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Digital Public Records

BB&K Attorney Christine Wood Discusses Record Retention Policies in *PublicCEO*



By **Christine Wood**

It's no secret: Public agencies are inundated with files.

A rise in digital records coupled with the use of personal devices, email accounts and diverse communication channels has lead electronic records to become increasingly problematic for agencies.

Add in a lack of records retention policies and increased California Public Records Act requests, and local agencies are feeling the crunch, especially in the costs of staff locating documents and litigation if records aren't produced in a timely manner.

For non-electronic records, agencies can help reduce their volume of PRA requests by digitizing and posting such records online as often as possible. In regard to electronic records, agencies are more severely challenged from records being kept well past their usefulness as a "just in case" measure.

With data production predicted to be 44 times greater in 2020 than it was in 2009, now is the time for agencies to review their records retention policies and practices to eliminate the storage of excess records and ensure both public employees and officials are proficient in what records need to be kept and how.

What is, and isn't, the Public Records Act?

Enacted in 1968, the PRA is one of California's two sunshine laws meant to hold public agencies accountable by allowing the public to inspect and copy records in the agency's care.

The PRA is not a retention or destruction policy. It isn't a privacy or usage policy either. The sole function of the State's public records law is to provide the public with disclosure.

Disclosure has become a heavy burden for agencies to bear, as recent case

People



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law has presented new challenges, including: introducing agencies to the threat of civil discovery, accounting for unpredictable attorney's fees and subjecting personal email accounts and phones/devices to the PRA.

- The Second District Court of Appeal's opinion in *City of Los Angeles v. Superior Court of Los Angeles County, et al.* means, **under certain circumstances, agencies litigating PRA cases could have to respond to civil discovery requests** — a time-sensitive process used to determine whether the agency is lawfully withholding documents.
- The City of San Diego was **ordered to pay attorneys' fees to a PRA requestor-plaintiff** because an additional record was located and proactively disclosed after litigation commenced. The Fourth District Court of Appeal's ruling in *Sukumar v. City of San Diego* demonstrates practical challenges agencies face in regard to record storage and the risks, including unpredictable attorney's fees, that are involved in PRA litigation.
- The California Supreme Court ruled in *San Jose v. Superior Court* that **records from a public employee's or elected official's personal account and/or device may be subject to disclosure under the PRA**. Emails and messages pertaining to public business fall into the court's description of a public record, which included four characteristics: 1.) it's a writing, 2.) relating to the conduct of people's business, 3.) prepared by or 4.) owned, used or retained by a state or local agency.

What Needs to be Kept? And How?

Records storage and the time they're kept will depend on an individual agency's retention policy. These policies are framework for how agency's care for, retain and dispose of the records in its possession.

In developing retention policies, agencies should identify:

- **Retention times for various types of records.** Agencies can segment retention times to keep different categories of records (emails, text messages, social media posts) that pertain to public business for varying amounts of time. This will not only help lessen the volume of data an agency is storing but also ensures records aren't kept longer than legally required.
- **Rules for records on agency-issued and personal devices.** Agencies need to have retention guidelines in place for correspondence on both government-issued and personal devices, as well as personal email accounts. If the text or email messages are public records, as defined in *San Jose*, they need to be kept. If they are located on a phone or personal email account, they should be pulled and properly archived on a cloud or network server.
- **Guidelines for social media posts.** With social media posts being considered a temporary form of correspondence, agencies can consider a more aggressive approach to retaining them. Consider using an e-discovery specialist or vendor for help in storing more complex electronic records with comments, metadata and other information.
- **Details on record destruction.** Records satisfying legal retention requirements become available for destruction each and every day. It is important agencies establish a system for how physical and electronic

records will be destroyed. This could include labeling and storage systems to track and make record destruction easier, as well as protocols on whether the destruction will occur automatically or if it needs approval before being executed.

It's important to note there are public records that cannot be disposed of, including, but not limited to:

- Records affecting the title to real property or liens
- Court records
- Records required to be kept by statute
- Records less than 2 years old
- Minutes, ordinances or resolutions of the legislative body

Records retention policies should be communicated and implemented across all levels of the organization. If facing litigation, an agency's records retention policy can be used as evidence that the agency was properly keeping and destroying its records.

Keep in mind these best practices:

- Be consistent with your retention policies
- Only include elements in your policies that the agency is willing to enforce
- Consult counsel before adopting your final policy to ensure all records are covered
- Conduct regular training to help staff and officials self-identify public records
- Develop tip sheets to help with the harvesting of emails and texts from devices

The PRA conversation on electronic devices and communications is ever evolving. Learn more about collection practices for mining records from personal electronic devices, in Best Best & Krieger LLP's upcoming webinar:

[Do You Know the Way \[After\] San Jose?](#)

Additional resources on maintaining records and e-discovery are also available through the California State Records and Information Management Program, [The Sedona Conference](#) and [League of California Cities](#), including LCC papers: [The People's Business](#) and [Email and E-Records Retention Issues Under the Public Records Act](#), that provide a good framework for records retention policies.

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