

PUBLIC RECORDS ACT

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Presented by

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Speaker, The Art of Depositions: Powerful Techniques to Maximize Your Success, National Business Institute, Fresno, California, June 18, 2008

Speaker, Practicing Legal Ethics in the Electronic Law Office, Half Moon Seminars, Fresno, California, September 25, 2008

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Public Records Act: Enacted in 1968 against background of impatience with secrecy. Government Code section 6250 declares, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

Proposition 59: Article I, section 3(b) of the California Constitution, added by the passage of Proposition 59 in 2004 (with 83 percent approval of the voters), gives constitutional stature to the right of access to writings of public agencies and meetings of government bodies. It mandates broad construction of laws guaranteeing access, narrow construction of exemptions.

What Agencies are Covered? "Local Agency" meaning: County, city, school district, municipal corporation, district, political subdivision, board, commission, or any agency of the above. Also any public agency or entity that is a "legislative body" under the Brown Act. [Government Code section 6252(b).]

What are Public Records?

- Any writing
- Containing information relating to the conduct of the public's business
- Prepared, owned, used or retained by any ... local agency regardless of physical form or characteristics. [Government Code section 6252(d).]

The classic case law definition from the case of *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 774 is as follows: "This 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."

Who has Access to Public Records? Anyone can ask for them, and the purpose of the request generally cannot be considered. City hall shouldn't ask someone for ID (although a *Contra Costa Times* series found that some people at City Hall do). Public agencies shouldn't play "hide the ball" and say "you didn't ask for it" under section 6253.1, they have an obligation to do all of the following: (1) assist the member of the public to identify the records and information responsive to the request, if stated; (2) describe the information technology and physical location in which the records exist; and (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.

Cost of Records: Cannot charge for staff time locating and pulling material, excising material, etc. The direct cost of duplication [which agencies can charge under Govt. Code section 6253(b)] is the cost of running the copy machine.”

Timing of Disclosure: Requester should be able to inspect and copy records at any time. Agency “shall make the records promptly available.” [Government Code section 6253(a) and (b)] Agencies must respond in writing within ten (10) days; in “unusual circumstances” that period can be extended by fourteen (14) days.

BATTLEGROUND UNDER PUBLIC RECORDS ACT: PUBLIC EMPLOYEE DISCIPLINE AND SALARIES.

●**Public Employee Discipline:** The Public Records Act provides an exemption for “personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” [Government Code section 6254(c).]

However, where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records may exist. [*AFSCME v. Superior Court* (1978) 80 Cal.App.3d 913, 918.]

“A review of the cases ... leads to the premise that there is a strong policy for disclosure of true charges. The cases do not stand for the premise that either a finding of the truth of the complaint contained in the personnel records or the imposition of employee discipline is a prerequisite to disclosure.” [*Bakersfield School Dist. V. Superior Court* (2004) 118 Cal.App.4th at 1041, 1046.] Courts must “examine the documents presented to determine whether they reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded.” (*Id.* at 1047.)

●**Employment contracts with any public employee is not exempt** [Government Code section 6254.8].

●**Public Employee Salaries:** Historically public employee salaries have been disclosed at the local, state and national levels.

Three Attorney General Opinions have also held that public employee salaries must be disclosed. [*68 Ops. Cal. Atty Gen.* 110, 113 (1977).]

●**What is the State Constitutional Privacy Right?** The California Constitution is sometimes cited, along with the CPRA’s privacy exemption, as a basis for withholding personal information from disclosure.

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Art. I, § 1.)

● **Deliberative Process/Government Officials' Calendars:** In *Times Mirror v. Deukmejian*, the California Supreme Court found that the Governor could refuse to disclose five years' worth of calendars to *Los Angeles Times*.

● **Applicants for Board of Supervisors:** A Court of Appeal decision held that the Governor could refuse to disclose the names of people who had applied for an appointment to the Board of Supervisors. This could be another battleground after Proposition 59. The ballot argument in support of Proposition 59 said, "Everyone needs access to information from the government ... Who is the Governor considering for appointment to a vacancy on the County Board of Supervisors?" Does Prop. 59 overrule that decision?

● **Police Personnel Records:** Covered by "Pitchess statutes" a statutory scheme embodied in Penal Code section 832.7 and 832.8. Pitchess statutes apply to complaints and discipline against police officers. Otherwise, police and law enforcement personnel records are exempt.

● **"Police Log" is Public:** Agencies are required to disclose: names, addresses, witnesses (not confidential information), date, time, location, diagrams, statements, factual circumstances surrounding the incident for crimes of:

- Arson
- Burglary
- Carjacking
- Explosion
- Fire
- Larceny
- Robbery
- Vandalism
- Vehicle theft
- Crimes defined in section 13960(c)

Law Enforcement agencies must also make public the following arrestee information:

- Full name and occupation
- Date of birth
- Color of eyes and hair
- Sex, height and weight

- Time and date of booking
- Location of arrest
- Factual circumstances surrounding the arrest
- The amount of bail set
- The time and manner of release
- The location where the individual is currently being held
- All charges the individual is being held upon
- Any outstanding warrants or parole or probation holds

An agency may withhold or redact the following:

- Name/addresses of confidential information
- Information that might endanger the safety of a witness or person involved
- Information that might endanger the successful completion of the investigation or related investigation
- Investigator's analysis or conclusions

● **Victim Names:**

- These are not public for most sex crimes, child endangerment, spousal abuse and the like because of possible interference with civil rights

● **Pending Litigation Exemption:**

- In general, it applies to documents created *after the commencement* of the litigation. It does not apply to records that were created in the ordinary course of the agency's business or for other purposes prior to the litigation.
- Once litigation is concluded, the pending litigation exemption no longer applies. **Note:** The attorney-client privilege may be ongoing and provide an alternative basis for nondisclosure.

● **Miscellaneous Exemptions:** Voter registration information, applicants for concealed weapon permits, income tax information, family records relating to adoptions. Section 6255 has the following "catch all" exemption: A record may be withheld if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." However, this section must be tested against the broader expansion of Prop. 59.

Finally, keep in mind a denial of production of records must be in writing [6255(b)].

Attorney's Fees for Failure to Comply: California Public Records Act Recovery: This issue was more substantively challenging for the Fifth District in its 3-0 decision authored by Justice Kane in *Galbiso v. O.P.U.D.* (2008) 167 Cal.App.4th 1063. The appellate court noted that a plaintiff prevails for purposes of a CPRA attorney's fees award when he/she files an action resulting in defendant's release of previously withheld documents, as long as the lawsuit was a "motivating factor" in the document release. [See *L.A. Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1391.]

Justice Kane stated: "We believe the language of section 6259 is sufficiently broad to include the present lawsuit. That is, where a means is employed by a public agency to effectively deny access to *all* public records and a lawsuit is filed to remedy the problem, that lawsuit would constitute a claim that 'certain public records are being improperly withheld from a member of the public' within the scope of section 6259."

Plaintiff, however, was not content to just win. She also suggested to the appellate court that an application of a fee multiplier was *mandatory* under the facts of the case. The appellate panel said no multiplier in this context is mandatory, but a matter for discretionary determination by the court below. [*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1240-1241.]