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February 10, 2022

Hon. Tani Cantil-Sakuye, Chief Justice
and Associate Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request for Depublication - *Getz v. Superior Court of El Dorado County* (2021) 72 Cal.App.5th 637 [287 Cal.Rptr.3d 637]

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

## I. INTRODUCTION

I write on behalf of the League of California Cities ("Cal Cities"), the California Special Districts Association ("CSDA"), and the California State Association of Counties ("CSAC") (collectively, "Organizations"), who jointly seek depublication of the Court of Appeal's opinion in the *Getz v. Superior Court of El Dorado County* case ("Opinion"), as permitted by the California Rules of Court, Rule 8.1125. In accordance with Rule 8.1125(a)(3), this letter addresses the interest of these Organizations that advocate on behalf of public agencies, the existing law and procedures followed by such public agencies to provide public records as required by law, and the reasons why the Opinion should be depublished.

### A. Interest of the Organizations Submitting Request

#### 1. Cal 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 California. 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.

2. CSDA

CSDA is a California non-profit corporation consisting of over 900 special district members throughout California that was formed in 1969 to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts. CSDA is advised by its Legal Advisory Working Group, comprised of 25 attorneys that represent special districts throughout the State. The group monitors litigation of concern to special districts and identifies cases that have statewide or nationwide significance and has identified this case as having statewide significance for special districts.

3. CSAC

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

B. Background on Legal Requirements and Public Agency Procedures for Processing a Public Records Request

Generally, any person may make a request under the Public Records Act (PRA) to inspect or receive a copy of disclosable public records "after deletion of the portions that are exempted by law" or, following review, determined to be "exempt from disclosure by express provisions of law." (*See* Gov. Code §6253(a)-(b).) Although public agencies range in size and resources, the following are the basic steps followed in response to a PRA request:

1. Receipt of PRA Request

Once a PRA request has been received, a public agency must, "within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor," unless the public agency extends that deadline by 14 days. (Gov. Code §6253(c) (emphasis added).)

2. Initial Determination and Response

"[I]f the [public] agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available." (Gov. Code §6253(c).)

To make such a determination, public agencies generally conduct a reasonable search for potentially disclosable records by alerting the staff potentially most knowledgeable about the records sought, the agency's information technology specialist(s) (if the agency has such a position), and their legal advisor(s). After this initial review, and based upon the information available to them at the time, the public agency provides an estimate of the number of potentially responsive records and when such records can be made available after the public agency determines which records, or portions thereof, are not exempt.

3. Public Agency's Duty to Provide Reasonable Assistance

If the PRA request is unclear, unfocused, or ineffective, a public agency is permitted and required, "to the extent reasonable under the circumstances," to assist the requester in identifying records or information responsive to the request; describe the information technology and physical location in which the records exist; and provide suggestions for overcoming any practical basis for denying access to the records or information requested. (Gov. Code §6253.1(a).)

Although this procedure seems simple, the "reality [is] that a requester, having no access to agency files, may be unable to precisely identity the documents sought … [so] writings may be described by their content [for the agency to] determine whether it has such writings under its control and the applicability of any exemption." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165-166 (emphasis added).)

Oftentimes, requests will lack precision. For example, if a request does not provide a relevant time period or lacks sufficient description for public agency staff to identify responsive records, then public agencies generally ask the requester to refine their request to be one that "reasonably describes an identifiable record" as required under Government Code section 6253(b).

If the requester does not narrow the request, then the public agency faces a decision: divert significant staff time and resources (which are often limited, especially for small agencies) to locate potentially responsive records and review them for exemptions, or articulate practical burdens to justify why disclosure will be delayed or limited, which is contrary to the legislative intent behind Government Code section 6253.1 and its options for public agencies to satisfy such a request.

4. Responses by Public Agency Permitted by Law

A public agency's response to a PRA request is deemed satisfied when the public agency: (a) makes the requested records available, subject to any applicable exemptions; (b) denies the request, citing applicable exemptions; (c) "makes available an index of its records" (*see* Gov. Code §§ 6253(a)-(b), 6253.1(d)); or (d) cannot identify the records or information after making a reasonable effort to elicit clarifying information from the requester. (*See* Gov.

