

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: January 17, 2019

TO: Kris Michell, Chief Operating Officer

FROM: City Attorney

SUBJECT: Case Law Update Relating to the California Public Records Act Cost Recovery

As permitted by California Government Code section 6253.9(b)(2), the City presently charges for the costs associated with responding to a California Public Records Act (CPRA) request when data compilation, extraction, or programming is necessary for constructing or compiling records.¹ Consistent with this practice, a new case may be useful in recovering costs if the City purchases or employs special technology in order to construct or redact otherwise disclosable records.

In *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward (National)*, 27 Cal. App. 5th 937 (2018), the National Lawyers Guild (Guild) served the City of Hayward (City) with a CPRA request seeking records relating to protests against incidents of police violence. In response, the City provided hundreds of records, including police body worn camera videos. The City redacted the body worn camera videos to exclude portions exempt from disclosure on privacy and security grounds. The City purchased and used special software with audio/video editing capabilities to redact the exempt portions of the videos. The City sent the Guild an invoice for the costs incurred in copying and redacting the videos, including the costs of purchasing the software and for time spent using the software. The Guild paid the invoice under protest, and thereafter filed suit.

The trial court ruled in favor of the Guild, holding that the CPRA does not permit a City to seek costs associated with making redacted versions of public records. The City appealed this decision. In reversing the trial court, the Court of Appeal held the City could charge for both the cost of the software purchase and the time incurred in redacting exempt portions of the videos. In reaching its decision, the Court of Appeal examined the provisions of California Government Code section 6253.9(b)(2), which allow a public entity to recover costs incurred in complying with a request that requires compilation, extraction, or programming necessary to produce the record requested. Specifically, the Court focused on the term “extraction” in section 6253.9(b)(2), and upon reviewing its legislative history, concluded there was a legislative recognition of the increased difficulty and enhanced costs of redacting electronic records. The court acknowledged that,

¹ Pursuant to Administrative Regulations 95.20, the City also charges .25 cents a page for physical copies of records. This Administrative Regulation is currently being amended.

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ordinarily, costs associated with review, redaction, and disclosure remain nonrecoverable; however, the court found that costs are recoverable when it is necessary to acquire special software to extract exempt material from otherwise disclosable records.

We suggest a narrow interpretation of this case based on its specific facts, meaning costs are recoverable only when it is necessary to purchase and employ advanced software to facilitate redactions. A broader interpretation without more specific instruction from the courts is discouraged, as there is a strong public policy in favor of transparency of the public's business and disclosure of public records without hindrance. A court would likely find that to inject new costs associated with regular searches such as costs for staff time, would deter requests for records. Further, this case must be read in conjunction with other case law, which states that ancillary costs, such as staff time expended in reviewing and redacting records, is not properly charged to the requestor under the CPRA. *See North County Parents Organization v. Department of Education*, 23 Cal. App. 4th 144 (1994). *See also*, Cal. Gov't Code Section 6253(c); and *League of California Cities, The People's Business: A Guide to the California Public Records Act*, (2017).

In sum, we believe the case does not change the ordinary rule that ancillary costs, such as staff time reviewing and redacting records are not recoverable; however, the City can recover costs when it is necessary to purchase advanced software to facilitate production or redactions. Our Office is available to provide training to Departments as requested.

Please contact this Office if you have any questions.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/William Gersten

William Gersten

Deputy City Attorney

WG:jvg

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