Court of Appeal Case No. G058996

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

CITY OF FULLERTON,

Plaintiff and Respondent,

v.

FRIENDS FOR FULLERTON'S FUTURE, et al.,

Defendants and Appellants.

.

Appeal from Orange County Superior Court
Case No. 30-2019-01107063-CU-NP-CJC
Hon. James L. Crandall

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT

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Pursuant to California Rules of Court, Rule 8.200(c), the League of California Cities ("Cal Cities") submits this *amicus curiae* brief in support of plaintiff and respondent City of Fullerton (the "City").

I.

IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST

Cal Cities is an association of 477 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 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 decline to impose an unreasonable burden of proof on an agency's cybersecurity claims, particularly where (a) the California Public Records Act ("CPRA") mandates agencies "promptly" disclose public records; and (b) the courts have recognized that inadvertent disclosures do sometimes occur, and agencies should have remedies to address these issues.

III.

STATEMENT OF FACTS

Cal Cities adopts the statement of facts in the Respondent's Brief. What appears clear from both parties' papers is that (a) Appellants have obtained certain City records; and (b) the City did not authorize Appellants to obtain those records. *See*, *e.g.*, Appellants' Opening Brief, pp. 11-12 (after Appellants obtained and published records on a blog, the blog "received a demand from the City, claiming that documents posted with articles were 'confidential' and demanding their return and removal"); Respondent's Brief, p. 14 (Appellants "took the City's confidential records without permission . . . they knew they were unauthorized to take these files from the City's account").

IV.

ARGUMENT

This brief focuses on a single issue – the legal standard for inadvertent disclosure, as Appellants appear to argue that they should not face liability under cybersecurity statutes, on the grounds that the City records Appellants obtained were (inadvertently) not secured.

"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 this brief, it is of no moment whether Appellants wrongfully took the City records, or even if 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).

The Court should apply a workable legal standard in considering whether there was an inadvertent disclosure, following *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, as Appellants had CPRA requests pending with the City.

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).

By the early 1970's, "[c]opy machines and computerization permitt[ed] inexpensive, rapid duplication of documents and data." *Central Bank v. Superior Court* (1973) 30 Cal.App.3d 962, 970; *see also* Gov. Code § 6253(b) (allowing agencies to charge for "direct costs of duplication" of records). 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 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

[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'S-BUSINESS-A-Guide-to-the-California-Pu.aspx> (as of Dec. 14, 2020).

> believe that human errors in the processing of public records requests will cease. . .

Ardon, 62 Cal.4th at 1188-1189 (quoting *amicus curiae* brief of Cal Cities and California State Association of Counties); *see also Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545 (15 million potentially responsive emails); *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 of the emails withheld as exempt).

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

In the case at bar, it appears that Appellants 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.*, Respondent's Brief, p. 57 (some records obtained by Appellants were not ready for release – rather, they were intended "for review and redaction" by the City's attorney). Agencies may redact records, where supported by a CPRA exemption. "Any reasonably 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, electronic 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, or copying them 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). Moreover, making disclosable records available through cloud services allows requestors to immediately receive records, rather than requiring them to (a) wait for paper copies of printed records; or (b) pick up USB drives or CD/DVD disks at the agency's office for later use.

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. This approach is consistent with the CPRA's

mandate that agencies "promptly" make records available to requestors. Gov. Code § 6253(b).

4. The Court Should Not Impose a "Gotcha" Theory of Waiver on Agencies

A requestor should not be permitted to force an agency into disclosure, with no opportunity to retrieve inadvertently-disclosed records, where confidentiality over the records accessed would be apparent either after obtaining the records, or after written notice from the agency'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 Unified School District v. Superior Court* (2015) 245 Cal.App.4th 887, 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").

5. The Court Should Decline to Impose an Unreasonable Burden of Proof on the City's Cybersecurity and Other Claims, Given the Disclosure and Redaction Obligations Imposed by the CPRA

The Court should decline to impose an unreasonable burden of proof for agencies that could set back agencies' efforts to promptly make records available under the CPRA (Gov. Code § 6253(b)), here via cloud storage.

