

THE PEOPLE'S BUSINESS:

A Guide to the California Public Records Act

LEAGUE OF CALIFORNIA CITIES

ACKNOWLEDGEMENTS

AUTHORS OF THE PEOPLE'S BUSINESS

The League gratefully acknowledges the work of the Public Records Act Publication Committee, which authored this guide. Each member devoted countless hours to this project, and the League sincerely thanks each of them.

Gregory P. Priamos, Chair
City Attorney, Riverside

Timothy T. Coates
Greines, Martin, Stein, & Richland, LLP

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

Roxanne M. Diaz
City Attorney, Hidden Hills
Richards, Watson & Gershon

Shawn D. Hagerty
City Attorney, Santee
Best Best & Krieger

Jolie Houston
City Attorney, Los Altos
Berliner Cohen

Craig Labadie
City Attorney, Concord

Juli Christine Scott
Chief Assistant City Attorney, Burbank

Kristina R. Scott
Deputy City Attorney, Los Angeles

Eileen M. Teichert
City Attorney, Sacramento

Paul H. Zarefsky
Deputy City Attorney, San Francisco

The League also thanks the following individuals for their assistance in reviewing and commenting on drafts of this publication: Amy Albano, City Attorney, Thousand Oaks; Jason Alcala, Assistant City Attorney, Livermore; Michael Jenkins, City Attorney, Diamond Bar, Hermosa Beach, Rolling Hills, and West Hollywood; Randi Johl, City Clerk, Lodi; Michelle Marchetta Kenyon, City Attorney, Calistoga, Rohnert Park, and Moraga; Colleen Nicol, City Clerk, Riverside; Lisa Pope, City Clerk, Malibu; Shalice Reynoso, City Clerk, Buena Park; and Brian Weinberger, Consultant, Senate Local Government Committee.

In addition, the League thanks the law firms of Greines, Martin, Stein, & Richland and Best Best & Krieger for their help with final edits, and a special thanks to Cindy Cekander of Best Best & Krieger for her invaluable assistance.

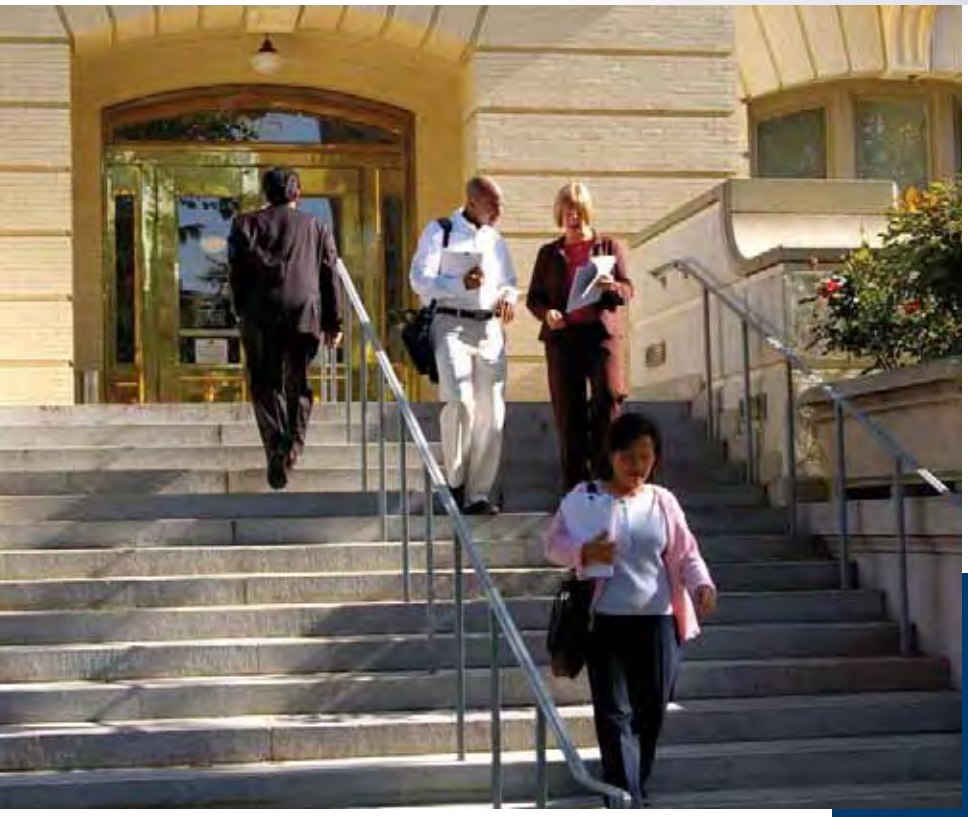
LEAGUE STAFF

Patrick Whitnell
General Counsel

Kourtney Burdick
Deputy General Counsel

Rhonda Boglin
Legal Assistant

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



CH. 1: INTRODUCTION AND OVERVIEW

CH. 2: THE BASICS

CH. 3: RESPONDING TO A PUBLIC RECORDS REQUEST

CH. 4: EXEMPTIONS

CH. 5: JUDICIAL REVIEW AND REMEDIES

CH. 6: RECORDS MANAGEMENT

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



Copyright © 2008
League of California Cities

All rights reserved. This publication, or parts thereof, may not be reproduced in any form without the permission of the League of California Cities.

TABLE OF CONTENTS

FOREWORD: iv

CHAPTER 1: INTRODUCTION AND OVERVIEW

Fundamental Right of Access to Information 2
Fundamental Right of Privacy and Need for Efficient and Effective Government 3
Achieving Balance 3
Proposition 59 3
Beyond the Law 4

CHAPTER 2: THE BASICS

Agencies Covered 6
What Are Public Records? 6
Who Can Request Records? 7

CHAPTER 3: RESPONDING TO A PUBLIC RECORDS REQUEST

Types of Requests 10
Form of the Request 11
Content of the Request 11
The Duty to Respond 11
Timing of the Response 11
Extending the Response Time 11
Assisting the Requester 12
Locating Records 12
Redacting Records 13
Types of Responses 13
Waiver 13
No Duty to Create a Record or to Create a Privilege Log 13
Timing of Disclosure 13
Fees 14

CHAPTER 4: EXEMPTIONS

Overview of Exemptions 18
Specific Exemptions 19
- Architectural and Official Building Plans 19
- Attorney Client Communications and Attorney Work Product 19
- Code Enforcement Records 20
- Drafts 20
- Election Information 21
- Identity of Informants 21
- Law Enforcement Records 22
- Library Circulation Records 25
- Licensee Financial Information 25
- Medical Privacy Laws 25
- Official Information Privilege 27
- Pending Litigation or Claims 28
- Personal Contact Information 29
- Personnel Records 29
- Public Contracting Documents 31
- Real Estate Appraisals and Engineering Evaluations 32
- Recipients of Public Services 32
- Taxpayer Information 33
- Trade Secrets and Other Proprietary Information 33
- Utility Customer Information 33

Public Interest Exemption 34
Effect of Proposition 59 on Exemptions 35

CHAPTER 5: JUDICIAL REVIEW AND REMEDIES

Overview 44
The Trial Court Process and Decision 44
Appellate Review 45
Attorney Fees and Costs 46

CHAPTER 6: RECORDS MANAGEMENT

Public Meeting Records 50
Electronic Records 51
Electronic Discovery 52
Records Retention and Destruction Laws 52

APPENDIX: Frequently Requested Information and Records 55

FOREWORD

The goal of this publication is to provide a comprehensive overview of the California Public Records Act for local government officials and employees, the public and the news media. This guide offers practical advice to assist local agencies in complying with the requirements of the Act and other related state laws. The guide is focused on settled law and is not intended to resolve emerging and unresolved legal issues.

The League thanks the following organizations representing diverse views and constituencies that reviewed, or were given the opportunity to review, this publication:

Association of California Water Agencies
California Association of Sanitation Agencies
California Attorney General's Office
California Common Cause
California District Attorneys Association
California First Amendment Coalition
California Newspaper Publishers Association
California Redevelopment Association
California School Boards Association
California Special Districts Association
California State Association of Counties
Californians Aware
City Clerks Association of California
Community College League of California
First Amendment Project
League of Women Voters of California

This publication is current as of March, 2008. Updates to the publication responding to changes in the Public Records Act and related laws including court interpretations are available at www.cacities.org/opengov.

As used in this guide, "local agency" means all public agencies to which the Public Records Act applies. This publication is not intended to provide legal advice. A local agency's legal counsel is responsible for advising its governing body and staff, and should always be consulted when legal issues arise.

Additional copies of this publication as well as an individual table of "Frequently Requested Information and Records" may be purchased by visiting CityBooks online at www.cacities.org/store.

CHAPTER 1:
INTRODUCTION AND OVERVIEW



FUNDAMENTAL RIGHT OF ACCESS TO INFORMATION

FUNDAMENTAL RIGHT OF PRIVACY AND NEED FOR EFFICIENT AND EFFECTIVE GOVERNMENT

ACHIEVING BALANCE

PROPOSITION 59

BEYOND THE LAW

CHAPTER 1:
INTRODUCTION AND OVERVIEW



FUNDAMENTAL RIGHT OF ACCESS TO INFORMATION

The California Public Records Act[1] (the "Act") is an indispensable component of California's commitment to open government. The purpose of the Act is to give the public access to information that enables them to monitor the functioning of their government.[2] The Act's fundamental precept is that governmental records shall be disclosed to the public, upon request, unless there is a legal basis not to do so.

Practice Tip:

Express legal authority is required to justify denial of access to public records. The perception that disclosure of a record could lead to potential embarrassment of the local agency, alone, is not a legal basis for denying access.

The Act provides for two types of access. One is a right to inspect public records:

> "Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided."[3]

The other is a right to prompt availability of copies of those records:

> "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."[4]

These rights of access are by no means unlimited and do not extend to records that are exempt from disclosure. In fact, the Act was the culmination of a 15-year effort by the Legislature to create a comprehensive general records law that attempted to accumulate all the exemptions in one location. Previously, one was required to look at the law governing the specific type of record in question in order to determine its disclosability. The Act now expressly states or references other laws that are the sources of legal authority permitting records to be withheld.[5]

FUNDAMENTAL RIGHT OF PRIVACY AND NEED FOR EFFICIENT AND EFFECTIVE GOVERNMENT

Two recurring interests underlie many of the exemptions from disclosure. First, many exemptions under the Act are based on protecting an individual's fundamental right to privacy and permit withholding of, for example, certain personnel or medical records.[6] If personal information is required from a person (for example, a government employee or appointee, or an applicant for government employment/appointment, as a precondition for the employment or appointment), a court would likely recognize a privacy interest in such information.[7] However, if information is provided voluntarily in order to acquire a benefit, the information relates to serious wrongdoing, or the information is associated with an applicant's qualifications, a court is less likely to recognize a privacy right.[8]

Second, a number of exemptions are based on the government's need to perform its assigned functions in a reasonably efficient and effective manner, such as maintaining confidentiality of investigative records, official information, pending litigation records, and preliminary drafts. In addition, a record may be withheld whenever the public interest in nondisclosure clearly outweighs the public interest in disclosure.[9] The deliberative process privilege combines these two interests in affording a measure of privacy to decision makers and concurrently aiding in the efficiency and effectiveness of government.[10]

ACHIEVING BALANCE

In enacting the California Public Records Act, the Legislature struck a balance between two competing, fundamental interests. The legislative findings declare that access to information concerning the conduct of the people's business is a fundamental and necessary right for every person in the state and that the Legislature is "mindful of the right of individuals to privacy."[11] The Act balances these competing interests by preserving an "island of privacy upon the broad sea of enforced disclosure."[12] For the past forty years, courts have also balanced these competing interests in deciding whether to order disclosure of records.[13] In administering the provisions of the Act, agencies must often balance the right of public access against the right of privacy and the need for governmental efficiency and effectiveness.



PROPOSITION 59

In November 2004, the voters approved Proposition 59, amending the California Constitution to include the public's right to access public records. "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[14]

Proposition 59 expressly states that "[t]his subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records…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."[15] The courts have not yet squarely ruled whether Proposition 59 provides the public with a greater right of access than is provided under the Act.



BEYOND THE LAW

The Act itself provides that "except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter."[16] A number of local agencies have gone beyond the mandates of the Act by adopting their own "sunshine ordinances" to afford greater public access.

To encourage local agencies' compliance, the Act provides for a mandatory award of court costs and attorney's fees to a prevailing plaintiff. A plaintiff need not obtain all of the requested records in order to be the prevailing party in litigation. A plaintiff is also considered the prevailing party if the lawsuit ultimately motivated the agency to provide the requested records.[17]

This publication is intended to help local agencies navigate the Act, comply with the spirit and intent of the Act, and interpret the Act in furtherance of open government. This publication is further intended to help members of the public understand their rights of access to public information, as well as the limitations on those rights.

Endnotes

1 Gov. Code, §§ 6250 et seq. All code references are to the California Code unless otherwise indicated.

2 *U.S. Dept. of Justice v. Reporters Com. for Freedom of Press* (1989) 489 U.S. 749; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

3 Gov. Code, § 6253, subd. (a).

4 Gov. Code, § 6253, subd. (b).

5 Gov. Code, §§ 6254, subd. (k), 6276.02 et seq.

6 Cal. Const., art. I, § 1; Gov. Code, §§ 6254, subd. (c), 6254, subd. (k), 6255; *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.

7 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal. App.4th 159; *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788.

8 *Calif. State Univ., Fresno Assn. v. Superior Court* (2001) 90 Cal.App.4th 810; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762; *Register Div. Freedom Newspaper, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646; *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.

9 Gov. Code, § 6255.

10 See "Deliberative Process Privilege," p. 35.

11 Gov. Code, § 6250; Cal. Const., art. I, § 3, subd. (b)(3).

12 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645.

13 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307; *Britt v. Superior Court* (1978) 20 Cal.3d 844.

14 Cal. Const., art. I, § 3, subd. (b)(1).

15 Cal. Const., art. I, § 3, subd. (b)(5).

16 Gov. Code, § 6253, subd. (e).

17 *Roberts v. City of Palmdale* (1993) 19 Cal.App.4th 469; *Belth v. Garamendi* (1991) 232 Cal.App.3d 896.

CHAPTER 2:
THE BASICS



AGENCIES COVERED

WHAT ARE PUBLIC RECORDS?

WHO CAN REQUEST RECORDS?

