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The California Public Records Act




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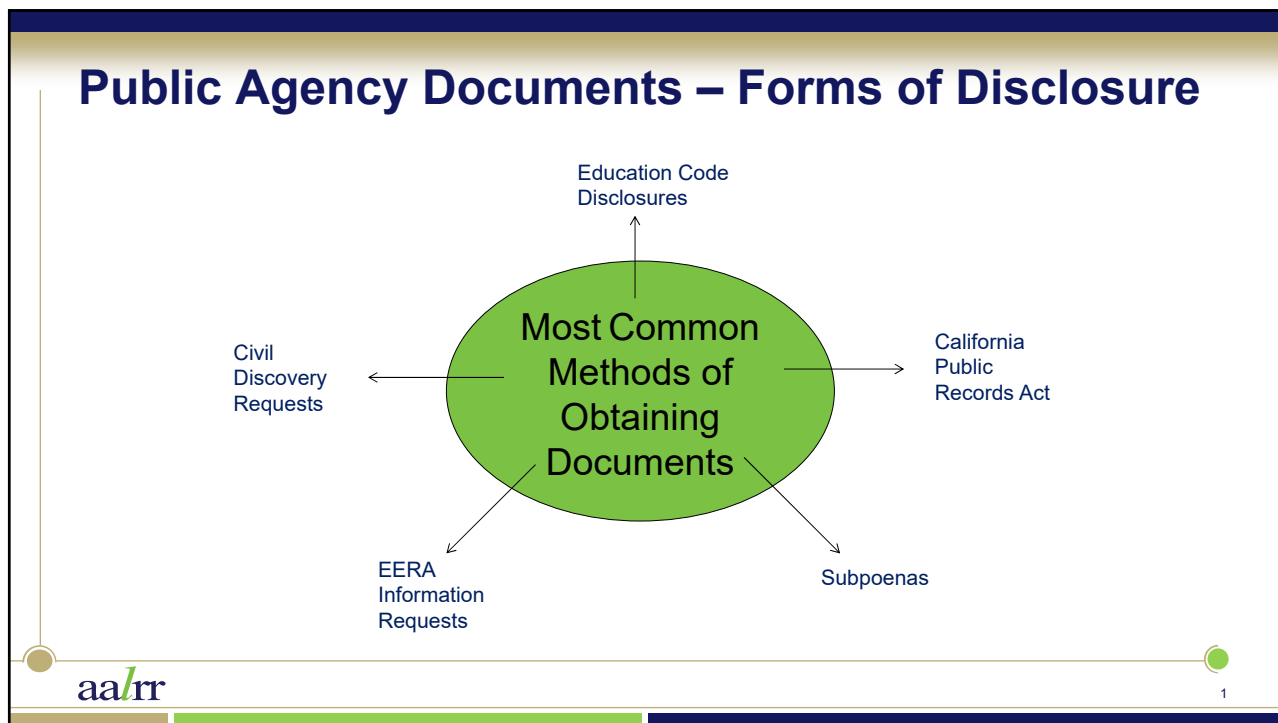
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California Public Records Act

California Public Records Act (“CPRA”) Points To Keep In Mind

- All public records are subject to inspection, **unless** an exception applies (e.g., attorney-client privilege)
- Very limited cost recovery
- Public agency pays legal fees if it loses legal challenge in court
- Be cognizant of the District’s retention policies

California Public Records Act (“CPRA”) Recodification

- Assembly Bill 273 was passed into law in 2021 which recodified the CPRA from to Government Code § 6250 *et seq.* to Government Code § 7920.000 *et seq.*
- The changes were operative on January 1, 2023.
- The Legislature in recodifying and reorganizing the CPRA did not intend to substantively change the law.
- These changes also did not “affect the status of judicial records as it existed immediately before the effective date of the provision that is continued in this section” (Gov’t Code, § 7920.200.)

The Basis for the CPRA

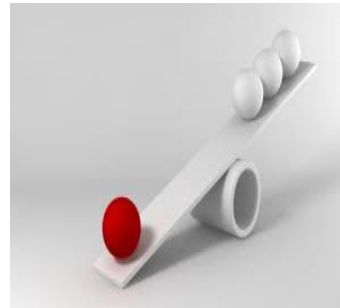
- **Government Code section 7921.000**
 - “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state”
- **Proposition 59 (Cal. Const., Art. 1, § 3(b))**
 - Requires that statutes or other types of governmental decisions, including those already in effect, be broadly interpreted to further the people’s right to access government information and narrowly construed if it limits the right of access

The Basis for CPRA

- **The General Rule**

- Unless an individual's right to privacy *outweighs* the public's interest in disclosure, or if disclosure is exempted by statute, a record retained by a public agency in the course of business must be disclosed upon request. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742)

- General policy favors disclosure
- A very powerful tool



What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

In *San Jose*, the California Supreme Court focused on the definition of “public record” under the CPRA (Gov’t Code, § 7920.530):

- 1) A writing;
- 2) With content relating to the conduct of the public’s business, which is
- 3) Prepared by, or
- 4) Owned, used, or retained by any state or local agency.

