IN THE SUPREME COURT OF CALIFORNIA

Case Nos. S282937 and S282950

CITY OF GILROY
Petitioner,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent,

LAW FOUNDATION OF SILICON VALLEY,
Real Party in Interest.

After a Decision by the Court of Appeal
Sixth Appellate District, Case Nos. H049552 and H049554

Superior Court, Santa Clara County,
Case No. 20CV362347

[PROPOSED] AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CITY OF GILROY

JENNIFER BACON HENNING, SBN 193915
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
Tel: (916) 327-7535
jhenning@counties.org

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Attorney General Opinions

Legislative Materials

I. INTRODUCTION

One of the questions presented for review in this case is whether it is a violation of the California Public Records Act (CPRA) for a public agency to fail to preserve records it determines are exempt from disclosure before a court has had an opportunity to conduct a review. Framed another way, does the CPRA require public agencies to maintain records that it determines are exempt from disclosure for up to three years (potentially the statute of limitations period for bringing a CPRA claim) in the event the requester might seek judicial review?

The California State Association of Counties (CSAC) agrees with the City of Gilroy and Amici League of California Cities (Cal Cities) and California Special Districts Association (CSDA) that the CPRA is not a retention statute, and this Court should affirm the Court of Appeal's conclusion that the City was not required to retain records that were lawfully destroyed under the City's record retention policy. This view is consistent with the plain language of the CPRA and the other statutes that operate in parallel with the CPRA governing a public agency's records retention obligations.

CSAC writes separately, however, to suggest to this Court that to the extent the Court might determine that the CPRA includes an implicit obligation to retain records, that obligation should not be read

as requiring public entities to preserve records for the full statute of limitations period as Real Party in Interest Law Foundation of Silicon Valley ("Law Foundation") argues. Rather, to the extent this Court finds the CPRA includes an implicit obligation to retain records, that obligation should be read as consistent with the long-standing "rule of reason" that applies to the CPRA.

Where a public agency responds reasonably to a CPRA request, works with the requester to identify records, and provides records and/or a response explaining the reason that records are being withheld, destruction of records that occur in accordance with the agency's document retention schedule in the normal course of business while the agency begins to process the request and after the request is no longer pending satisfies the requirements of the CPRA. The point in time that a request is considered no longer pending may vary depending on the circumstances, but in general a request is no longer pending a reasonable amount of time after the response has been provided to the requester with no further dialogue concerning the sufficiency of the response to the request.

The Legislature crafted retention statutes based on a variety of policy concerns – including individual privacy, cyber security risks, and expense – and those concerns would be sidelined with a blanket three-

year retention rule. At the same time, while public agencies receive high volumes of CPRA requests, only a small number of CPRA responses end up before a court for judicial review. It simply does not comport with the plain language of the statute or with the reasonableness standard that has been applied to the right to inspect records for more than half a century to require all records withheld in response to a CPRA request to be retained for up to three years in the event that a person requesting records might seek judicial review.

II. ARGUMENT

A. The CPRA is not a records retention statute and its plain language does not require a public agency to retain documents. To the extent this Court finds an implicit obligation to retain records under the CPRA, it must be tempered by the rule of reason.

CSAC believes in and supports the public's right to access records and agrees that right should be broadly construed. It is important to also remember that the statutory scheme was carefully devised with the intent of making public documents available for inspection while balancing individual privacy rights and the administrative burdens around record maintenance and expediency. (Cal. Const., art. I, § 3, subd. (b), pars. (2), (3); Gov. Code, §§ 7921.000, 7922.530.)

Perhaps for this reason, the CPRA does not contain any provisions requiring record preservation. There are numerous state laws governing the retention and destruction of records. But in the same way that the CPRA does not require a public agency to create records (*Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 665), it also does not specify that records must be retained. The CPRA merely requires a public agency to provide responsive records, subject to any applicable exemptions, that are in its possession at the time of the request.

The public's right to access records has also been subject to a reasonableness standard for more than fifty years. In 1967, this Court evaluated a precursor to the CPRA that allowed members of the public to inspect public records "at all times during office hours." The Court was called upon to consider whether a public agency could adopt rules limiting the hours that records could be inspected so that public agency staff would have sufficient time to perform other duties of the office. The Court upheld the regulations, concluding: "[T]he right created [by the applicable statutes] are, by their vary nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records

against theft, mutilation or accident damage, to prevent inspection from interfering with the order function of his office and its employees, and generally to avoid chaos in the record archives." (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 676.)

