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THE CALIFORNIA PUBLIC RECORDS ACT

September 2006

PREFACE: Recent and Pending Court Decisions are summarized at *the end* of this manual.

I. INTRODUCTION: The Public's Right To Access And The Public Agency's Duty

The California Public Records Act ("CPRA") was enacted by the Legislature to further the concept of government accountability. The CPRA allows the public relatively quick access to inspect and obtain copies of most public records. The CPRA sets forth the specific limited circumstances under which the public entity may refuse to produce the requested documents.

A. Public Access Is A Fundamental Right

The CPRA appears in the California Government Code at section 6250. At the outset, the legislature declares its intent: "In enacting (the CPRA), the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov't Code § 6250.

The Courts have said the CPRA was intended to safeguard the accountability of government to the public. *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762, 771 (1983). The CPRA was enacted for the purpose of increasing freedom of information and is designed to give the public access to information in the possession of public agencies. *CBS, Inc., v. Block*, 42 Cal.3d 646, 651 (1986).

B. Proposition 59 Amended Cal. Const. Art. 1 § 3

In November 2004, voters approved Proposition 59, which amended Article 1, section 3 of the California Constitution as follows (new language in italics):

SEC. 3

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) 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.

(b) (2) 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. A statute, court rule or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(b)(3) Nothing in this subdivision supercedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(b)(4) Nothing in this subdivision supercedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(b)(5) This 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.

(b)(6) Nothing in this subdivision repeals, nullifies, supercedes or modifies protections for the confidentiality of proceedings and records of the legislature, the members of the legislature, and its employees, committees, and caucuses provided by Section 7 of article IV, state law, or legislative rules adopted in furtherance of those provisions, not does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the legislature, and its employees, committees, and caucuses.

Passage of Proposition 59 triggered a flurry of public records requests that cited its passage as support for disclosure of previously-withheld records, most notably appointment calendars that had been withheld under *Times Mirror v. Superior Court* 53 Cal.3d 1325 (1991) and the "deliberative process privilege" that has been asserted under Cal. Gov't Code § 6255 (the "catch-all exemption"). The new requests argue that Proposition 59 changed the law, particularly with respect to exemptions that require a balancing test between the public's interest in disclosure and the public interest in non-disclosure. It is now argued that the public interest in disclosure has been elevated to "Constitutional level" and that such high level of interest in disclosure can seldom be "clearly outweighed" any particular public interest in non-disclosure as is required by section 6255.

On its face, Proposition 59 did not seem to change existing law. No appellate court has yet directly addressed the issue. However, in *California Commission on Peace Officer Standards and Training v. Superior Court* 128 Cal.App.4th 281 (2005, review granted) the Court said that “Proposition 59 enshrined the principle that the disclosure provisions of (the) CPRA be construed broadly into our state Constitution and declared access to government records and meetings to be a civil right.” See also *International Federation of Professional and Technical Engineers, Local 21, AFL-CIA et al. v. Superior Court of Alameda County (Contra Costa Newspapers)*, 2007 Cal. LEXIS 8918, (Aug. 27, 2007)

C. Personal Privacy Is Also A Protected Right

While the legislature declared in section 6250 that the public’s access to public documents is fundamental, the legislature also recognized the well-established right to personal privacy.

Public records sometimes include personal details about private citizens, and disclosure may infringe on privacy interests. (*City of San Jose v. Superior Court*, 74 Cal.App.4th 1008 (1999); City need not disclose names, addresses and telephone numbers of individuals complaining about airport noise where City already releases sufficient information for the public to monitor how the City was responding to issues.)

Thus, the CPRA was intended to provide access to governmental records while protecting individuals’ right to privacy. *Rosenthal v. Hansen*, 34 Cal.App.3d 754 (1973). In order to *balance public disclosure against individuals’ rights to privacy*, the CPRA specifically identifies those public records that do not have to be disclosed to the public.

Certain exemptions to disclosure specifically state that the exemption will apply where disclosure would constitute an unwarranted invasion of personal privacy. (See, e.g., Cal. Gov’t Code § 6254(c) relating to personnel, medical and similar files.) In such cases, the “invasion of privacy” question is analyzed to determine whether disclosure would give rise to a claim of a violation of the California Constitution’s privacy protections. That analysis involves three elements: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances of the particular case, and (3) a serious invasion of privacy. These are discussed at length in *Int’l Fed. Local 21*, citing *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 39-40 (1994).

D. A CPRA Request Requires Immediate Action

A CPRA request to a public agency triggers legal obligations of the public agency with specific timelines. A CPRA must be acted upon immediately. Failure to act may result in civil penalties and/or litigation.

If the request presents no questions or issues and identifies records that are routinely provided to members of the public, the department should proceed with complying with the request. If the request presents questions or issues, immediately send the request via fax or hand-delivery to County Counsel for review and advice.

While a more detailed discussion of various issues appears in subsequent sections, the following abbreviated guidelines should be followed:

1. What to do?

- Be familiar with Board of Supervisors Policy A-54, Public Access to County Records.
- Be familiar with Board of Supervisors Policy A-131, Privacy Protection.
- Make sure your department has established procedures to be followed when making records available for public inspection or copying.
- Upon receipt of a request for a public record, make the record promptly available, or determine whether to comply with the request within 10 days and notify the requestor of the estimated date and time the records will be made available.
- If the request explicitly requests records from within your department only, you may respond accordingly. If the request seeks records from “the County of San Diego,” you should coordinate through County Counsel.
- If it is determined to deny a written request, provide written notification of denial setting forth the explicit reasons for the denial of access to the record and the names and titles or positions of persons responsible for the denial.
- If necessary in unusual circumstances, extend the time to respond by not more than 14 days.
- A notification of extension must be made by the County officer in writing, setting forth the reasons for the delay and the expected date of determination.

- Check with County Counsel if you are uncertain how to handle a request for public records.

2. What Not To Do!

- Do not process a public records request if you are not the custodian of the records; refer the request to the appropriate custodian of the records if they are part of the County.
- Do not wait until the ninth or tenth day before beginning to process a request for public records.
- Do not provide records which statutes specifically make confidential.
- Do not charge a fee for the retrieval and inspection of requested public records in addition to the permissible fee for costs of duplication (unless the request is for a record in an electronic format and the request would require data compilation, extraction or programming to produce the record).
- Do not obstruct the inspection or copying of public records.

II. WHAT IS A “PUBLIC RECORD” UNDER CPRA?

Almost every document in the possession of a public agency is a “public record” under the CPRA. Only purely personal information unrelated to the conduct of the public's business would not be a public record.

A. California Government Code Section 6252 Defines “Public Record”

The term "public records" is broadly defined to 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.”** Cal. Gov't Code § 6252.

1. "Writing" means handwriting, typewriting, printing, photostating, photographing, transmitting by electronic mail or facsimile, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents. Cal. Gov't Code § 6252.

Example: A tape recording of a city council meeting prepared by the city clerk to facilitate the preparation of the minutes of the meeting is a public record. 64 Op. Att'y Gen. 317 (1981).

B. The Statutory Definition Is Construed Broadly

Section 6252's definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to the conduct of the public's business could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities. *Braun v. City of Taft*, 154 Cal.App.3d 332, 340 (1984).

A Public Defender database comprised of information contained in existing client files supplemented with information gathered from other public sources is not a public record because the Public Defender's core function, the representation of indigent criminal defendants, is a private function. *Coronado Police Officers' Association v. Carroll*, 106 Cal.App.4th 1001(2003).

The statutory definition of "public record" for purposes of the Public Records Act may be different (probably broader) than the court-fashioned definition of "public record" for purposes of California Government Code section 6200, dealing with crimes relating to public records. 64 Op. Att'y Gen. 317 (1981).

The fact that someone other than a public employee prepared the writing and submitted it to the public agency does not remove it from the definition of "public record." *Gallagher v. Boller*, 231 Cal.App.2d 482 (1964).

State courts (and their records) are exempt from the provisions of the Public Records Act, although such records may be open to inspection for other reasons. *Copley Press, Inc. v. Superior Court*, 6 Cal.App.4th 106 (1992).

