

# **SUMMARY OF THE MAJOR PROVISIONS OF THE PUBLIC RECORDS ACT**

**By**

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The Public Records Act and the Ralph M. Brown Act are the two primary statutes promoting transparency in local government. The Brown Act requires that most meetings of California local governments be conducted in public. The Public Records Act applies to all government agencies in California, local and state, and generally requires that the records government generates in its work be available for public inspection. The Records Act is found in the California Government Code beginning at Section 6250. In a nutshell, it requires all government records to be open to public inspection and that copies be made at cost and on request. The Public Records Act is based upon state policy that access to government information is “a fundamental and necessary right of every person in this state.” Government Code Section 6250.

This paper is intended to provide a brief overview of the content and requirements of the Public Records Act for use in training local elected officials under A.B. 1234. It is not intended as a detailed and technical overview of the statute for the guidance of City Clerks, Board Secretaries and other public records professionals, although some may find it a useful summary. If you have questions about your obligations under the Act, you should consult your legal counsel.

## **A. What Records are Subject to the Public Records Act**

The Public Records Act applies to all government records and defines it terms very broadly. A “public record” is:

“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.” Government Code Section 6252(e).

The word “writing” has an equally broad definition:

“any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or

combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” Government Code Section 6252(g).

Specifically included among the public records open to public inspection and copying are employment contracts between government agencies and their officials and employees:

“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 [authorizing non-disclosure of certain records under certain circumstances].” Government Code Section 6254.8.

## **B. Duties with Respect to Public Records**

*Open for Inspection.* In general, public records must be available for public inspection by members of the public at any time during business hours. Government Code Section 6253(a). Local agencies may adopt regulations governing public records requests (*id.*) and it is helpful to provide a form for records requests (so that all will be in writing and can be tracked) and to specify how a request must be made, as by specifying that it must be submitted to a specified official. This can prevent the time limits under the Act from running before a request reaches the appropriate official. Indeed, one California city found itself litigating whether a public records request tossed into the back of a police car by a criminal defendant had been properly submitted to the agency such that the time limits of the Act applied! A good policy can prevent disputes such as this.

If a portion of a public record is exempt from disclosure, the agency must “redact” or edit that document to protect the confidential material, while making “any reasonably segregable portion” available to the public. Government Code Section 6253(a).

*Provision of Copies.* A government agency must also provide copies of public records on request and may charge only its “direct costs of duplication” unless a statute specifies a specified, lower fee (as is true of many elections records). Government Code Section 6253(b). “Direct costs of duplication” do not include staff time to locate or retrieve records or to make copies. *North County Parents Organization v. Department of Education*, 23 Cal.App.4<sup>th</sup> 144 (1994). As this paper is written, many local governments charge copying costs on the order of 25 or 50 cents per page.

*Time for Providing Copies.* A request for copies must be satisfied “promptly” (Section 6253(b)) and an agency must indicate within 10 days of receiving a request whether it will provide copies of records in response to that request. Government Code Section 6253(c). In unusual circumstances, an agency can, by written notice to the requester, extend its time to provide copies for up to 14 additional days under Section 6253(c). These “unusual circumstances” are narrowly defined:

“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.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.” Section 6253(c).

*Denial of Records Request.* A denial of a written request for records must be in writing. Government Code Section 6255(b). That written denial must “state the names and titles or positions of each person responsible for the denial.” Section 6253(d). A request can be denied under one of the specific exceptions to the duty to disclose, such as those discussed below, or under the “general balancing” exception of Section 6255, also discussed below.

*Assistance to Requesters.* Government agencies must assist members of the public in obtaining access to public records by helping requesters identify records which are responsive to a request, describing the technological format and location in which records are stored, providing suggestions to overcome “any practical basis for denying access” such as how to narrow a request to make it possible for the agency to meet it without undue burden. Government Code Section 6253.1. As an alternative to these means of assistance, an agency can maintain an index of its records. Section 6253.1(d)(3).

*Destruction of Records.* Public records must be maintained for the period specified by a local records retention policy and can be destroyed only with the approvals required by that policy. The Government Code requires city records to be maintained for at least two years, Government Code Section 34090(d), and requires the written approval of the City Council and City Attorney for the destruction of records, Government Code Section 34090. A well-drafted records retention policy, such as the model policy available from the California Secretary of State, will have similar safeguards against unauthorized or early destruction of records.