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- **Element 1: “A writing . . .”**
 - “Writing means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation . . .” (Gov. Code, § 7920.545)
 - The Court compared traditional notions of a “writing” to modern realities:
 - Then: “physically identifiable”; “sent through mail or by carrier”; “fairly formal”; “focused on the business at hand”
 - Now: “email, text messaging, and other electronic platforms”; “ease and immediacy”; “tendency to share fleeting thoughts and random bits of information”; “varying degrees of importance”; “broad audiences”

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- **Element 2: “With content relating to the conduct of the public’s business, which is . . .”**
 - Work-related versus *primarily private* communications
 - At a minimum, must relate in some substantive way to “the conduct of the public’s business”
 - Does not include “every piece of information the public may find interesting”
 - Excludes communications that are primarily personal in nature

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- **Element 3: “Prepared by . . . any state or local agency”**
 - When employees are conducting agency business, they are working for the agency and on its behalf
 - A writing prepared by a public employee conducting agency business has been “prepared by” the agency
 - Even if the writing is prepared using the employee’s personal device

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

- **Element 4: “Owned, used, or retained by any state or local agency”**
 - Includes records in an entity’s actual or *constructive* possession
 - Constructive possession = agency has the right to *control* the records, directly or through another person
 - Records do not lose public record status because they are located in an employee’s personal account
 - A writing has been constructively “retained by” an agency even if the writing is retained in the employee’s personal account

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

Supreme Court's Limited Guidance for Agencies:

- 1) When a CPRA request seeks records believed to be in an employee's personal account or device, communicate the request to that employee.
 - Rely on employee (or official) to search his or her own files
 - Train employees
 - Submit an affidavit



What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

What is included in an affidavit?

- Employee's signed declaration, under penalty of perjury
- Description of the scope of the request
- A determination of whether the employee found responsive records and a description of the records the employee disclosed to the agency
- Employee's reassurance he/she does not know of any other records located on a private device/account that would be responsive to the request
- **Final determination of whether to produce a record rests with the agency, in consultation with legal counsel as needed.**

What is a Public Record?

City of San Jose v. Superior Court (2017) 2 Cal.5th 608

Supreme Court's Limited Guidance for Agencies: (cont.)

- 2) Preventive Measures - develop policies that reduce the incidence of public records being maintained solely in private accounts and devices.
 - Require all emails involving agency business, sent by an employee or official through a private account, to be copied to the employee's agency email account
 - Discourage employees and officials from using personal accounts to conduct agency business

CPRA Disclosable Documents

Analysis:

- **Is it a public record?**
 - Yes.

- **Is the public record disclosable?**
 - Yes, unless an exemption applies.
 - Two categories of exemptions
 - (1) Exemptions under CPRA specific sections
 - (2) "Catchall" Exemption under Government Code section 7922.000

CPRA Exemptions

- **Specific exemptions contained in Government Code**

- There are a multitude of exemptions, beginning at Government Code section 7923.600
- Based on two general principles
 - (1) individual privacy interests
 - (2) the government's need to perform its assigned functions in a reasonably efficient manner

CPRA Exemptions

- **Government Code section 7927.700**

- “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”
 - Just because a document is in a personnel file does not make it a “personnel document” exempt from disclosure
- This exemption comes into play frequently, but **BE CAREFUL**

CPRA Exemptions

Personnel File Exemption

- The personnel file exemption recognizes that public employees have a legally-protected right to privacy concerning **certain material contained in personnel files**. However, courts have recognized that the “privacy” exemption under **Section 7927.700** is limited and was developed to protect “intimate details of family and personal life, not business judgments and relationships.” (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 343-44.)
- To determine whether a document is exempt under Section 7927.700, the individual’s privacy interest in non-disclosure must be balanced against the public’s interest in disclosure. (*Int’l Fed. of Prof. Engineers Local 21 v. Superior Court* (2007) 42 Cal.4th 319, 338-39.)
 - To withhold a document, there must be a “clear overbalance” on the side of employee confidentiality. (*CSU Fresno Ass’n, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 831.)

