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Public Records Act's Cost Recovery Provision Narrowed By California Supreme Court

Vol. 2020,No. 3 | June 02, 2020

Last week the California Supreme Court issued an opinion outlining circumstances in which public agencies may recover costs associated with a California Public Records Act (CPRA) request from the individual making the request. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (May 28, 2020, S252445) __Cal.5th__.) Specifically, the Court held that an agency may not pass on to the requester the costs of redacting exempt information from electronic records. While the Court identified some situations where costs may be recovered for data extraction, it specifically noted that the costs associated with searching for responsive emails/documents or redacting exempt information from electronic records did not qualify as "extraction" and therefore were not recoverable.

Background

As the Supreme Court affirmed, generally a person who requests a copy of a public record under the CPRA must pay only the direct costs of duplicating the record. For paper records, this has been understood to mean the cost of running the copy machine and the expense of the person operating it, but to exclude staff time involved in searching for the records, reviewing records, and deleting exempt information. However, specific provisions allow for additional circumstances when electronic records are requested where costs may be recovered. For example, Government Code section 6253.9, subdivision (b)(2), states that requesters must pay for the costs of producing copies of electronic records if producing the copies "would require data compilation, extraction, or programming."

In this case, National Lawyers Guild (NLG) submitted two requests to the City of Hayward. Part of the requests included records that were contained on videos from body-worn cameras used by the City's police department. After the City spent 40 hours identifying relevant videos and removing all exempt audio and visual materials from the video files, it required NLG to pay the cost associated with this staff time. The City argued it could recover these costs as it had performed "data extraction" to prepare the records. NLG disagreed and filed suit.

Decision

When the case ultimately reached the California Supreme Court, the central question before it was whether the process of editing out exempt information from the videos constituted "data

extraction" within the CPRA. The Court held that it did not. It concluded that "'data extraction' does not cover the process of redacting exempt material from otherwise disclosable material." "[T]he term 'data extraction' does encompass a process of taking data out, but it is generally used to refer to a process of retrieving required or necessary data for a particular use, rather than omitting or deleting unwanted data."

While noting that it could not "comprehensively catalog what types of processes will or will not qualify as 'extraction' within the meaning of the statute," the Court provided examples of costs which would, or would not fit, within, this term. For example, "extraction costs" would include "exporting responsive data from a large government database into a spreadsheet in order to produce the spreadsheet, but they would not include time spent redacting personally identifiable or other confidential information from the spreadsheet once constructed." The Court went on to further to explicitly note that the cost recovery provision "does not, for example, cover time spent searching for responsive records in an e-mail inbox or a computer's documents folder. Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic records."

In response to the City's argument that public agencies often lack adequate resources to respond to overly burdensome requests, the Court explained that public agencies are protected through various CPRA provisions. It suggested that agencies could turn to section 6253, subdivision (a) which requires agencies to provide nonexempt portions of records "only if they area 'reasonably segregable' from potions exempted by law." The Court also pointed out that section 6255, subdivision (a), which allows agencies to withhold records if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record," may encompass requests that place undue burdens on an agency.

Impact

The Supreme Court's decision clarifies that where an agency is required to pull certain data from a large database in order to construct a record that can be disclosed to the requester, the associated costs may be recovered by the requester. However, agencies may not charge requesters for the cost of redacting electronic records, even if it requires "technologically more advanced means." And akin to locating responsive paper records, searching for responsive records in an email inbox or a computer's document folder also does not fit the definition of extraction, and therefore cannot be charged to the requester.

It is important for agencies to look to methods other than cost recovery to limit the financial impacts associated with CPRA requests. As the Court noted, working with requesters to narrow requests is often an effective approach. Where the scope of a "narrowed" request is still unreasonable, an agency may also look to the CPRA's limitations on requests to determine whether it must incur substantial costs to respond to the request.

If you have any questions regarding an agency's obligations in responding to a CPRA request, please do not hesitate to contact a DWK attorney in the BETA practice group.

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