, and sought to offer some limited guidance for how searches should be conducted for records sent or received on nongovernmental accounts that pertain to the public’s business.

DISCUSSION:

In light of the *City of San Jose* case, LAFCO’s legal counsel (Best, Best, & Krieger) prepared a sample electronics message policy. This sample policy was shared among several dozen of BB&K’s public agency clients, keeping the cost to the Commission at a minimum. LAFCO staff has modified the sample policy to meet the circumstances of this Commission and its staff. Attachment #2 to this staff report is the draft Electronic Communications Policy.

Public agencies may reasonably rely on officials and employees to search their own personal files, accounts, and devices for responsive material when a records request is received. The Court emphasized that employees/officials do not lose all privacy rights. The proposed policy identifies that when a records request is received, the LAFCO

Clerk will communicate the request to the “LAFCO official” which is defined by the policy to be any commissioner, employee of LAFCO, or a person assigned an Email account through LAFCO. The policy will be to rely on the LAFCO official to search their own personal files – LAFCO will neither seize nor search a LAFCO official’s personal device to comply with a public records request.

The California Supreme Court also discussed an employee or official submitting an affidavit that would give the local agency, requester, and ultimately the trial court reassurance that responsive records were appropriately searched on nongovernmental accounts. Such an approach must also strike “an appropriate balance” with the individual’s right of privacy in their personal affairs. The policy as presented includes the requirement for such a statement and a sample template for signature (included as a part of Attachment #2)

Email Platform for Commissioners

The draft Electronic Communications Policy identifies that all LAFCO Commissioners and staff shall be assigned a LAFCO electronic messaging account (Email account). This would promote the isolation of LAFCO business onto a single platform, and reduce the risk of LAFCO business on personal or other public Email. Staff’s analysis identifies two viable options for Commissioner Email accounts. The first option would be obtaining Email addresses from the County; currently LAFCO contracts with County Information Services Department (ISD) for LAFCO staff Email access and retention. The second option would be to obtain Commissioner Email addresses from Google’s Gmail Business platform. The similarities of both platforms are as follows:

- Ample storage
- Outbound footer (legal statement) can be placed on the Email. This would be in line with the proposed policy.
- Allows for syncing of appointments to Outlook calendar.
- When a PRA Request is received, LAFCO official searches Emails and provides the documents.

The chart below identifies the differences between County and Gmail Business Email platforms:

	County ISD	Gmail Business
Email on mobile device	Is available as a separate charge to LAFCO	Yes
Chat capable	No	Yes
Retention of permanently deleted items	Accessible for 6 months then automatically purged per County Policy schedule	Gmail automatically purges based upon LAFCO setting (i.e. 2 years)

Cost, per user, per month	\$15	\$10
Email address extension	That of staff: @lafco.sbcounty.gov	customizable
When a Commissioner leaves LAFCO service	County ISD will place contents onto storage device and delete account	Clerk would need to access account and place contents onto storage device for retention, then inactivate account

Staff is recommending that the Commission select the County as its Email platform without the added cost for access directly on a mobile device. As identified above, the County has an adopted policy for electronic communications retention and permanent deletion based upon its retention schedule. Second, there would be consistency throughout the agency for all LAFCO officials - same Email extensions, retention schedules, and Email server. Third, when a Commissioner leaves LAFCO, County ISD can provide LAFCO staff with the Email contents on an electronic medium, rather than the Email administrator directly accessing the former Commissioner's account to copy the Email contents. Lastly, if this is the platform chosen by the Commission, then the three Commissioners from the County Board of Supervisors would not necessarily require an additional Email that pertains specifically to LAFCO.

As a part of this process, it is the expectation of the policy that Commissioners and staff use or copy (cc) their LAFCO Email account for all communications related to LAFCO business. Further, LAFCO staff is recommending that a footer message be placed at the bottom of personal or other public agency Email addresses that directs LAFCO business to the LAFCO Email addresses. Staff is recommending that the language of the footer be:

CONFIDENTIALITY NOTICE:

***This Email address is intended for LAFCO business.** This Email and any files or attachments transmitted with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you may have received this communication in error, please advise the sender via reply Email and immediately delete the Email you received.*

Records Retention Policy

Attachment #3 to this staff report is the draft amendment to the Commission's Records Retention Policy. The basis of the amendment is to adopt the records retention policy for electronic communications of the County of San Bernardino as the Commission's official retention schedule for electronic communications.

Upon leave of service from LAFCO, the LAFCO Email administrator will request that County ISD close the LAFCO official's Email account and for the County ISD to copy the contents from the Email account onto an electronic medium (CD, DVD, USB flash drive) provided to LAFCO to be retained in accordance with the Commission's Record Retention Policy.

CONCLUSION:

Communications related to the conduct of public business are not excluded from being public records under the California Public Records Act simply because they were sent or received using a personal account or personal device. The California Supreme Court stated it is the local agency itself that is in the best position to adopt policies that will reduce the likelihood of public records being held in the private accounts of employees or officials that pertain to the public's business.

Staff has reviewed this new court directive and provided its analysis of the new policy to be adopted for the Commission. At this time, staff is requesting that the Commission provide any additional changes, corrections or amendments to the proposed policies. Finally, staff recommends that the Commission:

- Adopt the Electronic Communications Policy as proposed.
- Amend the Records Retention Policy as proposed.
- Authorize the Executive Officer to establish and remove Email addresses for Commissioners, when applicable, with the County Information Services Department using the County as its Email platform.
- Adopt the resolution reflecting the changes to the Policy and Procedure Manual.

KRM/MT

Attachments:

1. California Supreme Court Ruling in *City of San Jose v. Superior Court* Cal. 4th, 214 Cal.Rptr.3d 274, Decided March 2, 2017
2. Draft Electronic Communications Policy
3. Draft Records Retention Policy (with track changes)
4. Draft LAFCO Resolution No. 3258