



**THE PEOPLE'S BUSINESS:
A GUIDE TO THE PUBLIC RECORDS ACT**

August 2011 Supplement

This supplement to *THE PEOPLE'S BUSINESS: A Guide to the California Public Records Act* discusses changes in the law that have taken effect since the guide's original publication in 2008. The supplement covers both statutory changes and appellate decisions that affect the California Public Records Act. For ease of reference, these updates direct the reader to the chapter, subheading and page of the main text. An updated Table of Frequently Requested Information and Records is also included. Our objective is to provide the most complete and current resource to assist local agencies in complying with the requirements of the Act and other related state laws. This supplement is to be used in conjunction with the original publication.

This supplement is made available thanks to the hard work and dedication of the City Attorneys' Department's California Public Records Act Committee and League Staff:

Gregory P. Priamos, Committee Chair
City Attorney, Riverside

Eric W. Danly
City Attorney, Cloverdale & Petaluma
Meyers Nave

Craig Labadie
City Attorney, Concord

Donald Larkin
Assistant City Attorney, Palo Alto

Joseph M. Montes
City Attorney, Alhambra, Moorpark & Santa Clarita
Burke Williams & Sorensen LLP

Juli Christine Scott
Chief Assistant City Attorney, Burbank

Mario U. Zamora
Assistant City Attorney, Hanford
Griswold, LaSalle, Cobb, Dowd & Gin, LLP

Debra Margolis
City Attorneys' Department President and Liaison
City Attorney, Pleasant Hill

League Staff:
Patrick Whitnell, General Counsel
Koreen Kelleher, Deputy General Counsel
Janet M. Reynolds, Legal Secretary/Office Manager

CHAPTER 1: INTRODUCTION AND OVERVIEW

■ ACHIEVING BALANCE

Page 3 – Insert the following at the end of the paragraph:

Certain provisions in the Act help maintain the balancing scheme established under the Act and the cases interpreting it by prohibiting state and local agencies from making arrangements with other entities that could limit access to public records. For example, state and local agencies may not allow another party to control the disclosure of information otherwise subject to disclosure under the Act. [Gov. Code, § 6253.3.] Also, state and local agencies may not provide public records subject to disclosure under the Act to a private entity in a way that prevents a state or local agency from providing the records directly pursuant to the Act. [Gov. Code, § 6270 subd. (a).]

*Page 3 – Add the following **Practice Tip**:*

The Act provides that a third party cannot control disclosure of public records. So, for example, even though contracts or settlement agreements may require a city to give notice to another party that a request for the contract or settlement agreement has been made, the other party to such contract or settlement agreement cannot dictate whether the record is in fact a public record.

CHAPTER 2: THE BASICS

■ WHAT ARE PUBLIC RECORDS?

Page 6 – Insert a new footnote at the end of the second paragraph:

Gov. Code, § 6253.9. See also, discussion concerning production of electronic records and communications in Chapter 6.

Page 6 – Insert a new sentence at the end of the second paragraph:

However, documents that an agency previously possessed, but does not actually or constructively possess at the time of the request may not be subject to disclosure. [See *Am. Small Bus. League v. United States SBA* (2010) 623 F.3d 1052, (analyzed under FOIA). See “Practice Tip,” p. 30 of the Guide which discusses treatment of FOIA precedent.]

Page 6 - Insert a new third paragraph after the second paragraph in this section:

In addition to defining records subject to the Act, the Act also expressly makes particular types of records subject to the Act, or subject to disclosure, or both. For example, the Act provides that contracts of state and local agencies that require a private entity to review, audit or report on any aspect of the agency are public records, to the extent the contract is otherwise subject to disclosure under the Act. [Gov. Code, § 6253.31.] Specified pollution information that state or local agencies require applicants to submit, pollution monitoring data from stationary sources, and records of notices and orders to building owners of housing or building law violations are also public records. [Gov. Code, § 6254.7, but see *Masonite Corp. v. County of Mendocino Air Quality Management District* (1996) 42 Cal. App. 4th 436, regarding trade secret information that may be exempt from disclosure.] Employment contracts between state and local agencies

and any public official or employee are public records subject to disclosure. [Gov. Code, § 6254.8.] Itemized statements of the total expenditures and disbursements of judicial agencies provided for under the State Constitution are open for inspection. [Gov. Code, § 6261.]

■ WHO CAN REQUEST RECORDS?

Page 7 - Replace the entire paragraph with the following:

All “persons” have the right to inspect and copy disclosable public records. A “person” need not be a resident of California or a citizen of the United States to make use of the Act. [*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.] “Persons” include corporations, partnerships, limited liability companies, firms or associations. [Gov. Code, § 6252, subd. (c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.] Often, requesters include persons who have filed claims or lawsuits against the government, or who are investigating the possibility of doing so, or who just want to know what their government officials are up to. Local agencies and their officials are entitled to access public records on the same basis as any other person. [Gov. Code, § 6252.5.] With certain exceptions, neither the media nor a person who is the subject of a public record has any greater right of access to public records than any other person. [Gov. Code, § 6252.5; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271.] Further, local agency officials may access public records of their own agency that are otherwise exempt when authorized to do so as part of their official duties. [*Marylander v. Superior Court* (2002) 81 Cal.App.4th 1119; *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.661; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271. See “Information That Must Be Disclosed,” p. 22; “Requests for Journalistic or Scholarly Purposes,” p. 24.] When the members of a legislative body of a local agency are authorized to access a writing of the body or of the agency in the administration of their duties, the local agency shall not discriminate between or among any of those members as to which writing or portion thereof is made available or when it is made available. [Gov. Code, § 6252.5. See also Gov. Code, § 54957.2.]

