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Commentary

The Public Affairs Research Council of Louisiana

Reverse Lawsuit Sets Bad Example

AG's threat to sunshine law tempts all agencies to foil citizen access

The Public Affairs Research Council of Louisiana (PAR) wants the citizens of the state to understand the problem and impact of a recent legal move by the state Attorney General's office. Faced with a complex issue pitting the competing constitutional rights of both privacy and public access, the agency did not handle the matter properly. Its action sets an unfortunate example that likely will encourage egregious behavior among state and local government agencies and commissions across Louisiana. There are other, more appropriate legal means for the Attorney General to seek protection of documents based on concerns of privacy.

The context

Last week the Attorney General filed a lawsuit against a newspaper reporter who made a public records request. The request was for documents related to complaints of harassment by an official at the Louisiana Department of Justice. Claiming that constitutionally protected privacy concerns are at stake, the agency sued the requestor and is seeking a declaratory judgement from the court to prevent the release of documents in full or redacted form. The newspaper has argued that it is not seeking disclosure of specific information that would reveal the names of witnesses or others with a right to privacy.

PAR takes no position on whether the court will view the documents in question as exempt from disclosure as a matter of personal privacy. Sometimes the public's right-to-know conflicts with a person's right to privacy. Both principles can find support in the state Constitution. In unusual and hopefully rare cases, when the requestor of documents and the government agency cannot reach agreement, the court is an appropriate place to resolve the dispute and determine what can be released.

There is a proper way to go about these disputes. When a public agency believes that an exemption in state law applies to a government document or part of a document, it may cite the exemption and withhold or redact the record. The requestor can try to work out a compromise with the agency and is entitled to go to court to seek the release of the full document or a redacted copy. The public agency can respond, defend its position and get its day in court without initiating a lawsuit against a requestor. These types of disputes and court decisions are a legitimate process and a normal occurrence in Louisiana and elsewhere.

There is a proper way to go about these disputes.

The problem at hand

When a government agency does not follow the normal process and instead takes the misguided course of suing the citizen requesting the record, a completely different set of circumstances takes place. PAR's concern is that the Attorney General's initiative will be seen as a "reverse" or "revenge" public record lawsuit. The broader category of these types of action are known by the acronym SLAPP, for strategic lawsuit against public participation. SLAPPs are used by private companies and government bodies

against various forms of free speech and are intended to overwhelm or silence critics and investigators by intimidating or burdening them with legal attacks and the costs of mounting a defense.

Reverse lawsuits are a practice that has been decried across the country as a bad faith exercise of government secrecy and bullying. Although Louisiana is among a number of states with an anti-SLAPP law, it is not clear that law would be effective in this and other similar cases of open records concealment.

Not a good argument

The Attorney General's office contends that its lawsuit is an efficiency move to bring a quick resolution to the dispute. Under this standard, those who seek to exercise their constitutional right to request public documents will be thrilled to know that powerful agencies are putting them on the spot financially and legally in the name of government efficiency. Besides, once a court dispute seems likely, there is no guarantee that a reverse lawsuit will make the process easier. There are past examples, even in Louisiana, where reverse lawsuits have led to long legal battles. The Attorney General's office might think it is promoting efficiency, but it is instead promoting a doctrine of Government first, Citizens second.

The Attorney General's office might also make the dubious argument that its lawsuit will save taxpayer money. Public record requests have been the source and incentive for greater transparency and accountability for government agencies large and small for many years, shedding light on misuse of funds and power. Chilling public requests for records is the opposite of efficiency and government cost-savings. We could save the government a lot of trouble and expense by letting agencies operate in secret, but that's a recipe for disaster.

Public record requests have been an incentive for government accountability.

Setting a bad example

The real weight of the problem is that the Attorney General holds a position as the state's leading lawyer and advisor to state and local agencies regarding public records. The obvious danger is that this lawsuit will give authoritative encouragement to local and state agencies throughout Louisiana to pursue the same means to avoid disclosure. The problem is not hard to imagine: Each time a citizen seeks public documents that might make a local or state public official uncomfortable or embarrassed, that citizen would be met by a lawsuit to suppress their constitutional right to public access.

