LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, JULY 12, 2018

'Reverse' public records suits can have significant price tags

By Derek P. Cole

When peace officers and their union oppose release of a report regarding a controversial shooting in court, can they be liable for the winning party's attorney fees? Yes, ruled the 2nd District Court of Appeal. In *Pasadena Police Officers Association v. City of Pasadena*, 22 Cal. App. 5th 147 (Apr. 12, 2018), the court held the officers and union must pay the attorney fees of the Los Angeles Times after unsuccessfully seeking to prevent the report's disclosure.

Pasadena Police follows an earlier decision in which the 2nd District held that the report — prepared by a private consultaant to identify lessons learned from the shooting and recommend reforms in departmental policies — was not exempt from disclosure under the California Public Records Act. *Pasadena Police Officers Assn. v. Superior Court*, 240 Cal. App. 4th 268, 275 (2015). The procedural posture of the case was unusual. Unlike in most PRA cases, the Times had not sued the city of Pasadena, which had expressed its willingness to provide a copy of the report (albeit with significant redactions). Rather, the officers and their union had sued the city, seeking to stop it from disclosing the report.

This type of "reverse-PRA" lawsuit was not new. Prior precedent authorizes third parties to file actions to prevent agencies from disclosing records that could adversely affect their interests. *Marken v. Santa Monica-Malibu Unified School Dist.*, 202 Cal. App. 4th 1250, 1267 (2012). But in *Pasadena Police*, the 2nd District confirmed that filing such an action can come with a significant consequence — exposure to attorney fees if the lawsuit is not successful.

At first blush, this ruling may seem surprising. The PRA authorizes attorney fee awards, but does so only "should the *plaintiff* prevail in litigation." Gov. Code Section 6259(d) (emphasis added). In this case, the officers and the union were the plaintiffs; the Times became a party through intervention. Consequently, the plaintiffs in the case had not prevailed.

Pasadena Police should be viewed as a significant victory for news organizations and open government advocates.

Technically, however, a reverse-PRA lawsuit does not arise under PRA. It instead presents a dispute suitable for resolution under the declaratory relief or traditional mandamus statutes, Code of Civil Procedure Sections 1060 and 1085. Attorney fees in cases involving these statutes are governed by the "private attorney general" statute, Code of Civil Procedure Section 1021.5.

After concluding the PRA did not authorize an attorney fee award, the 2nd District considered whether Section 1021.5 provided an independent basis for an award of attorney fees to the Times. The court found it did.

In reaching this conclusion, the court had little difficulty finding that the prerequisites for a Section 1021.5 award — the enforcement of an important right, conferral of a significant public benefit, and necessity for private enforcement — had been met. The trial court, however, had found that that the reverse-PRA action was intended to vindicate the privacy interests of the officers who were involved in the shooting and, for this reason, denied awarding fees under a California Supreme Court case, *Application of Joshua S.*, 42 Cal.4th 945 (2008). *Joshua S.* held that the resolution of a purely private dispute — in that case, concerning the rights of two adoptive parents — does not justify a Section 1021.5 award simply because the case decides an important appellate issue.

The 2nd District disagreed with the trial court's application of *Joshua S.* It noted that peace officers, by nature of their profession, should expect that their actions will be publicly scrutinized. The court also noted that the positions the officers and union had asserted in the litigation would have expanded the scope of exemptions the PRA and other statutes provide for law enforcement activities. In this regard, the lawsuit had sought to advance the "institutional interests" of peace officers generally, not just the interests of the two officers who were the subject of the report. As the court bluntly observed, the lawsuit was "designed to expand the ability of police officers and a police department to withhold information from the public." This interest, it concluded, was a significant departure from the type of purely private interests that justify application of *Joshua S.*

Pasadena Police should be viewed as a significant victory for news organizations and open government advocates. Because of the decision, public employees and their unions will need to consider their exposure to substantial attorney fee awards in deciding whether to file lawsuits to attempt to prevent agencies from releasing records. It seems likely this may reduce the number of reverse-PRA lawsuits that are filed.

Even still, after *Pasadena Police*, the question arises whether the *Joshua S.* exception might be justified in other types of case involving public employees. If those employees are law enforcement officers, the likely answer is *no*. The 2nd District's reasoning implies that peace officer activities and duties are inherently subjects of public interest and could never qualify for the exception. But with other employees, there is an open question whether records affecting their privacy interests might be considered sufficiently private as to justify the exception. This issue is likely to be tested by employees who are not peace officers and the unions who represent them.

However future cases may interpret *Pasadena Police*, the case is consistent with California courts' general policy of construing public records laws broadly and ensuring there are adequate remedial mechanisms — here, attorney fees — to achieve that policy.

Derek P. Cole *is a partner and co-founder at Cota Cole & Huber LLP. Derek specializes in municipal and environmental law, providing both advisory and litigation services.*


COLE

Reprinted with permission from the ***Daily Journal***. ©2018 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.