2d Civil No. B272169
L.A.S.C. Case No.: BS157056

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

CITY OF LOS ANGELES, Plaintiff/Appellee, v. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, Defendants/Appellants.	NO. B272169 (Superior Court of California, County of Los Angeles Case No. BS 157056)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

On Appeal from the Los Angeles Superior Court
Honorable James C. Chalfant, Judge Presiding

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Pursuant to California Rules of Court, rule 8.200I, the League of California Cities (League), California State Association of Counties (CSAC), and California Special District's Association (CSDA) (collectively, Amici) respectfully request leave to file the attached amicus curiae brief in support of Appellant City of Los Angeles ("City").

The League is an association of 476 California cities with a common goal of promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those that are of significance to the LCC and its member cities. The committee identified this case as significant to cities because the trial court's decision penalizes the City of Los Angeles ("City") for asserting its residents' right to privacy when those individuals had no opportunity to do so themselves.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of

concern to counties statewide and has determined that this case is a matter affecting all counties.

CSDA is a California non-profit corporation association consisting of approximately 1,000 special district members throughout the State. These special districts provide a wide variety of public services to urban, suburban, and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of special district attorneys throughout the state, which monitors litigation of concern to its members and identifies those cases that are of statewide significance. The CSDA Legal Advisory Working Group has identified this case as being of such significance.

Amici submit this amicus curiae brief to explain why attorney's fees should not be awarded against municipalities that take action to protect their residents' personal rights, including the constitutional right to privacy. Individual residents' privacy rights are implicated when a request is made under the California Public Records Act[1] ("CPRA") for records that contain these individuals' personal information. The CPRA requires public agencies to disclose

[1] Gov. Code §§ 6250-6277.

responsive records in a short period of time. As in this case, it is often infeasible for individuals to assert their privacy rights, and public entities may be in the best position to assert those rights on behalf of their residents and customers. Municipalities will be reticent to oppose or object to the disclosure of information that could affect legitimate privacy concerns, if in the event they do not succeed in their efforts, they are required to pay attorney's fees incurred by the party seeking disclosure. Amici request that the Court consider these policies in deciding this case.

INTRODUCTION

The City asserted its residents' right to privacy by bringing a lawsuit against the Metropolitan Water District of Southern California ("MWD") immediately after MWD advised that it intended to disclose personal information in response to a CPRA request made by the San Diego Union Tribune ("Union Tribune"). Union Tribune's request sought personal information about approximately 29,000 customers of the City's Department of Water and Power, in particular, the names and residential addresses of customers who applied for or participated in MWD's Turf Removal Rebate Program ("Turf Program").

The City's suit was ultimately unsuccessful, and the trial court ordered the City to pay Union Tribune's attorney's fees under Code of Civil Procedure section 1021.5. This order is concerning because it disincentivizes municipalities from asserting their residents' and customers' constitutional rights. Because of the number of customers at issue and the short timeframe for MWD's response to

the CPRA request, there was no way to timely and effectively notify the individual customers so that they could assert their rights. Further, under the CPRA, individuals' private information may be disclosed without them knowing or having any reason to know of its disclosure.

Municipalities should not be penalized for attempting to protect their residents' privacy rights. This is particularly true where, as here, the individual residents had no opportunity to assert their own rights and the public entity's only interest in bringing legal action to protect disclosure was to protect its residents' rights.

FACTUAL BACKGROUND

The LCC adopts the factual background set forth in Sections IV and V of the City's Opening Brief.

ARGUMENT

A. THE RIGHT TO PRIVACY IS WELL-ESTABLISHED AND RECOGNIZED BY THE CPRA.

The right to privacy is a fundamental, inalienable right. (Cal. Const. art. I, § 1.) The constitutional right to privacy includes the right to control circulation of personal information. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35-36.) Types of information covered by the constitutional right to privacy include personal contact information, personnel records, financial information, and medical records. (See, e.g., *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1023-24 [names, addresses, and telephone numbers of airport noise complainants];

Marken v. Santa Monica-Malibu Unified School Dist. (2012) 202 Cal.App. 4th 1250, 1271 [significant privacy interest in investigation report and letter of reprimand regarding employee misconduct]; *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal.App. 4th 741, 754 [individuals' right of privacy extends to financial information]; *Grafilo v. Wolfsohn* (2019) 33 Cal.App. 5th 1024, 1034 [patients' medical records].)

In enacting the CPRA, the Legislature was "mindful of the right of individuals to privacy." (Gov. Code § 6250.) The CPRA also identifies exemptions to disclosure under the Act, including certain private information, such as:

- "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" (Gov. Code § 6254(c));
- "Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information" (Gov. Code § 6254(i));
- "Statements of personal worth or personal financial data required by a licensing agency" (Gov. Code § 6254(n)); and
- "[T]he name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies" (Gov. Code § 6254.16).

