Court of Appeal Case No. G058506

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

FRIENDS FOR FULLERTON'S FUTURE, et al.

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

Respondent,

CITY OF FULLERTON

Real Party in Interest.

Petition for Writ of Mandate
Orange County Superior Court Case No. 30-2019-01107063-CU-NP-CJC
Hon. Thomas A. Delaney

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF REAL PARTY IN INTEREST

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Pursuant to California Rules of Court, Rule 8.487(e), the League of California Cities (the "League") submits this *amicus curiae* brief in support of plaintiff and real party in interest City of Fullerton (the "City").

I.

IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

The League is an association of 478 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. The League 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.

II.

POINTS TO BE ARGUED BY *AMICUS*

The Court should reconcile the mandate of the California Public Records Act ("CPRA") to promptly disclose public records with a fair reading of inadvertent disclosure, as that term has been used by courts considering such disclosures in (a) litigation; and (b) state and local agencies' processing of public records requests.

III.

STATEMENT OF FACTS

The League adopts the statement of facts in the City's preliminary opposition. What appears clear from both parties' papers is that (a) Petitioners have obtained certain City records; and (b) the City did not expressly authorize Petitioners to obtain those records. *See, e.g.*, City's preliminary opposition, p. 10 ("Petitioners took records off the City's

Dropbox account that they were never invited or authorized to access and/or download.").

IV.

ARGUMENT

This brief focuses on a single issue – the legal standard for inadvertent disclosure. "Inadvertent disclosure" is defined as "[t]he accidental revelation of confidential information, as by sending it to a wrong e-mail address or by negligently allowing another person to overhear a conversation." *Black's Law Dictionary* (11th ed. 2019). For purposes of the Court's analysis, it is of no moment whether Petitioners wrongfully took the City records, or even the City mistakenly posted its records publicly online. The key fact is that the City did not intend to disclose the records, and "therefore disclosure was inadvertent under either scenario." *McDermott, Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1110 (citing *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818-819).

In this case, even though disclosure appears to have occurred, at least in some instances, <u>before</u> the City had actually sent Petitioners the non-exempt records responsive to their public records request, case law discussing inadvertent disclosures under the CPRA should still apply. The Court should apply a workable legal standard in considering whether there is a waiver of the exemptions to disclosure under the CPRA, following *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176.

1. The California Public Records Act

"The California Legislature in 1968, recognizing that 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state' [citation], enacted the California Public Records Act, which grants access to public records held by state and local agencies." *Long Beach Police Officers*

Assn. v. City of Long Beach (2014) 59 Cal.4th 59, 66-67. To that end, Government Code Section 6253(a) "provides all persons with the right to inspect any public record maintained by state or local agencies, subject to various enumerated exceptions." *National Conference of Black Mayors v. Chico Community Publishing* (2018) 25 Cal.App.5th 570, 578 (citation).

State and local agencies may charge for "direct costs of duplication" of records. Gov.Code § 6253(b). In line with copying costs being recoverable, by the early 1970's, "[c]opy machines and computerization [then] permitt[ed] inexpensive, rapid duplication of documents and data." *Central Bank v. Superior Court* (1973) 30 Cal.App.3d 962, 970. With the development of new technology, requestors were not limited to simply inspecting records at, say, a city hall or a state agency field office during business hours of the agency. Rather, requestors that paid copying costs could also obtain copies of records, as well. "For example, a requestor may first inspect a series of records, and then, based on that review, decide which records should be copied."[1]

2. Even Individual Public Records Requests Can be Voluminous

The volume of records covered by even one public records request can be staggering. In civil litigation, "document production may involve massive numbers of documents." *Rico*, 42 Cal.4th at 818. The same is true for public records requests, as the Supreme Court noted in *Ardon*:

> [P]ublic entities in this state collectively receive thousands upon thousands of public records requests. And the number of requests seems to be increasing each year . . . Further, the volume of records covered by even one public records request can be staggering [citing one request involving 65,000 pages of documents] . . . Public entities recognize that they must

[1] The People's Business: A Guide to the California Public Records Act (rev. April 2017), available at <https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx> (as of Nov. 25, 2019).

> function under these pressures, and they can always strive to do better—albeit with finite resources—in avoiding erroneous disclosures of privileged records. But the logistical problems public entities can face in reviewing, in some cases, even thousands of pages of records responsive to a public records request ... is daunting. It would be foolish to believe that human errors in the processing of public records requests will cease. . .

Ardon, 62 Cal.4th at 1188-1189 (quoting brief of League and California State Association of Counties); *see also Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353 (65,000 pages of documents reviewed); *Crews v. Willows Unified School Dist.* (2013) 217 Cal.App.4th 1368 (approximately 60,000 emails disclosed, 3,200 pages withheld as exempt).

In processing public records requests for emails, state and local agencies may go through some equivalent of a two-step process to respond to requestors. First, agency staff may pull relevant emails from computer servers, using appropriate search dates and/or terms, depending on the request, creating a set of emails that can be reviewed on a one-by-one basis. And second, there is an individualized review of the potentially responsive emails to determine whether the emails are both responsive and not otherwise exempt from disclosure.

