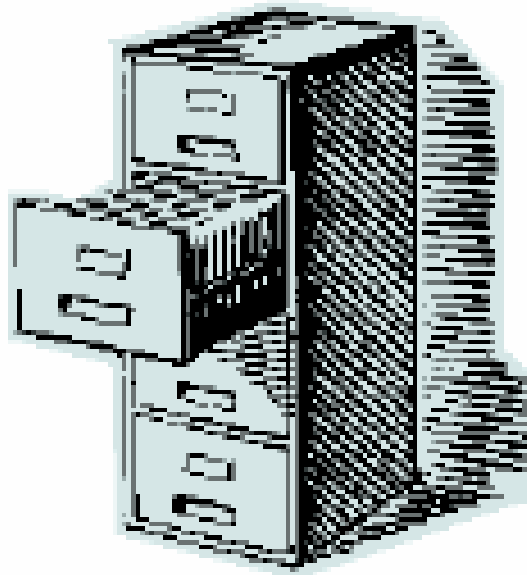


# **THE CALIFORNIA PUBLIC RECORDS ACT**



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# THE CALIFORNIA PUBLIC RECORDS ACT

## I. INTRODUCTION

The law regulating access to state and local government information in California is the Public Records Act (“CPRA”) and is found beginning at Section 6250 of the California Government Code. (See Appendix A for the text of the CPRA)

In establishing the CPRA, the California Legislature declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” And on November 2, 2004, California voters took this declaration a step further when they passed Proposition 59, which made access to public records a constitutional right under Section 3, Article 1 of the California Constitution.

The fundamental precept of the CPRA is that government records must be disclosed to the public, upon request, unless there is a specific reason not to do so. The CPRA sets forth a number of exemptions from this general disclosure requirement. The recurring interests that justify most of the exemptions from disclosure fall into two broad categories: (1) individual rights of privacy and (2) the ability of government to function effectively. One court described these competing objectives as the “preservation of islands of privacy upon the broad seas of enforced disclosure.”

If an agency improperly withholds records, a member of the public may seek a court order to enforce the right to inspect or copy the records sought, and may receive payment for court costs and attorney fees if such person prevails in the lawsuit.

## II. PUBLIC ACCESS vs. RIGHTS OF PRIVACY

### A. The Right to Monitor Government.

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (§ 6250)

The public's interest in monitoring government action increases in importance as a public official's power increases or becomes more unfettered. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646)

### B. The Right of Privacy.

The CPRA does not in and of itself establish any specific individual rights of privacy. Nevertheless, the number of exemptions crafted by the Legislature indicates a recognition of certain rights of privacy as established in the California Constitution (Article I, Section 1), by statute and through case law.

**C. Balancing Access and Privacy.**

In many instances where there is no clear exemption in the CPRA, agencies must balance the right of public access against the right of privacy. This is not an easy task as the scales are tipped in favor of disclosure, even more so now that access to public records is a state constitutional right particularly. Thus, the invasion of an individual's privacy or the interference with governmental operations must be sufficiently onerous as to clearly outweigh the public interest in disclosure. Since there is no bright-line test, the scope of coverage of the CPRA continues to be developed by the courts on a case by case basis.

**III. GENERAL SCOPE OF COVERAGE**

**A. What are *public records* in California?**

Public records include “any *writing* containing information *relating to the conduct of the public’s business* prepared, owned, used or *retained* by any state or local agency *regardless of physical form or characteristics.*” (§ 6252(e))

The definition is intended to cover every conceivable kind of record that is involved in the governmental process and pertains to any new form of record keeping instrument as it is developed. For example, public records stored in a computer (e.g., e-mail) are clearly included within the purview of public records. (§ 6254.9(d))

Only purely personal information unrelated to the conduct of the public’s business may be considered exempt from this definition. (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810)

**1. What constitutes a *writing*?**

A writing means “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any form of communication or representation . . . and any record thereby created, regardless of the manner in which the record has been stored.” (§ 6252(g))

**2. Is every writing in the custody of a public agency a public record under the CPRA?**

No. The mere custody or retention of a writing does not automatically make it a public record for the purposes of the CPRA. The key element is whether the record is kept because it is necessary or convenient to the discharge of official duties. (*California State University v. Superior Court* (2001) 90 Cal.App.4<sup>th</sup> 810)

Shorthand Test:

- Is the document normally kept by the agency in the course of business?
- Does it memorialize official transaction of the public's business?

“Only purely personal information unrelated to ‘the conduct of the public’s business’ could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally devoid of reference to governmental activities.”  
(*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762)

**B. What agencies are subject to the CPRA?**

All state and local agencies are covered by the CPRA, except courts and the Legislature. This includes boards, commissions or agencies created by a covered agency, including advisory boards. (§ 6252(d))

Private non-profit entities delegated legal authority to carry out public functions are also subject to the CPRA if they are funded with public money. (See Op.Atty.Gen. No. 01-401 (2002))

**C. Who has access to Public Records?**

All “members of the public” (e.g., individuals and entities) have the right to access government information with certain limited exceptions. These exemptions include officers, employees and agents of state and local agencies acting within the scope of their office or employment.