III. PUBLIC'S RIGHT TO INSPECT - GENERALLY

A. When And Where, Who And Why

In general, the CPRA is not to be construed to permit a local agency to delay or obstruct the inspection or copying of public records. Cal. Gov't Code § 6253, subd. (d).

1. **When And Where:** With limited exceptions relating to the gathering of voluminous or hard-to-find documents, or segregating out those records or parts of records that are exempt from disclosure, public records are **open to inspection at all times during office hours** of a public agency. Cal. Gov't Code § 6253, subd. (a).

a. **Reasonable Agency Regulation Of Access**

Right of public inspection is subject to an implied rule of reason which enables the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives. (*Bruce v. Gregory*, 65 Cal.2d 666, 676 (1967), construing the predecessor statutes to the CPRA.)

Example: Unprocessed absentee ballot applications are public records subject to inspection under the CPRA by any member of the public, including candidates; however, a county clerk may temporarily refuse to give access to unprocessed absentee ballot applications where, due to staffing and security needs, doing so would unduly interfere with the work of the office. 76 Op. Att'y Gen. 235 (1993).

2. **Who:** Every person has a right to inspect any public record, unless the CPRA specifically authorizes nondisclosure. Cal. Gov't Code § 6253, subd. (a).

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 hereinafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law. Cal. Gov't Code § 6253, subd. (a).

Civil Litigants and litigation – Potential litigants and litigants may use the CPRA to obtain information outside the discovery process. *Fairley v. Superior Court*, 66 Cal.App.4th 1414, 1422 (1998). Of course, the CPRA's exemptions apply to CPRA requests, so the scope of documents available through CPRA requests is limited compared to those available through discovery. Also, CPRA provisions, including exemptions, are not applicable to discovery, e.g., the "deliberative process" privilege is not available to defend against discovery requests even though it may be used to defend against CPRA requests. Cal. Gov't Code § 6260; *Marylander v. Superior Court*, 81 Cal.App.4th 1119, 1125 (2000):

But a party to pending litigation has a stronger and different type of interest in disclosure. (Code Civ. Proc., § 2017, subd. (a).) Accordingly, the Public Records Act expressly states that its provisions "shall not be deemed in any manner to affect . . . the rights of litigants . . . under the laws of discovery of this state." (Gov. Code, § 6260.) The exemptions contained in the Public Records Act simply do not apply to the issue

whether records are privileged in pending litigation so as to defeat a party's right to discovery. *Ibid.*

Criminal defendants – may use the Public Records Act to seek documents. *People v. Gonzalez*, 51 Cal.3d 1179, 1261 (1990)

Government agencies as requestors – “(E)ven though governmental agencies are not expressly included in section 6252, subdivision (c)’s definition of a “person,” the City is to be included in that definition unless to do so would infringe upon sovereign powers. *Los Angeles Unified School Dist. v. Superior Court*, 151 Cal.App.4th 759, 769 (2007)

3. **Why**: Access to public records may not be limited or prohibited based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure. Cal. Gov't Code § 6257.5. The fact that a requesting party is a **commercial entity** using the information for strictly commercial purposes does not diminish the public interest in the material requested. *Connell v. Superior Court*, 56 Cal.App.4th 601 (1997).

B. Exemptions To Disclosure Are Specifically Limited By The CPRA

The Public Records Act states a general policy in favor of disclosure, so that support for refusal to disclose information must be found among specified exceptions to that general policy. *Johnson v. Winter*, 127 Cal.App.3d 435 (1982). More on exemptions from disclosure below in section IX.

C. Segregating Exempt Materials

Where nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required so that the nonexempt materials may be disclosed. (Gov't Code, § 6253, subd. (a); *Northern California Police Practices Project v. Craig*, 90 Cal.App.3d 116 (1979).

IV. CPRA DISCLOSURE EXEMPTIONS ARE PERMISSIVE, BUT COUNTY POLICY IS MANDATORY

The CPRA provisions authorizing nondisclosure of certain records do not prevent a local agency from opening those records to public inspection, unless disclosure is otherwise prohibited by law. Cal. Gov't Code § 6254. The specific statutory exemptions from disclosure are discussed in section IX below. However, County policy is to assert applicable exemptions in order to protect privacy.

A. California Government Code Section 6254 Provides For Permissive Non-Disclosure

California Government Code section 6254 sets forth certain categories of documents that are exempt from disclosure and also exceptions to the exemptions. Thus, section 6254 requires careful reading. However, it is clear that the exemptions from disclosure in California Government Code section 6254 are permissive, not mandatory, i.e., they permit nondisclosure but do not require nondisclosure. *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal.App.3d 893, 905 (1984).

B. County Policy Is To Protect Personal And Private Information

While California Government Code section 6254 allows a public agency to disclose records even if they are statutorily exempt from disclosure, it is the policy of the County of San Diego to protect the privacy interests of all citizens.

1. Board of Supervisors Policy A-131

Under Board Policy A-131, personal information about individuals in the possession of the County, which is unrelated to the conduct of the public's business, is not to be disclosed, unless otherwise required by law. County officials are to deny requests for disclosure of private/personal information if, after consultation with County Counsel, the information requested by the public is determined to be exempt from disclosure under the CPRA.

Board Policy A-131 further provides:

- A public Records Act request seeking disclosure of an individual's private/personal information in the possession of the County must be reviewed in consultation with County Counsel.
- If disclosure would constitute an unwarranted invasion of privacy under California Government Code section 6254, subdivision (c), the request for such information is to be denied.
- The private/personal information must be maintained as confidential unless otherwise ordered by a court or the individual whose records are at issue provides express written consent to the disclosure.
- All County officers and employees must be familiar and fully comply with state and federal laws providing that certain types of private/personal information are confidential or privileged, and not to be disclosed to the public.

V. WAIVER OF DISCLOSURE EXEMPTIONS: NO TURNING BACK

With very limited exceptions, if a document that would otherwise be exempt from disclosure is disclosed to the public, any applicable exemption *is waived* and may not later be asserted. Waiver of the exemption occurs regardless of whether the disclosure was inadvertent.

A. California Government Code Section 6254.5

California Government Code section 6254.5 provides, in part, as follows:

Notwithstanding any other provisions of the law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Sections 6254, 6254.7, or other similar provisions of law. For purposes of this section, "agency" includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment. Cal. Gov't Code § 6254.5.

B. California Government Code Section 6254.5 Imposes "Strict Liability"

It does not matter that a disclosure of an exempt document occurred by mistake. Section 6254 provides no relief to the public agency for inadvertent disclosure. A San Diego Superior Court ruling involving the County held that even if the agency's attorney makes the inadvertent disclosure, applicable exemptions are waived.

C. Disclosures That Do Not Result In Waiver

The following disclosures, however, are among those listed in section 6254.5 that do not waive applicable exemptions.

Disclosures . . .

- Made pursuant to the Information Practices Act, Cal. Civ. Code § 1798, or discovery proceedings. Cal. Gov't Code § 6254.5, subd. (a).
- Made through other legal proceedings or as otherwise required by law. Cal. Gov't Code § 6254.5, subd. (b).

- Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes. Cal. Gov't Code § 6254.5, subd. (c).
- Not required by law, and prohibited by formal action of an elected legislative body of the local agency which retains the writings. Cal. Gov't Code § 6254.5, subd. (d).
- Made to any governmental agency that agrees to treat the disclosed material as confidential. Cal. Gov't Code § 6254.5, subd. (e). NOTE: We conclude that records provided in confidence to an agency's contractor fall within this category due to the statute's definition of "agency" which includes the agency's agents. To construe otherwise would be contrary to the statute's plain language and common sense. Government agencies would simply not function properly if they could not contract with private companies to perform some confidential activities.

VI. EFFECT OF BURDEN ON PUBLIC AGENCY TO COMPLY WITH REQUEST

The CPRA and case law contemplate that there will be some burden on a government agency to comply with a request to inspect and/or copy records. The burden of disclosing documents will not excuse the agency from disclosing documents except under extreme circumstances.