CHAPTER 2:
THE BASICS



AGENCIES COVERED

The Act applies to state and local agencies. For purposes of the Act, a state agency is defined to mean "every state office, officer, department, division, bureau, board and commission or other state body or agency."[1] A local agency includes a county, city (whether general law or chartered), city and county, school district, municipal corporation, special district, community college district or political subdivision.[2] This encompasses any committees, boards, commissions or departments of those entities as well. Nonprofit entities that are legislative bodies under the Brown Act are also subject to the Act. Private nonprofit entities that are delegated legal authority to carry out public functions are also subject to the Act if they are funded with public money.[3]



The Act does not apply to the Legislature or the judicial branch.[4] The Legislative Open Records Act covers the Legislature.[5] Most court records are disclosable as a matter of public right of access to courts under the First Amendment of the United States Constitution.[6]

WHAT ARE PUBLIC RECORDS?

The Act defines "public records" as "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."[7] A writing is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[8]

The definition of a public record is quite broad and is intended to encompass much more than written or printed documents. A public record is subject to disclosure under the Act "regardless of its physical form or characteristics."[9] For example, email messages and other electronic information are public records if they otherwise meet the statutory definition.

Over the years the courts have both broadened and limited the scope of the definition of a "public record." First, it is clear that the term "public records" encompasses more than simply those documents that public officials are required by law to keep as official records. Courts have held that a public record is one that is "necessary or convenient to the discharge of [an] official duty" such as a status memorandum provided to the City Manager on a pending project.[10] Second, courts have observed that merely because the writing is in the possession of the local agency, it is not automatically a public record. It must relate to the conduct of the public's business.[11] For example, records containing purely personal information unrelated to the conduct of the people's business, such as an employee's personal address list or grocery list, are considered outside the scope of the Act.[12]



WHO CAN REQUEST RECORDS?

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.[13] "Persons" include corporations, partnerships, limited liability companies, firms or associations.[14] 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.[15] 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.[16] 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.[17]

Endnotes

1 Gov. Code, § 6252, subd. (f). Excluded from the definition of state agency are those agencies provided for in article IV (except section 20(k)) and article VI of the Cal. Constitution.

2 Gov. Code, § 6252, subd. (a).

3 Gov. Code, § 6252, subd. (a), 85 Ops.Cal.Atty.Gen. 55 (2002).

4 Gov. Code, § 6252, subds. (a), (b); *Mack v. State Bar of Cal.* (2001) 92 Cal.App.4th 957.

5 Gov. Code, § 1070

6 *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258; *Champion v. Superior Court* (1988) 201 Cal. App.3d 777

7 Gov. Code, § 6252, subd. (e).

8 Gov. Code, § 6252, subd. (g).

9 Gov. Code, § 6252, subd. (e).

10 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

11 Gov. Code, § 6252, subd. (e); *Braun v. City of Taft* (1984) 154 Cal.App.3d 332*; San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

12 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

13 Gov. Code, § 6252, subd. (c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.

14 Gov. Code, § 6252, subd. (c).

15 Gov. Code, § 6252.5; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759.

16 Gov. Code, § 6252, subd. (b). See also Gov. Code, § 54957.2.

17 *Marylander v. Superior Court* (2002) 81 Cal.App.4th 1119; *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal. App.661. See "Information That Must Be Disclosed," p. 22; "Requests for Journalistic or Scholarly Purposes," p. 24.

CHAPTER 3:
RESPONDING TO A PUBLIC RECORDS REQUEST



TYPES OF REQUESTS

FORM OF THE REQUEST

CONTENT OF THE REQUEST

THE DUTY TO RESPOND

TIMING OF THE RESPONSE

EXTENDING THE RESPONSE TIME

ASSISTING THE REQUESTER

LOCATING RECORDS

REDACTING RECORDS

TYPES OF RESPONSES

WAIVER

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

TIMING OF DISCLOSURE

FEES

CHAPTER 3:
RESPONDING TO A PUBLIC RECORDS REQUEST



TYPES OF REQUESTS

There are two ways to gain access to a public record – inspecting the record at the local agency's offices, or obtaining a copy from the local agency. The local agency may not dictate to the requester which option must be used. That is the requester's decision. Indeed, a requester does not have to choose between inspection and copying but instead can choose both options. For example, a requester may first inspect a set of records, and then, based on that review, decide which records should be copied.

Practice Tip:

If the public records request does not make clear whether the requester wants to inspect or obtain a copy of the record or records being sought, the local agency should seek clarification from the requester without delaying the process of searching for, collecting, and redacting or "whiting out" exempt information in the records.

A requester may inspect public records during the local agency's regular office hours.[1] This does not mean that a requester has a right to demand to see a record and immediately gain access to it. The right to inspect is constrained by an implied rule of reason to protect records against theft, mutilation, or accidental damage, prevent interference with the orderly functioning of the office, and generally avoid chaos in record archives.[2] Moreover, the agency's time to respond to an inspection request is governed by the deadlines set forth below, which give the agency a reasonable opportunity to search for, collect, and, if necessary, redact exempt information prior to the records being disclosed in an inspection.[3]

If a copy of a record has been requested, the local agency generally must provide an exact copy except where it is "impracticable" to do so.[4] The term "impracticable" does not necessarily mean that compliance with the public records request would be inconvenient or time-consuming to the local agency. Rather, it means that the agency must provide the best or most complete copy of the requested record that is reasonably possible.[5] As with the right to inspect public records, the same rule of reasonableness applies to the right to obtain copies of records. Thus, the custodian may impose reasonable restrictions on general requests for copies of voluminous classes of documents.[6]

The Act does not provide for a standing or continuing request for documents that may be generated in the future. However, the Brown Act provides that a person may make a request to receive a mailed copy of the agenda, or all documents constituting the agenda packet for any meeting of the legislative body. This request shall be valid for the calendar year in which it is filed.[7]

FORM OF THE REQUEST

A public records request may be made in writing or orally, in person or by phone.[8] Further, a written request may be made in paper or electronic form and may be mailed, emailed, faxed, or personally delivered. A local agency may ask, but not require, that the requester put an oral request in writing. In general, a written request is preferable to an oral request because it provides a record of when the request was made and what was requested, and helps the agency respond in a more timely and thorough manner.

Practice Tip:

A public records request is different than a question or series of questions posed to local agency officials or employees. The Act creates no duty to answer written or oral questions submitted by members of the public. But if an existing and readily available record contains information that would directly answer a question, from a customer service standpoint, it is advisable to either answer the question or provide the record in response to the question.

CONTENT OF THE REQUEST

A public records request must reasonably describe an identifiable record or records.[9] It must be focused and specific[10] and clear enough so that the agency can decipher what record or records are being sought.[11] A request that is so open-ended that it amounts to asking for all of a department's files is not reasonable. If a request is not clear or is overly broad, the local agency still has a duty to assist the requester in reformulating the request to make it more clear or less broad.[12]

A request does not need to precisely identify the record or records being sought. For example, a requester may not know the exact date of a record or its title or author, but if the request is descriptive enough for the local agency to understand which records fall within its scope, the request is reasonable. Requests may identify writings somewhat generally by their content.[13]

No magic words need be used to trigger the local agency's obligation to respond to a request for records. The content of the request must simply indicate that a public record is being sought. Occasionally, a requester may incorrectly refer to the federal Freedom of Information Act ("FOIA") as the legal basis for the request. This does not excuse the agency from responding if the request seeks public records. A public records request need not state its purpose or the use to which the record will be put by the requester.[14] A requester does not have to justify or explain the reason for exercising a fundamental right.[15]

THE DUTY TO RESPOND

Under no circumstances should a local agency simply not respond to a public records request. Even if the request does not reasonably describe an identifiable record, the requested record does not exist, or the record is exempt from disclosure, the agency must respond.[16]

Practice Tip:

Though not legally required, a local agency may find it convenient to use a written form for public records requests, particularly for those instances when a requester "drops in" to an office and asks for one or more records. The local agency cannot require the requester to use a particular form, but having the form and even having agency staff assist with filling out the form may help agencies better identify the information sought, follow up with the requester using the contact information provided, and provide more effective assistance to the requester.

TIMING OF THE RESPONSE

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.[17] 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.[18] If the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request.[19] 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.[20]

EXTENDING THE RESPONSE TIME

A local agency may extend the ten-day response period for up to 14 additional calendar days because of the need:

- To search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
- To search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request;

Practice Tip:

If a local agency is having difficulty responding to a public records request within the 10-day response period, and there are not grounds to extend the response period for an additional 14 days, the agency may obtain an extension by consent of the requester. Often a requester will cooperate with the agency, particularly if the requester believes the agency is acting reasonably and conscientiously in processing the request. It is also advisable to document in writing any extension agreed to by the requester.



- To consult with another agency having substantial interest in the request (such as a state agency), or among two or more components of the local agency (such as two city departments) with substantial interest in the request; and/or
- In the case of electronic records, to compile data, write programming language or a computer program, or to construct a computer report to extract data.[21]

No other reasons justify an extension of time to respond to a public records request. For example, a local agency may not extend the time on the basis that it has other pressing business, or that the employee most knowledgeable about the records sought is on vacation or otherwise unavailable.

If a local agency exercises its right to extend the response time beyond the ten-day period, it must do so in writing, stating the reasons for the extension and the anticipated date of the response within the 14-day extension period.[22] The agency does not need the consent of the requester to extend the time for response.

■ ASSISTING THE REQUESTER

Local agencies must provide assistance to requesters who are having difficulty making a focused and effective request.[23] To the extent reasonable under the circumstances, a local agency must:

- Assist the requester in identifying records that are responsive to the request or the purpose of the request, if stated;
- Describe the information technology and physical location in which the records exist; and
- Provide suggestions for overcoming any practical basis for denying access to records.[24]

Alternatively, the local agency may satisfy its duty to assist the requester if it gives the requester an index of records.[25] Ordinarily an inquiry into a requester's purpose in seeking access to a public record is inappropriate,[26] but such an inquiry may be proper if it will help assist the requester in making a focused request that reasonably describes identifiable records.[27]

■ LOCATING RECORDS

A local agency must make a reasonable effort to search for and locate the record or records that have been requested.[28] No bright-line test exists to determine whether an effort is reasonable. That determination will depend on the facts and circumstances surrounding each request. In general, upon the local agency's receipt of a public records request, those persons or offices within the agency that would most likely be in possession of responsive records should be consulted in an effort to locate such records.



The right to access public records is not without limits. A local agency is not required to perform a "needle in a haystack" search to locate the record or records sought by the requester.[29] Nor is it compelled to undergo a search that will produce a "huge volume" of material in response to the request.[30] On the other hand, an agency typically will endure some burden – at times, a significant burden – in its records search. Usually that burden alone will be insufficient to justify noncompliance with the request.[31] Nevertheless, if the request imposes a substantial enough burden, an agency may decide to withhold the requested records on the basis that the public interest in nondisclosure clearly outweighs the public interest in disclosure.[32]

REDACTING RECORDS

Some records contain information that must be disclosed, along with information that is exempt from disclosure. A local agency has a duty to provide such a record to the requester in redacted form if the nonexempt information is "reasonably segregable" from that which is exempt,[33] unless the burden of redacting the record becomes too great.[34] What is reasonably segregable will depend on the circumstances. If exempt information is inextricably intertwined with nonexempt information, the record may be withheld in its entirety.[35]

Practice Tip:

Care should be taken in deciding whether to disclose, withhold, or redact a record. When a public records request presents novel or complicated issues or implicates policy concerns or third party rights, it is advisable to consult with the local agency's legal counsel before making this decision.

TYPES OF RESPONSES

After conducting a reasonable search for requested records, a local agency has only a limited number of possible responses. If a search yields no responsive records, the agency must inform the requester. If the agency locates a responsive record, it must decide whether to:

- Disclose the record;
- Withhold the record; or
- Disclose the record in redacted form.

In responding to a written public records request, if the local agency does not have the record or has decided to withhold it, or if the requested record is disclosed in redacted form, the agency's response must be in writing, and must identify by name and title each person responsible for the decision.[36]

If the record is withheld in its entirety or provided to the requester in redacted form, the local agency must state the legal basis under the Act for its decision not to comply fully with the request.[37] Statements like "we don't give up those types of records" or "our policy is to keep such records confidential" will not suffice.

WAIVER

Generally, whenever a local agency discloses an otherwise exempt public record to any member of the public, the disclosure constitutes a waiver of most of the exemptions contained in the Act for all future requests for the same information.[38] There are a number of statutory exceptions to the waiver provisions, including disclosures made through discovery or other legal proceedings and disclosures to another governmental agency that agrees to treat the disclosed material as confidential.[39]

Practice Tip:

A local agency should always document that it is supplying the record to the requester. The fact and sufficiency of the response may become points of dispute with the requester. Any response that denies in whole or in part an oral public records request should be put in writing.

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

A local agency has no duty to create a record that does not exist at the time of the request.[40] There is also no duty to reconstruct a record that was lawfully discarded prior to receipt of the request.

The Act does not require a local agency to create a "privilege log" or list that identifies the specific records being withheld.[41] The response only needs to identify the legal grounds for nondisclosure. If the agency creates a privilege log for its own use, however, that document may be considered a public record and may be subject to disclosure in response to a later public records request.

TIMING OF DISCLOSURE

Although the law precisely defines the time for responding to a public records request, it is less precise in defining the deadline for disclosing records. The Act simply states that copies of records must be provided "promptly."[42] As for when a requester must be given access to inspect records, the Act is silent, but it is generally assumed that the same standard of promptness applies. Further, the Act states that nothing therein "shall be construed to permit an agency to delay or obstruct the inspection or copying of public records,"[43] which signals the importance of promptly disclosing records to the requester.

Practice Tip:

The local agency may wish to maintain a separate file for copies of records that have been withheld and those produced (including redacted versions) in the event there is a legal challenge to the decision regarding the disclosure.

Neither the ten-day response period nor the additional fourteen-day extension may be used to delay or obstruct the inspection or copying of public records.[44] For example, requests for commonly disclosed records that are held in a manner that allows for prompt disclosure should not be withheld because of the statutory response period.

As a practical matter, records often are disclosed at the same time the local agency responds to the request. But in some cases, that time frame for disclosure is not feasible because of the volume of records encompassed by the request.



FEES

Practice Tip:

When faced with a voluminous public records request, a local agency has numerous options – for example, asking the requester to narrow the request, asking the requester to consent to a later deadline for responding to the request, and providing responsive records (whether redacted or not) on a "rolling" basis, rather than in one complete package. It is sometimes possible for the agency and requester to work cooperatively to streamline a public records request, with the result that the requester obtains the records or information the requester truly wants, while the burdens on the agency in complying with the request are reduced.

The public records process is in many respects cost-free to the requester. No fees may be charged to reimburse the local agency's costs incurred to search for a record, review a record, redact a record, assist a requester in formulating a request, or respond to a request. Nor may the local agency charge a fee for the requester's inspection of a record, even if staff time is expended in the inspection. For example, if concern for the security of records requires that an agency employee sit with the requester during the inspection, or if a record must be redacted before it can be inspected, the agency may not bill the requester for this expenditure of staff time.