CHAPTER 3: RESPONDING TO A PUBLIC RECORDS REQUEST

■ TIMING OF THE RESPONSE

Page 11 - Replace the paragraph with the following:

Time is critical in responding to public records requests. A local agency must respond promptly, but no later than ten calendar days from receipt of the request, to notify the requester whether records will be disclosed. [Gov. Code, § 6253, subd. (c).] The Act is silent as to whether a local agency has the same no-later-than-ten day window to evaluate whether the requested records are subject to disclosure when a requester merely wishes to inspect records. However, it is generally assumed that a local agency is afforded a reasonable period of time to retrieve requested records and review them to determine whether they must be produced for inspection, even when copies are not sought. If the request is received after business hours or on a weekend or holiday, the next business day may be considered the date of receipt. The ten-day response period starts with the first calendar day after the date of receipt. [Civ. Code, § 10.] If the tenth day falls on a

weekend or holiday, the next business day is considered the deadline for responding to the request. [Civ. Code, § 11.] The time limit for responding to a public records request is not necessarily the same as the time within which the records must be disclosed to the requester. [See “Timing of Disclosure,” p. 13.]

■ NO DUTY TO CREATE A RECORD OR TO CREATE A PRIVILEGE LOG

Page 13 - Replace the first paragraph in this section with the following:

A local agency has no duty to create a record that does not exist at the time of the request [Gov. Code, § 6252, subd. (e); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061; 71 Ops.Cal.Atty.Gen. 235 (1988).] (But see Chapter 6 concerning duties and obligations with respect to electronic records). There is also no duty to reconstruct a record that was lawfully discarded prior to receipt of the request.

FEES

Page 14 - Add to the end of Footnote 46:

Public Contracts Code sections 10111.2 and 20103.7; 8 CCR section 16402.

CHAPTER 4: EXEMPTIONS

■ SPECIFIC EXEMPTIONS

Attorney Client Communications and Attorney Work Product

Page 19 - Insert a new second paragraph in this section:

The attorney client privilege protects from disclosure the entirety of confidential communications between attorney and client, as well as among the attorneys within a firm representing such client, including factual and other information not in itself privileged outside of attorney client communications. [*Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725; *Fireman’s Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37.] The fundamental purpose of the attorney client privilege is preservation of the confidential relationship between attorney and client. It is not necessary to demonstrate that prejudice would result from disclosure of attorney client communications in order to prevent such disclosure. [*Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725.] When the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege. [*Clark v. Superior Court* (2011) 196 Cal.App.4th 37.] Unlike the exemption for pending litigation, attorney client privileged information is still protected from disclosure even after litigation is concluded. [*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363; see “Pending Litigation or Claims,” p. 28.] But note, the attorney client privilege will likely not protect communication between a public employee and his or her personal attorney if that communication occurs utilizing a public entity’s computer system and the public entity has a computer policy that indicates the computers are intended for

the public entity's business and are subject to monitoring by the employer. [*Holmes v. Petrovich Development Co. LLC* (2011) 191 Cal.App.4th 1047.]

Page 19- Replace the final paragraph in this section with the following:

The courts have established a narrower rule governing disclosure of attorney bills. An attorney's billing entries remain exempt from disclosure under the attorney client privilege or attorney work product doctrine insofar as they describe an attorney's impressions, conclusions, opinions, legal research or strategy. [*U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189; *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639.] Similarly, retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney client privilege. [Bus. & Prof. Code, § 6149 (a written fee contract shall be deemed to be a confidential communication within the meaning of section 6068, subdivision (e) of the Business & Professions Code and section 952 of the Evidence Code); Evid. Code, § 952 ("Confidential communication between client and lawyer"); Evid. Code, § 954 (attorney client privilege).] A local agency may waive the privilege and elect to produce the agreements. [Evid. Code, § 912. See also Gov. Code, § 6254.5 and "Waiver", p. 13.] Only the local agency's governing board may waive the privilege. [See Rules Prof. Conduct, rule 3-600.]

*Page 19 – Add the following **Practice Tip**:*

The attorney client privilege does not protect entire attorney bills from disclosure, only substantive attorney communications such as legal conclusions, research, or strategy. Some agencies simplify redaction of attorney bills and production of non-exempt bill information in response to requests by requiring that non-exempt portions of attorney bills, such as the name of the matter, the invoice amount, and date, are contained in separate documents from privileged bill text.

Page 22 - Add the following sub-heading and paragraph:

Information Technology Systems Security Records

An information security record is exempt from disclosure, if, on the facts of a particular case, disclosure would reveal vulnerabilities to attack, or would otherwise increase the potential for an attack on a public agency's information technology system. Disclosure of records stored within a public agency's information technology system that are not otherwise exempt under the law do not fall within this exemption. [Gov. Code, § 6254.19, effective January 1, 2011; see also Gov. Code, § 6254aa.]

Page 22 – add the following to the end of footnote 46:

Office of the Inspector General v. Superior Court (2010) 189 Cal.App.4th 695 [Office of the Attorney General has discretion to determine which investigatory records are subject to disclosure in connection with its investigations and investigatory records in that context may include some documents that were not prepared as part of, but became subsequently relevant to, the investigation.]

Page 25 – Replace the section titled “Library and Circulation Records” with the following:

Library Patron Use Records

All patron use records of any library that is supported in whole or in part by public funds are confidential and shall not be disclosed except to persons acting within the scope of their duties within library administration, upon written authorization from the person whose records are sought, or court order. [Gov. Code, § 6254, subd. (j).] The term “patron use records” includes written or electronic records that identify the patron, the patron’s borrowing information or use of library resources including database search records, or any other personally identifiable information requests or inquiries. [Gov. Code, § 6267, as amended by SB 445, effective January 1, 2012.] This exemption does not extend to statistical reports of registration and circulation or records of fines collected by the library. In addition, library and museum materials presented solely for reference or exhibition purposes, are exempt from disclosure. [Gov. Code, § 6254, subd. (j); Gov. Code, § 6267, as amended by SB 445, effective January 1, 2012.]

