IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER,

Plaintiff and Appellant,

v.

CITY OF HAYWARD, ET AL.,

Defendants and Respondents.

No. S252445

(Court of Appeal No. A149328)

(Super. Ct. No. RG15785743)

AFTER A DECISION OF COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

DECLARATION OF JUSTIN NISHIOKA

EXHIBIT B

— VOLUME III —

(PAGES 601-900)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Plaintiff and Appellant, v. CITY OF HAYWARD, ET AL., Defendants and Respondents.	**No. S252445** **(Court of Appeal No. A149328)** **(Super. Ct. No. RG15785743)**

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League of California Cities

www.cacities.org

Better Cities – A Better Life

April 6, 2000

Assembly Member Shelley
State Capitol, Room 3160
Sacramento, CA 95814

RE: AB 2799 (Shelley). Public Records: disclosure.
Notice of Opposition, unless amended

Dear Assembly Member Shelley:

The League of California Cities opposes AB 2799, which would provide that nothing in the act shall be construed to permit an agency to delay or obstruct the inspection or copying of public records and would require that the notification of denial of any request for records justifying its withholding to be in writing.

We oppose AB 2799 for the following reasons: First, it amends Section 6255 of the Government Code to require an agency to respond to a disclosure request in writing by demonstrating that the record in question is exempt under express provisions of this chapter. However, requests for disclosure are not required to be in writing. Amendments should be made to require that all disclosure requests be in writing *and* should precede any litigation against the agency denying the request.

In addition, Section 3. 6255. (b) states that the superior court is not bound by the statutes set forth under 6254, which outlines all public disclosure exemptions. In other words, if an agency justifiably denies disclosing any material set forth in 6254, that decision may be overturned if the public interest served by disclosing the record clearly outweighs the public interest served by not disclosing the record. Amendments should be made to eliminate this provision from the bill.

If the above amendments are made, the League will change its position from opposed, to neutral. If you have questions about our position, please feel free to call me at 658-8279.

Respectfully,

Amy Brown
Legislative Representative

cc: Members, Senate Public Employment and Retirement Committee

Conference Registration Office
Post Office Box 1519
Lafayette, CA 94549
925.283.2115
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Southern California Office
602 East Huntington Dr., Suite C
Monrovia, CA 91016
626.305.1
FAX 626.305.0

California State Association of Counties

April 3, 2000

APR - 4 2000

The Honorable Kevin Shelley
Member of the Assembly
Room 3160, State Capitol Building
Sacramento, CA 95814

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500
Facsimile
916.441.5507

RE: AB 2799 (Shelley) – Concerns
Set for hearing April 11, Assembly Governmental Organization Committee

Dear Assembly Member Shelley:

The California State Association of Counties (CSAC) writes to express its concerns regarding AB 2799, your measure relating to public records.

As you recall, we were very appreciative that you worked with us last year in discussions on AB 1099 to accommodate the concerns of local governments regarding expanded accessibility to public records in an electronic format. Our review of AB 2799, which contains provisions similar to those in AB 1099 relating to the release of documents in an electronic format, revealed potential new concerns with two specific provisions that may represent a marked shift in existing public record law.

Of greatest concern is the "reverse balancing" provision under Government Code section 6255(b). As we understand this provision, it would permit a court—despite any other exemption in the Public Records Act—to order disclosure of records "if, on the facts of the particular case, the public interested served by disclosing the record outweighs the public interest served by not disclosing the record." It would appear, for example, that preliminary drafts or notes, geological and utility systems data, complaint or investigation records of local law enforcement agencies, and any other records currently exempted could be ordered to be released.

A second area of concern relates to the proposed reinsertion of the word "delay" under section 6253(d) so that the provision reads: "Nothing in this chapter shall be construed to *delay or* obstruct the inspection of copying of public records." We currently are soliciting county input on this proposed revision to determine the significance of the amendment.

We would welcome the opportunity to work with you on addressing concerns of local government on AB 2099. As soon as we receive specific input on the provisions highlighted above, we will contact you. In the meantime, please do not hesitate to contact me at 916/327-7500, ext. 513, or Elizabeth Howard at 916-327-7500, ext. 537 to discuss this matter further. Thank you.

Sincerely,

Rubin R. Lopez
Legislative Representative

cc: The Honorable Herb Wesson, Chair, Assembly Governmental Organization Committee
Members and Consultants, Assembly Governmental Organization Committee

LH: 602 A - 290

Association of California
Insurance Companies
1121 L Street, Suite 510
Sacramento, CA 95814-3926
Tel. (916) 442-4581
Fax. (916) 444-3872
e-mail: acic@acic-1.org

April 4, 2000

The Honorable Herb Wesson, Chair
Assembly Governmental Organization Committee
California State Capitol, Room 2179
Sacramento, CA 95814

Re: **AB 2799 (Shelley, as introduced) Public records: disclosure**
ACIC Position: Oppose

Dear Assemblyman Wesson:

The Association of California Insurance Companies (ACIC) **opposes** AB 2799 which is set to be heard in the Assembly Governmental Organization on **Monday, April 10, 2000.**

AB 2799 would essentially vitiate the protection of confidential records provided by the exemptions of particular records specified in Government Code §6254 of the Public Records Act by subjecting such records to a vague balancing test involving the "public interest." Of particular concern to insurers is the exemption stated in Government Code §6254(d)(1)-(4) which protects the confidentiality of information submitted by insurance companies to the Department of Insurance for regulatory purposes. This exemption is essential to insurers if the department is to assure protection of proprietary information submitted by individual companies. Enactment of AB 2799 could lead to the wholesale diminution of confidentiality protections afforded under current law by possibly disrupting the free flow of information to the department.

The State of California, through enactment of §6254, has established as a matter of public policy that certain types of information should be exempt from the disclosure requirements of the Public Records Act. There is no need to change that determination.

The ACIC respectfully requests your **"NO"** vote on AB 2799.

Very truly yours,

Jeffrey J Fuller
Vice President & General Counsel

cc: Assemblyman Kevin Shelley, Author
Richard Rios, Consultant, Assembly G.O. Committee

CALIFORNIA ASSOCIATION of SANITATION AGENCIES

925 L Street, Suite 1400 Sacramento, CA 95814 TEL: (916) 446-0388 – FAX: (916) 448-4808

April 5, 2000

The Honorable Kevin Shelley
State Capitol, Room 3160
Sacramento, CA 95014

SUBJECT: **AB 2799 (SHELLEY) RELATING TO THE PUBLIC RECORDS ACT—OPPOSE**

Dear Assembly Member Shelley:

On behalf of the California Association of Sanitation Agencies (CASA), I regret to inform you that we must oppose your AB 2799, which would allow a court to order disclosure of documents without regard to whether the documents are protected from disclosure by a privilege.

CASA understands the need to ensure that the public has timely access to public documents. However, not every document produced by a public agency is suitable for disclosure. Current law recognizes that there are valid reasons to withhold documents, such as employee privacy, attorney-client privilege or deliberative process privilege. AB 2799 would allow a court to override these considerations and order disclosure. This would effectively nullify the public entity's right to claim these privileges. Moreover, because the payment of attorney's fees is mandatory under the Public Records Act, a public entity would be obligated to pay a plaintiff's attorney's fees even where a record was properly withheld if the judge decides to override that decision pursuant to the bill.

For these reasons, we must oppose your AB 2799. Thank you for your consideration of our concerns.

Sincerely,

Roberta L. Larson

Personal Insurance Federation of California

California's Personal Lines Trade Association
REPRESENTING THE LEADING AUTOMOBILE AND HOMEOWNERS INSURERS

MEMORANDUM

Date: April 6, 2000

To: Honorable Herb Wesson
Members of the Governmental Organization Committee

From: Dan C. Dunmoyer, President
Phyllis A. Marshall, Vice President of Legislative and Regulatory Affairs
G. Diane Colborn, Senior Legislative Advocate and Counsel

Re: AB 2799 (Shelley): Public Records: disclosure
Assembly Governmental Organization Committee: April 10, 2000
PIFC Position: Oppose

The Personal Insurance Federation of California (PIFC), representing insurers selling 40% of the personal lines insurance sold in California, including State Farm, Farmers, 21st Century, SAFECO, and Progressive Insurance Companies opposes AB 2799 by Assemblyman Shelley.

AB 2799 would require a state agency or the superior court of California to disclose a record, made exempt under the express provisions of the California Public Records Act, if the state agency or the superior court determines that, "the public interest served by disclosing the record clearly outweighs the public interest served by not disclosing the record". This provision effectively eliminates the safeguards which exist for protecting both confidential and proprietary information.

This change in the law will have a substantial and profound adverse effect on the manner in which entities interact with state agencies. Entities would be reluctant to share confidential and/or proprietary information with state agencies which they would otherwise disclose. This will have a crippling effect on the ability of state agencies to carry out their administrative functions. This change would, in effect, substantially diminish the role that state agencies play in regulating entities and would buttress the role of the judiciary. Such a change would spur litigation and would place a strain on the judiciary which would be accessed on a regular basis to issue protective orders as a means of safeguarding against the release of confidential and proprietary information. The effect of this change is to shift oversight authority from state agencies to the judiciary.

980 NINTH STREET • SUITE 2030 • SACRAMENTO, CA 95814 • PHONE (916) 442 • 6646 • FAX (916) 446 • 9548 • E-MAIL

Under California's Public Records Act ("PRA"), Government Code Sections 6250 et. seq., a state agency must disclose any "public record" in its possession to any person unless an exemption applies. Government Code Section 6252 (d) defines "public records" 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". While the scope of records covered by the PRA is fairly broad, the statutory scheme includes several specific exemptions. Government Code Section 6254 provides that "nothing in this chapter shall be construed to require disclosure of records that are any of the following " and delineates twenty-six exemptions. These exemptions were designed to protect the privacy of persons who have disclosed confidential information to the government, to preserve state secrets, agency deliberative processes and confidential sources of information.

The safeguards provided in Sections 6254 (a) through (d) of particular importance to PIFC and its member companies are:

"(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business,. . .

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6. . .

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referenced in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referenced in paragraph (1)."

AB 2799 would eliminate these safeguards and would require the disclosure of confidential information. It should be noted that one of the top legislative public policy debates this year centers around the issue of privacy. This legislature is considering proposals to enhance privacy protections in both the private and public sector. This bill contravenes those discussions by requiring the disclosure of confidential information by a state agency or the superior court. As noted above, these are but a few of the list of extensive exemptions provided for in Section 6254. The other exemptions range from law enforcement records including victim information, hospital and medical information, local taxpayer information, etc. In addition, subsection (k) prohibits disclosure of information which is exempted or prohibited pursuant to federal or state

law, including, but not limited to, provisions of the Evidence Code relating to privilege. AB 2799 would require the release of this information, which could have the effect of subjecting entities to liability, based on privacy rights.

The business of insurance is regulated by the Department of Insurance Commissioner. Effective regulation is dependent on the free flow of information from insurers to the Commissioner whether that information be confidential, proprietary or damaging. State agencies, particularly those that are charged with regulating a particular industry, must have the necessary tools to acquire information. The exemptions in Section 6254 were designed to do just that – allow for the free flow of information that is necessary for that state agency to carry out its public purpose. AB 2799 would eliminate this free flow of information and instead would require insurers to access the courts in order to seek protective orders every time information is requested from the Commissioner, be that information to assess a complaint, information pertaining to a market conduct examination or any other information which might otherwise be released into the public domain, thus subjecting insurers to additional liabilities.

AB 2799 would have the effect of creating a "pre-litigation" adversarial atmosphere on interactions between the Commissioner and insurers. This would substantially hinder the administrative process and would have a damaging effect on the resolution of administrative processes. AB 2799 has the effect of shifting administrative and/or regulatory enforcement to class action exposure.

In conclusion, entities that are regulated are required to provide regulators and state agencies with information that is proprietary and adverse to the company's interest. This allows state agencies to carry out their administrative and executive functions. A regulated industry's willingness to continue to provide this kind of information depends on the promise of confidentiality provided by Section 6254. AB 2799 removes that assurance of confidence and thus diminishes the ability of state agencies to carry out their purpose.

For these reasons we urge your "NO" vote on AB 2799, by Assemblyman Shelley. If you have any questions regarding our opposition, please feel free to contact Phyllis Marshall at (916) 442-6646.

cc:
Honorable Kevin Shelley
Ann Richardson, Deputy Legislative Secretary, Governor's Office
Richard Rios, Assembly Governmental Organization
Michael Peterson, Assembly Republican Caucus

Assembly
California Legislature

KEVIN SHELLEY

Majority Leader

February 25, 2000

Honorable Robert M. Hertzberg
Chair, Assembly Committee on Rules
State Capitol, Room 3016
Sacramento, CA 95814

Dear Chairman Hertzberg:

I am writing to request a waiver of Assembly Rule 49 for RN 5849, related to public records.

This legislation will make clear that a request for public records must be granted without delay by the public agency. It also requires that a public agency bear the burden of demonstrating why publicly held information should not be released when a member of the public requests such release, instead of requiring a member of the public to prove that the information should not be held as confidential.

Thank you in advance for your review of this request.

Sincerely,

Kevin Shelley
Majority Leader

KS:lpa

SACRAMENTO OFFICE • STATE CAPITOL • P.O. BOX 942849, SACRAMENTO, CA 94249-0012 • PHONE (916) 319-2012 • FAX (916) 319-2112
DISTRICT OFFICE • 455 GOLDEN GATE AVENUE, SUITE 14600, SAN FRANCISCO, CA 94102 • PHONE (415) 557-2332 • FAX (415) 557-1178
E-MAIL: Kevin.Shelley@asm.ca.gov

⑧ **REQUEST TO SUSPEND THE LIMIT ON THE INTRODUCTION OF BILLS**

¶ To the Committee on Rules:

¶ Pursuant to Assembly Rule 49, I request permission to suspend the bill introduction limitation with respect to the following bill:

¶ RN 0005861 .

¶ _____ ☐ <r>
Assembly Member
Ecnn Shelley

⑭ **Permission of Rules Committee**

¶ Assembly Chamber, _____ ☐ <r>

¶ The Committee on Rules grants permission to suspend Assembly Rule 49(c) with respect to the following bill: RN _____ .

¶ _____, Chair ☐ <r>

<ke>

AB 2799 (Shelley): Public Records

Origin: California Newspaper Publishers Association

Problem: In California, all government agencies are subject to the California Public Records Act (CPRA). The CPRA governs the public's right to access information from state and local agencies, including cities and counties, school districts, municipal corporations, and any other boards or commissions that are part of a covered political entity (Gov. Code Section 6252).

Records held electronically have become the focus of great debate. Under current law, when a person makes a request for data contained in computer format, the agency has the discretion to determine in which form the information should be provided. An agency can effectively frustrate a public record's request by providing the requested records in a form different from the public's request.

It is very important that an agency disclose public information in a timely fashion. If there is a legitimate dispute over whether or not a record is covered by an exemption, the agency is entitled to take up to 10 working days to either provide the information or provide the written grounds for its denial. The 10-day period in not intended to delay access to records; however, many state agencies believe the 10-day grace period can be used for any record. By delaying the process, the public often gives up and never acquires the record.

The disclosure of various records is left solely at the discretion of public agencies. Current law allows for the public interest balancing test, a "catchall" provision that allows the government to withhold access to <u>any</u> record if the public interest warrants it. This provision is a one-way street – if it is used by an agency, it is used only for the purpose of denying access to a record. For those records that are not specifically exempt for the CPRA, the public should have the same right as the government to use the balancing test to access the record when the public interest demands it.

Solution: AB 2799 would improve the open government process by:

•Stating that no public agency shall obstruct <u>or delay</u> the inspection or copying of public records.
•Requiring a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format, etc.).
•Allowing citizens wishing to view information to prove that the public interest served by releasing the record clearly outweighs the public interest served by not disclosing the information.

Support: California Newspaper Publishers Association, California First Amendment Coalition

Opposition: Attorney General, League of California Cities, CSAC, California Municipal Utilities Association, Personal Insurance Federation of California, California Association of Sanitation Agencies, Association of California Insurance Companies, California Chamber of Commerce, Civil Justice Association of California, American Insurance Association, CNPA, Wine Institute

Status: Assembly Government Organizational Committee
Hearing: April 24, 2000

MAR 20 2000

ASSEMBLY GOVERNMENTAL ORGANIZATION COMMITTEE

HERB J. WESSON, JR., Chairman

Bill Analysis Worksheet

Bill No.: AB 2799
Author: Assemblyman Shelley

Hearing Date: Not set.
Staff : Richard Rios

All committee worksheets must be returned to the committee no later than the Monday of the week preceding the scheduled hearing date. The Chair may refuse to hear a bill, even though it has been set, if the author fails to promptly return a completed worksheet.

1) ***Need for the bill.*** Please present all the relevant facts (be specific) that demonstrate the need for this bill. What is the problem or deficiency in current law which the bill seeks to remedy?

2) ***Origin and background of the bill.***

a) Who is the source of the bill? What person, organization, or entity requested introduction? Please provide phone numbers.

b) Has a similar bill been introduced before? If so, please identify the session, bill number and disposition of bill.

c) Please attach copies of any background material for this bill, or state where such material is available for reference by committee staff.

d) Please list likely support and opposition. Please attach copies of letters of support or opposition received.

3) ***Amendments prior to hearing.*** If you plan substantive amendments prior to the hearing, please explain briefly the substance of the amendments. **Amendments must be submitted to the committee secretary (in Legislative Counsel form) at least five legislative days prior to the hearing.**

4) ***Witnesses.*** Please list the witnesses you plan to have testify

5) ***Staff person to contact.*** Please state the name and phone number of the staff contact for the bill.

RETURN THIS FORM TO: ASSEMBLY GOVERNMENTAL ORGANIZATION COMMITTEE
1020 N STREET, ROOM 159
319-2531, FAX 319-3979

ASSEMBLY GOVERNMENTAL ORGANIZATION COMMITTEE
HERB WESSON, JR., Chairman

Bill Analysis Worksheet

Bill No: AB 2799 – Shelley

1. **Need for the bill**: **AB 2799** addresses three issues in the California Public Records Act (Govt. Code Sec. 6250 et seq).
   a. **Electronic access** – The bill would require state and local agencies to provide copies of accessible computerized public records in an electronic format. Current law provides virtually no direction on this issue either for the public or agencies governed by the Act. The law merely provides that "Computer data shall be provided in a form determined by the agency (Govt. Code Sec. 6253 (b))." **AB 2799** would provide reasonable rules for public access to electronically held records, including a provision that these records shall be made available in any form in which the agency holds the information.
   b. **"Delay" -- AB 2799** would reinsert the word "delay" into Sec. 6253 (d), removed unwisely in 1996 legislation, to provide that, notwithstanding the timelines described in the Act, an agency shall not delay access to the inspection or copying of public records.
   c. **Reverse Balancing Test** – Govt. Code Section 6255 provides for the public interest balancing test, a "catchall" provision that allows the government to withhold access to any record, even if it is not specifically exempt by law, if the public interest warrants it. The provision is a one-way street – if it is used by an agency, it is used only for the purpose of denying access to a records request (E.g., "we admit there is no statutory exemption allowing the agency to withhold the record, but we believe under the facts of this request, the public interest in disclosure is clearly outweighed by the public interest in nondisclosure. Access denied.") **AB 2799** would level the playing field by giving the same balancing test to the public for records that may be exempt pursuant to statute. The bill would give discretion to an agency or the Superior Court to provide any record exempt by provisions of the law if, ". . . on the facts of the particular case, the public interest served by disclosing the record clearly outweighs the public interest in not disclosing the record." **AB 2799** would merely give the public the same tool as the government to provide -- rather than deny -- access, when the public interest demands it. The provision dovetails with existing Sec. 6253 (e), which allows agencies to adopt requirements that allow for "faster, more efficient, or greater access to records" than prescribed by the minimum standards set forth in the Act.

2. **Origin and background of the bill.**
   a. California Newspaper Publishers Association (Tom Newton, General Counsel Ph. (916) 288-6015, fax 288-6005, tom@cnpa.com) and Honorable Debra Bowen (Electronic access provision).

b. Yes. AB 1099 (Shelley) and SB 1065 (Bowen). Both bills were introduced in 1999. AB 1099 was amended late last year for another purpose; SB 1065 was vetoed.

c. Attached are Chapter 2, *Inspection of Public Records*, from CNPA's *Reporter's Handbook on Media Law*, and, *Access to Public Information: The California Public Records Act* from *The California Journalists Legal Notebook*, published by the California First Amendment Coalition.

1. People resources (other than Assemblyman Shelley):
   Honorable Debra Bowen and her Chief of Staff Evan Goldberg
   Tom Newton
   Terry Francke CFAC General Counsel (916) 974-8888
   Tom Burke, Davis Wright Tremaine (415) 276-6552, drafter of the recent revision to the San Francisco Sunshine Ordinance.
   Barbara Blinderman, (310) 550-1675, CFAC Board member and access attorney.
   James Chadwick, Gray Cary Ware & Freidenrich (650) 833-2293, First Amendment and access counsel to newspapers.
   Ray Herndon and Dan Weikel (800) LATIMES, Southern California Chapter of the Society of Professional Journalists. } stories / analogies
   Rachel Boehm, (415) 442-3999 Steinhart & Falconer, Northern California Chapter of the Society of Professional Journalists.
   Richard Mckee, (626) 585-7013, citizen activist and access advocate.

d. Likely Support and opposition:

Support: See c. 1. above, and, in addition, potentially the California Taxpayers Association, League of Women Voters, Planning and Conservation League and others.

Opposition: Potentially, any agency described in Govt. Code Section 6252 (a) and (b) and their taxpayer-financed trade associations.

3. **Amendments prior to Hearing**: none planned.

4. **Witnesses**: Tom Newton, Terry Francke.

5. **Staff**: Ryan Spencer
   319 - 2340

For AG's

GOVERNMENT CODE
Section 6254

Section 6253 CBS vs. Block

Agency may withhold any of the following documents.

6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following: → they will not do it unless forced by court

(a) 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.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the

what info. has been withheld that should have been disclosed

Amendment: will not affect "shall not be disclosed" article

GOVERNMENT CODE Section: 6254

disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 289a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential.

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Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

(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 Part 65 of the Education Code.

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

(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.

(k) 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.

(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, provided that public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public data base maintained by the Legislative Counsel that are described in Section 10248.

(n) 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 applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with Section 44500) of the Health and Safety Code, where an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application which are subject to disclosure under this chapter.

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(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q) Records of state agencies related to activities governed by Articles 2.6 (commencing with Section 14081), 2.8 (commencing with Section 14087.5), and 2.91 (commencing with Section 14089) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. In the event that a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee. The Joint Legislative Audit Committee shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places maintained by the Native American Heritage Commission.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Services pursuant to subdivision (b) of Section 1282 of the Health and Safety Code.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with Section 32000) of the Health and Safety Code, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or

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nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to Section 10133 or 11512 of the Insurance Code. However, the record shall be open to inspection within one year after the contract is fully executed.

(u) (1) Information contained in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.

(2) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to Section 12050 of the Penal Code by the sheriff of a county or the chief or other head of a municipal police department.

(v) (1) Records of the Major Risk Medical Insurance Program related to activities governed by Part 6.3 (commencing with Section 12695), and Part 6.5 (commencing with Section 12700), of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Part 6.3 (commencing with Section 12695), or Part 6.5 (commencing with Section 12700), of Division 2 of the Insurance Code, on or after July 1, 1991, shall be open to inspection one year after they have been fully executed.

(B) In the event that a contract for health coverage that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The Joint Legislative Audit Committee shall maintain the confidentiality of the contracts and amendments thereto, until the contract or amendments to a contract is open to inspection pursuant to paragraph (3).

(w) (1) Records of the Major Risk Medical Insurance Program related to activities governed by Chapter 14 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with

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health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 14 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The Joint Legislative Audit Committee shall maintain the confidentiality of the contracts and amendments thereto, until the contract or amendments to a contract is open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of the Department of Consumer Affairs pursuant to Chapter 20 (commencing with Section 9800) of Division 3 of the Business and Professions Code, for the purpose of establishing the service contractor's net worth, or, financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y) (1) Records of the Managed Risk Medical Insurance Board related to activities governed by Part 6.2 (commencing with Section 12693) of Division 2 of the Insurance Code, and that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) (A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with Section 12693) of Division 2 of the Insurance Code, on or after January 1, 1998, shall be open to inspection one year after they have been fully executed.

(B) In the event that a contract entered into pursuant to Part 6.2 (commencing with Section 12693) of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other provision of law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The Joint Legislative Audit Committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or (3).

(z) Records obtained pursuant to paragraph (2) of subdivision (c) of Section 2891.1 of the Public Utilities Code.

Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless

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disclosure is otherwise prohibited by law.

Nothing in this section prevents any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act.

(Amended by Stats. 1998, Ch. 110, Sec. 1. Effective January 1, 1999.)

GOVERNMENT CODE

Section 6254

GOVERNMENT CODE
Section 6254.1

6254.1. (a) Except as provided in Section 6254.7, nothing in this chapter requires disclosure of records that are the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information, in accordance with Section 18081 of the Health and Safety Code.

(b) Nothing in this chapter requires the disclosure of the residence or mailing address of any person in any record of the Department of Motor Vehicles except in accordance with Section 1808.21 of the Vehicle Code.

(c) Nothing in this chapter requires the disclosure of the results of a test undertaken pursuant to Section 12804.8 of the Vehicle Code.

(Amended by Stats. 1993, Ch. 546, Sec. 1. Effective January 1, 1994.)

GOVERNMENT CODE
Section 6254.1

GOVERNMENT CODE
Section 6254.8

6254.8. Every employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255.

(Added by Stats. 1974, Ch. 1198.)

GOVERNMENT CODE
Section 6254.8

GOVERNMENT CODE
Section 6255

6255. 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 making the record public clearly outweighs the public interest served by disclosure of the record.

(Added by Stats. 1968, Ch. 1473.)

GOVERNMENT CODE
Section 6255

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Ryan:
I don't know who is doing this bill. Prepare TY note & Bruce for my signature & clip out ideas.

March 7, 2000

Assemblyman Kevin Shelley,
in Sacramento and San Francisco

Dear Kevin,

As the Bay Guardian editor-publisher and as a founder and board member of the California First Amendment Coalition, and as the catalyst and mover on the original Brown act bill (via CFAC and the Society of Professional Journalists), I am passing along some suggestions to you on the bill you are working on with the California Newspaper Publishers Association and CFAC.

These come from Terry Francke, the legal counsel of CFAC, and myself and our staff. If you have any questions or need anyone for expert advice or expert testimony on this bill, please feel free to contact Terry at the CFAC office, 916-974-8888, fax 916-974-8880, or by e-mail, cfac@cfac.org.

Thanks very much. Keep us informed--on this bill and any other hot stuff you are cooking on. Good to see you again, in the Inner Mission, at our office. Good luck.

Sincerely yours,

Bruce B. Brugmann

Bruce B. Brugmann
editor and publisher

BBB:bbb

Draft

contact: Tricia

1. Protection of Speakers

Citizens addressing local bodies sometimes say provocative things or go off on tangents irrelevant to the agenda or even to the agency's jurisdiction. Courts have concluded that under the First Amendment, bodies can rule irrelevant comments out of order and curtail time-wasting speech, but cannot otherwise prevent speakers from saying things critical of staff or administration. Most local bodies seem to be able to live with these constraints, but occasionally seem to have overreacted to speakers they found offensive or annoying. One man was arrested on a trespass pretext after questioning the basis for the superintendent's salary at a school board meeting. Another was thrown out of a city council meeting as soon as spotted in the audience by a mayor he had offended. A third was arrested and charged with assaulting a peace officer when he winced in reaction to having his arm pulled behind his back when standing at the podium in a city council meeting. A fourth was sentenced to one and one half years in jail after being arrested several times for talking off topic at various meetings.

Two reforms are indicated. One would protect officials who unlawfully deny citizens access to the public forum created by the legislature in the Brown Act, but only to the extent that the denial is reasonable -- to the extent, that is, that the official couldn't be expected to know the law. The other would treat citizen speakers' failures to yield, wasting forum time and other out-of-order offenses as infractions, subject to citation much the same as a parking ticket, and preclude more police-like confrontation than necessary to maintain order.

Government Code Section 54954.3 is amended to read:

54954.3. (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting

before or during consideration of that item.

(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, consistently enforced and viewpoint-neutral regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker, and regulations treating willful refusal to observe such time limits as an infraction subject to a fine appropriate to the degree of disruption involved, but absent violent conduct on the part of the violator, no greater than the lowest fine resulting from a parking violation applicable in the jurisdiction where the meeting is held. No violator of any such regulation shall be subjected to force or taken into custody beyond that necessary to remove him or her from the meeting, or in consequence of the clear and immediate prospect of further disruption. No peace officer or other person shall eject a speaker from a meeting or otherwise use force against him or her except upon direction of the officer presiding, unless necessary to prevent or curtail an offense other than the disobedience of speaking regulations adopted pursuant to this subdivision. Both the peace officer or other person so directed and the presiding officer so directing him or her shall enjoy immunity from personal liability for the enforcement of such regulations, or for any conduct otherwise arguably infringing the rights of citizen speakers, insofar as it does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

2. Attorney Fees for Prevailing Plaintiffs in Public Interest Litigation

In a recent case (*Williams v. San Francisco Board of Permit Appeals*, 71 Cal.App.4th 442 [1999]) a San Franciscan went to court to keep a multistory apartment building from going up next to his Victorian home, which construction he said would violate city restrictions. He succeeded in getting a court to order the city authority to reconsider the building permit in the light of the authority's guidelines, but the First District Court of Appeal held that he was not entitled to recoup his attorney fees from the city under the private attorney general statute because he had failed the "public interest" test. Specifically, although the whole neighborhood supported him in his seven-month fight

with the city, the benefit of his litigation was too personal to his interests.

In particular, the court held that although he may not have had a hard dollar financial stake in the matter, his personal aesthetic stake outweighed the public benefit, and denying him attorney's fees was therefore justifiable. The troublesome aspect of this holding is that some of our most profoundly important rights—those protected by the constitution or laws under the police powers—are such that our fight to protect them may convey no concrete benefit on the community even if we win. If the government unconstitutionally curtails our rights to speak, disseminate printed material or petition, or allows its activities to create a public health hazard affecting our home or land, we may be injured in a way not affecting the public interest, i.e. in a manner giving us a very large stake in fighting but others in the community far less of a stake in any immediate sense. But if we are not supported in taking such rights to court, the government could "pick us off" one at a time, leaving each battle, even if successful on the merits, a tremendously expensive one—because each time the stake was disproportionately "personal" to the plaintiff.

The corrective approach is simply to presume that when a person fights to enforce his or her constitutional rights, or right to the protection of laws relating to public health, safety or welfare, his or her fight is inherently in the public interest. The presumption is not conclusive; a corporate plaintiff with litigation funds budgeted as a cost of doing business might well not qualify even under the presumption. But meanwhile the "personal stake" rationale would not always put a high litigation cost on preserving priceless rights. This approach harmonizes with existing protection against SLAPP suits.

Code of Civil Procedure §1021.5 is amended to read:

§1021.5. Attorneys' Fees in Action to Enforce Right Affecting Public Interest
Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. In any action in which the right enforced arises under the consutitution of this State or of the United States, or derives from a statute protective of the public health, safety or welfare, it shall be presumed that the action has resulted in the enforcement of an important right affecting the public interest; that a significant benefit, whether pecuniary or non-pecuniary, has been conferred

on the general public or a large class of persons; and that the necessity and financial burden of private enforcement are such as to make the award appropriate. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 49.

3. Brown Act Litigation and Discovery of Defendant Body Members

The Sixth District Court of Appeal recently concluded, in *Kleitman v. Superior Court*, 74 Cal.App.4th 1231 (1999), that members of a local legislative body may not be questioned in discovery as to their recollections concerning a closed session. This means that, for example, even when there is strong independent evidence to suggest that there was illegal action or discussion in closed session in violation of the Brown Act, members of the body may not even be queried about it. As the plaintiff said in that case, this ruling suggests that "Local legislative bodies (will) be free to discuss anything and everything in secret meetings and never answer any questions about what occurred. Such a privilege would virtually repeal the Brown Act." The court reached this conclusion because the Brown Act, while not stating that closed session information is confidential or privileged, provides for only two mechanisms to obtain it: court review in camera of any minutes actually kept, or of any tape recording made and preserved because of a prior court order based on a prior closed session violation.

54960.2. In any case in which discovery of the recollections of the members of a legislative body is sought by either the district attorney or the plaintiff in a civil action pursuant to Section 54959, 54960, or 54960.1 alleging that a violation of this chapter has occurred in a closed session, the party seeking discovery shall file a written notice of motion with the appropriate court with notice to the governmental agency to which the legislative body pertains. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(a) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following: (i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, and the date and time of the meeting or meetings concerning which the members' recollections will be sought. (ii) An affidavit which contains specific facts indicating that a violation of the act occurred in the closed session.

(b) If the court, following a review of the motion, finds that there is reasonable cause to believe that a violation has occurred and that no better source of evidence exists to confirm or refute such conclusion, it shall order the members of the legislative body and any other persons present in the closed session or sessions in dispute to submit to deposition or interrogatories. Responses made in such proceedings, however, shall remain subject to a protective order until and unless moved into evidence at trial.

(c) Nothing in this section shall permit discovery of communications which are protected by the attorney-client privilege, but that privilege shall be interpreted narrowly to avoid frustration of the discovery of violations of this Chapter, and otherwise no privilege exists for the contents of discussions held in closed session,

A Bill to Assure Taxpayer Notification of Public Agencies' Litigation Settlements, Victories and Defeats

Government Code Section 54957.1 is amended to read:

54957.1. (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows: (1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

(A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(A) If the legislative body accepts a settlement offer signed by the opposing

party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, ~~and upon inquiry by any person,~~ the ~~local agency~~ legislative body shall disclose the fact of that approval, and ~~identify~~ the substance of the agreement in an open and public session at its next regular meeting.

(4) At every regular meeting, for the period since the previous regular meeting, the legislative body shall publicly receive and disclose a report from its legal counsel or chief executive officer disclosing the fact and substance of every settlement agreement terminating or precluding litigation involving the agency as a party, and the substance of that agreement, as well as the fact and substance of any judgment for or against the agency in any judicial or other proceeding definable as "pending litigation" for purposes of closed sessions under section 54956.9, or of any action of an appellate court with respect thereto.

(45) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(56) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(67) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

(b) Reports that are required to be made pursuant to this section may be made

orally or in writing. The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

(c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

(d) Nothing in this section shall be construed to require that the legislative body approve actions not otherwise subject to legislative body approval.

(e) No action for injury to a reputational, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section.

Fax Cover Sheet

California Newspaper Publishers Association
Legislative/Legal Department

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Term

West's Ann.Cal.Penal Code § 11167.5

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 4. PREVENTION OF CRIMES AND APPREHENSION OF CRIMINALS
TITLE 1. INVESTIGATION AND CONTROL OF CRIMES AND CRIMINALS
CHAPTER 2. CONTROL OF CRIMES AND CRIMINALS
ARTICLE 2.5. CHILD ABUSE AND NEGLECT REPORTING ACT

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 11167.5. Confidentiality of reports; violations; disclosure

(a) The reports required by Sections 11166 and 11166.2 shall be confidential and may be disclosed only as provided in subdivision (b). Any violation of the confidentiality provided by this article is a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of five hundred dollars ($500), or by both that imprisonment and fine.
(b) Reports of suspected child abuse and information contained therein may be disclosed only to the following:
(1) Persons or agencies to whom disclosure of the identity of the reporting party is permitted under Section 11167.
(2) Persons or agencies to whom disclosure of information is permitted under subdivision (b) of Section 11170.
(3) Persons or agencies with whom investigations of child abuse are coordinated under the regulations promulgated under Section 11174.
(4) Multidisciplinary personnel teams as defined in subdivision (d) of Section 18951 of the Welfare and Institutions Code.
(5) Persons or agencies responsible for the licensing of facilities which care for children, as specified in Section 11165.7.
(6) The State Department of Social Services or any county licensing agency which has contracted with the state, as specified in paragraph (3) of subdivision (b) of Section 11170, when an individual has applied for a community care license or child day care license, or for employment in an out- of-home care facility, or when a complaint alleges child abuse by an operator or employee of an out-of-home care facility.
(7) Hospital scan teams. As used in this paragraph, "hospital scan team" means a team of three or more persons established by a hospital, or two or more hospitals in the same county, consisting of health care professionals and representatives of law enforcement and child protective services, the members of which are engaged in the identification of child abuse. The disclosure authorized by this section includes disclosure among all hospital scan teams.
(8) Coroners and medical examiners when conducting a postmortem examination of a child.
(9) The Board of Prison Terms, who may subpoena an employee of a county welfare department who can provide relevant evidence and reports that both (A) are not unfounded, pursuant to Section 11165.12, and (B) concern only the current incidents upon which parole revocation proceedings are pending against a parolee charged with child abuse. The reports and information shall be confidential pursuant to subdivision (d) of Section 11167.
(10) Personnel from a child protective agency responsible for making a placement of a child pursuant to Section 361.3 of, and Article 7 (commencing with Section 305) of Chapter 2 of Part 1 of Division 2 of, the Welfare and Institutions Code.
(11) Persons who have been identified by the Department of Justice as listed in the Child Abuse Central Index pursuant to subdivision (c) of Section 11170. Nothing in this paragraph shall preclude a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or victim in order to maintain confidentiality as required by law.
(12) Out-of-state law enforcement agencies conducting an investigation of child abuse only when an

agency makes the request for reports of suspected child abuse in writing and on official letterhead, identifying the suspected abuser or victim by name. The request shall be signed by the department supervisor of the requesting law enforcement agency. The written request shall cite the out-of-state statute or interstate compact provision that requires that the information contained within these reports is to be disclosed only to law enforcement, prosecutorial entities, or multidisciplinary investigative teams, and shall cite the criminal penalties for unlawful disclosure provided by the requesting state or the applicable interstate compact provision. In the absence of both (1) a specific out-of-state statute or interstate compact provision that requires that the information contained within these reports be disclosed only to law enforcement, prosecutorial entities, or multidisciplinary investigative teams, and (2) criminal penalties equivalent to the penalties in California for unlawful disclosure, access shall be denied.

(13) Persons who have verified with the Department of Justice that they are listed in the Child Abuse Central Index as provided by subdivision (c) of Section 11170. Disclosure under this section shall be subject to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Nothing in this section prohibits a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or victim to maintain confidentiality as required by law.

(14) Each chairperson of a county child death review team, or his or her designee, to whom disclosure of information is permitted under this article, relating to the death of one or more children and any prior child abuse investigation reports maintained involving the same victim, siblings, or suspects. Local child death review teams may share any relevant information regarding case reviews involving child death with other child death review teams.

(c) Authorized persons within county health departments shall be permitted to receive copies of any reports made by health practitioners, as defined in Section 11165.8, pursuant to Section 11165.13, and copies of assessments completed pursuant to Sections 123600 and 123605 of the Health and Safety Code, to the extent permitted by federal law. Any information received pursuant to this subdivision is protected by subdivision (e).

(d) Nothing in this section requires the Department of Justice to disclose information contained in records maintained under Section 11169 or under the regulations promulgated pursuant to Section 11174, except as otherwise provided in this article.

(e) This section shall not be interpreted to allow disclosure of any reports or records relevant to the reports of child abuse if the disclosure would be prohibited by any other provisions of state or federal law applicable to the reports or records relevant to the reports of child abuse.

CREDIT(S)

1992 Main Volume

(Added by Stats.1983, c. 1082, § 1. Amended by Stats.1985, c. 1593, § 4, eff. Oct. 2, 1985; Stats.1985, c. 1598, § 7.5; Stats.1987, c. 167, § 1; Stats.1987, c. 1459, § 22; Stats.1988, c. 1580, § 5; Stats.1989, c. 153, § 1; Stats.1989, c. 1169, § 2.)

2000 Electronic Update

(Amended by Stats.1995, c. 391 (A.B.1440), § 1; Stats.1997, c. 24 (A.B.1536), § 1; Stats.1997, c. 842 (S.B.644), § 4; Stats.1997, c. 844 (A.B.1065), § 1.5; Stats.1998, c. 485 (A.B.2803), § 135.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2000 Electronic Update

1995 Legislation

The 1995 amendment added a new subd. (c), relating to disclosure to authorized persons in county health departments; and redesignated as subds. (d) and (e) former subds. (c) and (d).

1997 Legislation

Stats.1997, c. 844, in subd. (a), substituted "is" for "shall be", substituted "imprisonment in a county jail not to exceed six months" for "up to six months in jail or" and inserted "that imprisonment and fine"; in subd. (b), in par. (7), substituted "all hospital scan teams" for "hospital scan teams located in the same county", in par. (9), substituted "who may subpoena an employee of a county welfare department who can provide relevant evidence and" for "may subpoena", and added pars. (10) to (14), relating to child protection agency personnel, persons listed in the Child Abuse Central Index as provided in subds. (c) and (e) of § 11170, out-of-state law enforcement agencies, and each county's child death review team's chairperson; and in subd. (c), substituted "Sections 123600 and 123605" for "Sections 10900 and 10901".

Under the provisions of § 3 of Stats.1997, c. 844, the 1997 amendments of this section by c. 844 (A.B.1065) and c. 842 (S.B.644) were given effect and incorporated in the form set forth in § 1.5 of c. 844.

An amendment of this section by § 1 of Stats.1997, c. 844, failed to become operative under the provisions of § 3 of that Act.

Section 1 of Stats.1997, c. 842 (S.B.644), provides:

"This act shall be known and may be cited as Lance's Law Child Safety Reform Act of 1997."

Amendment of this section by § 4.5 of Stats.1997, c. 842 (S.B.644), failed to become operative under the provisions of § 8 of that Act.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

1998 Legislation

Stats.1998, c. 485, made nonsubstantive changes to maintain the code.

Subordination of legislation by Stats.1998, c. 485 (A.B.2803), to other 1998 legislation, see Historical and Statutory Notes under Business and Professions Code § 4840.

1992 Main Volume

The 1985 amendment by c. 1593 added subd. (b)(5).

The 1985 amendment by c. 1598, in subd. (a), substituted "Sections 11166 and 11166.2" for "Section 11166"; substituted, in subd. (b)(5), "subdivision (h) of Section 11166" for "Section 11166.1"; and added subd. (b)(6).

Section 12 of Stats.1985, c. 1598, provides:

"Section 7.5 of this bill incorporates amendments to Section 11167.5 of the Penal Code proposed by both this bill and AB 2337 [Stats.1985, c. 1593]. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 1986, (2) each bill amends ←Section 11167.5 of the Penal Code→ [←Section 11167.5→ was so amended], and (3) this bill is enacted after AB 2337, in which case Section 11167.5 of the Penal Code, as amended by AB 2337, shall remain operative only until the operative date of this bill [Jan. 1, 1986], at which time Section 7.5 of this bill shall become operative, and Section 7 of this bill shall not

become operative."

The amendment by Stats.1987, c. 1459, in subd. (b)(5) substituted "Section 11165.7" for "subdivision (h) of Section 11166"; and inserted subd. (b)(7) relating to hospital scan teams.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1988 amendment added, to the list in subd. (b) of persons or agencies to whom reports may be disclosed, subd. (b)(8) regarding coroners and medical examiners.

The 1989 amendment inserted "or any county licensing agency which has contracted with the state" in subd. (b)(6), and added subd. (b)(9).

The 1989 amendment by c. 1169 of this section explicitly amended the 1989 amendment of this section by c. 153.

LAW REVIEW AND JOURNAL COMMENTARIES

Child sexual abuse and the law. B. Kay Shafer, 12 L.A.Law. 46 (Sept.1989).

LIBRARY REFERENCES

1992 Main Volume

Words and Phrases (Perm.Ed.)

Legal Jurisprudences
Cal Jur 3d Crim L § 46.

Treatises and Practice Aids
Witkin, Summary (9th ed) Torts § 288.
The Rutter Group, Family Law (Hogoboom & King) § 11:166.

NOTES OF DECISIONS

In general 1
District attorneys 2

1. In general

The information in the California department of justice child abuse files, which is to be used in furtherance of investigating suspected child abuse and carrying out the purpose of the Child Abuse Reporting Law (§ 11165 et seq.), namely the protection of children, must be provided to child protective agencies submitting a report, or to a district attorney who has requested notification of a suspected child abuse case, but the department is not obligated to furnish this information to other persons or agencies. 65 Ops.Atty.Gen. 335, 6-1-82.

2. District attorneys

A district attorney, when investigating or prosecuting a case of child abuse where the victim is or has been the subject of juvenile dependency or wardship proceedings in which the district attorney did not participate, has access to the records of the juvenile court only through an order of the juvenile court permitting such access and may not obtain such records by a search warrant or subpoena duces tecum; but, where the victim has been the recipient of public welfare aid or assistance the district attorney, for his investigation or prosecution, has access to the records of the welfare agency pertaining to the victim and may obtain such records by search warrant or subpoena duces tecum. 66 Ops.Atty.Gen. 106, 3-31-83.

West's Ann. Cal. ◆Penal◆ Code § ◆11167.5◆

CA ◆PENAL § 11167.5◆
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Term

West's Ann.Cal.Welf. & Inst.Code § 4135

WEST'S ANNOTATED CALIFORNIA CODES
WELFARE AND INSTITUTIONS CODE
DIVISION 4. MENTAL HEALTH
PART 2. ADMINISTRATION OF STATE INSTITUTIONS FOR THE MENTALLY DISORDERED
CHAPTER 1. JURISDICTION AND GENERAL GOVERNMENT

§ 4135. Mentally abnormal sex offender; commitment; discharge; records; inspection

Any person committed to the State Department of Mental Health as a mentally abnormal sex offender shall remain a patient committed to the department for the period specified in the court order of commitment or until discharged by the medical director of the state hospital in which the person is a patient, whichever occurs first. The medical director may grant such patient a leave of absence upon such terms and conditions as the medical director deems proper. The petition for commitment of a person as a mentally abnormal sex offender, the reports, the court orders and other court documents filed in the court in connection therewith shall not be open to inspection by any other than the parties to the proceeding, the attorneys for the party or parties, and the State Department of Mental Health, except upon the written authority of a judge of the superior court of the county in which the proceedings were had.
Records of the supervision, care and treatment given to each person committed to the State Department of Mental Health as a mentally abnormal sex offender shall not be open to the inspection of any person not in the employ of the department or of the state hospital, except that a judge of the superior court may by order permit examination of such records.
The charges for the care and treatment rendered to persons committed as mentally abnormal sex offenders shall be in accordance with the provisions of Article 4 (commencing with Section 7275) of Chapter 3 of Division 7.

CREDIT(S)

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(Added by Stats.1970, c. 339, p. 734, § 1. Amended by Stats.1971, c. 1593, p. 3332, § 358, operative July 1, 1973; Stats.1977, c. 1252, p. 4497, § 536, operative July 1, 1978.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1998 Main Volume

Former § 4135, added by Stats.1957, c. 2411, p. 4156, § 2, was repealed by Stats.1965, c. 1784, p. 3978, § 4. It related to the determination of disability.

Derivation: Former § 5604, added by Stats.1949, c. 1457, p. 2540, § 1.

Former § 5605, added by Stats.1949, c. 1457, p. 2540, § 1.

Former §§ 5704, 5705, added by Stats.1965, c. 391, p. 1678, § 5.

Former §§ 6454, 6455, added by Stats.1967, c. 1667, p. 4107, § 37.

LIBRARY REFERENCES

1998 Main Volume

Mental Health ⇐441.
WESTLAW Topic No. 257A.
C.J.S. Insane Persons § 248.

NOTES OF DECISIONS

In general 1
Records 2

1. In general

Where district attorney told defendant that only way he could get treatment was by plea of guilty in criminal court to burglary in second degree but, in fact, defendant could have been referred as mentally disordered sex offender whether convicted of felony or misdemeanor and could have been referred without criminal conviction as mentally abnormal sex offender and where district attorney, defendant's attorney, defendant and his mother all believed that ordinary procedures of diagnosis and treatment would be available to defendant though they were not because of defendant's inability to communicate in English, failure to afford promised diagnosis and treatment required setting aside plea of guilty and judgment of conviction thereon. People v. Cortez (App. 1 Dist. 1970) 91 Cal.Rptr. 660, 13 Cal.App.3d 317.

2. Records

New confidentiality provisions of § 5328 do not affect proceedings under the Lanterman-Petris-Short Act as these judicial records are public, but judicial records concerning commitment of mentally abnormal sex offenders under § 6454 (repealed 1970), initial proceedings concerning wards and dependent children in juvenile court (§ 827) and prepetition evaluation reports concerning mentally disordered (§ 5202) are confidential. 53 Ops.Atty.Gen. 25, 1-23-70.

West's Ann. Cal. Welf. & Inst. Code § 4135
CA WEL & INST § 4135
END OF DOCUMENT

Term

West's Ann.Cal.Welf. & Inst.Code § 5328

WEST'S ANNOTATED CALIFORNIA CODES
WELFARE AND INSTITUTIONS CODE
DIVISION 5. COMMUNITY MENTAL HEALTH SERVICES
PART 1. THE LANTERMAN-PETRIS-SHORT ACT
CHAPTER 2. INVOLUNTARY TREATMENT
ARTICLE 7. LEGAL AND CIVIL RIGHTS OF PERSONS INVOLUNTARILY DETAINED

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 5328. Confidential information and records; disclosure; consent

All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential. Information and records obtained in the course of providing similar services to either voluntary or involuntary recipients prior to 1969 shall also be confidential. Information and records shall be disclosed only in any of the following cases:
(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his or her guardian or conservator shall be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical or psychological responsibility for the patient's care.
(b) When the patient, with the approval of the physician, licensed psychologist, or social worker with a master's degree in social work, who is in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him or her in confidence by members of a patient's family.
(c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he or she may be entitled.
(d) If the recipient of services is a minor, ward, or conservatee, and his or her parent, guardian, guardian ad litem, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him or her in confidence by members of a patient's family.
(e) For research, provided that the Director of Mental Health or the Director of Developmental Services designates by regulation, rules for the conduct of research and requires the research to be first reviewed by the appropriate institutional review board or boards. The rules shall include, but need not be limited to, the requirement that all researchers shall sign an oath of confidentiality as follows:

_____
Date

As a condition of doing research concerning persons who have received services from _____ (fill in the facility, agency or person), I, _____, agree to obtain the prior informed consent of such persons who have received services to the maximum degree possible as determined by the appropriate institutional review board or boards for protection of human subjects reviewing my research, and I further agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.
I recognize that the unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.
(f) To the courts, as necessary to the administration of justice.

(g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families.
(h) To the Committee on Senate Rules or the Committee on Assembly Rules for the purposes of legislative investigation authorized by the committee.
(i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed.
(j) To the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient, except that when the patient is unable to sign the release, the staff of the facility, upon satisfying itself of the identity of the attorney, and of the fact that the attorney does represent the interests of the patient, may release all information and records relating to the patient except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information that has been given to him or her in confidence by members of a patient's family.
(k) Upon written agreement by a person previously confined in or otherwise treated by a facility, the professional person in charge of the facility or his or her designee may release any information, except information that has been given in confidence by members of the person's family, requested by a probation officer charged with the evaluation of the person after his or her conviction of a crime if the professional person in charge of the facility determines that the information is relevant to the evaluation. The agreement shall only be operative until sentence is passed on the crime of which the person was convicted. The confidential information released pursuant to this subdivision shall be transmitted to the court separately from the probation report and shall not be placed in the probation report. The confidential information shall remain confidential except for purposes of sentencing. After sentencing, the confidential information shall be sealed.
(l) Between persons who are trained and qualified to serve on "multidisciplinary personnel" teams pursuant to subdivision (d) of Section 18951. The information and records sought to be disclosed shall be relevant to the prevention, identification, management, or treatment of an abused child and his or her parents pursuant to Chapter 11 (commencing with Section 18950) of Part 6 of Division 9.
(m) To county patients' rights advocates who have been given knowing voluntary authorization by a client or a guardian ad litem. The client or guardian ad litem, whoever entered into the agreement, may revoke the authorization at any time, either in writing or by oral declaration to an approved advocate.
(n) To a committee established in compliance with Sections 4070 and 5624.
(o) In providing information as described in Section 7325.5. Nothing in this subdivision shall permit the release of any information other than that described in Section 7325.5.
(p) To the county mental health director or the director's designee, or to a law enforcement officer, or to the person designated by a law enforcement agency, pursuant to Sections 5152.1 and 5250.1.
(q) If the patient gives his or her consent, information specifically pertaining to the existence of genetically handicapping conditions, as defined in Section 341.5 of the Health and Safety Code, may be released to qualified professional persons for purposes of genetic counseling for blood relatives upon request of the blood relative. For purposes of this subdivision, "qualified professional persons" means those persons with the qualifications necessary to carry out the genetic counseling duties under this subdivision as determined by the genetic disease unit established in the State Department of Health Services under Section 309 of the Health and Safety Code. If the patient does not respond or cannot respond to a request for permission to release information pursuant to this subdivision after reasonable attempts have been made over a two-week period to get a response, the information may be released upon request of the blood relative.
(r) When the patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim or victims, then any of the information or records specified in this section may be released to that person or persons and to law enforcement agencies as the psychotherapist determines is needed for the protection of that person or persons. For purposes of this subdivision, "psychotherapist" means anyone so defined within Section 1010 of the Evidence Code.
(s) To persons serving on an interagency case management council established in compliance with Section 5606.6 to the extent necessary to perform its duties. This council shall attempt to obtain the consent of the client. If this consent is not given by the client, the council shall justify in the client's chart why these records are necessary for the work of the council.
(t)(1) To the designated officer of an emergency response employee, and from that designated officer to an emergency response employee regarding possible exposure to HIV or AIDS, but only to the extent necessary to comply with provisions of the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (P.L. 101-381; 42 U.S.C. Sec. 201).
(2) For purposes of this subdivision, "designated officer" and "emergency response employee" have the same meaning as these terms are used in the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (P.L. 101-381; 42 U.S.C. Sec. 201).
(3) The designated officer shall be subject to the confidentiality requirements specified in Section 120980, and may be personally liable for unauthorized release of any identifying information about the HIV results. Further, the designated officer shall inform the exposed emergency response employee that the employee is also subject to the confidentiality requirements specified in Section 120980, and may be personally liable for unauthorized release of any identifying information about the HIV test results.

(u)(1) To a law enforcement officer who personally lodges with a facility, as defined in paragraph (2), a warrant of arrest or an abstract of such a warrant showing that the person sought is wanted for a serious felony, as defined in Section 1192.7 of the Penal Code, or a violent felony, as defined in Section 667.5 of the Penal Code. The information sought and released shall be limited to whether or not the person named in the arrest warrant is presently confined in the facility. This paragraph shall be implemented with minimum disruption to health facility operations and patients, in accordance with Section 5212. If the law enforcement officer is informed that the person named in the warrant is confined in the facility, the officer may not enter the facility to arrest the person without obtaining a valid search warrant or the permission of staff of the facility.
(2) For purposes of paragraph (1), a facility means all of the following:
(A) A state hospital, as defined in Section 4001.
(B) A general acute care hospital, as defined in subdivision (a) of Section 1250 of the Health and Safety Code, solely with regard to information pertaining to a mentally disordered person subject to this section.
(C) An acute psychiatric hospital, as defined in subdivision (b) of Section 1250 of the Health and Safety Code.
(D) A psychiatric health facility, as described in Section 1250.2 of the Health and Safety Code.
(E) A mental health rehabilitation center, as described in Section 5675.
(F) A skilled nursing facility with a special treatment program for chronically mentally disordered patients, as described in Sections 51335 and 72445 to 72475, inclusive, of Title 22 of the California Code of Regulations.
The amendment of subdivision (d) enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law.