A. The Public Interest In Sparing The Agency The Burden Must Outweigh The Public Interest In Disclosure

Neither the CPRA nor the courts are overly sympathetic to the plight of public agencies claiming that a disclosure of documents is too burdensome on the agency.

1. State Board of Equalization v. Superior Court, 10 Cal. App. 4th 1177 (1992)

In the *State Board of Equalization* case, the court required the Board of Equalization to comply with a request for records consisting of 2,100 separate documents, or an estimated 6,000 pages of material, many of which would require deletion of confidential taxpayer information. The court required the state board to **prepare an index at requestor's expense** of the 2,100 documents in order to allow the requesting party to narrow its records request.

The Court held that the fact that it is time consuming to segregate exempt material does not obviate the requirement to do it, unless the burden is so onerous as to clearly outweigh the public interest in disclosure. *Id.* p. 1190, fn.

14. The fact that a request is for a voluminous amount of material is usually not a reason for not complying with the request. *Id.* p. 1177.

2. Other Cases On “Burden”

In *CBS Broadcasting Inc. v. Superior Court* 91 Cal.App.4th 892 (2001), the court rejected an argument by the State Department of Social Services that estimated salary costs in the amount of \$43,000 to comply with a PRA request imposed a significant burden.

In *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal.3d 440, 452-454 (1982), the court ruled that if the information which would remain after exempt material has been redacted would be of little or no value to the requester, the agency may refuse to disclose the record on the grounds that the segregation process is unduly burdensome.

In *Rosenthal v. Hansen*, 34 Cal.App.3d 754, 761 (1973), the court held that public agencies may be able to impose reasonable restrictions on general requests for copies of voluminous classes of documents (e.g., the State Benefit Determination Guide and all other circulated papers, memos, manuals and documents used to determine eligibility for unemployment insurance benefits, estimated at 80,000 to 85,000 pages of material), giving access to the desired documents, but restricting copies to specific requests for copies of specific documents.

VII. PROCEDURES UPON RECEIPT OF A REQUEST TO INSPECT AND/OR COPY RECORDS

Members of the public may ask to inspect records, copy records, or both. A person may want to just look at records, look at the records for purposes of picking out those she or he wants to copy, or a person may just order copies of documents without reviewing them first. There is to be no fee or charge for simply inspecting documents. The “direct costs” of duplicating records may be charged for copies of records. Certain costs may be able to be received if required to produce a copy of a record in an electronic format.

A. Requests To Inspect Records

A person desiring to inspect public records is not required to give any particular notice in order to inspect those records during normal working hours. See Cal. Gov't Code § 6253. The CPRA does not require a request for records to be in writing. *Los Angeles Times v. Alameda Corridor Transportation Authority*, 88 Cal.App.4th 1381 (2001).

1. Agency To Assist Persons Making Requests

To the extent reasonable under the circumstances, public agencies must assist members of the public to make a focused and effective request that reasonably describes an identifiable record or records. Cal. Gov't Code § 6253.1. Public agencies must assist members of the public by doing the following:

- Assisting the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
- Describing the information technology and physical location in which the records exist.
- Providing suggestions for overcoming any practical basis for denying access to the records or information sought.

If the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester which would help identify the record or records, the requirement to assist the member of the public is deemed satisfied.

Additionally, the requirement to assist the member of the public does not apply if:

- The public agency makes the requested records available.
- The public agency determines that the request should be denied and “bases that determination solely on an exemption listed in Section 6254.”
- The public agency makes an index of its records available.

2. Agency Allowed Time To Segregate Exempt Documents

California Government Code section 6253, subdivision (a) provides, in part, that “any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.” Thus, the agency must be given a reasonable period of time to segregate exempt documents.

3. Agency Allowed Reasonable Time To Find Documents

Where records cannot be found or are not in possession of the public agency at the time of the request, but are “public records” of the

agency, the agency will be in compliance with the CPRA if it searches for and discloses the documents promptly upon locating them. *Rogers v. Superior Court*, 19 Cal.App.4th 469, 483 (1993). In other words, if a person shows up at an agency office and asks to inspect documents that are not readily available, the agency may properly advise the requestor to return at a later time to inspect the documents.

4. Good Faith Efforts To Find Documents

Because of the fundamental public interest in access and disclosure, it can safely be said that public agencies have a duty to deal with CPRA requests in good faith, and that the focus of efforts should be to find and disclose the documents requested, when adequately identified, bearing in mind the County's policies and the exemptions from disclosure provided by statute.

The request itself will provide initial guidance as to the breadth of the search required.

Consider to whom the request is addressed and how the request is phrased. A request sent to the Office of the Chief Administrative Officer and asking that "the County of San Diego" produce all documents pertaining to a certain subject is going to require the broadest effort to locate documents because it is addressed to the office that oversees all departments and seeks documents from the County as a whole. In such a case, a broadcast e-mail or memorandum to the appropriate department heads would be in order asking them to determine whether they have any responsive documents in their respective departments. A rule of reason would also apply, e.g., if a request was addressed to the Office of the Chief Administrative Officer, sought documents from "the County of San Diego" and yet the records sought were only those reflecting all wild boar attacks in the County, the Department of Animal Control would be a reasonable department to which the inquiry might be sent, but Department of Public Works would likely not have such records.

If a CPRA request is sent directly to a particular department, and explicitly seeks records of that department, then the department can respond based on a search of its own records. The department's response should make it clear that the response is confined to that particular department.

If a CPRA request is sent directly to a particular department but seeks records in the possession of "the County of San Diego" or some other broad language, then the department should search for its own responsive documents, but should also pass the request on to other departments that might reasonably have such documents and coordinate their response. Such a request and response might also be coordinated through the Office of Chief Administrative Office.

Finally, if the request presents legal questions, or relates to a major or controversial issue or project, consult and coordinate with the Office of County Counsel.

5. **Agency May Adopt Regulations Providing Greater Access To Records, But Not Less Access**

Local agencies may adopt procedures to be followed that provide faster, more efficient, or greater access to public records than prescribed by the minimum standards set forth in the Act. Cal. Gov't Code § 6253, subd. (e).

B. **Requests To Copy Records**

As noted, a member of the public may ask to inspect documents and select those of which she or he would like copies. Alternatively, a requestor may simply define the records desired and request copies. In either case, the CPRA imposes deadlines and procedural guidelines for production of copies.

1. **California Government Code Section 6253, Subdivision (b): Make Records "Promptly Available"**

California Government Code section 6253, subdivision (b) provides that copies of identifiable records shall be made "promptly available" upon request, and that a fee for copying may be charged.

However, California Government Code section 6253, subdivision (c) allows the agency to take up to 10 days to search for and identify the requested documents and determine whether any of them, or portions thereof, are exempt from disclosure. (See section IX below).

California Government Code section 6253, subdivision (b) provides as follows:

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. (Emphasis added.) Cal. Gov't Code § 6253, subd. (b).

a. **“Identifiable Record” Means Existing Records**

As seen from the language of the statute, a request for records must reasonably describe an identifiable record or records. Cal. Gov't Code § 6253, subd. (b). A request for disclosure of a public record should be limited, focused and specific. *Rogers v. Superior Court*, 19 Cal.App.4th 469, 480-481 (1993). Since a requester has no access to public agency files and may be unable to precisely identify the documents sought, **writings may be described by their content**; the agency is then obliged to search for records based on criteria set forth in the search request. *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159 (1998).

A public agency is not required to transform a public record in one form (e.g., a tape recording of a city council meeting) into a record or copy in an entirely different form (e.g., a written transcript of every word spoken at a city council meeting) on the request of the person requesting a copy. 64 Op. Att'y Gen. 317 (1981).

Generally, a **public agency is not required to prepare or compile a new record that does not currently exist** in order to respond to a Public Records Act request. *State Board of Equalization v. Superior Court*, 10 Cal.App.4th 1177, 1192 (1992). See Section VIII regarding responding to requests for records in an electronic format.

