Case No. C083956

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

NATIONAL CONFERENCE OF BLACK MAYORS, et al.,
Plaintiffs and Respondents,
v.
CHICO COMMUNITY PUBLISHING, INC.,
Defendant and Appellant;

CITY OF SACRAMENTO, et al.
Defendants and Respondents.

[PROPOSED] AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES®, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF SACRAMENTO

On Appeal from an Order of the Superior Court, County of Sacramento
Honorable Christopher E. Krueger; Case No. 34-2015-80002124

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Third APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C083956
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 305215 NAME: Alison Leary FIRM NAME: League of California Cities STREET ADDRESS: 1400 K Street, Suite 400 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: 916-658-8281 FAX NO.: 916-658-8240 E-MAIL ADDRESS: aleary@cacities.org ATTORNEY FOR (*name*): Amici Curiae, League of California Cities, et al.	SUPERIOR COURT CASE NUMBER: 34-2015-80002124
APPELLANT/ PETITIONER: Chico Community Publishing, Inc. RESPONDENT/ REAL PARTY IN INTEREST: National Conference of Black Mayors/City of Sacramento	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Amici Curiae, League of California Cities, et al.

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

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Date: January 23, 2018

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▶ Alison E Leary
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

As in all reverse-California Public Records Act ("CPRA") lawsuits, this case involves a local agency called on to balance its responsibilities under California's open government laws with the need to protect privacy rights. The City of Sacramento ("City") was thrust into this dispute after receiving a CPRA request from the Sacramento News & Review ("SN&R") that revealed records on the City's email server that the city attorney's office believed were protected by the attorney-client privilege.

After discovering the records, the city attorney's office informed the holder of that privilege, the National Conference of Black Mayors ("NCBM"), that it possessed the records and intended to disclose them. NCBM then filed a reverse-CPRA lawsuit to enjoin the City from releasing any attorney-client privileged records. SN&R challenged NCBM and sought to have all records released. Caught between the two, the City awaited instruction from the court. Ultimately, in accordance with the court's order, the City released certain documents, withheld certain documents, and produced redacted versions of certain documents.

Now, under Government Code[1] section 6259, SN&R seeks to recover all of the attorneys' fees and costs it incurred as a result of the reverse-CPRA lawsuit from Kevin Johnson in his capacity as the former Mayor of Sacramento—an award that would be satisfied by the City.

[1] All further statutory references are to the Government Code unless otherwise stated.

(§ 6259(d) "The costs and fees shall be paid by the public agency of which the public official is a member or employee….").)

Through this appeal, NCBM urges this Court to answer the question "Does section 6259 authorize the award of attorneys' fees and costs to the records requester in a reverse-CPRA lawsuit against the local agency in possession of the records?" in the affirmative. The only other appellate court to consider this question answered in the negative: "[A] requesting party who participates in a reverse-CPRA lawsuit would not be entitled to the recovery of attorney fees, as would be the case if the party had successfully litigated his or her right to access to documents against a public agency…." (*Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1268.)

Amici urge this Court to maintain the *Marken* court's reading of section 6259, not only because it is correct, but also because it furthers the Legislature's purpose, serves justice, and protects important public policies.

FACTUAL AND PROCEDURAL BACKGROUND

Amici adopt and do not repeat the Statement of Facts, Procedural History, and Standard and Scope of Review prepared by the City. (City's Respondent's Brief, pp. 7-18.)

LEGAL ARGUMENT

1. SECTION 6259 MANDATES THE AWARD OF ATTORNEYS' FEES AND COSTS TO A PREVAILING PLAINTIFF IN A PROCEEDING BROUGHT TO COMPEL PRODUCTION OF RECORDS UNDER THE CPRA—A STANDARD NOT MET BY RECORDS REQUESTERS WHO PARTICIPATE IN REVERSE-CPRA LAWSUITS.

At its core, this case presents a simple question of statutory interpretation. "When construing statutes, [the court's] goal is 'to ascertain the intent of the enacting legislative body so that [the court] may adopt the construction that best effectuates the purpose of the law.'" (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919 [quoting *Gattuso v. Harte–Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567].) Courts must not "examine the language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165.) "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 24 Cal.4th 733, 737.)