**D. Why does the CPRA make a distinction between “person” and “member of the public” in Section 6252?**

The CPRA provides that an agency’s ability to consider a record confidential may be waived if that same record has already been disclosed to a “member of the public.” The distinction simply clarifies that a waiver will not occur if the record is shown to a government official acting in his or her official capacity. (§ 6254.5)

**E. Do public officials have any special status in making CPRA requests?**

No. An elected member or officer of any state or local agency is entitled to access to public records on the same basis as any other person. The only exception is the District Attorney, who may not be denied access to certain investigative records that would otherwise be exempt. (See §§ 6262, 6264 and 6265)

**F. Does the media or a person who is the subject of a public record have any special status in making CPRA requests?**

No. Neither the media nor a person who is the subject of a public record has any greater right of access to public records than a person with simply an “idle curiosity.” (*Marylander v. Superior Court* (2002) 81 Cal.App.4<sup>th</sup> 1119; *California State University v. Superior Court* (2001) 90 Cal.App.4<sup>th</sup> 810)

**IV. REQUESTS FOR RECORDS AND AGENCY RESPONSES**

**A. What rights do members of the public have to information?**

Any person may (a) *inspect* or (b) receive a *copy* of identifiable public records. (§ 6253)

**B. When may records be inspected?**

Records are open to inspection at all times during the *office hours* of the agency. (§ 6253) The inspection of public records does not require a written request. If only **access** to specific records is requested, it *must be given promptly*, unless there is some question about whether a particular record must be made available or is subject to an exemption.

**C. Are there any limits on record requests?**

Records must exist and be identifiable. There is no duty under the CPRA to comply with requests that prospectively seek records. Requests may describe writings by their content and do not require precise identification of the documents themselves. (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4<sup>th</sup> 159)

**D. What happens if a records request is vague?**

If there is a question about the clarity of the request, the public agency must assist the member of the public to make a focused and effective request by doing all of the following, to the extent reasonable under the circumstances:

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request;
2. Describe the information technology and physical location in which the records exist; and
3. Provide suggestions for overcoming any practical basis for denying access to the records or information sought. (§ 6253.1)

**E. When has an agency helped enough in clarifying a request?**

The agency has met its obligation if:

1. It is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester to help identify the records.
2. The records are made available.
3. The agency determines an exemption applies.
4. The agency makes available an index of its records. (§ 6253.1)

**F. Does it make a difference if a request involves the production of a huge volume of data, or, conversely, requires searching an enormous volume to data?**

Generally, no. The critical issue is whether records responsive to the request can be located with “reasonable effort.” (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4<sup>th</sup> 159; *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4<sup>th</sup> 1177) The cost of complying with a request is generally not a sufficient ground for refusing to respond to a request. (See *CBS Broadcasting, Inc. v. Superior Court* (2001) 91 Cal.App.4<sup>th</sup> 892 [estimated cost of over \$43,000 to respond to request did not justify refusal to provide identifiable records]).

On the other hand, a voluminous request or a search that requires looking for the proverbial “needle in the haystack” may constitute an undue burden under the balancing test of Section 6255, if the public interest served by the request is minimal compared to the scarce public resources necessary to comply with the request.

**G. Does the purpose of the request make a difference?**

Generally, no. The purpose of the requesting is generally irrelevant. (*California State University v. Superior Court* (2001) 90 Cal.App.4<sup>th</sup> 810) Thus, requests by a commercial entity solely for commercial purposes does not diminish the public interest inherent in the material requested. (*Connell v. Superior Court* (1999) 56 Cal.App.4<sup>th</sup> 601) However, courts have cautioned the public that the purpose of the CPRA is not primarily for facilitating research. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4<sup>th</sup> 1008)

**H. Is an agency required to create a document or compile a list in response to a PRA request?**

Generally, no. An agency's obligation is to make records available responsive to a request, not to create documents or to compile lists that otherwise do not exist. One exception to this rule is with respect to the extraction of information from electronic records provided that the requester pays the reasonable to the necessary programming and computer services. (See Section IV(L) below.)

**I. May an agency impose reasonable restrictions on the manner of inspection?**

Yes. The right of inspection is not an inflexible demand on the agency irrespective of the consequences. There is an *implied rule of reason* that enables the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation, or accidental damage, to prevent inspection from interfering with the orderly function of the agency's office and its employees, and generally to avoid chaos in record archives. (*Bruce v. Gregory* (1967) 65 Cal.2d 666)

Reasonable inspection regulations may include:

1. Requiring a written request for records or at least proof of the identity of the requester.
2. A mutually agreeable time for the inspection to minimize impacts on and interference with staff and their duties or the use of the records requested.
3. Staff monitoring of the inspection.

**J. How can the public inspect computer records?**

Writings subject to inspection include electronically stored information (e.g., e-mail); however, the CPRA is silent on how the inspection of such information must be accommodated. Transferring such electronic records to a diskette for desktop computer viewing is one possible response to this dilemma.

**K. Can an agency just say "no" to a request?**

No. A denial must be in writing and include the reason for non-disclosure. The denial notification should cite the specific exemption under the CPRA or other state or federal law, and, if applicable, demonstrate that on balance, there is a predominant public interest in non-disclosure under Section 6255. The name and title of the official responsible for denying access must be included in the denial notice. (§§ 6253(d) and 6255)

**L. What are the basic rules for obtaining copies of records?**

1. **Any person may receive a copy of any identifiable public record.** Upon request, an exact copy must be provided unless it is impracticable to do so.
2. **10-day initial response.** An agency must determine within 10 days after the *receipt* of a request whether the request seeks copies of identifiable public records that may be disclosed and must promptly notify the person making the request of this determination.

**Note:** This is the deadline to respond to a request for a *copy* of a record not to simply *inspect* a record. The CPRA does not provide a specific time period to respond to inspection requests, so subject to the implied rule of reason and the need to review the requested records for applicable exemptions or privacy interests, inspection requests should be complied with “promptly.”