Government agencies can tip the scale and devote substantial taxpayer resources to legal battles, overwhelming private citizens seeking what rightfully is the public's to see. Whereas a major newspaper might have the resources for such a fight, average citizens, smaller media and government watchdogs might not.

Summary

Considering the institutional authority and level of trust granted to the Attorney General's office for upholding government transparency, its actions in dealing with its own public record requests hold enormous significance. The agency does not need to forfeit its right to legal recourse, if necessary, to withhold records that it believes are protected from public scrutiny due to legitimate exceptions in law. But the agency should not do so by filing suit against a requestor. That is contrary to the spirit of Louisiana's public records doctrine. The magnitude and implications of the agency's mistake are serious.

The Attorney General should regret this lawsuit. He should provide guidance to all state and local agencies and commissions that reverse lawsuits are bad policy and not in the best interests of open government and citizen rights. The Governor should instruct state agencies and commissions under his command in the executive branch that reverse lawsuits will not be the policy of his administration. Local government officials and their representative associations also should take a stand against this practice.

PAR Special Background Information

The Threat of Reverse Lawsuits

The Louisiana Constitution sets a high bar for government transparency. No public records should be withheld unless there is a clear expression of law allowing an exemption. For example, critical personal information such as social security numbers are indeed private and should be protected.

Unfortunately, in recent years public agencies across the country have taken a path to act aggressively against their citizens by filing lawsuits against the requestors rather than handing over the documents or simply defending their opinion in court. These “reverse” lawsuits against a public petitioner are used to prevent disclosure and discourage the filing of freedom-of-information requests. The action is a threat because it can serve as a deterrent to filing requests and can be more costly to the petitioner. The citizen is confronted with a lawsuit – along with its delays and expenses – just for exercising a constitutional right to obtain information.

Under the normal process, if an unsatisfied requestor of public records sues an agency and prevails in court, the agency can be ordered to pay for the requestor’s legal and court costs. By taking the abnormal step of suing first, an agency can try to turn the tables on the requestor. In that situation, the court may be less likely to order the agency to cover the requestor’s expense. In the Louisiana Attorney General’s case against the newspaper reporter, the lawsuit asks the court to “cast the defendant with all costs of these proceedings” and to grant the agency “any and all relief the court deems proper.” When a government body uses this approach, it creates a profound chilling effect on members of the public who merely ask for public documents.

The National Freedom of Information Coalition, of which PAR is a member, and other government sunshine advocates have criticized reverse lawsuits as a cynical abuse of power. It is not surprising that the Attorney General’s lawsuit has attracted nationwide, negative media coverage for Louisiana by multiple outlets.

The practice is not new to Louisiana. The state Department of Education sued a requestor five years ago. In 2018 the city of Tallulah sued a reporter for trying to access documents. Last year the city of Monroe sued a local newspaper for submitting a request for files. Rather than aiding and abetting a bad practice, the Attorney General should be an advocate for stopping this type of lawsuit abuse and preventing government agencies from normalizing this anti-public behavior.

The Attorney General is a statewide elected official who oversees the Louisiana Department of Justice, an executive branch agency handling a variety of legal and law enforcement issues for the state. Among the agency’s principal mandates are to defend and uphold the open records law and hold state and local governments across Louisiana to a high standard of compliance with sunshine laws.

For decades the Attorney General’s office has provided guidance and opinions to assist all stakeholders in understanding, interpreting and complying with sunshine laws. It has enforcement powers, plays an educational role and is the go-to agency on this subject matter. In the past year, the AG’s office has issued sensible and helpful guidance on the effect of open meetings and public records law with regard to emergency pandemic conditions. The agency needs to get back on track.

Public Affairs Research Council of Louisiana | For more information please contact:
Robert Travis Scott, President, 225-926-8414 ext. 221 robertscott@parlouisiana.org