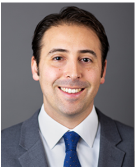
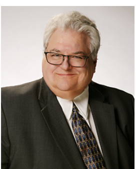
Court of Appeal Clarifies Rules for Retaining Emails That are Included in CEQA Records





by Ellis F. Raskin & Claire Hervey Collins & Paul J. Beck

Key Points

- Public agencies must retain emails that would be required for inclusion in an administrative record pursuant to CEQA.
- Agencies must retain "[a]ll written evidence or correspondence submitted to, or transferred from" them "with respect to" CEQA compliance or "with respect to the project." This includes emails that fit this description.
- Public entities should retain these documents as "official records" and should assure that they are not subject to potential destruction under the entity's retention policies.

In its recent decision in *Golden Door Properties, LLC v. The Superior Court of San Diego County*, the Court of Appeal clarified public agencies' duty to retain documents and emails related to CEQA proceedings. In conjunction with a series of legal challenges to a residential and commercial project in San Diego County (the "Project"), members of the public asked a trial court to order the county, the project developer, and the CEQA consultants to turn over records (including emails) pertaining to the Project. The County, the developer, and the consultants opposed these requests. The County had deleted most of the County staff's emails pertaining to the Project because they were not flagged as "official records," and the County's computers automatically deleted all emails that are not flagged as "official records" after 60 days. The trial court ruled that the County's email policy was lawful, and the County had no duty to retain documents that may be included in the record of proceedings in a CEQA lawsuit. But the Court of Appeal reversed the trial court's decision.

The Court of Appeal ruled that CEQA requires certain records to be preserved so that courts can adequately review an agency's decision to approve or deny a project. Those documents are identified in Public Resources Code section 21167.6. The Court of Appeal held that "a lead agency may not destroy, but rather must retain writings section 21167.6 mandates for inclusion in the record of proceedings." Therefore, according to the Court of Appeal, "to the extent County administrative policies provide for the destruction of e-mails that section 21167.6 mandates to be retained, section 21167.6 controls."

The Court of Appeal noted that it was "sensitive to government costs" to retain additional records and emails. In this case, the County estimated that it would incur "$76,000 per month for e-mail storage." However, the Court of Appeal also noted that CEQA does not require that a lead agency retain "every e-mail and preliminary draft." Rather, under Public Resources Code section 21167.6(e)(7), the County must retain "[a]ll written evidence or correspondence submitted to, or transferred from" the County "with respect to" CEQA compliance or "with respect to the project." Under section 21167.6(e)(10), the County must also retain, among other things, "all internal agency communications, including staff notes and memoranda related to the project" or CEQA compliance. The Court also clarified that "the e-mail equivalent to sticky notes, calendaring faxes, and social hallway conversations — that is, e-mails that do not provide insight into the project or the agency's CEQA compliance with respect to the project — are not within the scope of section 21167.6, subdivision (e) and need not be retained to comply with section 21167.6."

The Court of Appeal noted that neither section 21167.6 nor the Court's ruling "require Project-related e-mails to be retained in perpetuity," and indicated that the statute of limitations to challenge a CEQA approval is probably a relevant consideration for how long email must be retained.

Because many record documents had been deleted by the county, the Petitioners attempted to reconstruct the CEQA record by seeking a court order to compel the county's outside consultants to turn over emails that were in their possession. The Court of Appeal ultimately agreed that the county's outside consultants could be compelled to turn over those documents, because their inclusion in the CEQA record was mandatory, and the Court of Appeal reversed a trial court ruling to the contrary. Although the Court of Appeal recognized that some internal agency communications, communications with consultants, and draft environmental documents may be exempt from public disclosure in certain circumstances (e.g., when those documents play a role in the agency's "deliberative processes"), the county failed to invoke those exceptions because it failed to identify the "specific explanation of the role played by any of the [withheld] documents in the deliberative process, or why disclosure would be harmful — other than these generalities."

Ultimately, public agencies should proceed with caution when deleting emails relating to a CEQA process. Agencies should generally mark those emails as "official records" to be retained at least through the running of a statute of limitations on a CEQA action, and agencies should train staff to retain all records that fall within the scope of Public Resources Code section 21167.6, including:

1. All project application materials.
2. All staff reports and related documents prepared by the public agency with respect to its compliance with the substantive and procedural requirements of CEQA and with respect to the action on the project.
3. All staff reports and related documents prepared by the public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the agency pursuant to CEQA.
4. Any transcript or minutes of the proceedings at which the decisionmaking body of the public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.
5. All notices issued by the public agency to comply with CEQA or with any other law governing the processing and approval of the project.
6. All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.
7. All written evidence or correspondence submitted to, or transferred from, the public agency with

respect to compliance with CEQA or with respect to the project.

8. Any proposed decisions or findings submitted to the decisionmaking body of the public agency by its staff, or the project proponent, project opponents, or other persons.
9. The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3), cited or relied on in the findings or in a statement of overriding considerations adopted pursuant to CEQA.
10. Any other written materials relevant to the public agency's compliance with CEQA or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with CEQA.
11. The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.

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