

LEGAL ALERTS | JUL 30, 2018

Public Agency Spared Attorneys' Fees Award in Reverse PRA Action

California Appellate Court Decision in *National Conference of Black Mayors, et al. v. Chico Community Publishing Company*



A Public Records Act requester is not entitled to attorneys' fees from a public agency when a third party intervenes to stop the agency from producing the requested records, a California appellate court recently ruled. Third party opposition to an agency's PRA disclosure is known

as a "reverse PRA" action.

In *National Conference of Black Mayors, et al. v. Chico Community Publishing Company*, the Third District Court of Appeal issued a decision that seeks to strike a balance between the public's right to records and the interests of individuals who will be affected by their disclosure. At the same time, it alleviates public agency liability for attorneys' fees when the public agency is prepared to disclose records, but is blocked from doing so by the "reverse PRA" action.

In 2015, City of Sacramento Mayor Kevin Johnson was also the president of the National Conference of Black Mayors, an organization that filed for bankruptcy during Johnson's term as president. Appellant Chico Community Publishing, which publishes the *Sacramento News and Review*, sought public records from the City related to the Mayor's use of City resources during NCBM's bankruptcy. The City found emails between Johnson and NCBM's law firm that contained possibly privileged attorney-client communications. The City determined those emails were public records and alerted Johnson and the law firm that it would release the records because the City "had no authority to assert attorney-client privilege over the records on behalf of [NCBM's] outside counsel." NCBM, its law firm and Johnson filed a petition against the City seeking to prevent release of the records in a "reverse PRA" action. The lawsuit also named the newspaper as a respondent. The City did not oppose the petition, but the newspaper did. The trial court completed a private review of the emails in question and determined that 75 of the 113 emails were to be

People



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produced to the newspaper — some in their entirety and some with redactions. The newspaper then filed a motion for attorneys' fees against the City under the PRA, and the trial court denied the motion.

In its decision, the appellate court affirmed the trial court ruling, noting that the PRA allows the requester to recover attorneys' fees only when an agency denies a request and the requester then successfully sues the agency to turn over the withheld records. First, in this instance, the City did not deny the request. The City appropriately determined the emails were public records because Johnson sent them as NCBM president, a role he could not have had if he had not been Sacramento's mayor.

Second, pursuant to *Marken v. Santa Monica-Malibu Unified School District*, decided in 2012, the City alerted the parties who had a privacy interest in the records that the emails would be disclosed absent a court order ruling otherwise. Once the petitioners sought an injunction to block the release of the records, the City had no other obligations — not even to oppose the petition — because the City “could not assert the privilege that exempted the records from disclosure.” It was not the City's privilege to assert. Government Code section 6254 states: “The exemptions to the Act do ‘not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.’”

Third, the court rejected the newspaper's argument that Johnson's role as a petitioner/elected official seeking to prevent disclosure converted the action into a PRA action. Although Johnson could only have been president of NCBM because of his position as mayor, “these inter-related positions...did not transform all of Johnson's actions with regard to [NCBM] into actions of Johnson the public official.” Johnson “did not abandon his right to privacy or his right to assert the attorney-client privilege when he was elected mayor,” the opinion added.

The newspaper urged the court to award attorneys' fees based on the public policy that “the Act should be read broadly in favor of public disclosure.” However, the court rejected the argument because the “goal of achieving access to public records is not adversely affected.” The PRA “expressly provides...for a cause of action to compel disclosure, not an action to prohibit disclosure.”

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