The rule of reason continued to be applied after the CPRA was enacted in 1968, with the understanding that "both the right to inspect and receive copies of public records under the Act are subject to an implied rule of reason." (*Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761 [upholding the ability of public agencies to impose reasonable restrictions on general requests for voluminous classes of documents, and restricting copies to specific requests for copies of specific documents].) The Attorney General has also found, on numerous occasions, that the CPRA is subject to a rule of reasonableness. (See 53 Ops.Cal.Atty.Gen 136, 151 (1970) [applying rule of reasonableness to find it proper to limit the hours of public record inspection]; 64 Ops.Cal.Atty.Gen 317, 321 (1981) [confirming that "both the right to inspect and to receive copies of public records under the Act are subject to an implied rule of reason" and noting that the practicality of what is being requested of the agency is a factual question]; 64 Ops.Cal.Atty.Gen 186, 190 (1981) ["[U]pon the payment of a statutory fee or reasonable charge, a public agency has the duty to provide a

person with a copy of any identifiable public record unless under the circumstances it would be unreasonable to do so. The reasonableness of any particular request for a copy of a public document presents a factual issue."]; 76 Ops.Cal.Atty.Gen. 235, 241 (1993) [finding that although absentee ballot applications are public records and open to inspection under the CPRA, "[t]his conclusion, however, must be tempered by the 'rule of reason' stated in *Bruce v. Gregory*…."].)

Indeed, "the purposes of the CRPA should be honored through such a reasonableness standard, so that not only an agency response, *but the request that generates it*, are within reasonable boundaries that are appropriate in light of the statutory scheme." (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 228 (emphasis added).) For this reason, courts are "mindful of the press of business of public agencies, particularly in these difficult fiscal times, and will not hold the [public agencies] to an impossible standard, but to a reasonable one." (*Id.* at p. 229.)

It is worth noting that reasonableness also applies to the public agency's duty to assist members of the public in formulating requests. (Gov. Code, § 7922.600.) Specifically, public agencies must: "(1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated. (2)

Describe the information technology and physical location in which the records exist. (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought." (*Ibid.*) These requirements are "satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records." (*Ibid.*)

This provision was added to the CPRA in 2001 by Assembly Bill 1014. Committee analysis of the bill explained: "In order to avoid any undue burdens on the public agency, this bill would require that the agency perform these acts only 'to the extent reasonable under the circumstances.' What this phrase means exactly is to be determined by each agency on a case-by-case basis, according to proponents, thus giving the agency sufficient flexibility but also shifting the burden of alleging unreasonableness on the part of the agency to the requestor." (Senate Judiciary Com, Analysis of Assem. Bill No. 1014 (2001-2002 Reg. Sess.) as amended Aug. 20, 2001, p. 6.)

In practice, this creates something of an iterative process where, to the extent that a records request is unclear or overly broad, the public agency works with the requester to help identify available records. The requester has a duty to make a reasonably focused request

for records, and the public agency has a duty to assist the requester in doing so by identifying records that would be responsive to its request. (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1419, 1427.) And, as noted in the Judiciary Committee analysis, the requester has an obligation to raise concerns about the reasonableness of the effort being made by the public agency to provide records. After any obligations under Section 7922.600 are complete, responsive records are provided, and determinations are made about records that are being withheld, the request is closed.

As the City of Gilroy and Amici Cal Cities and CSDA briefs make plain, the CPRA is not a records retention statute. There are no provisions requiring records to be maintained. In fact, local agencies are specifically authorized to destroy certain records on specified time schedules, and to adopt retention policies. (See, e.g., Gov. Code, § 26202.) Such retention policies are adopted in open and public meetings and are publicly available documents, putting the public on notice as to the time each type of document is retained. Destruction of records in accordance with a lawfully adopted retention schedule is a good practice and aids in the efficient administration of government. (See, e.g., Assem. Com. on Local Gov., Analysis of Sen. Bill No. 742 (1999-2000 Reg. Sess.) as amended Apr. 28, 1999, p. 2 [noting that the value

of a bill creating a Local Government Records Management Guidelines Program is to ensure more effective retention of historic documents and to keep pace with new opportunities and threats "as rapid technological advances in digital media permit new recordkeeping efficiencies while also posing new risks of fraud and forgery"].) The Legislature also carefully crafted retention schedule schemes to prevent the potential over collection by the government of information about private individuals. (See, e.g., Civ. Code, § 1798.90.51, subd. (b)(2)(G); Assem. Com. on Privacy and Consumer Protection, Analysis of Sen. Bill No. 34 (2015-2016 Reg. Sess.) as amended July 2, 2015, p. 6 ["Automatic license plate readers have the potential to create permanent records of virtually everywhere any of us has driven, radically transforming the consequences of leaving home to pursue private life, and opening up many opportunities for abuse. . . . Clear regulations must be put in place to keep the government from tracking our movements on a massive scale." (internal citations omitted)]; Gov. Code, § 53166 [requiring local agencies that use cellular communications interception technology to develop a privacy policy that includes the process that will be used to destroy retained information]; Health & Saf. Code, § 11361.5 [requiring destruction of certain arrest and conviction records]; *All of Us or None–Riverside Chapter v. Hamrick* (2021) 64 Cal.App.5th