3. **Extension of time limit.** In *unusual circumstances*, the time limit to initially respond may be extended by written notice to the person making the request setting forth the reasons for the extension and the date on which a determination is expected to be made. No such notice shall specify a date that would result in an extension for more than 14 days. "Unusual circumstances" includes (a) the need to search for records in field or separate offices, (b) the need to search through a voluminous amount of records, (c) the need to consult with another agency with a substantial interest in the record, and (d) the need to compile data or to create a computer program to extract the data.

**Note:** The 10-day rule (and 14-day extension) only applies to the notification as to whether records will be made available. It does not mean that records must be produced within this period; however, the CPRA does require that records be made available promptly. (§ 6253(b))

4. **Copying costs.** An agency may withhold producing copies of records until the requester pays the *direct costs of duplication* or a *statutory fee*, if applicable. (§ 6253(b))
  - a. **Direct costs of duplication** means the cost of running the copying machine and conceivably also the expense of the person operating it. It does not include staff time associated with the ancillary tasks of retrieval, inspection, redacting and handling. (*North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4<sup>th</sup> 144)
  - b. **A statutory fee** is one expressly established pursuant to a federal or state statute and not an “ordinance”. However, the California

Attorney General has opined that counties may charge a fee higher than direct costs provided such fee does not exceed the amount reasonably necessary to recover the cost to the county of providing the copy. (85 Ops.Cal.Atty.Gen. 225 (2002))

5. **Records in an electronic format.** These records must be made available in any electronic format in which the agency holds the information. Each agency must provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication is limited to the direct cost of producing a copy of a record in an electronic format (e.g., the cost of the diskette).

A requester bears the cost of producing a copy of the record, including cost to construct a record, and the cost of programming and computer services whenever:

- a. The record is produced only at otherwise regularly scheduled intervals.
- b. The request requires data compilation, extraction, or programming to produce the record.

There is no requirement to release an electronic record if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software. (§ 6253.9)

**M. How should the agency respond if there is an applicable exemption?**

If a record falls within one of the exemptions listed in the CPRA, or is withheld because the public interest in nondisclosure clearly outweighs the public interest in disclosure, the agency must notify the requester of the reasons for withholding the record, but is not required to provide a list of each record withheld. (*Haynie v. Superior Court* (2001) 26 Cal.4<sup>th</sup> 1061)

**N. What if only part of a record is exempt from disclosure?**

If only part of a record is exempt from disclosure, the agency must redact the document to allow disclosure of the non-exempt portions of the record. (§ 6253(a))

**Note:** The fact that it is time-consuming to redact a record does not eliminate the need to do so, unless the resulting redacted record would be of little value to the requester.

**O. Can an agency adopt guidelines or requirements that differ from the CPRA?**

Yes. The provisions of the CPRA are *minimum* standards. Agencies are free to adopt procedures that allow for *faster* or *greater* access to records than those prescribed in the CPRA. (§ 6253(e))

**P. Is an agency required to adopt its own procedures or guidelines for complying with the CPRA?**

Generally, no, except for certain state agencies and a few local agencies listed in Section 6253.4. (See Appendix B – Sample Agency Public Records Access Guidelines)

**V. EXEMPTIONS**

**A. May an agency disclose a record listed as exempt in the CPRA?**

Generally, yes. Most exemptions are discretionary. An agency is allowed to give more extensive access unless a contrary intent is clearly expressed in the CPRA.

**B. Can there be selective disclosure?**

No. If a record is disclosed to a “member of the public”-- a person with no particular official role or special legal entitlement to it -- that record cannot be withheld from other members of the public.

There are some exemptions from the selective disclosure prohibition, however, such as disclosures made pursuant to the Information Practices Act (Civil Code § 1798 *et seq.*) and disclosures made to another governmental agency that agrees to treat the records as confidential. (§ 6254.5)

**C. What are the most frequently used exemptions? (§ 6254)**

1. Preliminary and temporary drafts, notes and memoranda.
2. Pending litigation documents.
3. Private personal information.
4. Investigative, security and intelligence information.
5. Privileged and otherwise confidential information (such as education records).
6. The public interest balancing test.

CPRA exemptions are narrowly construed, and the agency opposing disclosure bears the burden of proving that one or more exemptions apply in a particular case. (*STI Outdoor LLC v. Superior Court* (2001) 91 Cal.App.4th 334)

**D. Preliminary Drafts and Memoranda. (§ 6254(a))**

The draft/memo exemption is very narrow. It applies only to documents that are “pre-decisional” (i.e., the contents contribute to the reaching of some administrative or executive determination). It also applies only to documents not customarily retained “in the ordinary course of business.”

1. **Is the possibility that a draft may be revised before being submitted for formal action sufficient justification for a preliminary draft exemption?**

No. The fact that a document has not yet been formally approved by some decisional body, and is “tentative and liable to error or alteration” is not justification for withholding them from the public.

**E. Pending Litigation Records. (§ 6254(b))**

In general, the exemption only applies to documents created *after the commencement* of the litigation. It does not apply to records that were created in the ordinary course of the agency’s business or for other purposes prior to the litigation.

- A *claim form* filed under the Tort Claims Act would not be exempt.
- An *arrest report* that may later become relevant to defending a suit for excessive force by a police officer is not exempt, because it pre-dates the litigation and was not created for litigation purposes.

Once the litigation is concluded, the exemption no longer applies. (However, the attorney-client privilege may be ongoing and provide an alternative basis for nondisclosure.)

1. **Must the details of a lawsuit settlement be disclosed?**

Yes. An agreement by a public agency with a settling party not to disclose records pertaining to a settlement cannot be enforced against a request under the CPRA. Not only are the monetary and other terms of the settlement disclosable, but also other documents including medical records and claims investigations.