The local agency may charge a fee for the direct costs of duplicating a record when the requester is seeking a copy,[45] or it may charge a statutory fee, if applicable.[46] Direct costs of duplication include costs of reproduction, and conceivably the cost of staff time expended in making a copy of the record.[47] An agency may require payment in advance before providing the requested copies;[48] however, no payment can be required merely to look at a record where copies are not sought.

Although permitted to charge a fee for duplication costs, a local agency may choose to reduce or waive that fee.[49] For example, the agency might waive the fee in a particular case because the requester is indigent; or it might generally choose to waive fees below a certain dollar threshold because the administrative costs of collecting the fee would exceed the revenue to be collected. An agency may also set a customary copying fee for all requests that is below the amount that reflects actual duplication costs.

Endnotes

1 Gov. Code, § 6253, subd. (a).
2 *Bruce v. Gregory* (1967) 65 Cal.2d 666; *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754; 64 Ops.Cal.Atty.Gen. 317 (1981).
3 See "Timing of the Response," p. 11.
4 Gov. Code, § 6253, subd. (b).
5 *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754.
6 *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754; 64 Ops.Cal.Atty.Gen. 317 (1981).
7 Gov. Code, § 54954.1; see also Gov. Code § 65092 [standing request for notice of public hearing], Cal. Code Regs., tit. 14, ch. 3, §§ 15072, 15082 and 15087 [standing requests for notice related to environmental documents].
8 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.
9 Gov. Code, § 6253, subd. (b).
10 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.
11 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
12 See "Assisting the Requester," p. 12.
13 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
14 See Gov. Code, § 6257.5; *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d 440.
15 Gov. Code, § 6250; Cal. Const., article I, § 3.
16 Gov. Code, § 6253.
17 Gov. Code, § 6253, subd. (c).
18 Civ. Code, § 10.
19 Civ. Code, § 11.
20 See "Timing of Disclosure," p. 13.
21 Gov. Code, § 6253, subds. (c)(1) - (4).
22 Gov. Code, § 6253, subd. (c).
23 Gov. Code, § 6253.1; *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177.
24 Gov. Code, § 6253.1, subds. (a)(1) - (3).
25 Gov. Code, § 6253.1, subd. (d)(3).
26 See Gov. Code, § 6257.5.
27 Gov. Code, § 6253.1, subd. (a).
28 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
29 *Cal. First Amend.Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
30 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
31 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
32 *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d 440; see also 64 Ops. Cal.Atty.Gen. 317 (1981).
33 Gov. Code, § 6253, subd. (a); *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d. 440.
34 *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d. 440.
35 *ACLU Foundation v. Deukmejian* (1982) 32 Cal.3d. 440.
36 Gov. Code, §§ 6253, subd. (d), 6255, subd. (b).
37 Gov. Code, § 6255, subd. (b).
38 Gov. Code, § 6254.5; 86 Ops.Cal.Atty.Gen. 132 (2003).
39 Gov. Code, § 6254.5.

40 Gov. Code, § 6252, subd. (e); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061; 71 Ops.Cal.Atty.Gen. 235 (1988).
41 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.
42 Gov. Code, § 6253, subd. (b); 88 Ops.Cal.Atty.Gen. 153 (2005); 89 Ops.Cal.Atty.Gen. 39 (2006).
43 Gov. Code, § 6253, subd. (d).
44 Gov. Code, § 6253, subd (d).
45 Gov. Code, § 6253, subd. (b).
46 Gov. Code, § 6253, subd. (b); 85 Ops.Cal.Atty.Gen. 225 (2002); see, e.g., Gov. Code, § 81008.
47 *North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144.
48 Gov. Code, § 6253, subd. (b).
49 Gov. Code, § 6253, subd. (e); *North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144.

CHAPTER 4:
EXEMPTIONS



OVERVIEW OF EXEMPTIONS

SPECIFIC EXEMPTIONS

- Architectural and Official Building Plans
- Attorney Client Communications and Attorney Work Product
- Code Enforcement Records
- Drafts
- Election Information
- Identity of Informants
- Law Enforcement Records
- Library Circulation Records
- Licensee Financial Information
- Medical Privacy Laws
- Official Information Privilege
- Pending Litigation or Claims
- Personal Contact Information
- Personnel Records
- Public Contracting Documents
- Real Estate Appraisals and Engineering Evaluations
- Recipients of Public Services
- Taxpayer Information
- Trade Secrets and Other Proprietary Information
- Utility Customer Information

PUBLIC INTEREST EXEMPTION

EFFECT OF PROPOSITION 59 ON EXEMPTIONS

CHAPTER 4:
EXEMPTIONS



OVERVIEW OF EXEMPTIONS

The underlying purpose of the Act is to assure broad access to public records. Any grounds for denying access to public records must be found in the enumerated exemptions of the Act.[1] The Act's general policy of disclosure can only be accomplished if the exemptions are narrowly construed. As a result, courts—both as a matter of statutory interpretation and now by constitutional mandate—construe exemptions under the Act narrowly.[2]

This means that in responding to a record request, the local agency must allow access to the record unless it can identify an exemption within the Act that would justify nondisclosure of the information. Moreover, in circumstances where a record may contain some information that is subject to an exemption and other information that is not, the local agency must produce the record, but may redact the information that is exempt.

As discussed below, many of the exemptions are very specific and pertain to particular types of public records such as certain personnel, police, or medical records. Two exemptions, however, have a broader scope and may apply even if a record does not fall within any other exemption contained in the Act. First, the Act exempts records that are otherwise exempt from disclosure under other statutes.[3] Second, the Act's "public interest" or "catchall" provision allows nondisclosure where the local agency demonstrates on the facts of a particular case that the public interest in nondisclosure clearly outweighs the public interest in disclosure.[4]

Practice Tip:

When evaluating a record for purposes of determining whether it falls within any exemption under the Act, a local agency should always bear in mind that it might also be subject to nondisclosure under other statutes such as the Evidence Code or Penal Code.[5]

SPECIFIC EXEMPTIONS

Architectural and Official Building Plans



Certain of the materials submitted by third parties to local agencies may qualify for federal copyright protection.[6] In addition, local agencies may claim a copyright in many of their own records.

The Act exempts records, "the disclosure of which is exempted or prohibited pursuant to federal or state law…."[7] Federal copyright law defines "architectural work" as the "design of a building as embodied in any tangible medium of expression, including building, architectural plans, or drawings."[8] The law includes architectural plans as "original works of authorship" which have an automatic federal copyright protection.[9] Architectural plans are therefore protected under the federal copyright law and may be inspected, but cannot be copied without the permission of the owner. "Fair use of copyrighted materials" does not require disclosure or the right to copy architectural plans. The Fair Use rule is a defense to a copyright infringement action; it is not proper to use the Fair Use rule offensively in order to obtain copyrighted materials.[10]

State law addresses inspection and duplication of building plans and authorizes inspection of the plans by the public.[11] The official copy of building plans maintained by a local agency's building department may be inspected, but may not be copied without first requesting the written permission of the licensed or registered professional who signed the document and the original or current property owner. A request for written permission from the professional must be accompanied by a statutorily prescribed affidavit signed by the person requesting to make copies, attesting that the copy of the plans shall only be used for the maintenance, operation and use of the building, that the drawings are instruments of professional service and are incomplete without the interpretation of the certified, licensed or registered professional of record, and that a licensed architect who signs and stamps plans, specifications, reports, or documents shall not be responsible for damage caused by subsequent unauthorized changes to or uses of those plans.[12] After receiving this required information, the professional cannot unreasonably withhold written permission to make copies of the plans.[13]

Additionally, the California Attorney General has determined that interim grading documents, including geology, compaction, and soils reports are public records.[14]

Practice Tip:

These statutory requirements do not prohibit duplication of reduced copies of plans that have been distributed to local agency decision-making bodies as part of the agenda materials for a public meeting.

Attorney Client Communications and Attorney Work Product

The Act specifically exempts from disclosure "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code relating to privilege."[15] The Act's exemptions protect attorney client privileged communications and attorney work product, as well as, more broadly, other work product prepared for use in pending litigation or claims.[16]

Even after litigation is concluded, 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.[17] Similarly, retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney client privilege.[18] A local agency may waive the privilege and elect to produce the agreements.[19] Only the local agency's governing board may waive the privilege.[20]

Code Enforcement Records

Local agencies may pursue code enforcement through administrative or criminal proceedings, or a combination of both. Records of code enforcement cases for which criminal sanctions are sought may be subject to the same disclosure rules as police and other law enforcement records, including the rules for investigatory records and files, as long as there is a concrete and definite prospect of criminal enforcement.[21] Records of code enforcement cases being prosecuted administratively do not qualify as law enforcement records.[22] However, some administrative code enforcement information, such as names and contact information of complainants, may be exempt from disclosure under the official information privilege, the identity of informant privilege, or the public interest exemption.[23]

Drafts

The Act exempts from disclosure "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."[24] The purpose of the "drafts" exemption is to provide a measure of privacy for writings concerning pending agency action. The exemption was adapted from the federal Freedom of Information Act ("FOIA"), which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[25] The California Supreme Court has observed that the FOIA "memorandums" exemption is based on the policy of protecting the decision making processes of government agencies, and in particular the frank discussion of legal or policy matters that might be inhibited if subjected to public scrutiny.[26]

Practice Tip:

By adopting written policies or developing consistent practices of discarding preliminary deliberative writings, local agencies may facilitate candid internal policy debate. Such policies and practices may exempt from disclosure even preliminary drafts that have not yet been discarded, so long as the drafts are not maintained by the local agency in the ordinary course of business, and the public interest in nondisclosure clearly outweighs the public interest in disclosure.

The courts have held that the "drafts" exemption in the Act has essentially the same purpose as the "memorandums" exemption in the FOIA, and that the "drafts" exemption protects deliberative materials produced in the process of making agency decisions, but not factual materials.[27] Some courts have distinguished between pre-decisional advisory opinions, recommendations and policy deliberations, which are exempt, and memoranda of factual material or purely factual material contained in and severable from deliberative memoranda.[28] However, in discussing the closely-related deliberative process privilege, which is also based on the FOIA "memorandums" exemption, the California Supreme Court has observed that the fact/opinion distinction may be misleading because even purely factual material may expose the deliberative process. According to the California Supreme Court, the key question under the FOIA "memorandums" exemption is whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.[29]

To qualify for the "drafts" exemption:

- the record must be a preliminary draft, note, or memorandum;
- that is not retained by the local agency in the ordinary course of business; and
- the public interest in withholding the record must clearly outweigh the public interest in disclosure.[30]

The courts have observed that preliminary materials that are not customarily discarded or that have not in fact been discarded pursuant to policy or custom must be disclosed.[31] What distinguishes the "drafts" exemption from the deliberative process privilege is a focus on whether the records containing deliberative information are normally retained by the local agency. If the records are normally retained, they do not qualify for the exemption. This is in keeping with the purpose of the FOIA "memorandums" exemption of prohibiting the "secret law" that would result from confidential memos retained by local agencies to guide their decision-making.

Election Information

Voter Registration Information

Voter registration information, including the home street address, telephone number, email address, precinct number, or other number given by the Secretary of State, is confidential and cannot be disclosed except as specified in the Elections Code. Similarly, the signature of the voter shown on the voter registration card is confidential and shall not be disclosed to any person, except as provided in the Elections Code.[32] Voter registration information may be provided to any candidate for federal, state, or local office; any committee for or against an initiative or referendum measure for which legal publication is made; and to any person for election, scholarly, journalistic or political purposes, or for governmental purposes as determined by the Secretary of State.[33]



Identifying information contained in voter registration records including a California Driver's License, California ID card, or other unique identifier used by the State of California is confidential and shall not be disclosed to any person (including those entitled to voter registration information).[34]

When a person's vote is challenged, the voter's home address or signature may be released to the challenger, elections officials, and other persons as necessary to make, defend or adjudicate a challenge.[35]

The elections official shall permit a person to view the signature of a voter for the purpose of determining whether the signature matches a signature on an affidavit of registration or a petition. The signature cannot be copied.[36]

Information or data compiled by public officers or employees that reveals the identity of persons who have requested bilingual ballots or ballot pamphlets is not a public record and shall not be provided to any person other than those public officers or employees who are responsible for receiving and processing those requests.[37]

Initiative, Recall, and Referendum Petitions

Any petition to which a voter has affixed his or her signature for a statewide, county, city, and/or district initiative, referendum, recall or matters submitted under the Education Code is not a public record and is not open to inspection except by the public officers and/or employees whose duty it is to receive, examine or preserve the petitions. This prohibition extends to all memoranda prepared by county elections officials in the examination of the petitions indicating which voters have signed particular petitions.[38]

If a petition is found to be insufficient, the proponents and their representatives may inspect the memoranda of insufficiency to determine which signatures were disqualified and the reasons for the disqualification.[39]

Identity of Informants

A local agency has a privilege to refuse to disclose and to prevent another from disclosing the identity of a person who has furnished information in confidence to a law enforcement officer or representative of a local agency charged with administration or enforcement of a law. This privilege applies where the information purports to disclose a violation of a law of the United States, the State of California or another public entity, and where the disclosure is forbidden by state or federal law. It also applies where the disclosure of the identity of the informant is against the public interest because there is a necessity for

preserving the confidentiality of the informant's identity that outweighs the necessity for disclosure in the interest of justice.[40] This privilege extends to disclosure of the contents of the informant's communication if the disclosure would tend to disclose the identity of the informant.[41]



Law Enforcement Records

Overview

Law enforcement records are generally exempt from disclosure except for certain specific types of information that must be disclosed.[42] The actual investigation files and records are themselves exempt from disclosure, but the Act requires the local agency to disclose certain information derived from them.[43]

The type of information that must be disclosed differs depending upon whether it relates to, for example, calls to the police department for assistance, the identity of an arrestee, information relating to a traffic accident, or certain types of crimes, including, for example, car theft, burglary, or arson. The identities of victims of certain types of crimes, including minors and victims of sexual assault, are required to be withheld if requested by the victim, or the victim's guardian if the victim is a minor.[44] Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.[45] Certain information that may be required to be released may be withheld where the disclosure would endanger a witness or interfere with the successful completion of the investigation. The disclosure exemption extends indefinitely, even after the investigation is closed.[46]

Release practices vary by local agency. Some local agencies provide a written summary of information being disclosed, some release only specific information upon request, while others release reports with certain matters redacted. Other local agencies release reports upon request with no redactions except as mandated by statute. Some local agencies also release 911 tapes[47] and booking photos, although this is not required under the Act.[48]

If it is your local agency's policy to release police reports upon request, it is helpful to establish an internal process to control the release of the identity of minors or victims of certain types of crimes; or to ensure that releasing the report would not endanger the safety of a person involved in an investigation or endanger the completion of the investigation.

Practice Tip:

Many departments that choose not to release entire reports develop a form that can be filled out with the requisite public information.