In the case at bar, it appears that Petitioners obtained the City records while the City was in the midst of (but had not completed) the second step, at least in some instances. *See, e.g.*, City's preliminary opposition, pp. 21-22 (records obtained by Petitioners were not ready for release – rather, they were intended "for review by the City's attorney, for redaction and/or exemption under the Public Records Act") (emphasis in original). Agencies may redact records, where supported by a CPRA exemption. "Any reasonable segregable portion of a record shall be available for inspection . . . after deletion of the portions that are exempted by law." Gov.Code § 6253(a). In other words, "the fact that a public

record may contain some confidential information does not justify withholding the entire document." *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1187 (citation).

3. Benefits of Cloud Services

In recent years, email correspondence has replaced hard copy letters and memos, to a large extent. In responding to public records requests for such electronic records, agencies often disclose electronic records (such as emails) by providing requestors with a hyperlink to the records stored on a cloud service on the internet (such as Dropbox, OneDrive, Box.com, and Google Drive).

Disclosing electronic public records via hyperlink to cloud storage saves agencies time and money. Agencies no longer need to spend the time printing out responsive emails. And where an agency provides responsive records electronically, the electronic records no longer need to be copied to a USB drive or a CD/DVD disk. For requestors, receiving electronic records via hyperlink to cloud storage makes it unlikely that they would be required to pay "direct costs of duplication." Gov.Code § 6253(b).

In short, agencies' migration to cloud services to provide responses to requestors (a) provides a costs savings to <u>both</u> agencies and requestors; and (b) facilitates swift access to records for requestors at little or no cost to the requestor. This approach is consistent with the CPRA's mandate that agencies "promptly" make records available to requestors. Gov.Code § 6253(b). Making disclosable records available through cloud services allows for requestors to immediately receive records, rather than the traditional (a) awaiting paper copies of printed-out records; and/or (b) picking up USB drives or CD/DVD disks at the agency's office, and taking it to a personal computer.

4. The CPRA Waiver Statute Does Not Apply to Inadvertent Disclosures

The bases that would allow an agency to decline to disclose a record are enumerated as exemptions in Section 6254. "[T]he exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow for nondisclosure but do not prohibit disclosure." *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1263 (citations); Gov.Code §§ 6254 & 6253(e) (allowing agencies to "adopt requirements . . . that allow for faster, more efficient, or greater access" than allowed by the Public Records Act, unless otherwise prohibited by law).

In view of the agency's discretion to exercise an exemption (to support nondisclosure), an agency is deemed to waive grounds for claiming an exemption under the CPRA once it publicly discloses records to any member of the public. *See* Gov.Code § 6254.5. In certain circumstances, however, waiver does not apply. *See id.*

Additionally, the Supreme Court has read Section 6254.5 in the same manner as Evidence Code 912, finding that "state and local agencies [may] waive an exemption [to disclosure under the CPRA] by making a voluntary and knowing disclosure." *Ardon,* 62 Cal.4th at 1189. Section 6254.5 "does not apply to inadvertent disclosures," even where the disclosure is to a nonlawyer. *Id.* at 1188, 1189 (exemptions not "forfeited through simple inadvertence").[2] This is because "human error is as likely

[2] "Indeed, if the inadvertent disclosure under the Public Records Act is made to a nonlawyer, the public agency might never become aware of the mistake. But the fact that a proper remedy might be difficult to obtain for an inadvertent disclosure under the Public Records Act provides no reason to deny a remedy when a judicial forum does exist. Here, City moved in the trial court assigned the underlying case for relief. Doing so was proper." *Ardon*, 62 Cal.4th at 1189. Where an agency inadvertently discloses

to occur in the process of responding to a Public Records Act request as to a discovery request. . . ” *Id.* at 1188.

Here, since the City was processing various public records requests from Petitioners and other third parties, but had not yet completed its review (to determine what is responsive, and of that set, what is exempt), the Court should still apply the rule adopted by the Supreme Court in *Ardon*. As the City correctly noted, a requestor should not be permitted to engage in “self-help tactics” (City’s preliminary opposition, p. 36) where confidentiality over the records would be apparent either after obtaining the records, or, at a minimum, after written notice from the City’s attorneys – of the inadvertent disclosure.

Inadvertent disclosure does not result in waiver, “if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure.” *Regents of Univ. of Cal. v. Superior Court* (2008) 165 Cal.App.4th 672, 683. Courts have rejected the theory of what amounts to a compelled waiver in instances of inadvertent disclosure, as it “invites . . . a ‘gotcha’ theory of waiver, in which an underling’s slip-up in a document production becomes the equivalent of actual consent.” *Ardon*, 62 Cal.4th at 1187 (citing *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654); *Newark USD*, 245 Cal.App.4th at 906 (noting that if it adopted a compelled waiver approach, it would “encourage attorneys litigating against a public agency to accompany every discovery request with an identical PRA request, merely on the chance that an inadvertent production of privileged documents should occur”).