CREDIT(S)

1998 Main Volume

(Added by Stats.1972, c. 1058, p. 1960, § 2, operative July 1, 1973. Amended by Stats.1974, c. 486, p. 1120, § 2, eff. July 11, 1974; Stats.1975, c. 1258, p. 3300, § 6; Stats.1977, c. 1252, p. 4574, § 570, operative July 1, 1978; Stats.1978, c. 69, p. 190, § 5; Stats.1978, c. 432, p. 1502, § 12, eff. July 17, 1978, operative July 1, 1978; Stats.1978, c. 1345, p. 4397, § 1; Stats.1979, c. 373, p. 1396, § 364; Stats.1979, c. 244, p. 529, § 1; Stats.1980, c. 676, p. 2036, § 332; Stats.1981, c. 841, p. 3234, § 6; Stats.1982, c. 234, § 6, eff. June 2, 1982; Stats.1982, c. 1141, § 7; Stats.1982, c. 1415, § 1, eff. Sept. 27, 1982; Stats.1983, c. 755, § 3; Stats.1983, c. 1174, § 1.5; Stats.1985, c. 1121, § 3; Stats.1985, c. 1194, § 1; Stats.1985, c. 1324, § 1.7; Stats.1991, c. 534 (S.B.1088), § 6; Stats.1996, c. 1023 (S.B.1497), § 464, eff. Sept. 29, 1996; Stats.1996, c. 111 (S.B.2082), § 2.)

2000 Electronic Update

(Amended by Stats.1998, c. 148 (A.B.302), § 1.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2000 Electronic Update

1998 Legislation

Stats.1998, c. 148, (A.B.302), in subd. (h), substituted "Committee on Senate Rules or the Committee on Assembly Rules" for "Senate Rules Committee or the Assembly Rules Committee"; added subd. (u); and made nonsubstantive changes.

1998 Main Volume

As added in 1972, the section read:

"All information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000), to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only:

"(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his guardian or conservator must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care.

"(b) When the patient, with the approval of the physician in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled;

"(d) If the recipient of services is a minor, ward, or conservatee, and his parent, guardian, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(e) For research, provided that the Director of Health designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

____ Date

"As a condition of doing research concerning persons who have received services from ____ (fill in the facility, agency or person), I, ____, agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.

"I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

_____ Signed

"(f) To the courts, as necessary to the administration of justice.

"(g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families.

"(h) To the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by such committee.

"(i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed.

"The amendment of subdivision (d) of this section enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law.

"This section shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative."

Section 4 of Stats.1972, c. 1058, p. 1962, provides:

"It is the intent of the Legislature, that, if Reorganization Plan No. 1 of 1970 becomes operative, Section 5328 of the Welfare and Institutions Code, as amended by Section 1 of this act, shall remain in effect only until Reorganization Plan No. 1 of 1970 becomes operative and on that date Section 5328 of the Welfare and Institutions Code, as added by Section 2 of this act, which includes the changes in Section 5328 made by both Reorganization Plan No. 1 of 1970 and Section 1 of this act, shall become operative."

The 1974 amendment added subd. (j).

The 1975 amendment added subd. (k).

The 1977 amendment substituted in subd. (e) the "Director of Mental Health" for the "Director of Health" and deleted an operative date provision for this section.

The 1978 amendment by c. 432 inserted in the introductory paragraph "Division 4.5 (commencing with Section 4500),"; and inserted in subd. (e) "or the Director of Developmental Services".

The 1978 amendment by c. 1345, amending c. 432, inserted in the introductory paragraph the references to Division 4 and Division 4.1; inserted the second sentence of the introductory paragraph; substituted in subd. (b) "physician, licensed psychologist, or social worker with a master's degree in social work, who is in charge of the patient" for "psychiatrist, or licensed psychologist in charge of the patient".

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1979 amendment by c. 244 added subd. (l).

Subordination of amendment by Stats.1979, c. 373, to other legislation during the 1979 portion of the 1979-80 regular session which affects this section and which takes effect on or before Jan. 1, 1980, see Historical and Statutory Notes under Business and Professions Code § 700.

The 1980 amendment substituted in the first sentence of the first paragraph "Division 4 (commencing with Section 4000)" for "Division 4 (commencing with Section 4001)" and "Division 7 (commencing with Section 7100)" for "Division 7 (commencing with Section 7000)"; substituted a period for a semicolon at the end of subds. (a) to (d); deleted at the end of subd. (l) "of the Welfare and Institutions Code"; and deleted from the last paragraph "of this section" following "subdivision (d)".

The 1981 amendment substituted in the third sentence of the introductory provisions "shall be disclosed only in any of the following cases" for "may be disclosed"; made pronouns sexually neutral throughout the section; inserted in subd. (d) "guardian ad litem"; inserted the remainder of the first sentence of subd. (e) following "conduct of research"; inserted in the oath of confidentiality the provisions relating to prior informed consent; added subd. (m); and made other technical changes.

The 1982 amendment by c. 234 added subd. (n); and inserted "or psychological" in the second sentence of subd. (a).

Legislative findings concerning Stats.1982, c. 234, see Historical and Statutory Notes under Civil Code § 43.7.

The 1982 amendment by c. 1415, amending c. 234, deleted the signature line from the form for the oath of confidentiality in subd. (e); and added subd. (o).

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1983 amendment by c. 1174 in subd. (b), substituted "master's" for "masters"; in subd. (e), substituted "The" for "Such" preceding "rules"; in subd. (k), substituted "The" for "Such" preceding "agreement"; and added subds. (p) and (q).

Under the provisions of § 3 of Stats.1983, c. 1174, the 1983 amendments of this section by c. 755 and c. 1374 were given effect and incorporated in the form set forth in § 1.5 of c. 1374.

Amendment of this section by § 3.5 of Stats.1983, c. 755, failed to become operative under the provisions of § 4 of that Act.

Amendment of this section by § 1 of Stats.1983, c. 1174, failed to become operative under the provisions of § 3 of that Act.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

Stats.1985, c. 1324 inserted subds. (r), (s) and (t).

Section 5 of Stats.1985, c. 1324, provides, in part:

"Section 1.7 of this bill incorporates amendments to Section 5328 of the Welfare and Institutions Code proposed by this bill, SB 1088 [Stats.1985, c. 1121], and AB 1750 [Stats.1985, c. 1194]. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1986, (2) all three bills amend Section 5328 of the Welfare and Institutions Code [Section 5328 was so amended], (3) this bill is enacted after SB 1088 and AB 1750, in which case Sections 1, 1.3, and 1.5 of this bill shall not become operative."

Amendment of this section by §§ 4 to 6 of Stats.1985, c. 1121, failed to become operative under the provisions of § 7 of that Act.

Amendment of this section by §§ 2 to 4 of Stats.1985, c. 1194, failed to become operative under the provisions of § 6 of that Act.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1991 amendment deleted former subd. (r) and redesignated as subds. (r) and (s) former subds. (s) and (t). Prior to deletion former subd. (r) read:

"(r) To the agency established in this state to fulfill the requirements and assurances of Section 142 of the federal Developmental Disabilities Act of 1984 for a system to protect and advocate the rights of persons with developmental disabilities, as defined in Section 102(7) of the federal act. The agency shall have access to the records of a person with developmental disabilities who resides in a facility for persons with developmental disabilities when both of the following conditions apply

"(1) The agency has received a complaint from, or on behalf of, the person and the person consents to the disclosure to the extent of his or her capabilities.

"(2) The person does not have a parent, guardian, or conservator, or the state or the designee of the state is the person's guardian or conservator."

Legislative findings and intent of Stats.1991, c. 534 (S.B.1088), see Historical and Statutory Notes under Civil Code § 1798.24b.

The 1996 amendment inserted subd. (t), relating to notice to designated officers of emergency response employees, and made nonsubstantive changes throughout the section.

Legislative findings, declaration and intent relating to Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Subordination of legislation by Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Former § 5328, added by Stats.1967, c. 1667, p. 4074, § 36, amended by Stats.1968, c. 1374, p. 2659, § 48; Stats.1969, c. 722, p. 1429, § 21.1; Stats.1970, c. 593, p. 1173, § 1; Stats.1970, c. 1291, p. 2386, § 1; Stats.1970, c. 1627, p. 3445, § 21.1; Stats.1971, c. 776, p. 1528, § 3; Stats.1971, c. 1593, p. 3341, § 377; Stats.1972, c. 1058, p. 1958, § 1, relating to similar subject matter, was repealed by force of its own terms on July 1, 1973, the operative date of Reorganization Plan No. 1 of 1970.

Derivation: Former § 5328, added by Stats.1967, c. 1667, p. 4074, § 36, amended by Stats.1968, c. 1374, p. 2659, § 48; Stats.1969, c. 722, p. 1429, § 21.1; Stats.1970, c. 593, p. 1173, § 1; Stats.1970, c. 1291, p. 2386, § 1; Stats.1970, c. 1627, p. 3445, § 21.1; Stats.1971, c. 1593, p. 3341, § 377; Stats.1971, c. 776, p. 1528, § 3; Stats.1972, c. 1058, p. 1958, § 1.

CROSS REFERENCES

Access to records for purposes of appeal, see Welfare and Institutions Code § 4726.
Administrative rules and regulations, see Government Code § 11342 et seq.
Conservatees, change to more restrictive placement, written notice notwithstanding this section, see Welfare and Institutions Code § 5358.

Inspection of public records, see Government Code § 6250 et seq.
Mental health services recipients, information about and records of as confidential, see Welfare and Institutions Code § 5540.
Patient access to health records, see Health and Safety Code § 123110.
Physician-patient privilege, see Evidence Code § 990 et seq.
Pre-petition screening, application of this section, see Welfare and Institutions Code § 5202.
Psychotherapist-patient privilege, see Evidence Code § 1010 et seq.
Record of disclosures, see Welfare and Institutions Code § 5328.6.
State hospital records, availability to conservatorship investigator, see Welfare and Institutions Code § 5366.

CODE OF REGULATIONS REFERENCES

Conduct and management of facilities, see 9 Cal. Code of Regs. § 900.

LAW REVIEW AND JOURNAL COMMENTARIES

Confidentiality of genetic information. (1982) 30 UCLA L.Rev. 1283.

Duty of psychotherapists to warn. (1978) 14 Cal.W.L.Rev. 153.

Ethical problems for physicians raised by AIDS and HIV infection: Conflicting legal obligations of confidentiality and disclosure. Bruce A. McDonald, 22 U.C.Davis L.Rev. 557 (1989).

Institutionalizing the rights of mental patients: Committing the Legislature. Grant H. Morris (1974) 62 Cal.L.Rev. 957.

Out of mind? Out of sight: The uncivil commitment of permanently incompetent criminal defendants. Grant H. Morris and J. Reid Meloy, 27 U.C.Davis L.Rev. 1 (1993).

Physician-patient privilege: Absent patient. (1975) 27 Hastings L.J. 99.

Release of mental health records: legislative review. (1973) 4 Pac.L.J. 439.

Untangling Tarasoff: duty of psychotherapist to warn potential victim of mentally ill patient. (1977) 29 Hastings L.J. 179.

Volunteering children: Parental commitment of minors to mental institutions. James W. Ellis (1974) 62 Cal.L.Rev. 840.

LIBRARY REFERENCES

1998 Main Volume

Mental Health ⇐21.
WESTLAW Topic No. 257A.
C.J.S. Insane Persons §§ 17 to 20.
Legal Jurisprudences
Cal Jur 3d Crim L § 2844; Del Child § 99; Evid § 458; Incomp § 155.
Am Jur 2d Administrative Law § 232, Evidence §§ 962 et seq., Mandamus § 204, Records and Recording Laws §§ 12 et seq.

Treatises and Practice Aids
Witkin, Procedure (4th ed) Actions § 35.
Witkin, Evidence (3d ed) §§ 1053A, 1214.
Witkin & Epstein, Criminal Law (2d ed) § 1647.

NOTES OF DECISIONS

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1. In general

In action by parents against hospital for injuries sustained upon being attacked by their son, who was treated by hospital for mental disorders, disclosure of son's psychiatric record was authorized by this section. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

Mental health facility's medical records relating to mother's treatment as an outpatient were subject to psychotherapist-patient privilege in proceeding to have children declared dependent. In re S. W. (App. 2 Dist. 1978) 145 Cal.Rptr. 143, 79 Cal.App.3d 719.

Detailed provisions of the Lanterman-Petris-Short Act regulating disclosure of confidential information do not apply to disclosure of information not governed by the Act; since the legislature did not extend the Act to control all disclosures of confidential matter by psychotherapists, it must be inferred that the legislature did not relieve the courts of their obligation to define by reference to the principles of common law the obligation of a therapist in those situations not governed by the Act. Tarasoff v. Regents of University of California (1976) 131 Cal.Rptr. 14, 17 Cal.3d 425, 551 P.2d 334.

Provision of this section relating to confidentiality of mental patient records, which allowed disclosure of such records to courts when necessary for administration of justice, did not allow superior court to obtain such records for use of state board of chiropractic examiners in determining whether to suspend or revoke license of chiropractor under voluntary treatment for alcoholism. Riverside County v. Superior Court for Riverside County (App. 4 Dist. 1974) 116 Cal.Rptr. 886, 42 Cal.App.3d 478.

Provision of this section relating to confidentiality of mental patient records, which allows disclosure of such records to courts when necessary for administration of justice, does not permit courts to obtain records for use of administrative agencies. Riverside County v. Superior Court for Riverside County (App. 4 Dist. 1974) 116 Cal.Rptr. 886, 42 Cal.App.3d 478.

The workers' compensation appeals board is a court for purposes of this section, which provides that all information and records obtained in the course of providing community services to persons impaired by mental disorders or chronic alcoholism may be disclosed only in specified situations, including disclosure to courts as necessary to the administration of justice; public health service records covered by 42 C.F.R. § 1.104 are available to any adjudicatory body, such as the workers' compensation appeals board, which has the power to compel witnesses to appear before it. 61 Ops.Atty.Gen. 46, 1-31-78.

A hospital is required to make available, if requested, patient records which contain information regarding purchase, sale or disposition of dangerous drugs in addition to hospital pharmacy records, in connection with an official inspection or investigation under Bus. & Prof.C. §§ 4010, 4232, except as otherwise prohibited by this section governing disclosure of records pertaining to mental patients. 59 Ops.Atty.Gen. 186, 3-4-76.

Medical information regarding patients in mental hospitals is confidential and cannot be disclosed by a mental facility to the attorney general, a district attorney or probation officer for the purpose of enforcing child support obligations, but such information may be obtained by court order. 54 Ops.Atty.Gen. 24, 3-19-71.

New confidentiality provisions of this section do not affect proceedings under the Lanterman-Petris-Short Act as these judicial records are public, but judicial records concerning commitment of mentally abnormal sex offenders, initial proceedings concerning wards and dependent children in juvenile court, and prepetition evaluation reports concerning mentally disordered are confidential. 53 Ops.Atty.Gen. 25, 1-23-70.

2. Construction with other laws

In action by parents against hospital for injuries sustained upon being attacked by their son, who was treated by hospital for mental disorders, psychotherapist-patient privilege under Evid.C. § 1014 was applicable, as son's psychiatric records contained confidential communications between patient and psychotherapist, and privilege had been claimed by party authorized to do so by Evid.C. § 1014, and fact that authorization under this section for disclosure to courts as necessary to administration of justice did not override privilege under Evid.C. § 1014 meant that son's records were not subject to discovery unless privilege had been waived, or exception to privilege applied. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

Pen.C. § 11161.5 (repealed) requiring that psychotherapists and others report evidence of child abuse gained by observation of the patient-victim prevails over this section, since it is legislative intent that the child's welfare should control over the confidentiality of his or her communications with the psychotherapist. 58 Ops.Atty.Gen. 824, 11-21-75.

3. Confidentiality of records

Where there is no showing by person claiming confidentiality of records under statute prohibiting disclosure of confidential information pertaining to recipient of specified mental health services that records were generated in course of receiving such services, disclosure is not governed by that statute. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

4. Disclosure of records

Civil action by recipient of mental health services for willful and knowing release of confidential information about recipient can be maintained only if information allegedly released pertains to services rendered under statutorily enumerated sections of Welfare and Institutions Code. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

Statutory bar against disclosure of confidential information pertaining to recipient of mental health services is not absolute, but, rather, is subject to numerous exceptions. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

5. Privileges and immunities

Nothing in either statute prohibiting disclosure of confidential information of recipient of mental health services or statute authorizing civil action for disclosure of such information affects any other privilege or immunity which might apply to disclosure of information. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

6. Psychotherapist-patient privilege

Patient-physician and patient-psychotherapist privileges operate wholly independent of the confidentiality provisions of statute governing legal and civil rights of persons involuntarily detained. Albertson v. Superior Court (App. 2 Dist. 2000) 91 Cal.Rptr.2d 749, 77 Cal.App.4th 431, review filed.

Defendant was entitled to have trial court review psychiatric and medical records of five-year-old witness to alleged burglary in order to determine whether records were privileged and whether defendant's constitutional right to a fair trial might overcome any privilege applicable to any particular record. People v. Boyette (App. 6 Dist. 1988) 247 Cal.Rptr. 795, 201 Cal.App.3d 1527.

Psychotherapist-patient privilege for mental health care records contained in Evid.Code § 1014 operates independently of this section. People v. Pack (App. 2 Dist. 1987) 240 Cal.Rptr. 367, 194 Cal.App.3d 1512, review denied, appeal reinstated 248 Cal.Rptr. 240, 201 Cal.App.3d 679.

Trial court was required by Evid.Code § 916 to assert psychotherapist- patient privilege on its own motion on behalf of victim of various crimes where county mental health service released records to court and did not assert that privilege on her behalf, victim had not waived that privilege, and none of the exceptions contained in Evid.Code §§ 1016-1027 applied. People v. Pack (App. 2 Dist. 1987) 240 Cal.Rptr. 367, 194 Cal.App.3d 1512, review denied, appeal reinstated 248 Cal.Rptr. 240, 201 Cal.App.3d 679.

7. Notice

In order for discovery order requiring hospital to produce all records pertaining to decedent in wrongful death case to be valid under this section establishing a general prohibition against disclosure, party seeking disclosure would be required to provide hospital with notice of discovery proceedings addressed to its records. Boling v. Superior Court In and For Santa Clara County (App. 1 Dist. 1980) 164 Cal.Rptr. 432, 105 Cal.App.3d 430.

8. Necessity of information

In this section, subd. (f) contemplates use of information and records as necessary to administration of justice in some pending judicial action or proceeding. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

9. Civil tort actions

The general prohibition, subject to defined exceptions, against disclosure of information and records obtained in course of providing services under specified sections of Welfare and Institutions Code extends only to those records specifically described in this section. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

In action brought by minor plaintiff to recover damages for the wrongful death of her mother, provision of this section governing disclosure of confidential information and records obtained in the course of providing services to the mentally ill or retarded was inapplicable and did not support disclosure of records held by county welfare department relating to minor plaintiff, in absence of showing that minor plaintiff was receiving treatment under programs for the mentally ill or retarded. Sinagoga v. Superior Court In and For Santa Clara County (App. 1 Dist. 1978) 146 Cal.Rptr. 302, 81 Cal.App.3d 223.

10. License revocation proceeding

Use of Welf. & Inst.Code §§ 4514 and 5328 making treatment information and records of developmentally disabled and mentally disabled persons confidential, to prevent disclosure of confidential records to administrative hearing officer, in operator's license revocation proceeding when records had not been used by Department of Social Services in preparation of accusation or at hearing did not violate due process. Gilbert v. Superior Court (Dept. of Social Services) (App. 5 Dist. 1987) 238 Cal.Rptr. 220, 193 Cal.App.3d 161, review denied.

11. Criminal investigations

There was no reasonable probability that former employee of law firm would prevail on her claim, under statute authorizing civil action by recipient of specified mental health services for disclosure of confidential information, against firm for alleged disclosure of her private records, so that trial court could require employee, as vexatious litigant, to furnish security; records pertained to criminal case in which employee was involved which were ordered sealed, order did not cite statute, there was no showing that records pertained to services enumerated in statute, and disclosure of records, by filing in court and by mailing to employee's attorney during course of litigation between firm and employee, arguably fell within exception to statute for disclosure to courts as necessary for administration of justice. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

Sheriff's deputies violated neither spirit nor letter of this section guaranteeing confidentiality of records obtained in course of providing methadone maintenance program by using one person enrolled in such program as informant against another enrollee, since information which informant transmitted to deputies and which led to sale of heroin outside clinic had no relation to program and was not obtained by informant under pretext of program relevance. Armenta v. Superior Court of Santa Barbara County (App. 2 Dist. 1976) 132 Cal.Rptr. 586, 61 Cal.App.3d 584.

This section prohibits the department of mental hygiene from supplying movement and identification information, such as fingerprints, concerning patients in state hospitals to the bureau of criminal identification and investigation, except that information concerning firearms in the hands of mental patients, registration of sexual psychopaths, information concerning arsonists, escapees, and statistical data is not confidential and may be released to the bureau. 53 Ops.Atty.Gen. 20, 1-21-70.

12. Child abuse reports

The duty to report child abuse under the Child Abuse Reporting Law (Pen.C. § 11165 et seq.) supersedes the confidentiality provisions of the Lanterman-Petris Short Act (this section). 65 Ops.Atty.Gen. 345, 6-1-82.

Pen.C. § 11161.5 (repealed) imposed no duty upon a psychotherapist to report that an involuntarily detained patient being treated under the Lanterman-Petris-Short Act (§ 5000 et seq.) has revealed that he has abused his child. 57 Ops.Atty.Gen. 205, 4-30-74.

13. Probation reports

Trial court erred in permitting confidential information received from mental hospital to remain part of probation report, but error did not necessitate remand for purposes of resentencing, as confidential medical records were not basis for court's denial of probation request. People v. Gardner (App. 5 Dist. 1984) 198 Cal.Rptr. 452, 151 Cal.App.3d 134.

14. Warning of patient's propensities

Provisions of the Lanterman-Petris-Short Act governing release of confidential information did not prevent psychotherapists, who were employed by university hospital, from warning plaintiffs' daughter of mental patient's stated intentions to kill daughter; not only did treating therapist's letter to campus police to detain the patient not constitute an "application in writing," absent allegations that the therapists', the hospital or any staff member had been designated by the county to institute an involuntary commitment proceeding, there was no showing that the psychotherapy provided the patient fell under any treatment program authorized by the Act. Tarasoff v. Regents of University of California (1976) 131 Cal.Rptr. 14, 17 Cal.3d 425, 551 P.2d 334.

Treatment facilities may not disclose fact that a person is or was a patient unless authorized by release or court order, nor may patient request release of information without physician's approval, nor disclose presence of patient to one seeking to serve legal process, but warnings of dangerous propensities is authorized by treatment facility. 53 Ops.Atty.Gen. 151, 4-7-70.

15. Patients' advocate

A patients' advocate has a right of access to records in mental treatment facilities to the extent that such facilities participate in a local mental health program under the jurisdiction of the local director who appointed the advocate; as to other facilities, such right of access is limited by requiring patient consent before such records can be released, however, once the required consent is obtained, the right of access is effective in facilities that are operated under a contract with the county and in facilities that are privately operated, other than federal facilities. 62 Ops.Atty.Gen. 57, 2-9-79.

A patient's advocate's right of access to treatment records is not terminated by the discharge of the patient. 62 Ops.Atty.Gen. 57, 2-9-79.

The right of access to the consenting patient's treatment records in treatment facilities outside of the local program, is the same whether a patients' advocate is a county employee or an employee under contract with the county. 62 Ops.Atty.Gen. 57, 2-9-79.

16. Sexually violent predators proceedings

District attorney was not entitled to direct access to all of convicted sex offender's mental health records which were in possession of Department of Mental Health after filing petition against offender under Sexually Violent Predators Act (SVPA), since to extent such records were generated in course of providing mental health services, they were confidential and thus privileged under statute governing legal and civil rights of persons involuntarily detained. Albertson v. Superior Court (App. 2 Dist. 2000) 91 Cal.Rptr.2d 749, 77 Cal.App.4th 431, review filed.

West's Ann. Cal. Welf. & Inst. Code § 5328
CA ◆WEL &◆ INST § ◆5328◆
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Term

West's Ann.Cal.Penal Code § 11167.5

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 4. PREVENTION OF CRIMES AND APPREHENSION OF CRIMINALS
TITLE 1. INVESTIGATION AND CONTROL OF CRIMES AND CRIMINALS
CHAPTER 2. CONTROL OF CRIMES AND CRIMINALS
ARTICLE 2.5. CHILD ABUSE AND NEGLECT REPORTING ACT

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 11167.5. Confidentiality of reports; violations; disclosure

(a) The reports required by Sections 11166 and 11166.2 shall be confidential and may be disclosed only as provided in subdivision (b). Any violation of the confidentiality provided by this article is a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of five hundred dollars ($500), or by both that imprisonment and fine.
(b) Reports of suspected child abuse and information contained therein may be disclosed only to the following:
(1) Persons or agencies to whom disclosure of the identity of the reporting party is permitted under Section 11167.
(2) Persons or agencies to whom disclosure of information is permitted under subdivision (b) of Section 11170.
(3) Persons or agencies with whom investigations of child abuse are coordinated under the regulations promulgated under Section 11174.
(4) Multidisciplinary personnel teams as defined in subdivision (d) of Section 18951 of the Welfare and Institutions Code.
(5) Persons or agencies responsible for the licensing of facilities which care for children, as specified in Section 11165.7.
(6) The State Department of Social Services or any county licensing agency which has contracted with the state, as specified in paragraph (3) of subdivision (b) of Section 11170, when an individual has applied for a community care license or child day care license, or for employment in an out- of-home care facility, or when a complaint alleges child abuse by an operator or employee of an out-of-home care facility.
(7) Hospital scan teams. As used in this paragraph, "hospital scan team" means a team of three or more persons established by a hospital, or two or more hospitals in the same county, consisting of health care professionals and representatives of law enforcement and child protective services, the members of which are engaged in the identification of child abuse. The disclosure authorized by this section includes disclosure among all hospital scan teams.
(8) Coroners and medical examiners when conducting a postmortem examination of a child.
(9) The Board of Prison Terms, who may subpoena an employee of a county welfare department who can provide relevant evidence and reports that both (A) are not unfounded, pursuant to Section 11165.12, and (B) concern only the current incidents upon which parole revocation proceedings are pending against a parolee charged with child abuse. The reports and information shall be confidential pursuant to subdivision (d) of Section 11167.
(10) Personnel from a child protective agency responsible for making a placement of a child pursuant to Section 361.3 of, and Article 7 (commencing with Section 305) of Chapter 2 of Part 1 of Division 2 of, the Welfare and Institutions Code.
(11) Persons who have been identified by the Department of Justice as listed in the Child Abuse Central Index pursuant to subdivision (c) of Section 11170. Nothing in this paragraph shall preclude a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or victim in order to maintain confidentiality as required by law.
(12) Out-of-state law enforcement agencies conducting an investigation of child abuse only when an

agency makes the request for reports of suspected child abuse in writing and on official letterhead, identifying the suspected abuser or victim by name. The request shall be signed by the department supervisor of the requesting law enforcement agency. The written request shall cite the out-of-state statute or interstate compact provision that requires that the information contained within these reports is to be disclosed only to law enforcement, prosecutorial entities, or multidisciplinary investigative teams, and shall cite the criminal penalties for unlawful disclosure provided by the requesting state or the applicable interstate compact provision. In the absence of both (1) a specific out-of-state statute or interstate compact provision that requires that the information contained within these reports be disclosed only to law enforcement, prosecutorial entities, or multidisciplinary investigative teams, and (2) criminal penalties equivalent to the penalties in California for unlawful disclosure, access shall be denied.

(13) Persons who have verified with the Department of Justice that they are listed in the Child Abuse Central Index as provided by subdivision (c) of Section 11170. Disclosure under this section shall be subject to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Nothing in this section prohibits a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or victim to maintain confidentiality as required by law.

(14) Each chairperson of a county child death review team, or his or her designee, to whom disclosure of information is permitted under this article, relating to the death of one or more children and any prior child abuse investigation reports maintained involving the same victim, siblings, or suspects. Local child death review teams may share any relevant information regarding case reviews involving child death with other child death review teams.

(c) Authorized persons within county health departments shall be permitted to receive copies of any reports made by health practitioners, as defined in Section 11165.8, pursuant to Section 11165.13, and copies of assessments completed pursuant to Sections 123600 and 123605 of the Health and Safety Code, to the extent permitted by federal law. Any information received pursuant to this subdivision is protected by subdivision (e).

(d) Nothing in this section requires the Department of Justice to disclose information contained in records maintained under Section 11169 or under the regulations promulgated pursuant to Section 11174, except as otherwise provided in this article.

(e) This section shall not be interpreted to allow disclosure of any reports or records relevant to the reports of child abuse if the disclosure would be prohibited by any other provisions of state or federal law applicable to the reports or records relevant to the reports of child abuse.

CREDIT(S)

1992 Main Volume

(Added by Stats.1983, c. 1082, § 1. Amended by Stats.1985, c. 1593, § 4, eff. Oct. 2, 1985; Stats.1985, c. 1598, § 7.5; Stats.1987, c. 167, § 1; Stats.1987, c. 1459, § 22; Stats.1988, c. 1580, § 5; Stats.1989, c. 153, § 1; Stats.1989, c. 1169, § 2.)

2000 Electronic Update

(Amended by Stats.1995, c. 391 (A.B.1440), § 1; Stats.1997, c. 24 (A.B.1536), § 1; Stats.1997, c. 842 (S.B.644), § 4; Stats.1997, c. 844 (A.B.1065), § 1.5; Stats.1998, c. 485 (A.B.2803), § 135.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2000 Electronic Update

1995 Legislation

The 1995 amendment added a new subd. (c), relating to disclosure to authorized persons in county health departments; and redesignated as subds. (d) and (e) former subds. (c) and (d).

1997 Legislation

Stats.1997, c. 844, in subd. (a), substituted "is" for "shall be", substituted "imprisonment in a county jail not to exceed six months" for "up to six months in jail or" and inserted "that imprisonment and fine"; in subd. (b), in par. (7), substituted "all hospital scan teams" for "hospital scan teams located in the same county", in par. (9), substituted "who may subpoena an employee of a county welfare department who can provide relevant evidence and" for "may subpoena", and added pars. (10) to (14), relating to child protection agency personnel, persons listed in the Child Abuse Central Index as provided in subds. (c) and (e) of § 11170, out-of-state law enforcement agencies, and each county's child death review team's chairperson; and in subd. (c), substituted "Sections 123600 and 123605" for "Sections 10900 and 10901".

Under the provisions of § 3 of Stats.1997, c. 844, the 1997 amendments of this section by c. 844 (A.B.1065) and c. 842 (S.B.644) were given effect and incorporated in the form set forth in § 1.5 of c. 844.

An amendment of this section by § 1 of Stats.1997, c. 844, failed to become operative under the provisions of § 3 of that Act.

Section 1 of Stats.1997, c. 842 (S.B.644), provides:

"This act shall be known and may be cited as Lance's Law Child Safety Reform Act of 1997."

Amendment of this section by § 4.5 of Stats.1997, c. 842 (S.B.644), failed to become operative under the provisions of § 8 of that Act.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

1998 Legislation

Stats.1998, c. 485, made nonsubstantive changes to maintain the code.

Subordination of legislation by Stats.1998, c. 485 (A.B.2803), to other 1998 legislation, see Historical and Statutory Notes under Business and Professions Code § 4840.

1992 Main Volume

The 1985 amendment by c. 1593 added subd. (b)(5).

The 1985 amendment by c. 1598, in subd. (a), substituted "Sections 11166 and 11166.2" for "Section 11166"; substituted, in subd. (b)(5), "subdivision (h) of Section 11166" for "Section 11166.1"; and added subd. (b)(6).

Section 12 of Stats.1985, c. 1598, provides:

"Section 7.5 of this bill incorporates amendments to Section 11167.5 of the Penal Code proposed by both this bill and AB 2337 [Stats.1985, c. 1593]. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 1986, (2) each bill amends ◆Section 11167.5 of the Penal Code◆ [◆Section 11167.5◆ was so amended], and (3) this bill is enacted after AB 2337, in which case Section 11167.5 of the Penal Code, as amended by AB 2337, shall remain operative only until the operative date of this bill [Jan. 1, 1986], at which time Section 7.5 of this bill shall become operative, and Section 7 of this bill shall not

become operative."

The amendment by Stats.1987, c. 1459, in subd. (b)(5) substituted "Section 11165.7" for "subdivision (h) of Section 11166"; and inserted subd. (b)(7) relating to hospital scan teams.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1988 amendment added, to the list in subd. (b) of persons or agencies to whom reports may be disclosed, subd. (b)(8) regarding coroners and medical examiners.

The 1989 amendment inserted "or any county licensing agency which has contracted with the state" in subd. (b)(6), and added subd. (b)(9).

The 1989 amendment by c. 1169 of this section explicitly amended the 1989 amendment of this section by c. 153.

LAW REVIEW AND JOURNAL COMMENTARIES

Child sexual abuse and the law. B. Kay Shafer, 12 L.A.Law. 46 (Sept.1989).

LIBRARY REFERENCES

1992 Main Volume

Words and Phrases (Perm.Ed.)

Legal Jurisprudences
Cal Jur 3d Crim L § 46.

Treatises and Practice Aids
Witkin, Summary (9th ed) Torts § 288.
The Rutter Group, Family Law (Hogoboom & King) § 11:166.

NOTES OF DECISIONS

In general 1
District attorneys 2

1. In general

The information in the California department of justice child abuse files, which is to be used in furtherance of investigating suspected child abuse and carrying out the purpose of the Child Abuse Reporting Law (§ 11165 et seq.), namely the protection of children, must be provided to child protective agencies submitting a report, or to a district attorney who has requested notification of a suspected child abuse case, but the department is not obligated to furnish this information to other persons or agencies. 65 Ops.Atty.Gen. 335, 6-1-82.

2. District attorneys

A district attorney, when investigating or prosecuting a case of child abuse where the victim is or has been the subject of juvenile dependency or wardship proceedings in which the district attorney did not participate, has access to the records of the juvenile court only through an order of the juvenile court permitting such access and may not obtain such records by a search warrant or subpoena duces tecum; but, where the victim has been the recipient of public welfare aid or assistance the district attorney, for his investigation or prosecution, has access to the records of the welfare agency pertaining to the victim and may obtain such records by search warrant or subpoena duces tecum. 66 Ops.Atty.Gen. 106, 3-31-83.

West's Ann. Cal. ◆Penal◆ Code § ◆11167.5◆

CA ◆PENAL § 11167.5◆
END OF DOCUMENT

◀ Term ▶

West's Ann.Cal.Welf. & Inst.Code § 4135

WEST'S ANNOTATED CALIFORNIA CODES
WELFARE AND INSTITUTIONS CODE
DIVISION 4. MENTAL HEALTH
PART 2. ADMINISTRATION OF STATE INSTITUTIONS FOR THE MENTALLY DISORDERED
CHAPTER 1. JURISDICTION AND GENERAL GOVERNMENT

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 4135. Mentally abnormal sex offender; commitment; discharge; records; inspection

Any person committed to the State Department of Mental Health as a mentally abnormal sex offender shall remain a patient committed to the department for the period specified in the court order of commitment or until discharged by the medical director of the state hospital in which the person is a patient, whichever occurs first. The medical director may grant such patient a leave of absence upon such terms and conditions as the medical director deems proper. The petition for commitment of a person as a mentally abnormal sex offender, the reports, the court orders and other court documents filed in the court in connection therewith shall not be open to inspection by any other than the parties to the proceeding, the attorneys for the party or parties, and the State Department of Mental Health, except upon the written authority of a judge of the superior court of the county in which the proceedings were had.

Records of the supervision, care and treatment given to each person committed to the State Department of Mental Health as a mentally abnormal sex offender shall not be open to the inspection of any person not in the employ of the department or of the state hospital, except that a judge of the superior court may by order permit examination of such records.

The charges for the care and treatment rendered to persons committed as mentally abnormal sex offenders shall be in accordance with the provisions of Article 4 (commencing with Section 7275) of Chapter 3 of Division 7.

CREDIT(S)

1998 Main Volume

(Added by Stats.1970, c. 339, p. 734, § 1. Amended by Stats.1971, c. 1593, p. 3332, § 358, operative July 1, 1973; Stats.1977, c. 1252, p. 4497, § 536, operative July 1, 1978.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1998 Main Volume

Former § 4135, added by Stats.1957, c. 2411, p. 4156, § 2, was repealed by Stats.1965, c. 1784, p. 3978, § 4. It related to the determination of disability.

Derivation: Former § 5604, added by Stats.1949, c. 1457, p. 2540, § 1.

Former § 5605, added by Stats.1949, c. 1457, p. 2540, § 1.

Former §§ 5704, 5705, added by Stats.1965, c. 391, p. 1678, § 5.

Former §§ 6454, 6455, added by Stats.1967, c. 1667, p. 4107, § 37.

LIBRARY REFERENCES

1998 Main Volume

Mental Health ⇐441.
WESTLAW Topic No. 257A.
C.J.S. Insane Persons § 248.

NOTES OF DECISIONS

In general 1
Records 2

1. In general

Where district attorney told defendant that only way he could get treatment was by plea of guilty in criminal court to burglary in second degree but, in fact, defendant could have been referred as mentally disordered sex offender whether convicted of felony or misdemeanor and could have been referred without criminal conviction as mentally abnormal sex offender and where district attorney, defendant's attorney, defendant and his mother all believed that ordinary procedures of diagnosis and treatment would be available to defendant though they were not because of defendant's inability to communicate in English, failure to afford promised diagnosis and treatment required setting aside plea of guilty and judgment of conviction thereon. People v. Cortez (App. 1 Dist. 1970) 91 Cal.Rptr. 660, 13 Cal.App.3d 317.

2. Records

New confidentiality provisions of § 5328 do not affect proceedings under the Lanterman-Petris-Short Act as these judicial records are public, but judicial records concerning commitment of mentally abnormal sex offenders under § 6454 (repealed 1970), initial proceedings concerning wards and dependent children in juvenile court (§ 827) and prepetition evaluation reports concerning mentally disordered (§ 5202) are confidential. 53 Ops.Atty.Gen. 25, 1-23-70.

West's Ann. Cal. Welf. & Inst. Code § 4135
CA WEL & INST § 4135
END OF DOCUMENT

Term

West's Ann.Cal.Welf. & Inst.Code § 5328

WEST'S ANNOTATED CALIFORNIA CODES
WELFARE AND INSTITUTIONS CODE
DIVISION 5. COMMUNITY MENTAL HEALTH SERVICES
PART 1. THE LANTERMAN-PETRIS-SHORT ACT
CHAPTER 2. INVOLUNTARY TREATMENT
ARTICLE 7. LEGAL AND CIVIL RIGHTS OF PERSONS INVOLUNTARILY DETAINED

Current through 1999 portion of 1999-2000 Reg. Sess. and 1st Ex. Sess.

§ 5328. Confidential information and records; disclosure; consent

All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential. Information and records obtained in the course of providing similar services to either voluntary or involuntary recipients prior to 1969 shall also be confidential. Information and records shall be disclosed only in any of the following cases:
(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his or her guardian or conservator shall be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical or psychological responsibility for the patient's care.
(b) When the patient, with the approval of the physician, licensed psychologist, or social worker with a master's degree in social work, who is in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him or her in confidence by members of a patient's family.
(c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he or she may be entitled.
(d) If the recipient of services is a minor, ward, or conservatee, and his or her parent, guardian, guardian ad litem, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him or her in confidence by members of a patient's family.
(e) For research, provided that the Director of Mental Health or the Director of Developmental Services designates by regulation, rules for the conduct of research and requires the research to be first reviewed by the appropriate institutional review board or boards. The rules shall include, but need not be limited to, the requirement that all researchers shall sign an oath of confidentiality as follows:

_____
Date

As a condition of doing research concerning persons who have received services from _____ (fill in the facility, agency or person), I, _____, agree to obtain the prior informed consent of such persons who have received services to the maximum degree possible as determined by the appropriate institutional review board or boards for protection of human subjects reviewing my research, and I further agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.
I recognize that the unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.
(f) To the courts, as necessary to the administration of justice.

(g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families.
(h) To the Committee on Senate Rules or the Committee on Assembly Rules for the purposes of legislative investigation authorized by the committee.
(i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed.
(j) To the attorney for the patient in any and all proceedings upon presentation of a release of information signed by the patient, except that when the patient is unable to sign the release, the staff of the facility, upon satisfying itself of the identity of the attorney, and of the fact that the attorney does represent the interests of the patient, may release all information and records relating to the patient except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information that has been given to him or her in confidence by members of a patient's family.
(k) Upon written agreement by a person previously confined in or otherwise treated by a facility, the professional person in charge of the facility or his or her designee may release any information, except information that has been given in confidence by members of the person's family, requested by a probation officer charged with the evaluation of the person after his or her conviction of a crime if the professional person in charge of the facility determines that the information is relevant to the evaluation. The agreement shall only be operative until sentence is passed on the crime of which the person was convicted. The confidential information released pursuant to this subdivision shall be transmitted to the court separately from the probation report and shall not be placed in the probation report. The confidential information shall remain confidential except for purposes of sentencing. After sentencing, the confidential information shall be sealed.
(l) Between persons who are trained and qualified to serve on "multidisciplinary personnel" teams pursuant to subdivision (d) of Section 18951. The information and records sought to be disclosed shall be relevant to the prevention, identification, management, or treatment of an abused child and his or her parents pursuant to Chapter 11 (commencing with Section 18950) of Part 6 of Division 9.
(m) To county patients' rights advocates who have been given knowing voluntary authorization by a client or a guardian ad litem. The client or guardian ad litem, whoever entered into the agreement, may revoke the authorization at any time, either in writing or by oral declaration to an approved advocate.
(n) To a committee established in compliance with Sections 4070 and 5624.
(o) In providing information as described in Section 7325.5. Nothing in this subdivision shall permit the release of any information other than that described in Section 7325.5.
(p) To the county mental health director or the director's designee, or to a law enforcement officer, or to the person designated by a law enforcement agency, pursuant to Sections 5152.1 and 5250.1.
(q) If the patient gives his or her consent, information specifically pertaining to the existence of genetically handicapping conditions, as defined in Section 341.5 of the Health and Safety Code, may be released to qualified professional persons for purposes of genetic counseling for blood relatives upon request of the blood relative. For purposes of this subdivision, "qualified professional persons" means those persons with the qualifications necessary to carry out the genetic counseling duties under this subdivision as determined by the genetic disease unit established in the State Department of Health Services under Section 309 of the Health and Safety Code. If the patient does not respond or cannot respond to a request for permission to release information pursuant to this subdivision after reasonable attempts have been made over a two-week period to get a response, the information may be released upon request of the blood relative.
(r) When the patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim or victims, then any of the information or records specified in this section may be released to that person or persons and to law enforcement agencies as the psychotherapist determines is needed for the protection of that person or persons. For purposes of this subdivision, "psychotherapist" means anyone so defined within Section 1010 of the Evidence Code.
(s) To persons serving on an interagency case management council established in compliance with Section 5606.6 to the extent necessary to perform its duties. This council shall attempt to obtain the consent of the client. If this consent is not given by the client, the council shall justify in the client's chart why these records are necessary for the work of the council.
(t)(1) To the designated officer of an emergency response employee, and from that designated officer to an emergency response employee regarding possible exposure to HIV or AIDS, but only to the extent necessary to comply with provisions of the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (P.L. 101-381; 42 U.S.C. Sec. 201).
(2) For purposes of this subdivision, "designated officer" and "emergency response employee" have the same meaning as these terms are used in the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (P.L. 101-381; 42 U.S.C. Sec. 201).
(3) The designated officer shall be subject to the confidentiality requirements specified in Section 120980, and may be personally liable for unauthorized release of any identifying information about the HIV results. Further, the designated officer shall inform the exposed emergency response employee that the employee is also subject to the confidentiality requirements specified in Section 120980, and may be personally liable for unauthorized release of any identifying information about the HIV test results.

(u)(1) To a law enforcement officer who personally lodges with a facility, as defined in paragraph (2), a warrant of arrest or an abstract of such a warrant showing that the person sought is wanted for a serious felony, as defined in Section 1192.7 of the Penal Code, or a violent felony, as defined in Section 667.5 of the Penal Code. The information sought and released shall be limited to whether or not the person named in the arrest warrant is presently confined in the facility. This paragraph shall be implemented with minimum disruption to health facility operations and patients, in accordance with Section 5212. If the law enforcement officer is informed that the person named in the warrant is confined in the facility, the officer may not enter the facility to arrest the person without obtaining a valid search warrant or the permission of staff of the facility.
(2) For purposes of paragraph (1), a facility means all of the following:
(A) A state hospital, as defined in Section 4001.
(B) A general acute care hospital, as defined in subdivision (a) of Section 1250 of the Health and Safety Code, solely with regard to information pertaining to a mentally disordered person subject to this section.
(C) An acute psychiatric hospital, as defined in subdivision (b) of Section 1250 of the Health and Safety Code.
(D) A psychiatric health facility, as described in Section 1250.2 of the Health and Safety Code.
(E) A mental health rehabilitation center, as described in Section 5675.
(F) A skilled nursing facility with a special treatment program for chronically mentally disordered patients, as described in Sections 51335 and 72445 to 72475, inclusive, of Title 22 of the California Code of Regulations.
The amendment of subdivision (d) enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law.

CREDIT(S)

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(Added by Stats.1972, c. 1058, p. 1960, § 2, operative July 1, 1973. Amended by Stats.1974, c. 486, p. 1120, § 2, eff. July 11, 1974; Stats.1975, c. 1258, p. 3300, § 6; Stats.1977, c. 1252, p. 4574, § 570, operative July 1, 1978; Stats.1978, c. 69, p. 190, § 5; Stats.1978, c. 432, p. 1502, § 12, eff. July 17, 1978, operative July 1, 1978; Stats.1978, c. 1345, p. 4397, § 1; Stats.1979, c. 373, p. 1396, § 364; Stats.1979, c. 244, p. 529, § 1; Stats.1980, c. 676, p. 2036, § 332; Stats.1981, c. 841, p. 3234, § 6; Stats.1982, c. 234, § 6, eff. June 2, 1982; Stats.1982, c. 1141, § 7; Stats.1982, c. 1415, § 1, eff. Sept. 27, 1982; Stats.1983, c. 755, § 3; Stats.1983, c. 1174, § 1.5; Stats.1985, c. 1421, § 3; Stats.1985, c. 1194, § 1; Stats.1985, c. 1324, § 1.7; Stats.1991, c. 534 (S.B.1088), § 6; Stats.1996, c. 1023 (S.B.1497), § 464, eff. Sept. 29, 1996; Stats.1996, c. 111 (S.B.2082), § 2.)

2000 Electronic Update

(Amended by Stats.1998, c. 148 (A.B.302), § 1.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2000 Electronic Update

1998 Legislation

Stats.1998, c. 148, (A.B.302), in subd. (h), substituted "Committee on Senate Rules or the Committee on Assembly Rules" for "Senate Rules Committee or the Assembly Rules Committee"; added subd. (u); and made nonsubstantive changes.

1998 Main Volume

As added in 1972, the section read:

"All information and records obtained in the course of providing services under Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7000), to either voluntary or involuntary recipients of services shall be confidential. Information and records may be disclosed only:

"(a) In communications between qualified professional persons in the provision of services or appropriate referrals, or in the course of conservatorship proceedings. The consent of the patient, or his guardian or conservator must be obtained before information or records may be disclosed by a professional person employed by a facility to a professional person not employed by the facility who does not have the medical responsibility for the patient's care.

"(b) When the patient, with the approval of the physician in charge of the patient, designates persons to whom information or records may be released, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(c) To the extent necessary for a recipient to make a claim, or for a claim to be made on behalf of a recipient for aid, insurance, or medical assistance to which he may be entitled;

"(d) If the recipient of services is a minor, ward, or conservatee, and his parent, guardian, or conservator designates, in writing, persons to whom records or information may be disclosed, except that nothing in this article shall be construed to compel a physician, psychologist, social worker, nurse, attorney, or other professional person to reveal information which has been given to him in confidence by members of a patient's family;

"(e) For research, provided that the Director of Health designates by regulation, rules for the conduct of research. Such rules shall include, but need not be limited to, the requirement that all researchers must sign an oath of confidentiality as follows:

____ Date

"As a condition of doing research concerning persons who have received services from ____ (fill in the facility, agency or person), I, _____, agree not to divulge any information obtained in the course of such research to unauthorized persons, and not to publish or otherwise make public any information regarding persons who have received services such that the person who received services is identifiable.

"I recognize that unauthorized release of confidential information may make me subject to a civil action under provisions of the Welfare and Institutions Code.

_____ Signed

"(f) To the courts, as necessary to the administration of justice.

"(g) To governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families.

"(h) To the Senate Rules Committee or the Assembly Rules Committee for the purposes of legislative investigation authorized by such committee.

"(i) If the recipient of services who applies for life or disability insurance designates in writing the insurer to which records or information may be disclosed.

"The amendment of subdivision (d) of this section enacted at the 1970 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law.

"This section shall become operative on the same date as Reorganization Plan No. 1 of 1970 becomes operative."

Section 4 of Stats.1972, c. 1058, p. 1962, provides:

"It is the intent of the Legislature, that, if Reorganization Plan No. 1 of 1970 becomes operative, Section 5328 of the Welfare and Institutions Code, as amended by Section 1 of this act, shall remain in effect only until Reorganization Plan No. 1 of 1970 becomes operative and on that date Section 5328 of the Welfare and Institutions Code, as added by Section 2 of this act, which includes the changes in Section 5328 made by both Reorganization Plan No. 1 of 1970 and Section 1 of this act, shall become operative."

The 1974 amendment added subd. (j).

The 1975 amendment added subd. (k).

The 1977 amendment substituted in subd. (e) the "Director of Mental Health" for the "Director of Health" and deleted an operative date provision for this section.

The 1978 amendment by c. 432 inserted in the introductory paragraph "Division 4.5 (commencing with Section 4500),"; and inserted in subd. (e) "or the Director of Developmental Services".

The 1978 amendment by c. 1345, amending c. 432, inserted in the introductory paragraph the references to Division 4 and Division 4.1; inserted the second sentence of the introductory paragraph; substituted in subd. (b) "physician, licensed psychologist, or social worker with a master's degree in social work, who is in charge of the patient" for "psychiatrist, or licensed psychologist in charge of the patient".

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1979 amendment by c. 244 added subd. (l).

Subordination of amendment by Stats.1979, c. 373, to other legislation during the 1979 portion of the 1979-80 regular session which affects this section and which takes effect on or before Jan. 1, 1980, see Historical and Statutory Notes under Business and Professions Code § 700.

The 1980 amendment substituted in the first sentence of the first paragraph "Division 4 (commencing with Section 4000)" for "Division 4 (commencing with Section 4001)" and "Division 7 (commencing with Section 7100)" for "Division 7 (commencing with Section 7000)"; substituted a period for a semicolon at the end of subds. (a) to (d); deleted at the end of subd. (l) "of the Welfare and Institutions Code"; and deleted from the last paragraph "of this section" following "subdivision (d)".

The 1981 amendment substituted in the third sentence of the introductory provisions "shall be disclosed only in any of the following cases" for "may be disclosed"; made pronouns sexually neutral throughout the section; inserted in subd. (d) "guardian ad litem"; inserted the remainder of the first sentence of subd. (e) following "conduct of research"; inserted in the oath of confidentiality the provisions relating to prior informed consent; added subd. (m); and made other technical changes.

The 1982 amendment by c. 234 added subd. (n); and inserted "or psychological" in the second sentence of subd. (a).

Legislative findings concerning Stats.1982, c. 234, see Historical and Statutory Notes under Civil Code § 43.7.

The 1982 amendment by c. 1415, amending c. 234, deleted the signature line from the form for the oath of confidentiality in subd. (e); and added subd. (o).

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1983 amendment by c. 1174 in subd. (b), substituted "master's" for "masters"; in subd. (e), substituted "The" for "Such" preceding "rules"; in subd. (k), substituted "The" for "Such" preceding "agreement"; and added subds. (p) and (q).

Under the provisions of § 3 of Stats.1983, c. 1174, the 1983 amendments of this section by c. 755 and c. 1374 were given effect and incorporated in the form set forth in § 1.5 of c. 1374.

Amendment of this section by § 3.5 of Stats.1983, c. 755, failed to become operative under the provisions of § 4 of that Act.

Amendment of this section by § 1 of Stats.1983, c. 1174, failed to become operative under the provisions of § 3 of that Act.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

Stats.1985, c. 1324 inserted subds. (r), (s) and (t).

Section 5 of Stats.1985, c. 1324, provides, in part:

"Section 1.7 of this bill incorporates amendments to Section 5328 of the Welfare and Institutions Code proposed by this bill, SB 1088 [Stats.1985, c. 1121], and AB 1750 [Stats.1985, c. 1194]. It shall only become operative if (1) all three bills are enacted and become effective January 1, 1986, (2) all three bills amend Section 5328 of the Welfare and Institutions Code [Section 5328 was so amended], (3) this bill is enacted after SB 1088 and AB 1750, in which case Sections 1, 1.3, and 1.5 of this bill shall not become operative."

Amendment of this section by §§ 4 to 6 of Stats.1985, c. 1121, failed to become operative under the provisions of § 7 of that Act.

Amendment of this section by §§ 2 to 4 of Stats.1985, c. 1194, failed to become operative under the provisions of § 6 of that Act.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1991 amendment deleted former subd. (r) and redesignated as subds. (r) and (s) former subds. (s) and (t). Prior to deletion former subd. (r) read:

"(r) To the agency established in this state to fulfill the requirements and assurances of Section 142 of the federal Developmental Disabilities Act of 1984 for a system to protect and advocate the rights of persons with developmental disabilities, as defined in Section 102(7) of the federal act. The agency shall have access to the records of a person with developmental disabilities who resides in a facility for persons with developmental disabilities when both of the following conditions apply.

"(1) The agency has received a complaint from, or on behalf of, the person and the person consents to the disclosure to the extent of his or her capabilities.

"(2) The person does not have a parent, guardian, or conservator, or the state or the designee of the state is the person's guardian or conservator."

Legislative findings and intent of Stats.1991, c. 534 (S.B.1088), see Historical and Statutory Notes under Civil Code § 1798.24b.

The 1996 amendment inserted subd. (t), relating to notice to designated officers of emergency response employees, and made nonsubstantive changes throughout the section.

Legislative findings, declaration and intent relating to Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Subordination of legislation by Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Former § 5328, added by Stats.1967, c. 1667, p. 4074, § 36, amended by Stats.1968, c. 1374, p. 2659, § 48; Stats.1969, c. 722, p. 1429, § 21.1; Stats.1970, c. 593, p. 1173, § 1; Stats.1970, c. 1291, p. 2386, § 1; Stats.1970, c. 1627, p. 3445, § 21.1; Stats.1971, c. 776, p. 1528, § 3; Stats.1971, c. 1593, p. 3341, § 377; Stats.1972, c. 1058, p. 1958, § 1, relating to similar subject matter, was repealed by force of its own terms on July 1, 1973, the operative date of Reorganization Plan No. 1 of 1970.

Derivation: Former § 5328, added by Stats.1967, c. 1667, p. 4074, § 36, amended by Stats.1968, c. 1374, p. 2659, § 48; Stats.1969, c. 722, p. 1429, § 21.1; Stats.1970, c. 593, p. 1173, § 1; Stats.1970, c. 1291, p. 2386, § 1; Stats.1970, c. 1627, p. 3445, § 21.1; Stats.1971, c. 1593, p. 3341, § 377; Stats.1971, c. 776, p. 1528, § 3; Stats.1972, c. 1058, p. 1958, § 1.

CROSS REFERENCES

Access to records for purposes of appeal, see Welfare and Institutions Code § 4726.
Administrative rules and regulations, see Government Code § 11342 et seq.
Conservatees, change to more restrictive placement, written notice notwithstanding this section, see Welfare and Institutions Code § 5358.