Add the following to footnote number 73:

SB 445 amends Government Code § 6267, effective January 1, 2012

Medical Privacy Laws

Page 25 - Replace the first two paragraphs with the following:

State and federal medical privacy laws that may apply to records of local agencies include the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act and the Health Insurance Portability and Accountability Act. [Evid. Code, § 990 et seq.; Civ. Code, § 56 et seq.; Health & Saf. Code, § 128675 et seq.; 42 U.S.C. § 1320d.] The exemptions from and prohibitions against disclosure contained in these laws are incorporated into the Act. [Gov. Code, § 6254, subd. (k).]

Local agencies that receive or maintain individually identifiable health information may comply with the requirements of the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act and the Health Insurance Portability and Accountability Act by citing appropriate sections of the Act, as well as applicable medical privacy laws and regulations, in declining to disclose protected, individually identifiable health information. [Both § 6254, subd. (c) and § 6254, subd. (k) of the Act probably apply to most records protected under the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act or the Health Insurance Portability and Accountability Act. Section 6254, subdivision (c) of the Act exempts from disclosure “[p]ersonnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy.” Section 6254, subdivision (k) of the Act exempts “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” Protected individually identifiable health information is probably also exempt from disclosure under the “public interest” exemption in § 6255 of the Act.]

*Page 25 - Add the following sub-heading and paragraph under **Medical Privacy Laws**:*

Health Data and Advisory Council Consolidation Act

State law requires any organization that operates, conducts, owns or maintains a health facility, hospital or freestanding ambulatory surgery clinic, as these terms are defined in the law, to file specified reports with the state that include detailed patient health and financial information. [Health and Saf. Code, §§ 128735, 128736, 128737.] Patient medical record numbers and any other data elements of these reports that could be used to determine the identity of an individual patient are exempt from disclosure. [Health and Saf. Code, §§ 128745 subd. (c)(6).]

Personal Contact Information

Posting Personal Information of Elected/Appointed Officials on the Internet

Page 29 - Replace the entire paragraph with the following:

The Act prohibits a state or local agency from posting on the Internet the home address or telephone number of any elected or appointed officials without first obtaining their written permission. [See Gov. Code, § 6254.21, subd. (f) (containing a non-exhaustive list of individuals who qualify as “elected or appointed official[s]”).] The Act also prohibits someone from knowingly posting on the Internet the home address or telephone number of any elected or appointed official or the official’s “residing spouse” or child, and either threatening or intending to cause imminent great bodily harm. [Gov. Code, § 6254.21.]

In addition, the Act prohibits a person, business or association from publicly posting or displaying on the Internet the home address or telephone number of any elected or appointed official where the official has made a written demand not to disclose his or her address or phone number. [Gov. Code, § 6254.21.]

The prohibition against posting home address and telephone numbers of elected or appointed officials on the Internet does not apply to a comprehensive database of property-related information maintained by a state or local agency that may incidentally contain such information, where the officials are not identifiable as such from the data, and the database is only transmitted over a limited-access network, such as an intranet, extranet, or virtual private network, but not the Internet. [91 Ops.Cal.Atty.Gen. 19 (2008).]

Personnel Records

Peace Officer Personnel Records

Page 30 - Replace the first paragraph in this section with the following:

Peace officer personnel records are both confidential and privileged. They clearly fall within the category of records, “the disclosure of which is exempted or prohibited pursuant to federal or state law....” [Gov. Code, § 6254, subd. (k); Pen. Code, § 832.7 and 832.8 and *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.]

Page 30 - Insert the following at the end of the second paragraph in this section:

These files are not protected from disclosure, however, when the district attorney, attorney general or grand jury are investigating the conduct of the officers. [Pen. Code, § 832.7, subd. (a).] The other notable exception arises where an officer publishes factual information concerning a disciplinary action that is known by the officer to be false. If the information is published in the media, the employing agency may disclose factual information about the discipline to refute the employee's false statements. [Pen. Code, § 832.7, subd. (d).]

Employee Contracts, Salaries, Benefits and Pension Information

Page 30 – Insert the following after the second paragraph in this section:

In addition to public employee contracts, salaries and benefits, public agencies are required to disclose the identities of pensioners and the amount of pension benefits received by such pensioners. In *Sacramento County Employees' Retirement System (SCERS) v. Superior Court* (2011) 195 Cal.App.4th 440, the court determined that the public interest in disclosure of the names of pensioners and data concerning the amounts of their pension benefits outweighs any privacy interests the pensioners may have in such information. The court indicated that the public interest in disclosure would not outweigh the privacy interest a member has in his or her home or e-mail addresses, telephone numbers and social security numbers, so that information should not be disclosed. With regard to the PERS system, the court pointed out that Government Code section 20230 provides that the identities of and amount of benefits received by PERS pensioners is subject to public disclosure. [See also *San Diego County Employees Retirement Association v. Superior Court* (2011) 196 Cal.App.4th 1228, citing with approval 25 Ops.Cal.Atty.Gen. 90 (1955) which exempts from disclosure employee election of benefits. For peace officer election of benefits see Penal Code sections 832.7 and 832.8 and *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 343.]

