

# CLIENT NEWS BRIEF

## Records Owned And Held By A Third Party Are Not Public Records Even If A Public Agency Has A Right To Access Such Records

A recent California appellate court ruling has clarified the reach of the California Public Records Act (CPRA). In *Anderson-Barker v. City of Los Angeles*, the Second District Court of Appeal held that records in the possession of a third party contractor under a contract with the City of Los Angeles were not subject to the CPRA where the city had access to but did not actually possess or control the records.

### Background

In *Anderson-Barker*, the plaintiff sought to compel the city to disclose electronically stored data relating to vehicles that private towing companies had impounded as directed by Los Angeles Police Department per a contractual agreement. The city had access to this information but did not control the data stored, nor did it control the databases on which it was stored. The city argued that the requested data did not qualify as "public records" under the CPRA because the city did not possess or control the data. Recent amendments to the contract with the third party contractors expressly stated that the data was "owned" by the contractors. The trial court ruled in favor of the city, and the Court of Appeal affirmed that decision.

### Analysis

The court focused on the issue of possession to decide whether the data in question must be produced under the CPRA. Prior state and federal cases (the latter addressing the Freedom of Information Act) had held that records are considered in possession or "constructive possession" of a public entity if they have "the right to control the records." The court, particularly following federal cases, held that constructive possession does not apply when the entity only has access to the data: "[t]o conclude otherwise, would effectively transform any privately-held information that a state or local agency has contracted to access into a disclosable public record."

The court further explained why this case does not reach the same result as the California Supreme Court's decision in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608. At issue in *City of San Jose* was a CPRA request for "all electronic information relating to public business, sent or received by [mayor and council members] using his or her private electronic devices" related to a city-involved real estate matter. The California Supreme Court ruled that such records were subject to the CPRA. (See [2017 Client News Brief No. 11](#).) The *City of San Jose* court, focusing on the definition of "public record," held that a record does not lose its "public record" status simply because of its location on a public employee's personal account. The *Anderson-Barker* court focused on a CPRA requirement distinct from the definition of "public record," that the record must be in the possession or control of the agency, ultimately finding that the City of Los Angeles did not have possession or control of the record because the record was with a third party. The city had only access to the records, and the court concluded that access does not satisfy the requirement of possession or control. However, the court also explained that data actually extracted from

March 2019  
Number 16



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the database by the governmental agency and used for a governmental purpose might be disclosable.

*Anderson-Barker* thus creates a distinction between documents in possession of an employee or official versus documents controlled by a third party contractor. The former will generally be subject to the CPRA, while the latter generally will not.

## Takeaways

Under *Anderson-Barker*, members of the public may not have a right to access records in the possession of a third party contractor. An agency or its employees or officials must control, and not merely have access to records, in order for the records to be subject to mandatory production under the CPRA. Public agencies may wish to address the structure of document control through contractual arrangements with third party contractors, allowing the agency to decide who controls records for purposes of CPRA production.

If you have any questions about the *Anderson-Barker v. City of Los Angeles* decision or the California Public Records Act in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).