

Taking a Shore Excursion Into The Public Records Act



City Clerk's Association of California

Nuts and Bolts
Northern Division
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What is the Public Records Act?



- California state law
- Affords any "person" the **right** to inspect and receive a copy of any identifiable public record
- "Person" includes an individual or corporation and elected members of local agencies



Policy of the Public Records Act

- While "mindful of the right of individuals to privacy . . . [the legislature] 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."

Government Code Section 6250



Policy of the Public Records Act

- Statutes and case law must be:
 - Broadly construed if it furthers the people's right of access and
 - Narrowly construed if it limits the right of access

California Constitution Art. 1, Section 3(b)
(Prop. 59, Nov. 2004)





What is a Public Record?



- "Public record" includes
 - 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



What is a Public Record?

- A "writing" is broadly defined and includes much more than written or printed documents—i.e., photos or tape recordings, drawings, plans, maps, films, discs, emails, etc.
- A "public record" does not include every piece of paper in city hall





Electronic Records

- Emails can be public records
- But which emails?





When is a Public Record EXEMPT from disclosure?

- List of types of records exempt from disclosure [Government Code Section 6254](#)
- Catch-all exemption:
Provides a general balancing test for withholding [Government Code Section 6255](#)
- List of exempt records identified by subject matter [Government Code Section 6275](#)



Common Statutory Exemptions

- Preliminary drafts, notes or interagency or intra-agency memoranda not kept in ordinary course of business (balancing test) [Government Code Section 6254\(a\)](#)





Common Statutory Exemptions



- Records created in anticipation of, or during, litigation until the litigation or claim has been finally adjudicated or settled

Government Code Section 6254(b)

- Arrest records, complaint reports, investigatory files and security files

Government Code Section 6254(f)



Common Statutory Exemptions

- Exemptions under other federal or state laws
 - Attorney-Client Privilege
 - Official Information
 - Confidential Informant



Government Code Section 6254(k)



Common Statutory Exemptions

- Personnel, medical or similar files
- But California Supreme Court has determined that salaries of public employees are generally disclosable



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

Government Code Section 6254(c)



Catch-All Exemption – Balancing Test



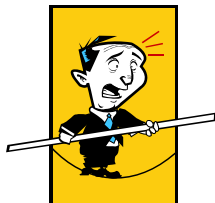
- “On the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record”

Government Code Section 6255



Balancing Test (continued)

- Burden on public agency to show that public interest in confidentiality outweighs public interest in disclosure
- Consult your City’s Attorney before using





Balancing Test (continued)

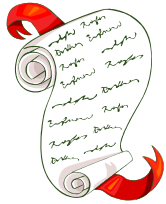


- Deliberative Process Privilege
 - Protects materials reflecting deliberative or decision-making processes
 - Example: Governor’s appointment calendars exempt from disclosure

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



When is a Public Record EXEMPT from disclosure?



- List of exempt records identified by subject matter
- 20 pages of exemptions
- Found in other state law (other California Codes)
 - Free access at: <http://www.leginfo.ca.gov/>
- Brought in through 6254(k)
Government Code Section 6275



What if Only Part of a Record is Exempt?

- The Public Records Act requires disclosure of "reasonably segregable" portions of records.
- If portions of a record are exempt:
 - Redact exempt portion
 - Disclose non-exempt portion





Waiver



- If exempt record is released, disclosure constitutes a waiver of the exemption



Who Decides if a Record is Exempt?

- City Clerk?
- City Attorney?
- Check your City's policy!





Collision of Retention and Disclosure





Procedure for Requesting Disclosable Records

- Requester not required to put request in writing. *LA Times v. Alameda Corridor Trans. Authority* (2001) 88 Cal. App. 4th 1381, 1392
- Requester not required to state a reason for request
- If record is otherwise subject to disclosure, may not limit access based upon purpose for which it's being requested. *Government Code Section 6257.5*



Procedure for Requesting Disclosable Records

- Can permits be copied and used to generate commercial mailing lists?





