

AGENDA ITEM

DATE: July 5, 2016

TO: Members, Board of Trustees

FROM: Office of General Counsel

SUBJECT: Report on Implementation of California Public Records Act

Effective January 1, 2016, the State Bar became subject to the California Public Records Act (CPRA). The Office of General Counsel took the following steps to ensure Bar-wide compliance with the CPRA:


- Drafted and circulated an administrative advisory that details protocols and procedures for handling and responding to CPRA requests
- Two designated CPRA coordinators were assigned to each department to receive and respond to requests where appropriate, or work with OGC to compile, review, redact, and provide responsive records to a requester
- Created a State Bar webpage dedicated to CPRA that is linked to the bottom of the State Bar homepage so that the public can easily find more information regarding the State Bar's compliance.
- Created a CPRA record request form to facilitate with public requests.
- Hired Steve McGinty to conduct an initial staff training with all State Bar departments
- Created template response letters for each department to utilize
- Created departmental tracking spreadsheets that track the number of requests received monthly and to ensure that we are meeting the 10-day timetable
- Disseminated member e-blast to notify members and provide them with opt-out preferences
- Conducted follow up sessions with departmental coordinators to evaluate how the State Bar policies are working for each department and answer any other questions.

From January 1 to May 31, 2016, the State Bar has received nearly 500 CPRA requests (80 in January, 111 in February, 140 in March, 108 in April, 57 in May).

The departments that typically receive the most requests are Member Services, OCTC, State Bar Court, and Communications. Complying with the CPRA has been time consuming; however, State Bar staff has quickly adapted to receiving and responding to requests.

http://www.calbar.ca.gov/ContactUs/PR.aspxIntranet Home :: State BarPublic Records Requests

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THE STATE BAR OF CALIFORNIA
Protecting the Public and Enhancing the Administration of Justice

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PUBLIC ACCESS TO STATE BAR RECORDS AND INFORMATION

Effective Jan. 1, 2016, public records maintained by the State Bar of California are available for copy or inspection by members of the public pursuant to the California Public Records Act ("CPRA"). (Gov. Code §§ 6250 et seq.)

The following guidelines ensure that members of the public fully understand and are afforded the opportunity to exercise their right to inspect and obtain copies of public records.

Requests for inspection or production of public records

Requests may be made in person at the State Bar offices, or by email, mail, or telephone. The State Bar encourages requestors to submit a **Public Records Act Request Form** and email it to PRA@calbar.ca.gov or mail it to The State Bar of California, ATTN: Public Records Request 10th Floor, 180 Howard St., San Francisco, CA 94105. Submitting the written form helps focus the request, avoids miscommunication and ensures that the requestor receives a response as soon as possible.

Providing the following information will help facilitate a prompt and thorough response from the State Bar:

- A brief description of the record being requested so that identification of such record can be made by State Bar staff;
- The period of time for which the records are being sought; and
- The department or office within the State Bar that created or maintains the record (if known).

If a requestor needs assistance in formulating a request, please call 415-538-2283 or email PRA@calbar.ca.gov.

Response

The State Bar has ten (10) days to respond to a CPRA request from the date the request is received. This response will typically inform the requestor whether the State Bar has responsive public records, when the records will be available for inspection or copying, the anticipated cost of providing copies, and whether any exemptions apply. Under certain circumstances, the State Bar may write to the requestor and invoke a 14-day extension.

Fees

The State Bar charges 10 cents per page for copies of public records. The first 10 pages will be provided at no cost. The State Bar can also charge for the cost of postage, certification of documents and other applicable fees. Records will be provided following receipt of payment.

Quick links to frequently requested records

Certain State Bar public records can be easily accessed through the following links:

- [Locate an attorney's State Bar membership profile](#)
- [Search an attorney's public record of discipline using the attorney search function](#)
- [Obtain State Bar Court records](#)
- [View bar passage rates](#)
- [Order a certificate of standing](#)
- [View Board of Trustees agendas](#)

Public Records Act exemptions

Requestors should be aware that several categories of State Bar records are exempt from disclosure under Senate Bill 387, including the following:

- State Bar discipline investigation records and Office of Chief Trial Counsel records (Bus. & Prof. Code § 6086.1(b); Gov. Code § 6254(f))
- Admissions records
 - Test administration records (Gov. Code § 6254(g))
 - Moral character records (Gov. Code § 6254(f); Bus. & Prof. Code § 6060.2)
 - Applicant information (Bus. & Prof. Code § 6060.25)
- Law corporation investigation records (Bus. & Prof. Code § 6168)
- Lawyer assistance program records (Bus. & Prof. Code §§ 6232(d); 6234(a))
- Fee arbitration settlement records (Bus. & Prof. Code § 6200(h))

