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PERSPECTIVE

Municipalities are being crushed by the weight of records requests

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Since the first year of law school, lawyers are taught about our adversarial system in which two attorneys act as zealous advocates for their clients before an unbiased fact finder. That happens to be the one thing in law school that has remained constant. I have found, however, that opposing counsel are sometimes pleasant people who just see the world, or rather the respective issues before the tribunal, differently. That seems to always be the case with the California Public Records Act (PRA), the series of statutes that govern how the public can access the public records to which they are constitutionally entitled.

I am an attorney that specializes in public and electronic records and public agency transparency. Government Code Section 20056 defines a "public agency" as any city, county, district, other local authority of or within the state – including school districts, water districts, sanitation districts, cemetery districts, fire districts, transportation districts, and other public bodies. My clients are public agencies that create, own, retain, and use thousands of public records every day. In 1968, the California Legislature determined that these records should be readily and promptly provided to the public so the citizenry can scrutinize and monitor the activities of public agencies. The vast majority of California public agencies facilitate this process without incident, but the attorneys that represent those that request public records often call for reform of the PRA because they believe that many – if not most – public agencies subvert public access. In this regard, I have to vehemently disagree with my colleagues.

Before we begin to look at ways to reform the PRA, it would be wise to look beyond the rare, non-compliant public agency. As someone who has the honor of assisting hundreds of public agencies with their PRA requests, I know that requests for public records are choking some agencies and costing taxpayers billions of dollars. Valuable PRA reform can (and should) help the public better access records to which they are constitutionally entitled while giving some reprieve to agencies that are struggling under the weight of voluminous requests from litigious and unreasonable requesters. Here are some examples.

A very large municipality within California received over 9,000 PRA requests last year. Let's just put that into context: that means this agency receives almost 30 PRA requests every business day, or about four requests an hour. It's no surprise that this municipality also pays a few million dollars a year in PRA litigation costs and damages because it would be virtually impossible for a public agency to adequately and efficiently respond to that volume of PRA requests without making some costly mistakes. That volume is just too enormous. As part of any reform, maybe the Legislature could incentivize the digitization of public records as a

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way to encourage public agencies to proactively make records available to the public on their website, thereby avoiding additional PRA requests.

In terms of litigious requesters, I work with a county that, in the process of responding to a request, was sued while it was asking the requester to agree on the search terms that the county could use to look for responsive records. Of course, the PRA allows a requester to seek redress when a public agency has denied access to otherwise public records, but there had been no denial of records with this request. In fact, the county was actively producing the more easily identifiable records while simultaneously trying to identify search terms for the less obvious set of records. Then, days after filing the writ, the requester sent another PRA request and, again, refused to work with the client to identify search terms. Within a few weeks of this second request, the now-petitioner amended the complaint to add the succeeding request. So, currently, this county is litigating a writ while having to still produce records related to the request, even though the requester won't provide any input or clarification. This is untenable and cannot be what the Legislature intended. Requesters must be required to work with agencies who are reasonably and sincerely trying to obtain clarification so that they have a better opportunity to find an identifiable public record, or face penalties for refusal to do so.

Finally, in terms of unreasonable requesters, disgruntled employees are another source of affliction for public agencies. I happen to work with a special district that, in the past five years, has seen a five-fold increase in the costs related to handling PRA requests. This increase directly comes from requests from a former employee who insists there is an element of corruption within the agency. Whether there is corruption, there should be a limit to this use of the PRA. No agency should have to buckle under the weight of PRA requests that are the result of baseless accusations. In fact, the agency has evidence that the disgruntled employee is submitting these requests specifically to escalate costs and burden the agency. Of course, it would be hard to write a rule that automatically invalidated requests from former employees, some of whom may be whistleblowers with a valid interest in obtaining public records. However, there has to be a way for a public agency to protect itself from requesters who are using the PRA to serve a personal vendetta.

In the past five years, the PRA has been modified to increase transparency – mostly in regards to law enforcement records – but there has been little effort to provide agencies a modicum of relief. While those are necessary changes, the unbearable drain on public agencies begs for additional reform. If there are reasonable adversaries out there (or friendly legislative advocates), let's work together to find measures that address the unbearable volume of requests faced by some agencies, as well as the litigious requesters and others that use the PRA for personal crusades.