Local Public Agencies Must Ensure Emails and Other Documents Are Retained Throughout CEQA Process and Override Automated Deletion Policies

The Fourth District Court of Appeal has clarified public agencies' duties with respect to the preservation and production of records in CEQA matters. Public agencies are obligated to preserve emails and other documents during the administrative process—irrespective of the agencies' standard and/or automated retention and destruction policies. Public agencies should evaluate their document retention and destruction policies and practices, and implement changes to prevent the unlawful loss of documents during both administrative and judicial proceedings.

The decision—*Golden Door Properties, LLC v. Superior Court of San Diego County* (July 30, 2020, No. D076605) __ Cal.App.5th __, 2020 WL 4364233—addresses the intersection of public agencies' obligations under the California Environmental Quality Act (CEQA), the Public Records Act, the Civil Discovery Act, and case law regarding administrative records. The Court held that the County of San Diego violated CEQA by failing, during the administrative proceedings and thereafter, to prevent emails from being deleted pursuant to the County's automatic 60-day deletion system. By not utilizing a system to prevent automatic deletion of project-related emails, the County failed to meet its obligation under Public Resources Code section 21167(e)(10) to ensure the record of administrative proceedings included "[a]ny other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including ... all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division."

Accordingly, irrespective of standard policies and/or automated practices, public agencies must take action to preserve documents during the administrative proceedings and until either the statute of limitations to file suit has expired or any litigation regarding the contents of the Administrative Record is fully resolved.

The Court further explained:

1. Provisions of the CEQA Guidelines that address public agencies'

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obligations to retain certain records for stated periods of times (e.g., comments on draft EIR's, notices of determination) do not excuse public agencies' statutory obligations to preserve other project documents during the administrative proceedings and associated litigation.
2. Case law regarding extra-record evidence—holding that it is generally not included in administrative records—does not apply to documents that had been destroyed during the administrative proceedings and were not actually in front of the decision-makers when they acted. Rather, as long as the documents had been part of the administrative proceedings, even if no longer preserved at the time of the final decision, they are record documents.
3. Public Records Act policy in favor of public access to government information supports parties' right to obtain records related to a project.
4. A litigant may serve a request for production of documents pursuant to the Civil Discovery Act in order to obtain documents for an administrative record.
5. Public agencies' duties to preserve and produce records are not dormant obligations that are only triggered upon a demand to preserve or produce.

Kevin D. Siegel and other attorneys at Burke, Williams & Sorensen, LLP can assist with review, revision, and implementation of your agencies' policies, as well as with project processing and litigation.