Case No. D076605
(Consolidated with Case Nos. D076924, D076993)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

GOLDEN DOOR PORPERTIES, LLC, et al.
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY
Respondent,

COUNTY OF SAN DIEGO, et al.
NEWLAND SIERRA LLC, et al.
Real Parties in Interest.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF REAL PARTY IN INTEREST SAN DIEGO COUNTY

On Appeal from the San Diego County Superior Court
Coordinated Case No. 37-2018-00030460-CU-TT-CTL
The Honorable Gregory W. Pollack

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I. INTRODUCTION

These consolidated cases are procedurally complex and factually dense, but at their core is a fairly straightforward question: What is the interplay between the statutory authority granted to local agencies to dispose of records and CEQA's administrative record requirements? More specifically, does CEQA's list of documents that must be included in an administrative record for CEQA litigation effectively require the lead agency to maintain all email that was sent or received over the entire course of the project's consideration, overriding local retention policies?

The answer to that question must be no. While there are other statutory requirements to retain particular documents for specified periods of time, CEQA's administrative record provisions contain no such requirements and therefore impose no such burden on the lead agency. Indeed, prior to the advent and ubiquitous use of email, it would have been viewed as absurd to claim that a lead agency violated the law and engaged in nefarious conduct if it did not save and include in the administrative record every handwritten note, every sticky note attached to a document, or every fax sent to colleagues to organize a meeting. Email hasnow taken the place of much of the paper and verbal communications of yesteryear. But no matter the format – email or paper – the analysis is still the same: not every word jotted down on paper – or in modern times, jotted down in an

email – must be included in an administrative record, and a lead agency violates no law and commits no breach of transparency or public trust by regularly deleting transitory, non-official email in accordance with adopted policy.[1]

Petitioner's argument that San Diego County was required to retain and place in the administrative record every email related to the project is not only inconsistent with CEQA's administrative record requirements, but also imposes a truly significant burden on local agencies. The ability granted to cities, counties and special districts by statute[2] to specify document retention periods for records not otherwise required by statute to be retained is based in large part on the cost of storing large volumes of records. Such storage costs come at a detriment to local agency funding and staffing for other programs and services. Maintaining all records regardless of significance also drastically increases the staff time needed to review documents in response to Public Records Act requests, which thereby increases the amount of time it takes to actually produce the documents to the requestor.

Petitioner's argument also fundamentally misconstrues the purposes of the administrative record in CEQA cases. CEQA provides a process

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[1] References to deleting email in this brief refer to "non-official" record emails, not required by statute to be retained.

[2] Gov. Code, §§ 26205.1, 34090, 60201& 60203.

intended to ensure that decisionmakers are fully informed, including having before them the informed views of project proponents and opponents alike when making their decision. But the administrative record, which does not get created unless litigation is filed, has a far narrower purpose – to allow a court to determine whether the agency's decision is supported by substantial evidence based on evidence that was before the agency at the time the decision was made. Lack of evidence in the recorddoes not, by itself, prejudice project opponents. Rather, it is more likely to prejudice project proponents who carry the burden of providing substantial evidence to support the decision to approve the project.

The trial court properly applied these principles in its rulings on Petitioner's discovery motions and motion to augment, and this Court should similarly deny the Petition for Peremptory Mandate in this case.

II. ARGUMENT

A. CEQA's Administrative Record Provision is Not a Retention Statute.

Petitioner argues that the County of San Diego's Countywide Records Management Program, as applied to the records that are listed in Public Resources Code section 21167.6, subdivision (e), violates CEQA. This argument is premised on the faulty assumption that Section 21167.6, the administrative record statute, requires retention of all of the documents listed therein. It does not.

The plain language of Section 21167.6 does not include any requirement that the specified documents be retained during the course of a project's consideration or after its approval. This absence is telling given the numerous places within CEQA where the Legislature has specifically directed that records must be retained for a specified period of time. (See RPI's Return to Petitions for Peremptory Writ of Mandate, p. 118.)

When the Legislature wishes to require a lead agency to retain a document, it certainly knows how to direct the agency to do so. (*Pryor v. Pryor* (2009) 177 Cal.App.4th 1448, 1456 ["Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, 'the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes."'], citing *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825.) But it did not include any retention requirements in Section 21167.6. Such requirements cannot be read into the statute when they do not exist. (Pub. Resources Code, § 21083.1; *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1522 [a literal, explicit, approach to statutory construction is mandatory under CEQA].)