Media Contact

Laura Ernste
Office of Communications
The State Bar of California
180 Howard St.
San Francisco, CA 94105
415-538-2283
barcomm@calbar.ca.gov

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THE STATE BAR OF CALIFORNIA

REQUEST FOR RECORDS Under California Public Records Act

Requester Information

Date _____

First Name _____ Last Name _____

Organization _____

Address _____

City _____ State _____ Zip Code _____

Email _____ Phone _____ Fax _____

Description of Information Requested

Please be as specific as possible. Attach additional sheets of paper as necessary. If a requestor needs assistance in formulating a request, please call (415) 538-2283 or email PRA@calbar.ca.gov.

When making your request, please be aware that several categories of State Bar records are exempt from disclosure under Senate Bill 387, including the following:

- Discipline Investigation & Office of Chief Trial Counsel Records (Bus. & Prof. Code § 6086.1(b); Gov. Code § 6254(f).)
- Admissions Records
 - Test Administration Records (Gov. Code § 6254(g).)
 - Moral Character Records (Gov. Code § 6254(f); Bus. & Prof. Code § 6060.2.)
 - Applicant Information (Bus. & Prof. Code § 6060.25.)
- Law Corporation Investigation Records (Bus. & Prof. Code § 6168.)
- Lawyer Assistance Program Records (Bus. & Prof. Code §§ 6232(d); 6234(a).)
- Fee Arbitration Settlement Records (Bus. & Prof. Code § 6200(h).)

SUBMIT THIS FORM

1) *By E-mail:* PRA@calbar.ca.gov

2) *By Mail:*
California Public Records Act
Requests State Bar of California
180 Howard Street
San Francisco, California 94105



STATE BAR MISSION:
Preserve and improve
our justice system in
order to assure a free
and just society under
law.

ADMINISTRATIVE ADVISORY NO. 15-22

DATE: December 17, 2015
TO: All State Bar Staff
FROM: Elizabeth Parker, Executive Director *EP*
SUBJECT: CALIFORNIA PUBLIC RECORDS ACT 15-22

Effective January 1, 2016, the State Bar will be subject to the California Public Records Act ("CPRA"). (California Government Code sections 6250 et seq.) The goal of this advisory is to provide a procedural overview of the intake, processing, and response to CPRA requests. Any staff person may end up being a recipient of a CPRA request, and because of the relatively strict time guidelines all staff should be familiar with these procedures.

Questions are expected and welcomed during the initial implementation of the CPRA procedures. Please contact Rachel Grunberg at x2309 or Erika Leighton at x2369 for assistance.

Guidelines for Access to Public Records

1. Intake

The definition of a public record is broad and is intended to encompass much more than hard copy documents. For example, email messages, photographs, videos, facsimiles, voice recordings, and other electronically stored information can be considered public records if they are created or maintained by the State Bar and relate in any way to the Bar's business.¹ Records should be presumed to be public unless there is an express exemption allowing the State Bar to withhold the records.

Anyone can request public records, including any natural person or any entity. Requestors do not need to make the request in writing, nor do they need to identify themselves, use the magic words "California Public Records Act", or provide a reason for their request. Any request for records should be treated as a CPRA request.

Requests for records can be in any form (oral or written), and may be made in-person or by email, telephone, or letter communication. Requestors may ask to inspect records at the Bar's offices or they may seek to have the Bar provide them with a copy of the records.

If a request is made to inspect records at either the San Francisco or Los Angeles Bar buildings during normal business hours, front desk personnel should contact the designated CPRA Coordinator in the applicable department for response.² If the records are readily available (e.g., State Bar Court files) the designated CPRA Coordinator should provide access to the records for inspection at that time. If the records are not readily available, or it is not clear whether an exemption applies or redactions need to be made, the requestor should be instructed to schedule an appointment at a later date.

Staff must attempt to assist requestors who are having difficulty in making a focused and effective request and provide suggestions for access to responsive materials. If possible, requestors should be directed to the State Bar's Public Records webpage <http://www.calbar.ca.gov/ContactUs/PRA.aspx>, and staff should suggest that the requestor complete the State Bar's CPRA Form – although this is not a requirement. If a requestor does not wish to fill out the CPRA Form, at a minimum, after receiving a request, staff should note the following information:

- (1) A contact email, address or telephone number of the requestor.
- (2) The name of the staff person taking the request.
- (3) The date the request was received by the agency.
- (4) A specific description of the records requested.

