

## GOVERNMENTAL ENTITY LIABILITY LEGAL UPDATE

June 2020

### MANNING & KASS RESPONDS TO COVID-19

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The entire world is currently facing troubling times. The COVID-19 pandemic has attacked nearly every area of the planet. While no location or industry is immune, our public servants and county facilities have been hit harder than most.

For 26 years, the law firm of Manning & Kass, Ellrod, Ramirez, Trester LLP has been there to help out federal, state and local municipalities with every type of legal problem that they experience. Now is no different.

The firm is pleased to announce that it has established a COVID-19 response team. This team has tremendous experience with issues involving jail and prison diseases (including Valley Fever), law enforcement workers' compensation claims, use of force claims arising out of law enforcement contacts and civil unrest disturbances, policy and training concerns, business interruption scenarios, and questions regarding the constitutionality of federal, state, and local ordinances and executive orders. For the past few months, this team has been actively working and responding to the pressing issues that have emerged, and continue to do so, from the COVID-19 pandemic.

If your agency is currently experiencing any problems associated with the current crisis, please contact us immediately. As ever, we are here to help.

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## COVID, CORRECTIONS, AND THE CONSTITUTION

*Laraya Parnell and Mae Alberto*

In the wake of COVID-19, it is difficult not to consider the impact that this pandemic will have, and already has made, on the correctional system. Of a myriad of civil rights issues in the corrections context, deliberate indifference allegations are already emerging and have gotten the attention of the courts, including the United States Supreme Court.

On May 14, 2020, Supreme Court Justice Sotomayor wrote a concurrence in *Valentine v. Collier*, discussing COVID-19 related issues and indicating that “while States and prisons retain discretion in how they respond to health emergencies, federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and death.”<sup>1</sup> Justice Sotomayor also made it clear that “administrative convenience must be balanced against the risk of danger presented by emergency situations.”<sup>2</sup> Accordingly, it is important for corrections administrators to not only be aware of the risks associated with COVID-19, but also to be proactive and preventative to minimize these risks to health and safety for the individuals in their care, custody, and control.

The Eighth Amendment requires prison officials to “take reasonable measures to guarantee the safety of the inmates.”<sup>3</sup> Deliberate indifference to an inmate’s serious medical needs or safety violates the Eighth Amendment’s proscription against cruel and unusual punishment. An Eighth Amendment claim predicated on allegedly deficient medical care requires a plaintiff to allege facts showing that: (1) the plaintiff had a serious medical need; and (2) the defendant’s response to that need was deliberately indifferent.<sup>4</sup> A serious medical

need exists if the failure to treat the condition could result in further significant injury or the unnecessary and wanton infliction of pain.<sup>5</sup>

An Eighth Amendment claim predicated on a substantial risk of serious harm requires a showing that the conditions under which the plaintiff was confined posed a “substantial risk of serious harm” to plaintiff<sup>6</sup> and that each individual defendant the plaintiff seeks to hold liable acted with a “sufficiently culpable state of mind.”<sup>7</sup>

In a failure to protect case, “that state of mind is one of ‘deliberate indifference’ to inmate health or safety.”<sup>8</sup> A claim of negligence, even gross negligence constituting medical malpractice, does not establish deliberate indifference under the Eighth Amendment.<sup>9</sup> Prison officials display a deliberate indifference to an inmate’s well-being only when they know of, and consciously disregard, a substantial risk of harm to the inmate’s health or safety.<sup>10</sup>

### COVID and the Constitution

Many of the recent claims relating to COVID-19 allege constitutional rights violations against the respective agency’s lack of a plan or failure to implement safety measures for the prevention and treatment of inmates for COVID-19. Thus, in addressing these claims, the courts are taking a critical look at the agency’s response and implementation efforts to, among others, identify individuals who are most at risk of COVID-19 complications, protect those high-risk individuals, and decrease inmate population to adhere to social distancing recommendations.

5       *Jett*, 439 F.3d at 1096.

6       *Farmer v. Brennan* , 511 U.S. 825, 834 (1994); *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015).

7       *Wilson v. Seiter*, 501 U.S. 294, 297 (1991); see also *Hudson*, 503 U.S. at 5, 8.

8       *Farmer*, 511 U.S. at 834

9       *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

10      *Farmer*, 511 U.S. at 837.