Exempt Records

The Act generally exempts most law enforcement records from disclosure, including:

- Complaints to or investigations conducted by a local or state police agency
- Records of intelligence information or security procedures of a local or state police agency
- Any investigatory or security files compiled by any other local or state police agency
- Customer lists provided to a local police agency by an alarm or security company
- Any investigatory or security files compiled by any state or local agency for correctional, law enforcement or licensing purposes.[49]

Information that Must be Disclosed

There are three general categories of information contained in law enforcement investigatory files that must be disclosed: information that must be disclosed to victims, their authorized representatives and insurance carriers; information relating to arrestees; and information relating to complaints or requests for assistance.

Disclosure to Victims, Authorized Representatives, Insurance Carriers:

Except where disclosure would endanger the successful completion of an investigation, or a related investigation, or endanger the safety of a witness, certain information relating to specific listed crimes must be disclosed upon request to:

- A victim
- The victim's authorized representative
- An insurance carrier against which a claim has been or might be made
- Any person suffering bodily injury, or property damage or loss.

The type of crimes listed to which this requirement applies include arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime defined by statute.[50]

The type of information that must be disclosed (except where it endangers safety of witnesses or the investigation itself) includes:

- Name and address of persons involved in or witnesses to incident (other than confidential informants)
- Description of property involved
- Date, time and location of incident
- All diagrams; statements of the parties to the incident
- Statements of all witnesses (other than confidential informants).[51]

Information Regarding Arrestees

The Act mandates that the following information be released pertaining to every individual arrested by the local law enforcement agency except where releasing the information would endanger the safety of persons involved in an investigation or endanger the successful completion of the investigation or a related investigation:

- Full name and occupation of the arrestee
- Physical description including date of birth, color of eyes and hair, sex, height and weight
- Time, date and location of arrest
- Time and date of booking
- Factual circumstances surrounding arrest
- Amount of bail set
- Time and manner of release or location where arrestee is being held
- All charges, including outstanding warrants, parole or probation holds, that the arrestee is being held on.[53]



Complaints or Requests for Assistance

The Act provides that the following information must be disclosed relative to complaints or requests for assistance received by the law enforcement agency — subject to the restrictions imposed by the Penal Code:

- Time and nature of the response
- To the extent the crime alleged or committed or any other incident is recorded, the time, date and location of occurrence, and the time and date of report
- Factual circumstances surrounding crime/incident

Practice Tip:

The release of traffic accident information is covered under the Vehicle Code, which requires the law enforcement agency to disclose the entire contents of a traffic accident report to persons who have a "proper interest" in the information, including the driver or authorized representative, guardian, conservator or parent of a minor driver, injured person, owners of vehicles or property damaged by the accident, persons who may be liable for breach of warranty and an attorney who declares under penalty of perjury that he or she represents any such person.[52]

Practice Tip:

Most police departments have some form of daily desk or press log that contains all or most of arrestee information. The Act does not require a local agency to grant a single requester to be given access on a subscription basis to records that may be created in the future. It applies only to records existing at the time of the request.[54] Further, there is no obligation to provide the information in the format requested if that is not the format used by the local agency to store the information or to create copies for its own use.[55]

- General description of injuries, property or weapons involved
- Names and ages of victims shall be disclosed, except the names of victims of certain listed crimes may be withheld upon request of victim or parent of minor victim. These listed crimes include various Penal Code sections which relate to topics such as sexual abuse, child abuse, hate crimes and stalking.[56]

The Penal Code provides that except as required by criminal discovery provisions, no law enforcement officer or employee of a law enforcement agency shall disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim of or witness to the alleged offense.[57]

Requests for Journalistic or Scholarly Purposes

Where a request states, under penalty of perjury, that it is made for a scholarly, journalistic, political or governmental purpose, or for an investigative purpose by a licensed private investigator, and that it will not be used directly or indirectly or furnished to another to sell a product or service to any individual or group of individuals, the Act requires the disclosure of the name and address of every individual arrested by the local agency and the current address of the victim of a crime, except for specified crimes.[58] Any address information furnished pursuant to this authorization may not be used directly or indirectly, or furnished to another to sell a product or service and is subject to statutory restrictions that preclude the furnishing of this information to an arrested person or a defendant in a criminal action.[59]

Practice Tip:

Law enforcement information such as complaint or incident information that may otherwise be subject to disclosure is confidential to the extent it includes reports of suspected child or elder abuse or neglect, or information contained in reports of suspected abuse or neglect. To avoid potential criminal liability, local agencies should only disclose reports of suspected child or elder abuse or neglect or information contained in such reports as permitted by state law.

Mental Health Detention Information

All information and records obtained in the course of providing services to a mentally disordered individual who is gravely disabled and/or a danger to others or himself, and who is detained (often referred to as a "detainee") and taken into custody by a peace officer, are confidential and may only be disclosed to enumerated recipients and for purposes specified in state law.[60] Willful, knowing release of confidential mental health detention information can create liability for civil damages.[61]

Elder Abuse Records

Reports of suspected abuse or neglect of an elder or dependent adult, and information contained in such reports, are confidential and may only be disclosed as permitted by state law.[62] The prohibition against unauthorized disclosure applies regardless of whether a report of suspected elder abuse or neglect is from someone who is a "mandated reporter" (any person that has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not for compensation) or from someone else.[63] Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.[64]

Juvenile Records

Police and Court Records

Records or information gathered by law enforcement agencies relating to the detention of or taking a minor into custody or temporary custody are confidential and subject to release only in certain circumstances and by certain specified persons and entities.[65] Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.[66]

Practice Tip:

Some local courts have their own rules regarding inspection of juvenile records, which may differ from county to county and may change from time to time. Care should be taken to periodically review the rules as the presiding judge of each juvenile court makes their own rules.

Different provisions apply to dissemination of information gathered by a law enforcement agency relating to the taking of a minor into custody where it is provided to another law enforcement agency, including a school district police or security department or other agency or person who has a legitimate need for information for purposes of official disposition of a case.[67] A law enforcement agency shall release the name of and descriptive information relating to any juvenile who has escaped from a secure detention facility.[68]

Child Abuse Reports

Reports of suspected child abuse or neglect, including reports from those who are "mandated reporters" (for example, teachers and public school employees and officials, physicians, children's organizations, community care facilities, etc.), and child abuse and neglect investigative reports that result in a summary report being filed with the Department of Justice are confidential and may only be disclosed to the persons and agencies listed in state law.[69] Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.[70]



Library Circulation Records

Library circulation records that are kept to identify the borrowers, and library and museum materials presented solely for reference or exhibition purposes, are exempt from disclosure.[71] Further, all registration and circulation records of any library that is in whole or in part supported by public funds are confidential. Such records remain confidential and shall not be disclosed except to persons acting within the scope of their duties within the administration of the library, pursuant to written authorization by the individual to whom the records pertain, or by superior court order.[72] The confidentiality of library circulation records does not extend to statistical reports of registration and circulation, or to records of fines collected by the library.[73]

Licensee Financial Information

When a local agency requires that applicants for licenses, certificates or permits submit personal financial data, that information is exempt from disclosure.[74] One frequent example of this is the submittal of sales or income information under a business license tax requirement. However, this exemption does not apply to financial information filed by an existing licensee or franchisee to justify a rate increase, presumably because those affected by the increase have a right to know its basis.[75]

Medical Privacy Laws

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, and the Health Insurance Portability and Accountability Act.[76] The exemptions from and prohibitions against disclosure contained in these laws are incorporated into the Act.[77]

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, 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.[78]

Physician/Patient Privilege

State law gives patients a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications between patients and their physicians.[79] The privilege extends to confidential patient/physician communications that are disclosed to third parties where reasonably necessary to accomplish the purpose for which the physician was consulted.[80] Patient information in the possession of a local agency may be subject to the privilege.

Confidentiality of Medical Information Act

State law prohibits providers of health care, health care service plans and contractors, as these terms are defined in the law, from disclosing individually identifiable medical information of a patient, enrollee or subscriber without first obtaining authorization, subject to certain exceptions.[81] State law also obligates employers to establish appropriate procedures to ensure the confidentiality of individually identifiable medical information, and prohibits employers from disclosing or permitting the disclosure or use of individually identifiable medical information without first obtaining authorization, subject to certain exceptions.[82] Local agencies that are not providers of health care, health care service plans or contractors as defined in state law may possess individually identifiable medical information protected under state law that originated with providers of health care, health care service plans or contractors.[83]

Practice Tip:

Patient medical information provided to local agency emergency medical personnel to assist in providing emergency medical care may be subject to the physician/patient privilege if providing the privileged information is reasonably necessary to accomplish the purpose for which the physician was consulted.

Local agencies are also obligated as employers to protect individually identifiable medical information protected under state law. Patients whose individually identifiable medical information is used or disclosed in violation of the state law may recover compensatory damages, limited punitive damages, limited attorneys' fees and their litigation costs.[84] Violations of state law that result in economic loss or personal injury of patients are subject to criminal penalties, and damages are available for negligent release of protected records.[85] Persons and entities that negligently disclose records protected under state law may be liable for administrative fines or civil penalties.[86] Knowingly and willfully obtaining, using, or disclosing information protected under state law is subject to substantial administrative fines or civil penalties.[87]



Health Insurance Portability and Accountability Act

Congress enacted the Health Insurance Portability and Accountability Act in 1996 to improve portability and continuity of health insurance coverage and to combat waste, fraud and abuse in health insurance and health care delivery through the development of a health information system and establishment of standards and requirements for the electronic transmission of certain health information.[88] The Secretary of the U.S. Department of Health and Human Services has issued privacy regulations governing use and disclosure of individually identifiable health information.[89] Persons that knowingly and in violation of federal law use or cause to be used a unique health identifier, obtain individually identifiable health information relating to an individual, or disclose individually identifiable health information to another person are subject to substantial fines and imprisonment of not more than one year, or both, and to increased fines and imprisonment for violations under false pretenses or with the intent to use individually identifiable health information for commercial advantage, personal gain, or malicious harm.[90] Federal law also permits the Health and Human Services Secretary to impose civil penalties.[91]

Workers' Compensation Benefits

A local agency may not release records pertaining to the workers' compensation benefits for an individually identified employee because they are exempt from disclosure as "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy."[92] The Act further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law.[93]

In addition, state law prohibits a person or public or private entity who is not a party to a claim for workers' compensation benefits from obtaining individually identifiable information obtained or maintained by the Division of Workers' Compensation on that claim.[94] "[I]ndividually identifiable information" means "any

data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity."[95] If a public records request falls within this broad definition as a request for "data concerning an injury or claim" that is linked to a local agency employee or other uniquely identifiable individual, then the record(s) may not be disclosed.



Once an application for adjudication has been filed, certain information may be subject to disclosure;[96] however, some of the personal information may still be protected under the Act.[97] Requests for such information after adjudication must identify the requester and state the reason for the request. If the purpose of such a request is related to pre-employment screening, the administrative director must notify the person about whom the information is requested and include a warning about discrimination against persons who have filed claims for workers' compensation benefits. Further, a residence address shall not be disclosed except to law enforcement agencies, the district attorney, other governmental agencies or for journalistic purposes. Individually identifiable information is not subject to subpoena in a civil proceeding without notice and a hearing at which the court is required to balance the respective interests—privacy and public disclosure. Individually identifiable information may be used for certain types of statistical research by specifically listed persons and entities.[98]

Official Information Privilege

A local agency has a privilege to refuse to disclose official information.[99] "Official Information" includes:

- Information that is protected by a state or federal statutory privilege or; and
- Information, the disclosure of which is against the public interest, due to necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.[100]

The local agency has the right to assert the privilege both to refuse to disclose and to prevent another from disclosing official information.[101] Where the disclosure is prohibited by state or federal statute, the privilege is absolute. In all other respects, it is conditional and requires a judge to weigh the necessity for preserving the confidentiality of information against the necessity for disclosure in the interest of justice. (This is similar to the weighing process provided for in the Act—allowing nondisclosure when the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.)[102] This is typically done through confidential judicial review.[103] As part of the weighing process a court will look at the consequences to the public, including the effect of the disclosure on the integrity of public processes and procedures.[104]

There are a number of cases arising out of this statute.[105] While many of the cases interpreting this privilege involve law enforcement records, other cases arise out of licensing and accreditation-type activities. The courts address these types of cases on an individualized basis and further legal research should be done within the context of particular facts. The statute defines "official information" as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."[106] However, the courts have somewhat expanded on the statutory definition by determining that certain types of information, such as police investigative files and medical information, are "by [their] nature confidential and widely treated as such" and thus protected from disclosure by the privilege.[107] Although there is no case law directly on point, this privilege, along with the informant privilege, may be asserted to protect the identities of code enforcement complainants and whistleblowers.

Pending Litigation or Claims

The Act exempts from disclosure "(r)ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to [the California Government Claims Act] until the pending litigation or claim has been finally adjudicated or otherwise settled."[108] Although the phrase "pertaining to" pending litigation or claims might seem broad, the courts nevertheless have construed the exemption narrowly, consistent with the underlying policy of the Act to promote access to public records. The exemption applies only to documents specifically prepared by, or at the direction of, the local agency for use in litigation. This includes records prepared not simply for an ongoing case, but those specifically prepared in anticipation of a future lawsuit, such as an incident report.[109]



It may sometimes be difficult to determine whether a particular record was prepared specifically for use in litigation or for other purposes related to the underlying incident. For example, an incident report may be prepared either in anticipation of defending a potential claim, or simply for risk management purposes. In order for the exemption to apply in those circumstances, the local agency would have to prove that the dominant purpose of the record was to be used in defense of litigation.[110]

It is important to remember that even members of the public that have sued a local agency are entitled to use the Act to obtain documents that may be relevant to the litigation, so long as the documents were not specifically prepared by the local agency for use in anticipated or pending litigation, and do not fall within some other exemption under the Act or other statute. The mere fact that the litigant might also be able to obtain the documents in discovery is not a ground for rejecting the request under the Act.[111]

The pending litigation exemption does not prevent members of the public from obtaining records submitted to the local entity by litigants, such as a claim for monetary damages filed prior to a lawsuit. This is because the document has been prepared by the litigant and not by the local agency.[112]

Once litigation has concluded and is no longer "pending," records previously shielded from disclosure by the exemption must be produced, unless covered by another exemption or statutory privilege. The public may therefore obtain copies of depositions from closed cases.[113] Documents concerning settlement of a claim, whether prepared by a litigant or the local agency, such as medical records, payment warrants, minutes of a claims settlement committee meeting, or investigative reports, must be produced unless shielded from disclosure by other exemptions of the Act or other statutes.[114]

Practice Tip:

In responding to a request for documents concerning settlement of a particular matter, it is critical to pay close attention to potential application of other exemptions under the Act or other statutory privileges. It is recommended that you seek the advice of your local agency counsel.

