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Access to Private Entity Records is Not Enough to Compel Disclosure Obligations Under CPRA

The Court of Appeal, Second District (Div. 7), recently held that the City of Los Angeles' mere right to access certain records of a private entity was not enough to establish that the City had constructive possession of the records for purposes of the California Public Records Act ("CPRA"). (*Cynthia Anderson-Barker v. The Superior Court of Los Angeles*, B 285391, January 22, 2019 (WL 276051)). This case provides guidance on whether a public agency is responsible for providing the records of a private entity, such as a consultant or vendor, in responding to a CPRA request and serves as an important reminder to have clear language in contracts relating to ownership of all records, including electronically stored data. Public agencies should carefully review the language contained in contracts with private entities to ensure that there are clear provisions addressing the ownership of records and that the obligations are appropriate given the nature of the contract. Taking these steps now will prevent confusion and delay when a CPRA request is filed seeking documents retained by a private entity.

The case arises from a CPRA request made by Cynthia Anderson-Barker ("Barker"), a civil rights and criminal defense attorney, to the City of Los Angeles ("City") seeking electronically-stored data relating to vehicles that private towing companies had impounded at the direction of the City. The City uses numerous privately-owned companies to tow and store impounded vehicles ("POCs"). The POCs store impoundment data electronically in a database known as the Vehicle Information Impound Center ("VIIC"). The VIIC, however, is on a server owned by another private entity, the Official Police Garage Association of Los Angeles ("OPGLA") which is comprised of POCs. The impounding POC also scans a form prepared by the City into a database called "Laserfiche," which is owned and maintained by an independent document storage company OPGLA contracts with to store POC-related documents. The City contracts directly with the POC for tow services and those contracts specify that the City is allowed to access the VIIC and Laserfiche databases without notice and 24 hours a day. The contracts also specify that the data contained on the VIIC and Laserfiche databases are owned by the POC.

The trial court concluded that the evidence showed that the City did

not have a duty to disclose the requested data because it did not possess or control the VIIC or Laserfiche records. In reviewing the trial court's decision, the Court of Appeal focused on whether the City had a "right to control the records," [as discussed in *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 609, 623], which would establish constructive possession of records subject to disclosure under the CPRA. The Court of Appeal ultimately found that the mere ability of the City to access the VIIC and Laserfiche databases was not enough to establish that the City had a right to control the records. Access alone did not equate to a form of possession or control and the Court of Appeal found that "[t]o conclude otherwise would effectively transform any privately-held information that a state or local agency has contracted to access into a disclosable public record. Nothing in the text or history of the CPRA suggests it was intended to apply so broadly." In reaching its conclusion, the Court of Appeal cited the *Forsham v. Harris* (1980) 445 U.S. 169, 186, a Freedom of Information Act ("FOIA") case, which held that FOIA only applies to records an agency has "in fact [created] or obtain[ed] and not to records which merely could have been obtained." While the Court of Appeal indicated that the City might have had a duty under the CPRA to disclose any data extracted from the VIIC or Laserfiche databases and utilized by the City, the City's right to access the databases was not enough to establish that the City had constructive possession of the data for purposes of obligating the City to produce that data under the CPRA.