751, 793 [mere redaction of such arrest and conviction records is not sufficient to meet destruction requirements].) Indeed, in enacting the relevant statute in this case authorizing destruction of data from body-worn cameras, the Legislature was mindful that retaining body-worn camera data has implications on the privacy rights of the public. (Assem. Com. on Privacy and Consumer Protection, Analysis of Sen. Bill No. 69 (2015-2016 Reg. Sess.) as amended Apr. 21, 2015, p. 5 ["[I]t would provide greater protection for individual privacy to shorten the recommended retention period, thereby reducing the amount of time that footage of civilians not under suspicion of having committed a crime is retained as a public record and available for disclosure to the public."].)

Given the various ways record retention and destruction policies protect both the privacy interests of members of the public and efficient governmental operations, it is not surprising that the Legislature has never included a retention requirement in the CPRA. As the Court of Appeal aptly noted, the CPRA does not designate what type of information must be maintained; its sole function is to provide for disclosure. (*City of Gilroy v. Superior Court* (2023) 96 Cal.App.5th 818, 836, citing *Los Angeles Police Dept v. Superior Court* (1977) 65 Cal.App.3d 661, 668.)

To the extent, however, that this Court might conclude that there is an implicit obligation for public agencies to retain records that are withheld in response to a CPRA request, such implied obligation should be subject to the same rule of reason that has been applied to the public's right to access records for decades. If a public agency has complied with its lawfully adopted document retention policy, meets its obligation to assist requesters in formulating their requests, and is not further contacted by the requester, that auto deletions may occur during the time it takes to identify and review responsive records or after the request is reasonably closed should not violate the CPRA. (See *Valenti v. City of San Diego* (2023) 94 Cal.App.5th 218, 235 [Requester ended the dialogue about the CPRA request, not the local agency, and, therefore, the requester was not entitled to attorneys' fees when records were produced during litigation.].) The rule of reason should apply such that public agencies can continue with their record management processes without the burden of retaining all withheld records for three years in the unlikely event that litigation is eventually filed.

Thus, the Court of Appeal's ruling in favor of the City of Gilroy should be affirmed either because the CPRA does not include an

obligation to retain records, or because the City acted reasonably and met any preservation requirement.[1]

As to the reasonableness of the City's actions, as the Court of Appeal noted, the 2018 records requests at issue in this case related to "Quality of Life" violations and the number of encampment sweeps. (*City of Gilroy, supra,* 96 Cal.App.5th at p. 825; Answer Br., p. 16, citing 5CPE 1389, 1393.) After the initial request was closed, the City engaged with Law Foundation's counsel on subsequent requests submitted in 2018, and ultimately provided its final response to those requests in December 2018 along with a summary of information from certain exempt records in January 2019. (Answer Br., pp. 17-18, citing 5CPE1393, 5 CPE 1276-1286, 5 CPE 1288-1290.) There was no additional dialogue from the Law Foundation at that time about the adequacy of the response to the 2018 requests, notwithstanding that

---

[1] In addition, to the extent this Court may decide, for the first time, that there is an implicit requirement to retain records under the CPRA, "considerations of fairness and public policy may require that [the] decision be given only prospective application." (*Newman v. Emerson Radio Corp*. (1989) 48 Cal.3d 973, 983-984.) In deciding whether a court ruling should be applied prospectively, courts give particular consideration to "the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372.) These factors favor the City of Gilroy and provide an independent basis for determining the City would not be liable for a CPRA violation or attorneys' fees in this case.

the Law Foundation is a sophisticated entity well versed in the CPRA and was represented by counsel throughout the process. (Answer Br., p. 18, citing 5 CPE 1225-1291.) Even its initial court filing did not mention any concerns with the 2018 requests. It was not until December 2020 – nearly two years after the responses to the 2018 requests were completed and having never raised a concern with the City about the 2018 responses prior to that date – that the Law Foundation amended its complaint to allege for the first time that it intended its 2018 requests to include body-worn camera footage. (Opening Br., p. 22.)