While medical records are subject to a constitutional right of privacy, and generally exempt from production under the Act and other statutes,[115] the litigant may be deemed to have waived the right to confidentiality by submitting them to the public entity in order to obtain a settlement.[116] Similarly, investigative reports in claims involving law enforcement activity may fall within specific exemptions for law enforcement reports[117] or reports prepared in anticipation of litigation may fall within the attorney client privilege.[118] Particular records or information relevant to settlement of a closed case may also be subject to nondisclosure under the public interest exemption to the extent the local agency can show that the public interest in nondisclosure clearly outweighs the public interest in disclosure.[119]

There is considerable overlap between the pending litigation exemption and both the attorney client privilege[120] and attorney work product protection.[121] However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney client privilege or work product protection.[122] Moreover, while the exemption for pending litigation expires once the litigation is no longer pending, the attorney client privilege and work product protection are ongoing.[123]

The attorney client privilege may come into play simultaneously with specific exemptions under the Act or other statutory privileges that could require a court to undertake confidential inspection of documents in order to determine application of the exemptions. The Act specifically references an Evidence Code provision that provides a court may not review privileged attorney client communications in camera for purposes of determining whether the privilege is established.[124] Thus, in a writ of mandate proceeding a local agency may have to submit other documents for inspection to allow the court to determine whether a particular exemption applies, such as evaluating whether the public interest in nondisclosure clearly outweighs the public interest in disclosure under the public interest exemption. But the court cannot conduct an in camera review of documents that the local agency contends are subject to the attorney client privilege.

Practice Tip:

It is important to separate potential attorney client communications from other records and make certain that privileged attorney client communications are not unintentionally submitted to the court for inspection.

Personal Contact Information

Court decisions have ruled that individuals have a substantial privacy interest in their personal contact information. However, a fact-specific analysis must be conducted to determine whether the public interest exemption protects this information from disclosure, that is, whether the public interest in nondisclosure clearly outweighs the public interest in disclosure.[125] Application of this balancing test has yielded varying results, depending on the circumstances of the case.

For example, courts have allowed nondisclosure of the names, addresses and telephone numbers of airport noise complainants.[126] In that instance, the anticipated chilling effect on future citizen complaints weighed heavily in the court's decision.

In other situations, courts have ordered disclosure of personal information contained in applications for licenses to carry concealed weapons,[127] the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance,[128] and the names of donors to a university-affiliated foundation, even though those donors had requested anonymity.[129]

Posting Personal Information of Elected/Appointed Officials on the Internet

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.[130] This section 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. It also 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 address or phone number. If an official makes such a written demand, it must include a statement describing a threat or fear for the safety of the official or any person residing at the official's home address. The written demand is effective for four years, regardless of the length of the official's term of office. Remedies include injunctive or declarative relief, misdemeanor or felony prosecution, and treble damages of not less than $4,000.[131]

Practice Tip:

In situations where personal contact information clearly cannot be kept confidential, inform the affected members of the public that their personal contact information is subject to disclosure pursuant to the Act.

Personnel Records

"Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" are exempt from disclosure.[132] The express policy declaration at the beginning of the Act "bespeaks legislative concern for individual privacy as well as disclosure."[133] Courts have continued to recognize that public employees have a constitutionally protected interest in their personnel files; however, recent decisions from the California Supreme Court have determined that public employees do not have a reasonable expectation of privacy in their names and salary information and their dates of employment. This interpretation also applies to police officers absent unique, individual circumstances.[134]

Practice Tip:

California courts continue to look for guidance to provisions of the Federal Freedom of Information Act (FOIA), on which the Act was modeled, as well as federal cases interpreting the FOIA relative to personnel records.[138]

In addition, the public interest exemption may protect certain personnel records from disclosure.[135] In determining whether to allow access to personnel files, the courts have determined that the tests are essentially the same. The extent of the employee's privacy interest in certain information and the harm from its unwarranted disclosure is weighed against the public interest in disclosure. The public interest in disclosure will be considered in the context of the extent to which the disclosure of the information will shed light on the local agency's performance of its duties.[136]

Concerning allegations of non-law enforcement public employee misconduct, courts have upheld the public interest against disclosure of "trivial or groundless charges." When "the charges are found true, or discipline is imposed," the public interest favors disclosure. In addition, "where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists."[137]

Peace Officer Personnel Records

Peace officer personnel records fall within the category of records, "the disclosure of which is exempted or prohibited pursuant to federal or state law...." These records are confidential and privileged.[139]

The discovery and disclosure of the personnel records of peace officers are governed exclusively by statutory provisions contained in the Evidence Code and Penal Code. Peace officer personnel records and records of citizen complaints ". . . or information obtained from these records . . ." are confidential and "shall not" be disclosed in any criminal or civil proceeding except by discovery pursuant to statutorily prescribed procedures.[140]

Practice Tip:

The appropriate procedure for obtaining information in protected peace officer personnel files is to file a motion commonly known as a "Pitchess" motion, which by statute entails a two-part process involving first a determination by the court regarding good cause for disclosure and materiality of the information sought, and a subsequent confidential review by the court of the files, where warranted.[145]

Peace officer "personnel records" include personal data, medical history, appraisals and discipline, complaints and investigations relating to events perceived by the officer or relating to the manner in which his or her duties were performed, and any other information the disclosure of which would constitute an unwarranted invasion of privacy.[141] The names, salary information and employment dates and departments of peace officers have been determined to be disclosable records.[142]

While the Penal and Evidence Code privileges are not per se applicable in federal court, federal common law recognizes a qualified privilege for "official information" and considers government personnel files to be "official information."[143] Such a qualified privilege in federal court results in a very similar weighing of the potential benefits of disclosure against potential disadvantages.[144]

Employment Contracts and Employee Salaries

Every employment contract between a state or local agency and any public official or public employee is a public record that is not exempt under either the personnel or public interest exemption.[146] Thus, for example, one court has held that two letters in a city firefighter's personnel file were part of his employment contract and could not be withheld under either the employee's right to privacy in his personnel file or the public interest exemption.[147]

With or without an employment contract, the names and salaries (including performance bonuses and overtime) of public employees, including peace officers, are subject to disclosure under the Act.[148] Public employees do not have a reasonable expectation that their salaries will remain a private matter. In addition, there is a strong public interest in knowing how the government spends its money. Therefore, absent unusual circumstances, the names and salaries of public employees are not subject to either the personnel exemption or the public interest exemption. Similarly, peace officer salary information is not exempted from disclosure under the Act. Thus, absent unique, individual circumstances such as where a peace officer's anonymity is essential to his or her safety, the names and salaries of peace officers are subject to disclosure under the Act.[149]

Contractor Payroll Records

State law establishes requirements for maintaining and disclosing certified payroll records for workers employed on public works projects subject to payment of prevailing wages.[150] State law requires contractors to make certified copies of payroll records available to employees and their representatives, representatives of the awarding body, the Department of Industrial Relations, and the public.[151] Requests are to be made through the awarding agency or the Department of Industrial Relations, and the requesting party is required to reimburse the cost of preparation to the contractor, subcontractors, and the agency through which the request is made prior to being provided the records.[152] Contractors are required to file certified copies of the requested records with the requesting entity within ten days of receipt of a written request.[153]



However, state law also limits access to contractor payroll records. Employee names, addresses and social security numbers must be redacted from certified payroll copies provided to the public or any local agency by the awarding body or the Department of Industrial Relations.[154] Only the name and social security number are to be redacted from certified payroll copies provided to joint labor-management committees established pursuant to the federal Labor Management Cooperation Act of 1978.[155] The name and address of the contractor or subcontractor may not be redacted.[156]

The Director of the Department of Industrial Relations has adopted regulations governing release of certified payroll records and applicable fees.[157] Such regulations require that requests for certified payroll records be in writing and contain certain specified information regarding the awarding body, the contract and the contractor; require awarding agency acknowledgement of requests; specify required contents of awarding agency requests to contractors for payroll records; and set fees to be paid in advance by persons seeking payroll records.[158]

Test Questions and Other Examination Data

The Act exempts from disclosure test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided in the portions of the Education Code that relate to standardized tests.[159] Thus, for example, a local agency is not required to disclose the test questions it uses for its employment examinations. State law provides that standardized test subjects may, within 90 days of the release of test results to the test subject, have limited access to test questions and answers upon request to the test sponsor.[160] This limited access may be either through an in-person examination or by release of certain information to the test subject.[161] The Education Code also requires that test sponsors prepare and submit certain reports regarding standardized tests and test results to the California Postsecondary Education Commission.[162] All such reports and information submitted to the Commission are public records subject to disclosure under the Act.[163]

Public Contracting Documents

Final contracts with local agencies are generally disclosable public records due to the public's right to determine whether public resources are being spent for the benefit of the community as a whole or the benefit of only a limited few.[164] When the bids or proposals leading up to those final contracts become disclosable depends largely upon the types of contracts involved.

For example, local agency contracts for construction of public works, and procurement of goods and non-professional services are typically awarded to the lowest responsive, responsible bidder through a competitive bidding process.[165] Bids for these contracts are usually submitted to local agencies under seal

and then publicly opened at a designated time and place. These bids are public records and disclosable as soon as they are opened.

Other local agency contracts for acquisition of professional services or disposition of property are awarded to the successful proposer through a competitive proposal process. As part of this process, interested parties submit proposals that are evaluated by the local agency and are used to negotiate with the winning proposer.

Practice Tip:

Local agencies should clearly advise bidders and proposers in their Requests for Bids and Requests for Proposals what bid and proposal documents will be disclosable public records and when they will be disclosable to the public.

While the public has a strong interest in scrutinizing the process leading to the selection of the winning proposer, the local agency's interest in keeping these proposals confidential frequently outweighs the public's interest in disclosure until negotiations with the winning proposer are complete.[166] If a winning proposer has access to the specific details of other competing proposals, then the local agency is greatly impaired in its ability to secure the best possible deal on its constituents' behalf.

Some local agencies pre-qualify prospective bidders through a request for qualifications process. The pre-qualification packages submitted, including questionnaire answers and financial statements, are exempt public records and are not open to public inspection.[167] Nevertheless, documents containing the names of contractors applying for pre-qualification status are public records and must be disclosed. In addition, the contents of pre-qualification packages may be disclosed to third parties during the verification process, in an investigation of substantial allegations or at an appeal hearing.



Real Estate Appraisals and Engineering Evaluations

The Act requires the disclosure of the contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or a local agency relative to the acquisition of property, or to prospective public supply and construction contracts, but only when all of the property has been acquired or when all of the contract agreement obtained.[168] By its plain terms, this exemption only applies while the acquisition or prospective contract is pending. Once all the property is acquired or all of the contract agreement obtained, the exemption will not apply. In addition, this exemption is not intended to supersede the law of eminent domain.[169] Thus, for example, this exemption would not apply to appraisals of owner-occupied residential property of four units or less, where disclosure of such appraisals is required by the Eminent Domain Law or related laws such as the California Relocation Assistance Act.[170]

Recipients of Public Services

Disclosure of information regarding food stamp recipients is prohibited.[171] Subject to certain exceptions, disclosure of confidential information pertaining to applicants for or recipients of public social services for any purpose unconnected with the administration of the welfare department also is prohibited.[172] This latter prohibition does not create a privilege.[173]

Housing Authority Tenants

Leases and lists or rosters of tenants of the Housing Authority are confidential and shall not be open to inspection by the public, but shall be supplied to the respective governing body on request.[174] A Housing Authority has a duty to make available public documents and records of the Authority for inspection, except any applications for eligibility and occupancy that are submitted by prospective or current tenants of the Authority.[175]

The Act exempts from disclosure records that are the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information in accordance with section 18081 of the Health and Safety Code.[176]

Taxpayer Information

Where information that is required from any taxpayer in connection with the collection of local taxes is received in confidence and where the disclosure of that information would result in an unfair competitive disadvantage to the person supplying the information, the information is exempt from disclosure.[177] Sales and use tax records may be used only for tax administration. Unauthorized disclosure or use of confidential information contained in these records can give rise to criminal liability.[178]

Trade Secrets and Other Proprietary Information

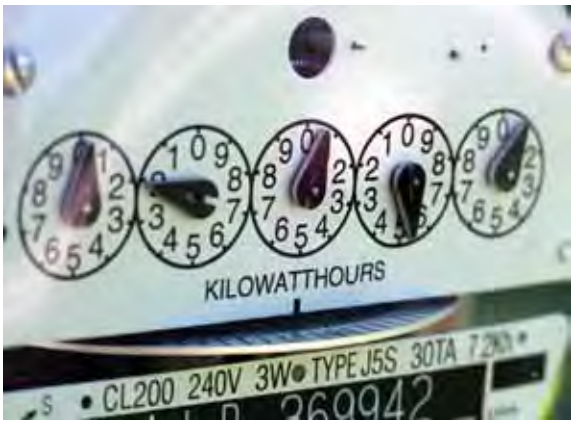
As part of the award and administration of public contracts, businesses will often give local agencies information that the businesses would normally consider to be proprietary. There are three exemptions that businesses often use to attempt to protect this proprietary information – the official information privilege, the trade secret privilege, and the public interest exemption.[179]

However, California's strong public policy in favor of disclosure of public records precludes local agencies from protecting most business information. Both the official information privilege and the public interest exemption require that the public interest in nondisclosure clearly outweighs the public interest in disclosure. While these provisions were designed to protect legitimate privacy interests, California courts have consistently held that when individuals or businesses voluntarily enter into the public sphere, they diminish their privacy interests.[180] Courts have further concluded that the public interest in disclosure overrides alleged privacy interests. For example, a court ordered a university to release the names of anonymous contributors who received license agreements for luxury suites at the school's sports arena. Another court ordered a local agency to release a waste disposal contractor's private financial statements used by the local agency to approve a rate increase.[181]

The trade secret privilege is for information, including a formula, pattern, compilation, program, device, method, technique or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[182]

However, even when records contain trade secrets, local agencies must determine whether disclosing the information is in the public interest. When businesses give local agencies proprietary information, courts will examine whether disclosure of that information serves the public interest.[183]

The Act contains several exemptions that address specific types of information that may constitute a trade secret — pesticide safety and efficacy information,[184] air pollution data,[185] and corporate siting information.[186] Other exemptions cover types of information that could include but are not limited to trade secrets — for example, certain information on plant production, utility systems development data, and market or crop reports.[187]



Utility Customer Information

Personal information expressly protected from disclosure under the Act includes names, credit histories, usage data, home addresses and telephone numbers of local agencies' utility customers.[188] This exception is not absolute, and customers' names, utility usage data and home addresses may be disclosable in certain situations. For example, disclosure is required when requested either by a customer's agent or authorized family member,[189] an officer or employee of another governmental agency when necessary for performance of official duties,[190] by court

order or request of a law enforcement agency relative to an ongoing investigation,[191] when the local agency determines the customer used utility services in violation of utility policies,[192] or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.[193]