1       *Valentine v. Collier*, No. 19A1034, 2020 U.S. LEXIS 2648, at \*2 (May 14, 2020)

2        *Id.* at \*8

3       *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984)

4       *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); see also *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

In *Faour Abdallah Fraihat v. United States Immigration & Customs Enforcement*,<sup>1</sup> United States District Court, Judge Bernal, in a lengthy opinion, criticizes the United States Immigration & Customs Enforcement's ("ICE") response to COVID-19, noting that ICE'S "month-long failure to quickly identify individuals most at risk of COVID-19 complications and to require specific protection for those individuals", as well as, ICE'S "failure to take measures within [its] power to increase the distance between detainees and prevent the spread of infectious disease" are "akin to reckless disregard."<sup>2</sup> The Court points out that defendants were aware of the grave risk posed by COVID-19, yet made an intentional decision to promulgate only non-binding guidance for the first month of the pandemic and failed to mandate a facility-wide response.

Judge Bernal remarks that "during a pandemic such as this, it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar system wide actions as jails and prisons."<sup>3</sup> The Court compares the defendants' response to that of the federal Bureau of Prisons, which it found "has issued a more decisive and urgent call to action."

Judge Bernal's detailed opinion calls for a prompt and firm response by prison and jail administrators to the pandemic crisis. At the very least, there must be specific guidelines in place.

On March 23, 2020, the Centers for Disease Control and Prevention ("CDC") issued interim guidance on management of COVID-19 in correctional and detention facilities. The CDC Interim Guidance provides

recommendations on a wide range of topics, including protocols for medical isolation, quarantines, social distancing, prevention by cleaning and disinfecting, pre-intake screening, and temperature checks.<sup>4</sup> Judge Bernal's opinion points to this Interim Guidance in its critique of the ICE'S action plan, and notes that the defendants did not include all of the CDC policies, but rather, provides advice that sometimes conflict with the CDC policies.

In addition to the CDC, the California Correctional Healthcare Services (CCHCS)<sup>5</sup> and the California Department of Corrections and Rehabilitation (CDCR)<sup>6</sup> have also updated their websites to account for the risks associated with COVID-19 in a correctional setting, discussing recommendations and providing informational sources for administrators regarding both the inmate population and correctional staff. Consistent review of these resources for updates and implementation of the proposed recommendations will likely be crucial to ensuring an appropriate and adequate response to the risks associated with COVID-19 in a prison or institutional setting.

<sup>1</sup> *Faour Abdallah Fraihat v. United States Immigration & Customs Enf't*, No. EDCV 19-1546 JGB (SHKx), 2020 U.S. Dist. LEXIS 72015 (C.D. Cal. Apr. 20, 2020)

<sup>2</sup> *Faour Abdallah Fraihat*, 2020 U.S. Dist. LEXIS 72015, \*70-72

<sup>3</sup> *Id.* at \*75.

<sup>4</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, p. 3, Center for Disease Control and Prevention (CDC), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> (last visited May 27, 2020)

<sup>5</sup> *COVID-19: Interim Guidance for Health Care and Public Health Providers*, California Correctional Healthcare Systems, <https://cchcs.ca.gov/covid-19-interim-guidance/> (last visited May 27, 2020).

<sup>6</sup> *COVID-19 Preparedness*, California Department of Corrections and Rehabilitation (CDCR), <https://www.cdcr.ca.gov/covid19/> (last visited May 27, 2020).

Included below is a non-comprehensive list of recommendations compiled from the CDC, CCHCS, and recent case law<sup>1</sup> regarding COVID-19 prevention and protections in correctional settings:<sup>2</sup>

- Educate inmates/staff on the COVID-19 pandemic by providing information about the COVID-19 pandemic, symptoms, transmission, and how to protect oneself from COVID-19.
- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands.
- Restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.
- Increase cleaning schedule for high-traffic areas and high-touch surfaces (faucets, door handles, keys, telephones, keyboards, etc.).
- Increase availability of hand hygiene supplies in housing units and throughout the facility to the extent it does not provide a security risk.
- Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.

<sup>1</sup> *Valentine v. Collier*, No. 4:20-CV-1115, 2020 U.S. Dist. LEXIS 67226, at \*3-6 (S.D. Tex. Apr. 16, 2020) (finding that there are certain precautions and protections the geriatric Texas prison are required to put in place due to the risks associated with COVID-19).

<sup>2</sup> To see the full and comprehensive list of recommendations from the CDC, CCHCS, and/or CDCR visit their respective websites or resources, which have already been included in this article.