Inspection of public records, see Government Code § 6250 et seq.
Mental health services recipients, information about and records of as confidential, see Welfare and Institutions Code § 5540.
Patient access to health records, see Health and Safety Code § 123110.
Physician-patient privilege, see Evidence Code § 990 et seq.
Pre-petition screening, application of this section, see Welfare and Institutions Code § 5202.
Psychotherapist-patient privilege, see Evidence Code § 1010 et seq.
Record of disclosures, see Welfare and Institutions Code § 5328.6.
State hospital records, availability to conservatorship investigator, see Welfare and Institutions Code § 5366.

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C.J.S. Insane Persons §§ 17 to 20.
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Treatises and Practice Aids
Witkin, Procedure (4th ed) Actions § 35.
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1. In general

In action by parents against hospital for injuries sustained upon being attacked by their son, who was treated by hospital for mental disorders, disclosure of son's psychiatric record was authorized by this section. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

Mental health facility's medical records relating to mother's treatment as an outpatient were subject to psychotherapist-patient privilege in proceeding to have children declared dependent. In re S. W. (App. 2 Dist. 1978) 145 Cal.Rptr. 143, 79 Cal.App.3d 719.

Detailed provisions of the Lanterman-Petris-Short Act regulating disclosure of confidential information do not apply to disclosure of information not governed by the Act; since the legislature did not extend the Act to control all disclosures of confidential matter by psychotherapists, it must be inferred that the legislature did not relieve the courts of their obligation to define by reference to the principles of common law the obligation of a therapist in those situations not governed by the Act. Tarasoff v. Regents of University of California (1976) 131 Cal.Rptr. 14, 17 Cal.3d 425, 551 P.2d 334.

Provision of this section relating to confidentiality of mental patient records, which allowed disclosure of such records to courts when necessary for administration of justice, did not allow superior court to obtain such records for use of state board of chiropractic examiners in determining whether to suspend or revoke license of chiropractor under voluntary treatment for alcoholism. Riverside County v. Superior Court for Riverside County (App. 4 Dist. 1974) 116 Cal.Rptr. 886, 42 Cal.App.3d 478.

Provision of this section relating to confidentiality of mental patient records, which allows disclosure of such records to courts when necessary for administration of justice, does not permit courts to obtain records for use of administrative agencies. Riverside County v. Superior Court for Riverside County (App. 4 Dist. 1974) 116 Cal.Rptr. 886, 42 Cal.App.3d 478.

The workers' compensation appeals board is a court for purposes of this section, which provides that all information and records obtained in the course of providing community services to persons impaired by mental disorders or chronic alcoholism may be disclosed only in specified situations, including disclosure to courts as necessary to the administration of justice; public health service records covered by 42 C.F.R. § 1.104 are available to any adjudicatory body, such as the workers' compensation appeals board, which has the power to compel witnesses to appear before it. 61 Ops.Atty.Gen. 46, 1-31-78.

A hospital is required to make available, if requested, patient records which contain information regarding purchase, sale or disposition of dangerous drugs in addition to hospital pharmacy records, in connection with an official inspection or investigation under Bus. & Prof.C. §§ 4010, 4232, except as otherwise prohibited by this section governing disclosure of records pertaining to mental patients. 59 Ops.Atty.Gen. 186, 3-4-76.

Medical information regarding patients in mental hospitals is confidential and cannot be disclosed by a mental facility to the attorney general, a district attorney or probation officer for the purpose of enforcing child support obligations, but such information may be obtained by court order. 54 Ops.Atty.Gen. 24, 3-19-71.

New confidentiality provisions of this section do not affect proceedings under the Lanterman-Petris-Short Act as these judicial records are public, but judicial records concerning commitment of mentally abnormal sex offenders, initial proceedings concerning wards and dependent children in juvenile court, and prepetition evaluation reports concerning mentally disordered are confidential. 53 Ops.Atty.Gen. 25, 1-23-70.

2. Construction with other laws

In action by parents against hospital for injuries sustained upon being attacked by their son, who was treated by hospital for mental disorders, psychotherapist-patient privilege under Evid.C. § 1014 was applicable, as son's psychiatric records contained confidential communications between patient and psychotherapist, and privilege had been claimed by party authorized to do so by Evid.C. § 1014, and fact that authorization under this section for disclosure to courts as necessary to administration of justice did not override privilege under Evid.C. § 1014 meant that son's records were not subject to discovery unless privilege had been waived, or exception to privilege applied. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

Pen.C. § 11161.5 (repealed) requiring that psychotherapists and others report evidence of child abuse gained by observation of the patient-victim prevails over this section, since it is legislative intent that the child's welfare should control over the confidentiality of his or her communications with the psychotherapist. 58 Ops.Atty.Gen. 824, 11-21-75.

3. Confidentiality of records

Where there is no showing by person claiming confidentiality of records under statute prohibiting disclosure of confidential information pertaining to recipient of specified mental health services that records were generated in course of receiving such services, disclosure is not governed by that statute. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

4. Disclosure of records

Civil action by recipient of mental health services for willful and knowing release of confidential information about recipient can be maintained only if information allegedly released pertains to services rendered under statutorily enumerated sections of Welfare and Institutions Code. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

Statutory bar against disclosure of confidential information pertaining to recipient of mental health services is not absolute, but, rather, is subject to numerous exceptions. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

5. Privileges and immunities

Nothing in either statute prohibiting disclosure of confidential information of recipient of mental health services or statute authorizing civil action for disclosure of such information affects any other privilege or immunity which might apply to disclosure of information. Devereaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

6. Psychotherapist-patient privilege

Patient-physician and patient-psychotherapist privileges operate wholly independent of the confidentiality provisions of statute governing legal and civil rights of persons involuntarily detained. Albertson v. Superior Court (App. 2 Dist. 2000) 91 Cal.Rptr.2d 749, 77 Cal.App.4th 431, review filed.

Defendant was entitled to have trial court review psychiatric and medical records of five-year-old witness to alleged burglary in order to determine whether records were privileged and whether defendant's constitutional right to a fair trial might overcome any privilege applicable to any particular record. People v. Boyette (App. 6 Dist. 1988) 247 Cal.Rptr. 795, 201 Cal.App.3d 1527.

Psychotherapist-patient privilege for mental health care records contained in Evid.Code § 1014 operates independently of this section. People v. Pack (App. 2 Dist. 1987) 240 Cal.Rptr. 367, 194 Cal.App.3d 1512, review denied, appeal reinstated 248 Cal.Rptr. 240, 201 Cal.App.3d 679.

Trial court was required by Evid.Code § 916 to assert psychotherapist- patient privilege on its own motion on behalf of victim of various crimes where county mental health service released records to court and did not assert that privilege on her behalf, victim had not waived that privilege, and none of the exceptions contained in Evid.Code §§ 1016-1027 applied. People v. Pack (App. 2 Dist. 1987) 240 Cal.Rptr. 367, 194 Cal.App.3d 1512, review denied, appeal reinstated 248 Cal.Rptr. 240, 201 Cal.App.3d 679.

7. Notice

In order for discovery order requiring hospital to produce all records pertaining to decedent in wrongful death case to be valid under this section establishing a general prohibition against disclosure, party seeking disclosure would be required to provide hospital with notice of discovery proceedings addressed to its records. Boling v. Superior Court In and For Santa Clara County (App. 1 Dist. 1980) 164 Cal.Rptr. 432, 105 Cal.App.3d 430.

8. Necessity of information

In this section, subd. (f) contemplates use of information and records as necessary to administration of justice in some pending judicial action or proceeding. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

9. Civil tort actions

The general prohibition, subject to defined exceptions, against disclosure of information and records obtained in course of providing services under specified sections of Welfare and Institutions Code extends only to those records specifically described in this section. Mavroudis v. Superior Court for San Mateo County (App. 1 Dist. 1980) 162 Cal.Rptr. 724, 102 Cal.App.3d 594.

In action brought by minor plaintiff to recover damages for the wrongful death of her mother, provision of this section governing disclosure of confidential information and records obtained in the course of providing services to the mentally ill or retarded was inapplicable and did not support disclosure of records held by county welfare department relating to minor plaintiff, in absence of showing that minor plaintiff was receiving treatment under programs for the mentally ill or retarded. Sinicore v. Superior Court In and For Santa Clara County (App. 1 Dist. 1978) 146 Cal.Rptr. 302, 81 Cal.App.3d 223.

10. License revocation proceeding

Use of Welf. & Inst.Code §§ 4514 and 5328 making treatment information and records of developmentally disabled and mentally disabled persons confidential, to prevent disclosure of confidential records to administrative hearing officer, in operator's license revocation proceeding when records had not been used by Department of Social Services in preparation of accusation or at hearing did not violate due process. Gilbert v. Superior Court (Dept. of Social Services) (App. 5 Dist. 1987) 238 Cal.Rptr. 220, 193 Cal.App.3d 161, review denied.

11. Criminal investigations

There was no reasonable probability that former employee of law firm would prevail on her claim, under statute authorizing civil action by recipient of specified mental health services for disclosure of confidential information, against firm for alleged disclosure of her private records, so that trial court could require employee, as vexatious litigant, to furnish security; records pertained to criminal case in which employee was involved which were ordered sealed, order did not cite statute, there was no showing that records pertained to services enumerated in statute, and disclosure of records, by filing in court and by mailing to employee's attorney during course of litigation between firm and employee, arguably fell within exception to statute for disclosure to courts as necessary for administration of justice. Devercaux v. Latham & Watkins (App. 2 Dist. 1995) 38 Cal.Rptr.2d 849, 32 Cal.App.4th 1571, rehearing denied, review denied.

Sheriff's deputies violated neither spirit nor letter of this section guaranteeing confidentiality of records obtained in course of providing methadone maintenance program by using one person enrolled in such program as informant against another enrollee, since information which informant transmitted to deputies and which led to sale of heroin outside clinic had no relation to program and was not obtained by informant under pretext of program relevance. Armenta v. Superior Court of Santa Barbara County (App. 2 Dist. 1976) 132 Cal.Rptr. 586, 61 Cal.App.3d 584.

This section prohibits the department of mental hygiene from supplying movement and identification information, such as fingerprints, concerning patients in state hospitals to the bureau of criminal identification and investigation, except that information concerning firearms in the hands of mental patients, registration of sexual psychopaths, information concerning arsonists, escapees, and statistical data is not confidential and may be released to the bureau. 53 Ops.Atty.Gen. 20, 1-21-70.

12. Child abuse reports

The duty to report child abuse under the Child Abuse Reporting Law (Pen.C. § 11165 et seq.) supersedes the confidentiality provisions of the Lanterman-Petris Short Act (this section). 65 Ops.Atty.Gen. 345, 6-1-82.

Pen.C. § 11161.5 (repealed) imposed no duty upon a psychotherapist to report that an involuntarily detained patient being treated under the Lanterman-Petris-Short Act (§ 5000 et seq.) has revealed that he has abused his child. 57 Ops.Atty.Gen. 205, 4-30-74.

13. Probation reports

Trial court erred in permitting confidential information received from mental hospital to remain part of probation report, but error did not necessitate remand for purposes of resentencing, as confidential medical records were not basis for court's denial of probation request. People v. Gardner (App. 5 Dist. 1984) 198 Cal.Rptr. 452, 151 Cal.App.3d 134.

14. Warning of patient's propensities

Provisions of the Lanterman-Petris-Short Act governing release of confidential information did not prevent psychotherapists, who were employed by university hospital, from warning plaintiffs' daughter of mental patient's stated intentions to kill daughter; not only did treating therapist's letter to campus police to detain the patient not constitute an "application in writing," absent allegations that the therapists', the hospital or any staff member had been designated by the county to institute an involuntary commitment proceeding, there was no showing that the psychotherapy provided the patient fell under any treatment program authorized by the Act. Tarasoff v. Regents of University of California (1976) 131 Cal.Rptr. 14, 17 Cal.3d 425, 551 P.2d 334.

Treatment facilities may not disclose fact that a person is or was a patient unless authorized by release or court order, nor may patient request release of information without physician's approval, nor disclose presence of patient to one seeking to serve legal process, but warnings of dangerous propensities is authorized by treatment facility. 53 Ops.Atty.Gen. 151, 4-7-70.

15. Patients' advocate

A patients' advocate has a right of access to records in mental treatment facilities to the extent that such facilities participate in a local mental health program under the jurisdiction of the local director who appointed the advocate; as to other facilities, such right of access is limited by requiring patient consent before such records can be released, however, once the required consent is obtained, the right of access is effective in facilities that are operated under a contract with the county and in facilities that are privately operated, other than federal facilities. 62 Ops.Atty.Gen. 57, 2-9-79.

A patient's advocate's right of access to treatment records is not terminated by the discharge of the patient. 62 Ops.Atty.Gen. 57, 2-9-79.

The right of access to the consenting patient's treatment records in treatment facilities outside of the local program, is the same whether a patients' advocate is a county employee or an employee under contract with the county. 62 Ops.Atty.Gen. 57, 2-9-79.

16. Sexually violent predators proceedings

District attorney was not entitled to direct access to all of convicted sex offender's mental health records which were in possession of Department of Mental Health after filing petition against offender under Sexually Violent Predators Act (SVPA), since to extent such records were generated in course of providing mental health services, they were confidential and thus privileged under statute governing legal and civil rights of persons involuntarily detained. Albertson v. Superior Court (App. 2 Dist. 2000) 91 Cal.Rptr.2d 749, 77 Cal.App.4th 431, review filed.

West's Ann. Cal. Welf. & Inst. Code § 5328
CA ◆WEL & ◆ INST § ◆5328◆
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GOVERNMENT CODE
Section 6253

6253. (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 hereafter 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.

(b) 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. Computer data shall be provided in a form determined by the agency.

(c) 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 therefor. In unusual circumstances, the time limit prescribed in 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. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) 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.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) Nothing in this chapter shall be construed to permit an agency to obstruct the inspection or copying of public records. Any notification of denial of any request for records shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

(Amended by Stats. 1999, Ch. 83, Sec. 64. Effective January 1, 2000.)

GOVERNMENT CODE
Section 6253.2

6253.2. (a) Notwithstanding any other provision of this chapter to the contrary, information regarding persons paid by the state to provide in-home supportive services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code or personal care services pursuant to Section 14132.95 of the Welfare and Institutions Code, shall not be subject to public disclosure pursuant to this chapter, except as provided in subdivision (b).

(b) Copies of names, addresses, and telephone numbers of persons described in subdivision (a) shall be made available, upon request, to an exclusive bargaining agent and to any labor organization seeking representation rights pursuant to subdivision (c) of Section 12301.6 or Section 12302 of the Welfare and Institutions Code or Chapter 10 (commencing with Section 3500) of Division 4 of Title 1. This information shall not be used by the receiving entity for any purpose other than the employee organizing, representation, and assistance activities of the labor organization.

(c) This section shall apply solely to individuals who provide services under the In-Home Supportive Services Program (Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code) or the Personal Care Services Program pursuant to Section 14132.95 of the Welfare and Institutions Code.

(d) Nothing in this section is intended to alter or shall be interpreted to alter the rights of parties under the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4) or any other labor relations law.

(Added by Stats. 1999, Ch. 804, Sec. 1. Effective October 10, 1999.)

GOVERNMENT CODE
Section 6253.2

GOVERNMENT CODE
Section 6255

6255. 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 making the record public clearly outweighs the public interest served by disclosure of the record.

(Added by Stats. 1968, Ch. 1473.)

GOVERNMENT CODE
Section 6255

SENATE BILL **No. 2027**

Introduced by Senator Sher

February 25, 2000

An act to amend Sections 6255 and 6259 of, and to add Sections 6253.3, 6257, and 6259.1 to, the Government Code, relating to public records.

LEGISLATIVE COUNSEL'S DIGEST

SB 2027, as introduced, Sher. Public records: disclosure.

(1) The California Public Records Act provides that except for exempt records, every state or local agency, upon request, shall make records available to any person upon payment of fees to cover costs. The act also requires each agency to determine within 10 days from the receipt of a request for records, whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and to promptly notify the person making the request of the determination and the reasons therefor.

The act also authorizes any person to institute judicial proceedings for injunctive or declarative relief or writ of mandate to enforce his or her right to inspect or receive a copy of any public record and requires that the court award court costs and reasonable attorney fees to the plaintiff if he or she prevails in the litigation.

This bill would require that written requests for inspection or copies of public records be addressed to the head of each public agency or his or her designee or, in the case of multimembered bodies, to the executive officer, executive secretary, administrator, or similar chief executive pursuant to specified procedures. The bill would also require that a

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Need to talk to Tom about

determination by a state or local agency that a request for a public record is denied be in writing and would provide that any person who is notified of a denial of a request for public records may appeal to the Attorney General pursuant to specified procedures within 20 days of the date of denial and in cases where the agency fails to provide any response under these provisions. By creating new duties for local agency officials, the bill would impose a state-mandated local program.

The bill would also require the Attorney General to issue a written decision within 20 working days of the date that the written request and written response or lack of response of the agency is received by the Attorney General and would provide that the time limit for the Attorney General to respond is directory and not mandatory. The bill would require the Attorney General to maintain copies of the opinions issued pursuant to these provisions, to publish the opinions annually in a special volume, and make them available on the Internet. The bill would declare legislative intent that these opinions shall be given no greater deference than any other opinion of the Attorney General.

The bill would also allow the superior court, in its discretion, to impose a fine on the agency of not more than $100 for each day that the agency's action resulted in the denial of the right to copy or inspect the record in question, not to exceed a total of $10,000, if the court finds that in declining to comply with a request to inspect or copy a record under the act, the agency acted in bad faith or with knowledge that the request sought nonexempt records. The bill would authorize a complaining party to seek his or her judicial remedy under the act without first exhausting the administrative remedy provided under this bill. The bill would exempt the Public Utilities Commission from these provisions during the period that the commission is required to comply with statutory provisions relating to public review of commission decisions and appeal procedures.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the

creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

(3) This bill would become operative on July 1, 2001.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 6253.3 is added to the Government Code, to read:

6253.3. Except for a public agency governed by a multimembered body, written requests for inspection or copies of public records shall be addressed to the head of each public agency, or an agency official designated by the agency head who shall be directly responsible to the agency head for compliance with this chapter. In the case of agencies governed by multimembered bodies, written requests for inspection or copies of public records shall be addressed to the executive officer, executive secretary, administrator, or similar chief executive subject to direction of the body or an agency official designated by that officer who shall be directly responsible to the body for compliance with this chapter. The name and address of the official designated under this section shall be made available to persons inquiring about procedures for requests under this chapter. In the event a written request is addressed to a party other than the official designated under this chapter, it shall be forwarded to that official immediately. Agencies may develop internal operating procedures to ensure that all staff are aware of the official designated under this section and that requests under this chapter are acted upon promptly. These procedures shall be in addition to, and not in lieu of, guidelines adopted under Section 6253.4 and

requirements adopted pursuant to subdivision (e) of Section 6253.

SEC. 2. Section 6255 of the Government Code is amended to read:

6255. *(a)* 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 making the record public clearly outweighs the public interest served by disclosure of the record.

(b) A response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

SEC. 3. Section 6257 is added to the Government Code, to read:

6257. (a) A person may request the Attorney General to review a state or local agency's denial of a written request to inspect or receive a copy of a public record by delivering a copy of the request and the written response by the agency denying, in whole or in part, the request to the office of the Attorney General within 20 days of receipt of the agency's written denial. In the case of the failure of an agency to provide any response under Section 6253 to a public records request within the time limits specified by this chapter, the person may seek review by the Attorney General by providing a copy of the request and the circumstances under which it was sent to the agency no less than 20 days and no more than 40 days after the request was delivered or mailed to the agency. The Attorney General may grant relief from the 40-day time limit upon a showing by the person seeking relief that he or she refrained from requesting review within the 40-day time limit because the person reasonably relied upon representations of the agency that a response would be forthcoming.

The person seeking review shall demonstrate by means of written proof of service or other credible and reliable means that a copy of his or her request for review has been delivered to the denying agency. Within 20 working

days of receipt of the request for review that complies with the requirements of this subdivision, the Attorney General shall issue a written opinion stating whether the agency's response or lack of response complied with provisions of this chapter.

(b) For good cause, the Attorney General may extend by 30 working days the time to issue an opinion under this section by sending written notice to the complaining party and a copy to the denying agency stating the reasons for the extension and the day on which a decision is expected to be issued. As used in this section, "good cause" means any of the following:

(1) The need to obtain additional information from the agency or the requester.

(2) The need to conduct research on issues of first impression.

(3) An unmanageable workload.

(4) Unanticipated absence of staff assigned to a particular request, or similar unavoidable circumstance.

(c) The Attorney General may solicit additional information or explanation from the denying agency, including copies of the records claimed to be exempt, or a detailed explanation of the content of the information in those records. The denying agency may, within 10 working days from the date of receipt of the request pursuant to subdivision (a), submit any additional information or explanation it deems relevant. However, the records or other information for which an exemption is claimed shall not be provided except in response to a request by the Attorney General and shall not be disclosed by the Attorney General. The Attorney General shall return or destroy nondisclosable records received under this subdivision upon completion of the review and shall not use the records for any other purpose. The agency need not provide records or information but failure to do so without adequate justification under the circumstances of the case may be considered in assessing the sufficiency of the agency's written denial under review.

(d) If the Attorney General or the Department of Justice is the agency that is the subject of the public records request, the request for review under this section shall be treated as a request for reconsideration and, where possible, shall be reviewed by members of the Attorney General's office not involved in the original decision.

(e) Upon completion of the opinion pursuant to this section, the Attorney General shall immediately mail a copy of it to the person requesting review and to the state or local agency that denied access to the record in question.

(f) The Attorney General shall maintain copies of opinions issued pursuant to this section at each of his or her legal offices for purposes of public inspection. The Attorney General shall cause to be published annually a special volume of opinions issued under this section and shall make the opinions available on the Internet. The Attorney General may charge a fee for the sale of the volumes not to exceed the reasonable cost of publication and distribution.

(g) Notwithstanding any other provision of law, except where the records of the Attorney General or the Department of Justice are at issue, neither the Attorney General, nor the Department of Justice, nor any of its staff shall be subject to suit or to discovery in any suit for any action taken as a result of review under this section.

(h) An opinion issued under this section does not affect the right of a person to enforce his or her right to inspect or to receive a copy of any public record through an action pursuant to Sections 6258 and 6259. A person shall not be required to exhaust the administrative remedies available in this section prior to filing a legal action. If a person elects to bring an action under Sections 6258 and 6259, the Attorney General shall not proceed under this section. If a person elects to seek review under this section, no legal action may be brought against the agency whose decision is the subject of the opinion until 10 days after the issuance and mailing of the opinion. A person may withdraw, by written notice, his or her

request for review under this section if the withdrawal notice is received by the Attorney General prior to the issuance of an opinion.

(i) (1) Representation of a state agency by the Attorney General involving advice that a request for inspection or copies of public records be denied, in whole or in part, may provide a basis for that agency to claim an attorney-client relationship that would preclude the Attorney General from providing an opinion under this section.

(2) A state agency against which an action is brought pursuant to Sections 6258 and 6259, after a receipt of an adverse opinion under this section, is authorized to retain counsel other than the Attorney General for the defense of that action.

(3) Except as provided in this section, the Attorney General's review under this section does not preclude the Attorney General's representation of the affected state agency on other matters.

(j) The time limits for the Attorney General to respond pursuant to subdivisions (a) and (b) are directory not mandatory.

(k) This section shall not apply to a request for public records made to a state agency by a party to a pending proceeding involving the state agency or an employee of the state agency, or a pending investigation by the state agency, if the Attorney General has provided or is providing legal advice or representation to the state agency with regard to the proceeding or investigation.

SEC. 4. Section 6259 of the Government Code is amended to read:

6259. (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of

Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, ~~he or she~~ *it* shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

(c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.

(d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award

court costs and reasonable attorney fees to the public agency.

(e) If an agency declines to comply with a request to inspect or copy a record requested pursuant to this chapter and the court determines that the agency acted in bad faith or with knowledge that the request sought nonexempt records, the court, in its discretion, may make an award not to exceed one hundred dollars ($100) per day, for each day, as determined by the court, that the agency's action resulted in the denial of plaintiff's right to copy or inspect the record or records in question. In determining the amount of an award under this subdivision, the court shall consider all facts and circumstances surrounding the agency's decision, including, but not limited to, the following factors:

(1) Whether the agency unreasonably failed to respond within the time periods set forth in Section 6253 or otherwise engaged in conduct that caused undue delay.

(2) Whether the agency's justification for denying the request was reasonably based upon its perceived obligation to protect the rights of persons or entities identified in the requested records.

(3) Whether the agency has developed publicly accessible internal operating procedures under Section 6253.3 or guidelines under Section 6253.4.

(4) Whether the agency's denial was based on a reasonable interpretation of the law.

(5) Whether the plaintiff acted in good faith in pursuing the request.

An award pursuant to this section shall not exceed a total of ten thousand dollars ($10,000) for the record or records in question, and an award shall not include the period of time that a request for an opinion is pending with the Attorney General pursuant to Section 6257 or the period of time that a court is considering the plaintiff's petition.

SEC. 5. Section 6259.1 is added to the Government Code, to read:

6259.1. Notwithstanding Sections 6253.3 and 6257, and subdivision (e) of Section 6259, the Public Utilities Commission shall not be in violation of these sections for nondisclosure of documents for any time period during which the commission is required to comply with statutory provisions relating to public review of commission decisions and appeal procedures.

SEC. 6. It is the intent of the Legislature that an opinion of the Attorney General issued pursuant to Section 6257 of the Government Code shall be given no greater deference than any other opinion of the Attorney General.

SEC. 7. This act shall become operative on July 1, 2001.

SEC. 8. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	AB 1099

THIRD READING

Bill No: AB 1099
Author: Shelley (D)
Amended: 9/9/99 in Senate
Vote: 21

SENATE FLOOR : 29-0, 9/9/99
AYES: Alarcon, Alpert, Baca, Bowen, Brulte, Burton, Chesbro, Costa, Dunn, Escutia, Hughes, Johannessen, Karnette, Kelley, Knight, Leslie, Lewis, McPherson, Murray, O'Connell, Ortiz, Perata, Poochigian, Rainey, Schiff, Sher, Solis, Speier, Wright
NOT VOTING: Figueroa, Hayden, Haynes, Johnson, Johnston, Monteith, Morrow, Mountjoy, Peace, Polanco, Vasconcellos

ASSEMBLY FLOOR : 55-21, 9/10/99 - See last page for vote

SUBJECT : Elections: ballot measures SCA 11

SOURCE : Author

DIGEST : Senate Floor Amendments of 9/9/99 delete previous version of the bill relating to public records.

The bill now requires SCA 11 of the 1999-2000 Regular Session to be designated as Proposition 1A on the March 7, 2000, statewide primary election ballot.

ANALYSIS: This bill authorizes the Governor to negotiate compacts with California Indian tribes, subject to ratification by the Legislature. The compacts permit the operation of slot machines, and the conduct of lottery

CONTINUED

games and banking and percentage card games on Indian land in California, subject to the terms of the compact.

SCA 11, if concurred in by the Senate, would be submitted to the voters for their approval at the March 7, 2000, statewide direct primary election. This bill designates that measure as Proposition 1A on that ballot.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

ASSEMBLY FLOOR: 55-21, 9/10/99

AYES: Alquist, Aroner, Battin, Bock, Calderon, Campbell, Cardenas, Cardoza, Cedillo, Corbett, Correa, Cunneen, Davis, Dickerson, Ducheny, Dutra, Firebaugh, Florez, Floyd, Gallegos, Havice, Hertzberg, Honda, Jackson, Keeley, Knox, Kuehl, Lempert, Longville, Lowenthal, Machado, Maldonado, Mazzoni, Migden, Oller, Rod Pacheco, Papan, Reyes, Romero, Scott, Shelley, Soto, Steinberg, Strom-Martin, Thomson, Torlakson, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Zettel, Villaraigosa

NOES: Ackerman, Ashburn, Baldwin, Bates, Baugh, Brewer, Briggs, Frusetta, Granlund, House, Kaloogian, Leach, Leonard, Maddox, Margett, Olberg, Robert Pacheco, Pescetti, Runner, Strickland, Thompson

NOT VOTING: Aanestad, Cox, McClintock, Nakano

RJG:jk 1/3/00 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 129

IN CONFERENCE

Bill No: SB 129
Author: Peace (D)
Amended: 8/26/99
Vote: 21

SENATE JUDICIARY COMMITTEE : 6-2, 4/27/99
AYES: Burton, Escutia, O'Connell, Peace, Sher, Schiff
NOES: Morrow, Wright
NOT VOTING: Haynes

SENATE FLOOR : 26-5, 5/20/99
AYES: Alpert, Baca, Bowen, Burton, Chesbro, Costa, Dunn, Figueroa, Hayden, Hughes, Johnson, Johnston, Karnette, Lewis, McPherson, O'Connell, Ortiz, Peace, Perata, Polanco, Schiff, Sher, Solis, Speier, Vasconcellos, Wright
NOES: Brulte, Kelley, Knight, Monteith, Mountjoy
NOT VOTING: Alarcon, Escutia, Haynes, Johannessen, Leslie, Morrow, Murray, Poochigian, Rainey

ASSEMBLY FLOOR : 53-24, 9/3/99 - See last page for vote

SUBJECT : Privacy: personal information

SOURCE : Author

DIGEST : As this bill left the Senate, the author stated that it was a "work in progress" with substantive provisions to be added later in the privacy: personal information subject area. The Assembly amendments now constitute the bill.

CONTINUED

As amended, this bill creates the Office of Privacy Ombudsman within the Office of the Secretary of State. According to the author, he intends this legislation to be the subject of a Conference Committee to comprehensively address the subject of protecting confidential information.

ANALYSIS : Existing law, under the Public Records Act, governs public access to records maintained by state and local public agencies.

Existing law provides, under the Information Practices Act of 1997, that state and local agencies must, among other things:

1. Maintain in its records only that personal information which is relevant and necessary to its governmental purpose.

2. Maintain accurate, relevant and complete records.

3. Disclose personal information only under specified circumstances; maintain records regarding the disclosure of personal information.

4. Allow individuals access to those records pertaining to them to provide for the amendment of those records. It also establishes civil remedies for its enforcement.

Existing law prohibits bookkeeping services from disclosing records containing personal information or information regarding a business entity without express written consent. It also prohibits video rental services from disclosing personal information without express written

consent, and provides for civil actions to enforce these provisions.

Existing law also regulates the activities of consumer credit reporting agencies, users of consumer credit reports, and furnishers of consumer credit information, and establishes civil remedies for enforcement.

This bill creates the office of Privacy Ombudsman (PO) under the Secretary of State (SOS) with specified authority

regarding privacy violations by commercial or governmental entities, and authorizes an individual to bring a cause of action for the unlawful release of personal information. Specifically, this bill :

1. Declares that any individual may sue a commercial or governmental agency for the unlawful disclosure of personal information about that individual without their permission. It also establishes a presumption in such proceedings that the person to whom the information released relates has sustained damages thereby, and that this is a rebuttable presumption that affects the burden of proof. In addition, treble damages may be awarded to the prevailing plaintiff under specified circumstances.

2. Establishes a position of PO under SOS with the following responsibilities:

   (a) Ensuring that commercial and governmental records are maintained such that personal information about individuals is not released in violation of law.

   (b) Acting as a nonbinding arbiter in disputes regarding the unlawful release of personal information gathered by commercial or governmental entities.

   (c) Recommending any corrections or changes to a commercial or governmental record pursuant to an

administrative proceeding. Such proceedings are to be completed within 60 days of receiving a complaint charging unlawful use of personal information.

(d) Adopting any regulations necessary to implement the above requirements.

3. Authorizes any commercial or governmental recordholder found by the PO to have unlawfully released personal information to seek redress in the courts.

Background

According to a 1998 Los Angeles Times article, biometric firms earned some $140 million in nationwide sales that year, with $25 million going to non-law enforcement uses.

As technology becomes less expensive, more businesses are using them for purposes such as requiring job applicants to submit fingerprints. The State Department of Motor Vehicles also requires fingerprints before issuing a California Identification card or Driver's License, and local agencies such as county welfare offices use fingerprints to identify clients. Increasingly banking and commerce institutions are also requiring customers to provide fingerprints as a form of identification.

Last session two bills were introduced addressing this growing phenomenon, SB 1622 (Peace) and AB 50 (Murray). Neither bill reached the Governor's desk.

SB 1622 (Peace), would have required persons other than law enforcement to obtain consent before they could collect biometric identification from a person and would prohibit any selling or sharing of biometric identifiers, (except with a law enforcement agency pursuant to a search warrant); and would provide for a penalty for violation of twenty-five thousand dollars ($25,000). SB 1622 died in the Assembly Banking and Finance Committee.

AB 50 (Murray) would have allowed biometric verification or identification to be used as a condition for commencing or completing a commercial transaction, if either a notice of the policy was posted, or they obtained the advance consent of the individual. Penalty for violation would be actual damages for negligent violation, and actual damages plus five thousand dollars for willful or reckless violation. SB 50 died in the Senate Rules Committee.

The bill, prior to Assembly amendments, would also have declared that no person other than a law enforcement agency or government agency acting in a manner required or authorized by law, may collect a biometric identifier without the consent of the individual. For those persons (businesses) who do obtain consent, the person's collection or use of a biometric identifier may not discriminate against any individual or community. No person would be able to provide biometric identifiers to third parties unless the data was encrypted, and the person would not be allowed to share the encryption code with third persons.

The author states his belief that "present law does not adequately impose restrictions on the collection and disclosure of personal information by government, businesses, or not-for-profit organizations."

Prior Legislation

AB 50 (Murray - 1997-98 Session). Died in Senate Rules Committee.

AB 1622 (Peace - 1997-98 Session): Senate Floor Vote: 36-0. Died in Assembly Banking and Finance Committee.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT : (Verified 4/29/99) (Unable to re-verify at time of writing)

Support as introduced:

Consumers for Auto Reliability and Safety
California Alliance for Consumer Protection

OPPOSITION : (Verified 4/29/99) (Unable to re-verify at time of writing)

Oppose as introduced:

County of Sacramento
California Association of Collectors
California Bankers Association

ASSEMBLY FLOOR :
AYES: Alquist, Aroner, Bock, Calderon, Cardenas, Cardoza, Cedillo, Corbett, Cunneen, Davis, Ducheny, Dutra, Firebaugh, Florez, Floyd, Gallegos, Granlund, Havice, Hertzberg, Honda, House, Jackson, Keeley, Knox, Kuehl, Lempert, Leonard, Longville, Lowenthal, Machado, Maldonado, Mazzoni, Migden, Nakano, Olberg, Papan, Reyes, Romero, Scott, Shelley, Soto, Steinberg, Strom-Martin, Thomson, Torlakson, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Villaraigosa

NOES: Ackerman, Ashburn, Baldwin, Bates, Battin, Baugh, Brewer, Briggs, Campbell, Cox, Dickerson, Frusetta, Leach, Maddox, Margett, McClintock, Oller, Robert Pacheco, Rod Pacheco, Pescetti, Runner, Strickland, Thompson, Zettel
NOT VOTING: Aanestad, Correa, Kaloogian

RJC:sl 9/8/99 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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MAR 22 2000

March 7, 2000

Assemblyman Kevin Shelley,
in Sacramento and San Francisco

Dear Kevin,

As the Bay Guardian editor-publisher and as a founder and board member of the California First Amendment Coalition, and as the catalyst and mover on the original Brown act bill (via CFAC and the Society of Professional Journalists), I am passing along some suggestions to you on the bill you are working on with the California Newspaper Publishers Association and CFAC.

These come from Terry Francke, the legal counsel of CFAC, and myself and our staff. If you have any questions or need anyone for expert advice or expert testimony on this bill, please feel free to contact Terry at the CFAC office, 916-974-8888, fax 916-974-8880, or by e-mail, cfac@cfac.org.

Thanks very much. Keep us informed--on this bill and any other hot stuff you are cooking on. Good to see you again, in the Inner Mission, at our office. Good luck.

Sincerely yours,

Bruce B. Brugmann

Bruce B. Brugmann
editor and publisher

BBB:bbb

☐ 255-8955 Main Fax ☐ 255-8762 Editorial Fax ☐ 621-2016 Classified Fax ☐ 487-2594 Display Fax

1. Protection of Speakers

Citizens addressing local bodies sometimes say provocative things or go off on tangents irrelevant to the agenda or even to the agency's jurisdiction. Courts have concluded that under the First Amendment, bodies can rule irrelevant comments out of order and curtail time-wasting speech, but cannot otherwise prevent speakers from saying things critical of staff or administration. Most local bodies seem to be able to live with these constraints, but occasionally seem to have overreacted to speakers they found offensive or annoying. One man was arrested on a trespass pretext after questioning the basis for the superintendent's salary at a school board meeting. Another was thrown out of a city council meeting as soon as spotted in the audience by a mayor he had offended. A third was arrested and charged with assaulting a peace officer when he winced in reaction to having his arm pulled behind his back when standing at the podium in a city council meeting. A fourth was sentenced to one and one half years in jail after being arrested several times for talking off topic at various meetings.

Two reforms are indicated. One would protect officials who unlawfully deny citizens access to the public forum created by the legislature in the Brown Act, but only to the extent that the denial is reasonable -- to the extent, that is, that the official couldn't be expected to know the law. The other would treat citizen speakers' failures to yield, wasting forum time and other out-of-order offenses as infractions, subject to citation much the same as a parking ticket, and preclude more police-like confrontation than necessary to maintain order.

Government Code Section 54954.3 is amended to read:

54954.3. (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting

before or during consideration of that item.

(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, consistently enforced and viewpoint-neutral regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker, and regulations treating willful refusal to observe such time limits as an infraction subject to a fine appropriate to the degree of disruption involved, but absent violent conduct on the part of the violator, no greater than the lowest fine resulting from a parking violation applicable in the jurisdiction where the meeting is held. No violator of any such regulation shall be subjected to force or taken into custody beyond that necessary to remove him or her from the meeting, or in consequence of the clear and immediate prospect of further disruption. No peace officer or other person shall eject a speaker from a meeting or otherwise use force against him or her except upon direction of the officer presiding, unless necessary to prevent or curtail an offense other than the disobedience of speaking regulations adopted pursuant to this subdivision. Both the peace officer or other person so directed and the presiding officer so directing him or her shall enjoy immunity from personal liability for the enforcement of such regulations, or for any conduct otherwise arguably infringing the rights of citizen speakers, insofar as it does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

2. Attorney Fees for Prevailing Plaintiffs in Public Interest Litigation

In a recent case (*Williams v. San Francisco Board of Permit Appeals*, 71 Cal.App.4th 442 [1999]) a San Franciscan went to court to keep a multistory apartment building from going up next to his Victorian home, which construction he said would violate city restrictions. He succeeded in getting a court to order the city authority to reconsider the building permit in the light of the authority's guidelines, but the First District Court of Appeal held that he was not entitled to recoup his attorney fees from the city under the private attorney general statute because he had failed the "public interest" test. Specifically, although the whole neighborhood supported him in his seven-month fight

with the city, the benefit of his litigation was too personal to his interests.

In particular, the court held that although he may not have had a hard dollar financial stake in the matter, his personal aesthetic stake outweighed the public benefit, and denying him attorney's fees was therefore justifiable. The troublesome aspect of this holding is that some of our most profoundly important rights—those protected by the constitution or laws under the police powers—are such that our fight to protect them may convey no concrete benefit on the community even if we win. If the government unconstitutionally curtails our rights to speak, disseminate printed material or petition, or allows its activities to create a public health hazard affecting our home or land, we may be injured in a way not affecting the public interest, i.e. in a manner giving us a very large stake in fighting but others in the community far less of a stake in any immediate sense. But if we are not supported in taking such rights to court, the government could "pick us off" one at a time, leaving each battle, even if successful on the merits, a tremendously expensive one—because each time the stake was disproportionately "personal" to the plaintiff.

The corrective approach is simply to presume that when a person fights to enforce his or her constitutional rights, or right to the protection of laws relating to public health, safety or welfare, his or her fight is inherently in the public interest. The presumption is not conclusive; a corporate plaintiff with litigation funds budgeted as a cost of doing business might well not qualify even under the presumption. But meanwhile the "personal stake" rationale would not always put a high litigation cost on preserving priceless rights. This approach harmonizes with existing protection against SLAPP suits.

Code of Civil Procedure §1021.5 is amended to read:

§1021.5. Attorneys' Fees in Action to Enforce Right Affecting Public Interest

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. In any action in which the right enforced arises under the constitution of this State or of the United States, or derives from a statute protective of the public health, safety or welfare, it shall be presumed that the action has resulted in the enforcement of an important right affecting the public interest; that a significant benefit, whether pecuniary or non-pecuniary, has been conferred

on the general public or a large class of persons; and that the necessity and financial burden of private enforcement are such as to make the award appropriate. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 49.

3. Brown Act Litigation and Discovery of Defendant Body Members

The Sixth District Court of Appeal recently concluded, in *Kleitman v. Superior Court*, 74 Cal.App.4th 1231 (1999), that members of a local legislative body may not be questioned in discovery as to their recollections concerning a closed session. This means that, for example, even when there is strong independent evidence to suggest that there was illegal action or discussion in closed session in violation of the Brown Act, members of the body may not even be queried about it. As the plaintiff said in that case, this ruling suggests that "Local legislative bodies (will) be free to discuss anything and everything in secret meetings and never answer any questions about what occurred. Such a privilege would virtually repeal the Brown Act." The court reached this conclusion because the Brown Act, while not stating that closed session information is confidential or privileged, provides for only two mechanisms to obtain it: court review in camera of any minutes actually kept, or of any tape recording made and preserved because of a prior court order based on a prior closed session violation.

54960.2. In any case in which discovery of the recollections of the members of a legislative body is sought by either the district attorney or the plaintiff in a civil action pursuant to Section 54959, 54960, or 54960.1 alleging that a violation of this chapter has occurred in a closed session, the party seeking discovery shall file a written notice of motion with the appropriate court with notice to the governmental agency to which the legislative body pertains. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(a) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following: (i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, and the date and time of the meeting or meetings concerning which the members' recollections will be sought. (ii) An affidavit which contains specific facts indicating that a violation of the act occurred in the closed session.

(b) If the court, following a review of the motion, finds that there is reasonable cause to believe that a violation has occurred and that no better source of evidence exists to confirm or refute such conclusion, it shall order the members of the legislative body and any other persons present in the closed session or sessions in dispute to submit to deposition or interrogatories. Responses made in such proceedings, however, shall remain subject to a protective order until and unless moved into evidence at trial.

(c) Nothing in this section shall permit discovery of communications which are protected by the attorney-client privilege, but that privilege shall be interpreted narrowly to avoid frustration of the discovery of violations of this Chapter, and otherwise no privilege exists for the contents of discussions held in closed session.

A Bill to Assure Taxpayer Notification of Public Agencies' Litigation Settlements, Victories and Defeats

Government Code Section 54957.1 is amended to read:

54957.1. (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows: (1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

(A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(A) If the legislative body accepts a settlement offer signed by the opposing

party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, ~~and upon inquiry by any person,~~ the ~~local agency~~ legislative body shall disclose the fact of that approval, and ~~identify~~ the substance of the agreement in an open and public session at its next regular meeting.

(4) At every regular meeting, for the period since the previous regular meeting, the legislative body shall publicly receive and disclose a report from its legal counsel or chief executive officer disclosing the fact and substance of every settlement agreement terminating or precluding litigation involving the agency as a party, and the substance of that agreement, as well as the fact and substance of any judgment for or against the agency in any judicial or other proceeding definable as "pending litigation" for purposes of closed sessions under section 54956.9, or of any action of an appellate court with respect thereto.

(45) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(56) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(67) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

(b) Reports that are required to be made pursuant to this section may be made

orally or in writing. The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

(c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

(d) Nothing in this section shall be construed to require that the legislative body approve actions not otherwise subject to legislative body approval.

(e) No action for injury to a reputational, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section.

Assembly
California Legislature

KEVIN SHELLEY

Majority Leader

FACSIMILE TRANSMISSION

Date: March 10, 2000

To: Randy Lyman	Fax: 415-255-8762
	Phone:
From: Emilee Ford	Fax: 916-319-2112
	Phone: 916-319-2012
RE: Kevin Shelley's Public Records Legislation	
Number of Pages Including Cover: 2	

Comments: Here is some information on two past-bills that Kevin has worked on. The second page is a fact sheet for his current legislation on public records. Let me know if you need anything else (I'm filling in for Tracy and Ryan this afternoon!)

AB 1601 – Open meetings & Records for UCSF

Establishes open meetings and records disclosure requirements for UCSF/Stanford Health Care. Under the terms of the merger, the University of California will contribute one-half of UCSF/Stanford Health Care's equity and assets through the privatization of the UCSF Medical Center and affiliated hospitals. The University of California will also transfer $8.25 million in cash and more than $300 million in assets. Under the merger UCSF/Stanford Health Care is expected to become the largest medical center on the West Coast. (Chapter 925, Statutes of 1997)

AB 1234 -- Posting of Public Meetings on the Internet

Requires state bodies to provide meeting notices on the Internet and to provide on written meeting notices the website where Internet notices are available. (Chapter 393, Statutes of 1999)

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E-MAIL: Kevin.Shelley@asm.ca.gov

Assembly
California Legislature

KEVIN SHELLEY

Majority Leader

AB 2799 (Shelley)
California Public Records Act

Timely responses to public records requests:

• AB 2799 states that no public agency shall delay the inspection or copying of public records. Current law prevents public agencies from "obstructing" inspection, which does not adequately ensure a timely response to a public records request.

Electronic Copies of Public Records

• AB 2799 also requires a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format). The electronic copy shall be the form that the agency uses, not the choice of the requestor.

• This provision makes information more accessible to the public and prevents agencies from "burying" important information in mounds of paperwork.

Balancing Test

• AB 2799 requires an agency wishing to withhold information to prove that the public interest served by not releasing the record clearly outweighs the public interest served by disclosing the information.

• Current law puts the burden on the individual to prove that the public interest is best served by the release of information, creating a barrier to the access of public information.

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THE REPORTER'S HANDBOOK ON MEDIA LAW CNPA 2000-01

REPORTER'S HANDBOOK ON MEDIA LAW

A PRACTICAL GUIDE TO THE PUBLIC'S RIGHT OF ACCESS

California Newspaper
Publishers Association

CHAPTER 2

Inspection Of Public Records

By Renee Nash

"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." – California Public Records Act, Government Code Section 6250.

PART I:
THE CALIFORNIA PUBLIC RECORDS ACT

A. OVERVIEW OF THE LAW

In civics class in high school, you learned about the three branches of government: the judicial, the executive and the legislative. Though there are vast amounts of records created and maintained by all three branches, the public has a constitutional right of access only to the records of the judicial branch. Public access to records of the legislative and executive branches of government is left generally to the discretion of each state legislature and the Congress. In California, all government agencies are subject to the California Public Records Act, the topic of most of this chapter. Access to records of federal government agencies is governed by the Freedom of Information Act, an overview of which will be provided at the end of the chapter. The chapter also contains a brief discussion of the Legislative Open Records Act, which covers both houses of the California Legislature.

B. GENERAL RIGHTS OF ACCESS

The policy underlying the public's right to attend meetings of its elected and appointed bodies also guarantees a certain amount of access to records held or created by those same government agencies – that is, the public has a fundamental right to oversee the conduct of its government. The California Public Records Act (Government Code Section 6250 and following) is the instrument that provides the public in California with the right to access records held by the state and all of its subdivisions. The California Public Records Act (CPRA) governs the public's right to access information from state and local agencies, including cities and counties, school districts, municipal corporations and any other boards or commissions that are part of a covered political entity (Government Code Section 6252).

The CPRA, as noted above, does not cover the judicial branch of government. The public's right to access judicial records is discussed in Chapter 10. The CPRA covers only government agencies. The law does not provide the public with the right to access

records held by any other agency or entity, including but not limited to, corporations, private individuals and homeowners' associations. The fact that an entity receives some government funding does not subject it to the provisions of the California Public Records Act. The CPRA covers records held or controlled by a government agency. This means, for example, that a city could not avoid turning over a requested record by having the mayor give it to a friend to keep until the public interest in the record died down.

In practice, the CPRA is one of the most important tools reporters have to gather information about government. The CPRA creates a presumption that all records held by government are public. An agency refusing access to a requested record bears the burden of providing legal justification for its decision (Government Code Section 6255). In addition, when a request for records is denied, the agency is required to provide the requester with the name and title of the person or persons responsible for the decision to deny access (Government Code Section 6257).

The CPRA provides that all records "are open to inspection at all times during the normal office hours of the state or local agency in question and that every citizen has a right to inspect any record unless there is an exemption that allows the agency to withhold access (Government Code Section 6253). This is the heart of the Act. A requester need not provide his or her name and is not required to state the purpose of the request. Also, even if there is an exemption that would allow the agency to withhold the record, in most cases they have the discretion to nonetheless release it. Be circumspect, therefore, when a government official tells you, "I'd really like to give you the record, but it's exempt."

Certain state agencies are required to adopt regulations based on the CPRA to assist in accessing records held by the agency. The public also has a statutory right to have a copy of all disclosable public records. The agency may require payment of the direct costs of duplication. If there is a dispute over whether a record or a portion thereof is public, it is important to communicate that the state Legislature intended the CPRA to be construed broadly in favor of access.

C. COVERED RECORDS

Records subject to public access under the CPRA "include(s) 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 the physical form or characteristic" (Government Code Section 6252[d]). "Writings" are further defined to include items such as maps, prints, disks or any other medium that contains information accessible under the CPRA. Records held electronically have become the focus of increased debate over the last several years as government agencies rely more and more on computers for the creation and storage of records. Issues surrounding the right to access records held in computer form will be discussed in more detail below.

D. DUTY TO SEGREGATE

There are many instances when a record will contain some information that is exempt from disclosure under the CPRA and some that is not. In these situations, the agency is not entitled to merely deny access to the entire record. Government Code Section 6253 provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions that are exempt by law." Therefore, when an agency rejects a request for a record based on the fact that the record contains some exempt material, it is important to determine just how much of the information is in fact exempt. Where it would not be too onerous a task, the agency is required to segregate or redact the exempt information from the rest of the record and provide you with the remainder. Whether a request is onerous is clearly a question of fact. Removing one paragraph from a 10-page report would clearly not be onerous. Removing a sentence from every paragraph of a 300-page report may or may not be considered onerous.

PART II:
PHYSICALLY ACCESSING RECORDS

A. COMPUTERIZED RECORDS

"Records" subject to disclosure under the CPRA are defined to include any physical recording of information, whether it be by photograph, handwritten or typewritten note, map or disk. Anyone making a CPRA request will normally receive an exact copy of the record (unless portions thereof are redacted, as discussed below). Under Government Code Section 6253, however, when a person makes a request for data contained in computer format, the issue of whether the agency has the discretion to determine in which form the information is provided, e.g., on disk, printed on paper or contained in a software program, has been hotly debated. The problem this often presents is that an agency can effectively frustrate a public records request by providing the requested records in a form that is extremely difficult and cumbersome to use. This issue was the subject of a lawsuit, Powers v. City of Richmond, 33 Cal.App.4th 1347 (1994).

The plaintiff in Powers made a CPRA request to the city of Richmond for records of certain expenditures made by the city. Records of expenditures were maintained by the city in computer form. The city responded to the request by providing the plaintiff with a printed check register, listing all checks written by the city during the fiscal year. It consisted of several thousand computer-generated pages of information that did not separately categorize any of the expenditures. The plaintiff argued that the city could easily have provided the requested information in a readable form merely by pushing a few buttons on the computer. Both the trial court and the court of appeal denied the plaintiff's request that the city provide the records in a more usable form, ruling that public agencies are required only to provide the public with records that already exist and are not required to create new records, no matter how simple the process would be.

As of the date of the publication of this handbook, CNPA is sponsoring legislation that would require that a request for an electronically held public record be provided in an electronic format.

B. COSTS OF DUPLICATION

Unfortunately, many government agencies look at the CPRA as a burden rather than as part of their responsibility to serve the public. As a result, some agencies have tried to either deter record requests or profit from them by charging high copying retrieval costs. However, under Government Code Section 6253, government agencies must make records available "upon payment [of] fees covering direct costs of duplication or a statutory fee, if applicable." Because the section only provides for a fee to cover the actual cost to duplicate the record, the California Attorney General has interpreted this language to prohibit agencies from charging members of the public any cost associated with retrieving the record, i.e. the salary of a clerk who spends thirty minutes searching for an archived record. When a requester asks to view, but not receive a copy of a record, the agency is prohibited from charging any amount to comply with the request.

The position of the Attorney General was enhanced by the California Court of Appeal in North County Parents Organization v. California Department of Education, 23 Cal. App.4th 144 (1994). A parents group brought suit against the state after receiving a bill of $126.50 for the copying of public documents. The bill was based on a per page charge of 25 cents. That charge included the cost of searching for the requested records. The court rejected the charge for the retrieval of records, holding that the state was limited to recovering the "direct cost of duplication," which it defined as "the cost of running the copy machine, and conceivably, also the expense of the person operating it."

In a letter opinion, the California Attorney General has opined that the direct costs of duplication include the pro rata salary of the employee making the copies as well as the cost of utilizing the machine. Once again, however, the opinion said that costs involved in retrieval of the records are not recoverable by government agencies.

What is recoverable, therefore, is the cost of running the duplicating machine. What also may be recoverable is the cost of the staff time spent making the copies. Time spent retrieving records, however, is never recoverable. Legislation sponsored by CNPA and signed into law in 1998 also clarifies that a member of the public, including a member of the media, has the right to make his or her own copies with a portable copy machine: "nothing in this chapter shall be construed to permit an agency to obstruct the inspection or copying of public records" (Government Code Section 6253(d). In sum, if you get a bill for fulfillment of a CPRA request that seems large, ask the agency to itemize its costs.

PART III:
TYPES OF EXEMPTIONS

As outlined above, the heart of the CPRA provides that the public has the right to inspect and copy records held by its government agencies unless an exemption applies. Remember that the burden is on the agency wishing to deny access to provide the legal basis for its position. Nonetheless, it is important for any reporter to be as familiar as possible with the exemptions. There are two categories of exemptions under the CPRA. The first category is the general exemption that captures any type of record that falls within the statutory definition. The second category is specific exemptions. These are statutory provisions that exempt certain classes of information from disclosure. These exemptions are explored in detail below. Additionally, it is important to understand that while certain exemptions are listed within the CPRA (most in Government Code section 6254), there also are hundreds of exemptions that are described in other code sections outside the CPRA.

Finding the specific exemptions under California law has, in the past, been a nightmare for both record holders and record requesters. Recent legislation has attempted to identify and alphabetically categorize exemptions that are contained in statutes outside of the CPRA. These exemptions are now listed in Government Code section 6275. The listed statutes cover everything from the location of Native American burial grounds to the results of AIDS tests.

A. GENERAL EXEMPTIONS

As has already been mentioned, there are literally hundreds of specific laws exempting specific records or types of records from public access under the CPRA. In addition to these specific laws, however, there also are a series of what are often referred to as "general exemptions" that could theoretically be invoked by a government agency to deny or attempt to deny access to any record or a portion thereof. Since agencies use these exemptions so often in defending their decision to deny access, it is essential that journalists understand the boundaries of these exemptions so that they know when agencies are attempting to stretch the exemption beyond its intended purpose. There are five of these so-called general exemptions, each of which will be discussed in detail below.

1. Personnel Records

One of the most cited exemptions used to deny access to government records is the so-called "personnel record" exemption. The specific code section, Government Code Section 6254(c), reads as follows: "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." It is the terminology selected by the Legislature in enacting this section that causes some agencies to attempt to use it in a manner that is broader than was originally intended. For one thing, agencies often will cite this exemption to withhold any record that is contained in an employee's personnel file, regardless of the subject of the record and regardless of whether it is also kept in another location. In sum, an agency cannot deny access to a record by merely placing it into the personnel file of one of its employees.

What the exemption does allow is the withholding of information concerning the intimate details of a person who is a subject of the record, no matter how the record is classified or where it is kept. The statute does **not** provide a general exemption for all "personnel records" of public employees. This was clarified in a 1985 opinion by the California Attorney General, which concluded that records showing the amounts and reasons for performance bonuses given to city employees were not exempt from disclosure under the CPRA, 68 Ops. Cal. Atty. Gen. 73 (1985).

