Lozano Smith ATTORNEYS AT LAW CLIENT NEWS BRIEF

February 2012
Number 07

PUBLIC EMPLOYEES MAY FILE SUIT SEEKING NONDISCLOSURE OF PERSONNEL INFORMATION PURSUANT TO PUBLIC RECORDS ACT REQUESTS

In a recent decision, *Marken v. Santa Monica-Malibu Unified School District,* Case No. B231787, the court of appeal granted public employees the right to file a lawsuit to prevent an employer from disclosing private personnel information in response to Public Records Act (PRA) requests. The court also concluded that under the PRA, complaints against employees that are substantial and well-founded must be disclosed. As the court made clear, balancing the privacy rights of an employee against the public's right to know about issues of public import remains a case-by-case determination. However, the pendulum continues to swing in the direction of disclosure.

In 2008, following a complaint of sexual harassment brought by a student against a high school teacher, the school district conducted an investigation and concluded, in part, that certain of the alleged acts "more likely than not *did* occur." The teacher received a written reprimand for violating the district's policy prohibiting sexual harassment. No criminal charges were filed against the teacher.

Two years later, the father of another high school student made a PRA request seeking the records related to the investigation and the district's findings that the teacher violated the sexual harassment policy. The request also sought any other records regarding any substantial complaints about the teacher's improper behavior toward students. The teacher was informed by the district of its intent to release some of the teacher's personnel records that the district determined to be responsive to the PRA request, including the investigation report, letter of reprimand, and other substantial complaints alleging improper behavior towards students. The teacher filed a lawsuit against the district asking the court to prohibit the release of his personnel records. The teacher argued that the release was not authorized under the PRA and would violate his constitutional and statutory rights of privacy.

In considering these issues, *Marken* became the latest in the line of cases addressing the conflict between the public's right to know versus the privacy rights of public employees.

Previous cases had opened the door to disclosure of certain personnel records under the PRA, particularly those records involving serious complaints which, whether proven or not, have "sufficient indicia of reliability to support a reasonable conclusion that the

complaint was well founded." (*Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041 (the public has the right to know about well-founded, substantive complaints against public employees, even if the complaint has not been confirmed as true); *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 ("a public official in an important and highly visible position," such as a school superintendent, has a lesser expectation of privacy in his or her personnel records when a well-founded complaint is involved).)

Building upon the precedent in *Bakersfield* and *BRV*, the *Marken* court concluded that the public can access documents about well-founded complaints made against school teachers. In balancing the issues, the *Marken* court held that the public's right to know about substantial complaints like the sexual harassment of students by district employees outweighs the privacy rights of teachers in certain circumstances. The court observed that a teacher "(o)ccupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the district enforces its sexual harassment policy." Disclosure of the reprimand was mandatory because the court found the investigation's information to be reliable, well founded, and substantial. The *Marken* court acknowledged that the records could be redacted prior to disclosure to protect confidential student information. Again, this determination was based on the specific facts of the case, and each PRA request must be considered on its own merits in light of the nature of the document sought.

Marken is also the first California case to conclude expressly that public employees have standing to file a lawsuit against their employers to prevent the disclosure of private information. This type of lawsuit is known as a "Reverse PRA" case. Under prior cases like *Bakersfield* and *BRV*, the courts had not decided whether employees who are the subject of the documents sought under a PRA request could object to disclosure.

Although *Marken* does not expressly require public employers to notify their employees of the possible disclosure of personnel files under the PRA, public entities may wish to consider notifying the subject employee once a PRA request is received. In *Marken*, the district expressly gave the employee an extended amount of time - one month - to object and exercise his rights in court prior to producing the records. Although the appellate court expressed concern about the length of the district's delay in producing the documents pending the employee's response, the practice of providing notice was implicitly accepted by the court. As stated by the court, the public agency's response to a PRA request "will proceed in accordance with the timetable set forth in (the PRA) unless immediately enjoined by the Superior Court." The delay that an action by an employee seeking such an injunction may cause was found by the court to be "outweighed by the statutory right of an interested party to ensure that public agencies do not disclose records whose confidentiality is mandated by law."

to monitor the latest developments in this area of the law. If you have any questions about this decision, or need assistance in relation to a Public Records Act request or personnel records matter, please feel free to contact one of our eight offices located statewide, visit our website, or follow Lozano Smith on Facebook.

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