- Isolate symptomatic patients immediately.
- Offer the seasonal influenza vaccine to all incarcerated/detained persons (existing population and new intakes) and staff throughout the influenza season.
- Where relevant, consider suspending co-pays for incarcerated/detained persons seeking medical evaluation for respiratory symptoms.
- Perform pre-intake screening and temperature checks for all new entrants.
- Note that if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons.
- If visiting is permitted, perform screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all visitors and volunteers on entry.
- Coordinate with law enforcement and the courts to identify lawful alternatives to in-person court appearances, such as virtual court, as a social distancing measure to reduce the risk of COVID-19 transmission.

It is also important to ensure your prison/institutional grievance system is still functional and available. This is critical to avoid other constitutional issues, like access to courts, and it allows the institution the ability to address and correct issues at an institutional level.

With awareness and action, the correctional system can be more than prepared to address the inevitable consequences that are a sure result of this pandemic season.

## COVID-19: PROTECTING LAW ENFORCEMENT OFFICERS AND OTHER GOVERNMENT WORKERS

*Nicole E. Hoikka*

While many across the country are working from home and sheltering in place, law enforcement officers and other government employees continue to work on the front lines, interfacing with the general public. First responders are especially vulnerable to contracting the novel coronavirus, and law enforcement agencies have faced COVID-19 positive cases among both their sworn and civilian employees. As of April 12, 2020, the Riverside County (CA) Sheriff's Department had 55 confirmed COVID-19 positive cases among its personnel;<sup>1</sup> as of May 20, 2020, the Los Angeles County Sheriff's Department had 189 employees who tested positive.<sup>2</sup> Even non-patrol personnel are at risk: as of May 15, 2020, 17 trainee officers at the Los Angeles Police Department academy tested positive for COVID-19.<sup>3</sup>

The obligations of employers to protect law enforcement and other government workers from COVID-19 infection have shifted in response to the pandemic.<sup>4</sup>

### Personal Protective Equipment

Pursuant to California Department of Fair Employment and Housing ("DFEH")<sup>5</sup> and federal Equal Employment

1 <https://www.riversidesheriff.org/AlertCenter.aspx?AID=Department-Status-Update-13>

2 <https://lausd.org/covid19updates/>

3 <https://www.policeone.com/coronavirus-covid-19/articles/17-lapd-recruits-infected-with-covid-19-agency-to-continue-training-DQBinhlw2yQBfgU1/>

4 <https://www.cdc.gov/coronavirus/2019-ncov/community/law-enforcement-agencies-faq.html>

5 <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Opportunity Commission ("EEOC")<sup>6</sup> guidelines, employers may require employees to wear personal protective equipment ("PPE"), such as face masks, gloves, or gowns.

The Centers for Disease Control ("CDC") recommends a minimum level of PPE for law enforcement who must make contact (less than 6 feet) with individuals confirmed or suspected to have COVID-19.<sup>7</sup> The CDC recommends a single pair of disposable examination gloves, a disposable isolation gown or single-use/disposable coveralls, a NIOSH-approved particulate respirator (i.e., N-95 or higher-level respirator), and eye protection (i.e., goggles or disposable face shield that fully covers the front and sides of the face).

### Disinfecting Workspaces and Equipment

Recognizing that many law enforcement personnel routinely change out of their uniforms at the station and wear street clothes and shoes home, the CDC recommends that law enforcement agencies provide laundry services for uniforms (considered a "porous item") to avoid law enforcement personnel potentially exposing household members. The CDC also recommends that law enforcement personnel practice "everyday measures" like hand hygiene, covering coughs and sneezes, and disinfecting frequently touched surfaces daily.

Cal/OSHA has not released specific guidelines for law enforcement agencies, but "police services" are among the employers covered by the Aerosol Transmissible Diseases ("ATD") Standard, set forth at California Code of Regulations, title 8, section 5199.<sup>8</sup> The ATD Standard was designed to protect employees from airborne infectious diseases such as COVID-19 and pathogens transmitted by aerosols. Employers covered by the ATD Standard are required to establish, implement and maintain an Aerosol Transmissible Diseases Exposure Control Plan.