However, the exemptions identified in the CPRA "are permissive, not mandatory – they allow disclosure but do not prohibit disclosure," except for a few specific categories of information.[2] (*National Conference of Black Mayors v. Chico Community Publishing, Inc.* (2018) 25 Cal.App. 5th 570, 579; see also *Marken v. Santa Monica-Malibu Unified School Dist.*, supra, 202 Cal.App. 4th at 1270 [CPRA exemptions "protect only against required disclosure, not permissive disclosure"].) For example, section 6254 states: "Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records". (Gov. Code § 6254, emphasis added.) Similarly, Government Code section 6254.16 provides: "Nothing in this chapter shall be construed to require the disclosure of" names, credit history, utility usage data, and contact information of local agencies' utility customers. (Gov. Code § 6254.16; see also, Gov. Code §§ 6254.1(b), 6254.18(a), 6254.20, 6254.27, 6254.28, 6254.29(b) ["Nothing in this chapter shall be construed to require the disclosure of" certain categories of private information].)

Thus, even if records responsive to a CPRA request contain private personal information, there is nothing prohibiting a public agency from disclosing them, even if an individual would find the

[2] The CPRA provides that home addresses and phone numbers of state employees, school district employees, county office of education employees "shall not be deemed to be public records." (Gov. Code § 6254.3.) Additionally, voter registration information is "confidential and shall not be disclosed to any person" except as provided by Election Code. (Gov. Code § 6254.4.)

disclosure a privacy issue. With only a few specified exceptions, the CPRA does not require protection of individuals' right to privacy.

B. THE CPRA DOES NOT PROVIDE A PROCEDURE FOR PROTECTING THIRD PARTIES' PRIVACY.

The CPRA generally requires agencies to respond to public records requests in just 10 calendar days. (Gov. Code § 6253(c).) Ten days is insufficient time to allow an agency to determine that responsive records include third parties' personal information and to notify those third parties of the potential disclosure.

The CPRA provides for extensions of the 10-day period, but extensions may not exceed 14 days. (*Id*.) Additionally, extensions of time are available only when one of four specific circumstances exists:

> (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
>
> (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
>
> (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
>
> (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

(Gov. Code § 6253(c)(1)-(c)(4).)

Notably, while the CPRA allows for an extension to allow the responding agency to consult with another agency with an interest in the information sought (Gov. Code § 6253(c)(3)), it does not permit additional time for consultation with *individuals* whose private information is sought.

1. Other statutory provisions provide for more practical and effective protection of third-party privacy rights.

The CPRA's approach to protection of third-party privacy differs significantly from the approach taken in other contexts where private information is sought. For example, subpoenas for records containing personal information must comply with the "notice to consumer" provisions set forth in Code of Civil Procedure sections 1985.3 and 1985.6. These provisions apply when records are subpoenaed from providers of personal services, including medical and dental professionals, banks and financial institutions, insurance companies, attorneys, accountants, and schools. (Code Civ. Proc. § 1985.3(a)(1).) The party subpoenaing records must provide a copy of the subpoena to the individuals whose records are sought. (Code Civ. Proc. § 1985.3(b).) At least ten days before the records are to be produced, consumers must be notified that records about them are being requested, and they must be advised about how to object to disclosure. (Code Civ. Proc. § 1985.3(b)(2),(e).) If a consumer objects, the subpoenaed party cannot disclose records unless the

consumer reaches an agreement with the subpoenaing party or a court orders disclosure. (Code Civ. Proc. § 1985.3(g)). Similar requirements apply when employment records are subpoenaed. (Code Civ. Proc. § 1985.6(b), (c), (f).) Disclosure of the records at issue is stayed until a court orders their production or the parties reach an agreement. (Code Civ. Proc. §§ 1985.3(g), 1985.6(f)(3).)

2. Reverse-CPRA actions are not necessarily the most effective way for individuals to assert their privacy rights.

The only means by which third parties can prevent their private information from being disclosed in response to a CPRA request is by initiating a reverse-CPRA action. (*Marken v. Santa Monica-Malibu School Dist*., *supra*, 202 Cal.App. 4th at 1265-67.) Citizens are not explicitly advised of this process, which is costly, takes time to pursue, and requires legal counsel in most cases. Unlike the "notice to consumer" statutes, the onus is on an individual to initiate a proceeding to assert his or her objections.

More importantly, individuals cannot avail themselves of a reverse-CPRA suit when they are not advised of impending disclosures of their personal information. Notification to individuals is not feasible when a CPRA request implicates the privacy of a significant number of people. In this case, Union Tribune's request affected the privacy of approximately 29,000 DWP customers. There was no practical way to notify each of these customers, particularly within the timeframe for MWD's response under the CPRA. Even if

all customers had been notified of the request for their private information and sought to protect their privacy, the outcome could have been a barrage of reverse-CPRA lawsuits. Instead, the most judicially efficient means for determining individuals' rights to privacy is a single action brought by one entity to assert all those rights. When a municipality brings a reverse-CPRA case to protect its residents' privacy rights, those rights are most effectively asserted, as the municipality has knowledge of and experience with the CPRA, and residents avoid the need to retain their own counsel.