Utility customers who are local agency officials with authority to determine their agency's utilities usage policies have lesser protection of their personal information because their names and usage data are disclosable upon request.[194]

PUBLIC INTEREST EXEMPTION

The Act establishes a "public interest" or "catchall" exemption that permits local agencies to withhold a record if the agency can demonstrate that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.[195] Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test.[196] The Act does not specifically identify the public interests that might be served by not making the record public, but the nature of those interests may be inferred from specific exemptions contained in the Act. The scope of the public interest exemption is not limited to specific categories of information or established exemptions or privileges. Each request for records must be considered on the facts of the particular case in light of the competing public interests.[197]

Practice Tip:

The public interest exemption balancing test weighs only public interests—the public interest in disclosure and the public interest in nondisclosure. Agency interests or requester interests that are not also public interests are not considered.[199]

The records and situations to which the public interest exemption may apply are open-ended, and when it applies, the public interest exemption alone is sufficient to justify nondisclosure of local agency records. The courts have relied exclusively on the public interest exemption to uphold nondisclosure of local agency records containing names, addresses and phone numbers of airport noise complainants, proposals to lease airport land prior to conclusion of lease negotiations, and information kept in a public defender's database about police officers.[198]

The public interest exemption is versatile and flexible, in keeping with its purpose of addressing circumstances not foreseen by the Legislature. For example, in one case, the court held local agencies could properly consider the burden of segregating exempt from nonexempt records when applying the balancing test under the public interest exemption.[200] In that case, the court held that the substantial burden of redacting exempt information from law enforcement intelligence records outweighed the marginal and speculative benefit of disclosing the remaining nonexempt information. In another case, the court applied the balancing test to the time of disclosure to hold that public disclosure of competing proposals for leasing city airport property could properly await conclusion of the negotiation process.[201]

The requirement that the public interest in nondisclosure must "clearly outweigh" the public interest in disclosure for records to qualify as exempt under the public interest exemption is important and emphasized by the courts. Justifying nondisclosure under the public interest exemption demands a clear overbalance on the side of confidentiality.[202] Close calls usually do not qualify for an exemption. There are a number of examples of cases where a clear overbalance was not present to support nondisclosure under the public interest exemption. The courts have held that the following are all subject to disclosure under the public interest exemption balancing test: the identities of individuals granted criminal conviction exemptions to work in licensed day care facilities and the facilities employing them; records relating to unpaid state warrants; court records of a settlement between the insurer for a school district and a minor sexual assault victim; applications for concealed weapons permits; letters appointing then rescinding an appointment to a local agency position; and the identities and license agreements of purchasers of luxury suites in a university arena.[203]



Deliberative Process Privilege

The public interest exemption incorporates the deliberative process privilege.[204] Like the "drafts" exemption, the deliberative process privilege derives from the FOIA "memorandums" exemption and its implementation of the executive or deliberative process privilege.[205] Congress' main concern in enacting the "memorandums" exemption was that frank discussion of legal or policy matters might be inhibited if subject to public scrutiny, and that efficiency of government would be greatly hampered if, with respect to such matters, local agencies were forced to operate in a fishbowl.[206]

The deliberative process privilege is based on the policy of protecting the decision-making processes of government agencies, and the notion that access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence are essential to effective governance in a representative democracy. The deliberative process privilege is similar to the common law privilege protecting against the disclosure of the mental processes of legislators. To prevent injury to the quality of executive decisions, the courts have focused on protecting communications to the decision maker before the decision is made. Courts have treated communications subsequent to the legislative decision as outside of the recognized privilege.[207]

Practice Tip:

The main difference between the deliberative process privilege and the closely related "drafts" exemption is that the deliberative process privilege may exempt from disclosure records that an agency normally retains.

The California Supreme Court has acknowledged that even purely factually material may be exempt from disclosure because it exposes the deliberative process. In applying the deliberative process privilege, courts focus more on the effect of the records' release and less on the nature of the records sought. The key question is whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.[208]

The California Supreme Court has applied this analysis to uphold nondisclosure of the Governor's calendars concerning both past and future meetings. California appellate courts have relied on the deliberative process privilege to uphold nondisclosure of the names and qualifications of applicants for temporary appointment to a local board of supervisors, names and background information about applicants for a county supervisor's seat, and the telephone numbers of calls made and received by local agency council members from cellular phones and second phones in home offices.[209]



■ EFFECT OF PROPOSITION 59 ON EXEMPTIONS

At the November 2, 2004 general election, the voters of California passed Proposition 59 which amended the California Constitution to include a public right of access to public records. The Constitution specifically provides: "The people have the right of access to information concerning the conduct of the people's business, and therefore the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[210] Thus, after enactment of Proposition 59, the right of public access to documents is not simply statutory, but a basic right under the Constitution. In furtherance of that goal, the constitutional provision states that a "statute, court rule, or other authority, including, those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[211] It also provides that any statute enacted after its effective date that limits the right of access must be adopted with findings identifying the interest protected by the limitation and the need for protecting that interest.[212]



Although Proposition 59 elevated the right of access to public records to constitutional stature, it appears to be simply declarative of existing law in terms of existing statutory exemptions. For example, while the Constitution states that an existing exemption must be narrowly construed,[213] this is consistent with longstanding case authority.[214] Moreover, the Constitution states that "[t]his subdivision 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."[215]

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]

Endnotes

1 *State of California ex rel Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414.

2 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414; see "Effect of Proposition 59 on Exemptions," p. 35.

3 Gov. Code, § 6254, subd. (k).

4 Gov. Code, § 6255; see also "Public Interest Exemption," p. 34.

5 See, for example, "Attorney Client Communications and Attorney Work Product," p. 19 and "Medical Privacy Laws," p. 25.

6 U.S.C. title 17.

7 Gov. Code, § 6254, subd. (k).

8 17 U.S.C. § 101.

9 17 U.S.C. § 102(A)(8).

10 17 U.S.C. § 107.

11 Health & Saf. Code, § 19851.

12 Health & Saf. Code, § 19851.

13 Health & Saf. Code, § 19851.

14 89 Ops.Cal.Atty.Gen. 39 (2006).

15 Gov. Code, § 6254, subd. (k).

16 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414; see also "Official Information Privilege," p. 27.

17 *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.

18 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].

19 Evid. Code § 912. See also Gov. Code § 6254.5 and "Waiver", p. 13.

20 See Rules Prof. Conduct, rule 3-600.

21 Gov. Code, § 6254, subd. (f); *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal. App.3d 778; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061; see "Law Enforcement Records," p. 22.

22 *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.

23 *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; see "Official Information Privilege," p. 27, "Identity of Informants," p. 21, and "Public Interest Exemption," p. 34.

24 Gov. Code, § 6254, subd. (a).

25 Gov. Code, § 6254, subd. (a); 5 U.S.C. § 552(b)(5).

26 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

27 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.

28 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.

29 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

30 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.

31 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.

32 Gov. Code, § 6254.4.

33 Elec. Code, § 2194.

34 Gov. Code, § 6254.4(c).

35 Elec. Code, § 2194, subd. (c).

36 Elec. Code, § 2194, subd. (c)(2).

37 Gov. Code, § 6253.6.

38 Gov. Code, § 6253.5.

39 Gov. Code, § 6253.5.

40 Evid. Code, § 1041; *People v. Navarro* (2006) 138 Cal.App.4th 146.

41 *People v. Hobbs* (1994) 7 Cal.4th 948.

42 Gov. Code, § 6254, subd. (f).

43 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061; 65 Ops.Cal.Atty.Gen. 563 (1982).

44 Gov. Code, § 6254, subd. (f)(2).

45 *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169.

46 *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048; *Williams v. Superior Court* (1993) 5 Cal.4th 337.

47 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061 [911 tapes].

48 86 Ops.Cal.Atty.Gen. 132 (2003) [booking photos].

49 Gov. Code, § 6254, subd. (f).

50 Gov. Code, § 13951, subd. (b).

51 Gov. Code, § 6254, subd. (f).

52 Veh. Code, § 20012.

53 Gov. Code, § 6254, subd. (f)(1).

54 *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754.

55 Gov. Code, § 6253.9, subd. (a).

56 Gov. Code, § 6254, subd. (f)(2).

57 Pen. Code, § 841.5, subd. (a).

58 Gov. Code, § 6254, subd. (f).

59 Gov. Code, § 6254, subd. (f)(3); Pen. Code, § 841.5; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32 [120 S.Ct. 483].

60 Welf. & Inst. Code, §§ 5150, 5328.

61 Welf. & Inst. Code, § 5330.

62 Welf. & Inst. Code, § 15633.

63 Welf. & Inst. Code, §15633.

64 Welf. & Inst. Code, § 15633.

65 Welf. & Inst. Code, §§ 827, 828; see Welf. & Inst. Code, § 827.9 [applies to Los Angeles County only]; see also *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767 [release of information regarding minor who has been temporarily detained and released without any further proceedings.]

66 Welf. & Inst. Code, § 827.

67 Welf. & Inst. Code, § 828, subd. (a); Cal. Rules of Court, rule 5.552(g).

68 Welf. & Inst. Code, § 828, subd. (b).

69 Pen. Code, §§ 11165.6, 11165.7, 11167.5 & 11169.

70 Pen. Code, § 11167.5, subd. (a).

71 Gov. Code, § 6254, subd. (j).

72 Gov. Code, § 6267.

73 Gov. Code, §§ 6254, subd. (j) & 6267.

74 Gov. Code, § 6254, subd. (n).

75 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

76 Evid. Code, § 990 *et seq.*; Civ. Code, § 56 *et seq.*; 42 U.S.C. § 1320d.

77 Gov. Code, § 6254, subd. (k).

78 Both section 6254, subd. (c) and section 6254, subd. (k) of the Act probably apply to most records protected under the physician/patient privilege, the Confidentiality of Medical Information 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 section 6255 of the Act.

79 Evid. Code, § 994.

80 Evid. Code, § 992.

81 Civ. Code, §§ 56.10, subd. (a), 56.05, subd. (g). "Provider of health care" as defined means persons licensed under section 500 and following of the Business and Professions Code or section 1797 and following of the Health and Safety Code, and clinics, health dispensaries or health facilities licensed under section 1200 and following of the Health and Safety Code. "Health care service plan" as defined means entities regulated under Health and Safety Code section 1340 and following. "Contractor" as defined means medical groups, independent practice associations, pharmaceutical benefits managers and medical service organizations that are not providers of health care or health care service plans.

82 Civ. Code, § 56.20.

83 Civ. Code, § 56.05, subd. (g).

84 Civ. Code, § 56.35.

85 Civ. Code, § 56.36, subds. (a), (b).

86 Civ. Code, § 56.36, subd. (c)(1).

87 Civ. Code, § 56.36, subd. (c)(2).

88 Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-192, § 261 (Aug. 24, 1996) 110 Stat. 1936; 42 U.S.C. § 1320d.

89 42 U.S.C. § 1320d-1–d-3, Health and Human Services Summary of the Privacy Rule, May, 2003. The final privacy regulations were issued in December, 2000 and amended in August, 2002. The definitions of "health information" and "individually identifiable health information" in the privacy regulations are in 45 Code of Federal Regulations part 160.103. The general rules governing use and disclosure of protected health information are in 45 Code of Federal Regulations part 164.502.

90 42 U.S.C. § 1320d-6. Federal law defines "individually identifiable health information" as any information collected from an individual that is created or received by a health care provider, health plan, employer or health care clearing house, that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual, and that identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

91 42 U.S.C. §1320d-5.

92 Gov. Code, § 6254, subd. (c).

93 Gov. Code, § 6254, subd. (k).

94 Lab. Code, § 138.7, subd. (a).

95 Lab. Code, § 138.7.

96 Lab. Code, §§ 5501.5 & 138.7.

97 Gov. Code, § 6254, subd. (c).

98 Lab. Code, § 138.7.

99 Evid. Code, § 1040.

100 *White v. Superior Court* (2002) 102 Cal.App.4th Supp. 1.

101 Evid. Code, § 1040, subd. (b).

102 Gov. Code, § 6255.

103 The term "in camera" refers to a review of the document in the judge's chambers outside the presence of the requesting party.

104 *Shepherd v. Superior Court* (1976) 17 Cal.3d 107.

105 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363; *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759.

106 Evid. Code, § 1040, subd. (a).

107 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363.

108 Gov. Code, § 6254, subd. (b).

109 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

110 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

111 *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.

112 *Poway Unified School Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496.

113 *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083.

114 *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893.

115 See "Medical Privacy Laws," p. 25.

116 *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893.

117 See "Law Enforcement Records," p. 22.

118 *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

119 Gov. Code, § 6255.

120 Evid. Code, § 950 et seq.

121 Code Civ. Proc., § 2018.030.

122 *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083.

123 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 [attorney client privilege]; *Fellows v. Superior Court* (1980) 108 Cal. App.3d 55 [work product protection].

124 Gov. Code, § 6259; Evid. Code, § 915, subd. (a).

125 Gov. Code, § 6255, subd. (a).

126 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.

127 *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.

128 *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.

129 *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810.

130 See Gov. Code, § 6254.21, subd. (f) [containing a non-exhaustive list of individuals who qualify as "elected or appointed official[s]"].

131 Gov. Code, § 6254.21.

132 Gov. Code, § 6254, subd. (c).

133 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

134 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *Commission on Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278.

135 Gov. Code, § 6255; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742; see also, *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272; see Chapter 4(c).

136 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *Commission on Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742; *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913.

137 *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913; *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041.

138 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; *Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301 [court found a reasonable expectation of privacy in one's personnel files]; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

139 Gov. Code, § 6254, subd. (k); Pen. Code, § 832.7; *City of Hemet v. Superior Court* (1995) 37.Cal.App.4th 1411.

140 Pen. Code, § 832.7; Evid. Code, §§ 1043, 1046.

141 Pen. Code, § 832.8.

142 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *Commission on Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278.

143 *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, cert. denied (1991) 502 U.S. 957; *Miller v. Pancucci* (C.D.Cal. 1992) 141 F.R.D. 292.

144 Evid. Code, § 1043 et seq.; *Guerra v. Board of Trustees* (9th Cir. 1977) 567 F.2d 352; *Kerr v. United States Dist. Court for Northern Dist.* (9th Cir. 1975) 511 F.2d 192, aff'd, (1976) 426 U.S. 394; *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515.

145 *People v. Mooc* (2001) 26 Cal.4th 1216; *People v. Thompson* (2006) 141 Cal.App.4th 1312; *City of San Jose v. Superior. Court* (1998) 67 Cal.App.4th 1135.

146 Gov. Code, § 6254.8.

147 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.