6 [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf)

7 <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-law-enforcement.html>

8 <https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>

In addition, all California employers are required to establish and implement an Injury and Illness Prevention Program (IIPP) to protect employees from workplace hazards, including infectious diseases. (See California Code of Regulations, title 8, section 3203.) Guidelines for the content of the written IIPP are provided on Cal/OSHA's website at <https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>.

### Screening

The CDC also recommends that law enforcement agencies encourage all personnel to self-monitor for symptoms before they come to work. EEOC and DFEH guidelines also allow employers to ask employees if they are experiencing COVID-19 symptoms, but employers must maintain all information as a confidential medical record. Employers may also measure an employee's body temperature for the limited purpose of evaluating the risk that employee's presence poses to others in a workplace as a result of the COVID-19 pandemic.

### Employee Leave Policies

The Families First Coronavirus Response Act ("FFCRA") requires government employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.<sup>1</sup> The statute has been in effect since April 1, 2020 and will continue through December 31, 2020. However, law enforcement officers may be excluded from Paid Sick Leave or Expanded Family and Medical Leave under the FFCRA, as they are classified as "emergency responders." Nonetheless, the U.S. Department of Labor encourages public sector employers to be "judicious" when exempting emergency responders from the FFCRA.<sup>2</sup>

### Correctional and Detention Facilities

Staff members at correctional and detention facilities face serious risks of exposure to the coronavirus beyond

<sup>1</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

<sup>2</sup> <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#57>

those covered by this article. More information and guidance for correctional and detention facilities can be found on the CDC's website at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html>.

## THE CLASS ACTION EFFECT: EXAMINING CORONAVIRUS LAWSUITS FROM ACROSS THE COUNTRY AND SOUTHERN CALIFORNIA

*Robert Murphy*

It has already started. Lawsuits have been filed on behalf of prisoners and inmates in multiple states and in multiple jurisdictions in California on both the state and federal level.

Across the country, the Michigan Department of Corrections has been served with a class-action lawsuit over its handling of the coronavirus outbreak inside its facilities. Of the more than 1,400 prisoners with confirmed cases of the virus, 41 inmates have died. The lawsuit accuses the department of violating prisoner's rights to be free from cruel and unusual punishment by exposing them to the risk of illness and death from COVID-19. The lawsuit alleges that the MDOC failed to implement necessary or adequate policies and practices throughout its prisons. Specifically, the lawsuit claims that prisoners have been denied proper and equal access to vital preventative measures to avoid the transmission of COVID-19 because they are not able to practice social distancing in housing units where they are double-bunked in a cell or confined in dormitory settings, as well as during meal times and yard time.

The department responded that its facilities are following the guidelines of both the CDC and Michigan Department of Health and Human Services. The lawsuit seeks a temporary restraining order and a permanent injunction to require the department to implement 21 measures which range from testing all prisoners and staff, to the release of low-security prisoners to home confinement. Independently, the department had already implemented some of the relief sought in the lawsuit.

Closer to home, the American Civil Liberties Union and Prison Law Office jointly filed a pair of class-action lawsuits in federal court on behalf of prisoners at Terminal Island and Lompoc facilities. Outbreaks at the two facilities as of the middle of May 2020 have infected a combined total of approximately 1,775 inmates and caused 10 inmate deaths. More than 900 people incarcerated in Lompoc have tested positive for the virus. That number represents more than 65% of the positive cases for the virus in all of Santa Barbara County where the prison facility is located. At the Terminal Island in Los Angeles County, more than 700 people, including several staff members, have tested positive. At least eight have died to date.

The lawsuits name the facility wardens as well as the director of the Federal Bureau of Prisons. Like the Michigan case, these class-action lawsuits allege that officials at both facilities allowed the virus to spread by failing to provide for social distancing, clean housing environments, basic cleaning supplies and personal protective equipment (PPE) to prisoners and staff. The lawsuits claim that chronic prison overcrowding makes it impossible for prisoners to maintain social distancing or take other basic safety precautions. The lawsuits contend that the officials have refused requests for home release despite directives that they do so. As with the Michigan lawsuit, these filings also claim that the alleged refusals amount to cruel and unusual punishment prohibited by the Eighth Amendment.

The complaints cite the fact that the Terminal Island facility has a rated capacity of 779 prisoners, yet currently houses 1,042 inmates. The lawsuits request temporary restraining orders and permanent injunctions to mandate safer housing conditions, along with a reduction in prison populations at both facilities. They also make the claim that the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act gave prison officials broad authority to release low risk offenders into home confinement so that it could reduce overcrowding and save lives, but officials have so far failed to use that authority. The lawsuit also alleges that despite the fact that Attorney General William Barr specifically urged the transfer of people with medical conditions, especially vulnerable to



serious illness and death from COVID-19 infections, and that has yet to be done at either facility.