A public agency is not required to comply with a request for records that will come into existence in the future since those are not currently identifiable public records. *Rosenthal v. Hansen*, 34 Cal.App.3d 754, 758 (1973).

b. **“Promptly Available” vs. reasonable time**

While California Government Code section 6253, subdivision (b) provides that copies shall be made “promptly available,” subdivision (c) more precisely gives the agency 10 days to determine which, if any, documents or portions thereof are exempt and which will be disclosed, and, “when the agency dispatches the determination (of disclosure and non-disclosure), and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available.” The Attorney General has said that where it is determined that the sought-after records are not exempt from disclosure, the records shall be made promptly available:

With respect to the date by which a county must respond to a request for parcel boundary map data maintained in an electronic format, the provisions of section 6253 govern, as quoted above. Since the data is not exempt from disclosure, a county is required to "make the records

promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable."

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However *Rogers, supra*, 19 Cal.App.4th at 483, while pre-dating the attorney general's opinion, explains that "promptly available" can mean "reasonably timely" given the circumstances of finding documents or other records and readying them for production."

c. "Direct Costs Of Duplication"

The direct costs of duplication are the cost of running the copy machine and the expense of the person operating it. *North County Parents Organization v. Department of Education*, 23 Cal.App.4th 144 (1994).

Direct costs of duplication **do not include** the time or expenses associated with the **retrieval, inspection and handling** of the file from which the copy is extracted. *Id.*

For charges connected to providing a record in an electronic format, see section VIII.

Government Code § 54985 allows the Board of Supervisors to pass ordinances allowing for the full reasonable cost recovery. Thus, a copy fee is established by ordinance for some departments. (See e.g., Admin. Code, § 176.6 [\$.20/pg. for Dept. of Agriculture, Weights and Measures].) If a copy fee is established by ordinance, this is the only fee a department can charge for providing copies pursuant to the CPRA.

d. "Exact Copies"

The CPRA provides that an exact copy must be provided unless it is "impracticable" to do so. Cal. Gov't Code § 6253, subd. (b).

2. California Government Code Section 6253, Subdivision (c): Ten-Day Limit To Respond To Request For Copies

As noted, this section provides the agency with 10 days to make exemption determinations. The section provides, in part, as follows:

Each agency, upon a request for a copy of records shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the

reasons therefore. In unusual circumstances, the time limit prescribed by this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days. When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available Cal. Gov't Code § 6253, subd. (c).

Thus, within 10 **calendar** days from receipt of a request for a copy of records, a public agency must (a) determine whether the request seeks copies of disclosable public records that it possesses, and (b) notify the person making the request of (i) whether the records are disclosable and (ii) the reasons for its determination, and (iii) the estimated date and time the records will be made available, if disclosable..

a. Extensions Of 10-Day Limit

In unusual circumstances, the time limit for notifying the person making the request may be extended for no more than 14 days. Any extension must be by written notice by the head of the agency, or his or her designee, to the person making the request. The written notice of extension must set forth the date on which a determination is expected to be sent. Cal. Gov't Code § 6253, subd. (c).

The “unusual circumstances” justifying an extension of the 10-day time limit are:

The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request. Cal. Gov't Code § 6253, subd. (c)(1).

The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request. Cal. Gov't Code § 6253, subd. (c)(2).

The need for consultation with another agency having substantial interest in the determination of the request. Cal. Gov't Code § 6253, subd. (c)(3).

The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. Cal. Gov't Code § 6253, subd. (c)(4).

b. Notice That Records Will Not Be Disclosed

If the records were requested in writing but will not be disclosed, the notification of denial of the request must be in writing and set forth the names and titles or positions of each person responsible for the denial in addition to the reasons for the denial. Cal. Gov't Code §§ 6253, subds. (c) & (d); 6255, subd. (b). If the request for records was not in writing and records will not be disclosed, the notification of denial of the request must advise the person making the request of the reasons for the denial. Cal. Gov't Code § 6253, subd. (c).

The PRA does not require a public agency to create a log of potentially responsive documents that are exempt from disclosure. (*Haynie v. The Superior Court of Los Angeles County*, 26 Cal.4th 1061 (2001).)

c. Notice That Records Will Be Disclosed

When an agency makes a determination that it will make records available, either within ten days from receipt of the request, or within not to exceed 24 days from receipt of the request if the ten-day time limit has been extended, it must notify the person making the request of its determination. The notice must state the estimated date and time when the records will be made available. Cal. Gov't Code § 6253, subd. (c).

VIII. COMPUTER-STORED RECORDS; INFORMATION IN ELECTRONIC FORMAT

It is becoming more common for records to be electronically stored rather than reduced to "paper." Public records stored in a computer remain public records subject to disclosure unless exempt under the CPRA. Cal. Gov't Code § 6254.9.

A. Making Computer Records Available In Electronic Format

If a public agency keeps records in electronic format, it must **make the record available in any electronic format in which it holds the information** when requested, unless (a) the record is otherwise exempt from disclosure, (b) the release would jeopardize or compromise the security or integrity of the record, or (c) the release would jeopardize or compromise the security or integrity of any proprietary software in which the record is maintained. The public agency is required to provide a copy of an electronic record in the format requested if it is the format that has been used by the agency to create copies for its own use or for other agencies.

Pending legislation – If a public agency maintains an Internet Website, as does the County of San Diego, SB 503 as originally proposed would have

required *all* identifiable public records kept in electronic format to be available for three years on the Web site by links on the homepage to the records. This bill is now in committee and the drafter is aware of the concerns it has raised. It is expected the language of the bill will change. The County's Office of Strategy and Intergovernmental Affairs is watching the bill. The State's legislative website's last status report dated November 17, 2005 shows committee hearings cancelled at author's request.

A public agency is not required to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format. A public agency is not permitted to make information available to the public only in an electronic format.

If a record is available in electronic format as well as in printed form the public agency may tell a person who requests a printed record that the information is available in electronic format.

B. Extending Time to Respond to Requests for Electronic Records

A public agency may extend the time to respond to a request for public records (up to 14 days after the initial 10 days) based on the need of the public agency to compile data, write programming language or a computer program, or construct a computer report to extract data.

C. Charging for Electronic Records (Cal. Gov't Code § 6253.9)

If the record requested is an electronic record in a format used by the agency, the cost of duplication would be the direct cost of producing a copy in an electronic format, i.e., the cost of copying a CD or copying records stored in a computer onto disks.

If the record requested would require data compilation, extraction, or programming to produce the record, or the record is one that is produced by the public agency only at otherwise regularly scheduled intervals, the requester must bear the cost of producing a copy of the record, including the cost of programming and computer services necessary to produce a copy of the record.

D. Software

Computer software developed by the County is not itself a public record. Cal. Gov't Code § 6254.9. Computer software includes computer mapping systems, computer programs, and computer graphics systems. Cal. Gov't Code § 6254.9. Computer software that was not developed by the County is a public record and is subject to disclosure unless it qualifies under a specific provision that exempts it from disclosure.

E. Electronic Pack Rats

Many employees keep multiple electronic drafts of documents they have created. They may do so intentionally or unintentionally, either way they are creating a huge body of public records that could be subject to disclosure just because they have been kept around. Remember, preliminary draft exemption does not apply to items that are routinely kept. Clean out our directories frequently!

IX. EXEMPTIONS FROM DISCLOSURE

The CPRA provides a list of specific exemptions from disclosure in California Government Code section 6254 and other sections. The CPRA provides for a “catch-all” exemption in California Government Code section 6255.

The courts have construed the statutory exemptions from disclosure narrowly in order to accomplish the general policy of disclosure. *Braun v. City of Taft*, 154 Cal.App.3d 332, 342 (1984).

A. Specific Statutory Exemptions

Several sections of the CPRA state specific records or categories of records that are exempt from disclosure. California Government Code section 6254 contains a number of categorical exemptions.

1. California Government Code Section 6254

This section sets forth types of records that are exempt from disclosure, and, in some instances, then qualifies the exemptions with exceptions. For example, California Government Code section 6254, subdivision (f) provides an exemption for records of complaints to and investigatory files of law enforcement agencies but then attaches a number of qualifications that give the public certain limited rights to information contained within the complaints and/or investigatory files.

These exemptions are designed to protect the privacy of persons whose data or documents come into governmental possession. *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 652 (1974).

a. Preliminary Drafts, etc.

Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure. Cal. Gov't Code § 6254, subd. (a); see also *Citizens for a Better Environment v. Department of Food & Agriculture*, 171 Cal.App.3d 704 (1985).

As can be seen, there are three criteria that must be met for this exemption to apply:

- The documents must be preliminary drafts, notes, or interagency or intra-agency memoranda.
- The documents must not be retained by the public agency in the ordinary course of business.
- There must be a public interest in nondisclosure that clearly outweighs the public interest in disclosure.

The purpose of this exemption is to provide a measure of agency privacy for written communications concerning matters pending administrative action. The courts have held that this exemption is similar to an exemption, 5 U.S.C. § 552(b)(5), in the federal Freedom of Information Act (FOIA). *Citizens for a Better Environment v. Department of Food & Agriculture*, 171 Cal.App.3d 704 (1985). The purpose of the federal exemption is to foster robust discussion within the agency of policy questions attending the pending administrative decisions. The FOIA exemption has been construed by the courts as protecting the deliberative materials produced in the process of making agency decisions, but not factual materials, and not agency law. For example, it would exempt from disclosure pre-decisional advisory opinions, recommendations and policy deliberations, but not factual materials.

The balancing test, although using similar language to that found in the “catch-all” exemption, is not analyzed exactly the same. With respect to the public interest in disclosure, if the records sought pertain to the conduct of the people’s business, there is a public interest in disclosure. This conclusion is based upon the legislative declaration underlying the Public Records Act that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” With respect to the public interest in nondisclosure, the courts have said that when analyzing subdivision (a), that interest is limited to fostering robust agency debate. *Id.*

b. Pending Litigation

Records pertaining to pending litigation to which the County is a party, or to claims made pursuant to the Government Tort Claims Act, until the pending litigation or claim has been finally adjudicated or otherwise settled. Cal. Gov’t Code § 6254, subd. (b).

- “The construction we give to ‘pending litigation,’ which focuses on the purpose of the document, serves to protect documents created by a public entity in anticipation of litigation, which documents it reasonably has an interest in keeping to itself until litigation is finalized.” *County of*

Los Angeles v. Superior Court, 82 Cal.App.4th 819, 832 (2000); *Fairley v. Superior Court*, 66 Cal.App.4th 1414, 1421-1422 (1998).

- If documents were not prepared for use in litigation, then a potential litigant may obtain them by means of a public records request, rather than filing a lawsuit and instituting formal discovery. *Fairley v. Superior Court*, 66 Cal.App.4th 1414 (1998).
- Records generated in the ordinary course of a public agency's business which may be relevant in future litigation to which the agency might be a party are not exempt from disclosure under this subdivision. 71 Op. Att'y Gen. 235 (1988); *City of Hemet v. Superior Court*, 37 Cal.App.4th 1411, 1418 (1995) [report of internal investigation prepared before claim filed not covered by pending litigation exemption].
- Claim forms filed pursuant to the Government Tort Claims Act as a prerequisite to suit against a public entity do not come within this exemption. *Poway Unified School District v. Superior Court*, 62 Cal.App.4th 1469 (1998).
- Letters between public entity attorneys and outside, opposing counsel that are in the possession of the public entity. Of course, if the opposing counsel elects to disclose, she or he can do so. *Board of Trustees of California State University v. Superior Court* 132 Cal.App.4th 889 (2005)

c. Personnel Files

This section exempts personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Cal. Gov't Code § 6254, subd. (c).

- The purpose of this exemption is to protect information of a highly personal nature on file with a public agency, such as a public employee's personnel folder or sensitive personal information that individuals must submit to the government. *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762, 777 (1983).
- *Copley Press Inc. v. Superior Court (San Diego)*, 2006 Cal.LEXIS 10229 (S128603) (August 2006). Peace officer personnel records in possession of Civil Service Commission for appeal of disciplinary action were exempt under Gov't Code §§ 6254(c) and 6254(k) (incorporating Penal Code § 832.7). Civil Service Commission was part of "employing agency" for purposes of statutes.
- The names and salaries of public employees, including peace officers, must be disclosed. *International Federation of Professional and Technical Engineers, Local 21, AFL-CIA et al. v. Superior Court of Alameda County (Contra Costa Newspapers)*, 2007 Cal. LEXIS 8918, (Aug. 27, 2007) ("Int'l

Fed'n"). A newspaper asked City of Oakland for names, job titles and gross salaries of all city employees whose earnings exceeded \$100,000 in FY 2003-04. Oakland agreed to disclose salary and overtime information for job classifications, but refused to link salaries/income to individual employee names. The Court rejected application of section 6254(c). The Court emphasized that the case involved "disclosure of financial matters directly related to the individual's public employment" and "(i)n light of the strong public policy supporting transparency in government, an individual's expectation of privacy in a salary earned in public employment is significantly less than the privacy expectation ... in the private sector." The Court further noted that "disclosure of public employee names and salaries is overwhelmingly the norm." The Court thus concluded that "public employees do not have a reasonable expectation of privacy in the amount of their salaries." Even if there was a reasonable expectation of privacy, the invasion of that privacy would not be "unwarranted" invasion. While the facts of the case were narrow, i.e., employees earning more than \$100,000/year and a history of releasing that exact information, the majority decision is sweeping. The case likely will be broadly construed to apply to all public employees at all salary levels, requiring disclosure in response to CPRA requests.

- The *Int'l Fed'n* case also held that **peace officer salaries** cannot be withheld pursuant to Penal Code § 832.7 through Gov't Code § 6254(k), because the salaries did not constitute "personnel records" or "personal data" as defined in Penal Code sec. 832.8. However, the Court noted a possible Gov't Code § 6255 exemption for undercover agents who might be exposed by disclosure. Regarding peace officer information, the Court concurrently released a decision holding that Penal Code §§ 832.7 and 832.8 do not protect peace officers' identities or the basic fact of their employment. *Comm'n on Peace Officer Stds. & Training v. Superior Court*, 2007 Cal. LEXIS 8916 (Aug. 27, 2007)
- This exemption has been applied to personal performance goals where they were included in the personnel file of a school district superintendent. *Versaci v. Superior Court*, 127 Cal.App.4th 805, 818 (2005). The *Versaci* Court sets forth a three-part test for the personnel and medical file exemption: First, the court must determine whether the records sought constitute a personnel file, a medical file or similar file. Second, if so, the court must then determine whether disclosure would compromise substantial privacy interests. (This step would presumably) involve the *Int'l Fed. Local 21* analysis of privacy interests. Third, the court must determine whether the potential harm to the privacy interests outweighs the public interest in disclosure.
- This exemption does not apply to such portions of a professional employee's personnel file as are necessary to disclose her **professional qualifications, such as education, training, experience**, awards, previous positions and

publications. *Eskaton Monterey Hospital v. Myers*, 134 Cal.App.3d 788, 794 (1982).

- For public access to an audit report addressing financial irregularities by two public officials to be permitted, there must be reasonable cause to believe the complaint to be well founded. *American Federation of State etc. Employees v. Regents of University of California*, 80 Cal.App.3d 913, 918 (1978).
- Medical records filed to support a claim against a county, where a settlement was reached, are not exempt under this subdivision. *Register Div. of Freedom Newspapers, Inc., v. County of Orange*, 158 Cal.App.3d 893 (1984).
- An employment contract between a local agency and a public official or employee is a public record not subject to this exemption. Cal. Gov't Code § 6254.8. In *Versaci*, the Court also held that the personal performance goals were not part of the employment contract because, although goal setting was referenced in the contract, performance evaluations were based on overall performance and not just goal achievement. *Versaci, supra*, 127 Cal.App.4th at 817.
 - Records showing the amounts and reasons for performance bonuses given to city executives were not exempt from disclosure under this subdivision. 68 Op. Att'y Gen. 73 (1985).
 - Payroll records of nongovernmental employees received by California State Housing Finance Authority for purposes of assuring compliance with law on prevailing wages are private and not subject to disclosure. 64 Op. Att'y Gen. 575, 582 (1981).
 - The State Treasurer's records specifying the owners of state registered bonds were subject to disclosure. 62 Op. Att'y Gen. 436, 439 (1979).
 - The names of and amounts received by county retirees contained in county payroll records were subject to disclosure. 60 Op. Att'y Gen. 110, 113 (1977).
 - This subdivision preserved the confidentiality of only a limited portion of the material found in a personnel file. As the information bears more remotely on the question of qualifications or performance, and by its personal nature, becomes more likely to be regarded as intrusive or embarrassing by its disclosure, the probability of its confidential nature increases. 53 Op. Att'y Gen. 136 (1970).

