

COLMA ADMINISTRATIVE CODE

CHAPTER THREE – PERSONNEL POLICIES

SUBCHAPTER 3.11 – ELECTRONIC COMMUNICATIONS, THE SAN JOSE CASE, AND THE PUBLIC RECORDS ACT

3.11.010 Background and Purpose

The Town of Colma City Council, as the legislative body of the Town of Colma, hereby adopts the following policy regarding the Town of Colma’s conduct of business via electronic communications by Councilmembers, employees, and all independent contractors. 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.

3.11.020 Definitions

As used in this subchapter, the following definitions apply:

“Town” means the Town of Colma and includes all of the Town’s contractors.

“Town official” shall mean any elected official, employee, and select independent contractors of the Town.

“Town 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 Town’s jurisdiction, including, but not limited to, pending or potential Town projects, past or prospective Town agenda items, or Town budgets or expenditures involving Town 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 a Town official 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 that is not Town owned or provided.

3.11.030 Policy/Protocols

(a) Town officials shall not use personal electronic messaging accounts for the creation, transmission or storage of electronic communications regarding Town business.

(b) All Town officials shall, within 30 days following the adoption of this policy, search all personal electronic messaging accounts to which they have user access and locate any electronic communications that might constitute a "public record", because it involved "Town business", as set forth above. All such communications shall be forwarded to the Town official's Town E-Mail account. To the extent the Town official believes that any part of such electronic communication contain personal matter not related to the conduct of the public's business, the Town official shall provide a declaration in a form provided by the City Attorney's office and as further discussed throughout this policy.

(c) If a Town official receives an electronic communication regarding Town business on his/her personal electronic messaging account, or circumstances require such person to conduct Town business on a personal electronic messaging account, the Town official shall either: (a) copy ("cc") any communication from a personal electronic messaging account to his/her Town E-Mail account or (b) forward the electronic communication to his/her Town E-Mail account no later than 10 days after the original creation or transmission of the electronic communication.

(d) Town officials shall endeavor to ask persons sending electronic communications regarding Town business to a personal electronic messaging account to instead utilize the Town official's E-Mail account, and likewise shall endeavor to ask a person sending an electronic communication regarding non-Town business to use the Town official's personal electronic messaging account.

(e) Town officials understand that electronic communications regarding Town business that are created, sent, received or stored on a personal 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.

(f) In the event a Public Records Act request is received by the Town seeking electronic communications from a Town officials personal electronic messaging account, the City Clerk's office shall promptly transmit the request to the applicable Town official(s). The City Clerk shall communicate the scope of the information requested to the applicable Town official, and an estimate of the time within which the Town intends to provide any electronic communications sought by the requesting party.

(g) It shall be the duty of each Town official receiving such a request from the City Clerk's office to promptly conduct a good faith and diligent search of his/her personal electronic messaging accounts for responsive electronic communications. The Town official shall then promptly transmit any responsive electronic communications to the City Clerk. Such transmission shall be provided in sufficient time to enable the City Clerk to adequately review and provide the responsive electronic communications to the requesting party.

(h) In the event a Town official does not possess, or cannot with reasonable diligence recover responsive electronic communications from the Town official's personal electronic messaging account, the Town official shall so notify the City Clerk, by way of a written

declaration, signed under penalty of perjury. In addition, a Town official who withholds any personal 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 shall be provided by the City Attorney's office.

(i) It shall be the duty of the City Clerk, in consultation with the City Attorney, to determine whether a particular personal electronic communication, or any portion of that electronic communication, is exempt from disclosure. To that end, the responding Town official shall provide the City Clerk with all responsive personal electronic communications, and, if in doubt, shall err on the side of caution and should "over produce". If a personal electronic communication involved both public business and a personal communication, the responding Town official may redact the personal communication portion of the electronic communication prior to transmitting the electronic communication to the City Clerk. The responding Town official 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 Town official should consult with the City Clerk or the City Attorney. The responding Town official shall be required to sign a declaration, in a form provided by the City Attorney, 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 Town business.

(j) Town provided AB 1234 (ethics) training should include a discussion of this policy. Such training should include information on how to distinguish between public records and personal records.

(k) Town officials understand that all electronic communications regarding Town business are subject to the Town's records retention policy, even if those electronic communications are or were created, sent, received or stored on a Town official's personal electronic messaging account. As such, unless the Town official has cc'd/transmitted electronic communications in accordance with this policy, that Town official must retain all electronic communications regarding Town business, in accordance with the Town's adopted records retention policy, regardless of whether such electronic communication is originally sent or received on a personal electronic messaging account.

(l) Failure of a Town official to abide by this policy, following its adoption, may result in one or more of the following:

- (1) Disciplinary action, up to and including termination (for employees); Censure (for elected officials);
- (2) Revocation of electronic device privileges (including revocation of stipend or reimbursement);
- (3) Judicial enforcement against the Town official directly, by the requesting party; and

(4) If this policy is adopted by way of ordinance, such penalty as is provided for violation of a Town ordinance.