**F. Personnel, Medical or Similar Records. (§ 6254(c))**

**1. What records does Section 6254(c) applies to?**

- a. The personnel files of a public agency's own employees.
- b. Records of other persons for whom an agency maintains personally significant information.

**2. Are all records in a personnel file exempt?**

No. The fact that information is in a personnel file does not necessarily make it exempt information.

For example, the kind of information that would be included in a resume, curriculum vitae or job application which demonstrate a person's fitness for his or her job in terms of education, training or work experience ordinarily are not exempt from disclosure. (*Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788)

**3. What kind of information about government job applicants is public?**

No court has yet addressed this question; however, the rule in the *Eskaton* case probably applies only to information about actual employees. It does not require the disclosure of government job applications, especially if the applicants have asked for, or applied upon assurances of, the confidential treatment normally accorded such processes.

**4. What kind of information about a current employee's job status is public?**

Letters or memoranda of a public employee's appointment to a position, rescission, reclassification, etc., are not exempt. They contain no personal information, regard business transactions and are manifested in the public employee's employment terms.

Employment contracts for public officials and employees are public records and are not exempt under the provisions of §§ 6254 and 6255. (§ 6254.8)

**5. What information about a government employee's misconduct or discipline is public?**

Complaints against the conduct of public employees, if they are submitted in confidence are probably protected from disclosure by the official information privilege in Evidence Code § 1040, to protect the interests of the complaining party. But if they deal with serious matters, and are

confirmed by the agency's investigation, the public interest dictates disclosure. (Exception: Police and law enforcement personnel -- a uniquely protected class.)

**G. Law Enforcement Investigation and Intelligence Records. (§ 6254(f))**

1. This exemption generally protects crime reports, investigative files, intelligence files and security procedures. *Once the investigatory exemption applies, it applies indefinitely, even after the investigation is closed.* Exceptions: crime reports may be released to victim, victim's representative or insurance company suffering a loss.
2. In the post-9/11 era, courts have shown a greater inclination to allow law enforcement agencies to withhold records pertaining to investigations.
  - Withholding of records related to a detention that did not result in an arrest upheld under investigative records exemption. Protection of such records extends beyond situations where the likelihood of enforcement has ripened into something concrete and definite and includes "everyday" and "routine" police activity. (*Haynie v. Superior Court* (2001) 26 Cal.App.4th 1061)
  - No requirement to disclose a post-investigative closing report that contains the investigators' opinions, thoughts and conclusions regarding potential criminal misconduct of a police officer. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169)
3. Agencies are required to disclose: names, addresses, witnesses (not confidential informants), date, time, location, diagrams, statements, factual circumstances surrounding the incident for crimes of:

Arson	Larceny
Burglary	Robbery
Carjacking	Vandalism
Explosion	Vehicle theft
Fire	Crimes defined in § 13960(c)

4. Law enforcement agencies must also make public the following arrestee information:
  - Full name and occupation
  - Date of birth
  - Color of eyes and hair
  - Sex, height and weight
  - Time and date of booking
  - Location of arrest

- Factual circumstances surrounding the arrest
- The amount of bail set
- The time and manner of release
- The location where the individual is currently being held
- All charges the individual is being held upon
- Any outstanding warrants or parole or probation holds

5. An agency may withhold or redact the following:

- Name/addresses of confidential informants
- Information that might endanger the safety of a witness or person involved
- Information that might endanger the successful completion of the investigation or related investigation
- Investigator's analysis or conclusions

6. Calls for service.

Subject to the restrictions of Penal Code § 841.5, an agency may release the following information: the time, substance, and location of all complaints or requests for assistance received by an agency and the time and nature of the response thereto, including the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved.

7. Victim names.

These are not public for most sex crimes, child endangerment, spousal abuse and the like because of possible interference with civil rights.

#### **H. Privileged, Confidential or Otherwise Exempt Records. (§ 6254(k))**

Subsection (k) is sort of a *mini* catch-all exemption in that it exempts from disclosure records that are prohibited or otherwise exempt from disclosure under federal or state law. This includes records that are privileged under the California Evidence Code, the attorney-client privilege, and, of course, the extensive list of exemption records set forth in §§ 6275 – 6276.48.

#### **I. Education Records. (§ 6254(k))**

While the CPRA does not contain an explicit reference to records maintained by public educational institutions, many student records at such institutions are protected from disclosure by the exemption in subdivision (k) for records the disclosure of which is prohibited by federal or state law.

School districts, charter schools, community colleges, and four-year colleges generally are subject to the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). FERPA requires educational institutions to maintain the privacy of student education records. "Education record" is defined broadly to include most information maintained by an institution about a student who has attended the institution. As such, FERPA has been held to preempt conflicting state law that would otherwise require the disclosure of such records. (*Rim of the World Unified School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393)

FERPA contains a number of exceptions. Most of these exceptions are exercised at the discretion of the educational institution and, more importantly, do not cause a student's records to become public information when exercised. However, it is possible that, for community colleges and four-year colleges, records identified under FERPA as "directory information" may be treated as public records by a court. "Directory information" may include information such as a student's name, photograph, address, honors received, and dates of attendance. Each institution designates what is directory information for that institution and each student may notify the institution that he/she does not wish to have directory information disclosed. As to directory information for which a student has not objected to disclosure, a court may prevent the institution from arbitrarily deciding when to release the information and treat it as a public record.

K-12 schools are slightly different, as they are also subject to state laws on the privacy of student records. State law limits the disclosure of directory information by K-12 institutions to non-profit businesses and persons, excepting media and prospective employers. (Ed. Code § 49073.) K-12 schools must also identify the individuals, officials, and organizations to whom they will disclose directory information. If a requester is not described on this list, it is unlikely that a court would consider the directory information to be a public record.