■ EFFECT OF PROPOSITION 59 ON EXEMPTIONS

Page 36 - Replace the second paragraph in this section with the following:

Proposition 59 “constitutionalized” the right of access to public records. On its face, it expressly does not “repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.” [Cal. Const., art. I, § 3, subd. (b)(5); *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319.] Both the courts and the Attorney General have also confirmed that Proposition 59 maintained all existing statutory exemptions, preexisting common law and constitutional separation of powers, as well as the Act's internal public interest exemption. [Gov. Code, §6254, *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742; Los Angeles Unified School Dist. v. Superior Court (2007) 151 Cal.App.4th 759; *International Federation of Professional and*

Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319; 87 Ops.Cal.Atty.Gen. 181 (2004); 88 Ops.Cal.Atty.Gen. 16 (2005); 89 Ops.Cal.Atty.Gen. 204 (2006).] For example, while the constitution states that an existing exemption must be narrowly construed, this is consistent with existing case authority. [*New York Times v. Superior Court* (1990) 218 Cal.App.3d 1579; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469; *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370.]

Page 36 - Delete the final paragraph in this section:

~~No published opinion has extensively analyzed the impact of Proposition 59 on the exemptions in the Act. However, one court summarily noted that as to construction of the specific exemptions under the Act, it was simply declarative of existing law.²¹⁶ In addition, in three separate opinions, the California Attorney General has concluded that Proposition 59 did not alter the application of exemptions under the Act that existed at the time of its enactment.²¹⁷ Enactment of Proposition 59 underscores the general principle that public access to records is the rule, and nondisclosure the exception, only to be invoked in narrow circumstances after careful consideration.²¹⁸~~

Page 38 – Add the following reference to footnote 49:

Dixon v. Superior Court (2009) 170 Cal.App.4th 1271 (coroner and autopsy reports).

Page 39 – Add the following reference to footnotes 120 and 123:

Costco Wholesale Corporation v. Superior Court (2009) 47 Cal.4th 725.

Page 39 – Add the following reference to footnote 124:

Clark v. Superior Court (2011) 196 Cal.App.4th 37.

Page 40 – Add the following references to footnote 142:

91 Ops.Cal.Atty.Gen. 11 (the names of peace officers involved in critical incidents, such as ones involving lethal force, are not categorically exempt from disclosure, however, the balancing test may be applied under the specific factual circumstances of each case to weigh the public interests at stake.)

Page 40 – Add the following references to footnote 146:

Gov. Code, § 53262(b).

Page 40 – Add the following references to footnote 154:

Trustees of Southern California IBEW-NECA Pension Plan v. Los Angeles Unified School District (2010) 187 Cal.App.4th 621.

Page 41 – Add the following references to footnote 203:

County of Santa Clara v. Superior Court (2009) 170 Cal.App.4th 1301; (See also, the discussion of GIS information in Chapter 6 at page 51.

CHAPTER 5: JUDICIAL REVIEW AND REMEDIES

■ THE TRIAL COURT PROCESS AND DECISION

Page 44 – Insert the following as a second paragraph in this section:

Although the Act provides the exclusive judicial remedy for resolving whether or not a public entity has erroneously refused to disclose a particular record or class of records, it does not preclude a taxpayer lawsuit seeking declaratory or injunctive relief to challenge the legality of an entity's policies or practices for responding to public records requests generally. [*County of Santa Clara v. Superior Court (Naymark)* (2009) 171 Cal.App.4th 119.]

Page 44 - Replace the last paragraph on page with the following :

A local agency may not commence an action for declaratory relief to determine the agency's obligation to disclose records to a member of the public under the Act. [*Filarsky v. Superior Court* (2002) 28 Cal.4th 419.] Allowing a local agency to seek declaratory relief to determine whether it must disclose records to a member of the public would require the person requesting documents to defend civil actions they did not commence and discourage them from requesting records, thereby frustrating the Legislature's purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of local agencies. However, a local agency is a "person" under the Act and may maintain an action to compel the disclosure of records under the Act from another public entity. [*Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759.]

■ APPELLATE REVIEW

Page 45 – Insert the following sentence at the end of the third paragraph of this section:

Absent a stay, any person who fails to obey the order of the court shall be ordered to show cause why he or she is not in contempt of court. [Gov. Code, § 6259, subd. (c).]

Page 46 - Replace the final paragraph of this section with the following:

While the trial court's decision regarding disclosure of records is not subject to the normal appeal process, other decisions of the trial court related to a lawsuit under the Act are subject to appeal. Thus, a trial court's decision to grant or deny a motion for attorney fees and costs under the Act is subject to appeal and is not subject to the extraordinary writ process. Similarly, an award of sanctions in a public records case is subject to appeal rather than a petition for an extraordinary writ. [*Butt v. City of Richmond* (1996) 44 Cal.App.4th 925.]

■ ATTORNEY FEES AND COSTS

Page 46 - Replace the first paragraph in this section with the following:

If the plaintiff prevails in the litigation, the judge must award court costs and reasonable attorney fees to the plaintiff. [Gov. Code, § 6259, subd. (d).] A plaintiff will be considered the prevailing party if the lawsuit results in the disclosure of some or all of the requested records. This means

that the plaintiff will likely be considered the prevailing party even when he or she has only achieved a partial victory in the lawsuit. [*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.] In addition, a plaintiff may be considered the prevailing party when the local agency discloses some or all of the records after the lawsuit is filed but prior to a court order requiring such disclosure, if the agency's disclosure was the result of or prompted by the lawsuit. [*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469; *Belth v. Garamendi* (1991) 232 Cal.App.3d 896.] A plaintiff may also qualify as the prevailing party if he or she is denied access to a public agency's offices to inspect records, even absent a showing that particular records were wrongfully withheld. [*Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063.] On the other hand, if the local agency did not decline to provide the records but, acting diligently, was only able to disclose them after the filing of the lawsuit, the plaintiff will likely not be considered the prevailing party because the lawsuit did not result in or prompt the disclosure. [*Motorola Communication & Electronics, Inc. v. State Dept. of General Services* (1997) 55 Cal.App.4th 1340; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.]