d. **Applications To State Agencies Regulating Financial Institutions.** Cal. Gov't Code § 6254(d)
[No text.]

e. **Confidential Utility Systems Data.** Cal. Gov't Code § 6254(e) [No text.]

f. **Records Of Complaint And Investigatory Files**

Cal. Gov't Code § 6254(f) is a complex, and somewhat convoluted, exemption that requires very careful reading. In summary, it **exempts** from disclosure the following:

- Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of a local police agency. Cal. Gov't Code § 6254, subd. (f); *see also, American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal.3d 440 (1982).
- Any investigatory or security files compiled by any local police agency. Cal. Gov't Code § 6254, subd. (f).
- Any investigatory or security files compiled by a local agency for correctional, law enforcement, or licensing purposes. Cal. Gov't Code § 6254, subd. (f).

NOTE: Bona fide investigatory files only. A government agency cannot exempt a document from disclosure by simply creating something called an "investigatory file" and putting the document in it – it must be a bona fide investigatory file. We reach this conclusion after an in-depth review of *Uribe v Howie*, 19 Cal.App.3d 194 (1971), *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645 (1974), *Younger v. Berkeley City Council*, 45 Cal.App.3d 825 (1975), *American Civil Liberties Union Foundation v. Deukemejian*, 32 Cal.3d 440 (1982), and *Williams v. Superior Court*, 5 Cal.4th 337 (1993).

Section 6254, subdivision (f) also contains various **exceptions to exemptions** that require the disclosure of certain information to certain persons. Its provisions should be carefully reviewed in connection with a CPRA request that involves this type of material.

- Specific, listed information from records of an incident involving injury, damage or other loss must be disclosed to the victim, an insurance carrier and certain others. This exception does not require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer. Cal. Gov't Code § 6254, subd. (f).

Section 6254, subdivision (f) goes on to carve out further specific information that is excepted from the exemptions noted above:

- Specific, listed information concerning each arrest made by the agency must be made public. Cal. Gov't Code § 6254, subd. (f)(1).
- Specific, listed information concerning all complaints or requests for assistance received by the agency must be made public. Cal. Gov't Code § 6254, subd. (f)(2).
- The current address of every individual arrested and the current address of the victim of a crime where the request is made for a scholarly, journalistic, political, or governmental purpose, or the request is made by a licensed private investigator for investigation purposes. Cal. Gov't Code § 6254, subd. (f)(3). This section had been ruled an unconstitutional limitation on commercial speech because it did not allow dissemination of the specified information to commercial users. However, the United States Supreme Court reversed the rulings of the lower courts in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), [120 S.Ct. 483, 145 L.Ed.2d 451], ruling that the statute, *as applied in the case before the Court*, was a restriction on access to information, not a restriction on speech, and was therefore not invalid on its face.

The information in the exceptions described above in sections 6254, subdivisions (f)(1), (2) and (3) need not be disclosed if disclosure would endanger the safety of persons involved in an investigation or would endanger the successful completion of the same or a related investigation. Cal. Gov't Code § 6254, subd. (f).

Case law relating to California Government Code section 6254, subdivision (f) exemptions:

- Records of investigations conducted by a law enforcement agency for the purpose of determining whether a violation of law may occur or has occurred are exempt on their face, whether or not they are ever included in an investigatory file. (*Haynie v. The Superior Court of Los Angeles County*, 26 Cal.4th 1061 (2001).)
- A sheriff's investigation report conducted at the request of the county's risk management office primarily to determine the validity of a tort liability claim is not exempt under this subdivision. *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal.App.3d 893 (1984).
- This exemption protects materials that, while not on their face exempt from disclosure, become exempt through inclusion in an investigatory file. *Williams v. Superior Court*, 5 Cal.4th 337 (1993).

- A post-investigation closing report that contains the investigators' opinions, thoughts and conclusions is exempt from disclosure. (*Rackawekas v. Superior Court*, 104 Cal.App.4th 169 (2002).)
- The exemption for law enforcement investigatory files does not terminate when the investigation ends. *Williams v. Superior Court*, 5 Cal.4th 337 (1993).
- The State Department of Health Services fiscal audit manual, containing the Department's strategy for audits to ascertain compliance with Medi-Cal regulations, constitutes law enforcement material. *Eskaton Monterey Hospital v. Meyers*, 134 Cal.App.3d 788 (1982).
- The records of intelligence information and security procedures incorporated into the gang reporting, evaluation, and tracking system by law enforcement agencies are not subject to public disclosure under this subdivision. 79 Op. Att'y Gen. 206 (1996).

g. Test Questions, Scoring Keys. Cal. Gov't Code § 6254(g)

“Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with section 99150) of the Education Code.”

h. Certain Real Estate Appraisals. Cal. Gov't Code § 6254(h).

“The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.”

i. Taxpayer Information Received In Confidence. Cal. Gov't Code § 6254(i).

Information required from a taxpayer in connection with the collection of local taxes that is received in confidence if disclosure of the information to other persons would result in an unfair competitive disadvantage to the person supplying the information.

- Records in assessor's office relating to claim of exemption from property taxes filed by church were open to public inspection. *Gallagher v. Boller*, 231 Cal.App.2d 482 (1964).
- Claims for senior citizens' exemptions from assessment of a parcel tax levied by a school district are subject to inspection by members of the public. 81 Op. Att'y Gen. 383 (1998).

j. Library Circulation Records. (Cal. Gov't Code § 6254(j))

“Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.” Cal. Gov't Code § 6254, subd. (j).

k. Prohibited by Federal or State Law. Cal. Gov't Code § 6254(k)

Records the disclosure of which is exempted or prohibited pursuant to federal or state law. A listing of other statutes that may provide an exemption under this section is found in California Government Code sections 6275 through 6276.48. One of the more frequent applications of this section is to assert “attorney-client privilege” and “attorney work product” as exemptions to disclosure.

Under California Evidence Code section 952 communication between attorney and client are privileged. Thus, a confidential memorandum written by a city attorney to the city council did not have to be disclosed. *Roberts v. City of Palmdale*, 5 Cal.4th 363 (1993).

California Code of Civil Procedure section 2018 “creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney’s impressions, conclusions, opinions or legal theories . . . (the) privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity.” *County of Los Angeles v. Superior Court*, 82 Cal.App.4th 819 (2000).

Penal Code provisions (§§ 832.7 and 832.8) providing that peace officer personnel records are confidential and shall not be disclosed except by discovery pursuant to Evidence Code procedures are included under this subdivision. *City of Hemet v. Superior Court*, 37 Cal.App.4th 1411 (1995).

The balancing test necessary under California Evidence Code section 1040, the privilege for "official information," is essentially equivalent to that set forth in California Government Code section 6255 (see below). *CBS, Inc. v. Block*, 42 Cal.3d 646, 656 (1986).

- l. Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary.** Cal. Gov't Code § 6254(l). [No text.]
- m. Records in the custody of or maintained by the Legislative Counsel.** Cal. Gov't Code § 6254(m). [No text.]
- n. Personal Financial Data for Licensing Purposes**

Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit. Cal. Gov't Code § 6254, subd. (n). Financial data supplied to a county by a company under contract to perform a service to the county in order to justify a fee increase was not exempt under this subdivision. *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762, 779 (1983). Assurances of confidentiality by a public agency are insufficient in themselves to justify withholding pertinent public information from the public. *Id.* at 775; cf. *Johnson v. Winter*, 127 Cal.App.3d 435 (1982).

- o. Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health & Safety Code.** Cal. Gov't Code § 6254(o). [No text.]
- p. Records showing deliberative processes and strategies related to specific employee relations activities.** Cal. Gov't Code § 6254(p). [No text.]
- q. Special negotiator's deliberative processes.** Cal. Gov't Code § 6254(q).

