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MCLE SELF-STUDY

In CEQA Litigation, When is an Agency Required to Include Internal Agency Emails in The Record of Proceedings?

By Katherine J. Hart and Leslie Z. Walker*

As in all writ practice, the evidence in a California Environmental Quality Act (CEQA)¹ action is generally limited to the administrative record of proceedings. Public Resources Code² section 21167.6 (e) prescribes the contents of an administrative record.³ The focus of this article is the last phrase of subparagraph (e) (10) which provides as follows:

Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project . . . and *all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division.* (Emphasis added.)

The addition of this last phrase of subsection (e) (10) in 1994 was part of a legislative reform effort to make CEQA litigation less expensive, but has largely had the opposite result. Drafted without a clear definition of "internal agency communication," this section could be read to include every sticky note or handwritten scribble on an adminis-

trative draft environmental document. The rapid escalation of electronic messaging ("email") and the relatively recent appellate court decision finding a record incomplete and inadequate,⁴ have converted section 21167.6 (e) (10) into a battleground for agencies and petitioners.

In the absence of judicial direction, agencies and private applicants who are frequently required to defend and indemnify the lead agency in the event of litigation,⁵ bear the burden of this costly debate. This article attempts to answer the question of which emails constitute inter-agency communication for the purposes of section 21167.6 (e) (10) by considering the section in light of statutes governing public records. This article begins by introducing the debate and its sources. The article then considers section 21167.6 (e) (10) in light of the Public Records Act (PRA),⁶ the Government Code sections pertaining to city and county document destruction, and CEQA.⁷

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I. SOURCE OF THE DEBATE

For many years after the addition of 21167.6 (e) (10), the interpretation of “internal agency communications” drew little interest. Two developments, however, have brought the issue to the forefront. First, agencies continue to increase their reliance on email as a medium for various types of correspondence, including communication between agency staff, and between agency staff and consultants. While email often replaces written correspondence, it also often replaces communication which would otherwise take place verbally either over the telephone or in person. As a result, many more inter-agency discussions are documented.

Second, in 2003, the Court of Appeals for the Fifth Appellate District reversed a project approval because the court could not locate the legally required findings in the disorganized and un-indexed 14 volume record of proceedings.⁸ In *Protect Our Water*, the record prepared for the case by Petitioners, but certified by the County, “read as if its preparers randomly pulled out documents and threw them into binders, failing to organize them either chronologically or by subject matter.” *Id.* at 365. The court found that it was nearly impossible to locate the pertinent documents in the 14 volume administrative record in the case. *Id.* at 372. The documents were incomplete and not labeled, and it was impossible to differentiate between documents and their attachments. *Id.* In essence, the record was unusable to the court. Playing upon the court’s findings in the *Protect Our Water* case, recently petitioners have attempted to extend the court’s holding and started arguing that all internal agency email must be retained and included in the record, or the record is incomplete and the approvals subject to judicial reversal.

To understand why the phrase “internal agency correspondence” in section 21167.6 (e) (10) should *not* require agencies to retain and include all emails sent among staff members or between staff members and consultants, we consider how the PRA and CEQA limit the retention and production requirements of section 21167.6 (e) (10).

II. DOCUMENT RETENTION AND DISCLOSURE UNDER THE PUBLIC RECORDS ACT

In the context of CEQA review, it is common for interested parties to make PRA requests while the environmental document is being prepared or after a project has been approved. It would make little sense if a petitioner could obtain more information by filing

a lawsuit and ordering the production of a record, than it could by filing a simple PRA request.⁹ Therefore, the production requirement in section 21167.6 (e) (10) must be read in light of the disclosure requirements of the PRA.

