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Recent California Public Record Act Developments

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Schools and community college districts are well aware of the right of the public to request inspection or disclosure of district records under the California Public Records Act (CPRA). The CPRA provides limited exceptions from these disclosure obligations, and specifies the procedures for disclosure of records. The following recent case developments may alter the way your agency responds to CPRA requests:

- Records related to complaints against a teacher may be protected by the personnel record exemption even if they are not part of the teacher's personnel file. (*Associated Chino Teachers v. Chino Valley Unified School District* (2018) 30 Cal.App.5th 530.)
- Records held and controlled by a private government contractor were not public records unless the public agency had "constructive possession" of the records. (*Anderson-Barker v. Superior Court of Los Angeles County* (2019) 31 Cal.App.5th 528.)
- The deliberative process privilege applies to "predecisional" records which, if disclosed, would allow a reader to reconstruct the "mental processes" that led to a final decision. (*Sierra Club, Inc. v. U.S. Fish & Wildlife Service* (9th Cir. 2018) 911 F.3d. 967.)
- The California Supreme Court's decision to accept review of a case regarding an agency's ability to charge a requester for the cost of review and redaction of requested records may have a significant impact on allowable cost recovery. That case should be decided in the next 12-18 months and provide needed guidance on when an agency can recover its costs. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward,* Supreme Court, Case No. S252445.)

Agencies should consider all of these cases when responding to CPRA requests.

Records Relating To Teacher Complaints Exempt From Disclosure

In *Associated Chino Teachers v. Chino Valley Unified School District,* the Court of Appeal addressed a CPRA request for "disposition letters." The disposition letters reported the outcome of an investigation into complaints that a teacher/coach had been yelling and belittling student athletes in public and holding practices at the teacher's home. The disposition letters were sent to the parents who complained, but were not placed in the teacher's personnel file.

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The Court of Appeal found that the disposition letters were exempt from disclosure under the CPRA because they were personnel or "similar files," the disclosure of which would constitute an unwarranted invasion of personal privacy. Even though the records were not in the teacher's personnel file, the Court reasoned that the records were personnel records because they contained personal information about the teacher accessible only to the employee's supervisors.

Further, the release of the records would implicate the substantial privacy interest of allegations of misconduct and the findings of the investigation. The court found that this privacy interest outweighed the public's interest in disclosure because the complaints were not substantial in nature. Unlike in other recent cases, the complaints, although well-founded, did not allege sexual misconduct, threats of violence, or violence. As to the claim that the disposition letters were already public records because they were disclosed to the complainants and were therefore in the public domain, the Court disagreed. It held that just because the information contained in the disposition letters was the same as or like the information available elsewhere in the public domain, did not mean the teacher had forfeited his or her right to privacy.

Associated Chino Teachers provides that even if there are records that are not physically within a staff member's personnel file, they may be considered personnel records subject to exemption from the CPRA. This case also indicates that some personnel files regarding complaints, even if well-founded, may be withheld if the complaint does not involve sexual misconduct, threats, or violence. Agencies should carefully review this case, and the others involving disclosure of records related to complaints against employees, when responding to a CPRA request for such records.

Only Records Subject To Agency Control Are Disclosable

In *Anderson-Barker v. Superior Court of Los Angeles County*, the Court of Appeal held that a public agency only has constructive possession of records within the meaning of the CPRA if it has the right to control the records, either directly or through another entity. In *Anderson-Barker*, a CPRA request sought disclosure of electronically-stored data related to vehicles that private towing companies had impounded at the direction of the city police department. The City responded that it would not disclose such records because the requested records were in the possession of a private entity, and therefore, the City did not possess or control them.

The Court delved into an analysis regarding constructive possession and distinguished constructive possession from mere access to records, stating that constructive possession means "the right to control the records." Because the City did not direct what information was to be placed in the electronic database, and had no authority to modify the data in any way, the Court held that the City did not have constructive possession of the records, and as such, was not required to disclose them. Agencies should consider this case's holding and whether they

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possess the records requested when a CPRA request seeks records held by or created by a third party or consultant.

Deliberative Process Privilege Standard Further Defined

In *Sierra Club, Inc. v. U.S. Fish and Wildlife Service,* the Ninth Circuit Court of Appeals addressed a dispute over a federal Freedom of Information Act ("FOIA") request for draft opinions and accompanying documents created by the United States Fish and Wildlife Service and the National Marine Fisheries Services. The agencies argued that the records were exempt from disclosure under the deliberative process privilege.

The Court explained that in order to qualify under the deliberative process privilege, a record must be both "pre-decisional" and "deliberative." Examples of "deliberative" materials include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." The Court found that exempt documents, if disclosed, would shed light on the Services' internal vetting process and allow a reader to reconstruct the "mental processes" that led to the production of a subsequent or final opinion.

While California agencies are not subject to FOIA, California courts look to FOIA cases for authority to interpret the provisions of the CPRA, including the CPRA's incorporation of the deliberative process privilege. This case provides additional clarity regarding records that may be exempt from CPRA disclosure under the deliberative process privilege. It may be particularly relevant where a CPRA request seeks records related to internal staff communications or draft reports.

California Supreme Court Takes Case Regarding CPRA Cost Recovery

Recently, the California Supreme Court granted review of a case addressing whether an agency may require a CPRA requester to reimburse the agency for costs incurred in reviewing and redacting electronic records. In *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward*, the Court of Appeal held that the agency could require a requester to reimburse it for these costs. The California Supreme Court subsequently took review of the case, putting this result on hold for the time being.

We expect this case to be decided by the California Supreme Court in the next 12-18 months and provide guidance on what costs an agency can recover in relation to CPRA requests. We will continue to provide updates as the case move forwards.

All of these cases could impact how your agency responds to a request for records under the CPRA. DWK has experience handling a wide variety of CPRA issues and can assist your

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agency in formulating appropriate request responses. If you have questions about these cases or any particular CPRA request, please do not hesitate to contact a DWK attorney in our Board Ethics, Transparency and Accountability group.

PRACTICE AREAS

- Board Ethics, Transparency and Accountability

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