In another local prisoner case, inmates in the Riverside County jail system recently filed a lawsuit against the Riverside County Sheriff's Department alleging violations of their Eighth Amendment rights against cruel and unusual punishment due to alleged overcrowding. The lawsuit contends that housing conditions in the jails make it impossible to maintain social distancing and sanitary conditions in the jails. As of last week, 141 inmates had tested positive. The jail population has already dropped by about 500 inmates. In response to a request for a temporary restraining order and permanent injunction, a federal judge has ordered the Sheriff's Department to submit a plan to achieve social distancing. The plan has not yet been made public.

In Los Angeles County, a class-action lawsuit filed by inmates at the Men's Central Jail makes similar claims of overcrowding and unsanitary conditions. It alleges that nearly 100 inmates are forced to live in the same open dorm unit where triple bunk beds are placed three feet apart. The lawsuit seeks the release of medically vulnerable individuals and implementation of a list of alleged preventative measures.

Prisons and jails, by their very design and construction cannot be easily reconfigured to achieve social distancing. After Governor Newsom announced his stay at home order in March, California prisons have released approximately 3,500 prisoners. Likewise, the daily jail population in the 58 California counties has been reduced by 20,000 from late February. Before the pandemic, the Los Angeles County jail daily population averaged approximately 17,000 inmates. The daily population in the Los Angeles County jails is now approximately 12,000 inmates.

Lawsuits brought on behalf of prisoners, inmates and detainees have already arrived and more are coming. With no vaccine likely until 2021, there is only so much that state prisons, county jails, and local detention facilities can do to create safer conditions and more space for those in their custody, while at the same time maintaining the safety and health of their staff. Each facility is different, yet the claims have a common thread: failure to maintain social distancing; failure to maintain sanitary and safe housing conditions; failure to reduce facility populations; failure to provide basic cleaning products; failure to take proper and adequate precautionary measures to prevent the spread of the disease; and failure to provide PPE to prisoners and staff - all in violation of the Eighth Amendment right against cruel and unusual punishment.

The lawsuits seek temporary restraining orders and permanent injunctions with specific demand for corrective measures. The lawsuits also seek compensatory damages for inmates and attorneys' fees for the lawyers that file them.

There are a number of privileges and immunities that can be pled to defend public entities and their employees against these claims. Chief among these

are the affirmative defenses of qualified immunity and public entity/employee immunity for discretionary acts. Strategies can be employed to plan for the defense of these lawsuits as they arise and for compliance with court orders should they be granted. Our Governmental Entity Defense Team is available to discuss these issues with you as they arise during this very difficult time.

## THE IMPACT OF COVID-19 ON GOVERNMENT AGENCY DISCLOSURES UNDER THE CALIFORNIA PUBLIC RECORDS ACT

*Edwin Sasaki*

The rapid spread of COVID-19 has triggered a heated political debate over how government officials should best respond to this imminent threat to public health. As a result, government agencies may soon face a wave of urgent requests from citizens and the media for immediate access to public records.

The California Constitution guarantees two important rights: (1) the individual's right of privacy and (2) the public's "right of access to information concerning the public's business," including "the writings of public officials and agencies."<sup>1</sup> But unfortunately for public agencies, sometimes these rights come into direct conflict, and the burden and expense of resolving that conflict falls directly on the shoulders of public agencies.

The California Supreme Court has observed that the public's right of access to official records is an essential right that lies at the very heart of the democratic process. "Openness in government is essential to the functioning of a democracy. 'Implicit in the democratic process is the notion that government should be accountable for its actions.

In order to verify accountability, individuals must have access to government files. Such access permits checks

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<sup>1</sup> *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal. App. 4th 1250, 1261.

against the arbitrary exercise of official power and secrecy in the political process.’<sup>1</sup>

“In the CPRA [California Public Records Act], the California Legislature has sought to reconcile these two fundamental, but sometimes conflicting, conditional rights.