Page 46 - Replace the third paragraph in this section with the following:

When determining the amount of attorney fees to be awarded, the trial court may consider the degree of the plaintiff's success in obtaining the objectives of the litigation; however, there is no requirement that the award of attorney fees be commensurate with or in proportion to the degree of success. Thus, a trial court retains discretion to award the entire amount of reasonable attorney fees expended in a lawsuit under the Act, even if only some of the records sought were ordered to be disclosed, as well as discretion to apply a lodestar enhancement after considering the facts and circumstances of the litigation. [*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379.]

Page 47 - Replace the final paragraph in this section with the following:

The successful local agency defendant may seek an award of attorney fees and court costs against an unsuccessful plaintiff, but the agency will only obtain such an award in very limited circumstances. Only when the court finds that the plaintiff's case is clearly frivolous may it award court costs and reasonable attorney fees to the local agency. [Gov. Code, § 6259, subd.(d); *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925.] A local agency defendant who brings a successful anti-SLAPP motion in a case brought under the Act cannot recover attorney fees or costs under that statute. [Code Civ. Proc., Section 425.16, subd. (c).]

CHAPTER 6: RECORDS MANAGEMENT

■ PUBLIC MEETING RECORDS

Page 50 - Replace the final paragraph in this section with the following:

Writings that are distributed to all or a majority of all members of a legislative body in connection with a matter subject to discussion or consideration at a public meeting of the body are public records (subject to the exemptions in the Act) and must be made available upon request without delay. [Gov. Code, § 54957.5, subd. (a).] Where such nonexempt writings are distributed during a public meeting, in addition to making them available for public inspection at

the meeting (if prepared by the agency or member of its legislative body) or after the meeting (if prepared by another person), they must be made available in appropriate alternative formats upon request by a person with a disability. [Gov. Code, § 54957.4, subd. (c).] The agency may charge a fee for a copy of this record; however, no surcharge may be imposed on persons with disabilities. [Gov. Code, § 54957.5, subd. (d).] When records relating to agenda items are distributed to all or a majority of all members of a legislative body less than 72 hours prior to the meeting, the records must be made available for public inspection in a designated location at the same time they are distributed. The address of the designated location shall be listed in the meeting agenda. [Gov. Code, § 54957.5, subds. (b)(1),(2).]

*Page 50 – Replace **Practice Tip** with the following:*

Some agencies have found it useful to adopt electronic records policies governing such issues as: what electronic records (for example emails) and what attributes of the electronically stored information are considered “retained in the ordinary course of business” for purposes of the Act; whether personal electronic devices (like computers, personal data assistants, cell phones, etc.) may be used to store or send electronic communications concerning the agency, or whether agency devices must be used; etc. Local agencies should consult with information technology officials to understand what information is being stored electronically and the technological limits of their systems for the retention and production of electronic records.

■ ELECTRONIC RECORDS

Page 51 - Replace all the paragraphs after the first paragraph in this section with the following:
The Act does not require an agency to keep records in an electronic format. But, if an agency has an existing, nonexempt public record in an electronic format, the Act does require the agency make the information available in any electronic format in which it holds the information when requested. [Gov. Code, § 6253.9, subd. (a)(1).] The Act also requires the agency to provide a copy of such records in any alternative electronic format requested if the alternative format is one that the agency uses for itself or for transmission to other agencies. [Gov. Code, § 6253.9, subd. (a)(2).] However, the Act does not require an agency to release a public record in the electronic form in which it is held if the release violates a license, or would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained. [Gov. Code, § 6253.9, subd. (f).] Likewise, the Act does not permit public access to records held electronically if access is otherwise restricted by statute. [Gov. Code, § 6253.9, subd. (g).]

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy. [Gov. Code, § 6253.9, subd. (a)(2).] However, requesters may be required to bear additional costs of producing a copy of an electronic record, such as programming and computer services costs, if the request requires the production of electronic records that are otherwise only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction or programming. [Gov. Code, § 6253.9, subd. (b).] Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format. [Gov. Code, § 6253.9, subd. (c). See “No Duty to Create a Record or to Create a Privilege Log,” p. 13.]

Electronic records may include “metadata,” or data about data contained in a record that is not visible in the text. For example, metadata may describe how, when or by whom particular data was collected, and contain information about document authors, other documents, or commentary or notes. Although no provision of the Act expressly addresses metadata, and there are no reported court opinions in California considering whether or the extent to which metadata is subject to disclosure, evolving law in other jurisdictions has held that some types of metadata are public records. [*Lake v. City of Phoenix*, (2009) 218 P.3d 1004; *O’Neill v. City of Shoreline* (2010) 240 P.3d 1149.] There are no reported California court opinions providing guidance on whether agencies have a duty to disclose metadata when an electronic record contains exempt information that cannot be reasonably segregated without compromising the record’s integrity.

The Act permits government agencies to develop and commercialize computer software and to benefit from copyright protections for agency-developed software. Computer software developed by state or local agencies, including computer mapping systems, computer programs, and computer graphics systems, is not a public record subject to the Act. [Gov. Code, § 6254.9, subds. (a), (b).] As a result, public agencies are not required to provide copies of agency-developed software pursuant to the Act. The Act authorizes state and local agencies to sell, lease, or license agency-developed software for commercial or noncommercial use. [Gov. Code, § 6254.9, subd. (a).] The exception for agency-developed software does not affect the public record status of information merely because it is stored electronically. [Gov. Code, § 6254.9, subd. (d).]