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privileged documents in response to a public records request, that is “for trial courts to take into consideration in granting relief to a public agency, rather than as a basis for presumptively denying relief in all circumstances.” *Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 909.

5. The CPRA's Mandate that State and Local Agencies Make Records Promptly Available Mitigates Against an Expansive Construction of Waiver

The Court should avoid an expansive reading of the CPRA's waiver statute that could set back agencies' efforts to promptly make records available (Gov.Code § 6253(b)), here via cloud storage. Otherwise, agencies may be forced to engage in a much more detailed review of records before disclosure, due to waiver concerns.

While the City has set forth a variety of types of records that appear to have been inadvertently disclosed, the League wishes to highlight an example of why the Court should decline to take an expansive reading of the CPRA's waiver statute. In 2018, the Legislature passed two new laws that increase access to law enforcement records, both of which involve a cumbersome redaction process before records can be produced.[3]

First, SB 1421 (Skinner) requires additional disclosure of several categories of law enforcement records under the CPRA, including records relating to incidents involving the following: (a) discharge of a firearm by a peace or custodial officer; (b) use of force by a peace or custodial officer results in death or great bodily injury; (c) a sustained finding by a law enforcement agency or oversight agency that a peace or custodial officer engaged in sexual assault involving a member of the public; and (d) a sustained finding of dishonesty by a peace or custodial officer. Penal Code Section 832.7(b)(5), added by SB 1421, limits redactions to four new categories of exemptions – but the redactions are mandatory ("An agency

[3] "Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the PRA favoring disclosure is to be implemented faithfully." *Northern Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 123-124.

shall redact . . . "), unlike most exemptions under the CPRA, which an agency may exercise its discretion to waive.

And second, AB 748 (Ting), which amends Government Code Section 6254(f), requires agencies, upon request, to produce law enforcement video and audio recordings of "critical incidents" involving discharge of a firearm or use of force resulting in death or great bodily injury.

These laws obviously provide a new benefit to the public in the form of law enforcement transparency, expanding the scope of law enforcement records available to the public. However, agencies must devote additional, generally unreimbursed, resources to reviewing and redacting the records, before release.[4] In responding to SB 1421 and AB 748 requests, many agencies have (a) provided requestors with hyperlinks to responsive records on cloud storage; and/or (b) posted the responsive records online, on their law enforcement agency's website. Agencies should be able to provide such records swiftly, to meet the CPRA's mandate of making records promptly available, and with the understanding that inadvertent disclosures can be addressed – due to the human error that occurs from time to time, as the Supreme Court recognized in *Ardon*.

In view of the CPRA's mandate to promptly make records available, the Court should not take an expansive view of the waiver statute. *Ardon* applies to "truly inadvertent disclosures and must not be abused to permit

[4] The Supreme Court will be considering whether agencies may recover costs of producing a digital video file to exclude exempt material (as "extraction") pursuant to Government Code Section 6253.9. *National Lawyers Guild v. City of Hayward* (2018) 27 Cal.App.5th 937 (rev. granted Dec. 19, 2018, S252445). However, beyond producing videos that exclude exempt material, it is unclear how much (if any) impact the *National Lawyers Guild* case will have on CPRA cost-shifting, when generally, agencies can only recover their "direct costs of duplication." Gov.Code § 6253(b).

the type of selective disclosure Section 6254.5 permits." *Id.* at 1190. If the Court were to take an overbroad view of the CPRA waiver provision of Section 6254.5, agencies' burdens on reviewing responsive records (to avoid waiver) may increase, which, in turn, may increase the time that agencies may need to respond to requestors. Such a result would be inconsistent with the purpose of the CPRA, to inform the public of the "conduct of the people's business." *Long Beach POA*, 59 Cal.4th at 66.

V.

CONCLUSION

For the foregoing reasons, the League urges the Court to affirm the Temporary Restraining Order issued by the trial court, and to protect the City records at issue upon further hearing and/or trial.

Dated: November 27, 2019

Respectfully Submitted,

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By: */s/ Javan N. Rad*
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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed *amicus curiae* brief is produced using 13-point Times New Roman type including footnotes and contains approximately 2,782 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 27, 2019

Respectfully Submitted,

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PROOF OF SERVICE

I do hereby declare and state that I am employed in the County of Los Angeles, I am over the age of eighteen years and not a party to the within entitled action. My business address is 100 North Garfield Avenue, Suite N210, Pasadena, California 91109.

On November 27, 2019, I served the foregoing documents described as:

***AMICUS CURIAE* BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF REAL PARTY IN INTEREST**

on the interested parties in the manner prescribed as follows:

[X] BY ELECTRONIC TRANMISTION VIA TRUEFILING: I caused a copy of the foregoing documents to be sent via TrueFiling to the persons, parties and/or counsel of record designated for electronic service in this matter on the TrueFiling website. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] BY MAIL: I am "readily familiar" with the City's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. I deposited such envelope in the mail at Pasadena, California. The envelope was mailed with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27, 2019, at Pasadena, California.

/s/ Leonela Colque
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