In order to determine whether a particular record is exempt under Section 6254(c), the following analysis should be used: (1) does the record associate the person in question with an aspect of the individual's personal life rather than with the business of the public agency or the individual's performance as a government employee?; and (2) would release of the information constitute an unwarranted invasion of personal privacy? Both questions must be answered in the affirmative for the exemption to be applicable. Also remember that the burden to justify withholding a record or a portion thereof lies with the agency seeking to deny access; it is not a sufficient justification merely to label the file a "personnel record."

The first question involves looking at the type of information that is being sought. For example, marital status, the number or legitimacy of children, medical conditions, welfare payments and religion are all examples of information that relates to aspects of the individual's personal life. On the other hand, information such as an individual's qualifications, employment background, education and similar information that relates to the individual's public function is generally public information. For example, most information contained in a resume should be a matter of public record.

A common scenario under which agencies seek to invoke Government Code Section 6254(c) involves salaries of public employees. While most agencies admit that salaries of public employees are matters of public record, many take the position that they are only required to disclose the "salary range" for the particular position rather than the exact salary of particular public employees. Although there are no appellate court decisions on point in California, there are a number of recent superior court decisions on point in California requiring disclosure of records of public employees' compensation. For example, in 1993 a superior court judge in Tulare County ordered the City of Visalia to turn over records of specific salaries to the *Visalia Times-Delta*. The city argued that because salaries are based on merit, disclosing precise salaries would be tantamount to disclosing performance ratings of individuals which, the city argued, would constitute a clearly unwarranted invasion of privacy. In rejecting the argument, the judge wrote: "[u]nder this logic, almost the entire file of a city employee should not be disclosed because the contents are 'personal' matters. Such an all or nothing approach has been disapproved by the courts."

In addition to specific records of compensation, employment contracts of public employees are expressly a matter of public record pursuant to Government Code Section

6254.8, which provides that "[e]very employment contract between a state or local agency and any public official is a public record."

2. Preliminary Drafts

Under Government Code Section 6254(a), preliminary drafts, notes, interagency or intra-agency documents or other records that are not retained by the public agency in the ordinary course of the agency's business are exempt from disclosure, but only provided that the public interest in exempting those records from disclosure "clearly outweighs" the public's interest in disclosure. Broken down, this exemption requires that the agency seeking to withhold the record make three separate showings: (1) the requested records are notes, drafts or memoranda; (2) the record is one that the agency would not normally retain in the ordinary course of business; and (3) the public's interest in disclosing the record clearly outweighs the public interest in making the record public.

Keep in mind that when a denial of a request for records is made and this section of the CPRA is cited, a good way to check on the agency's assertion is to ask for similar documents from other time periods or related to other projects. If those are produced, it may mean that the agency retains that type of record in its ordinary course of business. Remember as well, as with all of the exemptions, the burden to justify rejection of a request is with the agency, which must show that **all** the elements of the exemption apply.

In the event the agency denies a requested record, in addition to sending the model formal request letter contained in Appendix F of this book, it also may be helpful to cite a court decision that supports your position (this is true of all of the exemptions). For example, in Citizens for a Better Environment v. Department of Food and Agriculture, 171 Cal. App.3d 704 (1985), with respect to preliminary drafts, the court said that if the record in question is the type that normally would be kept on file (either in physical form or on a computer), the record must be provided to the requester without regard to the other two elements contained in the statute. Thus, because the agency has the burden to prove **all** the elements of the exemption apply in order to withhold the record, once it fails to prove one element, the record must become public.

The court in Citizens for a Better Environment also said that if the requested records contain mere raw material that would be disposed of once some final product is prepared, the record's "recommendatory" portions, if any, may be withheld, but the factual portion of the record must be disclosed. For example, suppose a city planning department conducts a survey and concludes that there are 4,000 homeless people in the city. If, in a draft report on the survey, the department recommends the city contribute money toward construction of a homeless shelter, the factual finding of 4,000 homeless people must be disclosed, but if the draft is discarded, the recommendation for a shelter may not be disclosable (at least from that report).

3. Pending Litigation / Attorney-Client Privilege

The CPRA contains two provisions that exempt from public disclosure certain records prepared by or for attorneys. The first exemption covers records that are considered "privileged" under the California Evidence Code. The second covers matters that are related to "pending" litigation.

a. Pending litigation

Government Code Section 6254(b) exempts from disclosure "[r]ecords pertaining to pending litigation to which a public agency is a party – or to formal claims made against the government agency – until the pending litigation or claim has been "finally adjudicated" or otherwise settled. This means that either the case has been settled, a jury has reached a verdict or a judge has reached a verdict or dismissed a suit. The only records exempted under this section are those created **after** the initiation of litigation. For example, if a city decides to sue a contractor for poor work on a project, the original contract between the city and the contractor are still subject to public inspection, but a memorandum written by the city attorney explaining why she thought the contract was breached would not be public. The exemption also encompasses claims filed against a government agency by a private individual or organization.

In general, records that were created prior to the filing of a claim or lawsuit against a public agency are not exempt from disclosure despite their relationship to the litigation, unless the record or records in question are covered by the attorney-client privilege. This position was made clear by the California Court of Appeal in Fairley v. Superior Court of Los Angeles County, 66 Cal.App.4th 1414 (1998), which held that the CPRA's pending litigation exemption applies only to documents or other records prepared for use in litigation. In order to qualify under this category, the record must have been created by the agency in response to the filing of a specific lawsuit. As a result, the fact that the requested record "is involved in litigation" may not be sufficient to allow the agency to withhold the record. Try to determine when the record was prepared and exactly what it contains. If the record was created prior to any legal action it is subject to public review absent the application of another exemption.

The California Court of Appeal, in Poway Unified School District v. Superior Court of San Diego County, 62 Cal. App. 4th 1498 (1998), held that a claim form submitted by a minor to a public school district under the California Tort Claims Act, is subject to disclosure under the CPRA. The exemption for pending litigation, the court said, was not applicable, since the claim had yet to ripen into a lawsuit.

b. Attorney-client privilege

Also exempt under the CPRA are records the disclosure of which would violate the California Evidence Code's provisions governing privilege. In general, the Evidence Code allows a privilege for confidential communications between a lawyer and his or her client, which in the case of the CPRA would be the public agency that he or she is

representing either through a private firm or as an agency employee. The California Supreme Court ruled in Roberts v. City of Palmdale, 5 Cal.4th 363 (1993), that the attorney-client exemption covers communications that are made pursuant to pending litigation as well as those which are not: "The attorney-client privilege applies to confidential communications made within the scope of the attorney-client relationship even if the communication does not relate to pending litigation; the privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." Also protected from disclosure under the CPRA is the so-called "attorney work product," which covers the research, impressions and conclusions of an attorney concerning a matter relating to the agency.

c. Settlement agreements

Parties to litigation often will attempt to keep the terms of the settlement of their case confidential (this generally is desired by the government agency to avoid having to defend against meritless claims). When one of the parties to the case is a government agency, regardless of the type of case, the courts have said that the terms of the settlement are a matter of public record pursuant to the CPRA, Register Division of Freedom Newspapers v. County of Orange, 158 Cal. App.3d 893 (1984). Access to settlement agreements contained in court records is discussed in Chapter 10. However, the agency itself is required under Register Division of Freedom Newspapers to provide the terms of the settlement agreement even if the agreement also is filed with a court.

d. Legal billings

One scenario under which the attorney-client privilege is often asserted is when a request is made for legal bills paid by a government agency to a private law firm. Many small agencies, particularly special districts, do not have large staffs and generally contract with a private firm to provide legal services. Even large cities and counties will sometimes hire a private attorney to litigate a particularly complex case. The problem arises when a member of the public wants to find out how much the agency is paying the law firm. Most agencies that receive requests for records of amounts paid to law firms under the CPRA take the position that the bills are exempt from disclosure under the attorney-client exemption. Many times they argue that because bills generally contain a description of the work performed, disclosure could prejudice the agency's position with respect to their legal adversary. Some agencies have argued that merely releasing the amount of monies expended could, in particular cases, prejudice their position.

CNPA's position is that legal bills, like other records held by government agencies, are presumptively a matter of public record. While there may be portions of the bill that could prejudice the agency, the burden is on the agency to demonstrate that fact and redact those portions of the record before providing the remaining portions to the requester. Simply put, unless the information in the bill would prejudice the legal position of the agency in the case, it must be released. As a general rule, the amount of the bill

always should be a matter of public record. There are no cases in which a court has allowed agencies to withhold such information.

4. Deliberative Process / Executive Privilege

The so-called "deliberative process privilege" or "executive privilege" exemption to the CPRA is a judicially created exemption arising out of Government Code Section 6255, which authorizes public agencies to withhold records when, "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." This exemption to the CPRA, discussed by the California Supreme Court, allows administrative agencies to withhold materials reflecting the deliberative process or policy-making processes of executives. This exemption was first recognized in Times Mirror Co. v. Superior Court, 53 Cal.3d 1325 (1991).

In 1988, a reporter for the Los Angeles Times made a CPRA request to then Governor George Deukmejian for copies of his appointment schedules, calendars, notebooks and other records listing the activities of the Governor from the time he took office until the date of the request, which covered a period of approximately five years. The Governor rejected the request, citing among his reasons Government Code Section 6255. The California Supreme Court eventually ruled that the public was not entitled to the requested records.

In addition to concerns about physical security, the governor argued that releasing records of people with whom he had met would hinder the decision-making process of his office: "Routine disclosures of the identities of the persons with whom the governor meets," he argued, "would inhibit the deliberative process, in some instances by discouraging persons from attending meetings, in others by leading to unwarranted inferences about the subject under discussion." In addition, the governor argued that although calendars and schedules contain "facts" rather than opinions, they necessarily reflect the governor's "deliberative judgment" as to those persons, issues or events he considers to be important enough to occupy his time. Therefore, the governor claimed, the disclosure of his calendars and schedules could substantially impair the quality of his decisions and the decision-making process of his office.

The Supreme Court also noted that the federal Freedom of Information Act (FOIA) provides an exemption for records that constitute so-called "executive privilege." Noting that the courts are guided in their interpretation of the CPRA by the FOIA, the Supreme Court concluded that the Congress must have adopted the privilege in order to guarantee full and frank discussions by decision-makers, thereby theoretically leading to better and more informed decisions by government officials.

The Times Mirror decision was later relied on by the California Court of Appeal, in Rogers v. Superior Court, 19 Cal. App.4th 469 (1993), when it rejected the request of a columnist for *The Burbank Leader* for access to records of telephone calls made by city

council members from city-owned cellular phones and home offices over a one-year period. The court said the records were exempt from disclosure pursuant to the deliberative process privilege: "Disclosure of the records sought will disclose the identities of persons with whom the government official has consulted, thereby disclosing the official's mental process," the court wrote.

The question that follows Times Mirror and Rogers is how far the deliberative privilege will be applied by the courts in future cases. The rationale for the privilege is to allow records associated with the decision-making of government officials to be exempt in order to avoid inhibiting that process. This rationale, however, seems inconsistent with the underlying goal of the CPRA, which is to allow the public to better oversee and participate in the decision making of its government.

5. Public Interest Exemption

Government Code Section 6255 allows public agencies to withhold records when, "on the facts of the particular case, the public interest served by disclosure clearly outweighs the public interest served by disclosure of the record." This section requires the agency wishing to withhold the record to balance the interests of the public in releasing the information and the interests of the public in keeping the information private. Each request for records must be examined separately according to the particular facts. A person requesting a record who encounters a section 6255 denial of access should press the agency to fully articulate the public interest served by nondisclosure. The following California cases illustrate how this exemption and the balancing test have been interpreted.

a. Government interest cannot be speculative

In Uribe v. Howie, 19 Cal. App.3d 194 (1971), an agricultural field worker who suffered symptoms associated with potential pesticide misuse sought access to pest control operator reports from the local county Agricultural Commissioner. The county refused to release the reports claiming the public interest in withholding the record -- that future reports would be unreliable if the operators knew details of their pesticide mixtures would be open to their competitors – clearly outweighed the public interest in providing the information to the sick worker.

The California Court of Appeals, which ordered the release of the information, said the public interest in disclosure was to ensure that the worker obtained adequate medical care and the tremendous utility of the information in a general study of the effects of pesticides on humans. The court found the public interest in disclosure was not clearly outweighed by the speculative concerns of the county.

b. Right to personal information

In Johnson v. Winter, 127 Cal. App.3d 435 (1982), the petitioner initially had been rejected in his application to a county sheriff's office for status as a special deputy, but after protest was granted the status. He then sought to obtain the file compiled on his application to determine why at first he had been rejected. The public interest in nondisclosure was identified by the sheriff as being able to protect the ability of his office to continue to gather candid and useful information used to make employee evaluations, especially from confidential sources.

The public interest in disclosure cited by the California Court of Appeal, which ordered release of the report, was that the applicant has a right to know what information had been compiled about him or her and also that the public has a strong interest in knowing how its government agencies exercise their discretion in making certain types of decisions.

c. Potential for abuse of records

In Eskaton Monterey Hospital v. Myers, 134 Cal. App. 3d 788 (1982), a group of hospitals that had been determined by the Department of Health Services to be out of compliance with Medi-Cal sought to obtain the department's fiscal audit manual. The hospital argued the public had a strong interest in knowing how an agency was exercising its discretion. The California Court of Appeal, however, ruled that the public's interest in disclosure of the manual was clearly outweighed by the public interest in not allowing Medi-Cal providers to circumvent governing regulations by using the audit manual as a guide for "manipulating expenditure itemizations."

d. Monitoring government

Another justification advanced for nondisclosure of records is that the request is so voluminous it would result in inordinate time and costs to gather and segregate the requested record, as in ACLU v. Deukmejian, 32 Cal.3d 440 (1982), where the plaintiffs sought to inspect forms containing information gained from law enforcement surveillance, which were maintained by the state attorney general. In CBS v. Block, 42 Cal App. 3d 646 (1986), the California Supreme Court ruled that applications to carry concealed weapons are a matter of public record based upon the importance of the public's interest in overseeing how such permits are being dispersed.

In New York Times Co. v. Goleta Water District, 218 Cal. App.3d 1579 (1990), the *Santa Barbara News-Press* sought a list of water district customers who had exceeded their maximum allowed usage of water under a rationing program. The newspaper argued that public access to the list of violators would provide incentive to comply and ensure that the agency was properly enforcing the provisions of the ordinance. The trial court ruled that disclosure would invade the privacy of residential customers. Despite concerns over privacy, the California Court of Appeals ruled that the privacy interests of the customers did **not** outweigh the right of the public to review the government's conduct. In this case, the newspaper wanted to determine how well the water district was enforcing

the regulations against excessive water usage in a time of drought. The court also rejected as "mere assertion" the concern posed by the district that customers whose names were published could be subjected to physical harm.

Every assertion of the section 6255 exemption should be analyzed on a case-by-case basis. Requesters should articulate the strongest possible public interest that would be served by releasing the records. In addition, changes in time and developments in technology may affect the outcome of the balancing test analysis. For example, while the request for records in ACLU was rejected because of the time and cost involved, it may be that better computers and new software now make such a request reasonably easy to satisfy.

B. LAW ENFORCEMENT RECORDS

1. Investigatory and Arrest Records

Nowhere in the CPRA is the public's right to access important government records more limited than when it comes to records of arrests or reports of criminal activity. Over the last decade, the public's already limited rights have been further eviscerated by court decisions and the California Legislature despite strong pressure from the media and public interest groups.

As of July 1, 1996, Government Code Section 6254(f) was amended to limit the number of people who have the right to access law enforcement information under the CPRA. In order to access such information, the amended law now requires that the requester declare "under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . ." The purpose of this statute was to limit commercial use of the information. The law also provides that "address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals," California Government Code Section 6254(f)(3).

However, the constitutionality of disallowing access to law enforcement information because the information is to be used for a "commercial purpose" was challenged in federal court. In United Reporting Publishing Corp. v. Los Angeles Police Department, 146 F.3d 1133 (1998), a company that sold the names of recent arrestees to its clients brought suit in federal court alleging that its constitutional rights were being violated. The federal court of appeals agreed with the company's argument that it is a violation of the First Amendment to treat commercial speakers differently than non-commercial speakers. "It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes," the court wrote.

The precise issue is whether it is constitutional to treat commercial users different than the other classes of users enumerated in the statute. The United States Supreme Court recently agreed to review the case after the state of California appealed the appellate court's decision.

a. Incident reports

Assuming that the requester is among the group of acceptable requesters, the statute then enumerates the specific information these requesters are entitled to receive: "the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location or the incident, all diagrams, statements or the parties involved in the incident, the victims of an incident, or an authorized representative thereof, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, carjacking, vandalism, vehicle theft, or a crime as (described in another section), unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation." The section further provides that it does not require the release of all or a portion of investigatory files "that reflect the analysis or conclusions of the investigating officer."

b. Arrest reports

With respect to persons arrested, Section 6254(f)(1) requires the release of "[t]he full name and occupation of every individual arrested by the agency; the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of the arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is being currently held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds."

c. Complaints for assistance

Government Code section 6254 (f) requires disclosure of the following information: "[T]he time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved."

The law further allows agencies to withhold the names of victims of specified sexual crimes either at the request of the victim or, if the victim is a minor, at the request of the victim's parent or guardian. The full text of the CPRA, published in Appendix B of this

book, includes a complete list of the offenses that exempt the above information from disclosure. The mere fact that the victim is a minor does not by itself allow the police to withhold his or her name. The crime must be one of those specified above.

Of course as with most other types of government records, agencies may release more information than is required by law. And, in many jurisdictions, police departments make face sheets available to the media for review on a daily basis. In most circumstances, it is when the police want the assistance of the public in finding a suspect or solving a crime that additional information, such as photographs, is provided to the media.

As with other requests for information under the CPRA, the agency in question bears the burden of establishing a legal justification for the refusal to disclose any of the information delineated above. Each piece of information that is considered public must be considered separately. For example, if the police are justified in not disclosing the name of the victim because to do so would endanger his or her life, that does not by itself justify a refusal to disclose other public information regarding the incident.

If the information requested is not listed above, the public may have no right to demand its disclosure, even after the investigation is complete. That was the ruling of the California Supreme Court in Williams v. Superior Court, 5 Cal.4th 337 (1993). The case arose when deputies in the San Bernardino County Sheriff's Department searched the home of a suspected drug dealer. The resident was severely injured by deputies during the search, which failed to turn up any illegal substances. The department then launched both administrative and criminal investigations into the incident. The two deputies involved were eventually disciplined although neither was convicted of a criminal offense.

The *Victorville Daily Press* filed a lawsuit under the CPRA after then-sheriff Dick Williams refused to release the administrative and investigatory records of the incident. The Supreme Court said it was confronted with two questions. The first was whether investigatory records remain confidential indefinitely or whether the public has a right to see them after all proceedings in the case had been completed. Attorneys for the newspaper argued that only "pending" investigation records should be exempt, and that the records in the case should be released since all action against the officers had been completed. The Supreme Court disagreed, saying, "we conclude that the exemption for law enforcement investigatory records does not end when the investigation ends."

The court in Williams was also quick to point out, however, that merely stamping a file as "investigatory" does not inevitably block public access: "It now appears to be well established that information in public files becomes exempt as investigatory only when the prospect of enforcement proceedings becomes concrete and definite." The second major part of the Williams decision overturned an appellate court decision that had limited the exemption from disclosure of investigatory records under the CPRA after applying the standards in the federal Freedom of Information Act. Under FOIA law, enforcement records cannot be withheld unless their release would harm one of the

interests specified in the Act, such as depriving the defendant of a fair trial or resulting in an unwarranted invasion of personal privacy.

Another decision to strike a blow against the public's ability to access law enforcement records was County of Los Angeles v. Los Angeles Superior Court (Kusar), 18 Cal. App.4th 588 (1993), which held that the public's right to access the information specified under Section 6254(f) exists only so long as the request is "current" and "contemporaneous" with the creation of the records. The court failed to define the term "contemporaneous," although it is fairly clear from the opinion that the court believed the public has a right to access information about recent incidents. Whether the term "recent" means one week ago or one month ago is an issue that will have to be litigated in subsequent cases. The decision by the California Court of Appeal, Second Appellate District, was not appealed to the Supreme Court and covers only jurisdictions within the Second Appellate District.

In the wake of the decisions in Williams and Kusar, the public's right to access information contained in investigatory files is very limited and can be summarized as follows: members of the public who meet the criteria for access have a right to any of the information expressly mentioned in section 6254(f)(1) and (2), so long as the request for information is contemporaneous with the events that are the subjects of the request and so long as release of the information would not place a witness or victim in danger or jeopardize the successful completion of the investigation; and information that is confidential under provisions of 6254(f) remains confidential even after the investigation is complete.

Despite these rather severe limitations on the public's right to access information about law enforcement, remember that there are alternative means to the information in many cases, including court records which, in criminal matters, often contain the police and arrest report in the court file. The public's rights to access court records are discussed more fully in Chapter 10.

2. Accident Reports

The California Vehicle Code provides that accident reports are confidential. Under Vehicle Code Section 20012, accident reports taken by the California Highway Patrol or other law enforcement agencies are not subject to access under the CPRA and are available only to drivers or other parties who have a proper interest in the accident (this would include an attorney representing one of the parties), including those who have suffered property damage or face civil liability as a result of the accident.

The statute also classifies as confidential reports that are "supplemental" to the accident report to the extent for example, an arrest was made pursuant to an accident in which the driver was alleged to be driving under the influence, the arrest report would be supplemental to the accident report and therefore confidential. Under the CPRA, however, much of the information contained in the arrest report may be a matter of public

record -- unless it would endanger a witness or victim or jeopardize an investigation. It is unclear how this potential conflict would be resolved if litigated. In practice, though, most law enforcement agencies make accident reports, or the information therein, available to the media.

3. Peace Officer Personnel Records/Citizen Complaints

California Penal Code Section 832.7 on its face appears to exempt from disclosure peace officer personnel records. The statute states that "peace officer personnel records . . . are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1943 and 1046 of the Evidence Code." As interpreted in Bradshaw v. City of Los Angeles, 221 Cal. App.3d 908 (1990), however, the statute applies only to litigation and does not preclude law enforcement agencies from releasing information contained in a peace officer's personnel file.

In Bradshaw, a Los Angeles police officer was accused of misconduct after holding two deputy sheriffs at gun point for 30 minutes. The officer, Bradshaw, was administratively disciplined by the Los Angeles Police Department and then appealed that decision to the Los Angeles Police Commission. The commission concurred with the findings of the department. Afterward, one of the commissioners spoke with a member of the media and disclosed information contained in Bradshaw's personnel file. Bradshaw sued the city, arguing that disclosing any information in his file violated his privacy rights and Section 832.7. The appellate court dismissed the lawsuit, holding that Section 832.7 does not prohibit law enforcement agencies from releasing information contained in a citizen complaint of officer misconduct. Rather, the court said, the statute limits only disclosure of the information in criminal and civil cases. The only information that agencies are prohibited from releasing, the court said, are those specific items set forth in the statute, which include the home telephone number and address of a police officer.

In its analysis, the Bradshaw court said that legislative history indicates that Section 832.7 was enacted to solve the problem of plaintiff "fishing trips." This happened when a plaintiff in a civil case against a police officer would, through discovery, attempt to obtain the officer's personnel file, which might contain evidence of other complaints against the officer, or other information such as psychiatric reports and disciplinary actions.

While the Bradshaw decision makes clear that agencies have the discretion to release information contained in peace officer personnel files, it did not compel it. However, in New York Times Co. v. Superior Court (Thomas), 52 Cal. App. 4th 97 (1997), the California Court of Appeals ruled that names of law enforcement officers who fired shots at a citizen were not privileged or confidential under Section 832.7 and were required to be disclosed to the *Santa Barbara News-Press* which made a CPRA request for the officers' names. In making its finding the court said,

> "*News-Press* is not seeking information relative to citizen complaints against police officers. Nor is it seeking to obtain reports on an internal investigation concerning the misbehavior of a peace officer. Rather it wishes the names of those deputies involved in the shooting. This information may be readily provided by the sheriff without disclosure of any part of the deputies' personnel files. Disclosure, moreover, would reveal no deliberative process of the investigation."

Whether an item of information is subject to disclosure under the CPRA depends on the nature of the information requested and the application of the other exemptions discussed, including Government Code Section 6254(f). Unfortunately, Section 832.7 has been misused by law enforcement agencies over the years to create a cloak of secrecy surrounding citizen complaints of police misconduct. Whenever a member of the general public registers a complaint with a law enforcement agency, that agency is likely to place all related records in the officer's personnel file, thereby prohibiting access to the file. Most law enforcement agencies simply will not release information about officer misconduct. However, if a journalist carefully crafts a request for certain information (instead of the actual personnel file or citizen complaint) the responding agency, pursuant to New York Times (Thomas) and absent the existence of any other applicable exemption, might be compelled to disclose the information.

4. Campus Crime Reports

Education Code Section 67380 sets forth requirements for the disclosure of criminal information and covers community colleges, California State Universities and campuses of the University of California, in addition to any postsecondary institution receiving public funds for student financial assistance. The section requires these schools to compile records of crime that involve violence, hate crimes, theft, destruction of property, illegal drugs or alcohol intoxication. Subject schools are further required to make information about all of the above crimes available within two business days after a request is made by a student, an applicant for admission, school employee or member of the media, unless the information would be exempt under Government Code Section 6254(f).

Recent changes in federal law (20 U.S.C. 1001) now require that schools receiving federal money make the same types of information set forth in Education Code section 67380 available to a requester within two business days after the request is made. Most importantly, under the new federal law, the Family Educational Rights and Privacy Act (FERPA) no longer prohibits the disclosure of the "final results" of disciplinary proceedings involving crimes of violence or nonforcible sex offenses.

C. SPECIFIC EXEMPTIONS

The CPRA enumerates many specific types of records that are exempt from disclosure. Additionally, Section 6254(k) exempts "records the disclosure of which is exempted or

prohibited pursuant to provisions of federal or state law, including, but not limited to provisions of the Evidence Code relating to privilege."

Section 6254(k) embraces hundreds of exemptions found in other California statutes. In breakthrough legislation enacted January 1, 1999, California has indexed all of these exemptions within the provisions of the CPRA itself, thus allowing someone searching for a record to more easily determine if there is an exemption, or, in a more likely scenario, to respond to the denial of a request by showing that there is no applicable exemption (Government Code section 6275). Some of the more common statutory exemptions include:

1. **DMV Records** – Residential address records maintained by the Department of Motor Vehicles were made confidential by legislation passed in 1989. Also exempt from disclosure: records of drug or alcohol-related driving offense convictions more than five years old (Vehicle Code section 1807.5); abstract reports showing blood-alcohol levels of persons convicted of driving under the influence (Vehicle Code section 1804); information in DMV records showing home addresses of legislators, law enforcement officers and other public officials who have requested confidentiality (Vehicle Code section 1808.4); and records of first offenses of drivers sentenced to traffic violator schools (Vehicle Code section 1808.7).

2. **Appraisals** – The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency for property to be purchased by the agency or considered for purchase by the agency (Government Code section 6254[h]).

3. **Certain Tax Information** – "Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of which would result in unfair competitive disadvantage to the person supplying such information" (Government Code section 6254[i]). Also specifically exempt: income tax returns (Revenue and Taxation Code section 19272); Franchise Tax Board settlements with taxpayers providing tax reductions of less than $5,000 (Revenue and Taxation Code section 19133); business information acquired by the Board of Equalization (Revenue and Taxation Code section 15619); and real property ownership statements (Government Code section 27280).

4. **Rap Sheets** – Under Penal Code sections 11075, 11105 and 13300 and related sections, access to state and local rap sheets is restricted to those with an official purpose for using them. Mere unauthorized possession of rap sheets is a crime. However, the fact that you cannot get access to the official "rap sheet" does not mean that you cannot legally determine the criminal record of a subject. Since most court records are open to public inspection, an individual can usually determine whether someone is charged with or convicted of a crime by looking under his or her name in county court records (please see Chapter 10 for a full discussion on judicial records).

The limitation on this type of search is that each county will have records of only those offenses for which the defendant was charged in that county. Sometimes convictions from other counties or states can be accessed by careful review of the documents, since prior convictions may be used to seek enhancement by the prosecution and may be used in probation reports to determine sentencing.

5. **Family Matters** – Adoption records (Civil Code section 227); medical and family information in birth certificates (Health and Safety Code section 10125.5); and welfare records (Welfare and Institutions Code sections 11478, 10850).

6. **Education Records** – K-12 pupil personnel records (Education Code sections 49073-76) [Note, however, that under Education Code section 48918(k) that records of expulsions are non-privileged, disclosable public records]; and college and university student personnel records (Education Code section 67140-47).

7. **State Investigations and Audits** – State lottery security audits (Government Code section 8880.46); information acquired in audits of lobbyists by the Franchise Tax Board (Government Code section 90005); information acquired in investigations of state departments; investigations of improper government activity (Government Code section 8547-8547.12); and inspection reports and deficiency lists compiled by the Department of Health Services concerning health facilities, until verified as received by the facility (Health and Safety Code section 1280).

8. **Crime and Law Enforcement** – Mandated reports of suspected child abuse (Penal Code section 11167.5); insurance company data provided to law enforcement agencies in vehicle theft or insurance fraud investigations (Vehicle Code section 10904); and certain prison records (Penal Code section 2081.5).

9. **Physical and Mental Impairment** – Medical information about patients in records of hospitals, doctors, and other health care providers (Civil Code section 56.10); information submitted to the Department of Health Services in cancer reports from health facilities (Health and Safety Code section 211.3); blood test and other public health records identifying individuals tested for the AIDS virus (Health and Safety Code sections 199.27-42, 1640 and following); patient records of drug abuse or treatment or prevention programs (Health and Safety Code section 11977); and mental health treatment records (Welfare and Institutions Code section 4132, 5328).

10. **Confidential Submissions** – The CPRA also exempts from disclosure many specific records that are "confidential submissions" made to government agencies on the condition that they remain confidential.

PART IV:
PROCEDURAL ASPECTS OF THE CPRA: MAKING A REQUEST AND RESPONDING TO A DENIAL

A. OBLIGATIONS OF GOVERNMENT AGENCIES

When making a request for a record under the CPRA, it is important to identify as specifically as possible the record or records you want to review or copy. This includes citing names, dates, locations or any other information that will assist the government worker in finding the desired record. Government Code Section 6253 provides that when a specific document that is not exempt from disclosure has been requested, the public agency in possession of the record(s) "shall make the records promptly available to any person, upon payment of fees covering direct costs of duplication, or statutory fee, if applicable." If there is a legitimate dispute over whether a record is covered by an exemption, the agency is entitled to take up to 10 working days to either provide the requested record or provide the written grounds for its denial. It is important to remember that the 10-day period is not intended and may not be used to delay access to records. In other words, the CPRA does not give agencies up to 10 days to provide records. If agencies are capable of providing the requested record before the 10-day period expires, the CPRA requires them to do so.

An extension of up to 14 additional days may be granted in the case of "unusual circumstances" when the request is made in writing by the head of the agency. Government Code Section 6253(c) defines "unusual circumstances" as (1) 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; (2) the need to search for, collect and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or (3) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

Remember, if only a portion of the records requested are deemed to be public records, then the agency is required to segregate the exempt from the non-exempt material.

B. REMEDY FOR NONDISCLOSURE

When an agency has failed to provide requested records within the statutory period or if the requester is not satisfied with the agency's proffered justification for non-disclosure, Government Code Section 6259 provides that a petition requesting the records may be filed in the Superior Court of the county of the agency that is the holder of the records. The court will then examine the records in private and determine if the agency was justified in withholding the records. If the judge determines that the records were improperly withheld, he or she must order the agency to disclose the record to the requester and to pay for the requester's court costs and reasonable attorney's fees (Government Code Section 6259).

The prospect of being required to pay costs and fees to the requester is a good deterrent for agencies that continue to improperly withhold records. Even if the records are voluntarily released before a judicial determination that the records are disclosable, the plaintiff is entitled to attorney's fees and court costs, Belth v. Gillespie, 232 Cal. App. 3d 896 (1991). Alternatively, if the court determines that the action filed by the requester is without any legal foundation, the court may – but is not required to – order the plaintiff to reimburse the agency for its costs incurred in the litigation.

If a judge denies a request to make a document public, the requester has the right to seek an immediate rehearing on the merits by an appellate court. This is significant because public agencies could frustrate the purpose of the CPRA if they were allowed to withhold a record while a case was on appeal, a process that often can take years.

C. SUMMARY OF RIGHTS

Under the CPRA, any person (natural, corporate, citizen or otherwise) has the following rights:

1. To inspect (look at, or as the case may be, listen to) any image writing or technologically recorded or stored item 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;

2. To be given access to public records at all times during the normal business hours of the applicable state or local agency; or, to be given legal justification for a decision to withhold any or all of the requested record based on one of the exemptions discussed earlier;

3. To be given access to the requested record(s) or a justification for the refusal without delay; and, in the event of a denial of access, to be promptly "notified of the agency's [decision] and the reasons therefor."

4. To receive promptly a copy of any record not exempt from disclosure upon payment of fees covering direct costs of duplication, or statutory fee, if applicable. If the agency does not have legal justification to withhold the entire record, they have an affirmative duty to segregate the disclosable from the exempt portions of the record and provide the requester with the disclosable portions thereof.

5. To be given a statement of justification for denial of the request no later than 10 days from the date of the request or, in one of three unusual circumstances, within an additional 14 working days. Any extension must be explained to the requester in the form of a written notice setting forth the reason for the delay and the date on which a determination is expected to be dispatched.

6. To challenge any refusal to grant access to, or a copy of, a record by seeking a court order or a declaratory judgment from the superior court, which is required to set pleading deadlines and a hearing on the matter "at the earliest possible time," and to decide the applicability of a proffered exemption by inspecting the record's contents in chambers.

7. To obtain, in the event the superior court determines (or the court of appeal if such review is sought) that an agency improperly withheld records, court costs and reasonable attorneys' fees to be paid by the agency that wrongfully denied access to the records prior to litigation.

PART V:
LEGISLATIVE OPEN RECORDS ACT

There are two branches of government in California whose records are not subject to the CPRA: records of judicial proceedings held by the courts and records of the state Legislature. The rules governing access to judicial records are covered in Chapter 10. Access to records of the California State Senate and Assembly are covered by the Legislative Open Records Act (Government Code Section 9070 and following). While modeled after the CPRA, the Legislative Open Records Act (LORA) gives the legislature more discretion to control the release of records than agencies subject to the CPRA.

A. RECORDS COVERED

The Legislative Open Records Act (LORA) covers "any writing prepared on or after December 2, 1974, which contains information relating to the conduct of the people's business prepared, owned, used or retained by the Legislature," Government Code Section 9072(c). Similar to the CPRA, the word "record" is broadly defined to cover any form of recorded information.

B. INSPECTION PROCEDURES

Similar to the CPRA, any member of the public has the right to inspect records that are public under LORA during the normal office hours of the Legislature. Members of the public also are entitled to a copy of a public record upon request and payment of a fee established by the Legislature to cover the costs "reasonably calculated to reimburse (the Legislature) for its actual cost in making such copies available" (Government Code Section 9073). By statute, the fee cannot exceed 10 cents per page.

Unlike the CPRA, however, members of the public have no right to demand inspection from any Legislative office. Under Government Code Section 9074, the Rules Committee of each house of the Legislature or the Joint Rules Committee is considered to have custody of all legislative records. Any request to inspect or copy a record must, therefore, be made to one of the Rules committees. Once a request is made, the committee is obligated to inform the requester "promptly" whether the record will be released. If the committee decides to deny access, the requester must be given a written justification for

the committee's decision to withhold the record within four working days of the date of the request. If a request is made while the Legislature is not in session, the committee is given up to 10 days to provide a written explanation of any denial.

C. EXEMPTIONS

The following is a list of the records that are specifically exempt from access under LORA:

1. Preliminary drafts, notes or legislative memoranda;

2. Records pertaining to pending litigation to which the Legislature is a party or to claims made against the Legislature until the claim or litigation has been finally adjudicated or settled;

3. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy provided that the Senate Committee on Rules, the Assembly Rules Committee, or the Joint Rules Committee shall determine whether disclosure of such records constitutes an unwarranted invasion of personal privacy;

The phone records of legislators, with the exception of the total charges incurred;

Records of locations at which legislators purchased gasoline, with the exception of the total charges incurred;

Records in the custody of the Legislative Counsel or in the custody of or maintained by the majority and minority caucuses. LORA does provide, however, that records may not be transferred to these places merely to avoid disclosure;

Correspondence to and from members of the Legislature and their staff;

Communications from private citizens to the Legislature; and

Records of complaints to or investigations conducted by the Legislature or relating to security procedures of the Legislature.

Like the CPRA, LORA provides that records also may be withheld when, "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 9074).

D. REMEDIES

A member of the public who believes that he or she has been denied access to records in

violation of LORA has the right to bring an action for injunctive or declarative relief. A court will then examine the requested record privately and determine whether it must be disclosed. An individual who is successful in such a lawsuit is entitled to be reimbursed for court costs and reasonable attorneys' fees. On the other hand, the state is entitled to court costs and reasonable attorneys' fees if the judge who reviewed the record makes the determination that the lawsuit is "clearly frivolous" (Government Code Section 9079).

E. ACCESS TO LEGISLATIVE COMPUTER DATABASE

In addition to LORA, a law passed in 1993 requires the Legislature to make the records of all bill texts, floor and committee votes, analyses and veto messages available through the Internet on a non-proprietary computer network.

PART VI:
THE FEDERAL FREEDOM OF INFORMATION ACT

A. INTRODUCTION

Although a thorough review of the Freedom of Information Act (FOIA) is beyond the scope of this book, there are several reasons why California journalists should familiarize themselves with at least the basic provisions of the Act. First, many if not most newspapers have at least one federal building, facility or installation in their coverage areas (e.g. national parks, military installations). Second, knowledge of how exemptions from FOIA have been interpreted by the federal courts may help dictate how parallel exemptions under the CPRA may be construed.

B. SPECIFIC RIGHTS

FOIA requires all departments of the executive branch of the federal government to provide public access to records that are not specifically exempt from disclosure. Some records which are descriptive of the agency's operating mission and structure, and any changes therein, must be published in the Federal Register (which is also open to inspection under FOIA). Other records, typically tracing the development of the agency's operating rules, procedures and opinions, must be made available for inspection and copying in a public meeting room. Although the agency is allowed to charge a fee for copying charges, it is not required to, so a waiver from such charges should always be requested.

Congress amended FOIA in 1996 to acknowledge the benefits associated with providing public information about the federal government electronically. These FOIA amendments, dubbed EFOIA, direct federal agencies to make public documents created on or after November 1, 1996 available electronically. The documents covered by EFOIA may be accessed in established public reading rooms or, where available, online. Keep in mind that if an exemption applies to a paper document requested under FOIA it will also apply to the electronic version requested under EFOIA.

C. EXEMPTIONS

FOIA has been extensively litigated since its inception in 1966, giving each of the nine exemptions a rich and complex history of judicial interpretation. Congressional amendments and executive orders have further added to the changing face of many of the exemptions. Unlike the CPRA, FOIA has a mere nine exemptions. As they are written, however, these broad exemptions have the ability to cover a portion of or all of a desired record. Each is briefly described below.

1. **National Security and Foreign Policy Classified Data** – Matters that are (a) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and (b) are so classified pursuant to an Executive Order.

2. **Internal Personal Data** – Matters that are related solely to the internal personnel rules and practices of an agency.

3. **Data Exempt From Disclosure Under Other Statutes** – Matters that are specifically exempted from disclosure by federal statute, provided that such statute (a) requires that the matters be withheld from the public in such a manner as to leave no discretion to the agency on the issue; or (b) establishes particular types of matters to be withheld.

4. **Confidential Proprietary Data** – Matters that are trade secrets, and commercial or financial information obtained from a person that are privileged or confidential.

5. **Non-Discoverable Agency Paperwork** – Matters that are inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than someone in litigation with the agency.

6. **Personal Privacy Data** – Matters that are personnel and medical files, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

7. **Investigatory/Law Enforcement Records** – Matters that are investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would: (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, disclose confidential information furnished only by the confidential

source; (e) disclose investigative techniques and procedures; or (f) endanger the life or physical safety of law enforcement personnel.

8. **Financial Regulation Records** – Matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

1. **Geological and Geophysical Data** – Matters that are geological and geophysical information and data, including maps concerning wells.

1. Although it is impossible to go into detail in discussing any of these exemptions, there is one case decided by the United States Supreme Court that is worth mentioning. In that case, United States Department of Justice, et al. v. Reporters Committee For Freedom of the Press et al., 489 U.S. 749 (1989), the high court denied a media request for a "rap sheet" of a reputed mobster. The court not only concluded that release of the information would invade the subject's privacy rights, it also stated that releasing the information would not shed light on the workings of government which, the court said, was the purpose of FOIA.

D. HOW TO REQUEST ACCESS TO FEDERAL RECORDS

If you are uncertain about the specific kind of information that is held by a particular agency, you can begin your search with the United States Government Manual, which prints a list of all federal agencies, describes their functions and includes local or regional addresses and telephone numbers. Most main branch libraries will have a copy, or one can be obtained from the U.S. Government Printing Office in Washington, D.C. 20402. Their web site can be contacted at www.access.gpo.gov. The Federal Information Center also can be of assistance.

The next step is to determine the nature of the information you are seeking as precisely as possible. Determine the name of the agency and, if the agency has one, the name of the freedom of information officer. If you have any difficulties, keep track of all the people you have dealt with and send a formal written request for the record(s). The Appendix contains a model letter which can be modified depending on the nature of your request.

Within 10 days of receipt of your letter, the agency is required to provide you with a written response. If the agency is denying all or part of your request, it must cite the specific basis for the denial of each record that is withheld and inform you of your appeal rights. If you wish to carry the matter further, see the sample FOIA Appeal Letter in Appendix H.

CHAPTER 2 CITATIONS

1. ACLU v. Deukmejian: 32 Cal.3d 440, 184 Cal.Rptr. 840 (1982)

2. Belth v. Gillespie: 232 Cal.App.3d 896, 283 Cal.Rptr. 829, 19 Media L. Rep. 1250 (1991)

3. Bradshaw v. City of Los Angeles: 221 Cal.App.3d 908, 270 Cal.Rptr. 711 (1990)

4. CBS v. Block: 42 Cal.3d 646, 725 P.2d 470, 230 Cal.Rptr. 362 (1986)

5. Citizens for a Better Environment v. Department of Food and Agriculture: 171 Cal.App.3d 704, 217 Cal.Rptr. 504 (1985)

6. County of Los Angeles v. Los Angeles Superior Court (Kusar): 18 Cal.App.4th 588, 22 Cal.Rptr.2d 409 (1993)

7. Eskaton Monterey Hospital v. Myers: 134 Cal.App.3d 788, 184 Cal.Rptr. 840 (1982)

8. Fairley v. Superior Court of Los Angeles County: 66 Cal.App.4th 1414, 78 Cal.Rptr.2d 648, 67 Cal.App.4th 730A (1998)

9. Johnson v. Winter: 127 Cal.App.3d 435, 179 Cal.Rptr. 585 (1982)

10. New York Times Co. v. Goleta Water District: 218 Cal.App.3d 1579, 268 Cal.Rptr. 21, 17 Media L. Rep. 1773 (1990)

11. New York Times Co. v. Superior Court (Thomas): 52 Cal.App.4th 97, 60 Cal.Rptr.2d 410, 25 Media L. Rep. 1668 (1997)

12. North County Parents Organization v. California Department of Education: 23 Cal.App.4th 144, 28 Cal.Rptr.2d 359 (1994)

13. Poway Unified School District v. Superior Court of San Diego County: 62 Cal.App.4th 1496, 73 Cal.Rptr.2d 777, 26 Media L. Rep. 1943 (1998)

14. Powers v. City of Richmond: 33 Cal.App.4th 1347, 28 Cal.Rptr.2d 814 (1994)

15. Register Division of Freedom Newspapers v. County of Orange: 158 Cal.App.3d 893, 205 Cal.Rptr. 92 (1984)

16. Roberts v. City of Palmdale: 5 Cal.4th 363, 853 P.2d 496, 20 Cal.Rptr.2d 330 (1993)

17. Rogers v. Superior Court: 19 Cal.App.4th 469, 23 Cal.Rptr.2d 412, 21 Media L. Rep. 2234 (1983)

18. Times Mirror Co. v. Superior Court: 53 Cal.3d 1325, 813 P.2d 240, 283 Cal.Rptr. 893 (1991)

19. United Reporting Publishing Corp. v. Los Angeles Police Department: 146 F.3d 1133, 26 Media L. Rep. 1915 (1998)

20. United States Department of Justice, et al. v. Reporters Committee For Freedom of the Press et al.: 489 U.S.749, 109 S.Ct.1468, 103 L.Ed.2d 774, 16 Media L. Rep. 1545 (1989)

21. Uribe v. Howie: 19 Cal.App.3d 194, 96 Cal.Rptr. 493 (1971)

22. Williams v. Superior Court: 5 Cal.4th 337, 852 P.2d 377, 19 Cal.Rptr.2d 882, 21 Media L. Rep. 1929 (1993)

CHAPTER 2 CITATIONS

Statutes

1. California Public Records Act, Government Code Section 6250 et seq.: CA GOVT. s 6250, West's Ann.Cal.Gov.Code §6250

2. California Government Code Section 6252: CA GOVT. s 6252, West's Ann.Cal.Gov.Code §6252

3. California Government Code Section 6255: CA GOVT. s 6255, West's Ann.Cal.Gov.Code §6255

4. California Government Code Section 6257: CA GOVT. s 6257, West's Ann.Cal.Gov.Code §6257

5. California Government Code Section 6253: CA GOVT. s 6253, West's Ann.Cal.Gov.Code §6253

6. California Government Code Section 6252(d).: CA GOVT. s 6253(d), West's Ann.Cal.Gov.Code §6252(d)

7. California Government Code Section 6253(d): CA GOVT. s 6253(d), West's Ann.Cal.Gov.Code §6253(d)

8. California Government Code Section 6254: CA GOVT. s 6254, West's Ann.Cal.Gov.Code §6254

9. California Government Code Section 6275: CA GOVT. s 6257, West's Ann.Cal.Gov.Code §6275

10. California Government Code Section 6254c: CA GOVT. s 6254, West's Ann.Cal.Gov.Code §6254c

11. California Government Code Section 6254.8: CA GOVT. s 6254.8, West's Ann.Cal.Gov.Code §6254.8

12. California Government Code Section 6254(a): CA GOVT. s 6254(a), West's Ann.Cal.Gov.Code §6254(a)

13. California Government Code Section 6254(b): CA GOVT. s 6254(b), West's Ann.Cal.Gov.Code §6254(b)

14. California Government Code Section 6243(b): CA GOVT. s 6243(b), West's Ann.Cal.Gov.Code §6243(b)

15. California Government Code Section 6255: CA GOVT. s 6255, West's Ann.Cal.Gov.Code §6255

16. California Government Code Section 6254(f): CA GOVT. s 6254(f), West's Ann.Cal.Gov.Code §6254(f)

17. California Government Code Section 6254(f)(3): CA GOVT. s 6254(f)(3), West's Ann.Cal.Gov.Code §6254(f)(3)

18. California Government Code Section 6254(f)(1): CA GOVT. s 6254(f)(1), West's Ann.Cal.Gov.Code §6254(f)(1)

19. California Government Code Section 6254(f)(2): CA GOVT. s 6254(f)(2), West's Ann.Cal.Gov.Code §6254(f)(2)

20. California Vehicle Code Section 20012: CA VEHICLE s 20012, West's Ann.Cal.Vehicle Code §20012

21. California Penal Code Section 832.7: CA PENAL s 832.7, West's Ann.Cal.Penal Code §832.7

22. California Education Code Section 67380: CA EDUC s 67380, West's Ann.Cal.Educ.Code §67380

23. 20 U.S.C. 1001: 20 U.S.C. §1001

24. California Government Code Section 6254(k): CA GOVT. s 6254(k), West's Ann.Cal.Gov.Code §6254(k)

25. California Vehicle Code Section 1807.5, 1804, 1808.7: CA VEHICLE ss 1807.5, 1804, 1808.7, West's Ann.Cal.Vehicle Code §§1807.5, 1804, 1808.7

26. California Government Code Section 6254(h): CA GOVT. s 6254(h), West's Ann.Cal.Gov.Code §6254(h)

27. California Government Code Section 6254(I): CA GOVT. s 6254(I), West's Ann.Cal.Gov.Code §6254(I)

28. California Revenue & Taxation Code Sections 19272, 19133, 15619: CA REV & TAX ss 19272, 19133,15619, West's Ann.Cal.Rev. & T.Code §§19272, 19133, 15619.

29. California Government Code Section 27280: CA GOVT. s 27280, West's Ann.Cal.Gov.Code §27280

30. California Penal Code Sections 11075, 11105, 13300: CA PENAL ss 11075, 11105, 13300, West's Ann.Cal.Penal Code §§11075, 11105, 13300.

31. California Civil Code Section 227: CA CIVIL s 227, West's Ann.Cal.Civ.Code §227

32. California Health & Safety Code Section 10125.5: CA HLTH & S s 10125.5, West's Ann.Cal.Health & Safety Code §10125.5

33. California Welfare & Institutions Code Sections 11478, 10850: CA WEL & INST ss 11478, 10850, West's Ann.Cal.Welf. & Inst.Code §§11478, 10850

34. California Education Code Sections 49073-76: CA EDUC ss 49073-76, West's Ann.Cal.Educ.Code §§49073-76

35. California Education Code Sections 67140-47: CA EDUC ss 67140-47, West's Ann.Cal.Educ.Code §§67140-47

36. California Government Code Section 8880.26: CA GOVT. s 8880.26, West's Ann.Cal.Gov.Code §8880.26

37. California Government Code Section 90005: CA GOVT. s 90005, West's Ann.Cal.Gov.Code §90005

38. California Government Code Sections 8547-8547.12: CA GOVT. ss 8547-8547.12, West's Ann.Cal.Gov.Code §§8547 - 8547.12

39. California Health & Safety Code Section 1280: CA HLTH & S s 1280, West's Ann.Cal.Health & Safety Code §1280

40. California Penal Code Section 11167.5: CA PENAL s 11167.5, West's Ann.Cal.Penal Code §11167.5

41. California Vehicle Code Section 10904: CA VEHICLE s 10904, West's Ann.Cal.Vehicle Code §10904

42. California Penal Code Section 2081.5: CA PENAL s 2081.5, West's Ann.Cal.Penal Code §2081.5

43. California Civil Code Section 56.10: CA CIVIL s 56.10, West's Ann.Cal.Civ.Code §56.10

44. California Health & Safety Code Section 211.3: CA HLTH & S s 211.3, West's Ann.Cal.Health & Safety Code §211.3

45. California Health & Safety Code Section 11977: CA HLTH & S s 11977, West's Ann.Cal.Health & Safety Code §11977

46. California Welfare & Institutions Code Section 4132, 5328: CA WEL & INST ss 4132, 5328, West's Ann.Cal.Welf.& Inst.Code §§4132, 5328

47. California Government Code Section 6253(c): CA GOVT. s 6253(c), West's Ann.Cal.Gov.Code §6253(c)

48. California Government Code Section 6259: CA GOVT. s 6259, West's Ann.Cal.Gov.Code §6259

49. California Government Code Section 9070 and following: CA GOVT. s 9070 et seq., West's Ann.Cal.Gov.Code §9070 et seq.

50. California Government Code Section 9073: CA GOVT. s 9073, West's Ann.Cal.Gov.Code §9073

51. California Government Code Section 9074: CA GOVT. s 9074, West's Ann.Cal.Gov.Code §9074

52. California Government Code Section 9079: CA GOVT. s 9079, West's Ann.Cal.Gov.Code §9079

53. Freedom of Information Act (FOIA): 5 U.S.C.A. §552

Cases

1. Powers v. City of Richmond: 28 Cal.Rptr.2d 814 (1994)

2. North County Parents Organization v. California Department of Education: 23 Cal.App.4th 144, 28 Cal.Rptr.2d 359, 89 Ed. Law Rep. 542 (1994)

3. Citizens for a Better Environment v. Department of Food and Agriculture: 171 Cal.App.3d 704, 217 Cal.Rptr. 504 (1985)

4. Fairley v. Superior Court of Los Angeles County: 66 Cal.App.4th 1414, 78 Cal.Rptr.2d 648, 67 Cal.App.4th 730A, 98 Cal. Daily Op. Serv. 7564, 98 Daily Journal D.A.R. 10,462, 98 Daily Journal D.A.R. 10,918 (1998)

5. Poway Unified School District v. Superior Court of San Diego County: 62 Cal.App.4th 1496, 73 Cal.Rptr.2d 777, 125 Ed. Law Rep. 165, 26 Media L. Rep. 1943, 98 Cal. Daily Op. Serv. 2736, 98 Daily Journal D.A.R. 3738 (1998)

6. Roberts v. City of Palmdale: 5 Cal.4th 363, 853 P.2d 496, 20 Cal.Rptr.2d 330 (1993)

7. Register Division of Freedom Newspapers v. County of Orange: 158 Cal.App.3d 893, 205 Cal.Rptr. 92 (1984)

8. Times Mirror Co. v. Superior Court: 53 Cal.3d 1325, 813 P.2d 240, 283 Cal.Rptr. 893 (1991)

9. Rogers v. Superior Court: 19 Cal.App.4th 469, 23 Cal.Rptr.2d 412, 21 Media L. Rep. 2234 (1983)

10. Uribe v. Howie: 19 Cal.App.3d 194, 96 Cal.Rptr. 493 (1971)

11. Johnson v. Winter: 127 Cal.App.3d 435, 179 Cal.Rptr. 585 (1982)

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14. CBS v. Block: 42 Cal.3d 646, 725 P.2d 470, 230 Cal.Rptr. 362 (1986)

15. New York Times Co. v. Goleta Water District: 218 Cal.App.3d 1579, 268 Cal.Rptr. 21, 17 Media L. Rep. 1773 (1990)

16. United Reporting Publishing Corp. v. Los Angeles Police Department: 146 F.3d 1133, 26 Media L. Rep. 1915, 98 Cal. Daily Op. Serv. 4948, 98 Daily Journal D.A.R. 7073 (1998) [see notes below]

17. Williams v. Superior Court: 5 Cal.4th 337, 852 P.2d 377, 19 Cal.Rptr.2d 882, 21 Media L. Rep. 1929 (1993)

18. County of Los Angeles v. Los Angeles Superior Court (Kusar): 18 Cal.App.4th 588, 22 Cal.Rptr.2d 409 (1993)

19. Bradshaw v. City of Los Angeles: 221 Cal.App.3d 908, 270 Cal.Rptr. 711 (1990)

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22. United States Department of Justice, et al.v. Reporters Committee For Freedom of the Press et al.: 489 U.S.749, 109 S.Ct.1468, 103 L.Ed.2d 774, 57 USLW 4373, 16 Media L. Rep. 1545 (1989)

Other

1. 68 Ops. Cal. Atty. Gen. 73, 2985, 1985 WL 167464 (Cal.A.G.) (1985)

Notes

1. the United Reporting Publishing case is currently under review by the US Supreme Court. The following is the WESTLAW cite for the pending cert and related materials. 199 S.Ct 901, 67 USLW 3302, 67 USLW 3342, 67 USLW 3464, 67 USLW 3468

2. The Bradshaw v. City of Los Angeles case has been criticized several times, but has not been overturned and except this criticism it appears to be good law.

3. In the text on the next to last page, there is a cite to Reporters Committee of Freedom of Information v. U.S.. I believe the case name is inaccurate. From the description of the case, I believe the correct case name is United States Department of Justice v. Reporters Committee For Freedom of the Press. Cite for the case I found is listed above.