The Law Foundation's expectation that the City should have retained bodycam footage starting at the time it received the initial 2018 records request is not only not supported by the plain language of the CPRA, but it is also simply not reasonable under the standards that have been articulated by the courts and the Attorney General for both public agency responses and those requesting records. The City performed its obligations under the Act: it searched for responsive records, engaged with the requester on the scope of the request, provided the response, and closed the response after no further dialogue from the Law Foundation. There is no obligation under these circumstances to have retained records it did not even know the Law

Foundation was seeking in the event that two years later, it would amend a petition filed about a different request to include a CPRA violation concerning the 2018 requests.

B. A decision to withhold records under the CPRA does not trigger the equivalent of a litigation hold under which a public agency must maintain records until the period has run for the requester to seek judicial review.

As the Court of Appeal stated below, the Law Foundation argues that "the CPRA should be broadly interpreted to impose a duty upon public agencies to preserve all documents responsive to a public records request that have been withheld as exempt for three years, pursuant to the three-year limitations period provided by Code of Civil Procedure section 388." (*City of Gilroy, supra,* (2023) 96 Cal.App.5th 818, 835.)[2] If there is an implicit obligation in the CPRA to retain records, however, there is no reason that obligation should be read to essentially require the equivalent of a litigation hold for every document that a public agency determines is exempt from disclosure. The well-established

[2] In its briefing before this Court, the Law Foundation states this position somewhat less directly as allowing a "reasonable time to seek judicial review of the assertion of an exemption." (Opening Br., p. 52.) Given the Law Foundation's position in the Court of Appeal, and given that it does not suggest a would-be petitioner is entitled to less time to file a petition than the possible statute of limitations would allow, the Law Foundation's argument should be read as requiring public agencies to retain withheld documents for what is asserted to be a three-year statute of limitations period.

rules about legal holds preclude this low of a standard for requiring record retention.

Under both state and federal law, once litigation is anticipated, a party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." (*Zubulake v. UBS Warburg* (S.D.N.Y. 2003) 220 F.R.D. 212, 271, 2003 U.S.Dist.LEXIS 18771 at **16; Evid. Code, § 413; Code Civ. Proc., § 2023.10; Pen. Code, § 135.) A litigant is obligated to "preserve evidence which it knows or reasonably should know is relevant to the action." (*UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)* (N.D.Cal. 2006) 462 F.Supp.2d 1060, 1067.) The preservation obligation attaches "from the moment that litigation is reasonably anticipated." (*Apple Inc. v. Samsung Elecs. Co., Ltd.* (N.D.Cal. 2012) 881 F.Supp.2d 1132, 1136.)

The Law Foundation's interpretation of the CPRA would essentially turn every decision to withhold a document in response to a records request into a litigation hold requirement. Not only is this requirement not explicitly in the CPRA statute, but to the extent there may be an implicit requirement, this interpretation runs directly counter to the reasonableness that is incorporated into interpreting the CPRA and rules about legal holds. Further, it is excessive and

unnecessarily burdensome, since the vast majority of CPRA responses are never before the courts or subject to judicial review. It is also inconsistent with the fact that the CPRA is designed to provide quick access to documents regarding the conduct of the people's business and an expedited judicial review process. "Indeed, the Act's provision regarding a public agency's obligation to act promptly upon receiving a request for disclosure [citation], the provision directing the trial court in a proceeding under the Act to reach a decision as soon as possible [citation], and the provision for expedited appellate review [citation] all reflect a clear legislative intent that the determination of the obligation to disclose records requested from a public agency be made expeditiously." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427-427.)

Further, a public agency may not commence an action for declaratory relief to determine the agency's obligation to disclose records to a member of the public under the Act. (*Filarksy, supra,* 28 Cal.4th at p. 426.) This Court previously held that allowing a local agency to seek declaratory relief to determine whether it must disclose records to a member of the public would frustrate the Legislature's purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of local

agencies. (*Id.* at pp. 426-427.) As such, a public agency has no ability to proactively resolve any potential issues concerning withholding records more quickly if, as in this case, a plaintiff asserts some two years later that its records request was misconstrued and records were improperly withheld. (See Answer Br., p. 22 and citations to the record therein.)