While computer mapping systems developed by local agencies are not public records subject to disclosure, such systems generally include geographic information system (GIS) data. Many local agencies use GIS programs and databases for a broad range of purposes, including the creation and editing of maps depicting property and facilities of importance to the agency and the public. As with metadata, the Act does not expressly address GIS information disclosure. However, where GIS basemap data is integrally associated with an agency-developed computer mapping system, the basemap is not a public record subject to disclosure. [*Sierra Club v. Superior Court* (2011) 195 Cal.App.4th 1537, but see *County of Santa Clara v. Superior Court*, (2009) 170 Cal.App.4th 1301 (holding that that the Act’s public interest exemption alone did not justify withholding GIS basemap information).]

State and local agencies subject to the Public Contract Code that are taking bids for construction of a public work or improvement, shall, upon request from a contractor plan room, provide an electronic copy of a project’s contract documents at no charge to the contractor plan room. [Pub. Contract Code, §§ 10111.2 and 20103.7.] The Public Contract Code does not define the term “contractor plan room,” but the term commonly refers to a clearinghouse that contractors can use to identify potential bidding opportunities and obtain bid documents. The term may also refer to an on-line resource for a contractor to share plans and information with subcontractors.

■ ELECTRONIC DISCOVERY

Page 52 - Replace both paragraphs in this section with the following:

The importance of maintaining a written document retention policy is evident by revisions to the Federal Rules of Civil Procedure, and California's Civil Discovery procedures, relative to electronic discovery. [Fed. Rules Civ.Proc., rule 26, 28 U.S.C.; Cal. Rules of Court, rule 3.724(8); Code Civ. Proc., §§ 985.8, 2016.020, 2031.020–2031.320.] These discovery procedures require parties in litigation to address the production and preservation of electronic records. These rule changes may require a local agency to alter its routine management or storage of electronic information, and illustrate the importance of having and following formal document retention policies.

Once a local agency knows or receives notice that information is relevant to litigation, it has a duty to preserve information for discovery. In some cases, the local agency may have to suspend the routine operation of its information systems in order to preserve information relevant to the litigation.

■ RECORDS RETENTION AND DESTRUCTION LAWS

Page 52 - Replace the first two paragraphs in this section with the following:

The Act is not a records retention statute. The Act does not prescribe what type of information a public agency may gather or keep, or provide a method for correcting records. [*Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661.] Its sole function is to provide access to and for disclosure of public records. [*Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661.] Other provisions of state law govern retention of public records.

Local agencies generally must retain public records for a minimum of two years, although some records may be destroyed sooner. [Gov. Code, § 34090, subd. (d).] For example, duplicate records that are less than two years old may be destroyed if no longer required. [Gov. Code, §34090.7.] Likewise, routine video monitoring need only be retained for one year, and may be destroyed or erased after 90 days if another record, such as written minutes, is kept of the recorded event. "Routine video monitoring" is defined as video recording by a video or electronic imaging system designed to record the regular and ongoing operations of a city, including mobile in-car video systems, jail observation and monitoring systems, and building security recording systems. [Gov. Code, §§ 34090.6, 34090.7.] State law does not permit destruction of records affecting title to or liens on real property, court records, records required to be kept by statute, and the minutes, ordinances, or resolutions of the legislative body or city board or commission. [Gov. Code, § 34090, subds. (a), (b), (c), (e).] Most local agencies adopt records retention schedules as a key element of a records management system. The Secretary of State has provided local governments with records management guidelines. [The Secretary of State's Local Government Records Management Guidelines may be viewed at <http://www.sos.ca.gov/archives/local-gov-program/pdf/records-management-8.pdf>.]

Frequently Requested Information and Records August 2011 Cumulative Supplement

This table is intended as a general guide on the applicable law and is not intended to provide legal advice.

The facts and circumstances of each request should be carefully considered in light of the applicable law.

A local agency's legal counsel should always be consulted when legal issues arise.

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Agenda materials distributed to a legislative body relating to an open session item	Yes	Gov. Code, § 54957.5. For additional information, see p. 50 of <i>"The People's Business: A Guide to the California Public Records Act,"</i> hereafter referred to as <i>"the Guide"</i> .
Audit Contracts	Yes	Gov. Code, § 6253.31
Auditor Records	Yes, with certain exceptions.	Gov. Code, § 36525(b)
Automated Traffic Enforcement System (red light camera)	No	Veh. Code, § 21455.5(e)(1)
Autopsy Reports	No	Gov. Code, § 6254(f); <i>Dixon v. Superior Court</i> (2009) 170 Cal.App.4th 1271.
Calendars of Elected Officials	Probably not, but note that there is no published appellate court decision on this issue post- Prop. 59. ¹	See <i>Times Mirror Co. v. Superior Court</i> (1991) 53 Cal.3d. 1325 and <i>Rogers v. Superior Court</i> (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. See also, 87 Ops.Cal.Atty.Gen. 181 (2004); 88 Ops.Cal. Atty.Gen. 16 (2005); 89 Ops.Cal.Atty.Gen. 204 (2006), as to scope of Prop. 59. For additional information, see p. 35 of the Guide.