¹ Public records are to be distinguished from answers to questions posed by the public, which the CPRA does not mandate.

² Front desk personnel will be advised of their responsibility and given a list of department CPRA Coordinators. (See **Attachment 1.**) In the event the front desk personnel cannot determine to whom the request should go, they are to contact the Office of General Counsel (OGC) for assistance.

The CPRA Form or the collected information needs to be forwarded immediately to the CPRA Coordinator in the appropriate department for response. ***Time is of the essence in handling CPRA requests.***

2. Processing

Generally, the CPRA Coordinator in each department will be responsible for responding to CPRA requests. If the State Bar receives a request for documents that appear to reside with more than one department (for example, a request for admission and discipline records) or more than one agency (for example, a request for State Bar records and Judicial Council or Supreme Court records), the request should be bifurcated and the applicable portion of the request should be sent by the CPRA Coordinator to the corresponding department or agency to process. In complex or mixed requests, staff should contact OGC, which is always available for consultation on an as needed basis.

In most cases, the CPRA Coordinator should provide responsive, disclosable documents to the requestor, unless there is an express exemption. OGC will provide CPRA Coordinators with a spreadsheet containing fields for tracking receipt of and response to requests, as well as template response letters for department specific requests for which there are express exemptions. For at least the first six months, CPRA Coordinators are to send their spreadsheets to OGC for review on the last work day of each month.

All CPRA Coordinators must indicate on their outgoing voicemail message who can be contacted in their absence. The CPRA Coordinator must also have an out-of-office response to emails that provides the same information.

3. Timing and Delays

A. Initial Response Time

CPRA requests must be responded to promptly, *without delay*. The agency has ten (10) days from the date the request is received to determine whether it will comply with the request and to notify the requestor if and when records will be produced and whether there are any anticipated copying costs.

A response must be provided to the requestor by the CPRA Coordinator within the 10-day period, and records should be produced within a reasonable time frame.

B. Additional Response Time

If the records sought are not readily available, or further analysis of the request is necessary, the CPRA Coordinator must write to the requestor within the 10-day period and indicate that the Bar is invoking a 14-day extension for the initial response based on one of more of the following:

“(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.”

These four reasons are the only reasons that justify a 14-day extension.

4. Calculation of Time

To calculate the 10-day response period, count from the first calendar day after the date of receipt of the request. If the request is received after business hours or on a weekend or holiday, the next business day will be considered the date of receipt. When either the 10-day time limit or the 14-day extension falls on a Saturday, Sunday or holiday, the next business day is considered the deadline for responding.

5. Cost

Departments can charge 10 cents (\$0.10) per page, with the first 10 pages provided at no cost.³ Advanced payment can be required before providing copies of records. Personal checks, certified checks, or cashier's checks are acceptable forms of payment. All checks should be made payable to The State Bar of California. Once the CPRA Coordinator receives payment, they are to submit the check, along with a daily cash receipt summary, to Finance. Departments may not charge for the cost incurred to search for records, review records, redact records, or for staff time in communicating with the requestor or formulating a response to a request.⁴

6. Redaction

Personal addresses, phone numbers, and email addresses, sensitive financial or medical data and social security numbers should be redacted. Please contact OGC before redacting any documents if you believe or are uncertain that redaction is necessary.

7. Questions

Questions are expected and welcomed during the initial implementation of the CPRA procedures. Please contact Rachel Grunberg at x2309 or Erika Leighton at x2369 for assistance.

³ Departments may charge separately for the cost of certification of records.

⁴ Departments can recover staff costs if a request is made for an electronic record that requires data extraction or programming to produce or that is only generated at regularly scheduled intervals (e.g., monthly, quarterly reports, annual reports, etc.)

Introduction to the California Public Records Act

Steven A. McGinty
November 13, 2015

Overview

- The CPRA, Government Code section 6250 et seq., is a comprehensive statute governing access to information. Its core purpose is to prevent secrecy in government and contribute significantly to the public understanding of government activities.
- The CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency, and the record must be disclosed unless a statutory exemption is shown.
- Burden on public agency to establish that something is not a public record; and, it limits the authority of public agency administrators to withhold records unless there is an expressed statutory right to do so.

Overview (cont.)

- Section 6250 Legislative finding and declaration:

“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.”