K-12 school must provide upon request pupil records relevant to legitimate educational interests to the following persons:

1. school officials and employees;
2. members and specific assistants of a school attendance review board;
3. pupil's current or next intended school or school district (subject to pupil notice, review and challenge rights);
4. state and federal auditors of educational programs;
5. juvenile justice officials;
6. parents of dependent students;
7. pupils at least 16 years old and have completed 10th grade;
8. district attorneys, judges, and probation officers participating in truancy programs;
9. law enforcement agencies for actions against a parent/guardian violating compulsory education law;

10. probation officers or district attorneys conducting criminal investigations concerning declaring a person a ward of the court or violation of probation;
11. certain law enforcement officials conducting kidnapping/abduction investigations; and
12. issuers of court orders or valid subpoenas. (Ed. Code §§ 49076, 49077)

K-12 schools also have the discretion to disclose pupil records in selected circumstances involving (a) health or safety emergencies; (b) financial aid applications; (c) voting registration officials; (d) school accrediting organizations; (e) education studies organizations; and (f) private schools. (Ed. Code § 49076) In many cases, any person obtaining pupil records including personally identifiable information about a student must maintain the confidentiality of the information by not further disclosing it without the parent/eligible student's written consent. Recipients of pupil records pursuant to the written consent of the parent/eligible student must receive notice that the transmission of any information in these records absent written consent is prohibited. (Ed. Code § 49075)

**Note:** The Education Code contains a number of provisions similar to the CPRA regarding the disclosure of public records, but many of these provisions impose a duty that differs from that of that of the CPRA. For example, parents (both custodial and non-custodial) have the right to inspect and review pupil records no later than five days after their request, which can be oral or in writing. (Ed. Code §§ 49069, 56504). School districts and other local educational agencies must provide assistance explaining and interpreting pupil records upon request. (Ed. Code §49069; 34 CFR § 99.10(c)) Only custodial parents may challenge the contents of pupil records.

School districts may charge a parent requesting documents for the actual cost of copying pupil records (not including search and retrieval time) except when such costs "effectively prevent[] the parent from exercising the right to receive such copies." (Ed. Code § 56504)

Schools must maintain a log, open only to parents and school officials responsible for the maintenance of pupil records (and certain state and federal government officials), which lists those who have received information from a student's record and how the information was used, except when the recipient of such information is the parent/eligible pupil, a party to whom directory information is released, a party receiving written consent from the parent/eligible student, or school officials and employees having a legitimate educational interest in such information. (Ed. Code § 49064)

## J. The Public Interest Exemption. (§ 6255)

Public agencies and officials also have some rights. Based on the facts of a particular situation, an agency may withhold a record if it can demonstrate the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record.

1. **The deliberative process exemption.** Over the years a judicially created exemption has been developed that protects certain contacts or communications between public officials and the public.
  - A request for five years' worth of information from the governor's appointment calendars was barred by Section 6255, because such scrutiny would interfere with the governor's deliberative processes and deter members of the public from conferring with him without bestowing any overriding benefit on the public. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325)
  - A request for disclosure of phone numbers dialed by city council members on official business over a year's time was barred by the deliberative process privilege. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469)
  - Refusal to disclose names and qualifications of applicants for appointment to a vacant county supervisor seat upheld. (*California First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159)
2. **Other situations where public interest favored nondisclosure.**
  - Public interest in preventing regulated businesses from circumventing effective compliance investigations by obtaining auditors' procedural manuals outweighs any public interest in disclosure of the manuals. (*Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788)
  - Public interest in preventing chilling effect on complaints and protecting privacy outweighs disclosure of identities of complainants regarding airport noise. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008)
3. **When have courts found the public interest in disclosure outweighs government interests?**
  - Monitoring regulation of the application of dangerous pesticides outweighs applicators' proprietary interests in spray report data and county concerns that reports would not be candid if disclosed. (*Uribe v. Howie* (1971) 19 Cal.App.3d 194)

- Monitoring city's contracting for services and regulation of contractor's fees charged to residents outweighs city's interest in encouraging contractors to submit proprietary information justifying the need for rate increases. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762)
- Confirming facts surrounding questioned personnel practices outweighs city's interest encouraging individuals to apply for municipal employment, where requested information is not a matter of personal privacy. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332)
- Monitoring how public funds are spent outweighs county interest in keeping settlements confidential to discourage unmeritorious claims. (*Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893)
- Monitoring effectiveness of water rationing program outweighs water district's interest in protecting reputations of those given citations for exceeding water allocation. (*New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579)
- Disclosure of license agreements (including names and addresses) of persons purchasing luxury suites at sports arena outweighs privacy concerns of persons who purchased the suites. (*California State University, Fresno Assoc. Inc. v. Superior Court* (2001) 90 Cal.App.4th 810)
- Disclosure of personnel records where grounds for complaint against employee are well-founded. A finding of the truth of the complaint contained in the personnel records or the imposition of employee discipline is not a prerequisite to disclosure. (*Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4<sup>th</sup> 1041).

**K. Homeland Security Exemption. (§ 6254(aa))**

In 2002, the Legislature adopted S.B. 1643 which added new subdivision (aa) to § 6254 so that there would be no doubt in the post-September 11th era that certain records prepared by an agency that assess its vulnerability to a terrorist attack or other criminal acts are exempt from disclosure:

**(aa) A document prepared by a local agency that assesses its vulnerability to terrorist attack** or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

**L. More Exemptions.**

Other exemptions set forth in the CPRA include:

- test material for exams
- library circulation records, including internet access records
- labor negotiation instructions
- attorney-client communications
- voter registration information
- signatures on petitions for initiatives, referenda and recall
- real estate appraisals
- income tax information on most individuals and businesses (most non-profits are not exempt)
- family records relating to adoptions
- some data regarding birth certificates

**M. Waiver Of Exemptions.**

Under § 6254.5, if a public agency member, agent, officer or employee acting within the scope of his or her responsibilities discloses a public record, such disclosure waives the exemption of § 6254, § 6254.7 or similar provisions of law.