If there is an implicit requirement in the CPRA to retain withheld documents, the obligation should be limited to a reasonable period, where reasonableness depends upon the particular facts of the request and the response. The cases and Attorney General Opinions cited above related to the "rule of reason" show that the CPRA has long been held to a reasonableness standard, where the practicality and reasonableness of a given situation are fact specific. As to the record retention issue, a reasonable retention period may include the period that the public agency is completing its review of responsive records or is undertaking its duty to assist the requester in identifying records and engaging with the requester on the response. However, once the requester is on notice that documents are being withheld and there is no further dialogue from the requester on the request, the request is no longer pending and the agency should be able to resume destruction of records according to a lawfully adopted retention schedule.

C. The Law Foundation's arguments ignore the significant challenges faced by public agencies in responding to CPRA requests.

The Law Foundation argues that "requiring the preservation of records withheld as exempt does not impose an undue burden on public agencies." (Opening Br., p. 75.) But as this Court has previously remarked, public agencies in California receive thousands and thousands of public records requests annually. (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190.) In general, the number of requests seems to be ever-increasing, perhaps due in part to the ease with which requests can be made electronically, including with a requestor's push of the "send" button to multiple jurisdictions. (*Ibid.*) There is no limit to the number of requests a person may submit or to the scope of the request. If the Court were to require all records subject to a CPRA request to be retained for three years, an ill-intentioned requester could cripple a local agency's records destruction efforts completely with a broadly or poorly worded request.

Public agencies in this State spend considerable resources responding to public records requests, including the cost of software to track requests, staff time to locate responsive documents and engage with the requester to assist in formulating the request, and attorney time to review documents for applicable privileges and exemptions. It is

a significant devotion of time and fiscal resources and should not be trivialized. While the public's right to access public records is undoubtably critical to a well-functioning democracy, it is also the case that every dollar spent searching for and maintaining records is one less dollar available for other critical services that further the public good. This, at its core, is why a rule of reason is applied to the CPRA.

The Law Foundation's argument is also premised in part on the fact that a public agency is already tasked with identifying responsive records, so subsequently retaining those records for the three-year statute of limitations period should not create any additional burdens. But this confuses the burden of searching for records with the burden of retaining records, which in and of itself is a significant burden. As noted above, the whole purpose of the statutory scheme authorizing destruction of records is a recognition that retaining records is burdensome and creates risk. As Governor Newsom stated in his message vetoing a bill that would have required state and local agencies to retain every public record transmitted by email for at least two years: "This bill does not strike the appropriate balance between the benefits of greater transparency through the public's access to public records, and the burdens of a dramatic increase in records-retention requirements, including associated personnel and data-

management costs to taxpayer [sic]." (Governor's veto message to Assem. on Assem. Bill No. 1184 (Oct. 13, 2019) 14 Recess Assem. J. (2019-2020 Reg. Sess.) p. 3684.) The courts have similarly noted that additional obligations imposed on a public agency after it has identified responsive records can also create significant burdens. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074-1075 ["To require *each* public agency to catalog the responsive documents for each of the requests it receives – even when the agency could legitimately claim that all responsive documents are exempt from disclosure – would be burdensome and of scant public benefit." (emphasis in original)].)

So too does the Law Foundation's argument that all withheld documents should be retained for three years fail to strike the appropriate balance between access to records and the need for privacy protection and administrative efficiency in government. The solution to the concerns raised by the Law Foundation is not retaining all withheld records for the full statute of limitations period. Rather, should this Court conclude there is an implicit requirement to retain records in the CPRA, such retention should be for only a reasonable period, with reasonableness determined on the facts of the case. Public agencies that have met their duty to timely search for records and make a reasonable effort to work with the requester to clarify the request and

help identify records when required, should be able to continue to apply their document retention and destruction policies once the request is no longer pending.

III. CONCLUSION

For these reasons, CSAC respectfully requests that the Court affirm the Court of Appeal opinion below. The CPRA is not a records retention statute, and the City of Gilroy thus did not violate the Act by following its lawful document retention policy. Alternatively, if this Court finds there is an implicit obligation to retain records in the CPRA, the obligation is subject to the "rule of reason," which the City of Gilroy met in this case.

Dated: September 25, 2024

Respectfully submitted,

By: /s/ *Jennifer Bacon Henning*

Jennifer Bacon Henning
SBN 193915

Counsel for Amicus Curiae
Calif. State Association of Counties

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13-point Century Schoolbook typeface. According to the word count feature in my Microsoft Word software, this brief contains 4,639 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 25th day of September, 2024 in Sacramento, California.

Respectfully submitted,

/s/ *Jennifer B. Henning*
By: _____
JENNIFER B. HENNING

Attorney for Amicus Curiae
California State Association of Counties