

## CALIFORNIA FIRST AMENDMENT COALITION'S OPEN GOVERNMENT SUMMARY

“A popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy.”

—James Madison

### **ACCESS TO RECORDS: THE PUBLIC RECORDS ACT**

#### **.I FRAMEWORK.**

##### **.A Basic structure.**

All public records are subject to disclosure unless they fall within one of the exemptions articulated in the Public Records Act (“PRA”).<sup>i</sup>

##### **.B “Public records” broadly defined.**

The definition of public records in the PRA includes most documents generated or used by the government.<sup>ii</sup>

##### **.C Numerous exemptions.**

The PRA is subject to numerous exemptions. There are a number of categorical exemptions in Government Code section 6254, which are often invoked by public agencies in denying access to records. There is a general “Catch-All” exemption created by Government Code section 6255. In addition, there are several hundred not included in the PRA itself, but set forth in other statutes and incorporated into the PRA under Government Code section 6254(k). Government Code sections 6275-6276.48 provide a list of many (but not all) of the statutes that may limit disclosure of information contained in public records.

## **.II WHAT AGENCIES ARE GOVERNED BY THE ACT?**

- .A State:** All state agencies except legislative and judicial agencies.<sup>iii</sup>
  - .1 Courts and court administrative bodies (such as the Judicial Council and the Administrative Office of the Courts) are not subject to the PRA. Access to court records is governed by constitutional and common law principles established by case law, by the California Rules of Court, and by separate statutes governing certain court records.
  - .2 State legislative records not available under PRA. There is a separate statute that governs records of the Legislature (the Legislative Open Records Act).<sup>iv</sup>
- .B Local:** All local agencies, including school districts and any board or commission of a city, county, municipal corporation or other political subdivision.<sup>v</sup> **Note:** If a public body is subject to the Brown Act, it is also subject to the PRA.
- .C Proposition 59:** The coverage of Proposition 59 (Article I, section 3(b) of the California Constitution) appears to be broader than that of the PRA. Specifically, courts and court administrative bodies may be subject to a constitutional right of access under Proposition 59.<sup>vi</sup>

## **.III WHAT ARE PUBLIC RECORDS?**

- .A Writing.**
  - .1 Includes handwritings, photographs, films, sound recordings, maps, magnetic tape, computer disks-virtually any means of recording any form of communication.<sup>vii</sup>
  - .2 Computer data is clearly within the definition of a public record.<sup>viii</sup>
- .B Containing information relating to the conduct of the public's business.**
  - .1 The requirement that a record relate to the conduct of the public's business is broadly construed, and rarely contested.<sup>ix</sup>
  - .2 According to the legislative history of the PRA:

This definition is intended to cover every conceivable kind of record that is involved in the governmental process. . . . 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.<sup>x</sup>

- .3 Includes the names of public employees,<sup>xi</sup> although it may not include home addresses and phone numbers of state employees.<sup>xii</sup> Note, however, that access to names of public officials and employees is increasingly disputed. Seeking access to names of public employees who are the subjects of investigations or controversies may be justified.<sup>xiii</sup> However, as a practical matter, you will probably get more information sooner if you agree that names of such employees can be withheld.
- .4 Note that the names and contract information for private citizens may also be exempt from disclosure, particularly those who submit information or complaints to the government with an expectation of confidentiality. Agreeing to allow public agencies to withhold such information may also expedite a request.

**.C Prepared, owned, used or retained by state or local agency.**

The records do not necessarily have to be in the actual custody of the public agency, if they are prepared, owned, or used by the agency.

**.D Regardless of physical form or characteristics.**

Information retained in an electronic format must be made available in any electronic form in which the agency holds the information.<sup>xiv</sup>

**.IV HOW DO YOU GET ACCESS?**

**.A Inspection.**

**.1 Records must be available for inspection during the regular office hours of the agency.<sup>xv</sup>**

.2 Procedures.

(a) Agencies may adopt procedures to be followed, but such procedures can't limit hours during which records are available.

(b) Some agencies are required to adopt written guidelines for accessibility of records, and to make those guidelines available free on written request.<sup>xvi</sup>

**.B Copying.**

**.1 You are entitled to copies of public records.<sup>xvii</sup>**

.2 Procedures

(a) You are not required by law to make a request in writing, but put your request in writing anyway. It gives you a record of what was requested, and establishes the date that starts time for a response running.