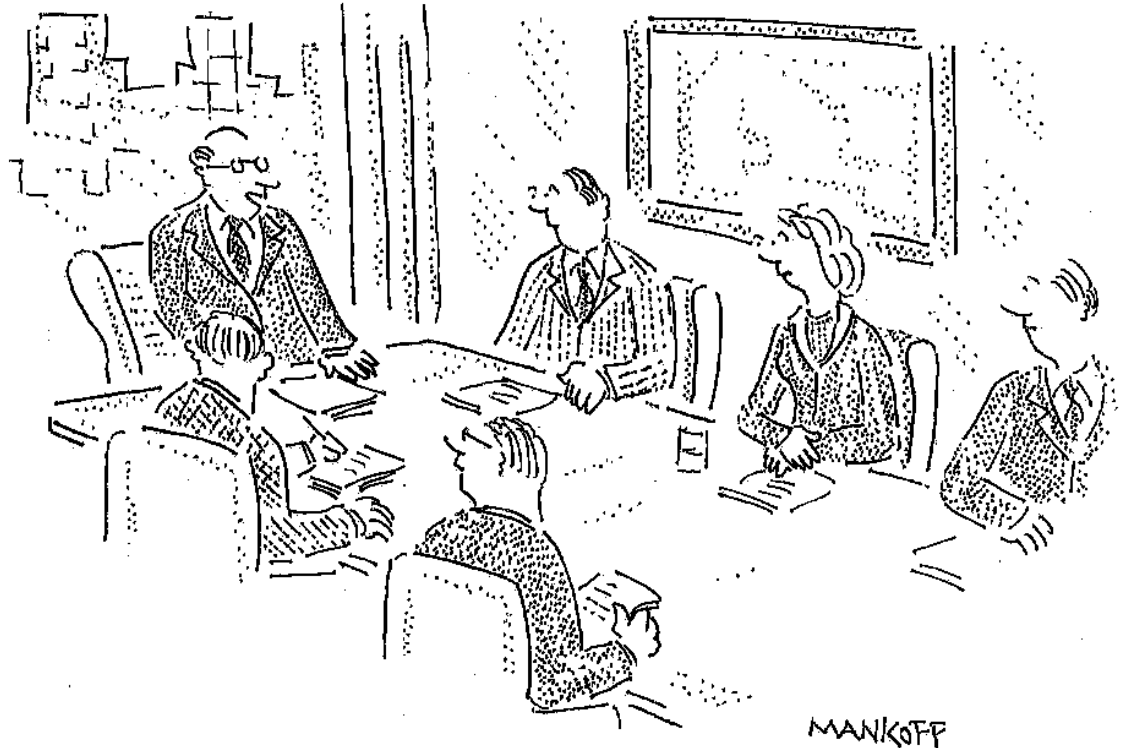
Overview (cont.)

- The provisions in the CPRA will be broadly construed if it furthers the public's right of access, and narrowly construed if it limits right to access.
- Balance the public right to access to information (heavily weighted), the government's need or lack of need to preserve confidentiality, and the individual's right to privacy.

Coverage of the CPRA

- All local and state government agencies, except those in the legislative and judicial branches, are covered by the CPRA.
- Starting January 1, 2016, the State Bar of California. (Senate Bill No, 387 (Stats. 2015, ch. 537, §§ 1 and 20).)

NOT the right attitude. Not the law.



*"Let's never forget that the public's desire for transparency
has to be balanced by our need for concealment."*

Public Record

- Any compilation of letters, words, images, sounds, or symbols in a fixed and reproducible form concerning public business that is prepared, owned, used, or retained by a public agency.

Public Record (cont.)

- Includes email and other electronically stored information contained on an agency's equipment, to the extent the information relates to the conduct of the public's business.
(§ 6252(e) and (g).)
- What about electronic information related to the public's business on personal devices?

Public Record (cont.)

- *City of San Jose v. Superior Court*, S218066. (H039498; 225 Cal.App.4th 75, mod. 225 Cal.App.4th 568c; Santa Clara County Superior Court; CV150427.) Petition for review after the Court of Appeal granted a petition for peremptory writ of mandate. This case presents the following issue: Are written communications pertaining to city business, including email and text messages, which (a) are sent or received by public officials and employees on their private electronic devices using their private accounts, (b) are not stored on city servers, and (c) are not directly accessible by the city, “public records” within the meaning of the California Public Records Act

What constitutes a public records request?

- An oral or written request to inspect or copy public records.
- Requester does not have to identify self.
- If an oral request is received, but the record is not immediately available and requester has identified self. it is a good practice to confirm the request in writing to avoid misunderstanding.
- While no requirement that oral request be put in writing, good practice to encourage voluntary use of a request form.
- If the request does not make clear whether seeking inspection or copying, the agency should clarify.