Some records, of course, should never be destroyed. The Government Code forbids a city to destroy the following original records and other local governments might well follow this lead:

- records affecting title to real property or liens thereon,
- court records,
- records required to be kept by statute,
- records less than two years old,

- the minutes, ordinances or resolutions of the legislative body or of a ... board or commission.

Government Code Sections 34090(a) – (e).

### **C. Records Exempt from Disclosure**

Certain information, of course, must be withheld from public inspection in order to protect personal privacy, allow local governments to negotiate effectively, and to obtain confidential legal advice. Accordingly, the Public Records Act and many other state laws specify exceptions to the duty to make records available to the public. These exceptions range from the basic to the very obscure. Indeed, the Public Records Act was amended in 1998 to add an Article 2 which lists literally hundreds of exceptions to the duty to disclose, ranging in alphabetical order from “Accident Reports, Admissibility as Evidence, Section 315, Public Utilities Code” to “Youth service bureau, confidentiality of client records, Section 1905, Welfare and Institutions Code.” Government Code Sections 6276.02 to 6276.48.

This paper could not begin to catalogue and analyze all these exceptions. Instead, the exceptions commonly applicable to the work of local governments are discussed.

*Non-records.* Most basic are those things which do not meet the definition of record because they are not “prepared, owned, used or retained” by a local government in the conduct of its business. So, the General Manager’s grocery list is not a disclosable public record merely because it is on his desk at the office.

*Preliminary Drafts, Notes and Memos.* There is a specific exception for preliminary drafts which exempts from disclosure under the Act:

“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.”

Government Code Section 6254(a). Under this language, preliminary drafts, note and memos *are* public records and must be disclosed unless “the public interest in withholding those records clearly outweighs the public interest in disclosure.” Given the public interest in disclosure, the courts can be expected to be skeptical of claims in favor of disclosure. The best practice may be to discard preliminary drafts and notes when they are no longer needed and to be prepared to disclose that are retained. If notes that would ordinarily be discarded have not yet been disposed of when a request is received, it may be best to consult legal counsel.

This exception is the basis of many government policies which define routine emails are non-records, allowing or requiring their routine destruction. The treatment of email under the Political Records Act and related laws is a complex topic beyond the scope of this paper, but it is plain that emails are records for both the purposes of the Public Records Act and the civil discovery statutes governing litigation. If email is not made available to the public, a well-drafted policy prepared or reviewed by legal counsel is a must.

*Litigation Records.* Also exempt are “[r]ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to [the Government Claims Act], until the pending litigation or claim has been finally adjudicated or otherwise settled.” Government Code Section 6254(b). This exception does not allow records created prior to a suit and relevant to it to be withheld merely because a suit is pending, but instead relates to records created for the suit. *71 Ops. Calif. Att’y Gen’l* 235 (1988). Many records exempt from disclosure under this exception will also be exempt as attorney-client privileged materials or attorney work product under Section 6254(k), discussed below.

*Personnel Records.* Government Code Section 6254(c) exempts from disclosure “[p]ersonnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” There has been recent litigation regarding the extent to which the public is entitled to know how much each employee of a government agency is paid. *Teamsters Local 856 v. Priceless, LLC* 112 Cal.App.4<sup>th</sup> 1500 (2000), upheld a refusal to provide specific information about the names and amounts earned by public employees. A different panel of this same appellate court subsequently disagreed in *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 128 Cal.App.4<sup>th</sup> 586, review granted (2005) and the California Supreme Court has granted review of this second case to resolve the issue. As this paper is written, the case is fully briefed and a decision may be likely in late 2006 or 2007. Pending resolution of that case, the following is our general advice: the local agency has no justification to refuse to produce its salary scales listing pay ranges by position. It cannot, however, disclose such personal information about its employees as home addresses and phone numbers, social security numbers (which are expressly protected by federal law), wage garnishments, child support obligations, and medical records.

*Criminal Investigations.* Government Code Section 6254(f) exempts from disclosure “[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of” law enforcement agencies, although specified information from arrest records and police reports is disclosable.

*Real Estate Appraisals.* No government agency need disclose “[t]he 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.”

*Taxpayer Information.* Government Code Section 6254(i) exempts from disclosure “[i]nformation 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.”

*Library Circulation Records.* Government Code Section 6254(j) exempts “[l]ibrary 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 of exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.” The U.S. Patriot Act, the extension of certain provisions of which is

currently under discussion in Congress, requires libraries to make such records available to law enforcement officials under certain circumstances.

