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Anti-SLAPP protection to public records requester answers some questions, but begs others

By Krista L. Baughman

Last week, the California Court of Appeal decided a case with important implications for those who file public records requests – and those who seek to block them – as well as for the application of California's anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc. Section 425.16). *Iloh v. Regents of University of California*, — Cal.Rptr.3d— (Cal. Court of Appeal, Fourth Dist., August 24, 2023).

Constance *Iloh*, an assistant professor at University of California, Irvine (UCI) authored four articles that were published by various academic journals. All four articles were later either retracted or corrected by the journals due to concerns about possible plagiarism or inaccurate citation references. These events became the subject of an article about *Iloh* published by the Center for Scientific Integrity (CSI), an "organization that reports on academic retractions and accountability." *Iloh* at *1. CSI sent UCI a request under the California Public Records Act (CPRA) (Gov. Code, § 7020.000 et seq.), seeking *Iloh's* post-publication communications with the four journals and UCI. UCI notified *Iloh* about the request and the school's intent to comply with it.

In response, *Iloh* filed a petition for writ of mandate, declaratory relief, and injunctive relief against UCI to prevent disclosure of her communications. She later added CSI as a real party in interest, and CSI filed a motion to strike *Iloh's* petition under the anti-SLAPP statute, arguing that the petition "arises from acts in furtherance of [CSI's] rights of petition and free speech in connection with a public issue." *Iloh* at *3. The trial court denied the motion, finding that protected activity was not the "basis" for CSI's petition.

The court of appeal reversed. To begin, the court addressed *Iloh's* argument that an anti-SLAPP motion was not available to CSI because CSI was not a named defendant, and no causes of action were asserted against it. *Iloh* at *4; *see* also section 425.16, subd. (b)(1) (permitting a special motion to strike "[a] *cause of action* against a person arising from [protected conduct]" (emphases added)). The court disagreed, reasoning that since the focus of the lawsuit was CSI's ability to access *Iloh's* communications under the CPRA, CSI had a "direct interest in the proceedings" and "will be impacted by the litigation's outcome." *Id.* The court cited *Rudisill v. California Coastal Com.*, 35 Cal.App.5th 1062 (2019) which suggests, without holding, that real parties in interest to a mandamus proceeding qualify as "persons" under the anti-SLAPP statute. *See Iloh* at *6, citing *Rudisill* at 1072; section 425.16, subd. (b)(1).

Next, the court examined whether the complaint implicated a "right of petition or free speech… in connection with a public issue," as required by prong 1 of the anti-SLAPP statute. *Iloh* at *6, *citing* section 425.16, subd. (b)(1). The court first noted that "[i]t is well established that reporting the news involves protected activity," and held that "because newsgathering is part and parcel of that protected activity," it is likewise protected. *Iloh* at *5. As such, because CSI issued the CPRA records request as part of its news gathering efforts in connection with reporting on the four article retractions, CSI's conduct was protected activity. *Id.* The court also concluded that the documents sought in the CPRA records request concerned "an issue of public interest" because they implicated how a public university uses public funds in connection with resolving quality or integrity problems in its professors' publications. *Id.*

Finally, the court considered whether *Iloh's* claims "arise from" the protected newsgathering activity. *Iloh* at *5, citing section 425.16, subd. (b)(1). The court answered in the affirmative, noting that "[t]he entire purpose of *Iloh* petition is to prevent the disclosure of records in response to CSI's CPRA request." *Id.* at *6. The court rejected *Iloh's* argument that anti-SLAPP protections can only apply to conduct that had already taken place, noting that "'protection may be afforded to preliminary actions that assist or are helpful in advancing the exercise of the right of free speech, even if the speech activity is still formative or incomplete at the time a lawsuit is filed.'" *Id.*, *citing Ojjeh v. Brown*, 43 Cal.App.5th 1027, 1041 (2019). The court reasoned that "a lawsuit targeting newsgathering activity threatens to chill participation in speech-related processes and, if successful, may block the exercise of free speech." *Iloh* at *6, *citing Ojjeh* at 1042.

Krista L. Baughman *is a partner of Dhillon Law Group, Inc., where she leads the firm's First Amendment, defamation and anti-SLAPP practice.*

The *Iloh* case is significant for several reasons. First, it allows real parties in interest – as opposed to just named defendants – to file an anti-SLAPP motion in a mandamus proceeding that targets their interests, even though no "cause of action" is asserted against them. Second, it holds that the act of seeking public records through a CRPA request can be "newsgathering" and thus protected conduct under prong 1 of the anti-SLAPP statute, at least where the requester's conduct is in connection with ostensible news reporting.

Iloh answers some questions but begs others. For example, is the court's holding limited to real parties in interest in mandamus proceedings, or could non-party litigants in other types of proceedings (for example, intervenor defendants) also use *Iloh* to file their own anti-SLAPP motions? And how should *Iloh* be applied where a CRPA records request is made by a private citizen instead of a "reporting organization" like CSI – could an individual still argue that her conduct was protected as "newsgathering"?

Whatever the answers to these questions, one thing seems sure: *Iloh* will be cited in anti-SLAPP decisions for some time to come.