When are public records subject to inspection and copying?

- At all times during regular office hours.

When is the duty to respond to the request triggered?

- When the request is received.

How does one respond to a request?

- First, do you understand what records are being requested?
- An agency's obligation to make records available for inspection and copying is triggered by a request that reasonably describes an identifiable record or records.
- If there is uncertainty about a request, the agency is required to help the requester make a focused and effective request that describes an identifiable record or records, to the extent reasonable under the circumstances.

Responding (cont.)

- The agency fulfills this duty by asking the requester questions about the information being sought such as the subject matter or type (e.g., applications, contracts), geographic location (e.g., Los Angeles County, district 2), and time frame (e.g., within the past year).
- Describing the information technology and physical location in which the records exist.
- Providing suggestions for overcoming any practical basis for denying access to the records or information sought.

Responding (cont.)

Practice tips:

- The requester does not have to reveal the purpose of the request, so s/he should not be asked why they want the records. However, if the requester reveals the purpose of the request, questions may be asked based on the purpose to assist in identifying records.
- Refer the requester to a website that may assist the requester to describe an identifiable record.
- Help the requester narrow the request so that the requester may obtain records quickly and inexpensively.

Responding (cont.)

The duty to help does not apply:

- (1) If the agency makes available the requested records.
- (2) If the agency determines the records are exempt from disclosure under section 6254.
- (3) The agency makes available an index of its records.

Who responds?

- Each office or program within the agency should have a PRA contact.
- Laura Ernde of the Office of Communications will coordinate responses.
- In the Office of General Counsel, the PRA team of Rachel Grunberg and Erika Leighton are available to provide legal guidance.

When is a response due?

- Promptly, without delay or obstruction.
- If a person comes to the agency office and makes a request to inspect a record, there should be someone available who has been trained in PRA matters who can handle the request. Generally, if the record is easily accessible and does not contain exempt material, it should be handed over immediately for inspection. On the other hand, if the record is not easily accessible or contains exempt material, then arrangements should be made to respond to the request under the timelines set for in the Act.

Timelines for responding.

- When a copy of a record is requested, the agency has 10 days to determine whether it will comply with the request. The 10-day time limit may be extended for up to 14 additional days in “unusual circumstances.”
- Unusual circumstances are defined as follows:
 - (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. (§ 6253(c).)

Timelines (cont.)

- In order to invoke the 14-day extension, the agency must write to the requester setting forth the reasons for the extension and the date on which a determination is expected to issue.
- Practice tips:
 - (1) The 10-day time limit, as well as the 14-day extension, is the period of time given to the agency to decide whether to comply with the request, not necessarily to produce records.
 - (2) When the 10th day falls on a Saturday, Sunday, or holiday, the determination may be issued on the next business day.

Timelines (cont.)

- (3) If no grounds to invoke the 14-day extension, but the agency needs more time to make a determination, obtain an extension by consent. If acting reasonably, the requester should be willing to grant additional time. Confirm extension in writing.

Timelines (cont.)

- During the time allowed, the agency must do the following:
 - (1) determine whether the request, in whole or in part, seeks disclosable public records in the possession of the agency;
 - (2) promptly notify the person making the request of the determination and the reasons for the determination; and,
 - (3) if the agency determines that the request seeks disclosable public records, state the estimated date and time when the records will be made available, and, if the requester wants copies, the estimated cost.

Timelines (cont.)

- Practice tips:

(1) If the agency is complying with the request, there is no need to state reasons for doing so.

(2) No duty to create a record.

(3) No duty to create privilege log or list that indicates specific records being withheld.

(4) Copies of records are provided upon receipt of payment.

Timelines (cont.) Sample Response

Letter Records to Disclose

Dear [Requester]:

I am writing in response to your Public Records Act request dated [date], addressed to [name] and received on [date]. You requested the following:

[Quoted language from PRA request specifying requested records.]

We located [#] pages of responsive records. The cost for a copy is [\$] per page. The total cost would be [\$].

Please send a cashier's check or money order made payable to the State Bar of California in the amount of [\$] to the address above. Upon receipt of the payment, we will mail you the copies.

Sincerely,

Timelines (cont.) Sample Response

Letter No Records

Dear [Requester]:

I am writing in response to your Public Records Act request dated [date], addressed to [name] and received on [date]. You requested the following:

[Quoted language from PRA request specifying requested records.]