For this reason, there is no conflict between the County's record retention policy and CEQA's administrative record requirements. Petitioner makes much of the "notwithstanding any other law" language in

the opening line of Section 21167.6, but that language simply has no bearing here. Lead agencies are not directed in Section 21167.6 to retain any particular records, and thus are free to follow their lawfully-adopted retention policies without running afoul of Section 21167.6. In the event an action or proceeding is filed challenging the project, the code provides petitioner options for record preparation. (Pub.Resources Code, §§ 21167.6, subd. (a), 21167.6.2.) The record will include, at a minimum, the documents listed in Section 21167.6, subdivision (e) that the agency elected to retain or was required by some other statute to retain. The notion that there is something about this process that requires a lead agency to retain every email that is sent or received during the duration of the project's consideration, just in case litigation is filed,has no support in the statute. (See, e.g., *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 588-589 [presuming trial court's ruling to deny augmentation of record was correct and finding that email between city manager and project developer did not need to be included in the administrative record].)

It is worth considering the timing of this process as well. Barring formal applicant election at a project's outset to proceed by an alternative process, an administrative record is not required to be prepared contemporaneously as the project moves through the CEQA process. In fact, in cases where there is no action filed against the project, there is no administrative record prepared at all. The record is only prepared upon

initiation of litigation, and at that point, the record is simply the vehicle through which a court can assess whether the agency's decision is supported by substantial evidence. To read Section 21167.6(e) as imposing comprehensive and costly retention requirementsby default, without regard to whether an administrative record will be prepared at all and without regard to the particular record's value in assessing substantial evidence to support the decision, belies the administrative record's role in the CEQA process.

A relatively new provision addressing administrative records allows the project applicant to request the lead agency to prepare the administrative record concurrently with the administrative process rather than waiting until litigation is initiated. (Pub.Resources Code, § 21667.6.2.) Though not directly applicable to this case because the process was not requested by project applicant here, the new statute's description of what is included in the administrative record is illuminating to the issues before this Court in a couple of ways. First, when the administrative record is prepared concurrently with the administrative process, the obligation to start creating the record begins "with the date of the release of the draft environmental document for the project." (Pub.Resources Code, § 21667.6.2, subd. (a)(1)(B).) Thus even when the record is created as the project is moving through the administrative process, the Legislature does not envision it is required to contain documents prior to the draft EIR

release date. This certainly undermines Petitioner's complaints here that the County was required by CEQA to maintain all of its email involving the project and include it in the administrative record.

Second, Section 21667.6.2 differentiates between all documents prepared by the lead agency and those that are included in the administrative record. (Pub.Resources Code, § 21667.6.2, subd. (a)(1)(D).) That provision notes that a document "prepared by the lead agency or submitted by the applicant after the date of the release of the draft environmental document for the project that is a part of the record of the proceedings" must be made available in electronic format. Inherent in this language is the recognition that there are some documents prepared by the lead agency after the release date of the draft EIR that are not part of the record, which further undermines Petitioner's arguments here. Indeed, if every document or email were required to be part of the administrative record, the phrase "that is a part of the record of proceedings" would be superfluous.

The flaw in Petitioner's argument that Section 21167.6(e)(7) and (10) override the County's document retention policy and require the County to retain all email related to the project is highlighted if it is applied to a time when the same work was accomplished without email. For example, suppose a staff member drafted a rough outline of a section of an EIR for a project. That draft, in paper form, would then be circulated to

other staff members and consultants working on the project. Each person in the chain of review would place notes in the margins, cross out language, pencil in revisions, etc. Perhaps a sticky note would be attached suggesting that the team meet to discuss the draft at a particular date. When the marked-up outlineisreturned to the original staff member, they would then rewrite the draft and dispose of the marked up version, because those notes would now be reflected in the revised draft. The sticky note requesting to meet on the project would certainly not be retained.

If litigation challenging the project were to follow months or years later, any drafts that were released for public review would be part of the record to show substantial evidence supporting the decision. But the original outline with handwritten notes and the sticky notewould be long gone, and that does not prejudice potential CEQA litigants in any way. It is hard to fathom that a petitioner in that lawsuit would complain that the administrative record did not include every hand-written note in a margin of an early draft or every sticky note related to the project, let alone allege that the public agency activelydestroyed years of documents in a way that concealed the process and violated the law.

The modern method of accomplishing the same tasks should be treated no differently. A staff member creates an electronic draft of a preliminary document and emails it to the other staff members and consultants on the project, who all email back their comments and edits,

and perhaps suggest a meeting to discuss the document further. Those comments and edits are reflected in the next version of the document. And the emails documenting that exchange and setting a meeting, like the old paper version equivalent of those same records, can be discarded. Section 21167.6 does not mandate a different result, and this process certainly does not rise to the level of "illegally" and "hastily" destroying public records. (Petition for Writ of Peremptory Mandate, p. 17.)