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Contact information – Names, addresses, and phone numbers of crime victims or witnesses	No	Gov. Code, § 6254(f)(2). <i>For additional information, see p. 29 of the Guide.</i>
Citizen complaints against peace officers – annual summary report to AG	Yes	Pen. Code, § 832.7(c). <i>For additional information, see p. 30 of the Guide.</i>
Citizen complaint information – names, addresses, and telephone numbers	No	<i>City of San Jose v. San Jose Mercury News</i> (1999) 74 Cal.App.4th 1008. <i>For additional information, see p. 30 of the Guide.</i>
Claims for damages	Yes	<i>Poway Unified School District v. Superior Court</i> (1998) 62 Cal.App.4th 1496.
Dog license information	Unclear.	See conflict between Health & Safety Code, § 121690(h) which states that license information is confidential, and Food and Agr. Code, § 30803(b) stating license tag applications shall remain open for public inspection.
Election petitions (initiative, referendum and recall petitions)	No, except to proponents if petition found to be insufficient.	Gov. Code, § 6253.5; Elec. Code, §§ 17200, 17400, and 18650; Evid. Code, § 1050. <i>For additional information, see p. 21 of the Guide.</i>
Emails between government staff	It depends.	Generally, emails are deleted by administrative policy and are not retained in the ordinary course of business. (See § 6254(a)). See also <i>Times Mirror v. Superior Court</i> (1991) 53 Cal.3d 1325; <i>Rogers v. Superior Court</i> (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. <i>For additional information, see p. 35 of the Guide.</i>
Employment Agreements/Contracts	Yes	Gov. Code, §§ 6254.8 and 53262(b). <i>For additional information, see p. 30 of the Guide.</i>

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Expense Reimbursement Report Forms	Yes	Gov. Code, § 53232.3(e)
Form 700 (Statement of Economic Interests) and Campaign Statements	Yes ²	Gov. Code, § 81008
Grading documents including geology reports, compaction reports, and soils reports submitted in conjunction with an application for a building permit	Yes	89 Ops.Cal.Atty.Gen. 39 (2006); but see Gov. Code, § 6254(e). <i>For additional information, see p. 19 of the Guide.</i>
Juvenile Court Records	No	<i>T.N.G. v. Superior Court</i> (1971) 4 Cal.3d. 767; Welf. & Inst. Code, §§ 827 and 828. <i>For additional information, see p. 24 of the Guide.</i>
Legal billing statements	Generally, yes, as to amount billed. No, as to any billing detail which reflects an attorney's impressions, conclusions, opinions or legal research or strategy.	Gov. Code, § 6254(k); Evid. Code, § 950, et seq.; <i>Smith v. Laguna Sun Villas Community Assoc.</i> (2000) 79 Cal.App.4th 639; <i>United States v. Amlani</i> , 169 F.3d 1189 (9th Cir. 1999); <i>Clarke v. American Commerce National Bank</i> , 974 F.2d. 127 (9th Cir. 1992); but see Gov. Code, § 6254(b) as to the disclosure of billing amounts reflecting legal strategy in pending litigation. <i>For additional information, see p. 19, 28 of the Guide.</i>
Library Patron Use Records	No	Gov. Code, §§ 6254(j) and 6267. <i>For additional information, see p. 25 of the Guide.</i>
Medical Records	No	Gov. Code, § 6254(c). <i>For additional information, see p. 25 of the Guide.</i>
Mental Health detentions (5150 reports)	No	Welf. & Inst. Code, § 5328. <i>For additional information, see p. 24 of the Guide.</i>

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Minutes of Closed Sessions	No	Gov. Code, § 54957.2(a). <i>For additional information, see p. 19, 34, 35 of the Guide.</i>
Notices/Orders to property owner re: housing/building code, violations	Yes	Gov. Code, § 6254.7(c). <i>For additional information, see p. 20 of the Guide.</i>
Official Building Plans (architectural drawings and plans)	Inspection only. Copies provided under certain circumstances.	Health & Saf. Code, § 19851; see also 17 U.S.C. §§ 101 and 102. <i>For additional information, see p. 19 of the Guide.</i>
Personal Financial Records	No	Gov. Code, §§ 7470, 7471, 7473; see also Gov. Code, § 6254(n). <i>For additional information, see p. 25 of the Guide.</i>
<p>Personnel</p> <ul style="list-style-type: none"> • Employee inspection of own personnel file • Investigatory reports • Names and salaries (including performance bonuses and overtime) of public employees, including peace officers 	<p>Yes, with exceptions.</p> <p>It depends.</p> <p>Yes, absent unique, individual circumstances. However, other personal information such as social security numbers, home telephone numbers and home addresses are generally exempt from disclosure per Gov. Code, § 6254(c).</p>	<ul style="list-style-type: none"> • <i>For additional information, see p. 29-31 of the Guide.</i> Lab. Code, § 1198.5. This section applies to charter cities. See Gov. Code, § 31011. For peace officers, see Gov. Code, § 3306.5. • <i>Sanchez v. County of San Bernardino</i> (2009) 176 Cal.App.4th 516; <i>BRV, Inc. v. Superior Court</i> (2006) 143 Cal.App.4th 742. <i>For additional information, see p. 29-30 of the Guide.</i> • <i>International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court</i> (2007) 42 Cal.4th 319.

