

Golden Door Properties v. Superior Court of San Diego County
(July 30, 2020) __ Cal.App.5th __

This case clarifies the contents of the administrative record for purposes of CEQA litigation. PRC Section 21167.6 describes the documents that make up the record of proceedings (administrative record) including "[a]ll written evidence or correspondence submitted to, or transferred from" the public agency. This includes "all internal agency communications, including staff notes and memoranda."

In this case, the County of San Diego, lead agency for the Newland Sierra project, no longer had those communications that were by e-mail and not flagged as "official records." If the County's e-mail user does not designate an e-mail as an "official record," by default the County's computer system permanently deletes that e-mail after 60 days regardless of whether the e-mail was actually an "official record." When project opponents filed discovery to obtain copies of these e-mails and related documents to prepare the record of proceedings, the County refused to comply, asserting that it no longer had the e-mails.

The trial court sent the case to a referee who found County was not required to retain these records. The trial court adopted that finding, and this appeal followed.

The Court of Appeal reversed. It summarized its decision as follows:

Preparing a record under section 21167.6 is not an end in itself, but rather the means for judicial review of CEQA determinations. A thorough record is fundamental to meaningful judicial review. Therefore, we hold that section 21167.6 requires the lead agency to retain such writings.

Moreover, in this case, to the extent the writings sought are encompassed within section 21167.6, subdivision (e), they are "official records" under the County's e-mail retention policies. Thus, the County should not have destroyed such e-mails, even under its own policies.

The referee's erroneous interpretation of section 21167.6 is the cornerstone for all the challenged rulings. Accordingly, we will order a writ of mandate issue directing the superior court to vacate its orders denying the motions to compel and after receiving input from the parties, reconsider those motions in light of this opinion.

The Court also held that copies of the destroyed e-mails that were held by the applicant and CEQA consultants were part of the administrative record and could be subpoenaed by the plaintiffs during the litigation. This correspondence was not automatically considered deliberative or privileged; the trial court should have examined the e-mails to determine whether there were deliberative or privileged documents among them that would not be subject to disclosure.