The State Bar does not have in its possession any records responsive to your request. If you have any questions regarding this matter you are welcome to contact me.

Sincerely,

Timelines (cont.) Sample 14-day Extension Letter

Dear [Requester]:

I am writing in response to your Public Records Act request dated [date] addressed to [name] and received on [date]. Our office requires additional time to respond to your request because we need to search for and collect any responsive records from multiple offices separate from our own, as well as appropriately examine any records responsive to your multi-part request and consult with [another agency having substantial interest in the determination of the request or among two or more units of the State Bar having substantial subject matter interest in the determination]. Pursuant to Government Code section 6253, subdivision (c), we expect to have a response to your request by [date].

Sincerely,

Costs

- The agency may charge only the direct cost of copying. The direct cost includes the pro rata expense of the duplication equipment utilized in making a copy of the record, and the pro rata expense in terms of staff time (salary and benefits) required to produce a copy. However, the agency may not charge for the staff time spent searching, collecting, examining, redacting, and mailing records.

Costs (cont.)

- May charge for costs of mailing (envelopes and postage).

Electronic Records and Costs

- If electronic records are requested, and the agency holds the records electronically, it shall make the records available in any electronic format in which it holds the records.
- In addition, if the request asks for electronic records in a format that has been used by the agency to create copies for its own use or other agencies, the agency shall provide a copy in that format.
- The cost of duplication in those two circumstances is limited to the direct cost of producing a copy in the electronic format.

Electronic Records and Costs (cont.)

- However, the requester must pay the cost to construct a record and the cost of programming and computer services to produce a copy of an electronic record when either
 - (1) the record is only produced at regularly scheduled intervals; or,
 - (2) the request would require data compilation, extraction or programming to produce the record.
- In those circumstances, consult with the information technology department to arrive at an estimate of time it will take to compile, extract, or program, and calculate the pro rata expense of the staff time (hourly salary and benefits) for doing so.
- Practice tip: Inform the requester that the work will begin upon receipt of payment of the estimated cost.

Exceptions for Electronic Records

- The agency is not required to construct a record in an electronic format if the agency no longer has the record available in an electronic format.
- The agency is not required to release an electronic record in the electronic form in which it is held if its release will jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

Written Determination

- If the request for inspection or copying was in writing, a response that includes a determination that the request is denied, in whole or in part, must be in writing.
(§ 6255(b).)
- Good practice to issue a written determination if oral request was made and request is denied in whole or in part.

Redaction

- If a requested record contains both exempt and nonexempt material, the agency must segregate or redact the exempt information and disclose the remainder of the record.

Exception From Duty to Redact

- If the redaction is extensive and burdensome (e.g., costly) and leaves little or no meaningful information to disclose.

Justification

- The agency must justify withholding any record by demonstrating that the record is exempt from disclosure under the Act.

Exemptions From Disclosure

- Specific statutory exemptions within the Act and exemptions incorporated by the Act.

OR

- Where the public interest in not disclosing the record clearly outweighs the public interest served by disclosure of the record.

Exemptions (cont.)

- Generally found in section 6254(a) – (ad).
- There are many exemptions from disclosure and some prohibitions from disclosure found outside the Act.
- Many of those exemptions from outside the Act are listed alphabetically in sections 6275-6276.48 of the Act.
- Section 6254(k) incorporates outside exemptions and prohibitions into the Act.

Exemptions (cont.)

- Several overarching themes justify most exemptions:
 - ◆ Individual's right to privacy.
 - ◆ Societal need to protect certain confidential relationships.
 - ◆ Government's need to perform its functions in a reasonably efficient manner.

Privacy

- Section 6254, subdivision (c) exempts from disclosure, “Personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy.”

Confidential Information

- Section 6254, subdivision (k) exempts from disclosure, “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 related to privilege.”

Confidential Information (cont.)

- Attorney-client privilege. (Evid. Code, § 950 et seq.)
- Attorney work product doctrine. (Code Civ. Proc., § 2018. 010 et seq).
- Official information privilege. (Evid. Code, § 1040 et seq.)
- Lawyer Referral Service-Client privilege. (Evid. Code, § 965 et seq.)

Confidential Information (cont.)

- *Los Angeles County Bd. of Supervisors v. Superior Court*, S226645. (B257230; 235 Cal.App.4th 1154; Los Angeles County Superior Court; BS145753.) Petition for review after the Court of Appeal granted a petition for peremptory writ of mandate. This case presents the following issue: Are invoices for legal services sent to the County of Los Angeles by outside counsel within the scope of the attorney-client privilege and exempt from disclosure under the California Public Records Act, even with all references to attorney opinions, advice and similar information redacted?