An additional rule of interpretation applies when courts construe the CPRA. (*Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, 166.) "In 2004, California voters approved Proposition 59, which amended the state Constitution to provide a right of access to public records." (*Ibid.*)

Proposition 59 also codified guidance on the proper interpretation of statutes that affect that right: "A statute…shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).) "*To the extent legislative intent is ambiguous*, this provision requires [courts] either to broadly or to narrowly construe the [CPRA], whichever way will further the people's right of access. [Citation.] But this rule of construction does not require [courts] to resolve every conceivable textual ambiguity in favor of greater access." (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190 [citing *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 166] [Emphasis added].)

Applying these well-established principles to the case at bar, this Court must conclude that a records requester who participates in a reverse-CPRA lawsuit does not meet the requirements for the recovery of attorneys' fees under section 6259.

A. The plain language of section 6259 does not permit a fee award to a records requester who participates in a reverse-CPRA lawsuit against the local agency in possession of the records.

In relevant part, section 6259 provides:

> (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.

> (b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public.
>
> (d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section.

This provision quite clearly addresses when a plaintiff is entitled to an award of attorneys' fees. It requires a finding that: (1) "records are being improperly withheld"; (2) "the public official's decision to refuse to disclose is not justified"; and (3) the "plaintiff prevail in litigation filed under this section."

The City and NCBM's briefs amply demonstrate that SN&R fails to satisfy each of these requirements. (City's Respondent's Brief, pp. 18-23; NCBM's Respondent's Brief, pp. 15-28.) Indeed, records requesters who participate in reverse-CPRA lawsuits never meet these requirements.

First, by nature, a reverse-CPRA lawsuit only arises when a local agency elects to disclose records sought by a records requester, thus the local agency cannot have improperly withheld documents. (*Marken, supra,* 202 Cal.App.4th at p. 1267.)

Second, a records requester who participates in a reverse-CPRA lawsuit is not a plaintiff in a lawsuit filed pursuant to Section 6259. (See Code Civ. Proc., § 481.180 ["'Plaintiff' means a person who files a complaint."]; § 6259 [defining litigation filed pursuant to section 6259 as "a verified petition to the superior court…that certain public records are

being improperly withheld from a member of the public."].)

Third, a records requester in a reverse-CPRA lawsuit cannot prevail within the meaning of the statute, because the local agency intended to disclose the requested records, and therefore the lawsuit cannot have motivated the local agency to disclose previously withheld records. (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 899 ["[A] plaintiff has prevailed within the meaning of the statute when he or she files an action which results in defendant releasing a copy of a previously withheld document."].)

B. Examining the language in the context of the statutory framework as a whole does not require this Court to expand liability for the payment of attorneys' fees under section 6259 beyond the plain language of the statute.

Even assuming arguendo that the text of section 6259 is ambiguous—it is not—the statutory framework of the CPRA does not, as SN&R suggests, require this Court to expand the class of persons entitled to attorneys' fees under section 6259. Relying on Article I, section 3, subdivision (b)(2) of the California Constitution, SN&R urges this Court to hold that government transparency prevails against privacy interests in all instances. This position overlooks that the CPRA values both transparency and privacy.

Notably, the opening provision of the CPRA states:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this

state.

(§ 6250.) Thus, even before emphasizing the fundamental purpose of transparent government, the Legislature identified the need to limit that purpose to protect personal privacy. Proposition 59 maintained this balancing of interests, both enshrining in the California Constitution a guarantee to the public's right of access to public records and preserving the individual's right of privacy. (Cal. Const., art. I, § 3, subds. (1), (3) ["Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy…."].) Accordingly, the Supreme Court has held that "the right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282.) Rather, courts "interpreting the [CPRA] seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy." (*ACLU v. Deukmejian* (1982) 32 Cal.3d 440, 447.)

Section 6254, which exempts a long list of documents from the CPRA's disclosure requirements, further evidences the careful balance the Legislature struck between the rights of access and privacy. Many of these exemptions demonstrate the Legislature's concern about third-party privacy and "reflect the reality that, in order to perform their many functions, governmental agencies must gather much information, some of

which the parties providing the information wish to be kept confidential." (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183.) For example, Section 6254, subdivision (c) exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Section 6254 also exempts "[i]nformation required from any taxpayer in connection with the collection of local taxes that is received in confidence" (*id.*, subd. (i)); "[l]ibrary circulation records" (*id.*, subd. (j)); "[s]tatements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for" (*id.*, subd. (n)); and "[r]ecords of Native American graves, cemeteries, and sacred places" (*id.*, subd. (r)).