148 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319 [holding that the names and salaries of public employees earning $100,000 or more per year, including peace officers, are subject to disclosure under the Act].

149 *Commission on Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278.

150 Lab. Code, § 1776.

151 Lab. Code, § 1776, subd. (b).

152 Lab. Code, § 1776, subd. (c).

153 Contractors and subcontractors that fail to do so may be subject to a penalty of $25 per worker for each calendar day until compliance is achieved. Lab. Code, § 1776, subds. (d), (g).

154 Lab. Code, § 1776, subd. (e).

155 Lab. Code, § 1776, subd. (e).

156 Lab. Code, § 1776, subd. (e).

157 Lab. Code, § 1776, subd. (i); see Lab. Code § 16400 et seq.

158 California Code Regs., tit. 8, §§ 16400, 16402.

159 Gov. Code, § 6254, subd. (g).

160 Ed. Code, § 99157, subd. (a); *Brutsch v. City of Los Angeles* (1982) 3 Cal.App.4th 354.

161 Ed. Code, § 9915, subds. 7(a) & (b).

162 Ed. Code, §§ 99153 & 99154.

163 Ed. Code, § 99162.

164 *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810.

165 Pub. Contract Code, § 22038.

166 Gov. Code, § 6255; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065.

167 Pub. Contract Code, §§ 10165, 10506.6, 10763, 20101, 20111.5, 20209.7, 20209.26 & 20651.5.

168 Gov. Code, § 6254, subd. (h).

169 Gov. Code, § 6245, subd. (h).

170 Gov. Code, § 7267.2, subd. (c).

171 Welf. & Inst. Code, § 18909.

172 Welf. & Inst. Code, § 10850.

173 *Jonon v. Superior Court* (1979) 93 Cal.App.3d 683.

174 Health & Saf. Code, § 34283.

175 Health & Saf. Code, § 34332, subd. (c).

176 Gov. Code, § 6254.1.

177 Gov. Code, § 6254, subd. (i); see also Rev. & Tax. Code, § 7056.

178 Rev. & Tax Code, §§ 7056 & 7056.5.

179 Evid. Code, §§ 1040 & 1060; Gov. Code, §§ 6254, subd. (k), 6255.

180 *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

181 *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

182 Civ. Code, § 3426.1, subd. (d). This trade secret definition is set forth in the Uniform Trade Secrets Act ("UTSA") at Civil Code section 3426.1, subdivision (d). However, Civil Code section 3426.7, subdivision (c) states that any determination as to whether disclosure of a record under the Act constitutes a misappropriation of a trade secret shall be made pursuant to the law in effect before the operative date of the UTSA. At that time, California used the Restatement definition of a trade secret, which was lengthy. See *Uribe v. Howie* (1971) 19 Cal.App.3d 194. Accordingly, it is not clear that the trade secret definition that applies generally under the UTSA is the trade secret definition that applies in the context of a public records request.

183 *Uribe v. Howie* (1971) 19 Cal.App.3d 194.

184 Gov. Code, § 6254.2.

185 Gov. Code, § 6254.7.

186 Gov. Code, § 6254.15.

187 Gov. Code, § 6254, subd. (e).

188 Gov. Code, § 6254.16.

189 Gov. Code, § 6554.16, subd. (a).

190 Gov. Code, § 6254.16, subd. (b).

191 Gov. Code, § 6254.16, subd. (c).

192 Gov. Code, § 6254.16, subd. (d).

193 Gov. Code, § 6254.16, subd. (f).

194 Gov. Code, § 6265.16, subd. (e).

195 Gov. Code, § 6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

196 *CBS Broadcasting, Inc. v. Superior Court* (2001) 91 Cal.App.4th 892.

197 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

198 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065; *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001.

199 *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001.

200 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

201 *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065.

202 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645.

203 *CBS Broadcasting Inc., v. Superior Court* (2001) 91 Cal.App.4th 892; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *Copley Press, Inc., v. Superior Court* (1998) 63 Cal.App.4th 367; *CBS, Inc. v. Block* (1986) 42 Cal.App.3d 646; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *California State University, Fresno Assn. v. Superior Court* (2001) 90 Cal.App.4th 810.

204 Gov. Code, § 6255.

205 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

206 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

207 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

208 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

209 *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.

210 Cal. Const., art. I, § 3, subd. (b)(1).

211 Cal. Const., art. I, § 3, subd. (b)(2).

212 Cal. Const., art. I, § 3, subd. (b)(2).

213 Cal. Const., art. I, § 3, subd. (b)(2).

214 *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.

215 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.

216 *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.

217 87 Ops.Cal.Atty.Gen. 181 (2004); 88 Ops.Cal.Atty.Gen. 16 (2005); 89 Ops.Cal.Atty.Gen. 204 (2006).

218 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319.

CHAPTER 5:
JUDICIAL REVIEW AND REMEDIES



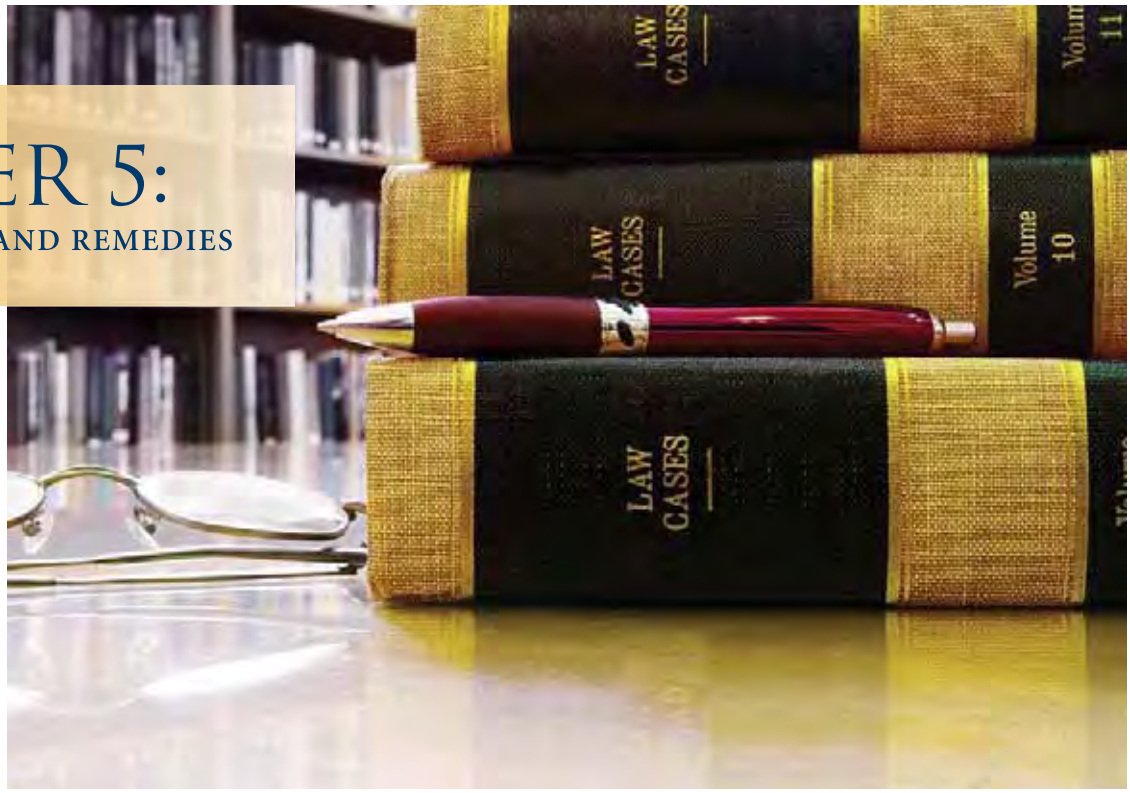
OVERVIEW

THE TRIAL COURT PROCESS AND DECISION

APPELLATE REVIEW

ATTORNEY FEES AND COSTS

CHAPTER 5:
JUDICIAL REVIEW AND REMEDIES



OVERVIEW

The Act establishes a special, expedited judicial process to resolve disputes over the public's right to inspect or receive copies of public records.[1] In contrast to other governmental transparency laws such as the Ralph M. Brown Act,[2] the Act contains no criminal penalties for a local agency's failure to comply with the Act. Rather, the Act is enforced through an expedited civil judicial process in which any person may ask a judge to compel a public agency to disclose a public record or a class of public records.[3] A person who successfully enforces his or her rights under the Act is entitled to receive reasonable attorney fees and court costs.[4] This chapter discusses the special rules that apply to lawsuits brought to enforce the Act.

Practice Tip:

Although the Act does not contain criminal penalties, violations of the Act can lead to public criticism of both the local agency and the individuals involved, payment of attorney fees by the local agency, and other non-criminal sanctions. Certain local agencies may also have local "sunshine" ordinance policies that make violations of the Act grounds for discipline of employees or officials.

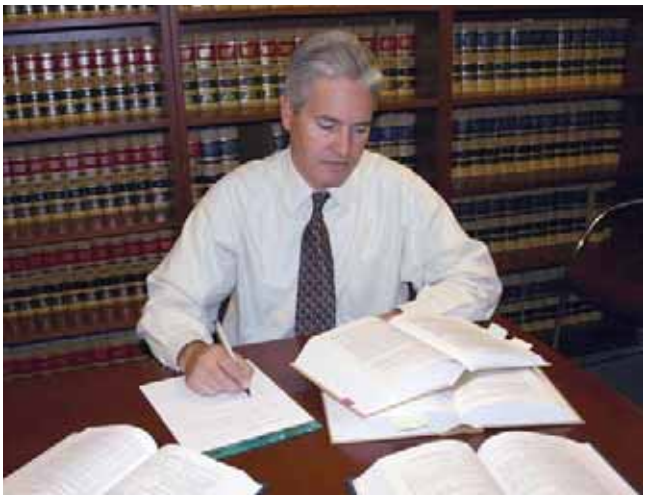
THE TRIAL COURT PROCESS AND DECISION

Any person may file a civil action for injunctive or declaratory relief or writ of mandate to enforce his or her right to inspect or receive a copy of any public record under the Act.[5] The action may be filed in any court of competent jurisdiction, which typically is the superior court in the county where the records or some part of them are maintained.[6] The Act does not contain a specific time period in which the action must be filed. Therefore, such action must be filed in a manner consistent with traditional actions for injunctive or declaratory relief or writ of mandate and would be subject to any limitations periods or equitable concepts such as laches applicable to such actions.

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.[7] Allowing a local agency to seek declaratory relief to determine whether it must disclose records to a member of the public would frustrate 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.[8]

A lawsuit brought to enforce the Act is not subject to the normal time periods that apply to other civil actions. The judge in each case will establish the times for responsive pleadings and for hearings with the object of securing a decision at the earliest possible time.[9] If the judge determines, based upon a verified petition, that certain public records are being improperly withheld from a member of the public, the judge will order the officer or person withholding the records to disclose the public record or show cause why he or she should not do so.[10]

In a typical action under the Act, the parties will file written arguments with the court to explain why the records should be disclosed or withheld. The court will also hold a hearing to give the parties an opportunity to argue the case. If permitted by the rules of evidence.[11] The judge may examine the record or records at issue in camera, that is, in the judge's chambers and out of the presence and hearing of others, to help decide the case.[12] The judge must decide the case based on a review of the record or records (if such review is permitted), the papers filed by the parties, any oral argument, and additional evidence as the court may allow.[13]



If the court finds that the public official's decision to refuse disclosure is not justified under the Act, the judge shall order the public official to make the record public.[14] 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 content with an order supporting the decision refusing disclosure.[15] The court may also order some of the records to be disclosed while upholding the decision to withhold other records. In addition, the court may order that portions of the records be redacted and compel the disclosure of the remaining portions of the records.

A local agency must disclose the public records pursuant to the trial court's order unless a party obtains a stay of the order or judgment through a petition to the appellate court. 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.[16]

APPELLATE REVIEW

As part of the expedited judicial review process established by the Act, a trial court's order is not considered to be a final judgment subject to the normal and often lengthy appeal process. In place of a normal appeal, such orders are subject to immediate review through the filing of a petition to the appellate court for the issuance of an extraordinary writ.[17] This manner of providing for appellate review through an extraordinary writ procedure rather than a normal appeal has been held to be constitutional.[18]

A party seeking review of a trial court's order must file a petition for review with the appellate court within 20 days after he or she is served with a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the written notice of entry of the order is served by mail, the period within which to file the petition is increased by five days.[19]

If a party wishes to prevent the disclosure of public records pending appellate review of the trial court's decision, that party must ask the appellate court for a stay of the order or judgment. The appellate court shall not grant such a stay unless the petitioning party demonstrates both that it will sustain irreparable damage because of the disclosure and that it is probable that the party will succeed on the merits of the case in the appellate court.[20]

Because the trial court's decision is not a final judgment for which there is an absolute right of appeal, the appellate court may decline to review the case without a hearing or without issuance of a detailed written opinion. However, since the intent of substituting writ review for the normal appeal process is to provide for speedier appellate review, not to provide for less appellate review, an appellate court may not deny an apparently meritorious writ petition that is timely presented and procedurally sufficient merely because the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.[21]



Once a court of appeal accepts a petition for review, the appellate process proceeds in much the same fashion as a normal appeal. The appellate court will establish a briefing schedule and set the matter for a hearing once briefing is complete. The scope of review is equivalent to the scope of review on appeal, and an appellate court will consider the merits of a trial court's order as if the case were on appeal.[22] The appellate court will conduct an independent review of the trial court's ruling, with the factual findings made by the trial court being upheld if based on substantial evidence.[23]

The decision of the appellate court, whether to deny review or on the merits of the case, is subject to discretionary review by the California Supreme Court through a petition for review.

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 deny attorney fees and costs under the Act is subject to appeal and is not subject to the extraordinary writ process.[24] Similarly, an award of sanctions in a public records case is subject to appeal rather than a petition for an extraordinary writ.[25]

■ ATTORNEY FEES AND COSTS

If the plaintiff prevails in the litigation, the judge must award court costs and reasonable attorney fees to the plaintiff.[26] 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.[27] 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.[28] 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.[29]

A member of the public may be entitled to an award of attorney fees and costs even when he or she is not denominated as the "plaintiff" in the action.[30] If the party is the functional equivalent of a plaintiff in a Public Records Act lawsuit—that is, if the party's intent to invoke the Act prompted the litigation—that party may be considered the prevailing plaintiff under the Act.