*Privileged Records.* Any record which is privileged under other law is exempt from disclosure under Section 6254(k) of the Public Records Act. Thus, all the Evidence Code privileges for attorney-client communications, communications between a patient and physician, etc. are also exempt from disclosure under the Public Records Act. In addition to the attorney-client privilege, which extends to communications between attorneys and their clients for the purpose of giving or receiving legal advice, many legal records are protected by the work product doctrine of the civil procedure statutes. That rule protects an attorney's legal research and analysis from disclosure without his or her consent. In general, we recommend that records of communications between an agency and its lawyers never be disclosed to the public unless the attorneys are first informed and determine that no privilege will be violated.

*Security Assessments.* In a provision added following the events of 9/11, Government Code Section 6254(aa) protects: "[a] document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal attacks intended to disrupt the agency's operations and that is for distribution or consideration in a closed session." Other sensitive data, like technical information about a utility or security system, can likely be withheld under the "general balancing exemption" discussed below.

*Election Records.* Exceptions to the duty to disclose are provided for initiative, referendum and recall petitions (Section 6253.5), requests for bilingual ballots (Section 6253.6), and certain voter registration information (6254.4).

*Utility Customer Data.* Government Code Section 6254.16 protects from disclosure:

"the name, credit history, utility usage data, home address or telephone of utility customers of local agencies, except that disclosure of name, utility usage data, and the home address of utility customers of local customers shall be made available upon request as follows:

- (a) To an agent or authorized family member of the person to whom the information pertains.
- (b) To an officer or employee of another governmental agency when necessary for the performance of its official duties.
- (c) Upon court order or the request of a law enforcement agency relative to an ongoing investigation.
- (d) Upon determination by the local agency that the utility customer who is the subject of the request has used utility services in a manner inconsistent with applicable local utility usage policies.
- (e) Upon determination by the local agency that the utility customer who is the subject of the request is an elected or appointed official with authority to determine the utility usage policies of the local agency, provided that the home

address of an appointed official shall not be disclosed without his or her consent.

(f) Upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure.”

This exception raises a question regarding the common practice of newspapers reporting major water wasters or water savers when drought restrictions are in place. Unless water waste violates a utility rule, triggering the exception of paragraph (d), only paragraph (f) would appear to justify releasing the names of wasters and savers to the press. Given the statutory preference for privacy, reliance on that exception to do so would appear to involve meaningful legal risk.

*Public Officials’ Addresses and Phones.* In this age of vastly enhanced information access via the Internet and of rampant identity theft, the law has begun to recognize the need to protect the personal data of public officials. First, the statute prevents a public agency from posting an official’s home address or phone to Internet without written consent:

“No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual.” Government Code Section 6254.21(a).

Second, the law makes it a crime to post a public official’s address or phone to the Internet in order to harm that person, a provision made necessary by the harassment of judges by criminals they had a role in convicting or whose rulings provoked controversy:

“No person shall knowingly post the home address or telephone number of any elected or appointed official, or of the official’s residing spouse or child on the Internet knowing that person is an elected or appointed official and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual. A violation of this subdivision is a misdemeanor. A violation of this subdivision that leads to the bodily injury of the official, or his or her residing spouse or child, is a misdemeanor or a felony.” Government Code Section 6254.21(b).

The carefully narrow language of this section reflects the difficulty of criminalizing expressive conduct under the First Amendment.

*“General Balancing Exception.”* Recognizing that no list, no matter how exhaustive, can cover every circumstance in which the public interest may require non-disclosure, the Legislative has authorized non-disclosure when an agency can bear its burden to prove “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.” This is known as the “general balancing exception” and while it is commonly relied upon by local governments, there are very few published appellate cases upholding decisions to withhold information on this basis. There is a statutory bias in favor of disclosure and the courts have heeded that legislative direction.

## **D. Electronic Records**

Recognizing that paper records are no substitute for electronic records when it comes to managing large amounts of data and finding needles in haystacks of data, the Legislature has required local governments that maintain electronic records to provide those records, on request, in electronic form. Government Code Section 6253.9(a). Such records must be provided in any format requested by a member of that public that the agency also uses. Sections 6253.9(a)(1), 6253.9(a)(2). It may recover its direct cost of providing the copy (which will often be nominal) as well as any software and hardware costs necessary to provide the data in an electronic format desired by a requester that the agency does not use for its own purposes. Government Code Sections 6253.9(a)(2), 6253.9(b). No agency is required to release records if to do so “would jeopardize or compromise the security or integrity of the original record or any proprietary software in which it is maintained.” Government Code Section 6253.9(f).