CPRA Exemptions

• Complaint and Disciplinary Documents

- Where charges are found to be true, or discipline is imposed, a member of the public is entitled to information about the complaint, the discipline, and the information upon which it was based. (*AFSCME v. Univ. of Calif.* (1978) 80 Cal.App.3d 913.)
- **Only allegations that are not “well-founded” and not “of a substantial nature” are exempt.** Courts have interpreted this to mean that **only “baseless or trivial” allegations are exempt.** (*Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.)
- Courts will examine records to determine if they contain “sufficient indicia of reliability” to support a reasonable conclusion that the complaint was well-founded. (*Bakersfield.*)
- When disclosing documents from a personnel file, we provide staff a *Marken* notice to provide the opportunity to object to disclosure *prior* to disclosing.

CPRA Exemptions

- **Government Code section 7927.500**
 - “Preliminary drafts, notes, or inter-agency or intra-agency memoranda which are not retained in the ordinary course of business are exempt, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.” (Emphasis added)

CPRA Exemptions

- **Government Code sections 7927.200 and 7927.205**
 - “Documents specifically prepared for litigation to which the agency is a party”
 - These documents are exempt until the pending litigation or claim has been finally adjudicated or otherwise settled
 - Included may be investigation reports prepared in anticipation of or in preparation for litigation (possible “exemption to the exemption” for personnel records?)

CPRA Exemptions

- **Government Code section 7927.705**
 - “Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.”
 - This includes documents reflecting deliberative or policy-making processes, attorney-client privileged material, copyright protected material, etc.
 - This also includes documents protected by other provisions of the Education Code (e.g., Sections 76200 through 76246 concerning confidentiality of student records) and federal law (e.g., Family Educational Rights and Privacy Act).

CPRA Exemptions

- **Government Code section 7929.605**
 - “Test questions, scoring keys, and other examination data used to administer a licensing examination for employment, or academic examination . . .”
- **Government Code section 7928.300**
 - employee home addresses and phone numbers

CPRA Exemptions

- **Attorney-Client Privilege**

- Government Code sections 7927.705 (other statutes)
 - Business and Professions Code; Evidence Code, California Code of Civil Procedure
- Applies to Board's receipt of confidential written communication from legal counsel to provide legal advice (e.g., a written legal opinion).
 - *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
- Applies to Attorney-Client Fee Agreements
 - Business & Professions Code, § 6149
- Recent invoices and descriptions
 - *Los Angeles Cty. Bd. of Supervisors v. Superior Court* (2016) 2 Cal. 5th 282, 297

CPRA Exemptions

- **Catchall Exemption**

- **Government Code Section 7922.000**
- “The agency shall justify withholding any record by demonstrating . . . 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.”
 - *City of San Jose v. Superior Court* (San Jose Mercury News, Inc.) (1999)
 - Withholding the contact information of the public who filed complaints with a public board was permissible because of the wealth of other information in the report. To disclose names, addresses, and telephone numbers would have a chilling effect on people who would complain about air traffic noise.

CPRA Exemptions

- **Catchall Exemption**

- Case-by-case basis if document does not fall within a specific statutory exemption
- Records requests inevitably impose some burden on government agencies; PRA requires “reasonable effort”
 - A request “which requires an agency to search an enormous volume of data for a ‘needle in the haystack’ or, conversely, a request which compels production of a huge volume of material may be objectionable as unduly burdensome.”
 - When weighing the benefits and costs of disclosure, expense or inconvenience to the public agency may properly be considered

CPRA Exemptions

- **Catchall Exemption: What is “reasonable effort”?**

- *Getz v. Superior Court of El Dorado County* (2021) 72 Cal.App.5th 637
 - Court held it was not overbroad or unduly burdensome to identify/produce responsive records for a request that sought all emails over a six-year period between all County employees and four email domains (of private companies)
 - Amounted to about 42,000 emails
 - Problems with County’s responses/actions
 - Voluntarily put together an index with all emails listed (even though PRA does not require creation of records that do not exist) - court took this as evidence “that the records could be located with reasonable effort and the volume of material was not unmanageable.”
 - Did not conduct a review of the records to identify actual examples of exempt materials, for which the County would need to conduct further review.

CPRA Exemptions

- **Deliberative Process Privilege**

- *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d
 - LA Times requested Governor's "appointment schedules, calendars, notebooks and any other documents that would list [the Governor's] daily activities"
- *California First Amendment Coalition v. Superior Court* (1998) 76 Cal.App.4th 159
 - Citizen organization requested Governor disclose names and qualifications of applicants for a temporary appointment by Governor to a local Board of Supervisors - appointment necessitated by the death of an elected supervisor
- Key question: Whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion thereby undermine the agency's ability to perform its functions.
 - Application depends on circumstances, and there are few precedents: use with caution

CPRA – Withholding Records

- **Proceed with caution**

- If a plaintiff brings lawsuit under CPRA and prevails, award of attorney fees is mandatory.
(*Los Angeles Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381.)
- A plaintiff "prevails" if the litigation motivated agency to release documents.
(*Motorola v. Dep't of Gen. Servcs.* (1997) 55 Cal.App.4th 1136.)