- (b) The agency must respond to a request for public records within 10 days. The time for responding can be extended by the agency for an additional 14 days.<sup>xviii</sup>
- (c) You are entitled to an exact copy unless it is impracticable to provide one.<sup>xix</sup>
- (d) The agency may charge a fee “covering direct costs of duplication” (or a statutory fee).<sup>xx</sup>
  - (1) “Direct cost” does not include search and retrieval time.<sup>xxi</sup>
  - (2) “Direct cost” does include maintenance costs and the salary of the clerk for time spent copying (essentially, what a copy shop would charge—usually \$.10-.25 per page, except for unusual copies).
  - (3) Note: Counties may be allowed, by statute, to charge fees that exceed the “direct costs of duplication,” so long as the fees do not exceed the amount reasonably necessary to recover the cost of providing the copy.<sup>xxii</sup>
- (e) You are entitled to copies of documents in electronic form, although public agencies may resist disclosure if the records are subject to manipulation in their original electronic form.<sup>xxiii</sup> If such an issue is raised, see if the agency can readily convert the electronic document into a static form (*e.g.*, converting a Word file into an Adobe .pdf file). The fees that may be charged for obtaining an electronic copy vary, but are generally limited to the direct cost of providing a copy in an electronic format.<sup>xxiv</sup>

**.C Materials containing both exempt and non-exempt information.**

- .1 You are entitled to non-exempt portions of a record if reasonably segregable.<sup>xxv</sup>
- .2 Always ask to have any reasonably segregable portion provided.

**.D Assistance.**

- .1 Government Code section 6253.1 obligates public agencies to assist the public to make focused and effective requests that reasonably describe identifiable records.
- .2 Public agencies are required, to the extent reasonable, to do all of the following:

- (a) Assist the public in identifying records and information responsive to the request or purpose of the request;

- (b) Describe the information technology and physical location in which the records exist;
- (c) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.
  - .3 Always include in your written PRA requests a request for assistance pursuant to Government Code section 6253.1.
  - .4 In general, ask the agency to identify the records or information responsive to your request, and to describe their location.

## **.V EXEMPTIONS.**

**.A** The Public Records Act contains or incorporates numerous exemptions.

- .1 The PRA itself contains many exemptions permitting public agencies to withhold certain categories of records. Most of these are set out in Government Code section 6254. Additional exemptions are included in separate sections.
- .2 The PRA also includes a provision exempting records the disclosure of which is exempted or prohibited under federal or other state law. Government Code section 6254(k) incorporates literally hundreds of specific statutory exemptions, most of which are listed at the end of the PRA (Government Code § 6275 *et seq.*), including, for example:

- (a) Rap sheets (“criminal offender record information”).<sup>xxvi</sup>
- (b) Medical records.<sup>xxvii</sup>
- (c) Court records in unlawful detainer proceedings (sealed for 60 days, or indefinitely if the defendant prevails).<sup>xxviii</sup>
- (d) Strawberry marketing information.<sup>xxix</sup>
- .3 Note: the fact that a statute is included in the list does not mean that it necessarily creates an exemption.<sup>xxx</sup> You need to look at the statute to determine if it actually prevents disclosure of public records.

**.B** **Frequently invoked exemptions.** The following are some of the most frequently exemptions:

- .1 Preliminary drafts or notes not normally retained, provided the public interest in withholding outweighs the public interest in disclosure (Government Code § 6254(a)).

- .2 Personnel, medical, and similar files (Government Code § 6254(c)).
- (a) This exemption is routinely invoked when the public agency believes a request seeks information pertaining to identifiable public officials or employees that is private or controversial.
- (b) *Salary information:* The courts are currently divided as to whether public employee salary information is subject to a right of privacy that makes it exempt from disclosure.<sup>xxxii</sup> The Supreme Court has agreed to hear a case addressing this issue.
- (c) *Investigations of employee misconduct:* The California courts have established a fairly liberal standard for disclosure of public records relating to complaints or investigations of misconduct by public employee or officials.
- They have held that there is a public policy against disclosure of “trivial or groundless charges,” but that “***where the charges are found true, or discipline is imposed***, the strong public policy against disclosure vanishes; this is true even where the sanction is a private reproof. In such cases a member of the public is entitled to information about the complaint, the discipline, and the ‘information upon which it was based.’<sup>xxxiii</sup>
  - In addition, they have held that “***where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists***.”<sup>xxxiii</sup>
- .3 Records pertaining to pending litigation to which public agency is a party (Government Code § 6254(b)).
- (a) Must have been prepared for use in the litigation.<sup>xxxiv</sup>
- (b) The PRA may be used to obtain documents generated in litigation in which the requestor was a party.<sup>xxxv</sup>
- (c) The exemption no longer applies when the litigation is resolved.<sup>xxxvi</sup>
- (d) The exemption is broader than the attorney work-product exemption; it protects any work product generated by a public agency in anticipation of litigation.<sup>xxxvii</sup>
- (e) But note: records protected by the attorney-client privilege or attorney work-product doctrine remain exempt from disclosure (under section 6254(k) and the California Evidence Code) even after the litigation is resolved.
- .4 Law enforcement/licensing agency records of complaints, investigative,

and security files (Government Code § 6254(f)).