The public interest exemption, which permits local agencies to withhold a record if the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure, may also protect records that implicate the right to privacy. (§ 6255; *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222 (upholding nondisclosure of individual teacher test scores designed to measure each teacher's effect on students' performance on standardized tests); *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008 (upholding nondisclosure of local agency records containing names, addresses, and phone numbers of airport noise complainants); *San Gabriel Tribune v.*

Superior Court (1983) 143 Cal.App.3d 762 (upholding nondisclosure of trade secrets and other proprietary information).)

When local agencies receive CPRA requests that fall within an exemption designed to protect privacy, they face a Catch-22. As the court in *City of Santa Rosa v. Press Democrat* (1987) 187 Cal.App.3d 1315, explained:

> We recognize the dilemma in which the City finds itself. If it refuses to disclose the information, it faces the possibility of defending an action by [the requester] to enforce the CPRA. If it fails to justify the nondisclosure, it will be liable for court costs and attorney fees. Moreover, if voluntary disclosure results in an unwarranted invasion of privacy, it becomes exposed to a civil suit for damages.

The case at bar, a textbook reverse-CPRA lawsuit, clearly demonstrates this dilemma. Relevant here is Section 6254, subdivision (k), which exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." In reviewing SN&R's CPRA request, attorneys in the city attorney's office happened upon records that appeared to fall within the protections of the attorney-client privilege. (City's Respondent's Brief, p. 8.)

Having identified records that implicated a privacy interest that this state's Supreme Court has described as fundamental to the administration of justice, the City was in a quandary. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The City could not assert the attorney-client privilege to refuse disclosing the records, as NCBM alone held that privilege. (Evid.

Code, § 953 [providing that the holder of the attorney-client privilege is the client]; Rules Prof. Conduct, rule 3-600 [providing that where an attorney represents an organization, "the client is the organization itself, acting through its highest authorized officer."].) Thus, in order to comply with its obligation to disclose public records, the City proceeded in the only way that it could, by informing NCBM's counsel of the CPRA request and of the City's intent to disclose the records. (City's Respondent's Brief, p. 8.) This resulted in NCBM filing a reverse-CPRA lawsuit seeking to enjoin the City from releasing any records protected by the attorney-client privilege. (*Ibid.*) At that point, the City was stuck in legal limbo, prohibited from appeasing either NCBM or SN&R.[2]

Considering as a whole the many exemptions in Section 6254 and the requirement that local agencies ensure the constitutional rights to both privacy and access to public records, requiring local agencies to pay for a

[2] Local agencies frequently find themselves in this type of situation. (See e.g., *Pasadena Police Officers Association v. City of Pasadena* (B275566, app. pending) [involving a local agency's decision to release a report with police officer personnel information redacted, and the resulting reverse-CPRA lawsuit brought by the Pasadena Police Officers Association to enjoin disclosure of the entire report]; *City of Los Angeles v. Metropolitan Water District of Southern California* (Super. Ct. Los Angeles County, 2016, No. BS 157056) [involving a local agency's decision to release the personal information of participants in its Turf Program and the resulting reverse-CPRA lawsuit brought by the Los Angeles Department of Water and Power to enjoin disclosure on the grounds that the information was exempt utility user information]; *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250 [involving a school district's decision to release records concerning the district's finding that a teacher violated the district's sexual harassment policy and the resulting reverse-CPRA lawsuit brought by the teacher to enjoin disclosure].)

CPRA requester's attorneys' fees in a reverse-CPRA lawsuit would upset the careful balance struck by the CPRA and Proposition 59, and would be unjust.

2. THIS COURT SHOULD NOT REQUIRE LOCAL AGENCIES TO PAY FOR ATTORNEYS' FEES OVER WHICH THEY HAVE LITTLE TO NO CONTROL.

Unlike a traditional CPRA lawsuit, local agencies have little to no control over the production of public records in a reverse-CPRA lawsuit. Once a petitioner files a reverse-CPRA lawsuit, local agencies are simply caught in the middle of a legal battle over the appropriate balance between external, competing interests.[3] Moreover, local agencies have little to no ability to control litigation costs, as the main dispute advances at the requester's and interested third party's—and ultimately the trial court's—behest.