THE CALIFORNIA JOURNALIST'S

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■

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Access to Public Information

The California Public Records Act
Purpose, Scope and Definitions

Why the Act Exists
The purpose of the California Public Records Act is to help the public understand how the government is performing its functions. As stated in its preamble (Government Code §6250), the law was enacted because "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."

The Act Applies to "Public Records"

Public
In the term "public records," "public" refers to material held by agencies of California's state and local governments, as stated in subdivision (d) of §6252, and as further elaborated in subdivisions (a) and (b):

> *(d) "Public records" 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.*
>
> *(a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.*
>
> *(b) "Local agency" includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or nonprofit organizations of local governmental agencies and officials which are supported solely by public funds.*

Points Worth Noting
- *Executive Branch Agencies* At the state level, the Public Records Act only covers executive branch records, not those of the legislature (Article IV) or the courts (Article VI), whose records are subject to different access rules — the Legislative Open Records Act on the one hand, and principles of common law and constitutional law on the other.

- *Local Agencies* On the local level, all government agencies but courts are covered — essentially the same field governed by the Ralph M. Brown Act with respect to meetings. The California Supreme Court has held that county grand juries,

although not strictly speaking "provided for" in Article VI of the California Constitution, are essentially agencies of the courts and therefore exempt from the Act.
— *McClatchy Newspapers v. Superior Court*, 44 Cal. 3d 1162 (1988)

- *Certain Publicly Funded Nonprofits* Also included would be an association of local officials or agencies, but only if all its funding came from governmental sources.

- *Federal Agencies* The Public Records Act reaches only California agencies. Federal agencies (again, executive branch only) are subject to the Freedom of Information Act (Title 5 U.S.C. 552 et seq.).

Records

The "records" element of "public records" is comprehensive. It refers to any "writing" concerning the public's business, and in subdivision (e) of §6252:

> *"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.*

Points Worth Noting

- *No Narrower Meaning* Agencies cannot escape the mandates of the Act by claiming that their records do not meet some more specialized definition of "public records" elsewhere in the law, so long as they fall within the broad definitions in §6252.
— *Cook v. Craig*, 55 Cal. App. 3d 773 (California Court of Appeal, 3d Dist. 1976)

- *Mandated or Discretionary* The Act applies to records whether they are legally required to be created and maintained, or whether they are a matter of the agency's own discretion and convenience — unless a statute specifically provides that only records required to be kept need be made accessible, for example with respect to county assessor's records.
— *Statewide Homeowners, Inc. v. Williams*, 30 Cal. App. 3d 567 (California Court of Appeal, 4th Dist. 1973)

- *Term of Art* "Writings" encompasses more than the medium of words. It includes everything which is fixed and reproducible enough to be preserved and communicated in some manner — verbal or nonverbal, qualitative or quantitative information, mediated by any technology.

Who Has Rights under the Act

Government Code §6252. As used in this chapter:

(c) "Person" includes any natural person, corporation, partnership, limited liability company, firm, or association.

(f) "Member of the public" means 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.

Points Worth Noting

- *Entitled Class* The universe of those with rights of access under the Public Records Act is not limited to living individuals. Under subdivision (c), any private organization with a legal personality — capable of suing and being sued — is also an entitled "person."

- *Citizenship not an Issue* Natural persons or corporations who are citizens of other states are entitled to use the Act.
  — *Connell v. Superior Court*, 56 Cal.App.4th 601 (3d Dist. 1997)

Agency Policies and Guidelines

Any public agency is free to adopt its own regulations and guidelines, consistent with and not reducing access under the Act. It is even free to allow access beyond the requirements of the Act, unless the disclosure is prohibited by some other law. Some state and regional agencies are required to have written access guidelines and to provide free copies of them on request.

Government Code §6253.

(a) . . . Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section. The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of these bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting that body's records:

Department of Motor Vehicles
Department of Transportation
Department of Corrections
Department of Justice
Department of Corporations
State Air Resources Board
Department of Parks and Recreation
State Board of Equalization
State Department of Health Services
State Department of Social Services
State Department of Developmental Services
Office of Statewide Health Planning and Development
Teachers' Retirement Board
Department of General Services
Public Utilities Commission
State Water Quality Control Board
All regional water quality control boards
Bay Area Air Pollution Control District
Golden Gate Bridge, Highway and Transportation District.
Department of Consumer Affairs
Department of Real Estate
Department of the Youth Authority
Department of Insurance
Secretary of State
Department of Water Resources
San Francisco Bay Conservation and Development Commission
Employment Development Department
State Department of Mental Health
State Department of Alcohol and Drug Abuse
Public Employees' Retirement System
Department of Industrial Relations
Department of Veterans Affairs
California Coastal Commission
San Francisco Bay Area Rapid Transit District
Los Angeles County Air Pollution Control District

(b) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. The guidelines and regulations adopted pursuant to this section shall not operate to limit the hours public records are open for inspection as prescribed in subdivision (a).

Government Code §6253.1. Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in this chapter.

Point Worth Noting

- *Greater Access Allowed* Section 6253.1 is probably the only provision of the Act that never gets cited by a government agency as authority for its policy. That section authorizes a reduction of secrecy. It means that unless some particular law clearly mandates a restriction on access, an agency is free to accommodate the public and in effect waive a discretionary exemption. The principal mechanism for this accommodation is found in the variety of local "Sunshine Ordinances" which cities and counties have begun to adopt with the encouragement of the California First Amendment Coalition. For more information, contact CFAC at (916) 974-8888.

Inspection of Public Records

The Public Records Act provides two rights to the public: to inspect public records and to obtain copies of them. The right to inspect is presumed; that is, a record is open to inspection unless some exception or exemption, spelled out or referenced within the Act, provides to the contrary. The records are open during normal office hours, and arbitrary or unnecessary delay in allowing inspection is not permitted.

Government Code §6253. (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 hereafter provided . . .

Government Code §6256.2. Nothing in this chapter shall be construed to permit an agency to delay access for purposes of inspecting public records . . .

Points Worth Noting

- *The "Rule of Reason"* The inspection right is not an inflexible demand on the agency irrespective of the consequences; it does not require, for example, that the agency's staff work on a document be suspended while a citizen peruses its contents. The California Supreme Court has concluded that such rights

> *are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable 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 record archives.*
>
> — *Bruce v. Gregory*, 65 Cal. 2d 666 (1967)

- *Computer Data* The Act clearly covers electronically stored information, and addresses the question of obtaining copies of computer data (see below). However, it is silent on how simple inspection of such information must be accommodated.

The "rule of reason" requires, however, that a requester must be given some means of reviewing (short of copying) at least those computer records that do not have confidential information in them.

Denial of Access Must Be Justified

An agency may not deny access by simply asserting that "It's not our policy." It must back its denial by citing some exception or exemption in the Act or elsewhere under state or federal law, or by demonstrating that, on balance, there is a predominant public interest in nondisclosure. The decisionmaker(s) responsible for denying access must be named in the denial notice.

Government Code §6255. 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 making the record public clearly outweighs the public interest served by disclosure of the record.

Government Code §6256.2 . . . Any notification of denial of any request for records shall set forth the names and titles or positions of each person responsible for the denial.

Points Worth Noting

- *Deadline for Response* As noted below, an agency has a 10-day deadline to process or consider a request for a copy of a record. Whether that is the deadline for responding to a simple inspection request is not clear and has not been addressed by a court. Combining the "rule of reason" and the no-delay rule in §6256.2, however, it seems clear that if an agency has a standing rule or readily determinable position affecting access to the record in question, it should let the requester know as soon as possible and not artificially prolong the process.

- *Balancing Test* The cases in which the §6255 "balancing test" has been held applicable to specific facts are noted beginning on page 126. While it may seem tempting for an agency to assert this *public interest* basis for denying access, courts are generally reluctant to recognize it unless there is a recognized public policy which supports withholding the information, or where the predicted ill effects of disclosure are speculative. But in some cases agencies have an incentive to assert the balancing test if failing to do so would result in the release of information injurious to someone's reputation. One case holds that an agency which fails to resolve doubts in favor of nondisclosure (by using §6255's balancing test, for example) may not be able to claim the absolute privilege accorded officials performing a duty if it is sued for releasing libelous material (*Neary v. Regents of the University of California*, 185 Cal. App. 3d 1136 (California Court of Appeal, 3d Dist. 1986)). A balancing test denial does not necessarily mean that an agency believes the public interest would be better served by nondisclosure. It may instead simply reflect the reluctance of the agency to face a possible defamation or invasion of privacy suit without the benefit of the absolute privilege.

Obtaining Copies

The Public Records Act addresses various issues regarding obtaining copies of nonexempt records: the form for producing computerized information; the fees chargeable for copies; the agency's duty to delete exempt information so that the public portion may be copied for release; and deadlines for responding to copy requests.

The Basic Rules

Government Code §6256. Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency . . .

Government Code §6257. Except with respect to public records exempt by express provisions of law from disclosure, each state or local agency, upon any request for a copy of records, which reasonably describes an identifiable record, or information produced therefrom, shall make the records promptly available to any person, upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law.

Government Code §6256. . . . Each agency, upon any request for a copy of records shall determine within 10 days after the receipt of such request whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefore.

Government Code §6256.1. In unusual circumstances, as specified in this section, the time limit prescribed in Section 6256 may be extended by written notice by the head of the agency 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 such notice shall specify a date that would result in an extension for more than 10 working days.

As used in this section "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request:

(a) 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.

(b) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.

(c) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

Points Worth Noting

- *Computer Data* No appellate court has examined the degree of discretion accorded by the statement that "Computer data shall be provided in a form determined by the agency." Specifically, it has not been decided whether an agency may arbitrarily decline to provide a disk or tape version of a computer record when it is readily capable of doing so and when the requester is prepared to pay duplication costs and/or supply the media for transfer of the data. Nor has an appellate court considered whether a public agency complies with the Act by providing bulk paper

printouts containing a large volume of information which the agency could have readily extracted by its own computer report-formatting capabilities, thus forcing the requester to manually sift to obtain the desired information. The latter scenario occurred in Alameda County when a superior court judge found compliance with the law in a case which was never resolved on the merits on appeal, because appeal was held to be a right unavailable under the Act (*Powers v. City of Richmond*, 10 Cal. 4th 85 (California Supreme Court, 1995)). It seems more likely, however, that the provision in question, which dates from 1970, was intended as no more than a protection for public agencies against what at that time might have seemed daunting demands for special reprogramming or other unusual computer access accommodations that would have placed an unusual burden on relatively inflexible governmental data processing systems.

- *"Identifiable Record"* The Act allows access to copies of records held by the government; it does not compel assembling or creating new records from disparate sources of information; nor does it compel writing a report to suit the requester's research specifications. Neither does it create the right, in effect, to a wholesale "subscription" to future records in a foreseeable series; the requester may be compelled to await the creation of identifiable records and then ask for copies. A request for records may be very large; however, it must be made with reasonable specificity; requests that are both very large and very general need not be honored.
  — *Rosenthal v. Hansen*, 34 Cal. App. 3d 754 (California Court of Appeal, 3d Dist. 1973)

- *Court-ordered List* Nothing in the Public Records Act requires an agency to create a list describing the records within the field of a sizable request. However, if doing so will help the requester narrow his request and thus reduce the production burden on the agency, particularly when the requester is willing to pay the cost for preparing such a list or index, it is not an abuse of discretion for a court to order its preparation.
  —*State Board of Equalization v. Superior Court (Associated Tax Consultants, Inc.)*, 10 Cal.App. 4th 1177 (California Court of Appeal, 3d Dist. 1992)

- *Segregation of Exempt Information* When a record contains information that is exempt from disclosure but otherwise public in character, it is the agency's duty to delete the former and produce the latter unless the exempt and nonexempt information are so interwoven as not to be "reasonably segregable." The agency's segregation and deletion burden may be considerable; the California Supreme Court held that if the result would be to leave the requester with little of the specific information sought, a costly segregation and deletion prospect may be the basis for denial altogether. The result is different, however, if the only deletion process required to make information disclosable involves the removal of personal identifiers, for example to protect individuals' privacy; in such cases extensive editing alone is not a basis for denial. (*ACLU v. Deukmejian*, 32 Cal. 3d 440 (1982)). For example, a taxing authority with an extensive body of specific rulings on particular taxpayer cases may not refuse to provide the records on the basis that masking

the identifiers will be a lengthy and costly process — especially where the requester is willing to pay the cost of the masking by a specially hired force of review attorneys.

—*State Board of Equalization v. Superior Court (Associated Tax Consultants, Inc.)*, 10 Cal.App. 4th 1177 (California Court of Appeal, 3d Dist. 1992)

- *"Statutory Fee"* This phrase refers to a specific monetary amount set by the Legislature or to a fee established by the agency under an act of the Legislature — a state statute — which expressly delegates to the agency the fee-setting function. An example is the DMV director's authority under Vehicle Code §1811 to set fees for various types of records. (*Shippen v. Department of Motor Vehicles*, 161 Cal. App. 3d 1119 (California Court of Appeal, 3d Dist. 1984)). While some local agencies contend that "statutory fee" permits any charge so long as it is formally established in an ordinance, the Act does not use "statute" and "ordinance" interchangeably. In the three other provisions in which "statute" is used, two of them clearly refer to state or federal legislation (§6254.5 (c) and §6254.6), and in the third instance "statute" and "ordinance" clearly do not refer to the same thing:

  > *Government Code §6254.7. . . .(c) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations . . . are public records.*

  If the Legislature meant to allow "fee[s] set by ordinance" it could have easily said so, although that language would have left the proliferation of high charges for public records access essentially unchecked.

- *"Direct Costs of Duplication"* means "the cost of running the copying machine, and conceivably also the expense of the person operating it. 'Direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." So ruled the Fourth District, California Court of Appeal in 1994, disapproving a 25 cent per page fee which reflected not only copying but "staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information." (*North County Parents Organization for Children with Special Needs v. Department of Education*, 23 Cal. App. 4th 144). A point supporting this view is that the fee charging under the Act attaches to copying — there is no fee-charging authority provided in the sections dealing with mere record inspections. To produce a record for inspection, the agency must expend every effort — search, retrieval, review, masking confidential information, replacement — except for copying itself. If these costs were meant to be motivated by a fee, there would need to be authority to charge a fee for inspection even when no copy was requested.

- *E-mail Transmission Fees* Government Code §11104.5, effective in 1998, allows public agencies to charge a "direct costs" fee for transmitting public records to the requester via electronic mail:

> (a) Notwithstanding any other provision of law, any requirement that a state agency send material, information, notices, correspondence, or other communication through the United States mail shall be deemed to include the authority for the state agency to send that material, information, notice, correspondence, or other communication by electronic mail upon the request of the recipient, unless impracticable to do so, or unless contrary to state or federal law.
>
> (b) Any state agency may require that direct costs incurred by the agency involving the electronic transmission of information be paid by the requester pursuant to this section and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1).
>
> (c) Nothing in this section shall be construed to permit an agency to act in a manner inconsistent with the standards adopted pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1) and the Information Practices Act of 1977 (Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of Division 3 of the Civil Code).

- *Fees and Police Reports* Some local law enforcement agencies charge high fees, well beyond the actual cost of duplication, for copies of such documents as accident and crime reports. These agencies apparently believe that since they need not produce copies of these records for general members of the public, but only for persons with a direct interest in the accident or crime (for insurance or litigation purposes), the records are therefore not "public records" subject to the fee-setting restrictions in the Act. In the Act's early days, the CHP took this position regarding its accident reports, The Second District, California Court of Appeal rejected this view in *Vallejos v. California Highway Patrol*, 89 Cal. App. 3d 781 (1979). If the agency provides copies of its records, either to the general public or to a special class of persons with defined access rights not generally available, then the Act's fee limitations apply.

- *Waiver of Fee* Although agencies rarely reduce or waive fees, they may do so, as part of their general authority to adopt regulations providing greater access to information than the minimum standards in the Act. (*North County Parents of Children with Special Needs v. Department of Education*, 23 Cal. App. 4th 144 (California Court of Appeal, 4th Dist. 1994)).

Exemptions in General

Exemptions Are Discretionary

Although agencies commonly treat Act disclosure exemptions as if they prohibit disclosure, the fact remains that these exemptions are discretionary; the agency may withhold information, but is not required to. The agency is free to allow more extensive access unless the contrary is clearly expressed.

Government Code §6254. Except as provided in §6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following: . . . 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.

Disclosure to the Public Waives Exemptions

If an agency discloses a record to a "member of the public" — a person with no official role or special legal entitlement to obtain it — then it cannot withhold the record from other members of the public based on a permissive exemption. The agency may change its general policy and take a more restrictive line concerning a certain type of document, but a particular record cannot selectively be made accessible to some citizens and not to others.

Government Code §6252. As used in this chapter: . . . (f) "Member of the public" means 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.

Government Code §6254.5. 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.

This section, however, shall not apply to disclosures:

(a) Made pursuant to the Information Practices Act (commencing with Section 1798 of the Civil Code) or discovery proceedings.

(b) Made through other legal proceedings.

(c) Within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes.

(d) Not required by law, and prohibited by formal action of an elected legislative body of the local agency which retains the writings.

(e) Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.

(f) Of records relating to a financial institution or an affiliate thereof, if the disclosures are made to the financial institution or affiliate by a state agency responsible for the regulation or supervision of the financial institution or affiliate.

(g) Of records relating to any person that is subject to the jurisdiction of the Department of Corporations, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Corporations.

(h) Made by the Commissioner of Financial Institutions under Section 1909, 8009, or 18396 of the Financial Code.

Points Worth Noting

The Trump Card The rule prohibiting selective disclosure can be an information requester's trump card. If this situation arises, the information is accessible no matter how plausible the agency's excuse for withholding it. But in order to use this rule, the requester must be prepared to establish that the information sought was in fact provided to some "member of the public," under circumstances where none of the waiver rule exceptions apply, namely:

- *Special Legal Access* If the other public citizen got the information through the exercise of special legal rights, then the disclosure was not within the agency's discretion: it was compelled, and thus does not amount to a waiver of its right to say "no" to others seeking the same information. For example:

    1. The Information Practices Act gives individuals the right to obtain information which a state agency has compiled about them, in order that they may protect their privacy interests and insure that the information is not erroneous. The fact that the agency provides them with this information does not preclude it from thereafter asserting the personal privacy exemption when others ask for the information.

    2. A person suing a government agency may use discovery rules to demand documents which the agency would not have otherwise released. Providing these records to the plaintiff does not impair the agency's ability to deny access to others.

    3. A parent of a public school pupil can demand to see the educational institution's files concerning his or her child's academic performance, disciplinary status or other "pupil personnel" records. While the school must accommodate such a demand, in doing so it does not waive its ability to deny such access to others.

- *Limited Legal Purposes* Some general nondisclosure laws list specific parties to whom the information may or must be disclosed. For example, information compiled by a government agency about a person's criminal history is generally confidential, but can be released to specific recipients for closely defined purposes, including but not limited to those who employ people who supervise children and need to be aware of their applicants' criminal background. The disclosure of criminal history information to a prospective employer in this scenario does not impair the agency's ability to deny access to others.

- *Prohibited Leaks* If a public agency or one of its employees slips a copy of a record to one person, its ability to deny access to others is generally waived. But not so if (1) the record is maintained by a local agency, and (2) disclosure of that type of record has been formally prohibited by the agency's elected (governing) body. This will rarely be the case, however, typically if the requester can estab-

lish a leak to someone else, the agency will be deemed to have waived its discretion to deny access.

- *Intergovernmental Exchanges* An agency does not waive its restriction rights in sharing a confidential record with another government agency, providing that the confidential treatment is transferred, in that access within the recipient agency is restricted to those with a written authorization from the agency head, and the recipient agency's uses of the information are consistent with the law creating the confidentiality in the first instance.

- *Regulatory Disclosures* State agencies regulating banks, savings and loans, credit unions and corporations sometimes disclose to the regulated parties certain generally restricted information which it has accumulated about their operations. This limited information sharing does not represent a waiver. Other agencies, however, are still subject to the general rule. If they share "confidential" information with the persons or businesses they are regulating, no matter how useful this practice may be to encourage compliance by the regulated party, they will be deemed to have waived their right to deny others' requests for the information.

— *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645 (California Court of Appeal, 3d Dist. 1974)

Requesting Access to Public Records

Given the variety of information requesters, types of information, reasons for requesting, public agencies involved, and public officials reacting to the requests, there is no ideal or guaranteed way to assert one's rights under the Public Records Act. However, the experience of many people in many situations suggests the following general points.

Dos and Don'ts

- **Do** remember that the Act deals with access to records, not information in the abstract.

- **Don't** assume that the Act compels public agencies to "tell" you things in the literal sense of conveying the information orally.

- **Do** some preliminary research to ascertain which records contain the information you want.

    1. For California state and local agencies, a unique resource for this effort is *Paper Trails*, a guide developed by the Center for Investigative Reporting and co-published with the California Newspaper Publishers Association. This well-indexed booklet by Barbara Newcombe lists the most general types of records maintained by each agency and department, what they are called, where they are kept and what information they hold.

2. If these guides are unavailable or do not have the information you need, find an advisor in the agency you believe holds the information — an inside expert who knows what's available and likes helping people understand. "I'm trying to find out what office deals with widget monitoring and who's the best informed person on that area." Keep asking this kind of question enough, and the people who really don't know or don't want to be bothered will eventually put you in touch with someone ready, willing and able to help. If this approach doesn't lead to the right person, try picking the brains of a (reasonably recent) former employee or an outsider who deals with that office regularly. When you deal with any of these people, try to determine the record types that contain what you want, what they are called, and what division, department or office has them.

- **Don't** let the process get hung up or stalled in while conducting the preliminary research. If someone says "That's internal only" or "We don't give that out to the public," then make it clear that you intend to determine (for yourself or your editor) whether the information exists, what it is called and where it is located.

- **Don't** expect to get personal help over the phone, every time you need it, especially if you are on deadline. If you expect to cover a beat regularly, then develop a relationship with these people at the earliest opportunity.

- **Do** tailor your request to what your preliminary inquiries have disclosed. For example, if you need the Widget Monitoring Log, and speak with the person who is in charge of it and gets (and fulfills) frequent requests for it, just ask at that point. Just asking — informally, orally and at the first opportunity once you know what to ask for — is always the preferred approach.

- **Don't** submit a written request without good reason. Doing so transforms you from a living customer into a piece of paper that will soon be covered by other papers. Good reasons include an initial refusal to your oral request or a substantial list of documents that you know will take some time to assemble.

- **Do** ask to see (or hear, in the case of tape recordings) the records you are interested in first, only ask for copies of those documents you really need to take away. This won't work if you can't visit the place where the records are kept, but if you can — unless you know that the record is exactly what you want — it's best to inspect on-site and make your copy order, if any, based on what you find.

- **Don't** ask for copies of records — especially a lot of records — that are entirely unfamiliar to you. You could end up paying substantial fees and mailing costs for reams of paper that turn out to be irrelevant to your purpose.

- **Do** request a sampling or a short selection of records that may be part of a longer-period request, if you believe the request may result in a sizable search or production burden. For example, although you may be interested in Widget Monitoring over the past five years, if the logs are created daily or weekly you may want to get a feel for what they show by asking for the most recent one or two months. If they turn out to be exactly the pay dirt you had hoped, you now know it without having to wait for weeks longer while five years' worth of files are combed.

- **Don't** ask for years of records unless you're sure they have what you really need, and if it will be necessary to mask certain information from the records, consider negotiating a phased production schedule rather than waiting for weeks (or months) for anything until the agency has reviewed and masked the last document.

- **Do** be alert to the possibility that a record you get may name or otherwise indicate other relevant records which you have not yet asked for or even thought of, and accordingly consider any records request as potentially the first in a series, each of which will progressively lead to more useful information.

- **Don't** assume you need to get all you will ever want with the first request, and don't say or do anything that will needlessly burn your bridges for further cooperation.

- **Do** be ready for those rare situations when you have been allowed to see a document but then have trouble getting a copy. Some requesters have been told that, on an earlier visit, they were mistakenly allowed to see a record, which has now been withdrawn from "the public file" upon their return to the office, and is not available for further inspection or copying. Others have had experiences leading them to believe that the record they initially saw (or were told about) has since been destroyed. Once a document has been inspected by any member of the public, it ordinarily cannot be withheld from either inspection or copying under the Act. Destroying a public record, especially in these circumstances, could be prosecuted as a felony. But in the meantime the requester may have trouble proving that the record was shown to him or her, or indeed that it ever existed. The only way to protect against this illegal treatment is somehow to record the document the first time it is shown — using a camera, a portable copier, fax machine in copy mode, or scanner — or by reading its contents into a tape recorder.

- **Don't** announce these methods, if you must use them, as measures taken because you do not trust the officials you are dealing with. If any explanation is required (and it need not be if you are reasonably discreet), simply note that it will save everyone time, effort and money if you can record the information immediately using your own resources.

- **Do** use any written request you make as an occasion to let the agency know you understand your rights and its obligations under the Public Records Act. There is no particular form or language required, but the "Sample Public Records Request Letter" on page 102 may serve this purpose.

SAMPLE PUBLIC RECORDS REQUEST LETTER

Date

Name and Title (of official with custody of the records)
Name of Agency
Address

RE: Public Records Act Request

Dear _____,

Pursuant to my rights under the California Public Records Act (Government Code §6250 et seq.), I ask to (inspect/obtain a copy of) the following, which I understand to be held by your agency:

(Describe the record as precisely as possible, including the designation of any forms or reports with titles, the date or dates if relevant, the author and addressee if the item is a letter or memo, etc. If the record is referred to in another document or published report and it will help to attach a copy of that reference, do so.)

I ask for a determination on this request within 10 days of your receipt of it, and an even prompter reply if you can make that determination without having to review the record(s) in question.

(**Use as applicable:** I would not ordinarily trouble you with this written request, but when I first made it informally I was told by _____ that your agency considers the information to be exempt from disclosure because _____. I respectfully suggest that this position, if I understand it correctly, is inconsistent with the Act as it has been interpreted in the following [authority/authorities] **[cite case or Attorney General's opinion]**.)

If you determine that any or all or the information qualifies for an exemption from disclosure, I ask you to note whether, as is normally the case under the Act, the exemption is discretionary, and if so whether it is necessary in this case to exercise your discretion to withhold the information.

If you determine that some but not all of the information is exempt from disclosure and that you intend to withhold it, I ask that you redact it for the time being and make the rest available as requested.

In any event, please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt and will not be disclosed.

If I can provide any clarification that will help expedite your attention to my request, please contact me at **(provide phone or fax number, pager number, etc.).**

(Use as applicable: I am sending a copy of this letter to your legal advisor to help encourage a speedy determination, and I would be happy to discuss my request with [him/her] at any time.)

Thank you for your time and attention to this matter.

Sincerely,
s/_____

Legal Actions to Obtain Public Records

The ultimate legal leverage for obtaining records under the Public Records Act is a civil action to obtain a court order for their release. There is no criminal sanction for simply refusing to provide records to a requester, although it is a felony to destroy public records, and in appropriate cases a temporary restraining order may be issued to prevent their destruction. A successful plaintiff in a public records suit can also get the court to order the defendant public agency to pay its court costs and attorney's fees — sometimes even when the records are made available prior to any action by the court.

Government Code §6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

Government Code §6259.

(a) Whenever it is made to appear by verified petition to the superior court of the country where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

(c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.

(d) The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

Government Code §6260. The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case.

Points Worth Noting

- *No Preemptive Strikes by Public Agencies* Under the Act, the requester always retains the litigation initiative. For example, a public agency may not go to court on its own to obtain a declaratory judgment that a record is not subject to disclosure.

  —*City of Santa Rosa v. Press Democrat*, 187 Cal. App. 3d 1315 (California Court of Appeal, 1st Dist. 1986)

- *No Exhaustion Requirement* After a requester has been turned down once, it is not necessary to seek administrative review or appeal prior to going to court. It may be useful to ask for a higher-level reconsideration of an initial refusal (asking the city council to waive an earlier asserted right by a department head, for example), but doing so is not legally required.

- *In Camera Inspection* If an agency argues that a document or class of documents is made confidential under some law, the dispute is about the law, not the contents, and a court will not review the records in camera. (*City of Richmond v. Superior Court (San Francisco Bay Guardian)*, 32 Cal. App. 4th 1430 (California Court of Appeal, 1st Dist. 1995)). But if the requester convinces the court that "confidential" files are commingled with public material, or raises other issues about the applicability of exemptions that can only be judged by reviewing the material in question, then an in camera examination by the court is necessary (*Williams v. Superior Court*, 5 Cal. 4th 337 (California Supreme Court 1993)).

- *No Appeal* There is no appeal of a trial court's decision granting or denying access to public records under the Act. But there is the court of appeal review by special writ. The principal difference is that the court of appeal may decline to review a superior court judgment without granting a hearing or issuing a written opinion. But if it accepts a case on a writ, then the scope of review and the procedure are essentially the same as for appeal — the appellate court will review the entire record from the lower court to determine whether, on the merits, the court has abused its discretion, namely whether the judge's findings were free from an error of law and supported by substantial evidence (*State Board of Equalization v. Superior Court*, 10 Cal. App. 4th 1177 (California Court of Appeal, 3d Dist. 1992)). And since the reason for the Legislature's substituting writ review for appeal was to provide speedier appellate attention to an order granting or denying access to records — not arbitrarily to keep parties out of the appellate courts — "an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue or law or because the court considers the case less worthy of its attention than other matters. . . . " (*Powers v. City of Richmond*, 10 Cal. 4th 85 (California Supreme Court, 1995)).

• *Attorney's Fees* If the plaintiff requester "prevails" in a public records disclosure suit, the court is required to order the public agency to release the disputed records and to pay the plaintiff's court costs and reasonable attorney's fees. If a public agency releases the disputed records after the plaintiff has filed suit, and demonstrably based on the suit, then the plaintiff is entitled to the "prevailing party" costs and fees even though the matter has not resulted in a court judgment — or a hearing (*Belth v. Garamendi*, 232 Cal. App. 3d 896 (California Court of Appeal, 1st Dist. 1991). This rule is intended to prevent public agencies from arbitrarily denying access by forcing requesters to spend money on litigation, and then releasing the records which would have been found indefensible if ever presented to a court. A court will not order payment of fees unless it is satisfied that records disclosure was *the result of* the plaintiff's suit. For example, if the agency has never declined to provide the records and has been reasonably diligent in attempting to find, compile and produce them, the fact that delivery of the information to the plaintiff occurred only after the filing of suit will not entitle the plaintiff to costs and fees (*Rogers v. Superior Court*, 19 Cal. App. 4th 469 (California Court of Appeal, 2d Dist. 1993)); (*Motorola Communication & Electronics, Inc. v. Department of General Services*, 55 Cal.App.4th 134, (3d Dist. 1997)). On the other hand, one court has held that an unsuccessful plaintiff who saddled an agency with far more than requests to see existing records was required to pay the agency's costs and attorney fees:

> The CPRA requires that requests for records must reasonably describe an identifiable record or information produced therefrom. (Section(s) 6257.) Appellant sought a voluminous amount of vaguely defined material. Many of his requests were not for existing records, but consisted of little more than interrogatories and demands that respondent prepare documents or provide opinions on possible future activities. . . .As the United States Supreme Court observed about the comparable federal act, it "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it has created and retained." . . . Given its quantity and substance, appellant's request cannot be characterized as other than harassment, and is clearly frivolous.
>
> — *Butt v. City of Richmond*, 44 Cal.App.4th 925 (3d Dist. 1996)

• *Relationship to Litigation-related Discovery* There are two principal legal processes for obtaining information from government officials or agencies. The Public Records Act is the more general, and can be used by any person at any time for any reason. The Evidence Code discovery laws provide another avenue, but it is restricted to parties in court actions — those suing or being sued by the government in a civil case, or defendants in a criminal case. There are fewer disclosure restrictions in the discovery process than under the Public Records Act, since discovery is intended to allow parties to obtain any information that might constitute, or even lead to, admissible evidence. But these restrictions — privileges — are also more powerful, in the sense that privileged information is also deemed exempt from disclosure under the Public Records Act (§6254, subdivision (k)).

On the other hand, Public Records Act exemptions do not operate as disclosure restrictions in the discovery process. For example, an information requester using

the Public Records Act will not be able to obtain confidential memoranda between a public agency and its attorney, because such communications are privileged under the discovery rules (*Roberts v. City of Palmdale*, 5 Cal. 4th 363 (California Supreme Court 1993)). But a party suing a police agency for the misconduct of its officers can obtain law enforcement investigative or intelligence records which would be exempt from disclosure under the Public Records Act, since such records are not privileged under the discovery rules (*ACLU v. Deukmejian*, 32 Cal. 3d 440 (California Supreme Court 1982)). Finally, a requester suing for information under the Public Records Act may be allowed some discovery to assist in preparing its case, for example to determine whether certain records were created or destroyed. Discovery cannot be used to force officials to disclose the information which is the subject of the dispute, and which they claim is exempt under the Act (*Los Angeles Police Department v. Superior Court*, 65 Cal. App. 3d 661 (California Court of Appeal, 2d Dist. 1977)).

District Attorney's Access to Public Records

The Act in §§6262-6265 gives a district attorney special access to public records. The principal differences from the general rules are that a state or local licensing agency may not use the exemption for investigative records to deny access to the district attorney, and that the deadline of 10 working days from the request for records requires not only a "determination" as to whether the record is exempt, but the actual *production* of any nonexempt records.

Frequently Encountered Exemptions From Disclosure

The Public Records Act is defined by its exemptions. Journalists frequently encounter the following exemptions, which are generally available to many, if not all agencies.

Administration

Preliminary and Temporary Drafts, Notes, Memoranda

The Basic Rule

Government Code §6254. Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are . . . : (a) Preliminary drafts, notes, or interagency or intra-agency memoranda which 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.

Points Worth Noting

- *"Working Papers"* Public agencies sometimes assert that records are not available under the Act because they are "drafts," "working papers," or "internal" documents — the fact that they have not been formally released, published, adopted or presented in a public forum justifies withholding them. The qualified

language in §6254 (a), however, suggests that no draft or memorandum is per se exempt from disclosure.

- *Three-part Test* In the only case interpreting this exemption, *Citizens for a Better Environment v. Department of Food Agriculture*, 171 Cal. App. 3d (3d Dist. 1985), the California Court of Appeal set forth a three-step analysis to determine whether it applies, and if so to what extent.

    1. It only applies to "predecisional" documents which facilitate some administrative or executive determination. A follow-up report on the effectiveness of an earlier decision would probably not satisfy this requirement unless it was also prepared to inform a new decision.

    2. The exemption only applies to documents that are not normally kept on file. "If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed."

    3. If a document is "predecisional" and not customarily retained "in the ordinary course of business," then the exemption may apply to any portion deemed a "recommendatory opinion." That is, statements as to what can, should or must be done about a given state of affairs in terms of legal or governmental action may be exempted. However, factual reports, observations, and even opinions, may not be exempted from disclosure. The court distinguished between the two types of content. It held that the public benefits when the factual background for decisions is disclosed, but that agencies need breathing space to freely and candidly explore alternatives and venture tentative suggestions in order to formulate policy options.

- *Rarely Applicable Citizens* demonstrates that the Act's "draft-memo" exemption rarely and minimally applies to the the "predecisional document recommendatory opinion" which the agency generally does not retain.

- *Subject to Revision Citizens* cites a much older case, predating the Public Records Act, which concludes that if official files records concern matters of public interest, the fact that they have not yet been formally approved by some decisional body, and are "tentative and . . . liable to error or alteration" is not a justification for withholding them from the public (*Coldwell v. Board of Public Works*, 187 Cal. 510 (California Supreme Court, 1921)). For example, an argument that the consultant's report may be subject to revision by an agency staff prior to being submitted to the policymakers, and may be "misleading" if released in its initial version, is an insufficient basis for nondisclosure in California.

- *Deliberative Process Privilege* Has the California Supreme Court's engrafting of the "deliberative process privilege" onto the Public Records Act swallowed or

supplanted the "draft-memo" exemption, since both trace their policy origins to the same common law principle embodied in Exemption 5 of the federal Freedom of Information Act? No. In *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991), the court employed the Public Records Act's §6255 balancing test to conclude that the public interest in knowing the flow of visitors to Governor Deukmejian's office over a five-year period was outweighed by the public interest in candid policy formation reflected in the deliberative process privilege. The latter privilege recognized in federal courts as a basis for limiting disclosure under FOIA, substantiated denying the Los Angeles Times' request for copies of the governor's daily appointment calendars for the first five years of his incumbency. But in *Times Mirror* the court noted that the "draft-memo" exemption in §6254 (a) did not apply to the calendars, since they were neither drafts nor memoranda; nor were they "preliminary"; and there was no question that they were preserved in the ordinary course of business. *Times Mirror* which applies the policy underlying the Public Records Act's "draft-memo" exemption to documents which would not qualify for the exemption. This approach has been used to exempt, under the deliberative process privilege, phone billing records that could be used to show long distance or cellular phone calls placed by city council members as part of official business (*Rogers v. Superior Court*, 19 Cal. App. 4th 469 (2d Dist. 1993)) and information submitted to Governor Pete Wilson by those applying to be appointed to fill a vacancy on a county board of supervisors (*Wilson v. Superior Court*, 51 Cal.App.4th 1136 (2d Dist. 1996)). Accordingly, if a document is a preliminary predecisional draft or memorandum, the relevant exemption is the qualified §6254(a) provision, not the expansive deliberative process privilege, applicable on a case-by-case basis to other kinds of documentary information.

Litigation

Pending Litigation Documents

The Basic Rule

Government Code §6254. Except as provided in §6254.7, nothing in this chapter shall be construed to require disclosure of records that are . . . : (b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with §810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

Points Worth Noting

- *Scope of Application* The attorney general analyzed the records "pertaining to pending litigation" in two 1988 published opinions.

  1. *Distinguished from Attorney-Client Privilege* In 71 Ops. Cal. Atty. Gen. 5, the attorney general concluded that the exemption includes materials which are protected by the attorney-client privilege, but it is not limited to those materials. Although the exemption expires when "the pending litigation has been finally adjudicated or otherwise settled," materials that are independently protected as confidential attorney-client communications remain privileged, while the other materials become available to the public.

2. *Inapplicable to Preexisting Records, Claims* 71 Ops. Cal. Atty. Gen. 235 addressed the fundamental question — what materials does the exemption apply to? The answer: Documents which the agency prepared prepared or acquired in the litigation process. The exemption does not apply to records that were created in the agency's ordinary course of business or for other purposes prior to the litigation. For example, an arrest report may later become relevant in defending a suite for excessive force by a police officer. This report will not be exempt because it predates litigation and was not created for litigation purposes. Likewise the prelitigation claim submitted to the agency pursuant to the Tort Claims Act, stating the claimant's name, address, the date, place and circumstances of the event resulting in the claim, a description of the injury or loss, and the amount claimed if less than $10,000, is not subject to this exemption (*Poway Unified School District v. Superior Court*, Case No. D029634 (4th Dist. 1998)). The Brown Act makes such claims accessible as one means of informing the public as to the subject of a closed litigation session of a local legislative body — see Section 54956.9 (b) (3) (C).

- *Depositions from Previous Litigation* One court concluded that "depositions generated in litigation arising out of claims against (a public agency) also relate to the conduct of public business subject to disclosure," and upheld an order to release depositions from no longer active civil cases concerning a police department's use of attack dogs.

  — *City of Los Angeles v. Superior Court*, 41 Cal.App.4th 1083 (2d Dist. 1996)

- *Settlement Disclosures* Despite the pending litigation exemptions "sunset" qualifier, some public agencies continue to withhold litigation settlement information. Some agencies agree to, or even instigate, nondisclosure clauses which purport to constrain both sides from releasing settlement details. If such agreements are confined to precluding comments or oral disclosures, they may well be enforceable. But an agreement by a public agency with a settling party not to disclose records pertaining to the settlement cannot be enforced against a request under the Public Records Act, the California Court of Appeal for the Fourth District has held (*Register Division of Freedom Newspapers v. County of Orange*. 158 Cal. App. 3d 893 (1984)). The Register case concluded that not only the agreement setting forth the monetary and other terms of the settlement, but other pertinent documents were available under the Act, despite other exemptions, including:

  1. *Claimant's Medical Records* Documents submitted by the claimant to support his claim of physical injuries are not exempt under the personal privacy exemption, since the claimant has waived any such privacy in submitting the records to substantiate his entitlement to payment of public funds.

2. *Claim Investigations* Records of inquiries conducted by the agency into the facts surrounding the claim, not for criminal investigation purposes but to assess the civil liability of the agency, are not eligible for withholding under the exemption for law enforcement investigations. This is the case even when the investigation is conducted by law enforcement officials.

3. *Public Interest Balance* The argument that secrecy is in the public interest because disclosure of settlements might encourage others to file nuisance claims is, in the court's view, overbalanced by "the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny". . . (which will). . . "put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds."

Private Personal Information

The Basic Rules

Government Code §6254. Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are. . . : (c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

Government Code §6254.8. Every employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255.

Points Worth Noting

- *Scope of Application* Section 6254 (c) applies to two types of records: those pertaining to a public agency's own employees — "personnel files" — and also those pertaining to any person about which the agency has "similar files" — not just medical records but any personally significant information.

- *Public Employees* The extent to which information about a public agency's individual staff members is or is not subject to disclosure varies with the type of information, the type of agency, and the type of employee, with no particular predictability or consistency. The following points were established with varying degrees of authority.

  1. *"Personal Privacy"* Government employees have private lives and the right to have them protected. But for them, certain aspects of daily life that would be private for those outside government service have been determined not to be subject to privacy protection. The line between public and private affairs for them has been drawn by reference to several examples. The Assembly Committee on Statewide Information Policy, in preparing what became the Public Records Act in 1968, noting the broad definition of public records, ob-

served, "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 devoid of reference to governmental activities." (*Cited in San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762 (2d Dist. 1983)). A comparable list of private topics was taken by one court from a federal case interpreting the privacy exemption in the Freedom of Information Act, namely "marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights, reputation and so on." (*Sims v. Central Intelligence Agency*, 642 F.2d 562 (D.C. Cir. 1980), cited in *Braun v. City of Taft*, 134 Cal. App. 3d 332 (California Court of Appeal, 5th Dist. 1984)).

2. *"Unwarranted Invasion"* Even arguably private information may be disclosed if the invasion would not in the circumstances be "unwarranted." There may be a public interest significance to normally private information which justifies its disclosure in a given instance. As the court in *Braun* observed, in upholding disclosure of several items of personal information (birthdate, phone number, social security and credit union numbers) from a city employee's personnel file: "Just because disclosure is allowed in this case does not mean that disclosure will be allowed in others. Each case must undergo an individual weighing process. The weighing process involves what public interest is served in this particular instance in not disclosing the information versus the public interest served in disclosing the information."

3. *Compensation* Every public employment contract is accessible under §6254.8, without qualification or limitation whatsoever. Some agencies assert fine distinctions here, typically to avoid disclosing the actual pay or benefits of certain employees. They maintain that the section does not apply to staff members who do not have a personalized express written employment "contract" — a particular document itemizing all the rights and obligations of employer and employee — and thus does not apply to most employees at all. Or they contend that it applies only to employees at will, or that it requires the disclosure of no more than the employee's salary range — not the exact amount currently earned. The ultimate rationale for these grudging reactions seems to be focused on the issue of compensation and embarrassment: that what a public employee earns is a matter of his or her personal privacy more than a matter of legitimate public interest. The closest case law on point is to the contrary. In *San Diego Union v. City Council of San Diego* (146 Cal. App. 3d 947), the California Fourth District Court of Appeal in 1983 held that a local government body's closed "personnel" session under the Brown Act could not be used to set the salaries of individual nonunion employees, observing:

Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. Public visibility breeds public awareness which in turn fosters public activism politically and subtly encouraging the governmental entity to permit public participation in the discussion process. It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds. With ever-increasing demands on public funds which have dwindled so drastically since the passage of Proposition 13, secrecy cannot be condoned in budgetary determinations, including the establishment of salaries.

Since then, the Brown Act has been amended to allow councils and boards to confer on individual pay raises in closed session — but only with their own bargaining agents who are elsewhere negotiating with the affected employees, and in any event any final action on compensation must take place in public session (§54957.6 (a)). The attorney general has also twice concluded that the specific compensation of individual employees is a matter of public record, not personal privacy. In a published opinion, 68 Ops. Cal. Atty. Gen. 73 (1985), the conclusion was that if a public employee is awarded a merit pay bonus, the public is entitled to know who the employee is, the amount awarded and even the reasons for the award. In an unpublished letter opinion, the conclusion was that in California, the exact compensation (not simply the pay range) of each employee is a matter of public record (Letter to Brian Hill from Deputy Attorney General Lisa Lewis Dubois, (6-17-1988)).

4. *Employment and Educational History* With respect to public employees, the kind of information that would be included in a resume, curriculum vitae or job application to demonstrate a person's fitness, in terms of education, training or work experience, for a government job is not a matter of personal privacy. As concluded by the California Court of Appeal in *Eskaton Monterey Hospital v. Myers*, 134 Cal. App. 3d 788 (3d Dist. 1982), ". . . information as to the education, training, experience, awards, previous positions and publications of the (employee) . . . is routinely presented in both professional and social settings, is relatively innocuous and implicates no applicable privacy or public policy exemption." This rule applies only to information about actual employees. It does not require the disclosure of government job applications, especially if the applicants have asked for, or applied upon assurances of, the confidential treatment normally accorded such processes. A court might well uphold an agency's refusal to supply such information, either on the basis of personal privacy or relying on the privilege for official information submitted in confidence (Evidence Code §1040) — unless satisfied that there was an overriding public interest in disclosure created by the particular circumstances. On the other hand, if the requester is willing to have job applications masked

to remove uniquely personal identifiers so that certain nonidentifying information (age, sex, ethnicity, types and durations of previous employment, degrees earned, etc.) is released, neither the privacy exemption nor the official information privilege should apply.

5. *Current Employment Status* In cases where doubt exists as to whether a person is still a public employee, what position he or she occupies, or when those situations changed, the Fifth District Court of Appeal held than an agency's letter or memorandum to the employee which announces or confirms the status change is not a private document. The court held that these communications:

> *contain no personal information. Though reclassification may be embarrassing to an individual, in California employment contracts are public records and may not be considered exempt. The letters (in question) were memoranda of (a public employs) appointment to a position and the rescission thereof; they therefore manifested his employment contract. Because the letters regarded business transactions and contained no personal information, the court properly ordered disclosure . . .*

The following section explains the law's treatment of letters which state the reasons for an employee's disciplinary reassignment.

6. *Complaints and Discipline* Confidential complaints against the conduct of public employees, are probably protected from disclosure by Evidence Code §1040's official information privilege. If the complaint is serious and confirmed by the agency's investigation, public interest dictates disclosure. In a case dealing with an audit report conducted by the University of California into "acts of alleged financial irregularities" by two managerial employees, the California Court of Appeal ordered disclosure of portions of the document, citing a case from the California Supreme Court dealing with complaints against attorneys. The rationale it borrowed from *Chronicle Publishing Co. v. Superior Court* , 54 Cal. 2d 548 (1960) was described thus:

> *The high court concluded . . . that: "'Only strong public policies weigh against disclosure'" of such matters. Such a strong public policy was found in the case or trivial or groundless charges which often, "no matter how guiltless the attorney might be, if generally known, would do the attorney irreparable harm. . ." . . . In such a situation the attorney was to be compared with "'"public officers and employees"'" generally, against whom such communications "'"are to be considered as highly confidential, and as records to which the public policy would forbid confidence to be violated."'" . . . But 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 reproval. 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." (citations omitted)

— *American Federation of State, County and Municipal Employees (AFSCME) v. Regents*, 80 Cal. App. 3d 913 (1st Dist. 1978)

The court in *AFSCME* summarized the principle by concluding that

a proper reconciliation of the (Public Records) Act and the constitutional right of privacy mandates that . . . the recorded complaint be of a substantial nature before access is permitted. And patently, it is in keeping with the rationale of Chronicle Publishing Co. and the express purpose of the Act that where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public access exists.

7. *Police and Other Peace Officers* Peace officers are uniquely protected, as their files are governed by Penal Code §832.7. Public citizens can obtain police files (including but not limited to citizen complaints, internal investigation results, and imposed disciplinary measures) only by filing a discovery motion in a preexisting criminal or civil prosecution. Unlike ordinary discovery, which is designed to disclose all unprivileged information that might lead to relevant evidence, the Evidence Code personnel discovery rules §§1043 and 1045 require a judge to prescreen the files and disclose only relevant and material evidence. This rule is not designed to protect peace officers' privacy; rather, it was enacted to prevent sheriff's and police departments from destroying peace officer records which are the subject of subpoenas. Rather than prosecute the sheriff's and police departments, the legislature enacted this law which makes it more difficult to obtain police personnel files than public employee files generally, but requires the employing departments to investigate citizen complaints and preserve them for five years.

In two recent cases, the California Court of Appeal held that these restrictive rules exempt the information from disclosure under the Public Records Act (*San Francisco Bay Guardian v. City of Richmond*, 32 Cal. App. 4th 1430 (1st Dist. 1995); *City of Hemet, v. Superior Court*, 37 Cal. App. 4th 1411 (4th Dist. 1995)). Grand juries, district attorneys and the attorney general's office have access to officer files without the discovery barrier, but these agencies seldom consider a criminal investigation when, as is typical, the officer's own department does not seek it. The employing agency is permitted to compile and publish summary statistics about complaints and their disposition — but not required to do so. Complainants have a right to a copy of their complaints, and to be generally informed regarding the disposition. However, they are not entitled to the internal investigation findings or of other complaints filed against the officer. The California Court of Appeal held that normally accessible arrest reports cannot be disclosed unless they concern current events — al-

lowing the public to review arrest information over a longer period might disclose a pattern of suspect conduct by specific arresting officers, and thus undercut the absolute secrecy as to peace officer performance (*County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 599 (2d Dist. 1993)).

Peace officer personnel data secrecy is not so all-encompassing as to prevent disclosure of the names of five Santa Barbara County sheriff's department deputies who discharged their weapons in an exchange of gunfire which left a suspect dead, since the requester was "not seeking information relative to citizen complaints against police officers (or) . . . reports on an internal investigation concerning the misbehavior of a peace officer."
— *New York Times Co. v. Superior Court (Thomas)*, 52 Cal.App.4th 97 (2d Dist. 1997)

- *Licensed Practitioners* The government maintains considerable personal information on those who apply for and obtain licenses or permits to conduct a professional practice, business, trade or other occupation. Records of this category reveal information about individuals ranging from lawyers to doctors to daycare center operators.

  1. *Unverified Complaints* Unverified licensing complaints are typically if not universally treated as confidential by the licensing agencies. Disclosing bogus or unfounded complaints would needlessly defame the subject (see language from *Chronicle Publishing Co.* above). A premature disclosure of a well-founded complaint might be inconsistent with the policy underlying the "official information" privilege in Evidence Code §1040, namely the government's investigative powers would be crippled if it could not assure informants of temporary confidentiality.

  2. *Fitness-related Information* A lengthy attorney general opinion, issued two years after passage of the Public Records Act, analyzed the law's requirements — particularly the privacy-related exemptions — respecting the personnel and other files of the San Francisco Bay Board of Pilot Commissioners. With respect to the application and personnel files used for documenting the fitness of persons for pilots' licenses, the attorney general concluded that the "'unwarranted invasion of personal privacy' referred to in subsection (c) of §6254 would occur . . . when information is released which bore little or no relevance to the question of fitness for, or the performance of, official duties." (53 Ops. Cal. Atty. Gen. 136 (1970)). Fifteen years later that view was echoed in an opinion interpreting the Act's privacy exemption in the light of the federal courts' view of the parallel exemption in the Freedom of Information Act: "The critical question is whether the information associates the person with the business of the public agency or with an aspect of the individual's personal life" (68 Ops. Cal. Atty. Gen. 73 (1985).

3. *Affirmative Disclosure* Regulatory agencies' disclosure policies on particular licensee information has, despite the above, tended to vary. For example, until recently the Medical Board of California refused to disclose its information concerning doctors who had been professionally disciplined or subjected to sizable malpractice judgments or even criminal penalties — all concededly matters of public record. Instead, requesters had been limited to information on only three licensees per request. The legislature enacted Business and Professions Code §2027 which became effective in 1998; it reads:

> *(a) The board shall post on the Internet the following information regarding licensed physicians and surgeons:*
> *(1) With regard to the status of the license, whether or not the licensee is in good standing, subject to a temporary restraining order (TRO), or subject to an interim suspension order (ISO).*
> *(2) With regard to prior discipline, whether or not the licensee has been subject to discipline by the board of another state or jurisdiction.*
> *(3) Any felony convictions reported to the board after January 3, 1991.*
> *(4) All current accusations filed by the Attorney General.*
> *(5) Any malpractice judgment or arbitration award reported to the board after January 1, 1993.*
> *(6) Any hospital disciplinary actions that resulted in the termination or revocation of a licensee's hospital staff privileges for a medical disciplinary cause or reason.*
> *(7) Appropriate disclaimers and explanatory statements to accompany the above information.*

- *Public Officers and Appointed Officials* An agency will occasionally assert the privacy exemption to withhold information about elected or appointed governmental officials. While these individuals do not surrender all or perhaps even most of their privacy rights because of their public roles, it appears well settled that information directly bearing on their qualification for public office, or the discharge of their public duties, is not private. Were it otherwise, for example, the 1974 Political Reform Act disclosure rules would be attackable as violations of the California Constitutional right of privacy (see below). On the contrary, the authorities respecting public employees or licensees information require disclosing significant information about elective and appointed officials. Thus, for example, the occasional refusal to disclose information submitted by private persons who are applying for appointments to public office — on governmental boards or commissions — would not be justified if the requested information relates to their qualifications for the position.

- *Addresses and Phone Numbers* Absent a demonstrated confidentiality concern and a correspondingly low public interest in disclosure, individual's home addresses and phone numbers are generally not exempt as private information under §6254 (c). The fact that the Legislature has made home address (and occasionally phone number) information confidential in a number of other specifically defined contexts, including records of the Department of Motor Vehicles (Vehicle Code §1808.21) and records of the registrar of voters (§6254.4), supports this conclu-

sion. If the Legislature deemed the information universally private then there would be no need for specific restrictions.

- *Constitutional Privacy Right* The California Constitution has its own protection for personal privacy which is sometimes cited, along with the Public Records Act's privacy exemption, as a basis for withholding personal information from disclosure. The right was elevated to constitutional status by a statewide ballot amendment in 1972 which added a single word to the existing Article I, Section 1: "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."

Does the constitutional privacy right provide an independent basis for withholding records? Yes, in the sense that it raises the stakes at risk in a wrong judgment call by the agency. It allows the person whose record was improperly disclosed to sue the agency for damages, even if the disclosure did not result in any substantial publicity, as in *Porten v. University of San Francisco*, 64 Cal. App. 3d 825 (California Court of Appeal, 1st Dist. 1976). In *White v. Davis*, 13 Cal. 3d 757 (1975), the California Supreme Court stated that one of the "mischiefs" to which the constitutional privacy right is addressed is "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party. . . ." Despite the breadth of the latter notion, the courts have not found any information disclosable under the Public Records Act which is not disclosable under the constitutional provision. In fact, courts generally use the same public and private interest factors and the same weighing processes, treating the exemption under the Act and the positive protection under the Constitution as interchangeable (see *American Federation of State, County and Municipal Employees v. Regents*, 80 Cal. App. 3d 913 (1st Dist. 1978)). A record which does not qualify for the protection of the former is unlikely to be held private under the latter.

Investigative, Security and Intelligence Information

The Basic Rules

Government Code §6254. Except as provided in §6254.7, nothing in this chapter shall be construed to require disclosure of records that are . . . :

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of §13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files which reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

1. *The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.*

2. *Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name, age, and current address of the victim, except that the address of the victim of any crime defined by Section 261, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, or 422.75 of the Penal Code shall not be disclosed, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 261, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, or 422.75 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 261, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, or 422.75 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.*

Points Worth Noting

- *Complexity* This subdivision's complexity is no accident. It reflects the tug-of-war between state and local law enforcement (who want to keep operational information inaccessible to the public), and journalists and other groups striving to maintain some access to information on law enforcement activities. The net effect, as interpreted by the courts in particular, is a triumph for governmental secrecy.

