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PUBLIC.RESOURCE.ORG, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PUBLIC.RESOURCE.ORG, INC.,

Petitioner,

v.

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW, and the CALIFORNIA BUILDING STANDARDS COMMISSION

Respondents.

Case No. 34-2021-80003612

PETITIONER PUBLIC.RESOURCE.ORG, INC.'S REPLY TO RESPONDENT CALIFORNIA OFFICE OF ADMINISTRATIVE LAW'S OPPOSITION TO PETITION FOR WRIT OF MANDATE

Date: March 25, 2022
Time: 1:30 p.m.
Dept: 27
Judge: Hon. Steven M. Gevercer

Action Filed: March 17, 2021

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I. INTRODUCTION

The California Office of Administrative Law ("OAL") has failed to demonstrate why Public.Resource.Org, Inc.'s ("Public Resource") petition for a writ of mandate ("Petition") pursuant to the California Public Records Act ("CPRA") should not be granted. OAL's Opposition brief ("Opposition") strays from well-settled California law in an effort to avoid providing Public Resource with a usable electronic copy of the California Code of Regulations ("CCR") under the clear mandates of the CPRA. That effort is unpersuasive for multiple reasons.

First, OAL must comply with Public Resource's request because it is in constructive possession of the CCR in a structured electronic format. OAL's contract with Thompson Reuters ("West") establishes a "Master Database" of the CCR, and contains contractual provisions regarding how OAL controls the data (the CCR) on that database. California law provides that an agency has constructive possession of records when it has the ability to control them. Here, it is undisputed that OAL has the full contractual rights to control the CCR records on the Master Database. As a result, OAL is in constructive possession of the Master Database CCR, and must disclose it to Public Resource.

Second, OAL argues that its contract with West was considered in the making of the CPRA and is therefore uniquely exempt. This argument is not only unsupported by the legislative history; it is squarely contradicted. The *exact same* legislative materials cited in the Opposition clearly demonstrate that the California Senate was specifically targeting OAL's contract with West when it passed a specific provision in the CPRA to prevent agencies from dodging their CPRA obligations by offloading public records to private entities. As such, OAL cannot plausibly argue that its agreement with West is somehow immune from that provision.

Third, the California Administrative Procedures Act ("APA") neither exclusively controls the distribution of the CCR nor serves as an implied exemption to the CPRA. The APA's provisions, by their plain terms, do not replace OAL's obligations under the CPRA. Moreover, OAL's argument that it does is contrary to the California Constitution, and finds no support in the text of the CPRA or California case law, under which agencies must justify withholding public records under a specific statutory exemption. Despite the existence of hundreds of exemptions in

the CPRA's text, OAL can point to none for the proposition that the APA supersedes OAL's duties regarding the CCR.

Fourth, the current online version of the CCR on West's website is insufficient for the public's access and use. That the public has limited access to a record has absolutely zero impact on an agency's duties under the CPRA. A requestor's pre-existing access to the records in question is entirely irrelevant to the agency's duty to disclosure the records subject to a valid CPRA request.

Finally, OAL makes a one-sentence argument that the CCR should be exempt from disclosure under the "public interest" catch-all exemption in § 6255. The argument is unsupported and meritless.

In sum, OAL's Opposition fails to articulate any legally valid reason why the Petition should not be granted.

II. ARGUMENT

A. OAL Has Constructive Possession of the Contents of the Master Database

OAL argues that it "does not possess the records petitioner now seeks." Opp. at 2, 16. This is incorrect as a matter of California law. The CPRA defines "possession" to "mean both actual and constructive possession." *Bd. of Pilot Comm'rs v. Super. Ct.*, 218 Cal. App. 4th 577, 598 (2013). Specifically, "an agency has constructive possession of records if it has the right to control the records, either directly or through another person." *Consol. Irrigation Dist. v. Super. Ct.*, 205 Cal. App. 4th 697, 710 (2012). As Public Resource explained in its Petition, there is no dispute that OAL "has the right to control the contents of the CCR Master Database" maintained by West ("Thompson Reuters"). Pet. at 15. The contract between OAL and West is unambiguous. Pet. at 15-16. The contract provides that:

