

Court Holds Requesting 47,000 Pages Not Unduly Burdensome Under Public Records Act

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Generally, cities may object to Public Records Act requests if they are overbroad and thus "unduly burdensome." (See Cal. First Amend. Coalition v. Superior Court (1998) 67 Cal.App.4th 159, 166.) However, a recent case (Getz v. County of El Dorado – Case No. C091337) cautions against using this type of "unduly burdensome" objection to justify denial or a refusal to disclose records and is a good reminder to carefully consider how an agency responds to a request for a voluminous amount of documents.

The case involved a request seeking approximately 47,000 of pages of responsive documents. The requester wanted records between the El Dorado County ("County") and a developer that built and managed the homes that was part of his homeowners' association. The requester initially requested "all development plans, proposals, reports and applicable correspondence" which included emails between the County and the developer. Although the County produced a number of records, the requester believed there were more documents that were not produced. As a result, the requester made a further request for records that included all emails sent from January 2013 and August 1, 2018, between any email address from four domain names associated with the developer and any County employee, regardless of their content.

The County made an "unduly burdensome" objection and worked with the requester to prepare an index of electronic records from which the requester could select which documents he sought through the request. Instead of selecting specific records to be produced from that index after the initial review, the requester simply asked for all records identified in the index to be produced, claiming that there was no undue burden because the County had already located (but had not yet reviewed) the potentially responsive records. The County did not respond to this further request, presumably because the requester did not further narrow down the response as requested by the County.

The requester sued. The trial court ruled in favor of the County finding that the request was overly broad and unduly burdensome and that the County had indeed fulfilled its obligations under the Public Records Act.

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On appeal, the County made several arguments, which were all rejected by the appellate court.

The first County argument, that the request was not focused or specific, failed because the request "did not require interpretation to determine responsiveness," and noting that the request identified emails from specific email addresses.

The second County argument, that the request was "overbroad and unduly burdensome," failed for several reasons. The County argued that it would take an extraordinary amount of time to review the records for potentially applicable exemptions under the CPRA, including emails exempt because of a common interest between the County and the developer in separate litigation. However, the Court noted that the County already located and indexed approximately 47,000 emails based upon the requester's identification of the dates and domain names associated with the records. Further, the County did not provide sufficient evidence that reviewing the 47,000 emails for potential draft or evidentiary privilege exemptions was unduly burdensome and the Court found that the County did not sufficiently support why it needed to review the emails to determine if exemptions applied. Although the County had asserted the exemption for draft documents under Government Code 6254(a), the Court found that the County did not submit sufficient evidence that draft emails were actually retained or why the public interest requires such draft emails be withheld, in accordance with Government Code section 6254(a). The County also asserted the exemption for privileges under Government Code 6254(k). The Court also rejected the application of this exemption finding that the County failed to support why the County needed to review the emails for the attorney-client privilege, since all four types of email domain names were to third parties (thus waiving any attorney-client privilege). The County also did not support why it needed to review the emails for the potentially applicable common-interest privilege, because only one of the four types of email domain names may be subject to that exemption and the County could have easily segregated those emails for review. As a result, the public interest in avoiding this type of burden to the County did not supersede the public interest in potential improper cooperation between the County and the developer.

Lastly, the third County argument, that the request sought items that were not public records based upon the domain names of non-county entities, failed because the County was the recipient of such emails and as such the Court determined that the emails likely involved public business.

Key Takeaways:

1. It continues to be difficult to use "undue burden" to justify

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denial or a refusal to disclose records and courts will scrutinize refusals to disclose records based upon a claim of "undue burden" and weigh it carefully against the public interest in transparency.

2. Courts will require substantial evidence of what the undue burden is and may not accept the time and expense to review potentially responsive records, alone, to justify non-disclosure. In other words, 47,000 potentially responsive emails might not be enough, especially when such potentially responsive emails may be segregated and reviewed for different exemptions.
3. Courts will scrutinize public agency efforts to narrow down a request to determine if such efforts indirectly impose additional criterion to the request.
4. Creating an index of electronic documents may undercut an argument that locating such records are unduly burdensome.
5. Public agencies may want to consider ways in which the agency maintains its records to determine if there are methods that could be utilized to simplify the review of records in response to a public record request. The Court of Appeals recommended segregating exempt records from non-exempt records (e.g., all attorney-client privileged communication is kept in a separate folder), which may help to streamline the review and production of documents responsive to public record requests.

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