Code §6253.1(b).) If the response involves any denial, it must be in writing. (Gov. Code §6255(b).)

These permissible responses were specifically considered by the California Newspaper Publishers Association when they sponsored the legislation that codified Government Code section 6253.1. The legislation was intended to, in part, better facilitate responses to requests, and give public agencies options to comply and avoid practical scenarios where public agencies could ignore or refuse to process requests. (*See* August 28, 2001 Senate Floor Analyses, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB1014#.)

5. Consequences for Failing to Respond to Request

If "certain public records are being improperly withheld from a member of the public", a court will review whether "the public official's decision to refuse disclosure is not justified under [Government Code] Section 6254 or 6255," and if so, the court may order the "public official to make the record public." (Gov. Code §6259(a)-(b) (emphasis added).) The requester is also entitled to attorney's fees for prevailing in litigation. (Gov. Code §6259(d).)

## II. SUMMARY OF THE OPINION

This Opinion addressed the interaction between the requester and El Dorado County ("EDC") on several related requests for public records.

The first request was made on March 29, 2018, seeking drafts involving development plans, proposals, reports, and correspondence between EDC and certain individuals. EDC responded in accordance with the PRA by reviewing each record for exemptions, determining which records were exempt or partially exempt from disclosure, and then producing an index with hyperlinks to the non-exempt documents. (Opinion, 287 Cal.Rptr.3d at 727.)

The requester did not raise any issues with EDC's response to his first request. After reviewing the documents provided, the requester submitted a second PRA request on August 1, 2018. This second request sought emails from EDC to certain email addresses. In response, EDC objected and notified the requester that there were approximately 47,000 potentially responsive records that would require hundreds of hours to review, and asked the requester to refine the request to allow for a more focused search that was administratively easier for EDC to process. In reply, the requester suggested, and EDC provided on March 25, 2019, an index of records ("March Index"). However, such index did not include many details describing the email record nor any hyperlinks to documents, and it appeared that EDC wanted the requester to identify specific emails before EDC reviewed them for applicable exemptions and then determine whether to disclose or withhold the records. (*Id.at* 727-729.)

The requester refused to identify which emails he sought, and instead asked EDC to produce all of the potentially responsive emails requested in the August 1, 2018 request that were identified in the March Index. EDC received this follow-up request on April 15, 2019, but EDC did not respond in writing or otherwise. (*Id.* at 728-729.)

On June 25, 2019, the requester filed the writ of mandate action seeking the disclosure of the emails identified in the March Index. At the trial court level, EDC cited the volume of e-mails responsive to the request, and argued that the need to review all of the emails to determine if they contain privileged information and to verify they are public documents, would impose an enormous burden. (*Id.* at 725-726.) The trial court agreed with EDC that the request was not specific or focused, and was overbroad and unduly burdensome, and concluded that EDC's efforts reasonably complied with the PRA. (*Id.* at 730.)

The appellate court reversed, and held: (1) the records identified in the March Index must be produced, without addressing whether EDC may review such records first to determine whether exemptions applied; (2) "that the [EDC] had already identified the records responsive to the request in the [March Index] but simply refused to produce them" and therefore the request cannot be overboard or unduly burdensome; (3) EDC did not provide substantial evidence to show that the records must be reviewed to determine whether exemptions applied; and (4) EDC "must make some showing that exempt or privileged information exists in the records requests" before the request can be considered overly broad or unduly burdensome.

## III. REASONS WHY THE OPINION SHOULD NOT BE PUBLISHED

Lower court decisions may be depublished where the Court of Appeal's decision was "wrong on a significant point" or where the opinion "was too broad and could lead to unanticipated misuse as precedent." (Joseph R. Grodin, The Depublication Practice of the California Supreme Court (1984) 72 Cal. L. Rev. 514, 515; *see also* Cal. R. of Ct., R. 8.1125 Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 11:180.1, p. 11-74.) This Opinion is wrong on several significant points of law and was too broad in a way that presents a high potential for misuse as a precedent, and as such, should be depublished.