A. DOCUMENT DISCLOSURE AND THE DELIBERATIVE PROCESS PRIVILEGE

The PRA is a disclosure statute. It provides that “[e]xcept 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 . . . shall make the records promptly available to any person. . . .”¹⁰ A “public record” is “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”¹¹

Pursuant to section 6252 (f) of the PRA, a “writing” is defined as follows:

[a]ny handwriting, typewriting, printing, photostating, photographing, photocopying, transmitted by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Therefore, the PRA provides that state or local agencies must make any email relating to the conduct of the public’s business, which is not protected from disclosure by an express provision of law,¹² available to any requesting member of the public. In terms of the administrative record, this means that all emails not otherwise exempted from disclosure must be included in the record.

1. Deliberative Process Privilege

One such express provision of law which limits the disclosure of a number of internal agency emails is the deliberative process privilege contained in the public interest exemption. The exemption protects from disclosure deliberative materials produced in the process of making agency decisions. The public interest exemption is contained in Government Code section 6255 (a) and states that:

[t]he agency shall justify withholding any record by demonstrating that the record

in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

Citizens for a Better Environment v. Department of Food and Agriculture (1985) 171 Cal. App. 3d 704, 714 interpreted section 6255 to “protect the deliberative materials produced in the process of making agency decisions, but not factual materials and not agency law.” The purpose of the exemption, according to the court, is to “foster robust discussion within the agency of policy questions attending pending administrative decisions. The means to achieve this is an exemption from disclosure of those portions of pre-decisional writings containing advisory opinions, recommendations, and policy deliberations.” *Id.*

In *Times Mirror Co. v. Superior Court*,¹³ the California Supreme Court ascertained that the deliberative process privilege applies when “disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Id.* at 1342.

Many internal agency communications contain advisory opinions, recommendations and policy deliberations. Protecting internal agency communications containing such information serves the policy purpose identified in *Citizens for a Better Environment* and the *Times Mirror Co. v. Superior Court* cases. Internal agency communications are, therefore, protected under the privilege and should not be disclosed pursuant to a PRA request so long as it can be shown that to disclose such internal agency communications would discourage candid discussion among agency members in such a way as to impede the agency’s ability to carry out its CEQA duty. Moreover, internal agency correspondence subject to the deliberative process privilege also should be excluded from the record of proceedings to maintain consistency between the PRA and CEQA. Thus, with respect to internal agency emails, an agency should only include in the record of proceedings those emails which relate to the conduct of the public’s business and are not pre-decisional writings containing advisory opinions, recommendations and policy deliberations, or subject to some other statutory privilege or exemption.

MCLE SELF-ASSESSMENT TEST

Earn one hour of MCLE self study credit by reading the article titled **"In CEQA Litigation, When is an Agency Required to Include Internal Agency Emails in the Record of Proceedings?"** on pages 1-6 and answering the below questions, choosing the one best answer to each question.

This MCLE test is valid until November 15, 2009.

- | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1. Under the California Environmental Quality Act ("CEQA"), the administrative record of proceedings includes all internal agency communications.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>2. The addition of section 21167.6(e)(10) to CEQA was intended to make CEQA litigation more expensive.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>3. Two developments have brought interpretation of the phrase "internal agency communications" to the forefront. First, email is an increasingly common mode of communication. Second, <i>Protect our Water v. County of Merced</i> found that an agency's disorganized and un-indexed records constitute a sufficient record of proceedings.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>4. Section 21167.6(e) should be read in light of the Public Records Act ("PRA") because it provides that all public records pertaining to the project approval shall be included within the administrative record.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>5. All emails relating to the conduct of the public's business are considered public records under the PRA.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>6. The PRA's deliberative process privilege allows non-disclosure of an email where the public interest served by not disclosing the record outweighs the public interest served by disclosure.
<input type="checkbox"/> True <input type="checkbox"/> False</p> | <p>7. <i>Citizens for a Better Environment v. Department of Food and Agriculture and Times Mirror Co. v. Superior Court</i> interpreted the deliberative process privilege to exempt from disclosure internal agency communications that contain advisory opinions, recommendations and policy deliberations.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>8. The PRA contains records retention requirements.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>9. Cities and counties may adopt policies for records destruction based on when their documents are no longer required.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>10. CEQA compels retention and production of agency emails where a lawsuit is anticipated.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>11. Internal agency communication is only referenced in CEQA's section 21167.6(e)(10) pertaining to administrative records, and is not mentioned in any other part of the CEQA process, such as application permitting or CEQA compliance.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>12. Email communication should be included in the administrative record regardless of whether the decision-making body reviewed the documents.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>13. Searching for and producing email communication will likely produce relevant information.
<input type="checkbox"/> True <input type="checkbox"/> False</p> | <p>14. Agencies should adopt email retention policies before a lawsuit is on the radar.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>15. Department heads should be trained on the PRA, local retention policies, and communication strategies specific to CEQA.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>16. If a staff member wants something to be part of the administrative record, he or she should email it to him or herself and save it in the file.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>17. When an agency receives a potentially controversial project application, and staff or consultants want to discuss project concerns or vulnerabilities, they should do so by emailing those concerns to the CEQA counsel directly. Copies may be provided to other staff or decisionmakers, but should not be disclosed to the public.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>18. When an agency receives a CEQA complaint, it should direct deletion or disposal of application related emails.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>19. If an agency discovers there is no records retention policy and emails have been destroyed, it may argue the retention was not required.
<input type="checkbox"/> True <input type="checkbox"/> False</p> <p>20. Agencies should not certify the record unless they are certain it is as complete as possible, and therefore agencies should not certify only portions of a record.
<input type="checkbox"/> True <input type="checkbox"/> False</p> |
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Constitutional Conservation? Water Pricing Disincentives and Proposition 218

By Joel Kuperberg*

Following one of the driest winters on record, court-ordered cutbacks of up to 30 percent in the pumping of water from Northern California to the central and southern portions of the State, significant reductions in Colorado River supplies in Southern California, and water reservoirs at 30-year lows,¹ the prospect of sufficient water looks bleak. The Governor has declared a statewide drought, as well as a state of emergency in nine Central Valley counties, and the Metropolitan Water District of Southern California declared a "water supply alert" throughout its six-county service area that encompasses almost eighteen million residents.²

Local water agencies are under increasing pressure to address the impending water shortage. Some agencies are considering water reductions and rationing. Others, however, are investigating water pricing disincentives. The Orange County Grand Jury recently issued a report recommending that, in lieu of water rationing, retail water agencies adopt "water conservation rates," structured as inclining block tiers, to address water shortage issues.³ At least one large agency has already adopted an inclining block tier water rate in order to encourage conservation,⁴ and others are considering tiered rate structures in light of the projected reduction in available water supplies.

While disincentive rates may be an equitable and efficient means of discouraging excessive water use, they raise serious questions under Article XIIIID of the California Constitution, commonly known as "Proposition 218." This article examines whether these demand-based pricing tools are subject to Proposition 218, and, if so, how they may be structured either to comply with the Constitutional restrictions, or to be outside the scope of the restrictions.

I. TRADITIONAL RATES COMPARED TO CONSERVATION RATES

The traditional water rate structure usually contains just one rate tier, aggregating all of

the agency's direct, indirect and administrative costs of supplying water to all of its customers and spreading those costs based upon the anticipated quantity of water to be delivered.⁵ Often referred to as a "postage stamp" structure, the traditional rate is charged to every customer regardless of the relative amounts of water used or the different costs incurred in delivering water to customers in different areas. This rate structure is designed to recover from each customer its proportionate share of all of the costs of providing water service to all customers.

By contrast, a demand-based conservation rate structure comprises escalating rate tiers,

with increasing levels of water use triggering increasingly higher rates. Under this structure, the lowest rate is equal to or less than the agency's actual cost of acquiring, treating and delivering the water, in order to encourage a specified reduced level of water consumption. Higher rates apply to higher levels of water consumption, creating escalating levels of disincentive for a customer to use additional water. In most cases, these higher tiers bear no relationship to the agency's actual cost of providing that increment of water to the customer, but instead represent price disincentives for what is deemed to be excessive use.

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