- When OAL sends updates to West, West is contractually obliged to include them in the Master Database.[1] Pet. Exhibit B. at 9.
- "The text of regulations and all other items in the Master Database shall be subject to

[1] OAL has, at some point in the past, sent the entirety of the CCR to West, and the contract clearly states that OAL sends West updates to the CCR as they're approved by OAL and the Secretary of State. As a matter of logic, it seems obvious that OAL has copies of the CCR in usable electronic form.

inspection, revision, and correction by OAL. The contractor shall take immediate action to make any corrections specified by OAL." *Id*.

- West cannot "alter the text of regulations, notices or any other materials furnished by OAL for publication, except as expressly directed or authorized by OAL." *Id*. at 15.
- OAL mandates a satisfactory level of accuracy in the Master Database as zero percentage (0%) of error rate. *Id*.
- OAL maintains all claims of ownership in the contents of the Master Database. *Id*.

It is undisputed that OAL has control over the contents of the Master Database. West makes every change that OAL dictates and West has no contractual ability to make any changes whatsoever to the CCR on the Master Database. This alone establishes constructive possession under the CPRA. *Cmty. Youth Athletic Ctr. v. City of Nat'l City*, 220 Cal. App. 4th 1385, 1427 (2013)(ordering disclosure based on constructive possession and exampling that "the contractual relationship of a public agency and its private consultant is important in determining the agency's duty of disclosure.").

OAL contends that it only controls the "data" in the Master Database, and not the database itself Opp. at 18. OAL misses the point. First, Public Resource is requesting a copy of the "data" in the Master Database. The "data" is the CCR, and the CCR is the record in question. The inquiry for purposes of constructive possession is whether the Agency has "control" of the records in question, and OAL *admits* that it has control over those records. Opp. at 18 ("OAL only maintains the rights to the *data* within the Master Database"). OAL thus has constructive possession over the exact records Public Resource seeks.

Second, OAL's theory of constructive possession is groundless. Under OAL's logic, constructive possession would only apply if an agency has actual control of the infrastructure containing the records. Opp. at 18 (stating that the Master Database is "a database that Thompson Reuters owns and controls."). According to their theory, OAL would need to own or physically possess West's computers, servers, and access passwords for it to have constructive possession over the records in question. But that's not constructive possession—that's just possession. Constructive possession, in the context of the CPRA, is found when the agency "has the right to

control the *records*, either directly or through another person." *Consol. Irrigation Dist*., 205 Cal. App. 4th at 710 (emphasis added). OAL unambiguously controls, through West, every letter of the CCR in the Master Database.

Caselaw is in accord. In *Community Youth Athletic Center v. City of National City*, 220 Cal.App.4th 1385, 1426, 1428–1429 (2013), a city's contractual ownership interest in, and right to possess, a consultant's underlying field survey records imposed the CPRA duty to disclose. In the same vein, OAL's reliance on *Anderson-Barker v. Super. Ct*., 31 Cal. App. 5th 528, 538 (2019) is misplaced. In *Anderson-Barker*, the court found that the agency did *not* have constructive possession of the records in question because "the City presented evidence showing that *it does not direct what information* the OPGs place on the VIIC and Laserfiche databases, *and has no authority to modify the data in any way*." *Id*. at 540 (emphasis added). Here, in stark contrast, OAL has the express contractual right to direct exactly what information West places in the Master Database, and the exclusive authority to modify that data in every way. Pet. at 15-16; Exhibit B at 3, 15. *Anderson-Barker* showcases exactly why OAL has constructive possession of the CCR in the Master Database, and why OAL cannot dodge its obligations under the CPRA by arguing otherwise.