Further, Petitioner's contention that all emails are "records" not only ignores the practical realities of the use of email, but is also inconsistent with guidance providing that transitory, draft, and inessential email correspondence are "non-records" that are not subject to retention requirements. For instance, California Records and Information Management Program (CalRIM) Records Retention Handbook, which defines the responsibilities of State agencies to implement records management, scheduling, and disposing of records, explains that "non-record" material includes letters of transmittal; informal notes, worksheets, and rough drafts of letters, memoranda, or reports; miscellaneous notices; library or reference material; etc., (*CalRim Records Retention Handbook*, California Records and Information Management Program (p. 5) [distinguishing "nonrecords" from records].)[3]CalRIM directs that such non-

[3] Available at: https://archives.cdn.sos.ca.gov/pdf/calrim-records-retention-handbook.pdf.

record material can be discarded as soon as it is read, and that "[n]on-record and duplicate emails should be deleted from mailboxes regularly." (*Ibid.*; *Practical Guidebook for Managing Electronic Records,* California Records and Information Management Program (Electronic Main Management Chapter;[4] accord 64 Ops.Cal.Atty.Gen. 317-323-327 (1981) [transitory communications, drafts, stenographic notes, and other communications not retained to preserve informational content are not "records."].) This Court should reject Petitioner's arguments to the contrary.

B. Interpreting CEQA's Administrative Record Provision as a Broad Retention Statute Creates Significant Burdens on Lead Agencies That Were Not Intended by the Legislature.

Petitioner's interpretation of Section 21167.6, if adopted by this Court, would create a significant burden on lead agencies. One of the main reasons that public agencies adopt record retention policies is to deal with the large volume of email sent and received by agency staff. "On average,employees send and receive about 50 email messages per day, which can be more than 1,200,000 messages per year for an organization of 100 employees." (Ward, *Electronic Discovery: Rules for a Digital Age* (2012) 18 B.U. J. Sci. & Tech. L. 150, 157.) More current estimates place that number even higher, noting that an average office employee receives 121 emails and sends 40 emails per day. (Spicer, *How Many Work Emails*

[4] Available at: https:www.sos.ca.gov/archives/records-management-and-appraisal/electronic-records/electronic-records-guidebook/

is Too Many? (Apr. 8, 2019) The Guardian.) For better or worse, everyone in an office environment knows that much of the conversation that would happen in hallways or over the telephone in the past are now accomplished via email. Overtime, the volume of records and the relatedstorage costsare tremendous even for small agencies, let alone an agency the size of San Diego County.

Beyond storage costs, there are other serious concerns with long term storage of email. For instance, email involving the public's business is a public record for purposes of the Public Records Act (Gov. Code, § 6252, subd. (g)), and may be disclosable unless exemptions or exceptions apply. (*Bertoliv. City of Sebastopol* (2015) 233 Cal.App.4th 353,373.) Thus, retaining all of the voluminous email sent and received by a public agency, much of which is insignificant routine communication of minimal public interest (scheduling emails, etc.), creates volumes of records that must be reviewed for potential responsiveness, privileges, exemptions, etc., in response to a Public Records Act request.

This concern is not mere hyperbole. The Supreme Court has acknowledged that the impact of the number of Public Records Act requests, and the volume of records involved in such requests, can be staggering. (*Ardonv. City of Los Angeles* (2016) 62 Cal.4th 1176, 1189.) For example, the University of California system alone saw the total number of public records requests increase from 3,266 in 2009 to 16,921 in

2017. (Williamson, *Industries Turn Freedom of Information Requests on Their Critics* (Nov. 5, 2018) New York Times.) The rate and scope of the requests mean it can sometimes take months on a rolling production schedule for the requester to receive all of the documents they request, costing significant staff time and at significant expense to both the agency and the requester.[5]

As part of efficient administration, and to try to minimize the costs and delay associated with record productions given the large volumes of records generated by public agencies, many agencies have adopted record retention policies.[6]Such policies allow public agencies to identify records that must be retained by statute, and those that should be retained for good government policy reasons. Importantly, the policies also set in place a mechanism fordiscardingsome records, the retention and storage of which ultimately create expense and delay for both the agency and the public, with little benefit in return. As noted by Real Parties in Interest, it is not

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[5] The Public Records Act provides that the person requesting records can be charged for the direct costs of duplication or a statutory fee. However, the Act does not permit an agency to charge for or recoup the cost of staff time to review and produce public records. (Gov. Code, § 6253, subds. (a) and (b).)