Identity of the Requestor

- **In General – Identity Does Not Matter**
 - CPRA defines a “**member of the public**” as “any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.” (Gov. Code, § 7920.515) A “member of the public” also includes other public agencies. (*Los Angeles Unified School District v. Superior Court* (2007) 151 Cal.App.4th 759)
 - A “**person**” under the CPRA “includes any natural person, corporation, partnership, limited liability company, firm, or association.” (Gov. Code, § 7920.520)
 - Unions
 - Sub-agencies (e.g., personnel commission making request to school district in which it operates)

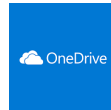
A Roadmap for Responding to CPRA Requests



Roadmap for Responding

Think in broad terms about where records may be stored:

- Personal hard drives
- Personal portable devices (voicemails, texts, photos, apps)
- Personal email accounts
- Social media accounts
- Anywhere else employees might communicate or store files
- Be sure to consider all possibilities and new platforms



Roadmap for Responding

- Determine whether the document seeks disclosable records
 - Does request seek “public records”?
 - Statutory Exemption? Catch-all?
 - Over-burdensome? “Needle in a haystack”?
 - Can non-disclosable information be redacted?

Deadlines for Responding

- Upon receipt of a CPRA request, a public agency has 10 days to determine whether the request seeks disclosable public records. (Gov't. Code, § 7922.535)
 - This does not mean that documents need to be produced within 10 days.
 - If the 10th day falls on a Saturday, Sunday or holiday, then the next business day shall be considered the tenth day for purposes of providing an initial response. (Gov't Code, § 6800)
 - Even if it appears that there are grounds for extension of time to respond, an initial response must be provided within 10 days



Deadlines for Responding

- In “unusual circumstances,” the public agency may take up to 14 additional days to determine whether the request seeks disclosable public records. (Gov't. Code, § 7922.535)
 - “Unusual circumstances” include the need to search for documents at other locations, the need to search a voluminous amount of material, and the need to consult with another agency, among others
 - If the public agency needs additional time, it may do so unilaterally. No need to request an extension

Roadmap for Responding

- Obligation to “assist the member of the public make a focused and effective request” (Govt. Code, § 7922.600):
 - Assist requestor to identify records and information that are responsive to request or to the purpose of the request
 - Describe information technology and physical location in which records exist
 - Provide suggestions for overcoming any practical obstacles to providing records or information

Roadmap for Responding

- If the public agency determines that the request seeks disclosable documents, it must provide an estimate as to when they will be made available. (Gov't. Code, § 7922.535)
 - There is no requirement that the documents be made available at the time of determination
 - **Best practice:** provide documents at time of determination (if feasible)
- Release of disclosable documents may be conditioned upon payment of direct duplication costs. (Gov't. Code, § 7927.200)
 - For electronic records, the requestor may be responsible for costs associated with programming and computer services necessary to extract data

Deadlines for Responding

- If the public agency determines that the request seeks non-disclosable documents, it must provide the identity and title of the person responsible for denying the request. (Gov't. Code, § 7922.540)
 - A response to a written request for inspection or copies that includes a determination that the request is denied in whole or in part, must be in writing.
- To the extent that it can be accomplished, non-disclosable information should be redacted from a document containing otherwise disclosable information. (Gov't. Code, § 7922.525)

Public Records in Electronic Format [Gov't. Code, § 7922.570]

- The agency shall make the information available in any electronic format in which it holds the information.
- Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.
- As a general rule, the cost of duplication shall be limited to the “direct cost” of producing a copy of a record in an electronic format.
- However, the requester shall bear the cost of producing, and the cost of programming and computer services, when:
 - (1) necessary to produce an electronic record that is produced only at otherwise regularly scheduled intervals or (2) The request would require data compilation, extraction, or programming to produce the record.

Public Records in Electronic Format

[Govt. Code, § 7922.580]

- 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.
- Public agency is not required to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

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Retention of Records

- Do you know the District's retention policies?
 - Most District documents must be retained for several years
- If there is a duty to maintain the record, and the District no longer has the record, an argument can be made that it has failed to produce public records.
- This can also affect the District's defense in reasonably anticipated civil litigation
- *Victor Valley Union High School District (2023) 91 Cal.App.5th 1121*
 - The court noted the district has a duty to retain video surveillance footage for at least a year pursuant to Government Code section 53160 and could be subject to evidentiary and other sanctions in civil litigation if it does not retain video footage (e.g., system automatically purged it). This is true, even if no litigation hold or other notice is provided, if the district was aware that an incident was caught on the video and neglected to save it before the automatic purge occurred.
- If retained in the regular course of business, or the District has access, it is likely a public record.

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Question & Answer Session

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Thank You

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