### A. The Opinion Mistakes the Duty to Provide a Further Response with the Improper Withholding of Disclosable Records

Government Code section 6253.1 affords public agencies various options when responding to a request for public records.[1] These options are:

[1] As discussed in Section I.B.4, *supra*, the legislative changes that resulted in section 6253.1 were promoted by newspapers seeking transparency, who understood that processes that overwhelmed public

(1) the public agency makes the records available (Gov. Code §6253.1(d)(1);

(2) the public agency denies the request based upon PRA exemptions (Gov. Code §6253.1(d)(2));

(3) the public agency makes available an index of records (Gov. Code §6253.1(d)(3)); or

(4) the public agency reasonably assists the requester in making a "focused and effective request that reasonably describes [identifiable records] to the extent reasonable under the circumstances", including providing "suggestions for overcoming any practical basis for denying access", and is unable to elicit additional clarifying information from the requester that will help identify the records (Gov. Code §6253.1(a)-(b)).

In the Opinion, the court acknowledged that EDC provided an index of records for the requester in response to the August 1, 2018 request that resulted in 47,000 potentially responsive records. By doing so, EDC met their initial obligation under Section 6253.1(d)(3). EDC never provided a subsequent written response indicating that EDC intended to withhold disclosable records. (Gov. Code §6255(b).) The record is unclear why EDC did not provide another response to the follow-up request seeking the same records. It could be because EDC believed it had already provided an adequate initial response consistent with Section 6253.1 of the PRA (by providing an index, or by providing reasonable assistance in focusing the request with no additional clarification given) and was not required to duplicate that response.

The Opinion glosses over this important fact and instead focuses on the follow-up request of the requester seeking all the records identified in the March Index and the failure of EDC to provide a response to this request. The Opinion incorrectly treats EDC's lack of a further response as a de facto determination to withhold the additional March Index-related records, without adequate explanation of its justification for doing so. Without such adequate explanation, this Opinion is likely to create confusion in future cases where an agency has provided an index of records consistent with Section 6253.1(d)(3) but has not provided an unambiguous response declaring the agency's intent to withhold disclosable records.

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agencies would not increase transparency or facilitate the prompt disclosure of public records. The solution was to provide a public agency the options to reasonably assist in a request that advances mutual understanding and facilitates the location and provision of disclosable public records.

B. The Opinion Improperly Concludes that a Failure to Further Respond Results in the Release of Records that Have Not Been Reviewed for Exemptions

Even assuming that the EDC intended to improperly withhold disclosable public records, the court incorrectly ordered EDC "to produce the text of e-mails and any attachments on [EDC's] index of 42,852" e-mails.

This order is inconsistent with existing law. Failing to provide a further response does not equate to an improper withholding of public records, and "requiring disclosure of otherwise exempt records as a penalty for delay in complying with the [PRA's] timing requirements is unduly harsh … [and the PRA] does not expressly provide such a remedy." (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072.) Furthermore, for claims that segregating exempt from non-exempt information is unduly burdensome, the existing procedure is for courts to review the records *in camera* to evaluate the burden. (*See American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453.)

Here, the court ordered that such records be released but did not order EDC to review such records or the trial court to undergo an *in camera* review of such records before disclosure. Such an order is inconsistent with the intent and spirit of the PRA, which allows public agencies to withhold certain exempt information before disclosure. (*See* Gov. Code §6253(a).)

Instead, an appropriate order would have been for EDC to provide a written response if it is denying the request, in whole or in part, as required under Section 6255(b), and to promptly review and disclose the remaining responsive and non-exempt records.