Procedure for Requesting Disclosable Records

- Can permits be copied and used to generate commercial mailing lists?
 - Generally yes. A public entity may not prohibit access based on the purpose for which access is requested





Procedure for Assisting Requests



- Cities must do all of the following (to the extent reasonable under the circumstances):
 - assist requester in identifying responsive records
 - describe the information technology and physical location of the records
 - provide suggestions for overcoming any practical basis for denying access

Government Code Section 6253.1



Denying Access to Records

- Grounds for Refusal:
 - Request does not seek records which are "reasonably segregable" from records which are exempt from disclosure
 - Request does not "reasonably describe an identifiable record"
 - Request would require agency to create new records not in existence (but see Gov't Code Section 6253.9 [electronic records])
 - Request seeks records which are exempt from disclosure



Determination Letter

- Agency has 10 calendar days to determine whether to grant request
- For "unusual circumstances," agency may take up to an additional 14 calendar days to make determination
- Promptly notify requester in writing





14-Day Extension



- Must provide written notification to requestor
- 14-day notification includes:
 - That additional time is required
 - Reason for delay
 - Date on which a determination will be given

Government Code Section 6253(c)



14-Day Extension – “Unusual Circumstances”



- Search for and collect records from other locations separate from office processing request
- Search for, collect & examine a voluminous amount of separate & distinct records in a single request



14-Day Extension – “Unusual Circumstances”

- Need for consultation w/another agency having a substantial interest in the request or among 2 or more components of the agency
- Need to compile data, write computer program or construct computer report to extract data

Government Code Section 6253(c)



Contents of Determination Letter

- Whether request is being granted or denied
- If granted, the estimated date and time when records will be made available
- If request is denied, in whole or in part, the reason(s) for denial
- Name and title of person responsible for denial
- Cost estimate for copying
- Request for pre-payment





Timing - Production of Copies



- Make records promptly available
- Most requests within 10 days
- But for really large requests - reasonable time period in which to produce



Procedures for Inspection

- Public records open to inspection at all times during office hours
- May deny access to exempt records
- Rule of reasonableness when responding to requests





Procedures for Inspection

- Work in advance with each department that has a public counter to determine:
 - inspection procedure
 - what is exempt





Procedures for Copies

- The person requesting the copies must pay for them before copies are released
 - Direct costs of duplication
 - **Not** staff time to research, retrieve or compile
- Exact copy unless impracticable





City's PRA Procedures

- May not use procedures to "delay or obstruct the inspection or copying of public records"
- May develop procedures that provide a "faster, more efficient, or greater" access to records than provided by procedures in Act



Government Code Section 6253(d) & (e)



Requests for Records in Electronic Format

- Documents are subject to disclosure in electronic format
- Record must be:
 - identifiable (no future requests)
 - disclosable
 - already in electronic format
- Must disclose but only in current format or format in which info has been kept
- Cost is still direct duplication unless...





Requests for Records in Electronic Format

- Requestor has to pay all costs (including programmer's time, etc.) IF:
 - Information is normally produced only at set times and requestor wants it now (i.e. quarterly reports) OR
 - Request would require "data compilation, extraction or programming to produce the record"

Government Code Section 6253.9



Requests for Records in Electronic Format

- Do not have to reconstruct a record if you no longer have it
- If the request is for hard copies and the information is also in electronic form, you MAY tell them it is also in electronic format





Requests for Records in Electronic Format

- Cannot provide information ONLY in electronic format (must still be able to provide hard copies)
- Do not have to release in electronic format if such release would compromise the security of the record or proprietary software in which it is maintained





Electronic Records

- Electronic Documents – more data than meets the eye





Electronic Records & Metadata

- Automatically attaches to word processing docs
- Includes info on:
 - Author and editors
 - Company
 - Time spent
 - When accessed and edited
- May include deleted text!

Document1 Properties			
General	Summary	Statistics	Contents
Title:	Letter to D.S.		
Subject:			
Author:	Benjamin B. Bickelbaum		
Manager:			
Company:	City of Whoville		
Category:			
Keywords:			
Comments:			



Email: Problem with Threads

- Exact copies must be provided
- Complete thread may contain irrelevant and embarrassing information

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From: Joe Employee, City Clerk, City Manager
To: Jane Employee, City Manager
Date: June 2, 2008 12:20 p.m.
Subject: RE: Question

More money? They're paid too much already!

Original Message
From: City Clerk
To: Joe Employee, Jane Employee, City Manager
Date: June 2, 2008 12:15 p.m.
Subject: RE: Question

More money and lots more money

Original Message
From: City Manager
To: Joe Employee, Jane Employee, City Clerk
Date: June 2, 2008 12:10 p.m.
Subject: RE: Question

I didn't know we were discussing compensation. What are the proposals?

Original Message
From: City Clerk
To: Joe Employee, Jane Employee, City Manager
Date: June 2, 2008 12:05 p.m.
Subject: RE: Question

I think the study session on the new library is next month. It will be at the same meeting as we discuss Council compensation.
  
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Consequences for Non-Compliance

- Litigation to enforce right to access
- Prevailing plaintiffs entitled to costs and attorneys fees