C. MUNICIPALITIES HAVE AN INTEREST IN PROTECTING THE PRIVACY OF THEIR RESIDENTS.

Courts have also recognized, in numerous contexts, the right of entities to assert the privacy rights of the individuals they serve. For example, the California Supreme Court held that a physician had standing to assert his patients' constitutional right to privacy in their prescription records. (*Lewis v. Superior Court* (2017) 3 Cal. 5th 561, 570.) One reason for this is that the potential disclosure of patients' private information may deter them from receiving necessary medical care, and a physician has an interest in patients seeking appropriate treatment. (*Id*.) Other entities, such as banks and sellers of products, have also been allowed to assert their customers' privacy interests. (See, e.g., *Overstock.com, Inc. v. Goldman Sachs Group* (2014) 231 Cal.App. 4th 471, 503 [financial institution has standing to assert privacy interest of its customers]; *Pioneer*

Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 368 [seller of DVD players allowed to assert customers' privacy interests in identifying information they provided to the seller].)

The right to assert individuals' privacy extends to government entities. In *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, a criminal defendant charged with resisting arrest and battery upon CHP officers, sought all CHP records of arrests for the same offenses during the preceding two years. (*Id. at* 72.) The criminal (municipal) court ordered production of the names and addresses of those arrestees. (*Id*.) On appeal, this Court held that the CHP Commissioner, as the custodian of the records at issue, has the right to assert the privacy rights of the former arrestees. (*Id. at* 76.) In so doing, this Court noted that "[i]t would be absurd to require that the arrestees whose names were ordered disclosed by the trial court here, personally appear in order to assert any right of nondisclosure they might have." (*Id. at* 77.) The Court acknowledged that individual privacy rights were critical in this case, as the former arrestees would be located and questioned by defense counsel; additionally, "it takes no great imagination to envision other forms of mischief which could result from the indiscreet use of the information" at issue. (*Id. at* 78.)

As a provider of utility services, the City must be able to assert its customers' right to privacy. As in *Craig v. Municipal Court*, there is a significant privacy interest in customer names and addresses. In order for the City to effectively provide services, such as water and power, to its residents, those residents must have confidence in the

privacy of the personal information they share with the City. The City, as custodian of DWP customers' names and addresses, has a right to assert customers' privacy rights, particularly when, given their numerosity, they cannot reasonably be required to personally assert them.[3] Additionally, as a municipality, the City has a substantial interest protecting the privacy of its citizens. (*Project 80's, Inc. v. City of Pocatello* (9th Cir. 1991) 942 F.2d 635, 638 [recognizing cities' substantial interest in protecting privacy of citizens in their homes].) The City acted properly and fairly by filing this reverse-CPRA case to protect those privacy rights.

D. AWARDING ATTORNEY'S FEES AGAINST MUNICIPAL PLAINTIFFS IN REVERSE-CPRA CASES DISINCENTIVIZES THEM FROM PROTECTING INDIVIDUAL PRIVACY INTERESTS.

Attorney's fee awards in reverse-CPRA cases are not based on the CPRA statute because the statute does not provide for reverse-CPRA lawsuits, much less attorney's fees in reverse-CPRA actions. (*Pasadena Police Officers Assn. v. City of Pasadena* (2018) 22 Cal.App. 5th 147, 160-61; *National Conference of Black Mayors v. Chico Community Publishing, Inc.*, *supra*, 25 Cal.App.5th at 581.) Instead, fees in such cases are analyzed under Code of Civil Procedure section 1021.5 pursuant to the private attorney general

[3] The importance of this right is demonstrated by the fact that three water districts (Intervenors/Appellants in this case) intervened in the action brought by the City so that they too could assert privacy rights on behalf of their customers.

theory. As discussed in the City's Reply Brief, unlike the CPRA, fees under Section 1021.5 are not automatically awarded to a prevailing party. (Petitioners' Appellants' Combined Respondent's/Reply Brief at pp. 25-28; *Contrast* Gov. Code § 6259(d) ["The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section."], *with* Code Civ. Proc. § 1021.5 ["Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties…"].)

Disallowing attorney's fee awards against municipalities protecting individuals' constitutional rights is consistent with the rationale for awarding fees under the private attorney general theory. "Fees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the cost of litigation." (*Pasadena Police Officers Assn. v. City of Pasadena*, *supra*, 22 Cal.App. 5th at 159, internal quotation marks and citations omitted.) Further, in order for fees to be properly awarded against a plaintiff in a reverse-CPRA case, the plaintiff must have "done something to compromise the rights of the public." (*Id. at* 164, citing *Adoption of Joshua S*. (2008) 42 Cal. 4th 945, 958.)