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
<ul style="list-style-type: none"> Names of pensioners and amounts received. Test Questions, scoring keys, and other examination data. 	<p>Yes</p> <p>No</p>	<ul style="list-style-type: none"> <i>Sacramento County Employees' Retirement System (SCERS) v. Superior Court</i> (2011) 195 Cal.App.4th 440; <i>San Diego County Employees Retirement Association v. Superior Court</i> (2011) 196 Cal.App.4th 1228. Gov. Code, § 6254(g)
<p>Police</p> <ul style="list-style-type: none"> Arrest Information Citizen complaint policy Criminal history Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video Crime reports Gang intelligence information In custody death reports to AG Juvenile court records List of concealed weapon permit holders 	<p>Yes</p> <p>Yes</p> <p>No</p> <p>No</p> <p>Yes</p> <p>No</p> <p>Yes</p> <p>No</p> <p>Yes</p>	<p><i>For additional information, see p. 22-25 of the Guide.</i></p> <ul style="list-style-type: none"> Gov. Code, § 6254(f)(1); <i>County of Los Angeles v. Superior Court (Kusar)</i> (1993) 18 Cal.App.4th 588. Pen. Code, § 832.5(a)(1) Pen. Code, § 13300 et seq.; Pen. Code, § 11105 et seq. Gov. Code, § 6254(f); <i>Haynie v. Superior Court</i> (2001) 26 Cal.4th 1061. Gov. Code, §§ 6254(f), 6255. Gov. Code, § 6254(f); 79 Ops.Cal.Atty Gen. 206 (1996). Gov. Code, § 12525 <i>T.N.G. v. Superior Court</i> (1971) 4 Cal.3d 767; Welf. & Inst. Code, §§ 827 and 828. <i>For additional information, see p. 24 of the Guide.</i> Gov. Code, § 6254(u)(1); <i>CBS, Inc. v. Block</i> (1986) 42 Cal.3d 646.

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
<ul style="list-style-type: none"> • Concealed weapon permits and applications • Mental health detentions (5150 reports) • Officer's personnel file • Peace officer's name, employing agency and employment dates • Names of officers involved in critical incidents • Traffic accident reports 	<p>Yes, except for home/ business address and medical/psychological history.</p> <p>No</p> <p>No</p> <p>Yes, absent unique, individual circumstances.</p> <p>Yes, absent unique, individual circumstances.</p> <p>Yes, to certain parties.</p>	<ul style="list-style-type: none"> • Gov. Code, § 6254(u)(1); <i>CBS, Inc. v. Block</i> (1986) 42 Cal.3d 646. • Welf. & Inst. Code, § 5328. <i>For additional information, see p. 24 of the Guide.</i> • This information can only be disclosed through a Pitchess motion. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045. • <i>Commission on Peace Officer Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278. • <i>Commission on Peace Officer Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278; <i>New York Times v. Superior Court</i> (1997) 52 Cal.App.4th 97; 91 Ops. Cal.Atty.Gen. 11 (2008). • Veh. Code, § 16005 [only disclose to those needing the information, such as insurance companies, and the individuals involved].
<p>Public Contracts</p> <ul style="list-style-type: none"> • Bid Proposals, RFP proposals • Financial information submitted for bids • Trade secrets 	<p>Yes, but only after negotiations are complete.</p> <p>No</p> <p>No</p>	<ul style="list-style-type: none"> • <i>Michaelis v. Superior Court</i> (2006) 38 Cal. 4th 1065; <i>but see</i> Gov. Code, § 6255 and Evid. Code, § 1060. <i>For additional information, see p. 31-32 of the Guide.</i> • Gov. Code, §§ 6254(a),(h) and (k), 6254.15 and 6255; <i>Schnabel v. Superior Court of Orange County</i> (1993) 5 Cal.App.4th 704, 718. <i>For additional information, see p. 31-32 of the Guide.</i> • Evid. Code, § 1060; Civ. Code, § 3426, et seq. <i>For additional information, see p. 33 of the Guide.</i>

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Purchase price of real property	Yes, after the agency acquires the property.	Gov. Code, § 7275
<p>Real Estate</p> <ul style="list-style-type: none"> • Property information (such as selling assessed value, square footage, number of rooms) • Appraisals and offers to purchase 	<p>Yes</p> <p>Yes, but only after conclusion of the property acquisition.</p>	<p><i>For additional information, see p. 32 of the Guide.</i></p> <ul style="list-style-type: none"> • 88 Ops.Cal.Atty.Gen. 153 (2005). • Gov. Code, § 6254(h); Note that Gov. Code, § 7267.2 requires release of more information to the property owner while the acquisition is pending.
Report of arrest not resulting in conviction	No, except as to peace officers or peace officer applicants.	Lab. Code, § 432.7
Settlement Agreements	Yes	<i>Register Division of Freedom Newspapers v. County of Orange</i> (1984) 158 Cal.App.3d 893. <i>For additional information, see p. 28 of the Guide.</i>
Software, including Geographic Information System (GIS) mapping systems	No	Gov. Code, § 6254.9; 88 Ops.Cal.Atty.Gen. 153 (2005); <i>but see County of Santa Clara v. Superior Court</i> (2009) 170 Cal.App.4th 1301 for GIS basemap as public record; <i>Sierra Club v. Superior Court</i> (2011) 195 Cal.App.4th 1537; <i>for additional information, see p. 51 of the Guide.</i>
Speaker Cards	Yes	Gov. Code, § 6255
Tax Return Information	No	Gov. Code, § 6254(k); IRS Code, § 6103.

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Taxpayer information received in connection with collection of local taxes	No	Gov. Code, § 6254(i). <i>For additional information, see p. 33 of the Guide.</i>
Telephone Records of Elected Officials	Yes, as to expense totals. No, as to phone numbers called.	See <i>Rogers v. Superior Court</i> (1993) 19 Cal.App.4th 469. <i>For additional information, see p. 35 of the Guide.</i>
Utility usage data	No, with certain exceptions.	Gov. Code, § 6254.16. <i>For additional information, see p. 33 of the Guide.</i>
Voter information	No	Gov. Code, § 6254.4. <i>For additional information, see p. 21 of the Guide.</i>

1 *The analysis with respect to elected officials may not necessarily apply to executive officers such as City Managers or Chief Administrative Officers, and there is no case law directly addressing this issue.*

2 *It should be noted that these statements must be made available for inspection and copying not later than the second business day following the day on which the request was received.*

SKU#: 1804 Price: \$3.00

Revised August 2011