

## Public Records Access V. Privacy: California's Struggle, *Law360*

By Louie Castoria and Aaron Cargain of Kaufman Dolowich & Voluck, LLP in San Francisco.

Published in *Law360*, New York (December 15, 2016)

*California's Supreme Court has taken under submission a case that will determine whether public employees' communications on personal devices are subject to public disclosure under the state's Public Records Act or are shielded by its constitutional right of privacy.*

*The decision could allow disclosure of privately made though work-related comments, ranging from attempts to conduct public business away from public scrutiny, to a text saying, "I hate my boss," an example used by several members of the court during oral arguments held on Dec. 7, 2016. As Associate Justice Goodwin Liu commented, "Every jurisdiction in California will be parsing what we say to tell their employees what to do."*

*The case, City of San Jose v. Superior Court (Smith), No. S218066, poses a narrow question: whether a blanket exemption exists under the statute (Cal. Govt. Code §§ 6250, et. seq.; the "act") for communications conducted on private devices. But it raises a broader question reminiscent of the recent presidential campaign: whether public servants should discuss public business using personal email accounts, social media or personal devices. Article I of the state Constitution — the same source for individuals' right of privacy — mandates that the act "shall be broadly construed[.]" (§3(b)(2) of article I.)*

*During oral arguments last week, all seven members of the court peppered counsel for the parties with questions that hinted at a search for a middle ground between the competing constitutional interests of transparency and privacy. Suggestions included leaving it to the state Legislature to strike such a balance by amending the statute; relying on public employees to seek trial court protection for their truly "private" communications; trusting state agencies to develop local rules for their employees, recognizing the substantial burden that broadly worded requests under the act can impose on small municipalities and agencies; or issuing a very narrow ruling and deferring the details for another day.*

### About the Case

City of San Jose arose from a request under the Public Records Act to the city by Ted Smith, a citizen, seeking voicemails, emails and text messages on the private electronic devices of San Jose's former mayor and others regarding a commercial real estate development in which the mayor had an interest. The city denied Smith's request for information from the private devices, stating that it does not prepare, own, use or retain records created on such devices. The San Jose Mercury News later published an article stating that a labor leader accidentally texted a city council member, proposing to give the mayor millions of dollars in connection with the development.