CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
CNPA Services, Inc.

2701 K Street, Sacramento, CA 95816 ♦ Ph: 916.288.6000 ♦ Fax: 916.288.6002 ♦ www.cnpa.com

# Court decision misconstrues CNPA position on legislation it sponsored in 2000

October 3, 2018
PRESS RELEASE
Contact: Tom Newton, CNPA Executive Director, 916.288.6015 or tom@cnpa.com

California News Publishers Association (CNPA) Executive Director Tom Newton issued the following statement in response to the First Appellate District Court's decision in *National Lawyers Guild v. City of Hayward*, filed September 28, 2018:

By authorizing agencies to charge members of the public high fees to access electronic copies of public records, a California Appellate Court in the case of *National Lawyers Guild v. City of Hayward (Hayward)* has just struck a body blow to the California Public Records Act (CPRA) and the public's right to know.

As general counsel for CNPA at the time, I was instrumental in amending the law in 2000 to add Government Code Section 6253.9. The legislation was introduced to update the California Public Records Act to give the public a right to obtain copies of public records in an electronic format instead of printed out on paper. Under the prior law, government agencies could choose to comply with requests for electronic public records (computer data) by burying requesters in paper. This is the archaic sentence in the statute CNPA sought to change: *Computer data shall be provided in a form determined by the agency.*

Well before 2000, government agencies had moved away from systems in which paper records were kept in metal file cabinets. Instead, state and local agencies created vast databases of public record information held in main-frame computers. Yet the CPRA gave public agencies unfettered discretion to thwart the public's ability to access the information on the same footing as agencies (i.e., to view and manipulate records using technology), and it allowed agencies to charge excessive fees for paper copies as compared to electronic distribution of information. At the time there was substantial evidence that at least some agencies which could have provided easy and inexpensive copies of electronically held records (likely on a floppy disk back then) chose instead to print the data out and provide paper copies to requesters at much higher comparative costs. Until it was changed in 2000, the law chilled public participation in self-governance by artificially inflating the cost of public access.

With this backdrop, the legislature in 2000 absolutely intended to both increase the public's meaningful access to public records under the law and significantly reduce the costs of access.

CNPA's intent was to modernize the law by requiring public agencies to provide a copy of a record in any electronic format in which the agency holds the record, recognizing that technology makes access to public records faster, cheaper and easier. For example, the requester could ask the agency to simply email a Microsoft Word document as opposed to the agency printing a paper copy of the record and requiring the requester to retrieve the physical document.

As *The Sacramento Bee* wrote in urging Governor Gray Davis to sign the legislation in 2000, "Today, in most instances, that real cost would be the trivial price of a diskette or, in the case of an e-mail transfer, free. In a democracy, the people are the government. We own the government records; we own the institutions, whether they be public schools or prisons…To safeguard the public's right to know, Davis should sign AB 2799…."

Of course, that cost of access is exponentially cheaper now.

The court's decision in *Hayward* misconstrued CNPA's position and the legislature's intent in enacting the law to the detriment of the public. Both prior to and after the enactment of the electronic access amendments, a key provision of the CPRA makes public agencies bear the costs of preparing public records for inspection or copying, including segregating information that is specifically exempt from disclosure from whatever disclosable information is contained in the requested record. This act of segregation is sometimes called redaction. These costs can be significant and can include attorney review of records and, at a minimum, require one or more public officials to make policy judgments and legal judgments about the content of the records sought to be disclosed.

In enacting the electronic access amendments to the law, the legislature made careful and limited exceptions that allowed agencies new cost recovery for certain computer programming functions required to provide an electronic copy of a record, like, for example, the costs of computer programming to compile a record from diverse data sources.

In the *Hayward* decision, the court appears to have interpreted the limited cost recovery provisions to not just allow recovery for the costs of extraordinary computer programming, but for "the tedious task of redacting them (the records)."

The appellate court overturned the trial court's denial of all but $1 of the cost incurred by the city to provide the video footage at issue, and approved Hayward's over $3,200 charge to the requesters. In doing so, the court created an ambiguous standard that allows agencies to shift from agencies to requesters the cost burdens of preparing computer records for public disclosure.

In pursuing legislation to improve the public's ability to access its records, CNPA never intended to authorize in statute an agency's right to recover fees for the act of segregating or redacting information from a public record. Such a rule would be contrary to the decision in *North County Parents v. Dept. of Education* (1994) 23 Cal.App.4th 144, which limited cost recovery to the direct costs of duplication of the records. If the Legislature had intended to limit the holding in that case, it would have done so explicitly. It did not.

Strangely, to prove its holding that the legislature intended to shift from agencies to the public the substantial costs of segregating exempt from not-exempt records, the appellate court set forth this part of a letter I wrote to the governor on behalf of CNPA urging his signature approval of the legislation:

*This provision guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency.* (General Counsel Thomas W. Newton, CNPA, letter to Gray Davis, Sept. 8, 2000, p. 2)

First, as CNPA is not the legislature, but only a proponent of a bill, it is incredible that the court could believe this sentence was "telling" of the legislature's intent when it passed the legislation. Second, the court's focus in the pulled-out sentence on "extra effort" is completely misplaced, as both the caselaw and pattern and practice of state and local agencies at the time the legislation was passed in 2000 -- 38 years after the enactment of the CPRA -- and even up until the court's decision a few days ago, was for agencies to bear the costs of segregating exempt from non-exempt records. If anything, CNPA's letter proves the opposite of the court's holding, that the legislature's intent was to allow new cost recovery solely for "extra efforts" – new efforts -- required by the amendment and that these new duties required of agencies must be limited to certain technical computer operations associated with complying with a request for a copy of an electronic record.

In an era when the distribution of electronic data has never been cheaper, CNPA believes the court's decision will give agencies carte blanche to price copies of electronic records, especially sensitive records an agency would rather keep secret like videos of police shootings, outside of the public's ability to pay.

On the issue of legislative intent and that of the voters too, Proposition 59 was approved by the State Legislature as Senate Constitutional Amendment 1 of the 2003–2004 Regular Session (Resolution Chapter 1, Statutes of 2004). It was adopted by the California State Senate by a vote of 34-0 and the State Assembly by 78-0. It was then put to voters as a ballot proposition November 2004. It passed with 9,334,852 (83.4%) votes in favor and 1,870,146 (16.6%) against.

The amendment to the state constitution makes access to the meetings and writings of public officials a civil right of every Californian. The constitutional amendment also requires courts to "broadly construe" statutes, like the CPRA, "if it furthers the people's right of access . . ." and to narrowly construe statutes that do not further the right of access. While the appellate court in *Hayward* gave lip service to the sunshine provisions of the state constitution, it wholly failed to apply its provisions to the facts of this case.

CNPA believes the state of California and its people are improved each time a member of the public or a journalist makes a records request to learn more about the operation of its government and expose its findings to the public. To secure the people's rights to hold its government to account, it has been settled public policy that the lion share of the costs associated with the exercise of CPRA rights by individuals should be borne by the agencies, which of course, means it should be spread among all of the taxpayers. To put these cost burdens on requesters can do nothing but chill the public's right to know and allow government to operate without being accountable to the public it serves.

CNPA awaits further action in this case and will consider pursuing legislation to clarify the legislature's intent to limit cost recovery to only the extraordinary computer programming incurred by an agency in complying with public records requests for copies of electronic public records.

*The California News Publishers Association is a trade association representing the interests of over 1,300 daily, weekly and digital news companies.*