Confidential Information (cont.)

- *Ardon v. City of Los Angeles*, S223876. (B252476; 232 Cal.App.4th 175; Los Angeles County Superior Court; BC363959.) Petition for review after the Court of Appeal affirmed an order in a civil action. This case presents the following issues: (1) Does inadvertent disclosure of attorney work product and privileged documents in response to a Public Records Act request waive those privileges and protections? (2) Should the attorney who received the documents be disqualified because she examined them and refused to return them?

Specific State Bar Exemptions

- B&P § 6060.2 Attorney applicant investigation.
- B&P § 6060.25 Attorney applicant information submitted to State Bar.
- B&P § 6086.1 Attorney disciplinary proceedings prior to formal proceedings.
- B&P § 6090.6 Attorney disciplinary proceedings, State Bar access to nonpublic court records.
- B&P § 6168 Attorney law corporation investigation.
- B&P §§ 6232 and 6234 Attorney voluntary participation in Attorney Diversion and Assistance Program.

Specific State Bar Exemptions (cont.)

- B&P § 6060.2 All investigations or proceedings conducted by the State Bar concerning the moral character of an applicant shall be confidential *and shall not be disclosed pursuant to any state law, including the CPRA*, unless the applicant, in writing, waives the confidentiality. However, the records of the proceeding may be subject to lawfully issued subpoenas

Specific State Bar Exemptions (cont.)

- B&P § 6060.25 Any identifying information submitted by an applicant to the State Bar for admission and license, and all State Bar admission records, including but not limited to, bar exam scores, law school and undergraduate GPA, LAST scores, race or ethnicity, and any information contained within the State Bar admissions database or any file or other data created by the State Bar with information submitted by the applicant that may identify an individual applicant, shall be confidential and shall not be disclosed pursuant to any state law including the CPRA.

Specific State Bar Exemptions (cont.)

- B&P § 6086.1(b) All disciplinary proceedings are confidential until the time that formal charges are filed and all investigations of certain specified matters are confidential until a formal proceeding is instituted. *These investigations shall not be disclosed pursuant to any state law including the CPRA.*

Specific State Bar Exemptions (cont.)

- B&P § 6090.6 In a disciplinary proceeding, the State Bar shall have access, on an ex parte basis, to all nonpublic court records relevant to the competence or performance of its members, provided that these records shall remain confidential *and shall not be disclosed pursuant to any state law, including the CPRA.*

Specific State Bar Exemptions (cont.)

- B&P § 6168 The State Bar may conduct an investigation of the conduct of the business of a law corporation....Such investigation shall be private and confidential *and shall not be disclosed pursuant to any state law, including the CPRA....*

Specific State Bar Exemptions (cont.)

- B&P §§ 6232 and 6234 An Attorney who is not the subject of a current investigation may voluntarily enter the diversion and assistance program on a confidential basis *and such information shall not be disclosed pursuant to any state law, including the CPRA.*
- Any information proved to or obtained by the ADAP, or any subcommittee or agent, is confidential *and shall not be disclosed pursuant to any state law including the CPRA.*

Government Functioning

- Section 6254, subdivision (a) exempts from disclosure, “Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.”

Government Functioning (cont.)

- To qualify for the exemption, the record must:
 - ◆ Be a preliminary draft, note, or memo;
 - AND BOTH
 - ◆ Not retained by the agency in the ordinary course of business, and,
 - ◆ The public interest in withholding the record must clearly outweigh the public interest in disclosure.
- Purpose: to protect quality of agency decision making.

Government Functioning (cont.)

- Section 6254, subdivision (b) exempts from disclosure, “Records pertaining to pending litigation to which the public agency is a party, or to ...[Government Tort Claims], until the pending litigation or claim has been finally adjudicated or otherwise settled.”
- NOTE: The attorney-client privilege “survives” the litigation.

Government Functioning (cont.)

- Section 6254, subdivision (f) exempts from disclosure, “...any investigatory or security files compiled by any... agency for...licensing purposes.”

Government Functioning (cont.)

- Section 6254, subdivision (g) exempts from disclosure, “Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination...”

Government Functioning (cont.)

- Section 6254, subdivision (n) exempts from disclosure, “Statements of personal worth or personal financial data required by a licensing agency and filed with an application with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.”

Public Interest Exemption

- Where there is no express exemption, the agency may still decline to disclose a record under section 6255 if, “on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosing the record.”