However, § 6254.5 sets forth a number of circumstances where disclosure *will not* result in a waiver. These include disclosures made: (a) under the Information Practices Act or through discovery; (b) in legal proceedings or as otherwise required by law; (c) within the scope of disclosure under other statutory schemes; (d) contrary to formal action of the legislative body that retains the record and the disclosure is not otherwise required by law; and (e) to any governmental agency that agrees to treat the disclosed material as confidential.

If a disclosure occurs by mistake or through inadvertence, an agency may take the position that the disclosure of an otherwise exempt public record does not constitute a waiver under § 6254.5. In one case, a court interpreted this provision as requiring that the employee must have acted “within the scope of his or her... employment” for there to be a “waiver,” and that the inadvertent release of information was outside the proper scope of the employee’s duties. (*Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436)

## **VI. TIPS FOR THE PUBLIC**

### **A. Tips for effectively using the CPRA.**

1. Include both a request for access and a request for copies in any written request.
2. Be sure to state a relevant time period in your request.
3. Demand a response in 10 days if requesting copies.
4. Refrain from requesting information that is clearly exempt from disclosure under the CPRA by limiting the scope of the request.
5. State the purpose of the interest served by the request.
6. Remember: monitoring an agency's performance of its duties is a more compelling interest than facilitating research.
7. Ask to review what is produced before paying for copies.
8. For voluminous requests, consider hiring a bonded copying service, particularly if there is an urgent need for the records requested.
9. Ask informally before invoking the law.
10. Try asking more than one agency.
11. Be polite -- kind words get better results.

### **B. What do you do if your request is rejected?**

1. State your rights and ask to speak to the highest-ranking official.
2. Keep a record of your contacts and the reasons you are given for the denial.
3. Get the denial in writing.
4. Write a letter to the editor about the denial.
5. Consult an attorney.

## **VII. TIPS FOR THE AGENCY**

### **A. Tips for effectively complying with records requests.**

1. Adopt local policy and guidelines to ensure consistent procedures.
2. Document the date of receipt of the request.
3. Route the request to designated employee, who in turn should notify all affected departments and employees.
4. Early retrieval and review of records allows time for an appropriate response.
5. If the purpose of the request is unclear, contact the requesting party to find out what information is really needed.
6. The fact that a request is burdensome and requires a lot of staff time and effort is not a valid basis for denial.
7. Refer questioned items to the agency's attorney.
8. If there is no California law on point, evaluate the request in light of the Freedom of Information Act ("FOIA") (5 U.S.C. § 552 et seq.)
9. Timely respond to requests.
10. If a denial is made, identify in writing the appropriate exemption and/or privilege.
11. Do not overcharge for copies.
12. Treat difficult and repetitive requests professionally.

## VIII. ENFORCING THE CPRA

### A. What happens when an agency fails to properly respond?

The ultimate legal leverage for obtaining records under the PRA is a civil action to obtain a court order for their release. There is no criminal sanction for simply refusing to provide records to a requester, although it is a felony to destroy public records.

"Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter." (§ 6258)

### B. Can a public agency preemptively go to court and have a record declared nondisclosable?

No. The litigation initiative is always with the requester. A public agency may not go to court on its own to obtain a declaratory judgment that a record is not subject to disclosure because such litigation would be a burden on the public seeking the information. (*Filarsky v. Superior Court (City of Manhattan Beach)* (2002) 28 Cal.4<sup>th</sup> 419)

### C. If a public agency denies access to records, must the requester appeal to some higher authority in the agency before taking legal action?

No. Once a requester has been turned down it is not necessary to seek administrative review prior to going to court.

### D. Legal process for enforcing the CPRA. (§ 6259)

1. File a verified petition to the superior court of the county where the records are situated and are being improperly withheld from a member of the public.
2. The court may order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.
3. The withheld record(s) are disclosed "in camera" (i.e., in the judges chambers) and the court decides the case after examining the record(s), reviewing all papers filed by the parties and listening to any oral argument or additional evidence as the court may allow.

4. If the court finds the decision to refuse disclosure is not justified under Sections 6254 or 6255, the judge shall order the public official to make the record public.
5. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its contents with an order supporting the decision refusing disclosure.
6. The review the decision of a superior court judge is by petition to the court of appeal for the issuance of an extraordinary writ against the superior court. (This is why the “superior court” is always named as the respondent in appellate decisions.)

**E. Costs and Attorney Fees.**

The CPRA mandates that a court award costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in the litigation. Prevailing on access to just one disputed record may be sufficient to justify an award of attorney fees. (*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381)

On the other hand, if the court finds that the plaintiff’s case is clearly frivolous, it may award court costs and reasonable attorney fees to the public agency.

**IX. RECENT COURT DECISIONS (Handout)**

## **X. RECORDS RETENTION ISSUES**

### **A. Controlling Statute: Government Code section 34090. (Others?)**

In comparison to the CPRA, which has generated over 80 separate statutes and growing, the *disposition* of local agency records is controlled by relatively few statutes. (Find county and local agency statutes.)