[6] See, e.g., City of Berkeley Res. No. 68,661-N.S. (Nov. 13, 2018); City of Los Angeles Admin.Code, Div. 12, Chap. 1; City of Monterey Ord., No. 05-98 (June 21, 2005); City of Pomona Res. 2016-1 (Jan. 11, 2016); County of Glenn Admin.Manual, tit.17, ch. 2; Napa County Policy Manual, Part 1, § 40; Santa Clara County Bd. Policy 3.57; Sonoma County Admin.Policy Manual, §6.1.

uncommon for email retention policy preservation periodsto be in the same range as San Diego County's 60-day policy for email that is not otherwise required to be kept longer. (See RPI's Return to Petitions for Peremptory Writ of Mandate, p. 102.)

The Governor recently recognized the importance of these issues when he vetoed Assembly Bill 1184 last year. That bill, which Amici opposed, would have required all public agencies to maintain all transmitted email related to agency business for at least two years.(Assem.Bill No. 1184 (2019-2020 Reg. Sess.) § 1.) The Senate Appropriations Committee analysis of the bill noted that requiring State agencies to retain all email for two years would result in costs to the Statethat "could reach into the millions ofdollars in one-time and in ongoing costs." (Sen. Com. on Approp. Com., Rep. on Assem. Bill No. 1184 (2019-2020 Reg. Sess.) Aug. 2, 2019, p. 1.)Local agencies are not entitled to any funding from the State for the costs that would have been associated with AB 1184's requirement to retain all email for two years. (Cal. Const., art. I, § 3, subd. (b), par. (7); Cal. Const., art. XIII B, § 6.) As a result, the costs of this bill would have been paid with local agency general funds, reducing funding available for other critical programs and services.

The Governor considered the additional benefits that the public would derive from a two-year email retention requirement and the costs

associated with that requirement, and concluded: "This bill does not strike the appropriate balance between the benefits of greater transparencythrough the public's access to public records, and the burdens of a dramatic increase in recordsretention requirements, including associated personnel and data-management costs to taxpayers." (Governor's veto message to Assem. on Assem. Bill No. 1184 (Oct. 13, 2019) Reccess J. No 14 (2019-2020 Reg. Sess.) p. 3684.)

Petitioner's argumentwould – at least as to email related to a CEQA project – result in a de facto email retention requirement. In that way, Petitioner seeks to achieve a result in this Court that could not be achieved legislatively. The Legislature did not include a document retention requirement in the CEQA administrative record statute, and the Governor declined to sign into law a requirement that public agencies retain all email for two years. This Court should similarly decline to create such a law from the bench.

C. CEQA's Purpose is Not Furthered by Petitioner's Argument, and Petitioner is not Prejudiced by County's Record Retention Policy.

The goal of CEQA is to have informed decisionmaking and informed public participation. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463).The purpose of the administrative record in CEQA litigation is more discrete.

Its purpose is to allow a court to determine whether the record demonstrates any legal error and whether it contains substantial evidence to support the agency's decision on a project. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Providing a record to the court that fails to show substantial evidence supporting the agency's decision may result in reversal of project approval.

For these reasons, omissions in the administrative record are unlikely to prejudice the participating public. Whether or not a document is included in the administrative record, which is only prepared after the project approval and only if litigation is initiated, is a completely separate inquiry from whether the decisionmakers and participating public were informed before the project was approved. In fact, removal of documents from the administrative record "is presumptively prejudicial to project proponents. It is, after all, the project proponents who will be saddled with the task of pointing to things in the record to refute asserted inadequacies in the EIR." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 13.)

As explained above, the County followed the applicable law in determining which documents to retain during the course of the project's consideration and ultimate approval. The record before this Court reflects that. The County certainly did not engage in "record destruction" prior to the requirement to prepare an administrative record. To the contrary, the

administrative record contained over 223,000 pages, including 6,000 emails. To the extent that any of the emails that the County no longer possesses should have been included in the administrative record, their exclusion is presumptively prejudicial to project proponents, and is not presumptively a CEQA error because the administrative record is not a decisionmaking document. (Pub.Resources Code, § 21005, subd. (b) [When it comes to disclosures in the CEQA process, there is no presumption that an omission is prejudicial.] .)

Petitioner's argument that Section 21167.6(e) requires retention of all project-related email cannot be reconciled with the purposes underlying that provision, and Petitioner cannot show prejudice by the County's destruction of email it was not required to retain. The Petition should be denied.

III. CONCLUSION

For all of these reasons, Amici Curiae respectfully request that this Court deny the petition in this case and affirm the trial court's order.

Dated: February 10, 2020

Respectfully submitted,

/s/

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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 4,245 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of February, 2020 in Sacramento, California.

Respectfully submitted,

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