OAL states that it "offered to make the CCR available in every format in its possession." Opp. 19. But this again ignores California law. The CPRA directs that agencies must provide a public record in "any electronic format in which it holds the information" and any requested format "used by the agency to create copies for its own use or for provision to other agencies." Cal. Gov't Code § 6253.9(a)(1)–(2). Here, that includes an XML format. OAL's contract with West states that:

> Upon completion or termination of the contract, the contractor shall provide OAL with a useable electronic database containing the data from the Master Database. The data must be provided in a standard (free from any proprietary formatting or codes) portable and easily processed or converted format such as XML or a relational database capable of extraction via standard SQL queries.

(Pet. Exhibit B at 9). Thus, OAL has the express right to an XML copy of the CCR in the Master

Database. OAL contends that it does not currently possess the usable "electronic database containing the data from the Master Database," and has never exercised its contractual right to do so. Opp. at 8, 16; Decl. of Kevin Hull at ¶ 3, Decl. of Andrew Martens at ¶ 5. But this is immaterial, since OAL has the contractual right to the record. In *Cmty. Youth Athletic Ctr.*, 220 Cal. App. 4th at 1427, the court held that the agency had constructive possession of underlying survey records retained by a consultant based on the agency's contractual right to them, regardless of whether it exercised that right: "Based on the contractual language between RSG and the Commission, the City had an ownership interest in the field survey material and it had the right to possess and control it, even though it did not enforce its contractual right." *Id.* So too here.

B. Section 6270 Forbids OAL from Offloading Possession of the CCR to West in a Way that Circumvents its Duties under the CPRA

To the extent that OAL now argues that its contract with West prevents it from possessing the CCR in an XML format from West because that contractual right can only be exercised at the "completion or termination" of the contract (Opp. at 8, 17), then OAL's position and conduct clearly violates a simple precept of the CPRA. The CPRA expressly forbids agencies from offloading public records to private entities in a manner that prevents them from responding to a CPRA request:

> Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity *in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter.*

Cal. Gov't Code § 6270.(a) (emphasis added). The California Supreme Court has interpreted this provision to mean what it says:

> "The statute's clear purpose is to prevent an agency from evading its disclosure duty by transferring custody of a record to a private holder and then arguing the record falls outside CPRA because it is no longer in the agency's possession. . . . It

simply prohibits agencies from attempting to evade CPRA by transferring public records to an intermediary not bound by the Act's disclosure requirements."

City of San Jose v. Super. Ct., 2 Cal. 5th 608, 623–24 (2017). The CPRA thus prohibits OAL from contracting around its CPRA obligations.

1. Legislative History Confirms that Section 6270 was Passed to Address OAL's Contract with West

OAL cites to a 1995 Senate Report as support for the argument that § 6270 does not apply to its contract with West because the arrangement is mentioned in the Senate proceedings. Opp. at 12; CA Bill Analysis dated June 12, 1995, Sen. Rules Comm. Rep. on Assem. Bill No. 141 (1995-1996 Reg. Sess.) as amended Jun 12, 1995. However, that document stands for the exact opposite conclusion – it suggests that the Senate was motivated to pass § 6270 to *combat* OAL's practices with West. Specifically, the OAL-West contract is used as an illustrative example of what the amendment (§ 6270) would *forbid*. The analysis states that § 6270 would "prohibit[] state and local agencies from providing public records to private entities in a way that would prevent the agency from providing the record directly to the public." *Id.* In its next breath, it criticizes the revenues generated for private industry by selling public records. As its *only example*, it notes "the State Office of Administrative Law (OAL) has a contract with Barclays Law Publishers to publish the Official California Code of Regulations… Barclays pays the OAL a license fee of $400,000 less a credit for 162 subscriptions of the Supplement that Barclays provides to various specified public offices and agencies. The state may buy the supplement for its own internal use…for a discounted price…These are not for resale or distribution to third parties." *Id.* It concludes that "public records required to be disclosed should not be privatized." *Id.* OAL's argument is entirely backward and misleading. Its relationship with West was not implicitly blessed in the legislative history of § 6270 – it was explicitly condemned. Section 6270 was seemingly passed for the express purpose of forbidding this exact arrangement. OAL cannot plausibly argue otherwise.