Government Code § 34090, which applies to cities, can be broken down into the following elements:

- (1) The head of a city department;
- (2) with the written approval of the legislative body and city attorney;
- (3) may destroy any city record;
- (4) after the record is no longer required;
- (5) provided that:
  - (a) the record is not less than two years old;
  - (b) the record is not required to be kept by some other statute;
  - (c) the record is not the minutes, ordinances or resolutions of the legislative body or of a city board or commission, which records must be permanently retained.

Suffice to say that the brevity of section 34090 puts the onus on city records custodians to fathom the requirements of elements (3) through (5).

### **B. What are “records” for the purposes of the controlling retention and destruction statutes?**

In light of the fact, discussed below, that city officers and employees can be fined and possibly imprisoned for improperly destroying public records, it is somewhat disconcerting to learn that, unlike the CPRA, Section 34090 provides no statutory definition of what constitutes a “record.” When presented with this dilemma, the California Attorney General offered the following definition of “record” for the purposes of section 34090, drawn largely from earlier judicial opinions:

“A thing which constitutes an objective lasting indication of a writing, event, or other information which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or

convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference." (64 Cal.Op.Atty.Gen. 317, 326 (1981))

While the Attorney General's definition of section 34090 "records" and the Legislature's definition of "public records" under section 6252 are very similar, there are some important distinctions. One particular difference involves preliminary drafts, notes or memoranda. Under the CPRA, such items may be disclosable for inspection *even if* "not retained by the public agency in the ordinary course of business" where the public interest in disclosure outweighs the public interest in withholding the records.<sup>1</sup> On the other hand, such items potentially fall outside the definition of "records" ascribed to section 34090 by the Attorney General if they are not "retained for the purpose of preserving its informational content for future reference." Thus, such preliminary drafts, notes or memoranda could be destroyed without impunity or having to follow the procedures outlined in section 34090, but if they were maintained in a file at the time of a public records request they could be potentially disclosable under the CPRA. In sum, the subtle distinctions between the definition of what is a "record" under the two statutory schemes only serves to underscore the critical importance of developing a standardized records retention program for the treatment of public records.

### C. **Developing a records retention schedule.**

The development and implementation of a comprehensive records management program is a complex subject beyond the scope of this paper. But if local agencies have delayed in introducing or updating their records management program for monetary reasons, they may want to reconsider their position, since by doing so they are probably not saving any money. Effective records management practices *pay* benefits in the form of increasing staff efficiency and reducing expenditures for filing equipment and space. Most importantly, from a legal perspective, the proper maintenance of records can assist in supporting or defending the agency's position on litigation matters and may deflect attempts to discredit an agency in the eye of a judge or a jury on how the agency manages its records. (See People v. Zamora (1980) 28 Cal.3d 88 [California Supreme Court upheld sanctions against prosecutors where police complaint records were improperly destroyed by the City of Los Angeles, which failed to follow "rigorous and systematic procedures" in compliance with section 30490])

The central component of an effective records management program is the records retention schedule. This schedule effectively serves as the agency's authority to receive, create, retain, and dispose of official public records. Provided the schedule is specific and consistently followed, courts will accept a

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<sup>1</sup> Govt. Code § 6254(a).

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retention schedule as establishing an agency's "ordinary course of business." (See generally, *People v. Memro* (1995) 11 Cal.4th 786 [where records were kept 3 years beyond 2-year statutory limit, defendant had burden to show bad faith in the destruction of records])

**D. Assistance in compiling lists of records required to be kept by statute.**

One key step in developing retention schedules that long confounded municipal records custodians was the requirement in section 30490 that "records required to be kept by statute" could not be destroyed unless that "other" statute also authorized the records to be destroyed. The task of compiling these "other statutes" means sifting through the growing body of state and federal laws that require the retention of records for longer than the two years prescribed by section 30490. Fortunately, the City Clerks' Association of California and the League of California Cities have made this task easier by preparing some basic guidelines as to the minimum legal requirements for the retention of local government records. (See "Local Government Records Retention Guidelines," August 1999, City Clerks' Association of California. It is available online at the California Secretary of State's website under the section devoted to the Local Government Records Retention Program: [http://www.ss.ca.gov/archives/level3\\_locgovrec.html](http://www.ss.ca.gov/archives/level3_locgovrec.html). According to this website, the Guidelines will be updated periodically.)

While these guidelines are very comprehensive and many cities simply adopt them wholesale, as noted in the official disclaimer, they are essentially a compilation of common records and retention periods and are not tailored to reflect any special administrative, operational, financial or historical needs of a jurisdiction. Therefore, local agency records custodians will still need to go through the process of inventorying and appraising the value of specific records when fashioning or modifying the agency's retention schedule. This process will likely require negotiations with the agency's various records custodians to realistically assess how long particular records should be kept beyond any requisite statutory period.

Shortly after the City Clerks' Association and the League produced their recommended guidelines, the Legislature, realizing that city and county agencies do not have standardized records programs, adopted Government Code § 12236. This statute directed the Secretary of State to create a new Local Government Records Program administered by the California State Archives. While this is a nascent project, the State Archives and Museum Division has already produced some helpful records management guidelines, and has compiled lists of records management resources and typical records retention periods. This information is available on the internet at the Secretary of State's website.

**E. Procedures for destroying records.**

Once records have fulfilled their administrative, fiscal, or legal purposes, they

should be timely destroyed in accordance with the agency's adopted records retention schedule. The standard procedure for destroying records outlined in section 34090 is straightforward. The records proposed to be destroyed should be generally listed in a resolution that is adopted by the legislative body. Since such action also requires the written consent of the agency's attorney," the attorney should either sign the resolution itself or a separate approval document may be attached as an exhibit to the legislative body's resolution.

