Case No. H049554

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

LAW FOUNDATION OF SILICON VALLEY
Petitioner/Plaintiff

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA
Respondent

CITY OF GILROY
Real Party in Interest

In the Original Proceedings Challenging a Judgment of the Superior Court of California, County of Santa Clara

Superior Court Case No. 20-CV-362347
The Honorable Nahil Iravani-Sani, Judge Presiding

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE CITY OF GILROY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed under California Rules of Court, Rule 8.208.

Dated October 18, 2022

_/s/_____
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Pursuant to Rule 8.487, subdivision (e) of the California Rules of Court, the League of California Cities (Cal Cities) and the California Special Districts Association (CSDA) respectfully request leave to file the accompanying brief in support of the City of Gilroy.

This brief was entirely drafted by counsel for the Amici and no part of counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation. See Cal. Rules of Court, rule 8.200, subd. (c).

INTEREST OF APPLICANTS

Because California cities and special districts are subject to the California Public Records Act (CPRA, Govt. Code §6251, et seq.) and must regularly ensure compliance with the CPRA, any decision affecting application of the CPRA has a significant impact on California public agencies. Amici have a significant interest in this action in particular. If the Court adopts a new requirement to place a three-year "litigation hold" on records that are potentially responsive to a CPRA requests but exempt from disclosure, it will place a heavy burden on agencies that will now have to monitor and track large volumes of records outside of the existing statutory retention scheme.

The Amici believe that this brief will provide additional background and context regarding the importance of this matter and its potential impact on government resources and effectiveness.

The League of California Cities (Cal Cities) is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to

enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

California Special Districts Association (CSDA) is a non-profit corporation with a membership of more than 900 special districts throughout California that was formed to promote good governance and to improve core local services through professional development, advocacy, and membership services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, recreation and parks, cemetery, fire protection, police protection, library, utilities, harbor and port, healthcare, and community-service districts. CSDA is advised by its Legal Advisory Working Group, comprised of 25 attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide significance. CSDA has identified this case as having statewide significance for special districts.

AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF GILROY

I. INTRODUCTION

In responding to and reviewing California Public Records Act (CPRA) requests, agencies and courts are called on to weigh multiple competing, yet fundamental interests. "The Public Records Act balances [the] rights of privacy, public access, and the need for governmental efficiency and effectiveness." (Cal. Municipal Law Handbook (Cont.Ed.Bar. 2022.) §2.204 pp. 229-230.) The CPRA achieves this balance, in part, by facilitating prompt disclosure of public records, providing a process for agencies and requesters to reasonably identify responsive records, and providing for speedy resolution if the agency and requester cannot reach an agreement on whether a record is subject to disclosure. Early resolution of disputes is necessary, both to ensure that agencies make timely disclosures and to promote governmental efficiency. However, that balance is only achieved if requesters and responders can achieve finality.

In this case, the Law Foundation of Silicon Valley (Law Foundation) argues that the CPRA requires agencies to place a three-year "litigation hold" on broad categories of records following a CPRA request, regardless of whether the requester has sought judicial review of the agency's determination. Nothing in the CPRA suggests that this is the intent of the legislation.

The City of Gilroy is not unique in receiving hundreds of CPRA requests each month. As acknowledged by the California Supreme Court, public agencies throughout the state receive "thousands and thousands of public records requests each year with the number of requests increasing each year to staggering proportions." (*Ardon v. City of Los Angeles,* (2016) 62 Cal.4th 1176, 1189.) The rule the Law Foundation seeks to establish would be contrary to the CPRA's objective of early disclosure and dispute

resolution, and it would significantly undermine governmental efficiency and effectiveness, placing a significant burden on public agencies. Managing thousands upon thousands of simultaneous retention holds in the off-chance that a requester may seek judicial review years after an agency completes its response to a CPRA request is not reasonable or feasible.

II. A THREE-YEAR RETENTION PERIOD FOR UNDISCLOSED RECORDS IS INCONSISTENT WITH THE CPRA'S MANDATE FOR PROMPT DISCLOSURE AND EARLY RESOLUTION OF DISPUTES

There is no prescribed method for making a CPRA request. (See *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal. App.4th1381, 1392.) While agencies may ask requesters to provide a written description of the records or recommend the use of a standard form, agencies cannot impose such requirements. (Cal. Municipal Law Handbook (Cont.Ed.Bar. 2022) §2.212 pp. 234.) Requests are often made in person at public counters, by phone, or by e-mail. Many times, records can be provided immediately—particularly if the request is focused and complies with the requirement to reasonably identify the record or records sought. Other times, a request will require a more detailed search and review. Where a request is ambiguous, agencies must attempt to assist the requester in making a more focused request.

