

# When Business Turns Personal

The consequences of commingling



BY MICHAEL F. YOSHIBA

The information gathered by right of way agents through the course of their work is necessary for supporting and defending condemnation lawsuits, project audits, public records requests, and occasionally employee performance or disciplinary reviews. It is because of this that right of way agents who use computers or cell phones provided by their agency or company must be very mindful of how they use them.

In the course of gathering information, it is not unusual for agents to use their own computers or cell phones for work purposes, or to use an agency's equipment for personal reasons. There can be some adverse consequences, however, when mixing business and personal communications. But with some vigilance and discipline, you can minimize these and avoid unnecessary costs.

So what set this off? Well, several months before Roy's vacation, the agency's technical staff discovered that the response time for employees using the internet through the agency's computer system was exceedingly slow, despite the addition of greater internet bandwidth. Upon further investigation, the technicians learned that the computer system was being slowed by employees accessing inappropriate websites. In response to this problem, the agency installed computer-monitoring software to identify and track employee internet use.

The agency soon discovered that the inappropriate internet usage was so prevalent among employees that it could only bring disciplinary action against the most egregious offenders. Roy was identified as one of them. Records tied to Roy documented hundreds of hours of inappropriate internet usage over a 60-day period. The agency expanded their investigation and collected Roy's building entry card usage, computer login records, phone records, computer usage and monthly timesheets.

Once confronted, Roy denied the charges of inappropriate computer usage and claimed that someone else must have stolen his password and login information. Unfortunately for Roy, the disciplinary review panel hearing officer was not convinced. The evidence clearly showed that only when Roy was off on his honeymoon, did the inappropriate internet usage end.

But even more alarming was the unintended result of the investigation, as it uncovered that

## What Was He Thinking?

Public records are generally classified as those records that are generated, kept and maintained within the normal course of conducting public agency business. There are many examples of the consequences of commingling personal and business communication, but one that comes to mind is the story of a right of way agent I'll call Roy. On his first day of work after returning from his honeymoon, Roy's employer, a well-known public agency, served him with a disciplinary action notice. The notice stated that the agency was going to reduce his pay for 18 months, demote him from his current job classification and place an adverse action letter in his permanent employment file. Welcome home Roy!



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Roy had used his work computer and an agency phone for lengthy calls to family members during work hours, shopping online, paying personal bills and executing stock market transactions with his day trading account. The agency-owned devices and the agency's backup data system had stored much of Roy's personal information including credit card numbers, PIN codes, bank account information and social security number. Rather than endure further scrutiny, Roy ended up accepting a settlement offer in compromise to keep this a private matter and to prevent it from becoming public information.

## Types of Information

Situations like Roy's are all too common these days, as computers and cell phones are used as business tools and for personal entertainment. This inherent versatility brings with it the temptation to mix business and personal use, which should be avoided.

The reality is, computers store just about everything - passwords and login data, email, contact information, photographs, videos, audio, correspondence, online search histories, spreadsheets, calendars and appointment logs. Because it is stored in the internal hard drives and often in remote, off-site servers as well, the information remains available, even if you think it has been deleted from your hard drive. Similarly,

cell phones save email, photographs, video, phone call logs, online searches, global tracking information and time records. In fact, it is actually stored in three ways - in a removable SIM card, as non-removable internal memory and as data stored remotely by the cell phone carrier.

## Consequences and Costs

The consequences of commingling personal information with business records can be very serious. More importantly, the time and money spent reviewing and redacting documents containing personal and public information is a difficult and time-consuming task for both right of way staff and legal counsel. The most common examples involve using personal email accounts and devices to respond to or receive agency emails.

There is the potential waiver of public agency privileges against disclosure. Each jurisdiction has different laws concerning disclosure of business information. In one jurisdiction, disclosing information that might otherwise be confidential with members of the public can result in a waiver of a public agency's disclosure exemption privileges (cf. Cal. Gov't. Code § 6254.5). The information released can be used to bolster an opposition or weaken a legal defense. At best, it is embarrassing, and at worst, grounds for disciplinary action or even termination of employment.

Roy's story highlights the fact that many employee disciplinary actions can be easily supported by citing the history of an employee's inappropriate use of business computers and phones. Personal information, when discovered, can be used to discredit individual testimony and factual assertions. Attorneys search for inconsistencies between employee timesheets, employment history, case notes, depositions and trial testimony. If discovered, inconsistencies will lead to unflattering contradictions and discredit the strength of the testimony being offered.

## Follow the Rules

Always remember that the commingling of personal communications with public agency business information can result in the unintended disclosure of personal information as a public record. It is critically important that the information generated by right of way agents is appropriately maintained and disposed of pursuant to a thoughtful records management plan. Familiarize yourself with your company's document handling plan. Be cognizant of how your company performs information gathering and storage. Avoid the use of personal cell phones, tablets and personal computers when responding to business related emails, text messaging and phone calls as much as possible. Through vigilance and diligence, we increase the likelihood that personal information will remain just that - personal. ☘

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