Section 34090 is not the only statute authorizing the destruction of municipal records. Government Code § 34090.5 establishes a comprehensive procedure for destroying records that typically are no longer necessary for normal operations but may be worth maintaining for future reference, albeit in a space saving format. Traditionally referred to as "microfilming," the statute has kept up with the times and now addresses a wide range of technologies that can accurately reproduce the original record. As long as the statute's procedures are strictly followed (including maintaining at least two copies of the original record -- one in a safe place and the other presumably available for the public or agency staff), the statute allows records officers to destroy records without the approval of the legislative body or agency attorney.

With respect to "duplicate" records, Government Code § 34090.7 permits a legislative body to adopt its own procedures for destroying such duplicates even if they are less than two years old, provided they are no longer required for agency business.

**F. Potential liability for improperly destroying records.**

If greater efficiency, potential costs savings and enhancing the agency's litigation posture are not sufficient justification for records custodians to update their records management practices, perhaps the prospect of potential personal liability and imprisonment may be grounds for reconsideration. Government Code § 6200 provides that any city officer having the custody of any record who willfully steals, removes, secretes, destroys, mutilates, defaces, alters or falsifies any record or permits any other person to do the same, may be punished by imprisonment for up to four years. The requirement that the action be "willful" has been interpreted as meaning nothing more than doing what is forbidden by the statute. (People v. Pearson (1952) 111 Cal.App.2d 9) In other words, a showing of criminal intent is not required. Government Code § 6201 broadens the net of potential liability by authorizing imprisonment for up to one year and a fine of up to \$1000 for any agency employee (i.e. non-officers) who commits any of the acts listed in § 6200. In short, any agency officer or employee that has access to original records and improperly removes, destroys or alters such records can be criminally charged with misconduct.

**G. Conclusions.**

When it comes to records retention issues, the adage, "it ain't over until it's over" has some special connotations. The proliferation of government paperwork and the potential for litigation stemming from this paper trail require that agencies reexamine their records management practices to ensure that information is available when and where it is needed, in an organized and efficient manner, from creation until final disposition. And if the final disposition of such records involves their destruction, by all means, make sure that such action is done in strict compliance with controlling statutes such as Government Code sections 34090 and following. .

## CPRA CASE STUDIES

1. A man walks up to the counter of a local agency and asks to inspect copies of the agenda and minutes for the prior week's board meeting. "Sure," responds the agency employee at the counter. "Could you please fill out this form, sign your name, and I'll get them right away."
2. A member of the public requests to see a video of a demonstration safety training conducted by the fire department at a recent agency meeting. The agency does not normally video tape its meetings, but it did on this occasion. An agency employee responds that the CPRA only applies to written documents, and besides, the agency does not have a VCR for public use.
3. After receiving the denial in No. 2, the member of the public asks to speak to the employee's supervisor, who tells her the same thing.
4. Mr. X. Terminator, who owns a local pest control company, makes a written request to the city's health services department for all public records identifying the properties in town that have complained about Africanized-bees within the past few months. When asked the purpose of the request, Mr. T responds that he's just keeping tabs on insect activity in the town in general and also thought that he might contact the owners of these troubled properties to offer his services. After hearing this, the records clerk refuses to provide the records.
5. Mr. Kumeta mailed a CPRA request to the city clerk for public records pertaining to the city's relationship with an Earth Day festival held in a city park. An employee of the city clerk's office called him back and told him that her office had two responsive records, and that other departments may have other records but that under the city's CPRA policy he would have to contact them directly. When asked how many departments the city had, the woman responded at least 34, maybe more. Rather than paying postage for 34 more letters, Mr. Kumeta filed a lawsuit.
6. Ms. Friendly of the local Welcome Wagon calls the county assessor's office and asks for a CD-Rom of all residential property sales in the county last month so that her organization can make these new residents feel right at home.

7. Jim Gadfly files a written CPRA request asking for records pertaining to settlements of all injury claims against the agency for the past year. The agency's new legal counsel, Emma Lee Tigous, promptly fires off a response letter objecting to the request on the grounds that it is "vague and unintelligible" as to the meaning of "injury," and therefore no records will be produced.
8. After waiting nearly one month for an agency to identify public records responsive to her request, upon receipt of the agency's response letter, Ms. Impatient calls the agency to arrange a time to inspect the identified records the following week. The clerk's office tells her: "No one is available to watch you inspect the records that week. Can you come by our office the week after?"
9. After noticing a closed session item on the agency's agenda regarding a meeting with a security consultant to discuss threats to public facilities, the owner of a local security consulting business, Alvin Q. Ueda, requests a copy of the agency's contract with the consultant.
10. Mr. Ueda then goes to the counter of the building department and asks to inspect the plans for the corporate research facility which houses Sirin R&D, which company he states is a client of his firm.
11. The *Reader* is a weekly newspaper that prides itself on investigative reporting and exposing governmental fraud and waste. Through an anonymous tip, the *Reader* learns that the city had hired a former waitress and cheerleader, Elena Christiano, who allegedly had a close personal relationship with an executive of a professional sports team to serve as a "deputy" press secretary for the mayor for two years while the city and the team were in negotiations over a new stadium for the team. In order to ascertain what duties Christiano actually performed and the costs to the public of having her on the payroll, the *Reader* requested the following documents:
  - A. All claims for workers' compensation or disability benefits.
  - B. All correspondence to and from Christiano.
  - C. All e-mails to and from Christiano.
  - D. All telephone and cellular telephone bills paid by the City for telephones used by Christiano.

How should the city respond to each request?

- A. Workers' compensation or disability benefits.

- B. Correspondence.
- C. E-mails.
- D. Telephone and cellular telephone bills.