A. Agencies must respond to requests that "reasonably describe" an identified or identifiable record.

Under the CPRA, agency staff must respond to a request that "reasonably describes an identifiable record or records." (Gov. Code, § 6253.) Litigation-style requests, such as the ones at issue in this case, are

overbroad and do not reasonably describe an identifiable record. [1] This is significant to public agencies because the CPRA does not require or anticipate legal review of requests for records. Many of the nearly 500 cities in California contract for city attorney services, and many of the thousands of special districts have no dedicated legal counsel at all. As such, a reasonable request should be understandable to any agency employee tasked with responding to the request.

As in this case, a request that seeks "any and all public records, constituting, reflecting, or relating to" numerous categories of records is not sufficiently focused to allow a reasonable agency employee to understand the specific nature or scope of the request. The use of the terms "reflecting" and "relating" creates ambiguity such that a reasonable person would have difficulty understanding the actual scope of the request and identifying responsive records.

B. An agency's obligation to assist a requester in making a focused and effective request is satisfied when the agency produces records, and/or is unable to elicit additional clarifying information to identify additional records.

While a vague and ambiguous request does not reasonably describe an "identifiable record," it is sufficient to trigger an agency's responsibility to "[a]ssist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated." (Gov. Code, § 6253.1, subd. (a)(1).)

"Under section 6253.1, [a public agency] has the duty to assist the public in formulating reasonable requests and then to respond accordingly,

[1] Even in the context of litigation discovery, the parties are required to meet and confer over the scope of the requests and make a good faith attempt to resolve differences. (Code Civ. Proc.§ 2016.040.) Here, while agencies are required to assist requesters, requesters are not required to accept assistance, even when the requests are ambiguous, and assistance will ensure that they receive the records they are seeking.

by communicating the scope of the public information requested to the custodians of its records. The purposes of the CPRA should be honored through such a reasonableness standard, so that not only an agency response, but the request that generates it, are within reasonable boundaries that are appropriate in light of the statutory scheme." (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 228 (disapproved of on other grounds by *National Lawyers Guild , San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488).)

Where an agency has assisted the requester to identify specific responsive records, and has either produced those records or withheld them based on an identified exemption, the agency has satisfied its responsibility to comply with its requirement to respond under Government Code section 6253. Further, the agency's duty to assist is deemed satisfied "if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records." (Gov. Code, § 6253.1, subd. (b).) Where an agency has produced those records that the requester has been able to identify, but has been unable to identify any additional information based on attempts to clarify a request, the agency's responsibility should also be deemed satisfied. While this finality is essential for prompt disclosure, speedy resolution, and governmental effectiveness, it does not prevent a requester from making additional document requests if they seek additional information (as appears to have happened here).

C. The CPRA is designed to promote the expeditious resolution of disputes over withheld records.

The CPRA requires agencies to make requested public records "promptly available" following receipt of any fees. (Gov. Code, § 6253, subd. (b).) Similarly, a judicial action taken to resolve a dispute over

disclosure is entitled to expedited resolution. "The times for responsive pleadings and for hearings in [such] proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time." (Gov. Code, § 6258.) A challenge to a trial court determination is available only by "a petition to the appellate court for the issuance of an extraordinary writ." (Gov. Code, § 6259, subd. (c).) Such a petition must be filed within 20 days after service of the order. (*Ibid.*)[2]

The expedited process applies not just to prevent agencies from delaying disclosure, but also to bring speedy resolution to disputes. "The legislative objective was to expedite the process and make the appellate remedy more effective. Indeed, the [CPRA] provision regarding a public agency's obligation to act promptly upon receiving a request for disclosure, the provision directing the trial court in a proceeding under the [CPRA] to reach a decision as soon as possible, and the provision for expedited appellate review all reflect a clear legislative intent that the determination of the obligation to disclose records requested from a public agency be made expeditiously." (*MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 265 [citing *Filarsky v. Superior Court,* (2002) 28 Cal.4th 419, 426-427, internal citations omitted].)

The three-year retention period proposed by the Law Foundation is not found in existing law and is inconsistent with the legislative priority of expeditious resolution of CPRA requests. This is particularly true when requests are cumbersome and/or vague and the agency believes the production to be complete.

[2] The record in this case indicates that the trial court granted a stipulation by the parties to extend the deadline by an additional 20 days.