- (a) This is a complex exemption. In general, law enforcement investigatory files are not required to be made public. The most typical example of such records are police reports.
- (b) However, law enforcement agencies *are* required to make certain categories of information public, even though those categories of information are generally contained in law enforcement investigatory files. The information required to be made public is discussed in more detail below.
- (c) The exemption for law enforcement and licensing agency investigatory files arises “only when the prospect of enforcement proceedings becomes concrete and definite.”<sup>xxxviii</sup>
- (d) However, once materials have become exempt, they remain permanently exempt, even after the investigation is over.<sup>xxxix</sup>

.5 Catch-all exemption.

- (a) *Government Code § 6255.* This provision exempts from disclosure any records if “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.”
- (b) *Deliberative process privilege.* This exemption includes the “deliberative process privilege,” allowing nondisclosure of records revealing the deliberations of agency officials. This doctrine was created by the California Supreme Court in 1991, in a case involving a request for the calendars of then Governor Deukmejian, and has since been applied in many other contexts, including records of phone calls by city council members, and records regarding applications to the Government for appointment to fill vacancies on county boards of supervisors. According to the Supreme Court, “the key question in every case is whether disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion with the agency and thereby undermine the agency’s ability to perform its functions.”<sup>xl</sup>
- (c) *Proposition 59.* Proposition 59 may have eliminated the “deliberative process privilege.” It was certainly intended to do so. The Ballot Argument in favor of Proposition 59 states in part as follows: “What will Proposition 59 do? It will create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how. . . . ***It will allow the public to see and understand the deliberative process through which decisions are made.***”

**.C Exemptions are not mandatory.**

- .1 Despite the existence of an exemption, an agency may allow inspection unless disclosure prohibited by law.<sup>xli</sup>
- .2 Thus, if an agency has disclosed the information sought, it may have waived right to claim exemption (Government Code § 6254.5).

**.VI DISCLOSURE OF LAW ENFORCEMENT INFORMATION REQUIRED UNDER 6254(f).**

**.A** Information required to be disclosed upon the arrest of an individual or individuals.

- .1 To whom the information must be disclosed: The public.
- .2 Information which must be disclosed:

- (a) Full name, current address and occupation of individual arrested;
  - (b) Physical description of the arrested individual including date of birth, color of eyes and hair, sex, height and weight;
  - (c) The time and date of the arrest;
  - (d) The time and date of booking;
  - (e) The location of the arrest;
  - (f) The factual circumstances surrounding the arrest;
  - (g) The amount of bail set;
  - (h) The time and manner of release or the location where the individual is currently being held; and
  - (i) All charges upon which the individual is being held, including any outstanding warrants from other jurisdictions and parole or probation holds.
- .3 **Exceptions to the obligations to disclose the information.** A particular item of information otherwise required to be disclosed may be withheld if:
    - (a) Disclosure of that information would endanger the safety of a person involved in an investigation; or
    - (b) Disclosure of that information would endanger the successful completion of the investigation or a related investigation.

**.B** Information required to be disclosed regarding complaints or requests for assistance received by the agency.

.1 To whom the information must be disclosed: The public.

.2 Information which must be disclosed:

(a) The time, substance and location of all complaints or requests for assistance;

(b) The time and nature of the response thereto;

(c) If information regarding crimes alleged or committed, or any other incident investigated, is recorded:

(1) The time, date and location of occurrence of the alleged crime or other incident;

(2) The time and date of the report;

(3) The name, age and current address of the victim except that: (1) the address of a victim of certain crimes involving sexual assault, unjustifiable punishment of a child, interference with exercise of civil rights, or corporal injury shall not be disclosed; and (2) the name of a victim of those same crimes may be withheld at the request of the victim or the parents or guardian if the victim is a minor.

.3 **Exceptions to the obligations to disclose the information.** A particular item of information otherwise required to be disclosed may be withheld if:

(a) Disclosure of that information would endanger the safety of a person involved in an investigation; or

(b) Disclosure of that information would endanger the successful completion of the investigation or a related investigation.

**.C** Information required to be disclosed regarding incidents caused by arson, burglary, fire, explosion, larceny, robbery, vandalism, vehicle theft, or a crime as defined by Government Code section 13960(c).

.1 To whom the information must be disclosed:

(a) The victims of the incident or their authorized representative;

(b) An insurance carrier against which a claim has been or might be made as a result of the incident; and

(c) Any person suffering bodily injury or property damage or loss as a result of the incident.