- *Agencies Affected* The public agencies entitled to assert the exemption include those with a general crime-related mission (the attorney general and the Department of Justice, state and local police organizations) and any state or local agency engaged in an activity with a "correctional, law enforcement or licensing" purpose. The latter category extends, for example, to professional or consumer protection regulatory agencies such as the Bureau of Collection and Investigative Services, which licenses and oversees collection agencies.
  —*Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645 (California Court of Appeal, 1st Dist. 1974)

- *Records Affected* The exemption applies to the following documents:
  1. *Complaints* Whether in the criminal or consumer protection domain. *(Black Panther Party).*

  2. *Intelligence Information* To detect potential criminal activity or relationships, but not information concerning a particular crime. This category does not include all information "reasonably related to criminal activity," but it does include "information that might identify individuals (who are targets of an intelligence inquiry), that might identify confidential sources, or that was supplied in confidence by its original source." (*American Civil Liberties Union v. Deukmejian*, 32 Cal. 3d 440 (California Supreme Court 1982)).

  3. *Security Procedures* California Highway Patrol training materials detailing enforcement tactics, weapons training, unarmed combat, searches, handcuffing, excessive speed enforcement, minimum speed enforcement, off-road vehicle enforcement and pursuit policies are exempt. However those dealing with general Vehicle Code enforcement, assistance to motorists, freeway stopping of patrol vehicles, transport of the ill and injured, chain and snow tire enforcement, response to private citizen arrests, bicycle racing and procedures for dealing with citizen complaints are not. (*Northern California Police Practices Project v. Craig*, 90 Cal. App. 3d 116 (California Court of Appeal, 3d Dist. 1979)).

  4. *Records Compiled for Correctional, Law Enforcement or Licensing Purposes* This category includes the investigation record and preexisting documents that have, at the time of the request, been "compiled" for law enforcement purposes. It does not include records created for other purposes, such as assessing a public agency's civil liability for an injury to a jail inmate (*Register Division of*

Freedom Newspapers v. County of Orange, 158 Cal. App. 3d 893 (1984)), or routine monitoring of the use of agricultural pesticides by licensed spray applicators (*Uribe v. Howie*, 19 Cal. App. 3d 194 (California Court of Appeal, 4th Dist. 1971)). In the latter case the court held that the exemption does not apply to a record simply because "that enforcement proceedings may be initiated at some unspecified future date or were previously considered"; the exemption only applies when "the prospect of enforcement is concrete and definite."

5. *Effect of Investigative Compilation* *Uribe* might be read to suggest that when an agency creates a record for some routine purpose independent of law enforcement, and then compiles it into an investigative file, all access to that record is cut off. For example, if the police department adds a report to its investigative file in the belief that it might be material to a pending investigation, and the report is later presented at a public meeting, the city might decline a request for a copy of the report. This "confiscatory" interpretation — "You can't have the report because the police have seized it as part of their investigation" — is probably incorrect. The rationale for withholding compiled information is to conceal the compilation itself — to keep the public and those under investigation from learning what the agency is investigating. Announcing that a document will not be released because it has been "seized" defeats this purpose, especially when the party under investigation has a copy or knows what it contains. Properly exercised, the exemption simply allows the investigating agency to withhold compiled records; however, custodians must make available for disclosure records which are created or accumulated for other purposes.

6. *Duration of the Exemption* Under the comparable provision in the federal Freedom of Information Act, law enforcement investigative records may become accessible to the public upon the termination of the investigation, that is when disclosure would no longer compromise the investigation. But under the Public Records Act the law enforcement exemption has been interpreted to operate otherwise; it may be asserted indefinitely at the agency's discretion, even after the investigation ends and there is no further prospect of enforcement (*Williams v. Superior Court*, 5 Cal. 4th 227 (California Supreme Court 1993). Moreover, a locally adopted "Sunshine Ordinance" may not compel a district attorney or sheriff to disclose information from closed cases, since to do so would be an illegal interference with these officers' investigatory and enforcement powers (*Rivero v. Superior Court*, 54 Cal.App.4th 1048 (3d Dist. 1997).

- *Defined Access Rights* As relief from the sweeping effect of the general exemption, two categories of access have been preserved. Each category has two limitations. First, concerning investigative records, there is no right to inspect or obtain copies of the records themselves. Second, if disclosure would endanger someone involved in the investigation or frustrate the completion of this or a related investigation.

  1. *Victims and Insurers* Those with an immediate personal or financial interest in an investigation are entitled to certain information with respect to certain incidents or crimes. These parties include the victims, their attorneys or other representatives (e.g., insurance companies facing a claim triggered by the incident), others suffering any injury, damage or loss resulting from certain crimes or disasters (e.g., arson, burglary, fire, explosion, larceny, robbery, vandalism, or vehicle theft) or crime victims entitled to restitution. These parties are entitled to the names, addresses and statements of all persons involved (including, but not limited to, witnesses, but not including confidential informants); the date, time and location of the incident; and any diagrams made.

  2. *Public and Press* Exemption subparagraphs (1) and (2) entitle everyone to certain additional information regarding complaints, incidents, crimes and arrests.
     a. Complaints and requests for assistance: The time and substance of all such communications, and the time and nature of the agency's response.
     b. Incidents and crimes: Any alleged or committed crime or any investigated incident must be reported. The report must include the time and date of the report, and the time, date and location of the occurrence. It must include the factual circumstances surrounding the incident or crime, a general description of any injury, weapon or property involved, and any victim's name, age and current address (with certain exceptions). If the crime is a sexual assault, child endangerment or abuse, spousal violence or a hate crime infringing upon the victim's civil rights, then the victim's address must be withheld; furthermore, the victim has the option of withholding his or her name. The address and telephone number of a victim of or witness to a crime may not be provided to any person arrested or who may be a defendant in the alleged crime.
     c. Arrests: The report for every person arrested must include the full name, current address, occupation, date of birth, eye and hair color, sex, height and weight; the time and date of arrest, time and date of booking, and the time and manner of release or current location of detention; the location of the arrest and factual circumstances surrounding the arrest; the charges on which the person is being held, including outstanding warrants or parole or probation holds; and the amount of any bail set.

d. Duration of access: The right of the press and public to the information above is with respect to "contemporaneous" crimes or arrests. There is no right of access to information about events over extended periods in the past, the California Court of Appeal held in a recent case, overturning a trial court's order that the Los Angeles Sheriff's Department produce information about selected arrests over a ten-year period.
— *County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588 (2d Dist. 1993)

Privileged and Otherwise Confidential Information

The Basic Rule

Government Code §6254. Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are . . . : (k) Records the disclosure of which is exempted or prohibited pursuant to provisions of state or federal law, including, but not limited to, provisions of the Evidence Code relating to privilege.

Points Worth Noting

- *Interface With All Other Law* This exemption has no particular content. It simply connects to statutes outside the Public Records Act which restrict access to specified records or information. It automatically exempts from disclosure any confidentiality law which is under the Act. These laws are numerous, and can be found throughout the California and federal codes, but ordinarily relate to information rarely sought by journalists. Subdivision (k) is commonly used to introduce one or more of the Evidence Code's three major privileges — protecting confidential communications between attorney and client, official information submitted in confidence, and trade secrets.

- *The Attorney-Client Privilege* A public agency is a legal entity which can sue and be sued, and is allowed legal counsel and the ability to communicate with that counsel in confidence. To a certain extent the legislature has restricted that freedom to communicate privately. The Ralph M. Brown Act and the Bagley-Keene Open Meeting Act prohibit a local legislative or state body from discussing topics with counsel in a closed session unless they are classifiable as "pending litigation." For example, such bodies may not retire into a closed conference to discuss general legal questions if no litigation is "pending." This restriction applies only to meetings — it does not prevent the same consultations in a written format. Such writings are fully protected by the attorney-client privilege and are exempt from disclosure under the Public Records Act (*Roberts v. City of Palmdale*, 5 Cal. 4th 363 (California Supreme Court, 1993)). The privilege applies to virtually all attorney-client communication where the client (in this case the government agency or official) is seeking or obtaining confidential legal advice including, as stated in Evidence Code §952,

information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

1. *Waiver* — In the Public Records Act context, waiver is always a principal issue concerning the attorney-client privilege. Has the information been communicated to someone who is outside the client's legal interests, or possibly even adverse to them? For example, if the agency's attorney sent a letter to a party with whom the agency is negotiating an agreement, that will waive the privilege.

2. *Attorney's Fees* — Is fee information — billings submitted by outside counsel, amounts paid or both — protected by the privilege? No California cases appear to address this issue, but the Ninth Circuit U.S. Court of Appeals recently summarized how a federal court in California would address it:

> Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. See, e.g. *Tornay* (v. U.S.), 840 F.2d at 1426; *In re Grand Jury Witness* (Salas and Waxman), 695 F.2d 359, 361-62 (9th Cir. 1982); *Hodge and Zwieg*, 548 F.2d at 1353; *United States v. Cromer*, 483 F.2d 99. 101-02 (9th Cir. 1973).
> — *Clarke v. American Commerce National Bank*, 974 F. 2d 127, Case No. 91-56327 (U.S. Court of Appeals, 9th Cir. 1992)

- *The Official Information Privilege* Prior to enactment of the Public Records Act, law enforcement agencies which refused to disclose investigative confidential information or informant identities relied on the official information received in confidence privilege. This privilege still serves this purpose when such information is sought as evidence in a court proceeding; however, for Public Records Act purposes, this privilege is typically cited as a basis for withholding information unrelated to law enforcement. Evidence Code §1040 states:

> *(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.*
>
> *(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:*
> *(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or*

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

Use of the privilege as an independent exemption from the Public Records Act does not add any factors for consideration that are not already available under other exemptions. For the privilege to apply, two conditions must be met.

1. *Confidential Acquisition* First, the information must have been "acquired in confidence" and not previously shared with the public. If the information supplier failed to convey it in confidence or the agency failed to treat it as confidential, then the privilege does not arise.

2. *Disclosure Illegal or against Public Interest* Furthermore, "(A)ssurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public," (*San Gabriel Valley Tribune v. Superior Court*, 143 Cal. App. 3d 762 (California Court of Appeal, 2d Dist. 1983)). To complete the privilege, disclosure must be prohibited by federal or state law (which would make it exempt under §6254 (k) in any event), or "against the public interest" under a balancing of factors essentially the same as in §6255 (see below). For example, in *San Gabriel Valley Tribune* the court found that the privilege was inapplicable to protect financial information which a garbage disposal firm submitted to the City of West Covina to support its city-approved rate increase request:

> *Disclosure was shown to weigh in favor of the public's interest in view of the fact that the rate increase amounted to a 15 to 25 percent increase in just two years that the public — not the City — would have to pay . . . Respondent City argues that disclosure will both invade a private company's privacy interests, as well as having a chilling effect on obtaining information in similar future transactions. It is said that such a threat to future dealings constitutes a sufficient reason to withhold disclosure in the name of the public's interest. This argument, however, misstates what the public's interest is as serving the privacy interests of a private contractor, rather than in serving the public's interest in participating in local government.*

3. *Inapplicable if Relied on for Decision* The privilege will not apply to information upon which a government official or body explicitly relies in making a decision. As stated in *San Gabriel Valley Tribune*,

> *. . . the City publicly based its (rate increase approval) decision on financial data supplied to it by the Disposal Company. It cannot now be heard to call for concealment after it voluntarily injected the data into the decision-making process of government. This was precisely the type of governmental action that the Brown Act and the Public Disclosure Act (sic) were designed to keep open to public scrutiny.*

- *The Trade Secret Privilege* Information subject to this privilege is defined generally in Civil Code §3426.1, subdivision (d), which states:

> *"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:*
> *(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and*
> *(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

There appears to be only one case which held that information was covered by this privilege and not therefore not disclosable under the Public Records Act. In *California School Employees Association v. Sunnyvale Elementary School District*, 30 Cal. App. 3d 46 (California Court of Appeal, 1st Dist. 1973), the court held that the privilege was broad enough to justify withholding research findings, despite the fact that the contract authorized sharing the information for official purposes, providing it was not published or sold. This case is not very useful because the plaintiff sued to prove that the consultant's contract violated the law, rather than to obtain information. *Uribe v. Howie* (19 Cal. App. 3d 104 (California Court of Appeal, 3rd Dist. 1971)), is the leading interpretation of the Act's trade secrets protection. The court held that licensed agricultural pest control operator "spray reports," which were filed monthly and in accordance with state law, were not protected. The court declined to apply the privilege for two reasons. First, the county often made the information available (including strength and combination data) to doctors, insurance adjusters and growers on a "need to know" basis, as did the pest control operators themselves, in billing statements to their grower customers. Second, the pesticide concentration did not represent a great investment in research and development; rather it was a trial and error approach. The court contrasted this relatively simple technique with the more complicated scientifically formulated pesticides which would likely be more eligible for trade secret protection.

The Public Interest Balancing Test

The Basic Rule

Government Code §6255. 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 making the record public clearly outweighs the public interest served by disclosure of the record.

Points Worth Noting

- *The "Catchall" Exemption* Even if no express exemption within the Public Records Act applies, and no other law restricts access, §6255 authorizes an agency to withhold information on an ad hoc basis, providing it can show that the public interest is better served by nondisclosure. This rule is often cited as an add-on to other asserted exemptions, but it is most effective when no others apply.

- *Circumstantial Application* Since §6255 is dictated by "the facts of the particular case," it is conceivable that certain information might be withheld in one situation, but subject to disclosure in another. For example, the California Supreme Court held that §6255 barred a request seeking Governor George Deukmejian's appointment calendar for the last five years. The court reasoned that such scrutiny would interfere with the governor's deliberative process, deter the public from conferring with him, and would not demonstrably benefit the public. The court noted that the balancing test applied in this case did not categorically exempt this information:

> . . . on the present record, we conclude that the public interest in nondisclosure clearly outweighs the public interest in disclosure. (§6255.) Lest there be any misunderstanding, however, we caution that our holding does not render inviolate the Governor's calendars and schedules or other records of the Governor's office. There may be cases where the public interest in certain specific information contained in one or more of the Governor's calendars is more compelling, the specific request more focused, and the extent of the requested disclosure more limited; then, the court might properly conclude that the public interest in nondisclosure does not clearly outweigh the public interest in disclosure, whatever the incidental impact on the deliberative process.
>
> — *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991)

Two years later the California Court of Appeal, relying on the deliberative process privilege and §6255, declined a request seeking the disclosure of city council members telephone records for an entire year. The court suggested that a more focused request might have been treated differently; it noted that the requester failed to suggest in the trial court that disclosing telephone numbers might reveal a misuse of public funds — a proposition which, if it had been on the record for appeal, might have been treated differently.

—*Rogers v. Superior Court*, 19 Cal. App. 4th 469 (2d Dist. 1993)

- *Where Disclosure Has Been Ordered* In the following cases, the public interest in disclosure has been found to outweigh the public interest in nondisclosure.

1. The public's interest in monitoring the government and its regulation of the application of dangerous pesticides outweighs applicators' proprietary interests in spray report data filed with county, and the county's anxieties that reports would not be candid if disclosed.

—*Uribe v. Howie*, 19 Cal.App.3d 194 (4th Dist. 1971)

2. The public's interest in monitoring the government and how it regulates licensed collection agents outweighs the government's interests in keeping investigative information confidential, at least where it discloses the information to licensees.

— *Black Panther Party v. Kehoe*, 42 Cal.App.3d 645 (3d Dist. 1974)

3. The public's interest in monitoring government supervision of public employees outweighs the government's interests in protecting employee privacy, where employee misconduct is substantial and confirmed, and not merely alleged or trivial.

— *American Federation of State, Municipal and County Employees v. Regents*, 80 Cal.App.3d 913 (1st Dist. 1978)

4. The public's interest in monitoring the city's contracting for services and regulation of contractors' fees charged to residents outweighs city's interest in not discouraging contractors from submitting proprietary information justifying need for rate increases.

— *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762 (2d Dist. 1983)

5. The public's interest in confirming facts surrounding questioned personnel practices outweighs the city's interest in not discouraging individuals from applying for municipal employment, at least where the information sought is not a matter of personal privacy.

— *Braun v. City of Taft*, 154 Cal. App. 3d 332 (5th Dist. 1984)

6. The public's interest in monitoring how public funds are spent outweighs the county's interest in keeping settlements confidential in order to discourage unmeritorious claims.

— *Register Division of Freedom Newspapers v. County of Orange*, 158 Cal. App. 3d 893 (4th Dist. 1984)

7. The public's interest in monitoring how sheriffs exercise discretion in issuing concealed weapons permits outweighs sheriffs speculative concerns that disclosure of permit applicant information will expose applicants to danger and discourage filing of applications.

— *CBS v. Block*, 42 Cal.3d 646 (California Supreme Court, 1986)

8. The public's interest in monitoring effectiveness of water-rationing programs outweighs the water district's interest in protecting the reputations of those given preliminary citations for exceeding water allocation.

— *New York Times Co. v. Superior Court*, 218 Cal. App. 3d 1579 (2d Dist. 1990)

9. The public's interest in discouraging taxing agencies from developing secret law outweighs the agency's interest in avoiding the burden of extensive masking of records, especially where masking consists mainly in removal of information that would identify taxpayers.
   — *State Board of Equalization v. Superior Court*,10 Cal.App.4th 1177, (3d Dist. 1992)

10. The public's interest in being kept fully informed regarding its peace officers' activities, especially in their use of deadly force, outweighs the sheriffs' interests in protecting the privacy of deputies who fired their weapons in an exchange that killed a suspect, by withholding their names.
   — *New York Times Co. v. Superior Court (Thomas)*, 52 Cal.App.4th 97 (2d Dist. 1997)

11. The public's interest in monitoring State Controller's payment of outstanding warrants is legitimate and substantial, even where a given request comes from a commercially interested firm.
   — *Connell v. Superior Court*, 56 Cal.App.4th 601 (3d Dist. 1997)

12. The public's interest in monitoring the police department's policy on dog use outweighs the speculative privacy interests relating to closed civil case depositions.
   — *City of Los Angeles v. Superior Court*, 41 Cal.App.4th 1083 (2d Dist. 1996)

- *Where Nondisclosure Has Been Upheld* In the following cases (in addition to *Times Mirror Co.* and *Rogers*, discussed above), the public interest in nondisclosure has been found to outweigh the public interest in disclosure.

1. The public's interest in avoiding prejudicial publicity concerning a prison inmate about to stand trial for murder outweighs the public's interest in knowing specifics about his prison life, especially where such information is otherwise treated as confidential.
   —*Yarish v. Nelson*, 27 Cal.App.3d 893 (1st Dist. 1972)

2. The public's interest in preventing regulated businesses from circumventing effective compliance investigations, by obtaining auditors' procedural manuals, outweighs any public interest in disclosure.
   — *Eskaton Monterey Hospital v. Myers*, 134 Cal.App.3d 788 (3d Dist. 1982)

3. The public's interest in allowing governor discretion in selecting political appointees outweighs its interest in knowing background information submitted by those seeking appointment.
   — *Wilson v. Superior Court*, 51 Cal.App.4th 1136 (2d Dist. 1996)

• *Where Outcome Was Mixed or Qualified* In the following cases the result was tentative or conditional.

1. The public's interest in encouraging citizens to provide vital confidential information to the government outweighs the public interest in knowing how a sheriff's office screens applicants for reserve officer status, if and only if the information sought was in fact obtained from citizens on the understanding that it would be kept confidential.

   — *Johnson v. Winter*, 127 Cal.App.3d 435 (1st Dist. 1982)

2. The public's interest in monitoring how law enforcement agencies maintain noncriminal intelligence operations is outweighed by the public's interest in avoiding undue burdens of checking and masking with respect to documents that would require extensive processing prior to release and would then contain little substance; but with respect to other documents which could be processed for release simply by removing personal identifiers, the public's monitoring interest again predominates.

   — *ACLU v. Deukmejian*, 32 Cal.3d 440 (California Supreme Court, 1982)

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RYAN
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FYI

Shelley and Bowen take another shot at public records reform

Assemblyman Kevin Shelley (D-San Francisco) and Sen. Debra Bowen (D-Marina del Rey) are back with legislation aimed at improving public access to electronically held public records, this time as a team. Last year, each went their own way. Bowen's **SB 1065**, reached the governor's desk only to be vetoed. Shelley's bill – **AB 1099** — was held in the Senate after he and Bowen got into minor disagreement over which bill should go forward. It was quickly determined the stronger Bowen bill should be sent to the governor and Shelley's bill was used by the legislature for another purpose.

This year they have teamed up by introducing **AB 2799**. Sponsored by CNPA, the bill is authored by Shelley, with Bowen as the principal co-author. The bill not only mirrors the electronic access provisions of Bowen's bill of last year, it would enact a reverse balancing test to place citizens on equal footing with government agencies and reinsert the word "delay" in the law (i.e., "nothing in this chapter shall be construed to permit an agency to *delay or* obstruct the inspection or copying of public records).

Reverse Balancing Test

Under current law, in addition to the hundreds of specific statutory exemptions from disclosure, the law allows an agency to withhold access to any record if it finds "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."

The provision is known as the public interest balancing test. It has been used aggressively by both agencies and the courts to exempt records the legislature never specifically determined to exempt. The California Supreme Court has described the public interest balancing test as establishing "a catchall," meaning it can be used as a screen through which every public records request should be pushed. In the famous Times Mirror case, in which the request sought the governor's appointment calendar, the court said "each request for records must be considered on the facts of the particular case in light of the competing public interests."

The balancing test has been

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Groups meet to discuss dependency court accesss

Last week, representatives of several diverse groups, including CNPA, met to discuss concerns associated with the prospect of opening California's dependency courts to the public. The meeting was prompted by the recent introduction of **SB 1391** by Senator Adam Schiff (D-Burbank), which would establish a presumption that a dependency court hearing is open and public unless, upon a specified objection or motion, the court finds on the record that admitting the public would seriously harm the child's best interest.

SB 1391 is co-sponsored by CNPA, Los Angeles County and the Children's Advocacy Institute.

Although no one has yet officially opposed **SB 1391**, concerns have been expressed by county welfare directors, social workers, foster care advocates and the state Department of Social Services. One worry is that the public, attending proceedings only, will be presented with an incomplete picture of a proceeding because of numerous state and federal confidentiality laws that prohibit attorneys and courtroom officials from commenting about any aspect of a dependency case. This, they argue, would shield the public from a clear understanding of the context of a proceeding and the complexities of the system.

Other concerns include: the stigmatization of a child if his name and picture was published; the potential for jeopardizing federal funding which is often conditioned on maintaining confidentiality; and the potential

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impact on the eventual disposition of a matter if the public is allowed to view the early stages of the proceedings.

Judge Michael Nash, Supervising Judge of the Los Angeles County Dependency Courts, told the group that as a "battle-scarred" judge, he welcomed public scrutiny of his courtroom and is "not afraid" of the public seeing the operation of the dependency system. Kathy Dresslar of the Children's Advocacy Institute said that in her view current confidentiality laws protect everyone involved in the system except for the children, who the laws were originally designed to protect. Charity Kenyon, a prominent media law attorney who represented the Sacramento Bee in a five year case involving dependency court access, explained that, in her experience, even though most of the officials involved in the dependency system wanted to provide the Bee with the information it was seeking, confidentiality laws served as a substantial legal barrier.

At the conclusion of the meeting, there was general consensus that the group would continue to meet to try to work through many of the concerns raised.

SB 1391 is expected to be heard by the Senate Judiciary committee sometime in April.

PUBLIC RECORDS

■ Continued from Page 8

construed by the courts to allow withholding of any record that would harm the *deliberative process*, including phone bill records, appointment calendars and information submitted by potential gubernatorial appointees. The exemption has been used to prevent access to citizen complaints, requests that are deemed too voluminous or requests that are too hard to manage. Moreover, the exemption is casually thrown in as an additional reason for denying access to records even when the agency argues the request should be denied based upon an express exemption.

The problem is that while the catchall exemption has become a powerful tool for agencies to refuse access to records the legislature never thought to specifically exempt, there is no similar tool for the public to use to pry open records that, exempt or not, should be disclosed because, under the facts of the particular case, the public interest demands it.

For example, many exemptions give agencies a great deal of discretion to withhold or disclose. Preliminary drafts, certain records reflecting on public employees, law enforcement records and many others may be withheld or disclosed, essentially, at the whim of the record holder.

Shelley and Bowen's bill would help level the playing field by adding a new subdivision (b) to the balancing test (Govt. Code Sec. 6255), to read: "Notwithstanding any provision of this chapter, an agency, or the superior court in any action brought pursuant to Section 6259, may disclose or order to be disclosed any record made exempt by express provisions of this chapter if, on the facts of the particular case, the public interest served by disclosing the record clearly outweighs the public interest served by not disclosing the record."

The law would allow either an agency or the courts to, in appropriate circumstances, release or order to be released any record when the public interest weighs in favor of disclosure. While staff believes state and local agency opposition to this provision may be intense, the bill will nonetheless create an opportunity to discuss before the Legislature the gross inequity of current law and the increasing inability of the public to monitor and control the institutions it has created. The bill has not yet been set for a hearing.

CNPA *Legislative Bulletin*

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Review AB 1099
Modern Access to Public Records

ASSEMBLY BILL No. 2799

Introduced by Assembly Member Shelley
(Principal coauthor: Senator Bowen)

February 28, 2000

An act to amend Sections 6253 and 6255 of, and to add Section 6253.2 to, the Government Code, relating to public records.

LEGISLATIVE COUNSEL'S DIGEST

AB 2799, as introduced, Shelley. Public records: disclosure.

(1) The California Public Records Act provides that any person may receive a copy of any identifiable public record from any state or local agency upon payment of specified fees. The act provides that it shall not be construed to permit an agency to obstruct the inspection or copying of public records and requires any notification of denial of any request for records pursuant to the act to set forth the names and titles or positions of each person responsible for the denial. The act also requires computer data to be provided in a form determined by the agency.

This bill would provide that nothing in the act shall be construed to permit an agency to delay or obstruct the inspection or copying of public records and would require that the notification of denial of any request for records justifying its withholding to be in writing. This bill would delete the requirement that computer data be provided in a form determined by the agency and would require any

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Need to contact:
SPJ

* Randy Lyman, S.F. Guardian

agency that has information that constitutes an identifiable public record that is in an electronic format to make that information available in an electronic format when requested by any person. The bill would require the agency to make the information available in any electronic format in which it holds the information. Because these requirements would apply to local agencies as well as state agencies, this bill would impose a state-mandated local program.

(2) The act requires the agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the act or that, 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.

This bill would authorize the agency or the superior court to disclose a record made exempt under the express provisions of the act if the agency or the superior court determines that, on the facts of the particular case, the public interest served by disclosing the record clearly outweighs the public interest served by not disclosing the record. By imposing new duties on local public officials, the bill would create a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 6253 of the Government Code is amended to read:

6253. (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 hereafter 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.

(b) 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. ~~Computer data shall be provided in a form determined by the agency.~~

(c) 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 therefor. In unusual circumstances, the time limit prescribed in 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. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) 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.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) Nothing in this chapter shall be construed to permit an agency to *delay or* obstruct the inspection or copying of public records. ~~Any~~ *The* notification of denial of any request for records *required by Section 6255* shall set forth the names and titles or positions of each person responsible for the denial.

(e) Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

SEC. 2. Section 6253.2 is added to the Government Code, to read:

6253.2. (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:

(1) The agency shall make the information available in any electronic format in which it holds the information.

(2) 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. Direct costs of duplication shall include the costs associated with duplicating electronic records.

(b) Nothing in this section shall be construed to require the public agency to reconstruct a report in an electronic format if the agency no longer has the report itself available in an electronic format.

(c) Nothing in this section shall be construed to permit an agency to make information available only in an electronic format.

(d) Nothing in this section shall be construed to permit public access to records held by the Department of Motor Vehicles to which access is otherwise restricted by statute.

SEC. 3. Section 6255 of the Government Code is amended to read:

6255. *(a)* The agency shall justify withholding any record *in writing* 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 ~~making~~ *disclosing* the record ~~public~~ clearly outweighs the public interest served by disclosure of the record.

(b) Notwithstanding any provision of this chapter, an agency, or the superior court in any action brought pursuant to Section 6259, may disclose or order to be disclosed any record made exempt by express provisions of this chapter if, on the facts of the particular case, the public interest served by disclosing the record clearly outweighs the public interest served by not disclosing the record.

SEC. 4. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

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CAPITOL ALERT

THE SACRAMENTO BEE NEWS

Davis: Judicial picks should follow my wishes or quit

By Herbert A. Sample
Bee Washington Bureau
(Published March 1, 2000)

WASHINGTON -- Insisting that democracy can work no other way, Gov. Gray Davis said Tuesday his appointees to the California judiciary should follow the positions he expressed in his 1998 campaign on the death penalty, same-sex marriages and other issues -- or resign.

Davis, in the nation's capital for a meeting of the National Governors' Association, said he would not lobby sitting judges on cases before them. But, he said, he would feel betrayed if a judge who privately stated compatible views on major issues while being vetted for a judicial appointment ruled in a different way later.

"If I had the feeling (potential nominees) had misled me, then I would feel they should resign," Davis said during a meeting with Washington-based reporters for California media outlets. "Now, they'll either resign or they'll not resign, but they're certainly not going to be elevated, I can assure you of that."

Gerald Uelmen, a professor at the Santa Clara University School of Law, said Davis' statements cast a shadow over the impartiality of all his judicial appointees.

"I would not appear before any judge he's appointed on a death penalty case without moving to disqualify that judge," Uelmen said. "If he's moving to require (a particular policy position) as a condition of appointment, those judges are not neutral. They are pre-committed. I think he has a basic misconception of what a judge's role is."

State Senate President Pro Tem John Burton, D-San Francisco, likened Davis' remarks to statements the governor made in July when he said the job of state legislators "is to implement my vision. That is their job."

"I think we could abolish state government and let him run it by fiat," Burton said. "The only people who I've heard had judicial litmus tests are the right-wing Republicans."

Davis' comments also appeared to confirm concerns expressed last year by some lawyers hoping for the nod of California's first Democratic chief executive in 20 years. At the time, the legal community was abuzz that Davis was ruling out anyone with contrary views on the death penalty.

The governor's spokesman said in October there was no right or wrong

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answer on the death penalty or abortion for potential judicial nominees who are being vetted. Davis' only criterion, aide Michael Bustamante said then, is that judges "implement the law . . . regardless of where they stand."

But Davis on Tuesday went beyond that. For example, he said he will choose no one who expresses ambivalence about the death penalty.

Moreover, he said he had told each of his judicial nominees "that while they have to follow the law . . . they're there because I appointed them and they need to keep faith with my electoral mandate. In other words, all my appointees, including judges, have to . . . more or less reflect the views I expressed in my election. Otherwise, democracies don't work."

"If (potential nominees) had given me a feeling they were with me on the death penalty and then they came to an opposite conclusion," Davis explained, "I would think they deceived me and deceived the electorate that put me in office. And I feel very strongly about that."

The governor said he does not use litmus tests, but that it is "fair and appropriate" to review the policy positions of potential nominees. He conceded that there are many issues on which he did not concentrate during his campaign and there is no way to foresee all the topics a judge may face in the future.

But Davis said his nominees should hold compatible views on subjects on which he took firm positions in 1998 --such as same-sex marriages, which he opposed, and the death penalty and abortion rights, which he backed. "I would want to get a sense that (their) views were in keeping with the ones that I had expressed publicly in the campaign," Davis said. "Otherwise, I do not believe it is fair to appoint someone who I suspect will conclude differently on an issue that I have expressed myself in the campaign."

Davis so far has appointed 16 judges to the state trial courts and four to the state courts of appeals -- all of whom have been confirmed by the state Commission on Judicial Appointments.

Davis said his views on the matter -- which he said applied more forcefully to executive branch appointees -- were rooted in his experiences as chief of staff to Gov. Jerry Brown during the 1970s.

"I don't believe in a thousand flowers bloom -- you just put anyone up there and they do anything they want. That's just chaos," the governor said.

On another matter, the governor praised the Vietnam War bravery of Arizona Sen. John McCain, who is seeking the Republican nomination for president. But Davis, also a Vietnam War veteran, said neither McCain nor Texas GOP Gov. George W. Bush could beat Vice President

Al Gore in California in the fall.

Bush and McCain "are on the wrong side of issues that matter to Californians," Davis said, citing abortion rights, gun control and the environment.

Bay Gas-Pump Prices Near Record Jumps of 12 to 17 cents per gallon in 2 weeks

Wednesday, March 1, 2000
San Francisco Chronicle
CHRONICLE SECTIONS

Arthur M. Louis, Ken Hoover, Chronicle Staff Writers

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Northern California gasoline prices have shot up by a breathtaking 12 to 17 cents per gallon in just the past two weeks, the California State Automobile Association reported yesterday.

The average price of a gallon of regular, unleaded gas at self-service pumps soared 12 cents to $1.71 in San Francisco -- just 4 cents shy of the record $1.75 reached last August.

The auto association, which normally surveys the market on a monthly basis, issued a special bulletin indicating that prices are flirting with the all-time highs set last summer.

Industry sources told The Chronicle that at least one major oil company informed dealers yesterday that it was raising gas prices again -- an increase that is expected to hit consumers within a few days.

In a memo to dealers, Shell disclosed new price increases of 5 cents per gallon for regular and plus grades and 6 cents for the premium grade.

The rapid price increases have stunned many motorists. A quick sampling at a Shell station at Third and Brannan streets in San Francisco found the same kind of annoyance that followed other oil industry price hikes in recent years.

"I think it's ridiculous," said Marilou Panganibar, 26, of Fremont who was pumping $1.75-a-gallon regular gasoline into her Honda Civic. "I just moved out here from Arizona and

I can't understand why it isn't cheaper (here) when the service station is practically right next door to the refinery. . . ."

Dennis DeCota, executive director of the California Service Station and Automotive Repair Association, blamed the major oil companies for the rising prices and the particularly lofty prices in San Francisco, which he said are the highest in the continental United States.

``They have absolutely no competition," DeCota said. ``This is a big number game. One cent added to the price of gasoline means $141 million for the oil companies, just in California."

He said the prices are not the fault of the service station owners, who are at the mercy of the oil companies.

Yesterday's survey by the state auto association attributed the price spikes not only to high crude-oil prices -- which got the brunt of the blame two weeks ago as they reached $30 per barrel -- but also to a reduction in gasoline inventories caused by unexpectedly low production at West Coast refineries.

The cities in the latest sampling by the state auto association all got hit with hefty increases.

Prices were up 15 cents in Oakland to $1.66. In both San Rafael and San Jose, they jumped 16 cents to $1.66.

Sacramento was hit with the biggest increase -- 17 cents, bringing its average price to $1.58.

The survey was limited to eight of the 18 Northern California cities tracked in the monthly reports, so CSAA was unable to cite an overall figure for the region.

Such steep increases in February are extraordinary if not unprecedented.

Prices normally hit peaks during the heavy-driving summer months but bottom out during the winter, when fewer drivers are on the

road and demand for gasoline is relatively low.

Scott Berhang, an editor with the Oil Price Information Service in New Jersey, said that gasoline inventories are ``unusually low on the West Coast for this time of year, due to a series of refinery shutdowns, both planned and unplanned."

He noted that a recent American Petroleum Institute survey indicated that the Western refineries held inventories of 26.6 million barrels, compared with the 27.5 million that is normal for this time of year.

Paul Moreno, a spokesman for the auto association, said he could not pinpoint which refineries were experiencing production slowdowns. ``We rely for our information on industry publications, which are not always specific," he said.

He said it was unlikely that the refiners were deliberately holding down the supply to boost prices.

``There's an incentive to make the product now because they can get a pretty good price," he explained.

Fred Gorell, a spokesman for Chevron Corp., the San Francisco oil giant, declined to say whether his company's refining operations have suffered unscheduled shutdowns.

Severin Borenstein, director of the University of California Energy Institute, said he had not heard about any unscheduled refinery shutdowns lately.

He said inventories may have sunk below normal levels because refineries ``anticipate less demand" due to ``the very high crude-oil prices. They may just be producing less because the cost of gasoline is so high and they think they might not be able to sell quite as much as usual."

Claudia Chandler, a spokeswoman for the California Energy Commission, a state planning agency, predicted that gasoline prices will sink

eventually.

She noted that the Organization of Petroleum Exporting Countries is expected to boost its production quotas at a meeting late this month. ``Hopefully that will bring crude down from $30 a barrel to more like the mid-20s," she observed.

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Drivers dig deeper as gas prices rise

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Drivers dig deeper as gas prices rise

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By Cathleen Ferraro
Bee Staff Writer
(Published March 1, 2000)

Gasoline prices have jumped to an average $1.58 a gallon in Sacramento, up 17 cents from just two weeks ago, reflecting delays in refinery maintenance and a surge of crude oil prices.

Gasoline industry experts say prices at the pump aren't expected to drop until April, just in time for a surge in demand as the summer driving season gears up.

The refinery problems have hit Northern California particularly hard, though the rest of the nation is paying record prices as well as crude oil prices surpass $30 a barrel.

Some drivers are starting to change their habits in response.

Damian Duran of Elk Grove said he started car pooling two weeks ago with a co-worker because of the gasoline price increases.

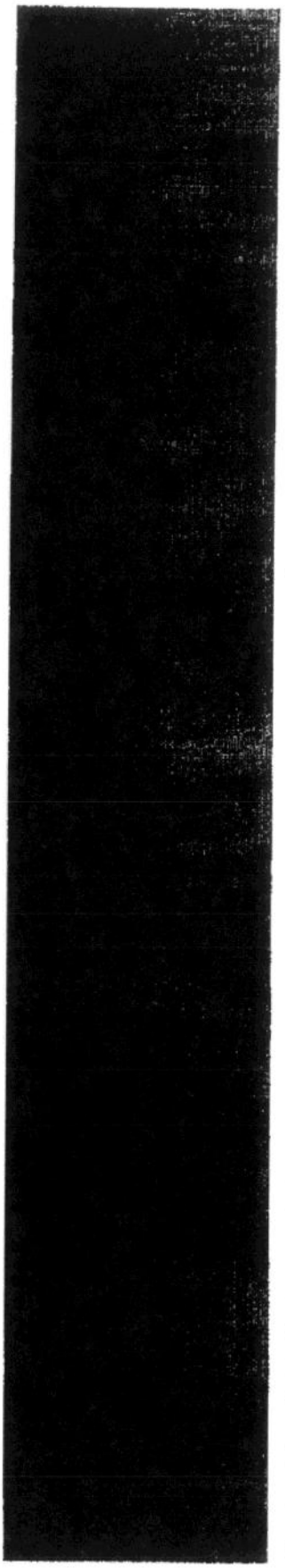
"I can't believe it," Duran said as he filled his tank with $1.84 a gallon unleaded plus Tuesday at the Chevron station at Broadway and 19th Street. "One week the prices are OK, . . . next week it jumps 10 cents to 20 cents it seems."

Duran, who works at Designer Tile in Elk Grove, said he's trying to find more ways to avoid using his car.

Winter is normally when oil refineries shut down parts of their operations for maintenance and repairs, so that things are ready for the summer driving season.

The problem this year, experts said, is that fixes and upgrades have stretched beyond the planned two- to three-week shutdowns.

"That affects production just as much as big, dramatic events



like (oil refinery) fires, but it's just not as widely known until inventories are down. And that's where we are today," said Paul Moreno, spokesman for the California State Automobile Association.

The group, also known as AAA of Northern California, issued a special report Tuesday showing gas prices jumped 12 cents to 17 cents a gallon in Sacramento and seven other Northern California cities since mid-February.

The survey, completed Monday, tracked prices for self-serve regular unleaded gasoline.

If drivers aren't happy about it, neither are station owners.

"It's like a runaway train," said Cathy Holtsman, owner of the Chevron station at 4800 Freeport Blvd. in Sacramento. "I think it's horrible and I can't do anything about it because I'm caught in the middle. We're just trying to keep up with (our) bills."

In the past two weeks, Chevron Corp. sent several notices of wholesale price increases on the gasoline it sells to Holtsman and other California dealers. The increases have ranged in size from a penny a gallon to almost a nickel.

While fuel prices are higher in Sacramento than they have been in months, they are still below the record $1.67 hit in April, when California refinery explosions cut into gasoline production.

Right now, San Francisco dealers are selling the most expensive gas in the state, according to the AAA report, averaging $1.71 a gallon. At least one Shell station in San Francisco's Sunset district was charging $2.05 a gallon Tuesday for regular unleaded fuel.

"It's bad. We don't know how the high prices are going to affect our business," said Leo, a limousine company manager who declined to give his last name, as he filled up near the financial district.

Gas prices in Southern California also are climbing, though not as sharply, for reasons the auto club and other analysts couldn't explain. Motorists in Los Angeles have seen prices rise to an average of $1.46 in two weeks.

So when does it all stop?

"If everything works right and these refineries come out of their (maintenance) turnarounds . . . then wholesale prices

should decline by mid-March," predicted Tom Glaviano, an analyst at the California Energy Commission.

But pump prices won't moderate for another month later, or until mid-April, he warned.

The Oil Price Information Service, an online price and market analysis firm, made similar predictions Tuesday.

"I think it's a short-lived situation," said Scott Berhang, an editor at the Lakewood, N.J.-based pricing service. "Some of these refineries on the West Coast are very, very old and they get in there, start making maintenance changes and things take longer than they thought. But in two weeks this will look a lot different because maintenance should be finished."

Outside California, motorists are coping with high gas prices, too, after the Organization of Oil Producing States scaled back production last year. A gallon of self-serve, regular unleaded fuel now goes for roughly $1.42 nationwide, the U.S. Energy Department said.

OPEC members will meet in Vienna on March 27 and are expected to agree to raise production that should ease oil price pressures.

A year ago, crude oil sold for $12 a barrel, and gas at some Northern California stations was as low as 99 cents a gallon.

Bee staff writer Eric Young contributed to this report.

AB 2799 (Shelley): Public Records

Origin: California Newspaper Publishers Association

Problem: In California, all government agencies are subject to the California Public Records Act (CPRA). The CPRA governs the public's right to access information from state and local agencies, including cities and counties, school districts, municipal corporations, and any other boards or commissions that are part of a covered political entity (Gov. Code Section 6252).

Records held electronically have become the focus of great debate. Under current law, when a person makes a request for data contained in computer format, the agency has the discretion to determine in which form the information should be provided. An agency can effectively frustrate a public record's request by providing the requested records in a form different from the public's request.

It is very important that an agency disclose public information in a timely fashion. If there is a legitimate dispute over whether or not a record is covered by an exemption, the agency is entitled to take up to 10 working days to either provide the information or provide the written grounds for its denial. The 10-day period in not intended to delay access to records; however, many state agencies believe the 10-day grace period can be used for any record. By delaying the process, the public often gives up and never acquires the record.

The disclosure of various records is left solely at the discretion of public agencies. Current law allows for the public interest balancing test, a "catchall" provision that allows the government to withhold access to <u>any</u> record if the public interest warrants it. This provision is a one-way street – if it is used by an agency, it is used only for the purpose of denying access to a record. For those records that are not specifically exempt for the CPRA, the public should have the same right as the government to use the balancing test to access the record when the public interest demands it.

Solution: AB 2799 would improve the open government process by:

- Stating that no public agency shall obstruct <u>or delay</u> the inspection or copying of public records.
- Requiring a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format, etc.).
- Allowing citizens wishing to view information to prove that the public interest served by releasing the record clearly outweighs the public interest served by not disclosing the information.

Support: California Newspaper Publishers Association, California First Amendment Coalition

Opposition: Attorney General, League of California Cities, CSAC, California Municipal Utilities Association, Personal Insurance Federation of California, California Association of Sanitation Agencies, Association of California Insurance Companies, California Chamber of Commerce, Civil Justice Association of California, American Insurance Association, CNPA, Wine Institute

Status: Assembly Government Organizational Committee
Hearing: April 24, 2000

Assembly
California Legislature

KEVIN SHELLEY

Majority Leader

AB 2799: Public Records – Electronic Records and Balancing Test

Problem: In California, all government agencies are subject to the California Public Records Act (CPRA). The CPRA is the instrument that provides the public in California with the right to access records held by the state and all of its subdivisions. It governs the public's right to access information from state and local agencies, including cities and counties, school districts, municipal corporations, and any other boards or commissions that are part of a covered political entity (Gov. Code Section 6252).

Records subject to public access under the CPRA "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 the physical form or characteristic. Records held electronically have become the focus of great debate. Under current law, when a person makes a request for data contained in computer format, the agency has the discretion to determine in which form the information should be provided. An agency can effectively frustrate a public record's request by providing the requested records in a form different from the public's request.

It is very important that an agency disclose public information in a timely fashion. If there is a legitimate dispute over whether or not a record is covered by an exemption, the agency is entitled to take up to 10 working days to either provide the information or provide the written grounds for its denial. The 10-day period in not intended to delay access to records; however, many state agencies believe the 10-day grace period can be used for any record. By delaying the process, the public often gives up and never acquires the record.

The disclosure of various records is left solely at the discretion of public agencies. Current law allows for the public interest balancing test, a "catchall" provision that allows the government to withhold access to any record if the public interest warrants it. This provision is a one-way street – if it is used by an agency, it is used only for the purpose of denying access to a record. For those records that are not specifically exempt from the CPRA, the public should have the same right as the government to use the balancing test to access the record when the public interest demands it.

Solution: This bill improves open government by stating that no public agency shall obstruct or delay the inspection or copying of public records. It requires a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format). Finally, It would give citizens wishing to view information the right to prove to a state agency that the public interest is served best when a record is disclosed rather than withheld.

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AB 2799
Questions and Answers

Q - What does this bill do?

A - This bill has three parts:

1. It states that no public agency shall obstruct or delay the inspection or copying of public records.
2. It requires a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format, etc).
3. It allows a citizen the opportunity to prove that the public's best interest is served by releasing an exempt record than by withholding the exempt record.

Q - Why add the word "delay?"

A - When the law was changed several years ago, the word "delay" was removed and "obstruct" replaced it. This was not the intent of the legislature.

Public agencies have the perception that current law allows them up to 10- days to produce **any** record or document, once request by the public. Although the 10-day grace period does exist, it is meant for specific purposes. Public agencies are given the 10 days to acquire information if they believe the record requested is exempt from disclosure and they need time to confer with their legal counsel. The 10-day period was not intended to allow state agencies to stall any document for any reason.

This law will require a public agency to produce the document as soon as feasibly possible, unless the agency genuinely believes there is a legal issue.

Q - Will public agencies need to give provide records in any electronic format the requestor asks for?

A - No, AB 1099 will not require agencies to make costly data conversions

from one format to another. The bill only states that agencies provide information to the public in a form in which that information is already available and used in everyday business.

Q - Does the reverse balancing test give to much discretion to courts?

A - No, this test is about a matter of fairness. Currently, public agencies determine whether or not the public interest is served best when an exempt record is withheld or disclosed. If a public agency chooses to withhold the information, the public must challenge this decision in court. This bill gives citizens the opportunity to challenge for the release of a record that a state agency has currently made exempt under the California Records Act, if he or she can prove that the release of the document serves best the public interest. This challenge can be made with either the public agency or, if necessary, in a court of law.

Basically, this bill equals the playing field by allowing both state agencies and citizens to argue for record disclosure.

Q - Does this bill allow disclosure of records that are specifically exempt by law?

A - No, this bill only applies to those records that are currently held at the discretion of public agencies. If the legislature has determined that a record shall not be disclosed, only an act of legislation may reverse that decision.

Bill Summary
California Public Records Act: Disclosure

The legislation has three parts to it. It makes a technical change by adding the word delay, it makes clear electronic copies must be made available, and it reverses the courts balancing test when a denial of a records request is sought by a public agency.

"OBSTRUCT AND DELAY"

The legislation states that no public agency shall obstruct or delay the inspection or copying of public records. The change to current law is the insertion of the word "delay."

> *Several years ago, the law was changed to delete the word delay and insert the word obstruct. Some agency officials argued that the Legislature intended to allow for delay by removing the word from the code. This bill will clarify that allowing delay is not the Legislature's intent.*

ELECTRONIC COPIES

The legislation also requires a public agency to make copies of public information available electronically (on a diskette, usually in Word or WordPerfect format). The electronic copy shall be the form which the agency uses, not the choice of the requestor.

BALANCING TEST

The legislation also requires an agency wishing to withhold information to prove that the public interest served by releasing the record clearly outweighs the public interest served by not disclosing the information. (Current law is the reverse of this balancing test.)

CALIFORNIA ASSEMBLY
REGULAR SESSION
1999-2000
VOTE TABULATION

SEQ. NO. 24.
AYES 63
NOES 3
NV 14

FILE 99
AB 2799 - SHELLEY
THIRD READING

DATE: 05/25/00
TIME: 12:14 PM

AYES - 63

AANESTAD	FIREBAUGH	MACHADO	STEINBERG
ALQUIST	FLOREZ	MADDOX	STRICKLAND
ARONER	FLOYD	MAZZONI	STROM-MARTIN
BATTIN	GALLEGOS	MCCLINTOCK	THOMPSON
BOCK	GRANLUND	MIGDEN	THOMSON
CALDERON	HAVICE	NAKANO	TORLAKSON
CARDENAS	HONDA	OLBERG	VINCENT
CARDOZA	HOUSE	PACHECO, ROBERT	WASHINGTON
CEDILLO	JACKSON	PACHECO, ROD	WAYNE
CORBETT	KEELEY	PAPAN	WESSON
CORREA	KUEHL	PESCETTI	WIGGINS
CUNNEEN	LEACH	REYES	WILDMAN
DAVIS	LEMPERT	ROMERO	WRIGHT
DICKERSON	LEONARD	RUNNER	ZETTEL
[illegible]UCHENY	LONGVILLE	SCOTT	MR. SPEAKER
[illegible]UTRA	LOWENTHAL	SHELLEY	

NOES - 3

ACKERMAN	ASHBURN	BREWER

NOT VOTING - 14

BALDWIN	CAMPBELL	KNOX	OLLER
BATES	COX	MALDONADO	VILLARAIGOSA
BAUGH	@FRUSETTA	MARGETT	VACANCY
BRIGGS	KALOOGIAN		

VOTE ADDED UPON LIFTING OF CALL AT MEMBER'S DESK.
* VOTE CHANGED FROM FLOOR, ADDED AT MINUTE CLERK'S CONSOLE.
+ VOTE ADDED, CHANGED, OR CORRECTED.
@ MEMBER ABSENT OR EXCUSED.

SEQ. NO. 24.

UNOFFICIAL BALLOT.

Memo

TO: Kevin
FROM: Ryan
RE: AB 2799 (Shelley) – Public Records
Hearing – April 24, 2000
Date: April 19, 2000

•AB 2799 has turned into a very controversial bill that has garnered a wide range of opposition. The opponent's concern lies with the third part of the bill: the reverse balancing test. This test will give citizens the ability to challenge for the disclosure of certain records that public agencies determined to be exempt from the California Public Records Act. The citizen will need to weigh the public interests in disclosure over non-disclosure and convince the public agency or court of his/her findings.

•I spoke with every opponent and even held a large meeting at the sponsor's (California Newspaper Publishers Association) office to discuss their concerns. The opponents dislike the concept entirely and will only relinquish their opposition if the reverse balancing test provision is removed completely.

•In private, the sponsor suggested an amendment that would remove the balancing test and replace it with a provision that requires public agencies to consider the public's interest before exempting certain documents. I shopped this idea around to a couple opponents and they still regarded it as another form of the balancing test that could work to release sensitive information.

•In its current form, this bill is in trouble. The sponsors and the committee consultant have acknowledged this as well. If the opponents are unaware of any amendments prior to the hearing, be prepared for a fight.

•However, if it looks like the bill will fail, you mentioned your preference to having the committee recommend deleting the balancing test in lieu of you offering it. If this is you still your preference, I can make arrangements with the committee consultant and the chair to force the amendment if it appears the bill does not have the votes. They will only act if given the signal.

•Do you still wish to proceed with this plan?

YES NO

Assembly Bill No. 2799 **Chapter** 982

Year 2000 **Regular Session**

Author Shelley

Date Received Sept. 7, 2000

Last Day to Act Sept. 30, 2000

Action of Governor Sept. 29, 2000

September 6, 2000

Honorable Gray Davis
Governor of California
Sacramento, CA

REPORT ON ENROLLED BILL

A.B. 2799 SHELLEY. PUBLIC RECORDS.

SUMMARY: See Legislative Counsel's Digest on the bill as adopted.

FORM: Approved.

CONSTITUTIONALITY: Approved.

TITLE: Approved.

CONFLICTS: This bill and Senate Bill No. 2027, which is also before the Governor, would both amend Section 6255 of the Government Code by adding a new subdivision (b) in an identical manner. However, this bill also amends subdivision (a) of Section 6255 of the Government Code by making a technical, nonsubstantive change to this subdivision, which is not made by S.B. 2027.

Thus, if this bill and S.B. 2027 are chaptered, the substantive changes to Section 6255 will be the same, regardless of the order of chaptering (see Sec. 9605, Gov. C.).

Bion M. Gregory
Legislative Counsel

By
Jacqueline R. Kinney
Deputy Legislative Counsel

JRK:rcm

Two copies to Honorable Kevin Shelley and Honorable Byron D. Sher, pursuant to Joint Rule 34.

DEPARTMENT OF INFORMATION TECHNOLOGY

Enrolled Bill Report

Bill Number	*Author*	*As Amended*
AB 2799	Shelley	July 6, 2000

Subject
Public Records: Disclosure

Date Enrolled	*Senate Votes*	*Assembly Votes*
September 7, 2000	*34 Ayes – 0 Noes*	*72 Ayes – 2 Noes*

Summary

This bill revises various provisions in the Public Records Act to make available public records in an electronic format if the information is kept in electronic format by a public agency. The bill would require any agency that has information that constitutes an identifiable public record that is in an electronic format to make the information available in any electronic format in which it holds the information. The bill would apply to both state and local agencies, and would also require any denial of a written request for public records to also be in writing. The bill also specifies what costs the requester would bear for obtaining copies of records in electronic format.

Analysis

Under existing law, the California Public Records Act allows an agency to provide computer data in any form as determined by the agency.

This bill eliminates the reference to computer data in the current law and creates a separate section requiring the agency to provide copies of the electronic records in the same electronic format in which it is held. An agency would not be required to release an electronic record in electronic form 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. The bill provides that the requestor would pay the direct costs associated with duplicating the records.

Background

The purpose of the bill is to increase the availability of governmental information to the public by requiring state and local agencies to provide electronic copies of records in the format in which they are held.

Recommendation

VETO

By ***Date:*** 9-25-00

Title

Elias Cortez, Chief Information Officer

DEPARTMENT OF INFORMATION TECHNOLOGY
Enrolled Bill Report

This bill is a blend of two bills that were passed by the Legislature last year, AB 1099 (Shelley) and SB 1065 (Bowen). AB 1099 passed the Senate and was chaptered, but contained provisions unrelated to electronic records. The Governor vetoed SB 1065. Most of SB 1065 has been incorporated into AB 2799.

Comment

The Department of Information Technology (DOIT) observes that this bill could create substantial problems for agencies by requiring that entire data bases be provided, or substantial portions of such data bases, in response to a request for public records.

Potential problems that could arise are:

1. The term "record," as used in Government Code Section 6253.2(a), in normal paper terms does not equate well with the term "record" in electronic or computer terms. The information stored in an electronic file that would constitute a record may not be separable from other information in that file. The bill as drafted may be read broadly to require the state to provide entire databases because the state routinely maintains electronic copies of such entire databases. While the bill may be read narrowly to exclude such requests, the burden would be on the state or local agency to defend such a position in any litigation over a broad request.

2. If the Public Record Act were read to require release of entire databases in electronic form, the state may find the bill effectively requires that the state provide many of its databases to private entities on a regular basis. The bill's effect would then be to provide some marginal benefit to those who employ the PRA to support research and journalism, while creating a new demand for public records that could be used for private commercial purposes. Such commercial use would substantially increase the state workload associated with the support of the PRA without commensurate benefit to the public.