C. The CCR is Not Exempted From the CPRA

OAL argues that the legislature has implicitly exempted the CCR from the CPRA by

passing the California Administrative Procedures Act ("APA"). Opp. at 11-12. OAL's argument fails at multiple levels.

First, as a matter of California law, the rights in the California constitution – including the right to public access of records enshrined in Art. I § 3(b)– reign supreme over statutes like the APA. *City & Cty. of San Francisco v. Regents of Univ. of California*, 7 Cal. 5th 536, 558 (2019) ("It is also basic that if there is a conflict between the California Constitution and a law adopted by the Legislature, the California Constitution prevails."). Here, the APA contains zero language supporting OAL's argument; nothing in its text suggests that the obligations specified for OAL are somehow substitutes for the CPRA. But nonetheless, even if there was a conflict between the people's right of access and the APA (which there is decidedly not), the constitution would control.

Second, OAL argues that the more "specific" language in the APA should prevail over a "general" CPRA.[2] But OAL's theory contradicts the California constitution, which states:

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

Cal. Const. Art I § 3(b)(2). The constitution directs that statutes such as the APA shall be narrowly construed to the extent they limit the people's right of access. OAL's reading of the APA *would* limit the people's right of access, and is anything but narrow.

Next, OAL argues that the *timing* of the APA's passage (after the CPRA) indicates that it should control over the CPRA's clear commands. Opp. at 12. But again, the constitution contemplates this very argument:

> A statute, court rule, or other authority *adopted after the effective date of this subdivision* that limits the right of access shall be adopted with findings

[2] OAL cites to *Rose v. State*, 19 Cal. 2d 713, 723-24 (1942). However, this case undermines OAL's argument at a fundamental level. In *Rose*, the California Supreme Court issued its seminal ruling that Cal. Const. Art I § 14 was "self-enforcing," giving plaintiffs the right to sue for a government taking despite defendant's arguments that statutes provided the state with immunity from suit. The court noted that legislation will not be interpreted to "abrogate or deny a right granted by the Constitution." *Id*. at 725.

demonstrating the interest protected by the limitation and the need for protecting that interest.

Cal. Const. Art. I § 3(b)(2)(emphasis added). Thus, as a matter of California constitutional law, OAL should be able to point to the findings of the legislature demonstrating that the APA's implicit limitation on the people's right of access protects an important interest. OAL points to no such findings, and indeed none exist. Nothing in the text of the APA or the California constitution supports OAL's strained reading.

Third, OAL's argument is contrary to the express provisions of the CPRA itself. The CPRA and California caselaw are overtly clear that the only way for an agency to resist disclosure of public records is under an express exemption in the statute. Cal. Gov't Code § 6255(a) ("The agency shall justify withholding any record by demonstrating that the record in question is exempt under **express** provisions of this chapter…"); *Id*. § 6253(b) ("Except with respect to public records exempt from disclosure by **express** provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person…"); *Id*. § 6253.1 (d)(2) ("The public agency determines that the request should be denied and bases that determination **solely** on an exemption listed in Section 6254."); *Long Beach Police Officers Ass'n v. City of Long Beach*, 59 Cal. 4th 59, 67 (2014) ("The act has certain **specific** exemptions (Cal. Gov't Code §§ 6254–6254.30), but a public entity claiming an exemption must show that the requested information falls within the exemption."); *City of San Jose*, 2 Cal. 5th at 616 ("Every such record 'must be disclosed unless a statutory exception is shown.'").