As discussed, entities may be in the best position to assert individuals' privacy rights on their behalf. (See, *supra*, § B(2).) Municipalities have a significant interest in representing and protecting the privacy of their citizens. (*Project 80s, Inc. v. City of*

Pocatello, *supra*, 942 F.2d at 638.) When, as here, a municipality brings a reverse-CPRA lawsuit to prevent another public agency from disclosing private records, the municipal plaintiff's only interest is the protection of third-party individuals' privacy. This case is unlike *Pasadena Police Officers Assn v. City of Pasadena*, where the police officers' union had an "institutional" interest in expanding the government's powers to withhold the types of records at issue in that reverse-CPRA case. (*Pasadena Police Officers Assn. v. City of Pasadena*, *supra*, 22 Cal.App. 5th at 165-66.) Here, the City had nothing to gain and no institutional interest to protect in initiating its reverse-CPRA case against MWD. Prosecuting a reverse-CPRA case is an endeavor that requires significant time and resources of a municipality. By bringing a reverse-CPRA case to protect its residents' constitutional rights, a public entity does not compromise, but rather, protects the rights of the public.

Municipalities should be encouraged to take affirmative action to protect their residents' constitutional rights. The trial court's order does just the opposite; by requiring a municipality to pay its opponent's attorney's fees, the court's order penalizes a municipality that strove to protect its residents' important rights. This is a severe penalty because attorney's fees are often significant and a public entity has very little (if any) control over how much its litigation opponent accumulates in fees.

Discouraging municipalities from bringing reverse-CPRA actions to assert privacy rights on behalf of their residents has at least one additional consequence that is detrimental to the public.

Under the CPRA, the public's right to access government records must be balanced against individuals' rights, including privacy rights. (*City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 626, citing Gov. Code § 6255(a).) The Supreme Court specifically stated that "[p]rivacy concerns can and should be addressed on a case-by-case basis." (*Id*. at 626.) Citizens do not get the benefit of this careful consideration of their rights if they are unable to personally assert those rights and government entities are discouraged from doing so on their behalf. When reverse-CPRA cases are not brought on behalf of individuals who cannot personally assert their rights, individual rights necessarily give way to disclosure of public records.

CONCLUSION

Municipalities should not be forced to choose between abandoning their residents' constitutional rights and risking the significant expense of a litigation opponent's attorney's fees. By bringing a reverse-CPRA action when it had nothing to gain, the City properly honored and defended the rights of approximately 29,000 residents, who had no opportunity to personally assert those rights. The trial court's award of attorney's fees against the City in this case tells municipalities that their residents' privacy rights are not worth asserting, and it tells Californians that their private information is not safe with their local government.

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Amici urge this Court to consider these implications and to reverse the award of attorney's fees under Code of Civil Procedure section 1021.5 against the City.

Respectfully submitted,

Dated: July 19, 2019

RICHARD DOYLE, City Attorney

By: ___*/s/ Elisa T. Tolentino*___
ELISA T. TOLENTINO
Senior City Attorney

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LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND CALIFORNIA SPECIAL DISTRICT'S ASSOCIATION

CERTIFICATE REGARDING WORD COUNT

I, Elisa T. Tolentino, counsel for Amicus Curiae, League of California Cities, hereby certify, pursuant to California Rules of Court, Rule 8.1204 (c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this Application for Leave to File Amicus Curiae Brief in Support of Appellant City of Los Angeles, exclusive of tables, cover sheet, and proof of service, according to my computer program is 3,619 words.

Respectfully submitted,

Dated: July 19, 2019

RICHARD DOYLE, City Attorney

By: *___/s/ Elisa T. Tolentino__*
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CASE NAME: City of Los Angeles, et al., v. Metropolitan Water District of Southern California

COURT OF APPEALS CASE NO.: B272169

(Superior Court, County of Los Angeles Case No.: BS 157056)

I, the undersigned declare that I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

I am familiar with the business practice of the Office of the City Attorney for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the City Attorney is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participant s who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 19, 2019, I caused to be served the attached:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

by transmitting a true copy via this court's TrueFiling system.

On July 19, 2019, I served participants in this case who have not registered with the court's TrueFiling system or are unable to receive electronic correspondence, a true copy thereof, enclosed in a sealed envelope in the internal mail collection service at the Office of the City Attorney, addressed as follows:

Hon. James C. Chalfant
Superior Court of California
County of Los Angeles
Stanley Mosk Courthouse
111 N Hill Street
Los Angeles CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 19, 2019, at San Jose, California.

/s/ Vada V. Burrow

Vada V. Burrow