Cal Cities wishes to highlight an example of why the Court should decline to undermine case law interpreting inadvertent disclosures, such as *Ardon*. 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.[2]

First, SB 1421 (Skinner) amended Penal Code Section 832.7, requiring 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 resulting 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

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[2] "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.

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

And second, AB 748 (Ting), which amended 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. *See*, *e.g.*, *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 921 ("the legislative intent behind SB 1421 was to provide transparency regarding instances of an officer's use of significant force and sustained findings of officer misconduct by allowing public access to officer-related records").

In responding to requests for records covered by SB 1421 and AB 748, many agencies have (a) provided requestors with hyperlinks to responsive records on cloud storage; or (b) posted the responsive records 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*.[3]

A precise example of the peril postulated in *Ardon* was demonstrated in a news article published in November 2020, when the San Diego Police Department inadvertently "published a document with confidential information about a crime victim."[4] A police captain was quoted in the article as stating "the department took the records down after a journalist of 'high integrity' flagged the released information and notified the department." As demonstrated from this article, where there is an inadvertent disclosure of clearly confidential information, even a layperson can recognize the privilege that attaches to the record, and a well-meaning member of the public (such as a journalist) can immediately notify the agency, without difficulty – to allow the agency to promptly take remedial measures.

In addition to police records, local governments hold a variety of sensitive data involving residents, visitors, and

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[3] Notably, human error may be exacerbated by the fact that agencies must devote scarce resources to reviewing and redacting records before release, and such resources are generally unreimbursed. For example, even where law enforcement agencies release videos of incidents, redacting where appropriate, the staff time in reviewing and redacting such videos is not chargeable to the requestor – even though the Supreme Court has recognized that video redacting is "not . . . entirely straightforward." *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 509.

[4] San Diego Police Records Website Down after Posting Confidential Information, November 13, 2020, available at <https://www.kpbs.org/news/2020/nov/13/san-diego-police-records-website-shut-down/> (as of Dec. 14, 2020).

businesses, such as paramedic records, health records, voter information, utility customer records, and tax records. In order to promote efficiency when conducting agency business, many agencies take advantage of technology to maintain this information. However, hosting this information electronically presents a variety of cybersecurity issues for local governments, many of whom have limited budgets for network and security systems, outdated technology, and limited IT staff to implement organizational safeguards to protect against cybersecurity breaches and/or human error.[5]

These issues present a challenge, as cities have a significant amount of sensitive records – and corresponding duties to promptly comply with the CPRA. The Court should therefore decline to impose a rule leaving local governments unable to protect confidential records, if material is inadvertently disclosed. Such a "gotcha" rule would (a) present a significant obstacle toward local governments' digital transformation; and (b) undermine the careful balance the Legislature struck in determining which government records are disclosable, and which may – and in some instances must – be withheld.

Additionally, if the Court were to take an overbroad view of agencies' duties to secure their records, such an approach may, in

[5] In fact, various levels of government encounter periodic difficulties safeguarding electronic records, as most recently evidenced by the recent cyber attack on federal agencies' critical infrastructure entities. *See* As Understanding of Russian Hacking Grows, So Does Alarm, January 2, 2021, available at <https://www.nytimes.com/2021/01/02/us/politics/russian-hacking-government.html> (as of Jan. 4, 2021).

turn, increase the time that agencies may need to comply with the CPRA. 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, Cal Cities urges the Court to affirm the trial court's grant of the preliminary injunction, and the denial of the anti-SLAPP motion.

Dated: January 4, 2021

Respectfully Submitted,

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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 Century Schoolbook type including footnotes and contains approximately 2,675 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: January 4, 2021

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, Room N-210, Pasadena, California 91101.

On January 4, 2021, I served the foregoing documents described as:

***AMICUS CURIAE* BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENT**

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 January 4, 2021, at Pasadena, California.

/s/Dianne R. Caccavella
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