The legislature has, over the years, included hundreds of express exemptions into the CPRA, from specific categories of documents to entire state agencies. *See* Cal. Gov't Code §§ 6253.2-.21; 6253.5-.6; 6254-6253.33 (exemptions added to the CPRA by the legislature spanning five decades). Thus, the California legislature knows exactly how to exempt a record from disclosure pursuant to the CPRA. Yet, OAL points to no exemption in the CPRA that applies to the CCR. Indeed, in the same year the legislature passed the APA (1979), it amended four sections of the CPRA (See Gov't Code § 6262-6265) but neglected to include any express

exemption for the CCR or OAL generally.

In sum, OAL contends that the APA can be read to imply an exemption because it contains specific statutory directives for OAL to distribute the CCR. Their argument has no support whatsoever. The APA does not support it. The California constitution expressly instructs that statutes like the APA be read to avoid any such limitations on the right of access. And finally, the CPRA itself and California case law confirm that agencies must point to an express exemption in the statute, which OAL has not done, and cannot do.

D. West's Online Version of the CCR Does Not Satisfy OAL's Obligations Under the CPRA

OAL contends that West recently changed its terms of service after a "holistic review" of its websites. Opp. at 14. Specifically, West removed the copyright notice from its website and the language requiring users to enable cookies since Public Resource filed its Petition. *Id*. But these changes do not relieve OAL from its obligations under the CPRA. This is so for two reasons.

First, the CPRA directs that an agency must make a public record available unless those records qualify for a statutory exemption. Cal. Gov't Code § 6250, *et seq*. To be sure, those statutory commands apply to agencies, like OAL, not private companies, like West. Here, Public Resource served a CPRA request on OAL, which is in constructive possession of the CCR on the Master Database. *Supra*, Part I. West's decisions regarding the terms of service may have increased access, but that does not eliminate OAL's obligations under the CPRA and does not impact these proceedings in any way.

Second, OAL argues that Public Resource has full "access" to the CCR on West's website, but this assertion rings hollow. Having "access" to some version of a public record is irrelevant to whether an agency is obligated to produce it pursuant to a valid CPRA request. California law establishes that even when a requestor has *actual possession* of the records at issue, even that is irrelevant to the agency's duty to produce those same records. *Caldecott v. Super. Ct.*, 243 Cal. App. 4th 212, 220 (2015) ("Caldecott's possession of copies is not a basis to withhold the Documents"). Here, OAL cannot point to West's website as an excuse to dodge its obligations under the CPRA.

E. The CCR is Not Exempt From Disclosure Under Cal. Gov't Code § 6255

At the end of its brief, OAL articulates a single sentence argument that the CCR should be

exempt from disclosure under the public interest catch-all exemption under Cal. Gov't Code § 6255. Opp. at 19. But OAL fails to support this contention with anything more than conclusory assertions about OAL's ability to work with private entities and sell the CCR to the public. *Id.* OAL provides no authority as to how or why these two precepts affect the public interest. Nor does OAL even attempt to establish that these precepts "clearly outweigh" the overwhelming public interest in public access to the CCR, or the California constitution's fundamental right of the public to access documents concerning the people's business. Cal. Govt. Code § 6255; Cal. Const. Art I § 3. OAL simply asserts that the public interest favors the status quo, which shields the public from full access to the CCR and any meaningful ability to engage with it. This is plainly insufficient to establish an exemption under Cal. Gov't Code § 6255.

III. CONCLUSION

The status quo of the CCR is contrary to established caselaw (*supra*, Part I), has been condemned by the California Legislature (*supra*, Part II), and is unsupported by plain text of the CPRA and California Constitution (*supra*, Parts III, IV). OAL has failed to establish that the CCR should not be produced pursuant to OAL's clear obligations under the CPRA. Public Resource respectfully requests that this Court grant Public Resource's Petition.

Dated: January 20, 2022

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