Records that reveal special negotiator's deliberative processes regarding negotiations with providers of health care services. This is a lengthy complicated section that must be read in full.

- r. Records of Native American graves.** Cal. Gov't Code § 6254(r). [No text.]

- s. **Final hospital accreditation report per H&S Code §1282.** Cal. Gov't Code § 6254(s). [No text.]
- t. **Local hospital district insurance contracts for alternative rates.** Cal. Gov't Code § 6254(t). [No text.]
- u. **Information in concealed weapon permit applications.** Cal. Gov't Code § 6254(u).

Information on applications that shows vulnerability to attack or that concerns the applicant's medical or psychological history of the applicant or family. Home addresses and telephone numbers of peace officers, judges, court commissioners and magistrates.

- v. **Records of the Major Risk Medical Insurance Program that reveal the deliberative processes in negotiations with health plans re Ins. Code § 12694 et seq. and Ins. Code § 12700 et seq.** Cal. Gov't Code § 6254(v). [No text.]
- w. **Records of the Major Risk Medical Insurance Program that reveal the deliberative processes in negotiations with health plans re Ins. Code § 10700 et seq.** Cal. Gov't Code § 6254(w). [No text.]
- x. **Financial data in applications for registration as a service provider with State Department of Consumer Affairs.** Cal. Gov't Code § 6254(x). [No text.]
- y. **Records of the Managed Risk Insurance Board reflecting deliberative processes of negotiators re Ins Code § 12693 et seq.** Cal. Gov't Code § 6254(y). [No text.]
- z. **Records obtained pursuant to Pub. Util. Code § 2891.1(c)(2).** Cal. Gov't Code § 6254(z). [No text.]
- aa. **Documents prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.** Cal. Gov't Code § 6254(aa). [No text.]

bb. Documents prepared by a private entity relating to critical infrastructure. (*Proposed – Assembly Bill 1775, pending in state legislature*)

Previously, section 6255 (“Catch-all provision) has been used to exempt from disclosure such records as jail blueprints. This paragraph provides greater specificity and detail regarding various types of documents and various types of buildings.

AB 1775 will substitute these provisions for the existing paragraph bb, which currently relates to records pertaining to Managed Risk Medical Insurance Board negotiations.

cc. Information provided to Secretary of State for registration in the Advanced Health Care Directive Registry. Cal. Gov’t Code § 6254(cc). [No text.]

2. Other Specific Exemptions

California Government Code sections 6275 through 6276.48 contain a listing of approximately 500 other statutes, which may provide an exemption from disclosure. The list is probably not inclusive of all possible statutory exemptions. The listing of a statute does not itself create an exemption from disclosure. Some exemptions include:

a. Initiative, referendum and recall petitions

Initiative, referendum, and recall petitions and all memoranda prepared by the Registrar of Voters in the examination of the petitions indicating which registered voters have signed particular petitions. Cal. Gov’t Code § 6253.5.

b. Information on Voter Registration Cards

The home street address (not including the city or post office address), home telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes and prior registration information shown on the voter registration card for all registered voters. Cal. Gov’t Code § 6254.4.

The California driver's license number, California identification card number, social security number any other unique identifier used by the state for purposes of voter identification shown on a voter registration card. Cal. Gov't Code § 6254.4.

c. Requests for Bilingual Ballot Materials

Requests for bilingual ballots or ballot pamphlets. Cal. Gov't Code § 6253.6.

d. Posting Home Addresses & Telephone Numbers On Internet

The home address and home telephone number of elected or appointed County officials may not be posted on the Internet without first obtaining the official's written permission. Cal. Gov't Code § 6254.21.

e. Records pertaining to "alternative investments" (Proposed – Senate Bill 439 – pending in state legislature.)

This bill will insert an exemption for records relating to pension fund investments in so-called "alternative investments" or private equity funds because disclosure could negatively impact performance of those investments.

3. California Government Code Section 6255: "Public Interest" or "Catchall" Exemption

California Government Code section 6255, subdivision (a), provides as follows:

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record.

a. Heavy Burden On The Public Agency

If a public entity determines, after balancing the public interests, that a record should not be disclosed, it should be prepared to be able to prove the rationale for this conclusion in court, if challenged. **The burden** of demonstrating that the public interest in nondisclosure clearly outweighs the public interest in disclosure **is upon the public entity** claiming the right to withhold the information. *Braun v. City of Taft*, 154 Cal.App.3d 332 (1984). This balancing of interests requires a clear overbalance on the side of confidentiality in order to allow the withholding of a record. *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645 (1974).

If the records sought pertain to the conduct of the people's business there is a public interest in disclosure. *The weight of the interest in disclosure is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate them. Citizens for a Better Environment v. Department of Food & Agriculture*, 171 Cal.App.3d 704, 715 (1985).

b. Legitimate Interests In Nondisclosure Inferred From Explicit Exemptions

For purposes of the balancing of interests, the nature of interests which might legitimately be served by not making a record public may be inferred, in part, from the specific exemptions contained in California Government Code section 6254; however, those interests are not exclusive. *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991).

c. Decisions

A mere assertion of possible endangerment

because of release of a record (water district claimed that providing names and addresses of residential customers who exceeded their water allocations would expose them to verbal or physical harassment) will not clearly outweigh the public interest in access to that record. *New York Times Co. v. Superior Court (Goleta Water District)* 218 Cal.App.3d 1579 (1990).

Nevertheless, courts have not required evidence that an individual was actually deterred from making a complaint by the prospect of public disclosure of her or his name and address. Courts have said that it may simply be inferred on the basis of human experience, that public disclosure will have a chilling effect on the number of complaints made. *City of San Jose v. Superior Court*, 74 Cal.App.4th 1008 (6th Dist. 1999). In *City of San Jose*, the appellate court said that the public interest in protecting the privacy of persons filing complaints about airport noise, and the public interest in preventing a "chilling effect" on citizens' complaints, clearly outweighed the public interest in disclosing complainants' addresses and telephone numbers, where other records were disclosed that provided enough information about complaints without such personal information. An earlier Attorney General opinion said that for the public to be aware of whether or not its government was responding to the public's concerns, the names and addresses of complainants had to be disclosed. The court in *City of San Jose* disagreed, but did point out that each case was to be decided on the specific facts that would bear on the weighing of competing public interests.

Speculative security concerns were not a sufficient public interest supporting nondisclosure. *Connell v. Superior Court*, 56 Cal.App.4th 601 (1997).

The interest in **encouraging people to provide accurate information** may or may not be a legitimate interest. In some cases, the courts have determined that withholding information provided by private persons to a public agency can be justified as necessary to insure that people will provide accurate information necessary for the conduct of government.

For example, requiring disclosure of the governor's appointment calendar might curtail the flow of information to the governor by inhibiting meetings with politically unpopular or controversial groups, other lawmakers, lobbyists or citizens' groups. *Times Mirror Co. v. Superior Court*, 52 Cal.3d 1325 (1991). But see the discussion regarding Proposition 59.

Prequalification financial statements from potential bidders on county contracts for refuse disposal may not be open to public inspection because the interests of the local agency in not chilling future information-gathering ability in prospective contractual relationships, and on the part of each enterprise in protecting its legitimate privacy interests as well as in the preservation of its undisclosed competitive advantages, would outweigh the public's need to be informed with regard to the contents of the financial statements. 68 Op. Att'y Gen. 16 (1985); see also 58 Op. Att'y Gen. 371 (1975).

In other cases, the courts have rejected claims that disclosure of records would chill future information gathering abilities. (*CBS, Inc. v. Block*, 42 Cal.3d 646 (1986), in which the court held against the public agency, which argued that having to disclose records of applications and licenses to possess concealed weapons would discourage the filing of such applications.)

Examples where the courts have balanced the public interest under California Government Code section 6255 include:

- Names, home addresses and the application forms of person who obtained concealed weapons permits must be disclosed. *CBS, Inc. v. Block*, 42 Cal.3d 646, 656-657 (1986).
- Proposals submitted to city in response to request for bids were exempt from disclosure during the negotiation process and before contract award. *Michaelis v. Superior Court*, 38 Cal.4th 1065 (June 2006).
- County case settlement documents ordered disclosed. *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal.App.3d 893, 908-910 (1984).
- Department of Justice index cards withheld as too burdensome. *American Civil Liberties Union v. Deukmejian*, 32 Cal.3d 440, 467 (1982).