3. If the bill were read to require the state to provide full databases in electronic format, facilitating electronic reuse and republishing, it would raise questions, not yet answerable, of information ownership and publishing responsibility in the Internet age.

4. The bill would fundamentally change the nature of what requests must be honored under the Public Records Act. Historically, a government agency was required to disclose existing records and documents that may have been produced in the conduct of the agency's business. This bill does not explicitly exclude requests to create new reports in existing electronic formats, and so could be read to require the creation of new reports rather than merely disclosure of existing reports and documents in the form of data runs and database duplication. This practice could lead to the

development of information and reports never anticipated at the time the data was collected.

Fiscal

The DOIT defers to the Department of Finance regarding the fiscal implications of this bill.

Recommendation

The DOIT recommends a veto of this bill. While the goal of improving public access to electronic records is laudable, this bill would require the production of information in types of "records" for purposes and in volumes that were not considered in the formulation of the public policy regarding public records access. A veto message has been prepared that describes our concerns regarding the provisions of this bill.

ENROLLED BILL MEMORANDUM TO GOVERNOR

BILL NO: AB 2799 **AUTHOR:** Shelley **DATE:** 09/10/2000

SENATE: 34 - 0

ASSEMBLY: 70 - 4 **CONCURRENCE:** 72 - 2

This bill requires state agencies to provide non-exempt documents and data in electronic format when requested in electronic format, and provides for recovery of the cost of production in specified instances. AB 2799 prohibits state agencies from delaying or obstructing the inspection or copying of public records and requires the notification of a denial of any request for public records to be in writing. The bill deletes the requirement that computer data be provided in a form determined by the agency and requires, instead, that an agency provide requested records in any format in which it holds that information. The bill requires an agency to justify in writing any withholding of information.

SPONSOR: California Newspaper Publishers' Association

SUPPORT:
Department of Corporations (Corporation)
Department of Financial Institutions
Department of Motor Vehicles
Business, Transportation, and Housing Agency
California Integrated Waste Management Board
Department of Pesticide Regulations
Department of Toxic Substances Control
State Water Resources Control Board
Department of Conservation
Department of Water Resources
Resources Agency
Franchise Tax Board
State Personnel Board
Department of Finance

OPPOSITION:
California of Department of Forestry
Air Resources Board
California Environmental Protection Agency
Department of General Services
State and Consumer Services Agency

STATE FISCAL IMPACT: This bill would provide that in regards to the payment of fees for records released in an electronic format, the requester of information would bear the "direct cost" of programming and computer services necessary to produce a record not otherwise readily produced, as specified. Therefore, the requester would pay any additional costs to the state. However, costs will depend on how many requests for information, and of what type, comes as a result of this bill. The time and money that must be spent in responding to requests remains to be seen; some of the costs may be reimbursable under the bill itself.

ARGUMENTS IN SUPPORT: This bill could provide greater access to information maintained by various agencies by providing the information in a form that may be more economical and convenient to requesters.

ARGUMENTS IN OPPOSITION: This bill could create confusion because it does not clearly state what constitutes an identifiable public record or a report, it limits the time to respond to complicated requests, and limits the costs recoverable in retrieving and producing an electronic record. In addition, this bill infers that state agencies can be requested to do analyses, write computer programs, and otherwise prepare the information requested. Under this new approach, private entities can request agencies to compile data in ways that meet the requestor's needs – an effort that currently is born by the requestor. The new approach could allow private entities to unilaterally direct the work that is performed by an agency to their benefit and could result in excessive state agency costs.

UNOFFICIAL BALLOT

1999-2000 Votes - ROLL CALL

MEASURE: AB 2799
TOPIC: Public records: disclosure.
DATE: 08/25/00
LOCATION: SEN. FLOOR
MOTION: Assembly 3rd Reading AB2799 Shelley By Bowen
(AYES 34. NOES 0.) (PASS)

AYES
****

Alarcon	Alpert	Bowen	Brulte
Burton	Chesbro	Costa	Dunn
Escutia	Figueroa	Hayden	Haynes
Hughes	Johannessen	Johnston	Karnette
Kelley	Leslie	McPherson	Monteith
Morrow	Mountjoy	Murray	O'Connell
Ortiz	Peace	Perata	Poochigian
Schiff	Sher	Solis	Soto
Speier	Wright		

NOES
****

ABSENT, ABSTAINING, OR NOT VOTING
****

Johnson	Knight	Lewis	Polanco
Rainey	Vasconcellos		

UNOFFICIAL BALLOT

1999-2000 Votes - ROLL CALL

MEASURE: AB 2799
TOPIC: Public records: disclosure.
DATE: 05/25/00
LOCATION: ASM. FLOOR
MOTION: AB 2799 SHELLEY THIRD READING
(AYES 70. NOES 4.) (PASS)

AYES
****

Aanestad	Alquist	Aroner	Baldwin
Bates	Battin	Bock	Briggs
Calderon	Campbell	Cardenas	Cardoza
Cedillo	Corbett	Correa	Cox
Cunneen	Davis	Dickerson	Ducheny
Dutra	Firebaugh	Florez	Floyd
Gallegos	Granlund	Havice	Honda
House	Jackson	Keeley	Knox
Kuehl	Leach	Lempert	Leonard
Longville	Lowenthal	Machado	Maddox
Maldonado	Mazzoni	McClintock	Migden
Nakano	Olberg	Robert Pacheco	Rod Pacheco
Papan	Pescetti	Reyes	Romero
Runner	Scott	Shelley	Steinberg
Strickland	Strom-Martin	Thompson	Thomson
Torlakson	Vincent	Washington	Wayne
Wesson	Wiggins	Wildman	Wright
Zettel	Hertzberg		

NOES
****

Ackerman	Ashburn	Brewer	Kaloogian

ABSENT, ABSTAINING, OR NOT VOTING
****

Baugh	Frusetta	Margett	Oller
Villaraigosa	Vacancy		

UNOFFICIAL BALLOT

1999-2000 Votes - ROLL CALL

MEASURE: AB 2799
TOPIC: Public records: disclosure.
DATE: 08/25/00
LOCATION: ASM. FLOOR
MOTION: AB 2799 SHELLEY CONCURRENCE
(AYES 72. NOES 2.) (FAIL)

AYES
****

Aanestad	Alquist	Aroner	Ashburn
Baldwin	Bates	Battin	Baugh
Bock	Briggs	Calderon	Campbell
Cardenas	Cardoza	Cedillo	Corbett
Correa	Cox	Cunneen	Davis
Dickerson	Ducheny	Dutra	Firebaugh
Florez	Floyd	Gallegos	Granlund
Havice	Honda	House	Jackson
Keeley	Knox	Leach	Lempert
Leonard	Longville	Lowenthal	Machado
Maddox	Maldonado	Margett	Mazzoni
McClintock	Migden	Nakano	Olberg
Oller	Robert Pacheco	Rod Pacheco	Papan
Pescetti	Reyes	Romero	Scott
Shelley	Steinberg	Strickland	Strom-Martin
Thomson	Torlakson	Villaraigosa	Vincent
Washington	Wayne	Wesson	Wiggins
Wildman	Wright	Zettel	Hertzberg

NOES
****

Ackerman	Kaloogian

ABSENT, ABSTAINING, OR NOT VOTING
****

Brewer	Frusetta	Kuehl	Runner
Thompson	Vacancy		

Analyst Name: Travis Pitts
Phone No.: (916) 323-1071

STATE AND CONSUMER SERVICES AGENCY

NO ENROLLED BILL REPORT REQUIRED

DEPARTMENT	AUTHOR	BILL NUMBER
Building Standards Commission	Assemblymember Shelley	AB 2799

☒ Technical bill - No program or fiscal changes to existing program. No analysis required. No recommendation on signature.

☐ Bill as enrolled no longer within scope of responsibility or program of this Commission.

Comments:

RECOMMENDATION: None / Defer to DCA/DGS

EXECUTIVE DIRECTOR	DATE	AGENCY SECRETARY	DATE
Travis Pitts	8/29/00		9/1/00

ENROLLED BILL REPO[illegible] GP:kaf **Bus[illegible]s, Transportation & Housing Agency**

DEPARTMENT	AUTHOR	BILL NO.
CORPORATIONS	Shelley	AB 2799
SPONSOR	RELATED BILLS	DATE LAST AMENDED
California Newspaper Publishers Association	AB 142 (Bowen – 1995); AB 2989 (Bowen – 1996); AB 179 (Bowen – 1997); SB 74 (Kopp – 1997); AB 1099 (Shelley – 1999); SB 1065 (Bowen – 1999); SB 2027 (Sher – 2000).	July 6, 2000
SUBJECT: Public Records: Electronic Format: Disclosure.		

SUMMARY

Amends the California Public Records Act to (1) require any state or local agency ("public agency") that has identifiable, non-exempt public records in an electronic format to make that information available in electronic format, unless otherwise prohibited by law and except as specified, (2) specify the costs the requester would bear for obtaining copies of records in an electronic format, (3) authorize a public agency to inform a requester that the information is available in electronic format when the request is for non-electronic information and the information is also in electronic format, (4) prohibit a public agency to delay the inspection or copying of public records, (5) add another unusual circumstance that would permit an extension of time for a public agency to respond to a request for public records, and (6) require a response to a written request for public records that includes a denial, in whole or in part, to be in writing.

ANALYSIS

Under existing law, the California Public Records Act ("PRA") provides, among other things, that any person may receive a copy of an identifiable, "non-exempt" public record from a public agency, upon request and payment of any statutorily mandated fee and any reasonable fees necessary to cover the direct costs of duplication. A "non-exempt" public record is a public record that is not exempt from disclosure by an express provision of law. Further, the PRA requires that if portions of the records are exempt from disclosure, any portions of such records that can be reasonably segregated are to be similarly provided, upon request, after the exempted portions have been deleted. The PRA also requires that, upon request, an exact copy of the non-exempt public record shall be provided unless impracticable to do so, that computer data is to be provided in a form determined by the public agency, that nothing in the PRA shall be construed to permit a public agency to obstruct the inspection or copying of public records, and that a

VOTE: SENATE				VOTE: ASSEMBLY			
FLOOR	AYE 34	NO 0		FLOOR	AYE 72	NO 2	
POLICY COMTE	AYE 5	NO 0		POLICY COMTE	AYE 12	NO 2	

RECOMMENDATION: SIGN 9/5/00

DEPARTMENT	DATE	AGENCY	DATE	BY:	DATE:
WILLIAM KENEFICK Acting Commissioner of Corporations & Assistant Commissioner, Office of Policy	8-31-00	Marcia Coulter			

public agency respond to a request for records within 10 days from receipt of the request or within 14 days in unusual circumstances, as specified.

AB 2799 would delete the requirement that computer data be provided in a form determined by the public agency and, instead, provide that, unless otherwise prohibited by law, any public agency that has identifiable, non-exempt public records in electronic format shall make that information available in electronic format when requested by any person and, when applicable, shall make the information available in any electronic format in which it holds the information and the requested format is one that has been used by the public agency to create copies for its own use or for provision to other public agencies.

In addition, AB 2799 would provide that (1) the cost of duplication shall be limited to the direct cost of producing a copy of a record in electronic format, except that it is also to include the cost to construct a record and the cost of programming and computer services under certain circumstances, (2) nothing in the bill shall be construed to require a public agency to reconstruct a record in electronic format if it no longer has the record in electronic format, (3) if the request is for information in other than electronic format, and the information also is in electronic format, the public agency may inform the requester that the information is available in electronic format, (4) nothing in the bill is to be construed to permit a public agency to make information available only in an electronic format, (5) nothing in the bill is to be construed to require the public agency to release an electronic record in electronic format 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, and (6) nothing in the bill shall be construed to permit public access to records held by any public agency to which access is otherwise restricted by statute.

Furthermore, AB 2799 would provide that nothing in the PRA shall be construed to permit a public agency to delay or obstruct the inspection or copying of public records and would add another unusual circumstance that would permit a public agency to extend the normal time to respond to a request for public records.

Existing law under the PRA also requires a public agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the PRA or that 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.

AB 2799 would require a response to a written request for inspection or copies of public records that includes a denial, in whole or in part, to be in writing.

The purpose of this bill is to ensure quicker, more useful access to public records.

COST

It is estimated that this bill will result in minor and absorbable costs to the Department of Corporations.

ECONOMIC IMPACT

This bill could make it easier and faster for members of the public to obtain public records from public agencies and, in some situations, may make it less expensive to do so, especially with respect to those public records that can be obtained in electronic format.

LEGISLATIVE HISTORY

The vote history can be found on the front page of the Enrolled Bill Report.

The California Newspaper Publishers Association is the sponsor of this bill.

According to the author's office, under current law, when a person makes a request for data contained in computer format, the public agency has the discretion to determine in which form the information should be provided. Thus, the author's office claims that a public agency can effectively frustrate a public record's request by providing the requested records in a form different from the public's request.

The author's office also states that it is very important that a public agency disclose public information in a timely fashion. If there is a legitimate dispute over whether or not a record is covered by an exemption, the public agency is entitled to take up to 10 working days to either provide the information or provide the written grounds for its denial. The 10-day period is not intended to delay access to records: however, many state agencies believe the 10-day grace period can be used for any record. The author's office claims that by delaying the process, the public often gives up and never acquires the record.

Related bills include the following:

AB 142 (Bowen – 1995): Would have required that, unless otherwise prohibited by law, any public agency in possession of public records in an electronic format shall, upon request, make that information available in an electronic format. AB 142 died in committee.

AB 2989 (Bowen – 1996): Would have enacted the Paper Reduction Act of 1996 to require that all public records which exist in an electronic format be available electronically. AB 2989 failed in committee.

AB 179 (Bowen – 1997): Would have amended the PRA to, among other things, require public agencies to provide a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so, provided that the requested form is one which is used by the public agency. AB 179 was vetoed by former Governor Wilson and the Governor stated as follows in his veto message:

"Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is 'unreasonable' to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it 'unreasonable'.

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done."

SB 74 (Kopp – 1997): Contained similar provisions to AB 179 (Bowen – 1997) and was vetoed by former Governor Wilson for the exact same reasons as AB 179.

AB 1099 (Shelley – 1999): Would have amended the PRA to (1) provide that a copy of computerized data shall be provided in any form that is requested from among any of the forms used by the public agency for the conduct of its business or for the making of copies for its own use or the use of any other public agency and (2) prohibit a public agency from purchasing, leasing, creating, or otherwise acquiring any electronic data processing system for the storage, manipulation, or retrieval of public records if it impairs public examination or electronic copying of public records. AB 1099 was eventually amended to deal with a totally different subject matter.

SB 1065 (Bowen – 1999): Would have amended the PRA to require any public agency that has identifiable public records in an electronic format to make that information available in electronic format, unless otherwise prohibited by law. SB 1065 was vetoed by Governor Davis for the reason that many of the state's computer systems do not yet have the capacity to implement the provisions of the bill.

SB 2027 (Sher – 2000): Would amend the PRA to allow persons to appeal to the Attorney General any public agency's denial of a request to inspect public records. It is noted that both AB 2799 and SB 2027 make the exact same changes to Government Code Section 6255, thereby not creating a chaptering-out problem with respect to this code section.

WHAT OTHER STATES ARE DOING

According to the author's office, there are 34 other states that have rules pertaining to electronic records access that are similar to AB 2799. The remaining 16 states, including California, have no guidelines or rules specifically addressing if electronic public records can be accessed and how.

ARGUMENTS PRO & CON

A. Arguments in Support of the Bill:

This bill would provide reasonable guidelines for public access to electronically held records. With the advent of the electronic age, more and more people want to be able to access information in an electronic format.

From the perspective of the general public, this bill allows for the economic and convenient public disclosure of identifiable, non-exempt electronic public records in electronic format. Copying a public record that is in electronic format to the same format (e.g., from CD to CD or disk to disk) should be easier, faster, and less expensive to do than copying from electronic format to paper or from paper to paper, especially when the records are voluminous.

Clarifies that nothing in the PRA shall be construed to allow a public agency to delay the inspection or copying of public records.

Allows a person whose written request for public records has been denied to receive the public agency's response in writing.

Allows public agencies another special circumstance under which they may extend the normal time to respond to a request for records.

In addition to the sponsor, the Orange County Register, the State Franchise Tax Board, and the 1st Amendment Coalition support this bill.

B. Arguments in Opposition to the Bill:

This bill could be costly or burdensome to public agencies that have records in electronic format, but no or inadequate means of duplicating and segregating non-exempt public records.

The physical nature of electronic records may complicate the "reasonable segregation" requirement of the PRA, create confusion, and result in the accidental public disclosure of exempt information. Such an inadvertent disclosure may have an impact on the legal interests of all concerned parties, resulting in legal actions and associated costs.

The County of Orange is opposed to the bill because county staff could be required to spend considerable time copying and editing records, determining if they are appropriate for public disclosure and responding with written justifications if the requests are denied.

RECOMMENDATION

Insofar as the Department of Corporations is concerned, a SIGN is recommended on AB 2799 because this bill provides reasonable guidelines for public access to electronically held public records which should help increase the availability of public records and reduce the cost and inconvenience associated with large volumes of paper documents. Furthermore, the bill will assist the public in having their requests for public records responded to in a more timely fashion and in writing if the request is in writing and there is a denial.

Contact: GERARDO PARTIDA
Title: Senior Corporations Counsel
Phone No.: (916) 322-3675

Other Contact Persons:

William Kenefick
Acting Commissioner
(916) 322-3633

Brian A. Thompson
Acting Chief Deputy
(213) 576-7509

ENROLLED BILL REPORT

Business, Transportation and Housing Agency

DEPARTMENT	AUTHOR	BILL NO.
Department of Financial Institutions	Shelley and Co-authors Bowen, Alquist and Romero	AB 2799
SPONSOR	**RELATED BILLS**	**DATE LAST AMENDED**
California Newspaper Publisher's Association	SB 2027	July 6, 2000
SUBJECT		
Public records: disclosure		

1. SUMMARY:

This bill provides access to and receipt of public records in an electronic format, and requires that a written request for inspection or copies of public records that include a determination that the request is denied shall be in writing and include the names and titles or positions of the persons responsible for the denial.

2. ANALYSIS:

A. Policy:

Existing law, Chapter 3.5 (commencing with Section 6250), of Division 7, of Title 1 of the Government Code, provides for the inspection of public records (the California Public Records Act ("PRA"). The PRA defines public records to include any writing containing information relating to the conduct of public business that is prepared, owned, used, or retained by any state or local agency regardless of the form in which it is maintained.

Existing law, Section 6253 of the Government Code:

- Requires public records to be open to inspection by all persons at all times during the office hours of a state or local agency and every person has a right to inspect any public records, except as provided;
- Upon a request for a copy of records, the state or local agency shall promptly make the records available to any person upon payment of fees covering the direct costs of duplication, or a statutory fee if applicable. Upon request an exact copy shall be provided, unless impracticable, and computer data shall be provided in a form determined by the agency;

VOTE: ASSEMBLY FLOOR	Aye 70	No 4	VOTE: SENATE FLOOR	Aye 33	No 0
Policy Comte. G.O.	Aye 12	No 2	Policy Comte. Judiciary	Aye 5	No 0

RECOMMENDATION:

SIGN

DEPARTMENT	DATE	AGENCY	DATE	BY:	DATE:
Donald R Meyer	8/30/00	Maria Contreras	9/5/00		

- Each agency, upon a request for a copy of records, is required within 10 days from the receipt for request, to determine whether the request seeks copies of disclosable public records in the possession of the agency and shall promptly notify the requestor of the determination and the reasons therefor. In "unusual circumstances," defined therein, the time limit may be extended by written notice by the head of the agency or his or her designee, setting forth the reasons for the extension. The extension may not exceed 14 days;
- Nothing in the chapter shall be construed to permit an agency to obstruct the inspection or copying of public records. The denial notification is required to provide the names and title or positions of the persons responsible for the denial; and
- A state or local agency may adopt requirements for itself that hasten or provide greater access to records.

This bill would amend Section 6253 of the Government Code by:

- Repealing language that computer data be provided in a form determined by the agency;
- Adding to the definition of "unusual circumstances" for the extension of determination of the disclosure of public records the need to compile data, or write programming language or a computer program, or to construct a computer report to extract data.

This bill would add Section 6253.9 to the Government Code to require that a government agency that has information that constitutes an identifiable public record that is in an electronic format, must make information available in an electronic format when requested, and shall comply with the following:

- The agency shall make the information available in any electronic format in which it holds the information;
- The 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;
- Nothing in this section shall be construed to require the public agency to reconstruct a report in an electronic format if the agency no longer has the report itself available in an electronic format;
- Nothing shall be construes to permit an agency to make information available only in an electronic format; and
- Nothing in this section shall be construed to permit public access held by the Department of Motor Vehicles in which access is otherwise restricted by statute.

Government Code Section 6255 provides that an agency shall justify the withholding of 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 making the record public clearly outweighs the public interest served by disclosure of the record.

This bill would amend Government Code Section 6255 by adding a subsection to provide that a response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing.

B. Fiscal:

The Assembly Appropriations Committee noted: assuming agencies generally respond in writing when denying a public records request, there should be negligible fiscal impact; and potential revenue loss to

agencies that currently make and sell copies of public records documents, the revenue loss would probably be offset by workload savings from providing electronic rather than paper copies of public records.

3. SPONSOR:

California Newspaper Publisher's Association

4. PRO & CON:

A. Arguments in Support of the Bill:

With the advent of the electronic age, more and more people want to be able to access information in an electronic format. There is no current authority under which a person seeking electronically available records can obtain such records in that format. The bill enables access to and receipt of records in an electronic format.

The current provision in the PRA that enables an agency the discretion to determine in which form information be provided to the requestor, enables that agency to frustrate requests by providing a copy of information in other than the format requested.

B. Arguments in Opposition to the Bill:

The County of Orange already provides public information to the public, and how to access that data, 24 hours a day on the Internet. Without reasonable regulations, public agency staff could be required to spend considerable time copying and editing records, determining if they are appropriate for public disclosure, and responding with written justification if the requests are denied.

5. RECOMMENDATION:

The Department of Financial Institutions recommends the Governor **Sign** the bill. The bill provides access to and receipt of public records in an electronic format, which is becoming the format of choice in this electronic age. The bill also provides that a written request for inspection or copies of public records that include a determination that the request is denied shall be in writing and include the names and titles or positions of the persons responsible for the denial.

6. FOR FURTHER INFORMATION CONTACT:

Name	Carol Chesbrough
Title	Chief Deputy Commissioner
Office Phone Number	(916) 322-0282
Home Phone Number	(916) 961-3019
Cell Phone	(916) 799-1912

Suggested Veto Language

To the Members of the California State Assembly:

I am returning Assembly Bill 2799 without my signature.

Assembly Bill 2799 provides access to and receipt of public records in an electronic format, and requires that a written request for inspection or copies of public records that include a determination that the request is denied shall be in writing and include the names and titles or positions of the persons responsible for the denial.

Numerous public agencies already provide public information to the public, and how to access that data, 24 hours a day on the Internet. Under the provisions of this bill, those public agencies could be required to spend considerable time copying and editing records, determining if they are appropriate for public disclosure, and responding with written justification if the requests are denied.

Respectfully,

Gray Davis
Governor

ENROLLED BILL REPORT

Business, Transportation & Housing Agency

DEPARTMENT	AUTHOR	BILL NO.
DMV	Shelley	AB 2799
SPONSOR	**RELATED BILLS**	**DATE LAST AMENDED**
Author	SB 48, Sher (1999) AB 179, Bowen (97/98 RS)	07/06/00
SUBJECT		
Public records: disclosure		

This analysis only addresses those provisions of the bill impacting the Department of Motor Vehicles (DMV).

SUMMARY: AB 2799 would require the department, upon request, to provide public record information in any electronic format in which it holds the information. This bill would also require state agencies to justify in writing that a requested record is exempt from the Public Records Act or that the withholding of the record is in the best interest of the public.

IMPACT ASSESSMENT: The California Vehicle Code contains provisions regarding information to be collected and to whom it may be disseminated which are specific to DMV. These provisions are based on the Information Practices Act, the Public Records Act and the federal Drivers Privacy Protection Act.

The department currently provides record information in an electronic format (magnetic tape or on-line direct access) to large volume requesters but only provides a paper (hard copy) document for one-time requests from the public.

AB 2799 deletes an existing statutory provision which allows state or local agencies to provide computer data in a form determined by the agency. Instead, it would require any state agency to provide public record information held in an electronic format to be disseminated in an electronic format when requested. It would also require state agencies to justify in writing that a requested record is exempt from the Act or that the withholding of the record is in the best interest of the public.

AB 2799 adds Section 6253.9 to the Government Code clarifying that a public agency may charge the requester for producing a copy of a record, including the cost to construct a record as well as the cost of programming and computer services. Since existing law authorizes the department to charge a fee that is sufficient to pay actual administrative costs of producing a copy of a record (§1811 of the California Vehicle Code), this provision has no new impact on the department's operations.

Additionally, since the department already has a system in place for providing information through electronic means through headquarters, this bill appears to have no significant impact on the department's operations.

VOTE: ASSEMBLY			VOTE: SENATE		
FLOOR	Aye 72	No 2	FLOOR	Aye 34	No 0
Policy Cmte.	Aye 12	No 2	Policy Cmte.	Aye 5	No 0

RECOMMENDATION:

SIGN

DEPARTMENT	DATE	AGENCY	DATE
[signature]	8/30/2000	[signature]	9/1/00

DC

ECONOMIC IMPACT: There will be no discernible economic impact on California residents or businesses if the provisions of this bill are enacted.

Related Legislation: SB 48, Sher (1999) would have added provisions to the Public Records Act to allow for an appeal process through the Attorney General's Office after the denial of a record request; would have established monetary fines if it is found the denial was unjustified; and would have required state agencies to demonstrate in writing that a requested record is exempt from the Act or that the withholding of the record is in the best interest of the public. This bill was vetoed by the Governor on October 9, 1999.

AB 179, Bowen (97/98 RS), contained provisions similar to SB 2799. The bill was VETOED by Governor Wilson due to its restricting an agency's discretion as to the form of the document made available.

SB 74, Kopp (97/98 RS) would have made changes to the Public Records Act to require state agencies to provide a copy of an electronic record in the form requested, unless it was not reasonable to do so. This bill was VETOED by Governor Wilson for the same reason as AB 179, above.

AB 4, Bates (95/96 RS), among other things, required the Office of Information Technology in the Department of Finance to work with specified entities to develop and implement a plan to make computerized public information retained by the state accessible to the public in computer readable form, as specified, and prohibit agencies from charging fees for accessing the information. This bill died in the Assembly Committee on Consumer Protection. The department's approved position was OPPOSE.

AB 142, Bowen (95/96 RS), would have required an agency to provide any identifiable public record, as specified, in an electronic format, at the actual cost of providing the information. This bill died in the Assembly Committee on Government Organization. The department's approved position was OPPOSE.

SB 1814, Leonard (95/96 RS), among other things, would have allowed a state agency to enter into contracts with private entities to provide public records to those entities, provided the agency supplies the public with electronic access to the same public records. This bill died in the Senate Committee on Government Organization.

AB 1624, Bowen (Ch. 1235, Stats. 1993) required the Legislative Counsel to make specified information available to the public in electronic form.

AB 2451, Bates (93/94 RS), sought to require the Office of Information Technology to work with state, federal and local government agencies, and members of the public to develop and implement a specified plan for free statewide computer-assisted access to computerized government information that is subject to disclosure. This bill died in the Assembly Unfinished Business file.

ARGUMENTS PRO:
- AB 2799 may provide the public with greater access to information contained on the department's records.
- This bill should result in some cost efficiencies as technology becomes more widespread.

There is no known support for this legislation.

ARGUMENTS CON:
- AB 2799 restricts an agency's discretion as to the form of the document made available.
- While some state departments may have the flexibility to meet the requirements of this bill with a minor expenditure, many smaller departments maybe financially burdened by the bill provisions.

There is no known opposition to this legislation.

WHAT THE OTHER STATES ARE DOING: Most states offer the same electronic services that California DMV currently provides.

RECOMMENDATION: SIGN

The Department of Motor Vehicles collects and maintains a great deal of information on the citizens of California. The majority of this information is public in nature and statutes have been passed to identify and protect confidential information. AB 2799 would add some minor administrative requirements but make no substantive change to policy or procedures.

For further information, please contact:

Steven Gourley, Director
Day telephone: (916) 657-6941
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For technical information, please contact:

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Beeper: (916) 551-6730

CIWMB

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)		
Board California Integrated Waste Management Board	Author Shelley	Bill Number AB 2799
Sponsor California Newspaper Publishers Association	Related Bills AB 2282 (Davis) SB 2027 (Sher)	Priority B
Subject Public records: Disclosure.		DNR ☒

SUMMARY

AB 2799 would:

- Revise various provisions in the California Public Records Act (CPRA) in order to make available public records, not otherwise exempt from disclosure, in an electronic format, if the information or record is kept in electronic format by a public agency.
- Specify costs the requester would bear for obtaining copies of records in an electronic format.
- Add, to the unusual circumstances that would permit an extension of time to respond to a public records request, the need of the agency to compile data, write programming language, or construct a computer report to extract data.
- Require that a response to a request for public records that includes a denial, in whole or in part, be in writing, and provides that the CPRA shall not be construed to permit an agency to delay or obstruct either the inspection or copying of public records.

BACKGROUND

According to this bill's sponsor, the California Newspaper Publishers Association, the purpose of AB 2799 is to ensure quicker access to public records. The sponsor also notes that the bill seeks to provide reasonable guidelines for public access to electronically held records.

Board Recommendation		Agency Recommendation	
☒ State Mandate		☐ Governor's Appointment	
☒ Sign	☐ Defer to:	☐ Sign	☐ Defer to:
☐ Veto		☑ Veto	
Chair/Director	Date:	Agency Secretary	Date:
Linda Moulton-Patterson	8/30/00	Winston H. Hickox	9/5/00

The California Public Records Act (CPRA), enacted in 1968, generally provides the public the right to inspect and obtain copies of documents and records retained by State and local government agencies, with certain exceptions. The definition of public records includes those maintained in computer format. However, agencies may select the form in which such electronic records are provided and may charge only for the direct cost of duplication. They may not charge for retrieving, reviewing or redacting records.

ANALYSIS/COMMENTS

AB 2799 would:

1. Require that an agency's response to a written request for access to public records be in writing if access to the records is denied, in whole or in part, by the agency.

2. Delete the requirement that public records kept on computer be disclosed in a form determined by the public agency.

3. Require public agencies to make public records available, when requested, in the electronic format in which they hold the information, unless release of the electronic record would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

4. Add to the list of unusual circumstances which may prevent an agency from dispatching records within the time limit prescribed in Government Code § 6253 (c), *the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.*

5. Specify that the direct costs of duplication, for which agencies may charge requesters pursuant to current law, include the costs associated with duplicating electronic records.

Related Bills.

- **AB 2282 (Davis)** would require all of the boards, departments, and offices within the California Environmental Protection Agency (CalEPA), with the exception of the Office of Environmental Health Hazard Assessment, to display on the Internet various final orders or documents on enforcement actions, as specified, if the orders or documents are public records that are not exempt from disclosure under the California Public Records Act. If enacted into law, the provisions of AB 2282 would become operative on April 1, 2001. AB 2282 passed the Assembly Governmental Organization Committee (14-1) on April 10, 2000; passed the Assembly Information Technology Committee (5-0) on April 24, 2000; passed the Assembly Appropriations Committee (21-0) on May 10, 2000; and passed the Assembly Floor (73-0) on May 25, 2000; passed the Senate Environmental Quality Committee (10-0) on June 19, 2000; passed the Assembly Floor (77-0) on August 21, 2000; passed the Senate Floor (38-0) on August 18, 2000; and passed the Assembly Floor (77-0) on August 21, 2000. AB 2282 was sent to enrollment August 21, 2000.

- **SB 2027 (Sher)** would create a procedure for appealing to the Attorney General (AG) when a public agency denies a written request for disclosure of public records and allow a court to award penalties, as specified, when the public agency's action resulted in the denial of the plaintiff's right to access the requested records. In addition, SB 2027 would, if the AG were to render an adverse opinion against a public agency, allow the agency to engage outside counsel to defend lawsuits that result from the denial of access to public records and would expressly state that the AG is not precluded from representing the public agency on other matters. Finally, the AG would be immune from suit or discovery in any suit for action taken as a result of review under this bill. All AG opinions issued under this review procedure would be published annually in a special volume of opinions. SB 2027 passed the Senate Judiciary Committee (6-0) on March 28, 2000; passed the Senate Appropriations Committee (8-3) on May 25, 2000; passed the Senate Floor (31-6) on May 31, 2000; passed the Assembly Governmental Organization Committee (13-1) on June 26, 2000; passed the Assembly Appropriations Committee (20-0) on August 24, 2000; and, passed the Assembly Floor (75-1) on August 25, 2000.

The IWMB, in accordance with the CPRA and the IWMB public records general policy (IWMB Administration Manual § 12000-04), disseminates public records generally within 2-3 days following receipt of a request. This time frame is well within the 10 days allowed by the CPRA. Furthermore, the IWMB provides quick electronic access to various databases and other public records by listing and making available downloadable and hard copies of its most significant reports and studies on the IWMB's Publications web page.

In addition, IWMB reports that are required by Legislation, the Annual Budget Act, or the Supplemental Report to the Budget Act are listed on the Internet by the Legislative Counsel's Office. All other IWMB reports, subject to disclosure under CPRA, are available to the general public upon request.

OTHER STATES

Rhode Island General Law (RIGL), Title 38, Chapter 38-2, § 38-2-3, requires state entities to provide public records, " . . . in any and all media in which the public agency is capable of providing them." More specifically, subsections (e - g) specify the following:

- (e) Any person or entity requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them. Any public body which maintains its records in a computer storage system shall provide any data properly identified in a printout or other reasonable format, as requested.

- (f) Nothing in this section shall be construed as requiring a public body to reorganize, consolidate, or compile data not maintained by the public body in the form requested at the time the request to inspect the public records was made except to the extent that such records are in an electronic format and the public body would not be unduly burdened in providing such data.

- (g) Nothing in this section is intended to affect the public record status of information merely because it is stored in a computer.

With regard to the cost to the requestor for obtaining public records, RIGL, Title 38, Chapter 38-2, § 38-2-4, establishes: (1) a fee of up to $.15 per page (standard or legal size); (2) a retrieval fee not to exceed $15.00 per hour (with no charge for the first hour), (3) that upon request, the agency shall provide a detailed itemization of the costs charged for search and retrieval; and (4) that a court may reduce or waive the fees charged for search or retrieval if it is in the public interest to do so.

VOTES

Committee	**Date of Vote**	**Vote**
*Assembly Governmental Organizations Committee	April 24, 2000	6-3
*Assembly Governmental Organizations Committee	May 8, 2000	12-2
Assembly Appropriations Committee	May 17, 2000	17-2
Assembly Floor	May 25, 2000	70-4
Senate Judiciary Committee	June 29, 2000	5-0
Senate Floor	August 25, 2000	34-0
Assembly Floor	August 25, 2000	70-4

* AB 2799 failed passage before the Assembly Governmental Organization Committee (6-3) on April 24, 2000; however, the author was granted reconsideration and the bill was passed in that same committee (12-2) on May 8, 2000.

SUPPORT/OPPOSITION

Support: California Newspaper Publishers Association
First Amendment Coalition
Taken From the August 19, 2000, Senate Rules Committee Analysis. Orange County Register
State Franchise Tax Board

Oppose: County of Orange

FISCAL IMPACT

No known impact. The IWMB, by making information available via its Internet site, responding promptly to public requests for information, and following strict guidelines for the administration of IWMB public records, already complies with most of the parameters proposed in AB 2799.

Code/Dept		($s in Thousands) 2000-01	2001-02	2002-03	Fund Name
	Revenue				
	State Operations				
	Capital Outlay				
	Local Assistance				

APPOINTMENTS

Not Applicable.

OTHER AFFECTED DEPARTMENTS ROLES/VIEWS

Other State agencies which are not as technologically advanced as the IWMB, with its powerful network, skilled webmasters, and contemporary computing environment, may have great difficulty delivering electronic records to requestors in the allotted timeframes.

PRO/CON

Pro: AB 2799 may ensure quicker, more useful access to public records.

Con: Opponents claim that redacting the nondisclosable information from the electronic records stored in the State's various and complex databases could be a costly and time-consuming process that is vulnerable to error and may result in the unintentional release of nondisclosable information.

RECOMMENDED POSITION

The IWMB recommends the Governor "Sign" AB 2799. This measure would not likely result in any additional workload for the IWMB because the IWMB currently operates in accordance with many of the bill's provisions. Further, the IWMB endorses improved access to public records.

LEGISLATIVE STAFF CONTACT

Contact	Work	Home	Cell Phone	Pager
Winston H. Hickox Secretary for Environmental Protection California Environmental Protection Agency	323-2514	484-0356	798-3363	None
Linda Moulton-Patterson Chair California Integrated Waste Management Board	255-2167	447-8063 or (714) 847-0469	798-6083	None
Patty Zwarts Assistant Secretary for Legislation California Environmental Protection Agency	322-7326	452-9464	None	731-0506
Karin Fish Chief Deputy Director California Integrated Waste Management Board	255-2185	645-9005	798-2912	None

dpr

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)		
Department Department of Pesticide Regulation	Author Shelley	Bill Number AB 2799
Sponsor California Newspaper Publishers Association	Related Bills	Priority B
Subject: Public records: disclosure.		DNR ☒

SUMMARY

The bill revises various provisions in the Public Records Act (PRA) in order to make public records available in an electronic format.

BACKGROUND

This bill is a blend of two bills that were passed by the Legislature last year, AB 1099 (Shelley) and SB 1065 (Bowen). AB 1099 was chaptered but contained provisions unrelated to electronic records. SB 1065 was vetoed by the Governor. (The veto message is attached.)

Most of AB 1099 is incorporated into AB 2799.

The PRA provides statutory authority to protect the rights of an individual's privacy, while recognizing that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person.

The PRA allows an agency to provide computer data in any form determined by the agency. It directs a public agency, upon request for inspection for a copy of the records, to respond to a request within ten days after receipt of the request. However, in unusual specified circumstances, the timeline for response may be extended to 14 days.

OTHER STATES

Every state has Public Records Act/Access legislation. Specific legislation and rulings stemming from various states are varied and cover a wide variety of materials. California appears to be at the forefront in its efforts to accommodate such requests.

Department Recommendation		Agency Recommendation	
☐ State Mandate		☐ Governor's Appointment	
☒ Sign	☐ Defer to:	☐ Sign	☐ Defer to:
☐ Veto		☑ Veto	
Chair/Director Paul Helliker	Date: 8/28/00	Agency Secretary Winston H. Hickox	Date: 9/5/00

ANALYSIS/COMMENTS

1. The bill clarifies that the PRA is not to be construed to permit agencies to delay records inspection or copying. This is in the spirit of the original PRA language.

2. The bill mandates that all denials of PRAs be in writing. This will have little impact on the Department of Pesticide Regulation (DPR) since it typically writes its reasons for denying PRA requests.

3. Electronic data is generally made available to the requestor if the whole of that data is fully disclosable. Government Code section 6253(b) of the PRA provides that an exact copy be provided unless impracticable. Should any portion(s) of requested information be protected from disclosure, the bill is unclear as to how much effort the agency must perform to release that disclosable portion(s) before fulfilling PRA requests become "impracticable." The requestor may deem it practicable while the State does not.

4. The language proposed to add in section 6253.9 makes it mandatory that the State "shall ... provide a copy of an electronic record ... if the ... agency create[d] copies for its own use or for provision to other agencies." Adherence to the letter of the law may create onerous tasks for those Department staff who must redact/delete protected information such as social security numbers, medical information, names, etc. While data fields may be deleted from the electronic formats, the manipulation of that data may create large data processing projects for the Department.

5. Furthermore, any electronic processing software must be able to print out documents and/or provide CD-ROM or floppy disks in case of PRA requests. This bill, as amended, provides for direct reimbursement and makes specific that requestor's will pay for programming time, albeit at the lowest programmer's pay level.

6. If the requested information is available electronically, informing the requestor requires a minimum effort.

7. Exempted information provision restates the importance of denying access to protected information.

SUPPORT/OPPOSITION

Support: California Newspaper Publishers Association
Orange County Register
State Franchise Tax Board
First Amendment Coalition

Oppose: County of Orange

Assembly Governmental Organization	5/8/00	Y-12, N-2
Assembly Appropriations	5/17/00	Y-17, N-2
Assembly Floor	5/24/00	Y-70, N-4
Senate Appropriations	7/5/00	Y-5, N-0
Senate Floor	8/25/00	Y-34, N-0

FISCAL IMPACT

The bill would result in minimal fiscal impacts to DPR. These costs would be related to tracking direct costs of providing electronic format to requestors.

APPOINTMENTS

The bill would not result in any appointments.

OTHER AFFECTED DEPARTMENTS ROLES/VIEWS

The bill will affect all state agencies, and it is expected that the responses regarding the bill will be varied.

ARGUMENTS

Pro: This bill clearly expresses that there should not be any delay in releasing records.

Electronic format enables the computer user to download and use the data on a personal computer.

Direct reimbursement is available.

Con: The subjective terminology, "jeopardize or compromise the security or integrity of the original record or of any proprietary software," leaves open areas for disagreement between requestors and the requested agencies.

RECOMMENDED POSITION

SIGN
The bill is virtually the standard currently used by DPR when addressing PRA requests, and it provides for direct cost reimbursement.

Attachment

LEGISLATIVE STAFF CONTACT

Contact	Work	Home	Cell Phone	Pager
Winston H. Hickox Secretary for Environmental Protection California Environmental Protection Agency	323-2514	484-0356	798-3363	None
Paul Helliker Director Department of Pesticide Regulation	445-4000	457-7407	847-7395	None
Patty Zwarts Assistant Secretary for Legislation California Environmental Protection Agency	322-7326	452-9464	None	731-0506
Adrienne Alvord Legislative Director Department of Pesticide Regulation	445-3976	448-1861 Weekends- (510)204-9101	761-7186	None

Governor's Message:

I am returning Senate Bill 1065 without my signature.

This is well-intentioned legislation. However, many of the state's computer systems do not yet have the capacity to implement the provisions of this bill. As such, this bill does not keep faith with previous legislation I have signed to protect the confidentiality of citizens whose personal information is maintained by state departments including the Employment Development Department, the Department of Motor Vehicles, the Department of Health Services, and the California Highway Patrol. I believe the State's information technology resources should be directed towards making sure that its computer systems are year 2000 compliant. The author was unwilling to add language which would ensure the completion of this task before the implementation of the provisions of this bill.

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)

Department	Author	Bill Number	Priority
Department of Toxic Substances Control	**Shelley**	**AB 2799**	B C

Sponsor
California Newspaper Publishers Association

Related Bills
AB 1099 (Shelley, 1999)
SB 1065(Bowen, 1999)

Subject:
Public records

DNR H

SUMMARY

AB 2799 requires state agencies to provide non-exempt documents and data in electronic format when requested in electronic format, and provides for recovery of the cost of production in specified instances. AB 2799 prohibits state agencies from delaying or obstructing the inspection or copying of public records and requires the notification of a denial of any request for public records to be in writing. The bill deletes the requirement that computer data be provided in a form determined by the agency and requires, instead, that an agency provide requested records in any format in which it holds that information. The bill requires an agency to justify in writing any withholding of information.

BACKGROUND

The California Public Records Act (Act) provides for the disclosure of non-exempt records by state agencies. Any person requesting a public record, as defined, is entitled to receive a copy upon payment of specified fees. Current law allows an agency to determine the form in which the request will be provided.

In 1999, Assemblyman Shelley introduced a similar version of this measure, AB 1099, also sponsored by the California Newspaper Publishers Association (CNPA). CNPA cited slow and unsatisfactory agency responses to requests for public records as the basis of the proposed legislation. Additionally, CNPA alleged that requests for public records were often met with production of voluminous, often unusable, information. AB 1099 was introduced in an effort to mandate disclosure of information in a user-friendly format. AB 1099 was ultimately gutted and amended to include unrelated subject matter.

ANALYSIS/COMMENTS

In the previous version of AB 2799, the Department of Toxic Substances Control (DTSC) took issue with certain undefined language. DTSC suggested in its analysis of the 7/6/00 version of AB 2799, that leaving the terms *identifiable public record* and *report* undefined

State Mandate [ ]	Governor's Appointment [ ]
Department Recommendation	**Agency Recommendation**
[X] Sign [ ] Defer to:_____	[ ] Sign [ ] Defer to:_____
[ ] Veto	H Veto
[ ] No EBR Required	[ ] No EBR Required
Director Edwin F. Lowry Date: 9/29/00	Agency Secretary Winston H. Hickox Date: 9/5/00

would leave room for agency interpretation as to what it would be required to disclose. Without clarifying what constitutes an identifiable public record or report, a failure to provide information based on DTSC's determination that a requested record/report did not constitute an identifiable public record, could result in an appeal for disclosure.

DTSC supports a policy of open government and is currently taking steps to make access to public information even easier to obtain. AB 2799, however, by failing to adequately define that which agencies would be required to disclose, by allowing only limited time in which to respond to a request, and by limiting the reimbursement available for producing copies, places DTSC at risk of penalty for failure to adequately respond within the time allotted to requests for reports/information in electronic format.

As a practical matter, DTSC will do its best to comply with all public records requests for reports in electronic format. Given, however, the current shortages in information technology staff, especially programmers, DTSC is concerned that there will be insufficient staffing available to meet departmental needs or the mandate to produce the reports within the maximum of 24 days from the day requested. Time and experience will tell if DTSC will need additional staffing to handle the needs/mandates coming from this bill.

OTHER STATES

Texas
Under the Texas Open Records Act, if public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. An agency must provide a copy in the requested medium under three conditions:

- the agency has the technological ability to produce a copy of the requested information in the requested medium
- the agency is not required to purchase any software or hardware to accommodate the request
- provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the agency and a third party

If the agency cannot comply with a request to produce a copy of information in a requested medium for any of the reasons described in the act, the agency must provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. An agency is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies. (Tex. Gov. Code §552.228).

Ohio
All public records must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

VOTES

Committee	Date of Vote	Vote
Assembly Governmental Organization	4/24/00	6 - 3 (fail)
Assembly Governmental Organization (reconsideration granted)	4/24/00	13-0
Assembly Governmental Organization	5/8/00	12-2
Assembly Appropriations	5/17/00	17-2
Assembly Floor	5/25/00	70-4
Senate Judiciary	6/29/00	5 - 0
Senate Floor	8/25/00	34-0
Assembly Concurrence	8/25/00	72-2

SUPPORT/OPPOSITION

Support:
- California Newspaper Publishers Association (sponsor)
- Orange County Register
- State Franchise Tax Board
- 1st Amendment Coalition

Oppose:
- County of Orange

FISCAL IMPACT

AB 2799's fiscal impact on DTSC is largely unknown. Costs will depend on how many requests for information, and of what type, comes as a result of this bill. The time and money that must be spent in responding to requests remains to be seen; some of the costs may be reimbursable under the bill itself. Although the measure states that nothing in the provisions would be construed to require reconstruction of a report, unclear language could generate an additional work load of constructing the requested reports or for defending the decision on written denials of public records requests.

ARGUMENTS

Pro: AB 2799 would facilitate access to public records, promoting the notion of open government, and allows for the recovery of some costs to the agency in reproducing the reports requested.

Con: AB 2799 could create confusion because: it does not clearly state what constitutes an identifiable public record or a report, it limits the time to respond to complicated requests, and limits the costs recoverable in retrieving and producing an electronic record.

RECOMMENDATION

Sign. Although AB 2799 does not state what constitutes an *identifiable public record* or a *report*, and although it has concerns about the fiscal impact and workload impact on its information technology and legal staffs in complying with the bill, DTSC supports measures that provide the public with access to public information. AB 2799's intent is consistent with DTSC's policy of providing its constituency with access to public information.

CONTACT PERSONS:

	DTSC Legislative Director	DTSC Director	Cal/EPA Legislative Director	Cal/EPA Secretary
Name:	Alan Gordon	Edwin Lowry	Patty Zwarts	Winston Hickox
Work Telephone Number:	(916) 324-0912	(916) 322-0504	(916) 322-7326	(916) 323-2514
Home Telephone Number:	(916) 737-7530	(916) 443-6468	(916) 452-9464	(916) 484-0356
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CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)			
Board: State Water Resources Control Board	Author: Shelley	Bill Number: AB 2799	Priority: B
Sponsor: California Newspaper Publisher's Association		Related Bills: SB 2027 (Sher); AB 2282 (Davis)	
Subject: Public records: disclosure		DNR ☒	

SUMMARY

AB 2799 would amend the California Public Records Act (PRA) to require agencies that have information in an electronic format to make it available when requested in any format in which it holds the information, or in the format requested if it is a format the agency uses to store, copy or provide the record. The bill would also require agencies to justify withholding a public record in writing.

BACKGROUND

The California PRA requires state and local agencies to make their records open to public inspection at all times during office hours, except as specifically exempted from disclosure by law. The PRA also provides that computer data must be provided in a form determined by the agency, and that the agency may charge a fee to cover the direct costs of duplication (Government Code Section 6253 (b)). Recent case law holds that direct costs of duplication means the costs of running a copy machine and the expense of the person operating it. Direct costs of duplication do not include costs for retrieval, inspection and handling of the file from which the copy is extracted. (*North County Parents Organization v. Dept. of Education*, 28 Cal. Rptr. 2d 359, (1994)). This case has imposed an additional financial burden on agencies that routinely receive a large number of requests for their records.

The estimated number of public records requests for information from the State Water Resources Control Board (SWRCB) and Regional Water Quality Control Boards (RWQCBs) in 1997 was 14,000. Among these, there were only two instances in which the request was denied, both times in writing. Most requests are for access to RWQCBs' records. Most are requests for identifiable, noncontroversial public records, and each RWQCB has designated staff to handle such routine requests. More complicated requests are forwarded to the Office of Chief Counsel at the SWRCB for a

Departments That May Be Affected: All agencies subject to the California Public Record's Act	
State Mandate ☒	Governor's Appointment ☐
Board Position: ☒ Sign ☐ Veto ☐ Defer to:	Agency Secretary Position: ☐ Sign ☑ Veto ☐ Defer to:
Board Chair: [signature] Date: 8/28/97	Agency Secretary: Winston H. Hickox Date: 9/5/97

determination of disclosure or nondisclosure. Very few requested records require redaction or reprogramming.

AB 2799 is very similar to last year's SB 1065 (Bowen), which was vetoed because of confidentiality concerns about electronic records of citizens, and because state computer systems needed to concentrate on year 2000 compliance (see veto message attached). The 2000 compliance is no longer an issue since the beginning of the year. The confidentiality concern appears to have been addressed in AB 2799 by not allowing access to public records to which access is otherwise restricted by statue (proposed §6253.9(g)). In SB 1065, this provision was limited to the Department of Motor Vehicles.

Other PRA bills of the 1999-2000 session include SB 2027 (Sher) and AB 2282 (Davis). SB 2027 is very similar to SB 48 (Sher), which would have created an Attorney General review process for public records request denials. SB 48 was vetoed because of conflicts between the Attorney General and state agencies. SB 2027 (Sher) is currently in the Assembly Appropriations Committee.

AB 2282 (Davis) would require, on and after April 1, 2001, every final enforcement order issued by the California Environmental Protection Agency and various boards and departments within the agency, under any provision of law that is administered by one of these entities, to be displayed for at least one year on the agency's Internet website, if the order is a public record that is not otherwise exempt from disclosure. AB 2282 is currently enrolled.

Past attempts to amend the PRA include the 1998-1999 session's AB 179 (Bowen) and SB 74 (Kopp), both of which were vetoed by Governor Wilson because of fears that they would add costs and rigidity to public agencies' obligations under the PRA.

ANALYSIS/COMMENTS

AB 2799 would provide that nothing in the PRA be construed to permit an agency to delay or obstruct the inspection or copying of public records. This bill would delete the requirement that computer data be provided in a form determined by the agency and would require any agency that has a public record not otherwise exempt from disclosure that is in an electronic format to make that information available in an electronic format when requested by any person. The bill would require an agency to make information available in any electronic format in which it holds the information, but would not require release of a record in an electronic format if its release would compromise the security or integrity of the original record or any proprietary software in which it is maintained. The bill would require that the requester bear the cost of programming and computer services necessary to produce a record not otherwise readily produced. Finally, AB 2799 would require a response to a written request for public records that includes a denial of the request in whole or in part to be in writing.

The SWRCB has no problem with the substance or intent of this bill. Agencies can provide electronic information cheaply and easily so long as they can do so in formats in which they already hold the information or as otherwise provided in 6253.2(a). Furthermore, allowing agencies or a superior court to disclose records under the

criterion of 6255 (b) is reasonable, and codifying denial of public records requests in writing under 6255(a) conforms with the SWRCB's current practice.

The SWRCB originally recommended the wording of Section 6253.2 should be overhauled for consistency, because "public record" is used interchangeably with other terms such as "information," "record," and "electronic record." Other amendments recommended by the SWRCB were incorporated into the bill, such as deletion of the undefined term "report," in the original version, and expanding the exception for the Department of Motor Vehicles to include other agencies that have public records restricted by statute.

OTHER STATES

Under the Texas Open Records Act, if public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. An agency must provide a copy in the requested medium under three conditions:

- the agency has the technological ability to produce a copy of the requested information in the requested medium;
- the agency is not required to purchase any software or hardware to accommodate the request; and
- provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the agency and a third party.

If the agency cannot comply with a request to produce a copy of information in a requested medium for any of the reasons described in the act, the agency must provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. An agency is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies. (Tex. Gov. Code §552.228).

In Ohio, all public records must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

VOTES

Committee	Date of Vote	Vote
Assembly Floor (concurrence)	8/25/00	72-2
Senate Floor	8/25/00	34-0
Senate Committee on Judiciary	6/29/00	5-0
Assembly Floor	5/25/00	70-4
Assembly Committee on Appropriations	5/17/00	17-2
Assembly Committee on Governmental Organization	5/8/00	12-2
Assembly Committee on Governmental Organization	4/24/00	13-0
Assembly Committee on Governmental Organization (failed passage)	4/24/00	6-3

SUPPORT/OPPOSITION

Support:
- California Newspaper Publishers Association (source)
- Orange County Register
- State Franchise Tax Board
- 1st Amendment Coalition

Oppose:
- County of Orange

FISCAL IMPACT

While there may be a workload associated with this bill, it does not appear substantial. AB 2799 requires the requester to bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record in either of two cases. In order to comply, the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals; or the request would require data compilation, extraction, or programming to produce the record (Section 6253.9(b)).

ARGUMENTS

Pro: According to the author's office, with the advent of the electronic age, more and more people want to be able to access information in an electronic format. Apparently, there is not current authority under which a person seeking electronically available records could obtain such records in that format. This means that if an agency makes a CD or disk copies of the records, a member of the public could not obtain records in that format-the public would have to buy copies made out of the printouts from the records. The expense of copying these records in paper format, especially when the records are voluminous, makes those public records practically inaccessible to the public, according to the author and the proponents.

The author also states that the current provision in the PRA that gives a public agency the discretion to determine in which form the information requested should be provided works so that the agency can effectively frustrate the request by providing a copy of the requested record in a form different from the request, which could sometimes render the information useless.

The sponsor of this bill, the California Newspaper Publishers Association (CNPA) also contends that the 10-day period that a public agency has to respond to a request for inspection or copying of public records is not intended to delay access to records. It is intended instead, when there is a legitimate dispute over whether the records requested are covered by an exemption, to provide time for the agency to provide the information or provide the written grounds for a denial. What many state agencies do, the sponsor says, is to

use the 10 days as a "grace period" for providing the information, during which time many a requester (members of the public) often gives up and never acquires the record.