Public Interest Exemption (cont.)

- The public interest at issue is the public's interest in monitoring the functioning of the agency.
- Look to exemptions found in 6254 to analogize whether privacy concerns expressed there may be applicable in a particular case.
- Look to federal Freedom of Information Act (FOIA), upon which CPRA was modeled, and litigation involving FOIA, for guidance.

Public Interest Exemption (cont.)

- Recognized subcategory is the “deliberative process privilege.” Exists to protect the decision making process.
- Key question: “[W]hether the disclosure of materials would expose the agency’s decision making process in such a way as to discourage candid discussions within the agency and thereby undermine the agency’s ability to perform its function.” (*Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325,1342.)

Public Interest Exemption (cont.)

- How applied?
- 5 years of Governor's calendars exempt. (*Times Mirror*.)
- Names and application materials of applicants for vacancy to be filled by Governor. (*Cal. First Amendment Coalition v. Sup. Ct.* (1998) 67 Cal.App.4th 159.)
- Records of telephone calls to and from city council members on cell phones and second phones in home offices. (*Rogers v. Sup. Ct.* (1993) 19 Cal.App.4th 469.)

Exemption Summary

In reviewing records for exemptions, separate out records that in whole or in part disclose the following:

- Attorney applicant investigations and information.
- Attorney disciplinary proceedings prior to formal proceedings.
- Attorney law corporation investigations.
- Attorney voluntary participation in the Attorney Diversion and Assistance Program (ADAP).
- Information provided to or obtained by the ADAP.

Exemption Summary (cont.)

- Attorney-client information.
- Information about pending litigation.
- Information that would disclose matters in personnel records.
- Examination information.

Exemption Summary (cont.) Sample Letter Withholding Records Because of Exemption

Dear [Requester]:

I am writing in response to your Public Records Act request dated [date], addressed to [name] and received on [date]. You requested the following:

[Quoted language from PRA request specifying requested records.]

The records you requested are exempt from disclosure under Government Code section 6254, subdivision [X, or X and Y].

[OR]

The records you requested are exempt from disclosure under [specify federal or state law] and thereby within the exemption from disclosure found in Government Code section 6254, subdivision (k).

[OR]

After careful examination of the request, we have determined that the records you requested are exempt for disclosure under Government Code section 6254, subdivision [X, or X and Y] [Cite to case law interpreting the statutory exemptions that is relevant and on point.] As such, we cannot comply with your request. If you have other or different legal authority that you would us to consider, please let me know.

Sincerely,

Waiver

- If an agency discloses a record exempt under the Act to a member of the public, the agency waives the right to claim any exemption for that record in the future.
- Who can waive? “Agency” includes a member, agent, officer, or employee of the agency acting within the scope of his or her membership, agency, office, or employment. (§ 6254.5)

Enforcement

- A requester may seek a court order to enforce the right to inspect or to receive a copy of public records.
- How? Verified petition alleging improper withholding of public records.
- Where? Superior Court in the county where records situated.
- Procedure: Bench trial based upon points and authorities, declarations, possible in camera inspection of records, and oral argument.

Enforcement (cont.)

- Issue for determination: was decision to refuse disclosure justified under section 6254 or 6255?
- Prevailing plaintiff shall be awarded costs and reasonable attorney fees.
 - Plaintiff prevails if agency discloses records in reaction to lawsuit.

Enforcement (cont.)

- Review of Superior Court order: by petition to the appellate court for an extraordinary writ within 20 days after service of written notice of entry of order.
 - Trial court may grant up to an additional 20 days for good cause.
- Order for disclosure may be stayed by appellate court if agency demonstrates irreparable damage and probable success on merits

Enforcement (cont.)

- Extent of review:
 - (1) Independent review of trial court's statutory balancing analysis.
 - (2) Factual findings made by trial court upheld if based on substantial evidence.

Additional Practical Tips

- Do not create “unhelpful” records.
- Be careful in use of email.
- Do not retain drafts without a good reason.
- Segregate exempt from non-exempt records where feasible.
- Document all contacts with requesters, including when supplying records.

Additional Practical Tips (cont.)

- If responding to a voluminous request consider the following:
 - (1) Ask requester to narrow the request.
 - (2) Ask requester to consent to a later deadline for responding to the request.
 - (3) Provide responsive records on a rolling basis.

Requester get the records and the burden on the agency is reduced.

Additional Practical Tips (cont.)

- When in doubt, treat any record inquiry as a PRA request.