The local agency, not the public official who made the decision, must pay any award of costs and fees. The award does not become a personal liability of the public official who made the decision not to disclose the public records.[31]

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.[32]

Endnotes

1 Gov. Code, §§ 6258, 6259.
2 Gov. Code, § 54950 et seq.
3 Gov. Code, § 6258.
4 Gov. Code, § 6259, subd. (d).
5 Gov. Code, § 6258.
6 Gov. Code, § 6259, subd. (a).
7 *Filarsky v. Superior Court* (2002) 28 Cal.4th 419.
8 *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759.
9 Gov. Code, § 6258.
10 Gov. Code, § 6259, subd. (a).
11 Evid. Code. § 915.
12 Gov. Code, § 6259, subd. (a).
13 Gov. Code, § 6259, subd. (a).
14 Gov. Code, § 6259, subd. (b).
15 Gov. Code, § 6259, subd. (b).
16 Gov. Code, § 6259, subd. (c).
17 Gov. Code, § 6259, subd. (c).
18 *Powers v. City of Richmond* (1995) 10 Cal.4th 85.
19 Gov. Code, § 6259, subd. (c).
20 Gov. Code, § 6259, subd. (c).
21 *Powers v. City of Richmond* (1995) 10 Cal.4th 85.
22 *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177.
23 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.
24 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.
25 *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925.
26 Gov. Code, § 6259, subd. (d).
27 *Los Angeles Times v. Alameda Corridor Transportation. Authority* (2001) 88 Cal.App.4th 1381.
28 *Rogers v. Super. Ct.* (1993) 19 Cal.App.4th 469; *Belth v. Garamendi* (1991) 232 Cal.App.3d 896.
29 *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.
30 *Fontana Police Depart. v. Villegas Banuelos* (1999) 74 Cal.App.4th 1249.
31 Gov. Code, § 6259, subd. (d).
32 Gov. Code, § 6259, subd. (d); *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925.

CHAPTER 6:
RECORDS MANAGEMENT



PUBLIC MEETING RECORDS

ELECTRONIC RECORDS

ELECTRONIC DISCOVERY

RECORDS RETENTION AND DESTRUCTION LAWS

CHAPTER 6:
RECORDS MANAGEMENT



PUBLIC MEETING RECORDS

Any person may request to receive a copy of a local agency meeting agenda or agenda packet by mail.[1] If requested, the agenda material must be made available in appropriate alternative formats to persons with disabilities.[2] If a local agency receives a written request to send agenda materials by mail, the materials must be mailed when the agenda is posted or distributed to a majority of the agency's legislative body, whichever occurs first.[3] Requests for mailed copies of agendas or agenda packets are valid for the calendar year in which they are filed, but must be renewed after January 1 of each subsequent year.[4] Local agency legislative bodies may establish a fee for mailing agenda materials.[5] The fee may not exceed the cost of providing the service.[6] Failure of a requester to receive agenda material is not a basis for invalidating action taken at the meeting for which agenda material was not received.[7]

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.[8] 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.[9] The agency may charge a fee for a copy of this record; however, no surcharge may be imposed on persons with disabilities.[10] Records pertaining to agenda items must be made available for public inspection at a location listed in the meeting agenda if the records are distributed less than 72 hours prior to the meeting.[11]

Practice Tip:

Some agencies have found it useful to adopt electronic records policies governing such issues as: what electronic records (for example, emails) 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.

ELECTRONIC RECORDS

"Public records" subject to the Act 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."[12] Therefore, records subject to the Act include records in any media, including electronic media, in which government agencies may possess records. This is underscored by the definition of "writings" treated as public records, which includes any "transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[13] Some provisions of the Act deal explicitly with electronic records.

Practice Tip:

Local agencies should consult with legal counsel concerning disclosure of metadata or GIS information.

The Act obligates agencies to provide electronic copies of existing, nonexempt records that are requested in an electronic format that the agency has already used for itself or transmission to another agency, unless doing so would compromise the security or integrity of the original record, or any proprietary software in which it is maintained, or unless otherwise prohibited by law.[14] Duplication costs of electronic records are limited to the direct cost of producing the electronic copy.[15] However, requesters may be required to bear additional costs of producing the electronic copy, such as programming and computer services costs, if the records are only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction or programming.[16] Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.[17]

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. No provision of the Act expressly addresses metadata, and no reported court opinions have considered whether or the extent to which metadata is subject to disclosure. Nor does the Act or its case law provide guidance on whether agencies have a duty to disclose electronic public records that contain exempt metadata if the agency is unable to electronically remove the metadata.



Electronic records maintained by local agencies may also include geographic information system (GIS) records and GIS technology that permits storage, processing and display of geographical information. 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, and no published cases discuss, GIS information disclosure.

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.[18] 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.[19] The exception for agency-developed software does not affect other public agency electronic records.[20]

Practice Tip:

The definition of "public records" for purposes of the Act and state records retention laws are different, and because local agency officials retain some discretion under the Act and state records retention laws concerning what records an agency retains, the fact that a particular type of public record is subject to disclosure under the Act does not necessarily mean that local agencies must retain such records.

■ ELECTRONIC DISCOVERY

The importance of maintaining a written document retention policy is evident by revisions to Rule 26 of the Federal Rules of Civil Procedure, which took effect December 1, 2006. Rule 26 requires parties in federal court litigation to address the production and preservation of electronic records. These rule changes do not require a local agency to alter its routine management or storage of electronic information. They do, however, illustrate the importance of having formal document retention policies.

In general, once federal court litigation begins, a local agency 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

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.[21] Its sole function is to provide for disclosure.[22] 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.[23] For example, duplicate records that are less than two years old may be destroyed if no longer required.[24] 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.[25] 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.[26]



However, there is no definition of the "public records" subject to state records retention statutes.[27] The Attorney General has opined that the definition of "public records" for purposes of the records retention statutes is "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."[28] Under this definition, local agency officials retain some discretion concerning what agency records must be kept pursuant to state records retention laws. Similarly, the Act allows for local agency discretion concerning what preliminary drafts, notes or interagency or intra-agency memoranda are retained in the ordinary course of business.[29]

Endnotes

1 Gov. Code, § 54954.1.
2 Gov. Code, § 54954.1.
3 Gov. Code, § 54954.1.
4 Gov. Code, § 54954.1.
5 Gov. Code, § 54954.1.
6 Gov. Code, § 54954.1.
7 Gov. Code, § 54954.1.
8 Gov. Code, § 54957.5, subd. (a).
9 Gov. Code, § 54957.4, subd. (c)
10 Gov. Code, § 54957.5, subd. (d).
11 Gov. Code, § 54957.5, subds. (b)(1),(2).
12 Gov. Code, § 6252, subd. (e), emphasis added.
13 Gov. Code, § 6252, subd. (g).
14 Gov. Code, § 6253.9, subd. (a).
15 Gov. Code, § 6253.9, subd. (a)(2).
16 Gov. Code, § 6253.9, subd. (b).
17 Gov. Code, § 6253.9, subd. (c). See "No Duty to Create a Record or to Create a Privilege Log," p. 13.
18 Gov. Code, § 6254.9, subds. (a), (b).
19 Gov. Code, § 6254.9, subd. (a).
20 Gov. Code, § 6254.9, subd. (d).
21 *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661.
22 *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661.
23 Gov. Code, § 34090, subd. (d).
24 Gov. Code, § 34090.7.
25 Gov. Code, § 34090, subds. (a), (b), (c), (e).
26 The Secretary of State's Local Government Records Management Guidelines may be viewed at *http://www.sos.ca.gov/archives/locgov/localgovrm7.pdf*.
27 64 Ops.Cal.Atty.Gen. 317 (1981).
28 64 Ops.Cal.Atty.Gen. 317 (1981).
29 Gov. Code, § 6254, subd. (a). See "Drafts," p. 20.

APPENDIX:
FREQUENTLY REQUESTED INFORMATION AND RECORDS

THE PEOPLE'S BUSINESS:
A Guide to the California Public Records Act

LEAGUE OF CALIFORNIA CITIES

THE PEOPLE'S BUSINESS:

A Guide to the California Public Records Act

LEAGUE OF CALIFORNIA CITIES

Frequently Requested Information and Records

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 "The People's Business: A Guide to the California Public Records Act," hereafter referred to as "the Guide".*
Calendars of Elected Officials	Probably not, but note that there is no published appellate court decision on this issue post- Prop. 59.[1]	*Times Mirror Co. v. Superior Court (1991) 53 Cal.3d. 1325 and Rogers v. Superior Court* (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.*
Contact information – Names, addresses, and phone numbers of crime victims or witnesses	No	Gov. Code, § 6254(f)(2). *For additional information, see p. 29 of the Guide.*
Citizen complaints against peace officers – annual summary report to AG	Yes	Pen. Code, § 832.7(c). *For additional information, see p. 30 of the Guide.*
Citizen complaint information – names, addresses, and telephone numbers	No	*City of San Jose v. San Jose Mercury News* (1999) 74 Cal. App.4th 1008. *For additional information, see p. 30 of the Guide.*
Claims for damages	Yes	*Poway Unified School District v. Superior Court* (1998) 62 Cal.App.4th 1496.
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. *For additional information, see p. 21 of the Guide.*
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 *Times Mirror v. Superior Court* (1991) 53 Cal.3d 1325; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. *For additional information, see p. 35 of the Guide.*

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.*

Frequently Requested Information and Records, Continued

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Employment Agreements/ Contracts	Yes	Gov. Code, §§ 6254.8 and 53262(b). *For additional information, see p. 30 of the Guide.*
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). *For additional information, see p. 19 of the Guide.*
Juvenile Court Records	No	*T.N.G. v. Superior Court* (1971) 4 Cal.3d. 767; Welf. & Inst. Code, §§ 827 and 828. *For additional information, see p. 24 of the Guide.*
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.; *Smith v. Laguna Sun Villas Community Assoc.* (2000) 79 Cal.App.4th 639; *United States v. Amlani,* 169 F.3d 1189 (9th Cir. 1999); *Clarke v. American Commerce National Bank*, 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. *For additional information, see p. 19, 28 of the Guide.*
Library Circulation Records	No	Gov. Code, § 6254(j) and 6267. *For additional information, see p. 25 of the Guide.*
Medical Records	No	Gov. Code, § 6254(c). *For additional information, see p. 25 of the Guide.*
Mental Health detentions *(5150 reports)*	No	Welf. & Inst. Code, § 5328. *For additional information, see p. 24 of the Guide.*
Minutes of Closed Sessions	No	Gov. Code, § 54957.2(a). *For additional information, see p. 19, 34, 35 of the Guide.*
Notices/Orders to property owner re: housing/building code, violations	Yes	Gov. Code, § 6254.7(c). *For additional information, see p. 20 of the Guide.*
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. *For additional information, see p. 19 of the Guide.*
Personal Financial Records	No	Gov. Code, § 7470, 7471, 7473; see also Gov. Code, § 6254(n). *For additional information, see p. 25 of the Guide.*

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.*

Frequently Requested Information and Records, Continued

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Personnel		*For additional information, see p. 29-31 of the Guide.*
• Employee inspection of own personnel file	Yes, with exceptions.	• Lab. Code, § 1198.5. This section applies to charter cities. *See* Gov. Code, § 31011. For peace officers, see Gov. Code, § 3306.5.
• Names and salaries (including performance bonuses and overtime) of public employees, including peace officers	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).	• *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court* (2007) 42 Cal.4th 319.
• Test Questions, scoring keys, and other examination data.	No	• Gov. Code, § 6254(g)
Police		*For additional information, see p. 22-25 of the Guide.*
• Citizen complaint policy	Yes	• Pen. Code, § 832.5(a)(1)
• Criminal history	No	• Pen. Code, § 13300 *et seq.*; Pen. Code, § 11105 *et seq.*
• Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video	No	• Gov. Code, § 6254(f); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.
• Crime reports	Yes	• Gov. Code, §§ 6254(f), 6255
• Gang intelligence information	No	• Gov. Code, § 6254(f); 79 Ops.Cal.Atty Gen. 206 (1996).
• In custody death reports to AG	Yes	• Gov. Code, § 12525
• List of concealed weapon permit holders	Yes	• Gov. Code, § 6254(u)(1); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• Concealed weapon permits and applications	Yes, except for home/ business address and medical/psychological history.	• Gov. Code, § 6254(u)(1); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• Officer's personnel file	No	This information can only be disclosed through a Pitchess motion. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045.
• Peace officer's name, employing agency and employment dates	Yes, absent unique, individual circumstances.	• *Commission on Peace Officer Standards and Training v. Superior Cour*t (2007) 42 Cal.4th 278.
• Names of officers involved in critical incidents	Yes, absent unique, individual circumstances.	• *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278; *New York Times v. Superior Court* (1997) 52 Cal.App.4th 97.
• Traffic accident reports	Yes, to certain parties.	• Veh. Code, § 16005 [only *disclose* to those needing the information, such as insurance companies, and the individuals involved].

Frequently Requested Information and Records, Continued

Information/Records Requested	Must the Information/Record Generally Be Disclosed?	Applicable Authority
Public Contracts		
• Bid Proposals, RFP proposals	Yes, but only after negotiations are complete.	• *Michaelis v. Superior Court* (2006) 38 Cal. 4th 1065; *but see* Gov. Code, § 6255 and Evid. Code, § 1060. *For additional information, see p. 31-32 of the Guide.*
• Financial information submitted for bids	No	• Gov. Code, §§ 6254(a),(h) and (k), 6254.15 and 6255; *Schnabel v. Superior Court of Orange County* (1993) 5 Cal.App.4th 704, 718. *For additional information, see p. 31-32 of the Guide.*
• Trade secrets	No	• Evid. Code, § 1060; Civ. Code, § 3426, et seq. *For additional information, see p. 33 of the Guide.*
Purchase price of real property	Yes, after the agency acquires the property.	Gov. Code, § 7275
Real Estate		*For additional information, see p. 32 of the Guide.*
• Property information (such as selling assessed value, square footage, number of rooms)	Yes	• 88 Ops.Cal.Atty.Gen. 153 (2005)
• Appraisals and offers to purchase	Yes, but only after conclusion of the property acquisition.	• 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	*Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893. *For additional information, see p. 28 of the Guide.*
Software, including mapping systems	No	Gov. Code, § 6254.9; 88 Ops.Cal.Atty.Gen. 153 (2005). *For additional information, see p. 51 of the Guide.*
Taxpayer information received in connection with collection of local taxes	No	Gov. Code, § 6254(i). *For additional information, see p. 33 of the Guide.*
Telephone Records of Elected Officials	Yes, as to expense totals. No, as to phone numbers called.	See *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469. *For additional information, see p. 35 of the Guide.*
Utility usage data	No, with certain exceptions.	Gov. Code, § 6254.16. *For additional information, see p. 33 of the Guide.*
Voter information	No	Gov. Code, § 6254.4. *For additional information, see p. 21 of the Guide.*



THE PEOPLE'S BUSINESS:

A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT

1400 K Street, Sacramento, CA 95814
Phone: (916) 658-8200 | Fax: (916) 658-8240
www.cacities.org

Price: $40.00
SKU 1800