[3] SN&R asserts that it is entitled to fees because it was "forced" to defend the reverse-CPRA lawsuit. (SN&R's Reply Brief, pp. 9, 13, 27-29, 42.) This interpretation implies that a local agency must indemnify a records requestor whenever an interested third party files a reverse-CPRA lawsuit. Not only does this interpretation lack any basis in the law, it is a sea change in policy. As the Supreme Court acknowledged in *Ardon v. City of Los Angeles* (2016) 62 Cal. 4th 1176, 1189, "'Though precise quantitative figures are unavailable,… each year public entities in this state collectively receive thousands upon thousands of public records requests. And .... the volume of records covered by even one public records request can be staggering [citing one request involving 65,000 pages of documents]....'" As discussed above, many of these requests implicate privacy rights that may give rise to a reverse-CPRA lawsuit. With 482 cities, 58 counties, and numerous other types of local agencies in California, the impact of this Court's decision, if it adopts SN&R's novel interpretation, will be great—obligating local agencies that acted in full compliance with the CPRA to pay potentially thousands of dollars in attorneys' fees merely because a records requester is dissatisfied with the local agency's litigation strategy.

A ruling that holds the City liable for a records requester's attorneys' fees in a reverse-CPRA lawsuit creates a situation in which local agencies, and ultimately the agencies' taxpayers, are responsible for fees over which they have no control and cannot avoid through settlement. Such a ruling would undermine several significant public policies that, although articulated in the context of the Government Claims Act, are implicated here. Specifically, local agencies should have ample opportunity to settle lawsuits, thereby avoiding the expenditure of public funds in needless litigation, and should be informed in advance of the possibility of liability and indebtedness to facilitate budgeting for upcoming fiscal years. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738; *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 72; *Munoz v. State of Calif.* (1995) 33 Cal.App.4th 1767, 1776; *Life v. County of Los Angeles* (1991) 227 Cal.App.3d 894, 899.) These policies ensure that local agencies can perform the essential public functions for which they were created. In light of these important public policies, amici urge the Court against creating a rule in which local agencies are liable for attorneys' fees in reverse-CPRA lawsuits.

CONCLUSION

Section 6259 is unambiguous, and its plain terms cannot support SN&R's interpretation of the statute. Nor would adopting SN&R's interpretation serve the dual purposes of the CPRA or Proposition 59. The statutory text, context, and purpose leave no genuine doubt that Section 6259 does not entitle a records requester who participates in a reverse-CPRA lawsuit to recover attorneys' fees against the local agency in possession of the records. Accordingly, the League, CSAC, and CSDA respectfully request that this court affirm the trial court's decision.

DATED: January 23, 2018

Respectfully Submitted,

By: / s / *Alison E. Leary*

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League of California Cities®, California State Association of Counties and California Special Districts Association

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel hereby certifies that the foregoing **[PROPOSED] *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES®, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF SACRAMENTO** is proportionally spaced and has a typeface of Times New Roman 13 point or more. I further certify that the attached brief contains 3,084 words, including footnotes, but excluding the caption page, tables and signature block, as counted by the Microsoft Word 2016 word processing program used to generate the brief. This is fewer than the 14,000 word limit set by rule 8.204(c)(1).

DATED: January 23, 2018

Respectfully Submitted,

By: / s / *Alison E. Leary*

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PROOF OF SERVICE

(Code of Civil Procedure §1013)
STATE OF CALIFORNIA - COUNTY OF SACRAMENTO

I, the undersigned, declare that I am a citizen of the United States and am employed in the City and County of Sacramento, State of California. I am over the age of 18 and not a party to this action; my business address is: 1400 K Street, Suite 400, Sacramento, CA 95814.

On January 23, 2018, I served the document(s) described as: **[PROPOSED] *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES®, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF SACRAMENTO** in this action by the following methods addressed as follows:

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Executed on January 23, 2018 at Sacramento, California.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in an office of a member of the bar of the court at whose direction the service was made.

Janet M. Leonard

Janet M. Leonard

National Conference of Black Mayors, et al. v. Chico Community Publishing Inc.
California Court of Appeal, Third Appellate District
Case No. C083956

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