CLIENT NEWS BRIEF

Court Reverses Attorneys Fee Award to Public Agency in Public Records Act Case Regarding Emails and Electronic Data

February 2015
Number 5

The latest appellate court decision addressing the Public Records Act has confirmed both how difficult it is for a public agency to recover its attorneys fees when litigating a dispute under that Act, and how unsettled the legal issues remain regarding public scrutiny of electronic communications. In *Bertoli v. City of Sebastopol* (January 30, 2015) 2015 Cal.App. Lexis 98, the court of appeal overturned a trial court's finding that litigation under the California Public Records Act (CPRA) was "clearly frivolous" and its award of costs and attorneys fees to the City. The court of appeal reached this conclusion despite its recognition that the CPRA requests in question were "overly aggressive, unfocused, and poorly drafted."

In *Bertoli*, a CPRA request was made for, among other items, copies of emails or other electronically stored data contained on the computer hard drives of past and present City officials and employees, including on both City-owned computers and private electronic devices. The request sought voluminous records. The City made space available in the City break room for document review, which included 20 days over the course of three months and the review of 65,000 pages of potentially relevant documents from 400 separate files. The requesting parties ultimately designated 16,000 pages for scanning.

Despite the City's extensive efforts, the requesting parties believed that potentially responsive electronic data still existed and proposed that a private third-party collection company search *all* City-owned computers, servers, and electronic storage devices, as well as any personal computers used by City employees to perform City work outside of the office. The City declined the offer, stating in part that the writings of individual councilmembers on their personal accounts were not disclosable under the CPRA because an individual government official is not a "local agency" under the CPRA.

The requesting parties then filed suit demanding that the City produce all electronically stored information, including emails, responsive to their CPRA request. This would have included searching some 109 computers, laptops, and other electronic storage devices. The trial court ruled that the City had sufficiently complied with the CPRA request. The court recognized that the City had shown a "remarkable degree of openness and cooperation" in responding to the CPRA request, and characterized the relief sought by the requesting party as an "unprecedented fishing expedition" that would require an "an extravagant use of limited city resources." The City filed a request for attorneys fees and costs pursuant to Government Code section 6259, subdivision(d), which allows a court to award costs and fees to a public agency in a CPRA case when a plaintiff's case is "clearly frivolous." The trial court agreed with the City's characterization of the case as clearly frivolous and subsequently awarded the City costs and attorneys fees in the amount of $44,630.

The court of appeal declined an earlier request to reverse the trial court's ruling on the substance of the CPRA dispute. As a result, the City was found to have complied with the CPRA. The court confirmed that a public agency need only disclose public records that can be located "with reasonable effort," and that the agency "cannot be subjected to a 'limitless' disclosure obligation."

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However, while the trial court's ruling that the City had complied with the CPRA was not disturbed, the court of appeal reversed the trial court's finding that the CPRA request was clearly frivolous, and thus overturned the award of attorneys fees and costs to the City. The court emphasized that in order to show that a CPRA case was clearly frivolous, the plaintiff's case must be *entirely* without merit. Because of the unsettled state of the law regarding application of the CPRA to emails and other electronic communications, the court of appeal concluded that the agency could not demonstrate that a reasonable attorney would not have pursued the matter.

The court of appeal's decision rested largely on its observation that the question of whether councilmember's emails, sent from their personal computers, are in fact disclosable under the CPRA is an "open issue." The trial court had concluded that such emails were not governed by the CPRA. The court of appeal, describing the law in this area as "in flux," discussed the recent case of *City of San Jose v. Superior Court*, which has previously been addressed in Lozano Smith news briefs. (See News Brief No. 21, April 2014). In *City of San Jose*, a trial court had concluded that emails sent or received on private electronic devices by the Mayor, City Council and City staff, were subject to the CPRA if they dealt with City business. An appellate court then reversed that decision, concluding that such emails were not records held by the City, and that they were therefore not subject to the CPRA. The California Supreme Court thereafter granted review, and has yet to issue a final ruling in that case. Particularly in light of the Supreme Court's pending review in the *City of San Jose* case, *Bertoli* concluded that the law remained unsettled, making it difficult to establish that the plaintiffs had been "clearly frivolous" in pursuing the issue.

This case demonstrates that issues around the increasing number of CPRA requests for emails remain unsettled. It remains important for public agencies to consider how they will use, retain and disclose emails and other electronically stored information. Lozano Smith's Technology and Innovation Practice Group offers a free informative document for school districts entitled "School District Email Retention," that addresses policy options for retention of emails. If you would like a copy of "School District Email Retention," please contact Harold Freiman.

Our Technology and Innovation Practice Group monitors issues such as the application of CPRA to electronic communications, legal issues regarding cloud computing, and the implementation of new technologies in schools. We will continue to track the *City of San Jose* case very closely, and will report as soon as a decision is rendered in that matter. Until these matters are settled, *Bertoli* confirms that there is a limit to how far a public agency must go in responding to requests for emails and electronically stored information, although the City in this case demonstrated that making an extensive, good faith effort to respond is still central to compliance with the CPRA. *Bertoli* also indicates that a public agency will have difficulty demonstrating that even the most overburdensome and aggressive requests for electronic data are frivolous.

For further information about this case and the treatment of electronic documents and emails under the CPRA, please feel free to contact one of our eight offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.