One of the practical effects of this Opinion is that requesters will be encouraged to make unclear, unfocused, and unspecific requests, knowing that if a public agency fails to fully respond or, in the eyes of the court, improperly assists the requester to focus the request, then the requester may obtain such records regardless of any lawful exemptions, and cash in on attorney's fees after abusing the process.

C. The Opinion Adds Requirements for Indexes Provided Under Section 6253.1(d)(3) Beyond What Is Required By Statute

The Opinion details the existence of two indexes provided by EDC – one containing hyperlinks to disclosable documents and another that did not contain such hyperlinks – and concluded that the unlinked index did not satisfy the PRA request.

The practical implication is that indexes, alone and without hyperlinks to other documents, do not constitute a response that complies with the PRA. This "index+" requirement goes beyond what is required by Section 6253.1(d)(3) and undermines the intent

of Section 6253.1, which is to facilitate identification and the prompt disclosure of relevant and disclosable records between a public agency and the requester.

D. The Opinion Improperly Concludes that a Public Agency Cannot Use Administrative Burdens to Argue that a Request is Unduly Burdensome and Implies Individualized Review of Potentially Exempt Records is Unnecessary Even if it Involves Potentially Privileged Information

The majority in this Opinion dismisses California Supreme Court precedent and the dissent of their colleague, expressly stating that the majority disagrees that a "relevant inquiry" for whether a request is unduly burdensome could be "how burdensome it is for [EDC] to make" a predisclosure review of the relevant documents. (*See* Opinion, 287 Cal.Rptr.3d at 737-738.)

This is in conflict with existing California Supreme Court precedent, which permits public agencies to establish that the burden of segregating exempt and non-exempt records justifies nondisclosure. (*American Civil Liberties Union Foundation,* 32 Cal.3d at 452-453.) The dissent in the Opinion points out this conflict – stating that the majority should have followed California Supreme Court precedent by allowing consideration of such administrative burdens, how as a practical matter it is difficult to prove an exemption at this stage when records have not been fully identified or segregated for exemptions, and how the majority should have upheld the trial court's ruling that the request was "overbroad and unduly burdensome". (Opinion, 287 Cal.Rptr.3d at 741-744.)

For example, the Opinion implies that potentially exempt emails do not have to be individually reviewed for privilege because only one of the four email domains at issue involved a law firm with which EDC had a common interest privilege, and thus, only a much smaller subset of emails had to be reviewed. (*See id*. at 736.) However, the law firm at issue represented the developer, and the developer and developer's consultant were two of the other three email domains subject to the request. The court does not consider whether the developer and consultant may have undertaken actions or communicated information subject to the common interest privilege at that law firm's direction, where the law firm's email was not included.

Furthermore, because the emails may be legally privileged, ethical requirements of reasonable care require individualized review of such records by EDC's attorneys. (*See* State Bar Opinion No. 2015-193 (discussing how electronic search terms may be over or under inclusive and attorneys may have to review the gathered data or consult with an e-discovery specialist to fulfill their ethical duties), available at https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL1.pdf.) Ignoring the public agency's need and their attorney's duty to review potentially responsive but exempt emails

ignores the practical reality that public agencies may not rely solely on electronic search terms to determine relevant or exempt information.

Thus, the Opinion essentially dismisses how administrative burdens, especially involving privileged information, may present a significant burden that should be considered in responding to a PRA request, which is inconsistent with practical reality of PRA processing procedures and also existing precedent. By allowing this Opinion to remain published, there is also an immediate threat of inconsistent opinions, due to the availability of contradictory California Supreme Court precedent and the highly persuasive dissenting opinion.

## IV. CONCLUSION

Allowing the Opinion to remain published will result in negative legal and practical consequences. Legally, this Opinion is inconsistent with the statutory intent set forth in Government Code section 6253.1, contradicts existing precedent, creates confusion in the existing law, and will create a split in authorities. Practically, public agencies will lose statutory tools and strategies intended to facilitate their ability to quickly provide responsive records. For these reasons, Cal Cities, CSDA, and CSAC respectfully request that the Court order depublication of this Opinion.

Sincerely,

Kane Thuyen