## **E. Remedies**

The statute provides for judicial review of an agency’s refusal to provide access to a record. Government Code Section 6259(a). If the Superior Court orders disclosure of records an agency has withheld, it must award the plaintiff attorneys’ fees and costs. Section 6259(d). By contrast, an agency can be awarded its fees and costs only if it shows that “the plaintiff’s case is clearly frivolous.” *Id.* Moreover, if an agency loses a public records case, it has no right to appeal to the Court of Appeal (although the requester may appeal a court decision upholding denial). Instead, it may petition the Court of Appeal for a writ of mandate, a form of appellate review that allows the appellate court discretion whether or not to hear the matter. Section 6259(c). The California Supreme Court upheld this seeming unfairness as an expression of the Legislature’s preference for public access to government information. *Filarsky v. Superior Court*, 28 Cal.4<sup>th</sup> 419 (2002).

## **F. Practice Tips**

We can offer a few practical tips regarding compliance with the Public Records Act:

*Don’t Create Unhelpful Records.* Certain information is so sensitive or so unhelpful should it be disclosed that it is advisable not to record it. For example, if you are “reading someone the Riot Act,” it may be better to do it orally and in person rather than via email, voicemail, or in writing. As efficient as electronic communications are, some things are best left to old-fashioned conversation.

*Copy staff on materials provided to the whole Board.* The Brown Act requires a local agency to treat as a public record, and make available to the public “without delay,” any writing distributed to a majority of the members of a legislative body with respect to an item subject to discussion at a public meeting. Government Code Section 54957.5. Staff may not be given copies of such materials by the person providing them to the Boardmembers and it may not always be clear when something has been provided to a majority of the Board. However, Boardmembers should provide agency staff a copy of any writing that appears to have been distributed to a majority of the Board when it is not clear that staff has already received it.

*Don't retain records without reason.* If you do not need records to serve the public, it is not wise to retain them. They take up space and make it harder to find useful records among the clutter. Thus, it is wise to adopt a records retention program, perhaps using the model prepared by the Secretary of State for local government use. It is wise to actually implement such a program once adopted and routinely destroy records as directed by such a policy. Information which cannot help you can hurt you by providing fodder for litigation to which the agency might not even be a party. In short, if you don't need it; don't keep it, complying of course with records retention and destruction policies and other legal requirements.

*Segregate Exempt from Non-Exempt Records.* Because the public is entitled to prompt access to public records, it is helpful to store exempt records separately from disclosable records. Not only will this facilitate prompt public access, it prevents inadvertent disclosure of privileged information. In particular, it is not a good idea to store legal memos and other attorney-client privileged information in publicly accessible files.

*Distinguish between personal and government records.* Some of the records Boardmembers receive personally are public records of the agency, such as those distributed to a majority of the Board and made records by the Brown Act section discussed above. Other records are personal, political, or otherwise not public records of the agency. It is helpful to store these materials separately and to keep non-government records outside government offices. Keeping personal records in a public place runs the risk of inadvertent disclosure and can allow others to argue that you are using public property for personal or political purposes.

*Be careful with email!* Electronic mail is a powerful technology allowing nearly instantaneous communication with large numbers of people and allowing vast amounts of information to be stored, searched and shared. That very power makes its misuse especially damaging. We often advise clients, only partly in jest, that they should never put anything in an email that they would not paint on the side of a barn. Once you hit "send," you have no control over where the message ends up. Deleting electronic records doesn't actually prevent their recovery in most cases (though recovery may require specialized skill and equipment). Those to whom you send it may not treat their email confidentially, allowing others access to their computers, or may forward something you would not. It is easy to mistype an email address and send a message to the wrong person. How many times have you received an email you were quite sure the sender did not intend you to see? If it is sensitive, don't send it via email.

## **G. Conclusion**

The basic purpose of the Public Records Act is plain and laudable – government should conduct its affairs in the open where the public we serve can hold us accountable for our actions. However, the text of the statute contains complex rules and some ambiguities; it can be confusing and compliance can be difficult. If you have any questions regarding any of its provision, you should contact your agency's General Manager or legal counsel.