III. THE PROPER PROCEDURE FOR PRESERVING RECORDS IS A PRELIMINARY INJUNCTION UNDER GOVERNMENT CODE SECTION 6258—NOT AN AUTOMATIC "LITIGATION HOLD"

An automatic three-year "hold" on all records withheld from disclosure is unnecessary and inconsistent with the CPRA. Government Code section 6258 allows for injunctive relief if a requester is concerned about the destruction of disputed records. (*Stevenson v. City of Sacramento,* (2020) 55 Cal. App.5th 545.) Unlike the automatic "litigation hold" advocated by the Law Foundation, injunctive relief requires a balancing of factors. "A trial court must weigh two interrelated factors when deciding whether to grant a plaintiff's motion for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction, that is, the interim harm the plaintiff is likely to sustain if the injunction is denied as compared to the harm the defendant is likely to suffer if the preliminary injunction is issued." (*SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280, as modified on denial of reh'g (June 11, 2013).) If the injunction is granted, "the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Code Civ. Proc., § 529(a).) The requirement for an undertaking applies to injunctions under Government Code section 6258. (*Stevenson, supra,* 55 Cal. App.5th at p. 551-553.)

The review and retention of physical and/or electronic records that may or may not be subject to disclosure or even responsive to a request places a financial burden on agencies. This includes both the cost of storage and personnel costs to maintain records. An injunction under Government

Code section 6258 ensures that the relative harms are properly balanced and the taxpayers are not burdened by financial consequences if the court determines that the requester is not entitled to the records.

It is important to note that declaratory relief is only available to members of the public who seek disclosure of public records. The burden on agencies that would be created by a three-year retention requirement is exacerbated by the fact that agencies cannot bring a declaratory relief action, or otherwise seek a determination that the withheld records are not subject to disclosure. (*See Filarsky, supra,* 28 Cal.4th at p. 432). Thus, an agency could be forced to retain thousands upon thousands of documents for years, without any indication that the documents are useful to, or even sought by anyone.

Long-term document storage places a burden on public agencies, both to manage and to store large volumes of records in various forms. Agencies cannot recover the costs of document storage and maintenance. In recognition of this burden, the legislature enacted Government Code section 34090 et seq., which controls when agencies may destroy records. This statute is outside of and independent of the CPRA. Nothing in the CPRA addresses records retention, and the CPRA should not be read to override the considerations in section 34090.

IV. COURTS CAN AND SHOULD CONSIDER THE BURDEN ON PUBLIC AGENCIES UNDER THE CPRA

In balancing the competing imperatives of public access and the need for governmental efficiency and effectiveness, courts should be mindful of the burden on public agencies. The legislature recognized this burden in adopting the CPRA. The CPRA contains numerous exemptions to protect both privacy and to support effective governmental operation in the public interest. (*see e.g.* Govt Code , §§ 6254, subds. (a)-(b), 6255). Had the legislature intended the CPRA to place additional burdens on

public agencies to retain records, beyond the times required under the retention statutes enacted in Government Code section 34090, they would have included that requirement in the statute. Inasmuch as the legislature was mindful of the need for effective and efficient government, they did not include a litigation hold requirement in the statute. There is no indication that such a retention requirement was intended.

V. CONCLUSION

The CPRA appropriately balances the important objective of governmental transparency, personal privacy, and the need for effective and efficient government. The three- year litigation hold advocated by the Law Foundation is not found in the CPRA, and was never intended by the legislature. As CPRA requests become more and more frequent, a three-year retention requirement on any records that are withheld from a CPRA request would be unmanageable and crippling to local public agencies.

Dated: October 18, 2022

Respectfully submitted,

By: /s/
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204 (c)(1), counsel for Amici Curiae exclusive of this certification, the cover, and the tables, this Application to File Amicus Curiae Brief and Amicus Curiae Brief of League of California Cities and California Special Districts Association in Support of Respondent contains 2,702 words, as determined by the word count of the computer program used to prepare the brief.

Dated: October 18, 2022 Respectfully submitted,

By:____/s/_____
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PROOF OF SERVICE

Re: *Law Foundation of Silicon Valley v. Superior Court (City of Gilroy), Sixth District Court of Appeal, Case No. H049554.*

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above entitled action, I am employed in Santa Clara County and my business address is 17575 Peak Avenue, Morgan Hill, CA 95037.

On October 18, 2022, I served the attached document(s) described as:

- **APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE CITY OF GILROY**

On the parties in the above named case.

[X] BY E-MAIL OR ELECTRONIC DELIVERY

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[X] BY UNITED STATES MAIL: I served the attached documents by enclosing true and correct copies in a sealed envelope with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Morgan Hill, CA addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 18, 2022, at Morgan Hill, California.

/s/
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