- Some employment records of city employee ordered disclosed. *Braun v. City of Taft*, 154 Cal.App.3d 332, 345-346 (1984).
- City contractor's financial data ordered disclosed. *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762, 780 (1983).
- Medi-Cal audit manual withheld. *Eskaton Monterey Hospital v. Myers*, 134 Cal.App.3d 788, 792-794 (1982).
- Employee applicants' personnel data given with assurance of confidentiality withheld. *Johnson v. Winter*, 127 Cal.App.3d 435, 438-439 (1982).
- University audit report withheld. *American Federation of State etc. Employees v. Regents of the University of California*, 80 Cal.App.3d 913, 915-919 (1978).

Names of individuals who purchased luxury suites in the Save Mart Center, a public arena on the campus of California State University, Fresno, funded primarily by private donations and operated by a University-affiliated, nonprofit auxiliary corporation, must be disclosed. *California State University, Fresno Association, Inc. v. Superior Court*, 90 Cal.App.4th 810 (2001).

- Prison building plans and security information withheld. *Procurier v. Superior Court*, 35 Cal.App.3d 211 (1973).
- The State Board of Corrections is not required to disclose to the public plans and specifications of local detention facilities. 73 Ops. Att'y Gen. 236 (1990).
- Pesticide applicator's spray reports ordered disclosed. *Uribe v. Howie*, 19 Cal.App.3d 194, 209-211 (1971).
- Claims for senior citizens' exemptions from assessment of a parcel tax levied by school district not exempt from disclosure. 63 Op. Att'y Gen. 383 (1998).
- Names, addresses and telephone numbers of persons filing noise complaints concerning the operation of a city airport are subject to public disclosure unless the city can establish that the public interest served by not making them public outweighs the public interest served by disclosure. 78 Op. Att'y Gen. 103 (1995). This opinion was implicitly called into question by the aforementioned *City of San Jose v. Superior Court*, 74 Cal.App.4th 1008 (1999).

d. Deliberative Process Privilege

The deliberative process privilege allows nondisclosure if 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. *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991).

The deliberative process privilege is designed to protect materials reflecting deliberative or policy-making processes, and not purely factual, investigative matters; often, however, the line blurs and the privilege is invoked to protect purely factual material, which exposes the deliberative process. *Rogers v. Superior Court*, 19 Cal.App.4th 469 (1993).

Policy bases for the deliberative process privilege include:

- It protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions.
- It protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon.
- It protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds. *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159 (1998).

The deliberative process exemption can apply to managerial level personnel, not just policy level decision-makers (such as the Board of Supervisors). In *County of Los Angeles v. Superior Court*, 82 Cal.App.4th 819 (2000), the court said it was possible that reports generated for detention center managers could qualify for the deliberative process exemption.

Not every disclosure which hampers the deliberative process implicates the deliberative process privilege; **only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence.** *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159 (1998).

Deliberative process examples:

- Governor's appointment calendars and schedules were exempt from disclosure because disclosure could jeopardize deliberative process by inhibiting private meetings and chilling the flow of information to the executive office. Requiring disclosure of the Governor's appointment calendar might curtail the flow of information to the Governor by inhibiting meetings with politically unpopular or controversial groups, other lawmakers, lobbyists or citizens' groups. *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991). As discussed at the outset, the November 2004 passage of Proposition 59 spurred a number of new CPRA requests – including one for the Governor's appointment calendar. While not conceding any change in the law, the Governor's office nevertheless released his calendar in early 2005.
- Documents in Governor's office concerning applicants for appointment to vacant seat on local board of supervisors, and staff evaluations and recommendations regarding applicants were covered by deliberative process privilege. *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159 (1998).
- Applications submitted to the Governor by persons seeking appointment to a vacancy on a local board of supervisors were exempt as subject to the deliberative process privilege. *Wilson v. Superior Court*, 51 Cal.App.4th 1136 (1996).
- Records disclosing the telephone numbers of persons with whom a city council member has spoken discloses the identity of such persons and is the functional equivalent of revealing the substance or direction of the judgment and mental processes of the city council member. Consequently, such records were exempt under the deliberative process privilege. *Rogers v. Superior Court*, 19 Cal.App.4th 469 (1993).

e. **Home Addresses & Telephone Numbers of Public Employees**

Under California Government Code section 6255, it is probable that the home addresses and home telephone numbers of County officers and employees would not have to be disclosed pursuant to the public interest exemption.

While it is in the public interest to know who works for a public agency and how to contact them at the public agency, it does not appear that disclosure of their home addresses and home telephone numbers would serve the public interest.

The Legislature, through certain exemptions, seemingly has indicated that it views disclosure of home addresses and home telephone numbers of persons not to have a very great public interest.

- Home addresses and home telephone numbers on voter registration cards are exempt from disclosure. Cal. Gov't Code § 6254.4.
- Home addresses in DMV records are exempt from disclosure. Cal. Gov't Code § 6254.1.
- Home addresses and home telephone numbers of utility customers of local agencies are exempt from disclosure. Cal. Gov't Code § 6254.16.
- Home addresses and home telephone numbers on applications to carry firearms of peace officers and judges are exempt from disclosure. Cal. Gov't Code § 6254, subd. (u).
- Home addresses in records of the Department of Housing and Community Development are exempt from disclosure, if the person requests confidentiality. Cal. Gov't Code § 6254.1.
- Home addresses and home telephone numbers of state employees and employees of school districts or county offices of education are exempt from disclosure, with certain exceptions. Cal. Gov't Code § 6254.3.

f. Copyrighted Material

A public agency may refuse to honor a Public Records Act request for a copy of copyrighted material, where the reproduction of such material would constitute a copyright infringement or where it would place an unreasonable burden on the public agency to provide such a copy in compliance with copyright restrictions. 64 Op. Att'y Gen. 186, 191-192 (1981). Under certain limited circumstances, reproduction of copyrighted material may fall within the "fair use" exception to copyright restrictions.

X. COURT PROCEEDINGS TO ENFORCE PUBLIC RECORDS ACT RIGHTS

A person may institute legal proceedings in court to enforce his or her right to inspect or to receive a copy of any public records. Cal. Gov't Code § 6258.

If the person prevails in the litigation, the court is required to order the public agency to pay court costs and reasonable **attorney's fees**. Cal. Gov't Code § 6259. **Award of costs and attorney fees is mandatory** where plaintiff

prevails in litigation under the Act; plaintiff "prevails" if litigation motivated defendant to release the requested documents. *Motorola Communication & Electronics, Inc. v. Department of General Services*, 55 Cal.App.4th 1340 (1997). Attorney fees may also be awarded to a person requesting records where the public agency, as plaintiff, unsuccessfully seeks a protective order from the court. *Fontana Police Dept. v. Villegas-Banuelos*, 74 Cal.App.4th 1249 (1999).

On the other hand, if the plaintiff's case is clearly frivolous, the court is required to award court costs and reasonable attorney's fees to the public agency. Cal. Gov't Code § 6259.

The PRA does not authorize a public agency to initiate an action after denying a request for records in order to determine its obligation to disclose documents to a member of the public. (*Felarsky v. Superior Court*, 28 Cal.4th 419 (2002), see also, *City of Santa Rosa v. Press Democrat*, 187 Cal.App.3d 1315 (1986).

XI. RECENT AND PENDING LEGISLATION

None pending as of Sept. 11, 2007.

XII. RECENT AND PENDING CASES

International Federation of Professional and Technical Engineers, Local 21, AFL-CIA et al. v. Superior Court of Alameda County (Contra Costa Newspapers), 2007 Cal. LEXIS 8918, (Aug. 27, 2007) See page 23-24.

Comm'n on Peace Officer Stds. & Training v. Superior Court, 2007 Cal. LEXIS 8916 (Aug. 27, 2007) See page 24.