Con: The County of Orange contends that the county, like many others, already provide information to the public on public records and how to access them, 24 hours a day through the Internet. "Without reasonable regulations," the county argues, "County staff could be required to spend considerable time copying and editing records, determining if they are appropriate for public disclosure and responding with written justifications if the requests are denied."

RECOMMENDED POSITION - SIGN

The bill would have little impact on the SWRCB or Regional Water Quality Control Boards since it is consistent with current practices. It appears to be a reasonable measure to disseminate public records in electronic form.

Title	Name	Office	Home	Pager/cell
Secretary, Cal/EPA	Winston Hickox	323-2514	484-0356	798-3363 595-2081 pager
Acting Chair, State Water Board	Art Baggett	657-0935	442-8816 209/379-2289	360-1544 pager 804-1544 cell
Legislative Director, Cal/EPA	Patty Zwarts	322-7326	452-9464	731-0506
Legislative Director, State Water Board	Tom Jones	657-1247	452-2489	523-8148

Unless noted otherwise, all telephone numbers are in the 916 area code.

BILL NUMBER: SB 1065
VETOED DATE: 10/10/1999

To the Members of the Senate:

I am returning Senate Bill 1065 without my signature.

This is well-intentioned legislation. However, many of the state's computer systems do not yet have the capacity to implement the provisions of this bill.

As such, this bill does not keep faith with previous legislation I have signed to protect the confidentiality of citizens whose personal information is maintained by state departments including the Employment Development Department, the Department of Motor Vehicles, the Department of Health Services, and the California Highway Patrol.

I believe the State's information technology resources should be directed towards making sure that its computer systems are year 2000 compliant. The author was unwilling to add language which would ensure the completion of this task before the implementation of the provisions of this bill.

Cordially,

GRAY DAVIS

BILL NUMBER: AB 179
VETOED DATE: 10/12/1997

To the Members of the California Assembly:

I am returning Assembly Bill No. 179 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional b urden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

BILL NUMBER: SB 74
VETOED DATE: 10/12/1997

To the Members of the California Senate:

I am returning Senate Bill No. 74 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional b urden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

ENROLLED BILL REPORT — RESOURCES AGENCY

Department	CONSERVATION	Author	SHELLEY	Bill Number	AB 2799
Sponsored By	CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION	Related Bills	SB 2027, SB 1065	Version	7/6/00
Subject	PUBLIC RECORDS: DISCLOSURE				

SUMMARY

AB 2799 would make changes to the Public Records Act (PRA) pertaining to the release of public records in an electronic format.

HISTORY AND SPONSORSHIP

AB 2799 is sponsored by the California Newspaper Publishers Association.

Staff with the sponsor's office stated that AB 2799 would provide timely access to public records and create reasonable requirements for public access to records held in an electronic format.

The Public Records Act

In 1968, the California PRA was enacted to declare that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this State. Public records 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. Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except for specified exemptions. Every agency may adopt regulations stating the procedures to be followed when making its records available.

Support & Opposition

AB 2799 is supported by the Orange County Register, State Franchise Tax Board, and the 1st Amendment Coalition.

AB 2799 is opposed by the County of Orange.

Supporters state that this bill would update the provisions of the PRA to reflect the advent of the electronic age with respect to obtaining electronic public records and the costs to agencies providing electronic records. Supporters believe that as citizens increasingly utilize information technology they will want access to public records in an electronic format. Supporters state that this bill would provide citizens with the choice to determine what form they would like the record to be provided, based upon the forms (paper or electronic) that the agency holds the information.

Opponents for AB 2799 point out that they already provide electronic records for public access by way of the Internet. They argue that the bill is not reasonable because it requires substantial amounts of staff time to gather, copy, edit, and determine if records are appropriate for disclosure.

Contact: Jason Marshall, Assistant Director
Office of Governmental & Environmental Relations
Office: (916) 445-8733 Cellular: (916) 769-4952
Home: (530) 622-4952

Recommendation: SIGN	
Department Director: Date 8/30	Agency Secretary: Date

Related Legislation
SB 2027 (Sher), pending on the Senate Floor, would make major changes to the compliance and enforcement provisions of the PRA. These provisions among others include creating a procedure for appealing to the Attorney General when a public agency denies a written request for disclosure of a public record.

Last year's SB 1065 (Bowen) was similar to AB 2799 in that it had identical provisions requiring public agencies holding information in an electronic format, to make that information available in the format it is held in, when requested under the PRA. Governor Davis vetoed SB 1065 because the state's computer systems did not have the capacity to implement the provisions of that bill and that resources should be directed at making the state's computer systems year 2000 compliant. Additionally, Governor Davis cited that the provisions of SB 1065 did not "protect the confidentiality of citizens whose personal information is maintained by state departments."

EXAMINATION: EXISTING LAWS & PROPOSED CHANGES
Under existing law, there are no provisions regarding how governmental agencies provide electronically held information to the requester of a PRA request.

AB 2799 would require that if information constituting an identifiable public record is held in an electronic format that the public agency make that information available in an electronic format held and utilized by the agency. If the release of a record would compromise the record or any proprietary software that the record is held in, an agency could deny the request on those grounds. AB 2799 would provide that if a request for a non-computer record is made and that record is also held in an electronic format, then the agency would be required to inform requesters of the record's availability in an electronic format.

Under existing law, when a written request to review public records is denied, the denying public agency is not required to justify the denial of that request in writing.

This bill would require that public agencies provide, in whole or in part, a written denial of a request for the release of public records to the requester, if the request was made in writing.

Existing law provides agencies ten days from the receipt of a record request to respond to the requester as to whether or not the records(s) can be disclosed. Existing law also provides for "unusual circumstances" where the time limit may be extended by written notice.

AB 2799 adds to the "unusual circumstance" provisions, the necessity to compile data, write computer programming language, or to construct a computer report in order to provide the requested data in an electronic format.

Existing law provides that public agencies make an accurate copy of a public record and that the requester may be a charged a fee associated with the direct costs of duplication.

AB 2799 specifies that direct costs shall include costs associated with duplicating electronic records. This would include costs of programming and computer services associated with compilation and extraction of a record.

DISCUSSION
The Department already practices two of the components of AB 2799: 1) providing electronic formatted responses to PRA requests; and 2) providing a written denial of PRA requests. However, regarding the

first item, those records that have been previously provided by the Department in electronic format have not been excessive in technical complexity, nor in staff time consumpted.

Because the Department expects that future PRA requests for electronic records will increase, the Department welcomes this bill's provisions that would specify that direct costs associated with the reproduction of public records include those costs associated with the reproduction of electronically held data.

FISCAL IMPACT
Because provisions of this bill specify that direct costs can be recouped from the requester, this bill would not have a negative fiscal impact to the Department. However, should the Department find that, in practice, the workload resulting from AB 2799 creates a burden that can not be recouped with a fee to the requester, the Department would seek an augmentation via a Budget Change Proposal.

ECONOMIC IMPACT
This bill would not appear to have a direct negative impact on business in the State.

OTHER STATES
It appears the majority of the western states use statutes similar to those presently used in California. Oregon statutes define that if the record is not available in the format requested, then it will be provided in the format that it is maintained in. Oregon charges fees for reproduction costs that include "summarizing, compiling or tailoring" to meet the person's request. Oregon has no requirement that a denial to receive public records be provided in written format.

VOTES
Failed Assembly Committee Governmental Organization (6-3) April 24, 2000.
Passed Assembly Committee on Governmental Organization (12-2) on May 8, 2000.
Passed Assembly Committee on Appropriations (17-2) on May 17, 2000.
Passed Assembly Floor (70-4) on May 25, 2000.
Passed Senate Committee on the Judiciary (5-0) on June 29, 2000.
Passed Senate Floor (33-0) on August 25, 2000.
Passed Assembly Concurrence (Rule 77 suspended) on August 25, 2000.

RECOMMENDATION
The Department of Conservation recommends the Governor **SIGN** AB 2799.

This bill would provide that public records in an electronic format be provided to a PRA requester in the form in which the public agency holds and utilizes the information. If a public agency denies a written request for public records, then the agency's denial must be made in writing. Both of the above items are practices already utilized within the Department of Conservation. This bill would also specify that direct costs to public agencies may be recouped (as a fee to the requester), and can include those costs associated with providing electronic formats of records.

RESOURCES AGENCY

ENROLLED
BILL REPORT

LEGISLATIVE STAFF CONTACT

CONTACT	WORK	HOME	CELL	PAGER
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Michael Sweeney Undersecretary for Resources Resources Agency	653-5227	(510)537-8150	955-1198	(888) 471-1080
Jennifer Galehouse Asst. Secretary for Legislation Resources Agency	653-5698	688-1317	601-0646	981-4180
Darryl Young Director Department of Conservation	322-1080	(530)753-1684	835-7962	
Pat Meehan Deputy Director Department of Conservation	322-1080	772-8527	591-4713	
Jason Marshall Legislative Representative Department of Conservation	445-8733	(530)622-4952	769-4952	

ENROLLED BILL REPORT

AGENCY		BILL NUMBER
RESOURCES		AB 2799
DEPARTMENT, BOARD OR COMMISSION	**DATE LAST AMENDED**	**AUTHOR**
WATER RESOURCES	7-6-00	Shelley

SUMMARY

This bill would revise various provisions of the California Public Records Act, mainly concerning the availability of electronic records. The bill would require that public records, which are not otherwise exempt from disclosure, be made available in an electronic format if the records are held in electronic format by the agency and that format is requested. The bill specifies what costs a requester would bear for obtaining copies in an electronic format. The bill also would require that, where a request for public records is in writing, a response that includes a denial of some or all of the requested records must be in writing.

ANALYSIS

The Public Records Act (Government Code Section 6250 et seq.) requires public agencies to disclose identifiable public records to members of the public upon request unless the records are exempt from disclosure. Records are broadly defined to include any writing related to the conduct of public business, regardless of form. Under current law, agencies are permitted to decide in what form "computer data" will be disclosed. In practice, public agencies make records held in electronic format available to the public in some form, even if not in the original electronic format. A requester must pay the direct costs of duplicating the record. This covers the cost of making copies but not searching for the record.

Agencies are required to notify requesters within 10 days of receiving a request of their determination whether to disclose a requested record, and this period may be extended by an additional 14 days in certain narrow circumstances. Current law does not require that the notice to a requester be in writing. Finally, the Act is to be interpreted in a way that does not permit an agency to "obstruct" the inspection or copying of public records.

ANALYZED BY: Neil Gould 653-3710
Lucinda Chipponeri 653-0488 Home: 443-9028

8/29/00 8/29/00

RECOMMENDATION: SIGN THE BILL

Chipponeri 8-29-00

DEPARTMENT DIRECTOR	DATE	AGENCY SECRETARY	DATE
Steven M. Hall	8/30	[illegible]	9/5/00

This bill would make the following changes:

1. The provision that agencies may determine the form in which computer data is to be provided would be deleted from the Act. Public agencies would be required to make information that is held in electronic format available in electronic format when requested to do so, provided that the information or record is not exempt from disclosure under the Act.

2. Agencies would be required to tell requesters if a requested record is also available in electronic format. Agencies would be required to make electronic records available in any electronic format in which they held information, and in the specific format that was requested if that format had been used by the agency to create copies for its own use or for other agencies. However, an agency would not be required to reconstruct a record in an electronic format if the agency no longer had the record available in that format.

3. An agency would not be required to provide a record in electronic format 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.

4. To the definition of the "unusual circumstances" in which an agency may extend the 10-day period for initial response by up to 14 days, the bill would add the need for an agency to compile data, to write programming language or a computer program, or to construct a computer report in order to extract data.

5. A requester would pay only the cost of copying an electronic record where the record is in a format that is used by the agency to make copies for itself or other agencies. A requester would be required to bear the entire cost of producing an electronic record, including the cost of constructing the record and the cost of programming and computer services needed to produce a copy, where either: (1) the record is otherwise produced only at regularly scheduled intervals; or (2) the request would require data compilation, extraction or programming in order to produce the record.

6. Public agencies would be required to respond in writing to a written request for records where the request is being denied in whole or part. Providing a written explanation of the basis for withholding records has been a Department practice for some time. These explanations are always drafted by the Department's legal office.

7. In the provision of the Act prohibiting agencies from obstructing access to records, agencies would now also be precluded from doing anything to "delay" access.

The changes to the Act proposed by this bill are reasonable. The bill is the result of several years of negotiations between media, open government, and public agency representatives. The Act was passed at a time when most public records in California were held in paper or film media. Public agency records are increasingly being created and stored in a variety of electronic formats. These formats, while internally useful to agencies and serving government's goal of efficiency, may not optimize access by the public. The Act's purpose - to allow citizens to monitor their government - requires that issues peculiar to electronic records be addressed. This bill represents a thorough and balanced approach. The principal concerns of public agencies about previous bills on access to electronic record - cost recovery, security of sensitive records, and sufficient time to locate and copy records - have all been adequately addressed in this bill.

COST

Under this bill, some requesters of electronic records are required to pay only the direct costs of duplication. For such requests, there would be an unrecoverable increase in State costs to search for and retrieve electronic records from a variety of formats. The magnitude of such an increase would depend on the number of requests and the complexity of each. Other requesters would be required to pay the entire cost of locating and producing a copy, and for those requests there would not be any increase in State costs.

ECONOMIC IMPACT

As noted in the Cost section above, under this bill some requesters would pay only the direct costs of duplicating a record in electronic format, while others would pay the entire cost of locating and producing a copy. Local public agencies would experience an increase in costs in the same way as the State.

LEGAL IMPACT

None anticipated. Although the Act provides that a requester whose request has been denied may file suit, the provisions of this bill regarding access to electronic records are thorough, clear and balanced.

APPOINTMENTS

None.

LEGISLATIVE HISTORY

The bill is sponsored by the California Newspaper Publishers Association. It is supported by the California First Amendment Coalition and the Orange County Register, and opposed by the County of Orange. Previous opposition from other local public agencies was withdrawn when provisions concerning the cost of reproducing electronic records were added.

The provisions of this bill concerning records in electronic format are similar to language in several bills from recent sessions. The author's AB 1099 of 1999 was amended late in the session to change its subject matter. Governor Davis vetoed SB 1065 of 1999 (Bowen). His veto message stated that while the bill was well-intentioned, he had asked, but the author was unwilling, to include language to ensure that the State's information technology resources were directed toward Year 2000 compliance before the provisions of the bill were implemented. SB 143 of 1998 (Kopp) contained similar language until late session amendments. In the 1997 session, both AB 179 (Bowen) and SB 74 (Kopp) were vetoed by Governor Wilson.

ARGUMENTS PRO AND CON

Pro:

1. With public agency records increasingly being created and stored in electronic format, there is a need to address public access to these records in order to serve the purpose of the Act to allow citizens to monitor their governments.

2. The provisions of this bill concerning electronic records are reasonable, and address the concerns of public agencies:

   a. requesters must bear the entire cost of producing copies in circumstances where a copy is not readily available;

   b. electronic records are exempt where disclosure would create, jeopardize or compromise over the security or integrity of the original record or the software in which it is maintained; and

   c. agencies are permitted to extend their time to respond to a request where electronic records complicate the search and copying process.

3. The concern expressed by the Governor in his veto message for AB 1065 of 1999 - compliance with Y2K - no longer applies.

Con:

1. There is no need for the addition of the word "delay" to the language governing interpretation of the Act although the addition appears to have little significance.

OTHER STATES

The federal Freedom of Information Act (5 USC § 552), after which California's Public Records Act is modeled, contains several provisions specifically about electronic records. Federal agencies are required to establish and maintain an electronic index of records that have previously been made available and are likely to be requested again. Records meeting those criteria that were created after November 1, 1996 are required to be made electronically available. Federal agencies are required to make reasonable efforts to search for records in electronic and non-electronic format. Finally, federal reports that are electronically available are required to be made available through an single electronic portal.

Most of the 50 states have a public records law, many of them also modeled after the federal FOIA.

RECOMMENDATION

Sign the bill. The bill represents a reasonable approach to making electronic records available.

RECORD OF PROGRESS

Passed by the Assembly	May 25, 2000	70-4
Passed by the Senate	August 25, 2000	34-0
Assembly Concurrence	August 25, 2000	72-2

RESOURCES AGENCY

ENROLLED
BILL REPORT

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ENROLLED BILL REPORT

Analyst: Roger Lackey
Work Phone: 845-3627

AGENCY	BILL NUMBER
State and Consumer Services	AB 2799
DEPARTMENT, BOARD, OR COMMISSION	**AUTHOR**
Franchise Tax Board	Shelley

(SEE ATTACHED)

VOTE

ASSEMBLY Policy, 12-2, Fiscal, 17-2, Floor, 72-2 SENATE Policy, 5-0, Floor, 34-0

RECOMMENDATION

✓ SIGN ___ VETO ___ NO RECOMMENDATION ___ DEFER TO: ___

Johnnie Lou Reese, FTB Contact Person (916) 845-4333 (Office) (916) 985-2825 (Home)	Happy Chastain, Deputy Secretary, Legislation (916) 653-3111 (Office) (916) 810-2768 (Pager) (916) 443-1366 (Home) (916) 806-8134 (Cellular)
EXECUTIVE OFFICER DATE	AGENCY SECRETARY DATE

ENROLLED BILL REPORT

Analyst: Roger Lackey
Work Phone: 845-3627

Department, Board Or Commission	AUTHOR	Bill Number
Franchise Tax Board	**Shelley**	**AB 2799**

SUBJECT

Public Record Disclosure/Make Available In Electronic Format If Available & When Requested

SUMMARY

This bill would require any state or local agency that has public information in an electronic format to make that information available to the public in the electronic format in which the state agency holds the information. The requester would pay the direct cost of duplicating the public record in an electronic format.

EFFECTIVE DATE

This bill would be effective on January 1, 2001, and operative for all public record act requests made after that date.

LEGISLATIVE HISTORY

SB 1065 (99/00), AB 179 (97/98), and AB 142 (95/96) were similar to this bill. SB 1065 was vetoed because many of the state's computer systems did not yet have the capacity to implement the bill while facing the Y2K issue and it did not sufficiently protect the confidentiality of personal information. AB 179 was vetoed because it created an inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it was "unreasonable" to do so, without defining the breadth of that exemption. AB 142 failed passage in the Assembly Committee of Governmental Organization.

IMPACT ASSESSMENT

Specific Findings

Under current state law, any person may obtain a copy of any identifiable public record, except records exempt from disclosure, upon payment of any fees (statutory or direct costs of duplication). If the record is stored as computer data, the agency is authorized to determine the format in which the computer data are provided to a requester.

This bill would require any agency that has public information in an electronic format to provide that information in any electronic format in which it holds that information. The agency also shall provide a copy of any electronic record in any format requested if the agency uses the requested format to make copies for itself or other agencies.

VOTE		
ASSEMBLY Policy, 12-2, Fiscal, 17-2, Floor, 72-2	SENATE Policy, 5-0, Floor, 34-0	
RECOMMENDATION		
✓ SIGN	VETO	NO RECOMMENDATION
Johnnie Lou Rosas, FTB Contact Person (916) 845-4333 (Office) (916) 966-2825 (Home)	Executive Officer	Date 3/30/00

This bill would provide that a written response is required only for a written request regardless of whether the request is denied in whole or in part.

This bill would provide that "unusual circumstances" under which an agency may delay providing a record would include the need to compile data, to write program language or a computer program, or to construct a computer report to extract data.

This bill would provide that a public agency would not be required to reconstruct a report in an electronic format if the report were no longer available in an electronic format. **This bill** also would provide that a public agency would not have to make records that are exempt from disclosure available in an electronic format.

This bill would provide that a public agency could refuse to disclose an electronic record if it feels that disclosure would jeopardize or compromise the security or integrity of the original record or any proprietary software in which it is maintained.

This bill would provide that direct costs of duplication would be limited to the direct costs of duplicating the electronic record. However, the requester would be required to bear the costs of producing a copy of the record. These costs would include the cost of programming and computer services necessary to produce a copy of the record produced only at otherwise regularly scheduled intervals or when the request would require data compilation, extraction, or programming to produce the record.

This bill would delete the existing provision authorizing an agency to determine the format in which computer data are provided.

Implementation Considerations

The terms "compile data" and "construct a record" are unclear. These terms could be interpreted to require a state agency actually to create a new public record to satisfy a request. The California Public Records Act requires state agencies to provide copies of **existing** public records, not to create new public records upon request. In order to implement this bill, the department will interpret that it will not be necessary to create a new public record.

Fiscal Impact on State Budget

Departmental Costs

This bill would not significantly impact the department's costs since existing law allows, and this bill further specifies, that agencies can be reimbursed for direct costs of duplication.

Tax Revenue Estimate

This bill would not impact the state's income tax revenue.

[redacted]

[redacted]

[redacted] July 5, 2000, meeting, the Franchise Tax Board voted 2-0 to support this [redacted], with member B. Timothy Gage abstaining.

STATE AND CONSUMER SERVICES AGENCY — **ENROLLED BILL REPORT**

DEPARTMENT	AUTHOR	BILL NUMBER
STATE PERSONNEL BOARD	Shelley	AB 2799
SPONSOR	**RELATED BILLS**	
California Newspaper Publishers Association	SB 2027; SB 2067	

SUBJECT
Public Records: disclosure

BILL SUMMARY:
This bill would require public agencies to make public records that are in electronic format available in an electronic format when requested to do so. The bill would require disclosure of records in any electronic format in which the agency holds the information, or in the requested format if it is one used by the agency to create copies for its own use or for provision to other agencies, and would eliminate the authority of the agency to select the electronic format in which it will provide records. The bill could be construed as requiring agencies to create new records for disclosure, despite language in existing law limiting disclosure to "identifiable" public records. The bill would further require public agencies to justify withholding of public records from disclosure by providing written justification, as specified. The bill would also expand the definition of conditions under which an agency would be able to demonstrate "unusual circumstances" justifying an extension of time to respond to a public records request, and would specify the costs that may be charged to requesters for electronic public records.

LEGISLATIVE HISTORY:
SB 2027, concerning remedies for violation of the California Public Records Act, and SB 2067, concerning standards for recording and certifying electronic records, are currently enrolled.

PROGRAM HISTORY:
Pursuant to the California Public Records Act (PRA), the State Personnel Board (SPB) receives and responds to numerous requests for public records.

SPECIFIC FINDINGS:
1. Existing law requires state and local agencies, including the SPB, to make identifiable public records, as defined in the PRA (Gov. Code, § 6253), available for inspection and/or copying upon request by any person. Under existing law, as interpreted by the courts, agencies are not required to create new records for disclosure to the public, but need only provide records that already exist. Although this bill retains the requirement that a public records request must reasonably describe an identifiable record or records, it also contains several provisions that could be construed as requiring agencies to not only produce existing, identifiable records but also to create new records from data stored in their databases. For example, the bill provides that an agency may justify extending the time to comply with a request based upon "the need to compile data, to

VOTE: Assembly			VOTE: Senate		
Floor:	Aye 72	No 2	Floor:	Aye 34	No 0
Policy Committee:	Aye 12	No 2	Policy Committee:	Aye 5	No 0
Fiscal Committee:	Aye 17	No 2	Fiscal Committee:	Aye ____	No ____
RECOMMENDATION TO GOVERNOR:	SIGN X	VETO X	DEFER TO OTHER AGENCY:		
DEPARTMENT DIRECTOR	DATE: 8/30/00		AGENCY SECRETARY	DATE: 9-6-00	

write programming language or a computer program, or to construct a computer report to extract data." Additionally, the bill provides that "the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record" when the "request would require data compilation, extraction, or programming to produce the record."

It is unclear what type of computer programming and computer services may be required of agencies in order to comply with these provisions. Although the bill states that the agency shall make the information available in any electronic format in which it holds the information or in the format requested if it is one that has been used by the agency to create copies for its own use or for provision to other agencies, the language also appears to suggest that agencies may be required to do more than simply retrieve existing, identifiable records, but may be required to perform programming, calculations, or other operations in order to provide customized information upon request. The bill does, however, provide that persons requesting electronic records must pay the cost of producing a copy of such records, including the cost to construct a record and the cost of programming and computer services necessary to produce a copy of the record, where the request would require either the production of a record at other that its regularly scheduled intervals, or where the request would require data compilation, extraction, or programming to produce the record. Thus, so long as agencies are permitted to recover the cost of producing electronic records, the financial impact appears to be minimal.

2. Existing law provides that computer data shall be provided in a form determined by the agency. This bill would eliminate the authorization of an agency to determine the form in which computer data is to be provided and, instead, require agencies to make electronic information available in any electronic format in which it holds the information or 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. It is unclear how an agency that has never copied electronic records for itself or others would be required to comply with this provision. For example, it is unclear whether the agency would be required to provide entire electronic data files or to copy such records to a floppy disc or compact disc. As amended, however, this bill does not require agencies to release electronic records in the form held by the agency if the release would jeopardize or compromise the security or integrity of the original record or proprietary software in which it is maintained.

3. Existing law gives a public agency ten days within which to notify the requester whether it will disclose the records requested; an agency may extend that date in writing to up to 14 days under "unusual circumstances." This bill would include among the grounds for such an extension the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. The 14-day period was originally established in order to afford agencies to obtain and examine primarily paper records. The vast array of available electronic records greatly expands the amount and type of information that may be available to the public. Depending on the nature of the information sought, even 14 days may be insufficient to enable the SPB to comply with a request that would require it to perform extensive computer programming to extract the data requested.

4. This bill also provides that it is not to be construed as permitting an agency to make information available only in electronic format, but does not specifically prohibit an agency from doing so. The bill would also authorize agencies to inform a requester that public records are available in an electronic format.

5. Existing law authorizes a civil action to compel disclosure of records improperly withheld by an agency. This bill would require the agency to provide a written response when it denies, in whole or in part, a written request for inspection or copying of public records. The bill would also clarify that no agency is required to provide public access to records to which access is otherwise restricted by statute.

REGULATIONS:
This bill would not require the SPB to adopt any regulations.

LEGISLATIVELY-MANDATED REPORTS:
This bill would not require any legislatively mandated reports.

COMMISSIONS AND BOARDS:
This bill would not require the creation of any new commission or board.

FISCAL IMPACT:
So long as the SPB were able to obtain reimbursement for its costs in complying with requests for public records in electronic format, this bill would not substantially increase the cost to the SPB of responding to PRA requests.

NATIONAL INQUIRY:
The U.S. Freedom of Information Act (FOIA) (5 U.S.C. § 552) has been amended to cover electronic records.

PRO AND CON ARGUMENTS:

Arguments in Support of the Bill:
- Would increase public access to electronic public records.
- Would increase public access to all public records.
- Would provide statutory authority for agencies to charge for their costs in producing public records in electronic format.
- Would provide additional protection to public agencies against having to disclose records that are protected by statute.

Arguments in Opposition to the Bill:
- Would require more work from agencies to provide written response to PRA requests.
- Agencies may be unable to comply with short time frame for responding to requests for electronic public records.
- Could increase litigation over PRA requests.
- Bill is unclear whether agencies would be prohibited from maintaining records in electronic format only.
- Bill is unclear whether and how an agency would be required to provide informa

contained in electronic data files or databases where it has never copied such records.

PROPONENTS/OPPONENTS:

Support: Likely supporters: Media organizations, public interest organizations.

Opposition: Possible Opponents: Some public entities may object to the increased regulation of their obligations to make records available to the public and to provide written response when denying public records requests.

RECOMMENDATION:

The State Personnel Board recommends that the Governor **SIGN AB 2799.**

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ENROLLED BILL REPO (CDF Intranet Form 104)

AGENCY **RESOURCES**	BILL NUMBER **AB 2799**
DEPARTMENT **Forestry and Fire Protection (CDF)**	AUTHOR **Shelley**

SUMMARY:

This bill would allow the release of a public record in any electronic format available and authorize the release of records that are exempt from the Public Records Act (PRA) in specified circumstances.

HISTORY:

The California Newspaper Publishers Association is sponsor of this bill. The provisions of this bill regarding electronic records are identical to those contained in SB 1065 (Bowen) of 1999 that was vetoed by the Governor.

IMPACT ASSESSMENT:

This bill would prohibit an agency from delaying the inspection or copying of public records. If a request for records were denied it would have to be in writing if the request is in writing.

If an agency keeps a record in an electronic format, the agency would have to make that information available in any electronic format in which it holds the information, but would not require a release of a record in the electronic form in which it is held if its release would jeopardize or compromise the security or integrity of the original record or any proprietary software in which it is maintained.

This bill would authorize the payment of fees for records released in an electronic format. It would require that the requester bear the cost of programming and computer services necessary to produce a record not otherwise readily produced.

Despite any specific exemption from disclosure in the PRA, a Superior Court could order the disclosure of a record if the court determines that it is in the public interest. This would apply the balancing test to all express statutory exemptions.

RECOMMENDATION **VETO**

DEPARTMENT HEAD	DATE	AGENCY HEAD	DATE
Andrea E. Tuttle	8/30/00		

ARGUMENTS PRO & CON:

Pro: This bill is intended to ensure quicker, more useful access to public records. It seeks to provide reasonable guidelines for public access to electronically held records. This bill intends to balance private citizens ability to access public records from public agencies with the discretion to deny such requests.

Con: Allowing a Superior Court to overrule express exemptions in the PRA is a bad idea and constitutionally suspect. The Legislature has already determined that certain records should be exempt from disclosure without any case-by-case balancing. Public agencies should be allowed to rely upon those legislative decisions. CDF's paramount concern is that making all public records subject to disclosure where a court applies its own balancing of the merits would not only violate the constitutional principle of separation of powers, it would naturally make the PRA more difficult to administer in a consistent manner. Moreover, it would only encourage frivolous litigation.

FISCAL EFFECT:

Potentially, the Attorney General's budget would need to be augmented to handle the increased litigation involving state agencies.

OTHER STATES:

Other states and the federal government have laws similar to the PRA, making government documents available to the public. The federal Freedom of Information Act is similar to California law except that it involves more detailed procedures. Among the states, each state takes a slightly different approach to providing public access to records. For example, Kentucky takes the unusual approach of having its Attorney General review complaints from the public that an agency denied a request for records. Court challenges come only after the Kentucky Attorney General has rendered a decision on the matter.

REASON FOR RECOMMENDATION: This bill is unnecessary since agencies are already required to respond promptly to request for public records. Adding a prohibition of any delay would cause confusion. Applying a "balancing test" to all exemptions from disclosure would eliminate certainty in the application of the law and encourage litigation. The bill would cause more demands on the budgets of state and local agencies, and would result in additional claims against the State Mandates Claims Fund.

FINAL VOTES:

Assembly (5/25/2000)		Concurrence (8/25/2000)		Senate (8/25/2000)	
Yes	70	Yes	72	Yes	34
No	4	No	2	No	0

PROPOSED VETO MESSAGE

AB 2799 (Shelley)

To the Members of the California Assembly:

I am returning Assembly Bill No. 2799 without my signature.

This bill would allow the release of a public record in any electronic format available and authorize the release of records that are exempt from the Public Records Act (PRA) in specified circumstances.

This bill is unnecessary since agencies are already required to respond promptly to request for public records. Adding a prohibition of any delay would cause confusion. The Legislature has already determined that certain records should be exempt from disclosure without any case-by-case balancing. Public agencies should be allowed to rely upon those legislative decisions. Making all public records subject to disclosure where a court applies its own balancing of the merits would not only violate the constitutional principle of separation of powers, it would naturally make the PRA more difficult to administer in a consistent manner. Moreover, it would only encourage frivolous litigation.

For the reasons stated above I must veto this bill.

RESOURCES AGENCY

ENROLLED
BILL REPORT

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CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

ENROLLED BILL REPORT

CONFIDENTIAL-Government Code §6254(l)		
Board: Air Resources Board	Author: Shelley	Bill Number: AB 2799
Sponsor: California Newspaper Publishers' Association	Related Bills:	Priority: B
Subject: California Public Records Act (PRA) Requests		DNR ☒

SUMMARY

AB 2799 requires agencies to release public records in the electronic format that the agency holds the information, and makes other changes to the PRA. In doing so, the language implies that state agencies can be requested to do new analyses, write computer programs, and otherwise prepare the information requested. This is contradictory to the nature of PRA requests and could result in excessive state agency costs.

BACKGROUND

The Public Records Act (PRA) requires all public agencies to provide access to, or copies of, public records upon request. Public records include any writing containing information relating to the conduct of the public's business. For computer data, existing law requires that the agency provide the information in a form determined by the agency. Certain records are exempt from public record requirements, such as drafts, notes, or memos that are not normally retained by the agency provided that the public interest in withholding those records clearly outweighs the public interest in disclosure. Other exempt records include pending litigation; personnel or medical files; crime victims' files; and confidential business information.

The PRA provides that the agency may charge a fee to cover the direct costs of duplication. Recent case law holds that direct costs of duplication means the costs of running a copy machine and the expense of the person operating it. It does not include costs for retrieval, inspection and handling of the file from which the copy is extracted. This case has imposed an additional financial burden on agencies that routinely receive a large number of requests for their records.

Board Recommendation		Agency Recommendation	
☒ State Mandate		☐ Governor's Appointment	
☐ Sign	☐ Defer to:	☐ Sign	☐ Defer to:
☒ Veto		☑ Veto	
Chair/Director: Alan Lloyd	Date: 8/30/00	Agency Secretary: Winston H. Hickox	Date: 9/5/00

Previous Legislation. In 1999, Governor Davis vetoed SB 1065 (Bowen, author-sponsored). SB 1065 would have required public agencies to make public records available in the electronic format in which they hold the information. It also specified that agencies may charge requestors for the direct costs associated with duplicating electronic records. The Governor's veto message that the bill has inadequate provisions to protect the confidentiality of citizens whose personal information is maintained by certain state departments.

In 1997 Governor Wilson vetoed two PRA bills. AB 179 (Bowen, author-sponsored) and SB 74 (Kopp, sponsored by the California Newspaper Publisher's Association) would have required state agencies to provide an electronic record in the form requested. The veto message stated that the bill created an inflexible mandate on state agencies resulting in additional costs.

In 1996, Governor Wilson vetoed SB 323 (Kopp) which was sponsored by the California Newspaper Publisher's Association. SB 323 would have required state agencies to identify, in writing, the statute or public interest served by not disclosing a particular record. The veto message stated that the bill created a significant, additional bureaucratic burden that provides no commensurate benefit to the public.

The veto messages for these four bills are attached.

ANALYSIS/COMMENTS

AB 2799 would require ARB, and other state agencies, to provide public records in the electronic format that the agency holds them, regardless of less costly options; and state in writing the reasons for withholding any records. These requirements are acceptable from a policy perspective, but could result in additional costs to agencies, depending on the size of and amount of requests.

If a PRA request requires the agency to construct a record, including programming and computer services costs, the bill allows an agency to take longer than 10 days to respond to the PRA request and provides that the requestor cover the costs of producing the record. These provisions are problematic for two reasons. First, they contradict the provisions of the bill discussed earlier in that they assume that agencies are required to provide any information the requestor requests even if that information does not exist as a public record. Yet the other provisions state that the agency only has to provide the record in its current format – no programming or construction required.

Second, the PRA has always been interpreted to refer to public records that exist before the request for that record. Under this bill, private entities could request agencies to compile data in ways that meet the requestor's needs – an effort that currently is born by the requestor. The new approach could allow private entities to unilaterally direct the work that is performed by an agency and could significantly increase state agency PRA workloads and costs.

For example, ARB maintains an inventory of air pollution sources. It contains information regarding the amount of specific pollutants each type of source emits. The inventory is a large printout in the form of a chart. Under this bill, a requestor could refer to the provision tat allows more than 10 days to prepare a document to request that ARB provide specific analyses or compilations of the raw data in the inventory. This could be a significant endeavor on ARB's part and one that only benefits the requestor.

OTHER STATES

Under the Texas Open Records Act, if public information exists in an format, the requestor may request a copy either on paper or in an electronic format. An agency must provide a copy in the requested format if the agency has the technological ability to produce the copy; the agency is not required to purchase any software or hardware to accommodate the request.

In Ohio, all public records must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

VOTES

Committee	Date of Vote	Vote
Assembly Governmental Organization	May 8, 2000	12-2
Assembly Appropriations	May 22, 2000	17-2
Assembly Floor	May 25, 2000	70-4
Senate Judiciary	July 5, 2000	5-0
Senate Appropriations	August 18, 2000	28.8
Senate Floor	August 25, 2000	33-0
Assembly Concurrence	August 25, 2000	Passed

FISCAL IMPACT

The provisions of this bill would require additional staff effort at ARB. These costs would be absorbable unless the number and size of public record requests significantly increases. If ARB receives requests that require manipulation of data or computer programming, the costs of responding to PRA requests could increase substantially.

APPOINTMENTS None.

OTHER AFFECTED DEPARTMENTS ROLES/VIEWS

This bill affects all state agencies.

PRO/CON

Pro: Facilitates more public access to agency records.

Con: Could allow private entities to unilaterally direct the work that is performed by an agency and could result in significant state agency workload and costs.

SUPPORT AND OPPOSITION

Support: Orange County Register, State Franchise Tax Board, First Amendment Coalition

Opposition: The County of Orange is opposed because county staff could be required to spend considerable time copying and editing records, and determining if they are appropriate for public disclosure.

RECOMMENDED POSITION

VETO. AB 2799 requires agencies to release public records in the electronic format that the agency holds the information, and makes other changes to the PRA. In doing so, the language infers that state agencies can be requested to do analyses, write computer programs, and otherwise prepare the information requested. Under this new approach, private entities can request agencies to compile data in ways that meet the requestor's needs – an effort that currently is born by the requestor. The new approach could allow private entities to unilaterally direct the work that is performed by an agency to their benefit and could result in excessive state agency costs.

LEGISLATIVE STAFF CONTACT

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Winston H. Hickox Secretary for Environmental Protection California Environmental Protection Agency	323-2514	484-0356	798-3363	None
Patty Zwarts Assistant Secretary for Legislation California Environmental Protection Agency	322-7326	452-9464	None	731-0506
Alan C. Lloyd Chairman Air Resources Board	322-5840	916/925-1051 775/853-7051	916/952-4883	None
Catherine Witherspoon Senior Policy Advisor Air Resources Board	322-5840	441-1143	798-7511	None
Robert P. Oglesby Legislative Director Air Resources Board	322-8520	530/756-0234	916/799-9702	736-5469

AB 2799 (Shelley)
Suggested Veto Message

To the members of the Assembly:

I am returning Assembly Bill 2799 without my signature.

This bill requires agencies to release public records in the electronic format that the agency holds the information and justify in writing the reasons for withholding records. These provisions would facilitate more public access to agency records.

However, other provisions in the bill would effectively redefine what constitutes a public record for Public Records Act (PRA) purposes. Under this bill, private entities can request agencies to compile data in ways that meet the requestor's specific needs – an effort that currently is born by the requestor. This approach could allow private entities to unilaterally direct the work that is performed by an agency to their benefit and could significantly increase state agency workloads and costs.

Because this bill represents a fundamental shift in the PRA approach I am returning it without my signature.

Sincerely,

GRAY DAVIS

BILL NUMBER: SB 1065
VETOED DATE: 10/10/1999

To the Members of the Senate:

I am returning Senate Bill 1065 without my signature.

This is well-intentioned legislation. However, many of the state's computer systems do not yet have the capacity to implement the provisions of this bill.

As such, this bill does not keep faith with previous legislation I have signed to protect the confidentiality of citizens whose personal information is maintained by state departments including the Employment Development Department, the Department of Motor Vehicles, the Department of Health Services, and the California Highway Patrol.

I believe the State's information technology resources should be directed towards making sure that its computer systems are year 2000 compliant. The author was unwilling to add language which would ensure the completion of this task before the implementation of the provisions of this bill.

Cordially,

GRAY DAVIS

BILL NUMBER: SB 323
VETOED DATE: 09/29/96

To the Members of the California Senate:

I am returning Senate Bill No. 323 without my signature.

This bill would provide that if an agency decides to withhold any record based on statute or public interest, the agency must identify in writing the statute or public interest served by nondisclosure of the record.

SB 323 adds to the obligations of governmental agencies which are already under the heavy burden of responding to Public Records Act requests. Under current law, an agency must determine, within 10 days of any request for a copy of agency records, whether to comply with the request and must state the reasons for declining to do so. This bill would require that where the agency decides to withhold the record under Section 6255, it specify the public interest in undisclosure as well as state th e public interest in disclosure.

Governmental agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates and special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests - many broad and unfocused - at the cost of doing their other responsibilities.

This bill imposes an additional and unreasonable burden on record-keeping to not only state the reasons for a denial, but to specify the specific public interest in nondisclosure of the documents and the public interest in disclosure at the risk of waiving the privilege of confidentiality for the records requested. It is a significant and unnecessary, additional bureaucratic burden that provides no commensurate benefit to the public to justify the time and tax money that would have to be expen ded to comply with the requirement.

Cordially,

PETE WILSON

BILL NUMBER: AB 179
VETOED DATE: 10/12/1997

To the Members of the California Assembly:

I am returning Assembly Bill No. 179 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional b urden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

BILL NUMBER: SB 74
VETOED DATE: 10/12/1997

To the Members of the California Senate:

I am returning Senate Bill No. 74 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional b urden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

STATE AND CONSUMER SERVICES AGENCY — **ENROLLED BILL REPORT**

DEPARTMENT	AUTHOR	BILL NUMBER
General Services	Shelley	AB 2799 (7/6/00)
SPONSOR	RELATED BILLS	
California Newspaper Publishers Association	See Legislative History	

SUBJECT
Public records: disclosure

BILL SUMMARY:

This bill would make various changes to the California Public Records Act (Act) by providing that agencies having public records available in electronic format make that information available in an electronic format when requested.

LEGISLATIVE HISTORY:

Assembly Bill 1099 (Shelley, 1999) was **similar to AB 2799** and required state agencies to provide computerized data in a format chosen by the requester if the agency uses that format in the course of its normal business. The bill was ultimately gutted and used for other legislation.

Senate Bill 48 (Sher, 1999) would provide an administrative appeals process for persons who are denied access to public records. The appeals process would be handled by the Attorney General's office. This bill was vetoed by Governor Davis (veto message attached).

Senate Bill 1065 (Bowen, 1999) was nearly identical to this bill and was vetoed by Governor Davis (veto message attached).

Senate Bill 143 (Kopp, Chapter 620, Statutes of 1998) made numerous changes to the Act including the establishment of a comprehensive index of public records that are exempt from disclosure under current law and contained in various other codes. (An early version of the bill deleted the language that allows an agency to determine the form in which computer data is to be provided; the language was reinstated at the request of the Department of General Services (DGS).

Assembly Bill 179 (Bowen, 1997) would have required state agencies to disclose computerized data in a format chosen by the requestor unless determined unreasonable to do so. This bill was vetoed by Governor Wilson (veto message attached).

Senate Bill 74 (Kopp, 1997) was similar to AB 179 and would have required state agencies to disclose computerized data in a format chosen by the requestor unless determined unreasonable to do so. This bill was vetoed by Governor Wilson (veto message attached).

Senate Bill 323 (Kopp, 1996) was similar to AB 179 and SB 74 in that it contained language relative to the disclosure of electronic data. This language was ultimately deleted from the bill.

VOTE: Assembly		VOTE: Senate	
Floor:	Aye _72___ No __2__	Floor:	Aye _34__ No __0___
Policy Committee:	Aye _12__ No ___2__	Policy Committee:	Aye __5__ No __0___
Fiscal Committee:	Aye _17___ No __2__	Fiscal Committee:	~~Aye ___ No~~ ___28.8__
RECOMMENDATION TO GOVERNOR:	SIGN _____ VETO _XX___	DEFER TO OTHER AGENCY	
DEPARTMENT DIRECTOR: Barry Keene by KKM	DATE: 9-1-00	AGENCY SECRETARY	DATE: 9/5/2000

Assembly Bill 2989 (Bowen, 1996) was the "Paper Reduction Act of 1996" and, among other things, required that reports required by law shall be submitted on paper and electronically sent to the State Librarian. This bill failed passage in the Assembly Governmental Organization Committee.

Assembly Bill 142 (Bowen, 1995) made changes to the Act relative to the availability of records contained in electronic format and established conditions under which "vital records" could be disclosed to the public. This bill was never heard and died in the Assembly Governmental Organization Committee.

DEPARTMENT SERVICE AND PROGRAM HISTORY:
The DGS incorporates six operating divisions composed of 23 offices that provide a broad range of business services to government. The DGS' functions include: procurement and contracting for goods and services; real estate and design services for state buildings; telecommunications; fleet management; information services; printing; architectural services; energy efficiency; legal services and building maintenance.

SPECIFIC FINDINGS:
Under existing law, the California Public Records Act provides that upon request and payment of duplication fees, state and local agencies must make non-exempt records available to the public. Among other things, the Act currently provides that **"Computer data shall be provided in a form determined by the agency"** (Government Code Section 6253). AB 2799 would delete that language, thereby taking away state agencies' ability to determine what form the data shall be provided.

Specifically, AB 2799 would provide that agencies having public records available in electronic format make that information available in electronic format when requested and, when applicable, comply with the following:

a. The agency shall make the information available in any electronic format in which it holds the information;

b. The agency shall provide a copy of an electronic record in the format requested if that format is one already used by the agency to create copies for itself or other agencies.

In addition, the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record under specified conditions.

Nothing in the bill shall be construed to:
- require a public agency to reconstruct a report in an electronic format if it is no longer available in that format;
- permit an agency to make information available only in an electronic format;

- require the public agency 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; or
- permit public access to records held by any agency to which access is otherwise restricted by statute.

In addition, the state agencies shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of law 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.

These provisions do not improve and clarify exiting law relative to public records access but simply make existing provisions ambiguous.

DGS' CONCERNS:
The Act dictates that state and local agency records deemed eligible for public disclosure shall be provided to a requester generally within ten days of the request and that **"computer data shall be provided in a form determined by the agency"**. By deleting this language from current law presumes that a mandate would be placed on state agencies that electronic records eligible for disclosure be provided in a format **determined by the requester.** This mandate has been proposed six times in the last four years. It has been vetoed three times and amended out of three other bills before they reached the Governor's desk. Each time, opposition from state agencies, contributed to this provision's demise.

Requiring that electronic records be provided in a format determined by the requester would burden the DGS, and presumably other state and local agencies, with the responsibility of compiling and sorting the information to fit the requester's specifications. These responsibilities are especially onerous when records must be painstakingly filtered to strike out information exempt from disclosure requirements or not pertinent to a given individual request.

Further, this measure would require an agency to make information available in any electronic format in which it holds that information. This information could be in the form of unfiltered spreadsheets or databases that the requester argues constitutes a format used by a state agency for its own business. This is overly-broad and a requester may claim access to information the Act never intended to make publicly available.

REGULATIONS: Existing law permits agencies to adopt requirements for themselves if those requirements provide for greater, faster, or more efficient access to records than is required by statute.

LEGISLATIVELY MANDATED REPORTS: N/A

COMMISSIONS AND BOARDS: N/A

FISCAL IMPACT:
Existing law provides that an agency may only recover the direct costs of duplicating a record. AB 2799 provides that "The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format." This would, seemingly, not cover the cost of staff who must review and pull the information being requested in order to comply with the requester's choice of formats.

NATIONAL INQUIRY: The United States adopted its first Freedom of Information Act in 1966, and all 50 state governments had similar laws by 1984. In fact, at the federal level, the Clinton Administration promised that its reinvention of the federal government would include efforts to improve compliance with the Freedom of Information law.

Canada's federal government adopted the Access to Information Act in 1982, and 11 of its 12 provinces and territories later passed comparable statutes.

PRO AND CON ARGUMENTS:

Arguments in Support of the Bill:
The business of government should be open and accessible to the public. Today, the vast majority of records created by state agencies are in an electronic format and easier to retrieve and reproduce. The public should have access to these records when available.

Arguments in Opposition to the Bill:
- Under existing law, state agencies may determine what format computer data is to be provided. While fulfilling requests for public information electronically is a worthy policy for state agencies to pursue, **it is not good policy to eliminate an agency's discretion in determining the most appropriate format to provide that information.**

- This measure would require an agency to make information available in any electronic format in which it holds that information. This information could be in the form of unfiltered spreadsheets or databases that the requester argues constitutes a format used by a state agency for its own business. This is overly-broad and a requester may claim access to information the Act never intended to make publicly available.

- In light of increased concerns regarding privacy rights there should be greater sensitivity to the release of electronic documents.

PROPONENTS/OPPONENTS:

Sponsor: California Newspaper Publishers Association

Support:
California First Amendment Coalition
Franchise Tax Board

Orange County Register

Opposition:
County of Orange

SIGNIFICANT VOTE COUNT:
This measure failed passage in its first policy committee (Assembly Governmental Organization Committee) but reconsideration was granted. This measure has received a total of 6 no votes, all of which occurred in the Assembly; all of the votes, except Mr. Floyd's, were cast by Republicans. We are, however, unaware of the reasons for the "No" votes.

RECOMMENDATION: **VETO**

This bill would make various changes to the California Public Records Act (Act) by providing that agencies having public records available in electronic format make that information available in an electronic format when requested.

All state agencies should be allowed to maintain discretion in determining the format of electronic records disclosed under the Act. This discretion is already circumscribed by a clear statutory mandate that state agencies shall not inhibit access to public information guaranteed by the Act. To that end, AB 2799 will not improve existing law, but rather, make existing law ambiguous.

In light of increased concerns regarding privacy rights there should be greater sensitivity to the release of electronic documents.

Therefore, the Department of General Services recommends a **VETO** on AB 2799.

KAREN NEUWALD
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VETO MESSAGE
Assembly Bill 2799, As Amended July 6, 2000

I am returning Assembly Bill 2799 without my signature.

This bill would amend the California Public Records Act to require that state agencies that have public records available in electronic format make that information available in an electronic format when requested.

Under existing law, state agencies may determine what format computer data is to be provided. While fulfilling requests for public information electronically is a worthy policy for state agencies to pursue, it is not good policy to eliminate an agency's discretion in determining the most appropriate format to provide that information. Additionally, in light of increased concerns regarding privacy rights, there should be greater sensitivity to the release of electronic documents

All state agencies should be allowed to maintain discretion in determining the format of electronic records disclosed under the Act. This existing discretion is already circumscribed by a clear mandate elsewhere in statute that state agencies shall not inhibit access to public information guaranteed by the Act. To that end, I believe AB 2799 will not improve existing law, but will simply make existing provisions ambiguous.

BILL NUMBER: SB 48
VETOED DATE: 10/09/1999

October 9, 1999

To Members of the California State Senate:

I am returning Senate Bill No. 48 without my signature.

This bill would authorize the Attorney General to issue an opinion on the validity of a State or local agency's denial of a request for information under the California Public Records Act.

I am signing Assembly Bill No. 427 which clarifies that no state agency, commissioner, or officer, shall employ legal counsel other than the Attorney General, or one of his assistants or deputies, in any matter in which they are interested, or a party to, as a result of office or official duties.

Therefore, under SB 48, should the Attorney General issue an opinion adverse to a state agency or department which ultimately leads to litigation, the Attorney General may not be able to represent an agency that it has already opined against.

SB 48 creates an Attorney General appeals process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments. Consequently, this bill could result in uneven legal representation and increased use of costly outside counsel by the agency or department.

Finally, the costs to comply with this bill would be borne by the General Fund and would likely be significant. Therefore, I am vetoing this bill.

Sincerely,

GRAY DAVIS

BILL NUMBER: SB 1065
VETOED DATE: 10/10/1999

To the Members of the Senate:

I am returning Senate Bill 1065 without my signature.

This is well-intentioned legislation. However, many of the state's computer systems do not yet have the capacity to implement the provisions of this bill.

As such, this bill does not keep faith with previous legislation I have signed to protect the confidentiality of citizens whose personal information is maintained by state departments including the Employment Development Department, the Department of Motor Vehicles, the Department of Health Services, and the California Highway Patrol.

I believe the State's information technology resources should be directed towards making sure that its computer systems are year 2000 compliant. The author was unwilling to add language which would ensure the completion of this task before the implementation of the provisions of this bill.

Cordially,

GRAY DAVIS

BILL NUMBER: AB 179
VETOED DATE: 10/12/1997

To the Members of the California Assembly:

I am returning Assembly Bill No. 179 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

BILL NUMBER: SB 74
VETOED DATE: 10/12/1997

To the Members of the California Senate:

I am returning Senate Bill No. 74 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON

DEPARTMENT OF FINANCE ENROLLED BILL REPORT

AMENDMENT DATE: July 6. 2000
RECOMMENDATION: Sign

BILL NUMBER: AB 2799
AUTHOR: K. Shelley. et al.

ASSEMBLY: 72/2
SENATE: 34/0

BILL SUMMARY: Public Records: Disclosure

This bill would revise various provisions in the Public Records Act (PRA) related to electronic copies of information.

FISCAL SUMMARY

The PRA provides that any person may receive a copy of any identifiable public record upon payment of fees covering direct costs of duplication or a statutory fee if applicable. This bill would provide that in regards to the payment of fees for records released in an electronic format, the requester of information would bear the "direct cost" of programming and computer services necessary to produce a record not otherwise readily produced, as specified. Therefore, any additional costs to the state would be paid by the requester.

This bill would result in increased duties to local agencies to provide records in electronic format. However, since the local agency has authority to receive payment for these services, any costs associated with this bill would not be reimbursable as a state mandated local program.

COMMENTS

This bill could provide greater access to information maintained by various agencies by providing the information in a form that may be more economical and convenient to requesters. Therefore, signature is recommended.

The PRA provides that any person may receive a copy of any identifiable public record from any state or local agency upon payment of fees covering direct costs of duplication or a statutory fee if applicable. The act provides that it should not be construed to permit an agency to obstruct the inspection or copying of public records and requires any notification of denial of any request for records pursuant to the act to set forth the names and titles or positions of each person responsible for the denial. The act also requires computer data to be provided in a form determined by the agency. The PRA also requires the agency to justify withholding any record by demonstrating that the record in question is exempt under express provisions of the act or that, on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by the disclosure of the record.

Analyst/Principal	Date	Program Budget Manager	Date
(0263) J. Lombard		S. Calvin Smith	
	9/1/2000	J. W. Mills	9-1-00
Department Director			Date
S. Timothy Boyer	9/6/00		

This bill would:

- Provide that nothing in the PRA should be construed to permit an agency to delay or obstruct the inspection or copying of public records.
- Delete the requirement that computer data be provided in a form determined by the agency and would require any agency that has information that constitutes an identifiable public record not otherwise exempt from disclosure that is in an electronic format to make that information available in an electronic format when requested by any person.
- Require the agency to make the information available in any electronic format in which it holds the information, but would not require release of a record in an electronic form in which the security or integrity of the original record or any proprietary software could be compromised.
- This bill would require a response to a written request for public records that includes a denial of the request in whole or in part to be in writing.

Because these requirements would apply to local agencies as well as state agencies, this bill would impose a state-mandated local program. However, this bill would provide that the requester of this information would bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record. Any costs upon local governments that result from this bill would be paid by the requester of information, therefore, no reimbursement would be required.

Because of the current state of technology, more people may want access to information in an electronic format. However, there is not current authority under which the public could obtain such records. For example, if an agency makes a CD or disk of copies of the records, a member of the public could not obtain records in that format. The public would have to buy copies made out of the printouts from the records. According to the author's staff, the expense of copying these records in paper format, especially when there are many records, makes it inaccessible to the public.

Section 17556(d) of the Government Code provides that the Commission on State Mandates shall not find a reimbursable mandate in a statute or executive order if the affected local agencies have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order. In its April 1991 decision in *County of Fresno v. State of California*, 53 Cal 3d, 482, (1991), the State Supreme Court held that this Section is facially valid under Section 6 of Article XIII B of the California Constitution. The court reasoned that Article XIII B was not intended to "reach beyond taxation", i.e., the article requires reimbursement only for those expenses that are recoverable solely from tax revenues. Section 6253 of the Government Code authorizes the affected local entities to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. Therefore, although this bill may result in additional costs to local government, those costs are not reimbursable because the affected local entities are authorized to charge fees to cover those costs.