.2 Information which must be disclosed:

- (a) Names and addresses of persons involved in incident;
  - (b) Names and addresses of witnesses (other than confidential informants) to the incident;
  - (c) The description of any property involved;
  - (d) The date, time and location of the incident;
  - (e) All diagrams of the incident;
  - (f) Statements of the parties involved in the incident; and
  - (g) The statements of all witnesses (other than confidential informants).
- .3 Exceptions to the obligation to disclose the specified information:
- (a) Any or all of the above information may be withheld if:
    - (1) Disclosure would endanger a witness or other person involved in the investigation; or
    - (2) Disclosure would endanger the successful completion of the investigation or a related investigation.
  - (b) That portion of investigative files which reflects the analysis or conclusions of the investigating officer need not be disclosed.

- i The California Public Records Act is codified at Government Code sections 6250-6277.
- ii Gov't Code § 6252(e).
- iii Gov't Code § 6252(a).
- iv Gov't Code §§ 9070-9080.
- v Gov't Code § 6252(b).
- vi Article I, Section 3(b)(1) of the California Constitution provides as follows: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meeting of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Although other provisions of Proposition 59 limit its application to the Legislature, nothing in Proposition 59 expressly limits exemptions or limits its application to the judicial branch of the government. However, the application of Proposition 59 to the courts or court administrative bodies has not yet been determined.
- vii Gov't Code § 6252(g).
- viii Gov't Code §§ 6252(e), 6253.9.
- ix *See, e.g., California State University v. Superior Court*, 90 Cal. App. 4th 810, 824-25 (2001); *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 774 (1983).
- x Assembly Comm. on Statewide Information Policy, Appendix 1 to Journal of Assembly (1970 Reg. Sess.) Final Report p. 9.
- xi *See, e.g., New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97 (1997).
- xii *See, e.g.,* Gov't Code § 6254.3 (exempting home address and telephone numbers of state employees and employees of school districts and county offices of education); Gov't Code § 6254.4 (home address, telephone number, and other information shown on voter registration card are exempt); Gov't Code § 6254.21 (home address or telephone number of any elected or appointed official not to be posted on the Internet).
- xiii *See, e.g., Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045-46 (2004); *American Federation of State, County and Municipal Employees v. Regents of the University of California*, 80 Cal. App. 3d 913, 918 (1978).
- xiv Gov't Code § 6253.9(a).
- xv Gov't Code § 6253(a).
- xvi Gov't Code § 6253.4.
- xvii Gov't Code § 6253(b).
- xviii Gov't Code § 6253(c).
- xix Gov't Code § 6253(b).
- xx Gov't Code § 6253(b).
- xxi *North County Parents Organization v. Department of Education*, 23 Cal. App. 4th 144, 146 (1994).
- xxii 85 Ops. Cal. Atty. Gen. 225 (2002).
- xxiii Gov't Code § 6253.9(f).
- xxiv Gov't Code § 6253.5(a)(2). *But see* Gov't Code § 6253.9(b).
- xxv Gov't Code § 6253(a).
- xxvi Gov't Code § 6276.12, referring to Penal Code §§ 11076, 11077, 11081, 13201, and 13202.
- xxvii Gov't Code § 6276.30, referring to Civil Code § 56.16.
- xxviii Gov't Code § 6276.12, referring to Code of Civil Procedure § 1161.2.

<sup>xxix</sup> Gov't Code § 6276.42, referring to Food and Agriculture Code § 62124.

<sup>xxx</sup> Gov't Code § 6275.

<sup>xxxi</sup> See *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 128 Cal. App. 4th 586 (2005), review granted, 32 Cal.Rptr. 3d 1 (July 27, 2005).

<sup>xxxii</sup> *American Federation of State, County and Municipal Employees v. Regents of the University of California*, 80 Cal. App. 3d 913, 918. (1978) (“AFSCME”). Accord, *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1044, 1046 (2004) (“Bakersfield”).

<sup>xxxiii</sup> *Id.*

<sup>xxxiv</sup> *County of Los Angeles v. Superior Court (Axelrad)*, 82 Cal. App. 4th 819, 830 (2000).

<sup>xxxv</sup> *City of Los Angeles v. Superior Court*, 41 Cal. App. 4th 1083(1996).

<sup>xxxvi</sup> Gov't Code § 6254(b) (“ . . . until the pending litigation or claim has been finally adjudicated or otherwise settled.”).

<sup>xxxvii</sup> *Fairley v. Superior Court*, 66 Cal.App.4th 1414, 1422, n. 5 (1998).

<sup>xxxviii</sup> *Williams v. Superior Court*, 5 Cal. 4th 337, 356 (1993).

<sup>xxxix</sup> *Id.*, at 361-62.

<sup>xl</sup> *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1342 (1991).

<sup>xli</sup> Gov't Code § 6254 (“Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.”).