While ‘mindful of the right of individuals to privacy’ (§ 6250), the Legislature has declared ‘access to information concerning the conduct of the People’s business is a fundamental and necessary right of every person in this state.’<sup>2</sup>

Thus, the CPRA generally provides “every person has a right to inspect any public record” (§ 6253 (a)), “[e]xcept with respect to records exempt from disclosure by express provisions of law....” (6253 (b).) Section 6254, in turn, lists 29 categories of documents exempt from the requirement of public disclosure, many of which are designed to protect individual privacy, including, “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” (§ 6254 (c).) (*Ibid.*)

During the COVID-19 pandemic crisis, however, agencies may find that their ability to respond has been severely compromised by budget cuts, social distancing requirements, staffing shortages, and remote working arrangements. If official records are not available online in electronic form, then restricting public access to government buildings where physical records are kept may prevent the public from inspecting those records.

The challenge that government agencies throughout California face is that even during a state of emergency, any failure to provide the public with a prompt and accurate response under existing law may subject agencies to expensive litigation and substantial liability in court.

<sup>1</sup> *Marken*, 202 Cal.App.4th at 1261, citing *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

<sup>2</sup> *Marken*, 202 Cal.App.4th at 1261.

The CPRA itself contains no language which would permit a government agency to delay or suspend the statutory deadlines for responding to public records requests. The emergency orders issued by Governor Newsom, the Chief Justice of the California Supreme Court, and by county courts do not address the question of whether counties are excused from their statutory obligations under the CPRA.<sup>3</sup>

While some government agencies are continuing to respond to public records requests, other government agencies have posted notices on their websites indefinitely suspending any responses. As a result, some public advocacy and media groups have threatened to file suit against government agencies, taking the position that any delay or refusal to release information constitutes a violation of the CPRA.<sup>4</sup>

This tension between the public’s right of access to information and the agency’s ability to respond can result in expensive litigation. For example, in the landmark case of *Sierra Club v. Superior Court* (2013) 57 Cal. 4th 157, the County of Orange and the Sierra Club became embroiled in a bitter public records dispute after the County insisted that the Sierra Club pay a fee, pursuant to a particular statute. The dispute lasted over six years and went all the way to the Fourth District Court of Appeal and then to the California Supreme Court. In the end, the County was not only forced to pay its own legal fees, but was also forced to pay \$1.3 million dollars to reimburse the Sierra Club for its legal fees.

A delay in producing records may result in an expensive lawsuit against the agency. Even if the agency prevails and is not ordered to pay opposing counsel’s fees, the agency must still pay its own fees, which may be very costly. So even an agency that ultimately “wins” in court can still lose a great deal financially.<sup>5</sup>

<sup>3</sup> See [http://www.lacourt.org/newsmedia/uploads/14202052283316COVID19TimelineofEvents-05212020\(Final\).pdf](http://www.lacourt.org/newsmedia/uploads/14202052283316COVID19TimelineofEvents-05212020(Final).pdf).

<sup>4</sup> <https://www.adweek.com/tvspy/utah-news-outlets-threaten-lawsuit-over-denied-covid-19-public-records-request/221688/>

<sup>5</sup> See *Motorola Communication & Electronics Inc. v. Dept. of General Services* (1997) 55 Cal.App.4th 1340, 1346.

Agencies that unilaterally refuse to respond to public records requests during the COVID-19 emergency run the risk of inviting costly and protracted lawsuits over whether their refusal to respond to public records requests is justified. Such a lawsuit may need to inquire into what resources the agency has available, what competing demands the agency faces, and how the agency has allocated its scarce resources to meet those competing demands.

It is difficult to predict how the courts or the Legislature will respond to these competing factors. But at least historically, the Legislature and the courts have placed a very high value on the public's right to gain access to government records and information. Without such access, it would be impossible for the public to challenge the adequacy or effectiveness of the government's response to the COVID-19 emergency.

Even in the face of staffing challenges brought on by the COVID-19 emergency, government agencies must still consider devoting some portion of their resources to responding to public records requests. Any agency that unilaterally refuses to respond to any requests for an indefinite period risks inviting strong negative publicity and a highly contentious and expensive lawsuit.

The law firm of Manning & Kass, Ellrod, Ramirez, Trester LLP has a dedicated staff of attorneys with expertise in public records disclosure matters. Our attorneys are available to consult with you on legal questions regarding how an agency facing staffing challenges during the COVID-19 emergency can best respond to public records requests under the CPRA.

***All information provided is of a general nature and is not intended nor represented to replace professional, specialized legal advice, nor should the information be relied upon as same.***

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