



Essential Hour: Your First Public Records Request Response

Friday, August 13, 2021

Jolie Houston, City Attorney, Los Altos, Berliner Cohen
Donald Larkin, City Attorney, Morgan Hill

DISCLAIMER

This publication is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in these materials. The League of California Cities does not review these materials for content and has no view one way or another on the analysis contained in the materials.

Copyright © 2021, League of California Cities. All rights reserved.

This paper, or parts thereof, may not be reproduced in any form without express written permission from the League of California Cities. For further information, contact the League of California Cities at 1400 K Street, 4th Floor, Sacramento, CA 95814. Telephone: (916) 658-8200.

ESSENTIAL HOUR:

YOUR FIRST PUBLIC RECORDS ACT REQUEST AND RESPONSE

Introduction and Background

The California Public Records Act (“CPRA”) was enacted in 1968 to:

- Safeguard government / local agency accountability;
- Promote maximum disclosure of local agency operations and business; and
- Acknowledge that secrecy is antithetical to a democratic system of government of, by and for the people.

Proposition 59 was passed in 2004 and added the public’s right to access public records to Article 1 of the California Constitution. The CPRA and legal precedent balance the public’s right of access to information with a local agency’s need to preserve confidentiality and to protect individual privacy rights.¹ A third consideration reflected in the CPRA case law is the government’s need to function effectively.²

The CPRA is an indispensable element of California’s commitment to open government for local agencies. The CPRA expressly provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person the state.”³

This Essential Hour Module will provide a helpful introduction to the CPRA and will assist practitioners to:

- Advise local agency clients about compliance;
- Remain accountable to their community members and other members of the public; and
- Safeguard confidential and privileged information as necessary to preserve effective local agency business and to protect individual privacy rights.

Legal Standard

The CPRA applies to state and local agencies. The CPRA provides a fundamental right of access to local agency information by providing the right to inspect public records during a local agency’s office hours⁴ and the right to prompt availability of copies of public records.⁵

The CPRA defines a public record as “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.”⁶ Writing is broadly defined⁷ and includes electronic

¹ Cal. Const., art I, §3 (Prop.59).

² *Times Mirror Co. v. Superior Ct.* (1991) 52 Cal.3d 1325, 1339-1334.

³ Govt. Code §6250.

⁴ Govt. Code §6253(a) and (f).

⁵ Govt. Code §6253(b).

⁶ Govt. Code §6252(e).

⁷ See Govt. Code §6252(g) (“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.”).

information such as emails, text messages, and audio/video recordings.⁸ Writings that are “prepared, owned, used, or retained” by the local agency, even if on an employee’s or public official’s personal device or account, may qualify as a public record, provided that the writing relates to the conduct of the public’s business.⁹

Practical Application

All persons have a right to inspect and copy public records.¹⁰ A CPRA request must reasonably describe an identifiable record.¹¹ The request may be in writing (including email) or oral. The local agency cannot require the requester to put the request in writing.¹² The request must be focused and clear enough so that the local agency can decipher what record or records are being sought.¹³ The requester does not have to justify or explain the reason his or her request for records.¹⁴

Once a CPRA request is received, the local agency should consider the following to ensure a timely and adequate response to the request:

- Assist the requester to make a focused and effective request (put such assistance in writing)¹⁵;
- Provide response within 10 days of the request in most cases (a 14-day extension is permitted in limited circumstances)¹⁶;
 - Check record categories--certain records have a shorter response time¹⁷;
- Timing of disclosure of the public records may be later—the CPRA provides that agencies shall make records “promptly available”;
- Disclosure on a “rolling basis” may help expedite large or difficult requests.

The local agency must initiate a good faith and reasonable search for responsive documents to determine:

- The type or nature of the records requested;
- Whether a review of personal electronic devices will be necessary to respond to the request;
- Which department/staff member/city official/consultant/agents have access to records responsive to the request;
- Whether content in the responsive documents may be privileged, confidential, or otherwise exempt from disclosure in whole or in part; and
- Whether any portion of the responsive documents needs to be redacted.¹⁸

⁸ Govt. Code §6252(e); §6252(g) *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619.

⁹ *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619.

¹⁰ Govt. Code §6250.

¹¹ Govt. Code §6252(b).

¹² *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1392.

¹³ *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 481; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165.

¹⁴ Gov. Code, § 6250; Cal. Const., art I, § 3.

¹⁵ Govt. Code §6253.1; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469 (city has a duty to assist the requester to identify desired records); *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.

¹⁶ Govt. Code §6253(c).

¹⁷ See e.g. Govt. Code §81008

Exemptions from Disclosure

Under the CPRA there are over 75 listed exemptions to protect both the public's right of privacy and the needs for efficient and effective government.¹⁹

- Exemption examples include protection for the attorney-client privilege²⁰, deliberative process²¹, certain law enforcement records²², drafts²³, and certain personnel records²⁴;
- There is also a “catch all” exemption where the local agency must demonstrate that on the facts of the particular case, the public interest in non-disclosure clearly outweighs the interest in disclosure;²⁵ and
- The local agency must identify any applicable exemptions from disclosure in its response.²⁶

Form of Response

Under the CPRA, the local agency should respond to a request as follows:

- Advise whether the city will disclose, withhold and/or redact the record;
- Identify any applicable exemptions;
- Note that there is no duty to create a record that does not exist at the time of the request,²⁷ nor is there a duty to create a privilege log²⁸;
- Generally, when a local agency discloses an otherwise exempt public record to any member of the public, the disclosure constitutes a waiver of the applicable exemptions for all other requests for the same record; however, inadvertent disclosure of exempt records may not waive applicable privileges²⁹; and
- If there is a denial, the name and position of the person responsible for denying the records request should be included.³⁰

¹⁸ Govt. Code §6254, Govt. Code §6255; *State of California Ex Rel Division of Industrial Safety* (1974) 43 Cal.App.3d 778, 783-784; *Haney v. Superior Court* (2001) 26 C.4th 1061, 1068-1069; League of California Cities, *The Peoples Business* (2017), pgs. 68-73 “Frequently requested information and records table,” resources cited therein.

¹⁹ See Govt. Code §6254.

²⁰ Govt. Code 6254(k)

²¹ Govt. Code §6255.

²² Govt. Code §6254(f).

²³ Govt. Code §6254(a).

²⁴ Govt. Code §6254(c).

²⁵ Govt. Code §6255.

²⁶ Govt. Code §6255; *Long Beach Police Officers Assn v. City of Long Beach* (2104) 59 Cal.App.4th 59, 67.

²⁷ *Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 665-66.

²⁸ *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075.

²⁹ Govt. Code, § 6252.7; but see Govt. Code §6254.5, *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176,1183.

³⁰ Govt. Code §6253(c); Govt. Code §6255; Gov. Code §6253(b); *Haney v. Superior Court* (2001) 26 Cal.4th 1061; Govt. Code §6254.5; *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176,1183.

Costs Associated with the Response

The CPRA limits the costs associated with providing a response that agencies may recover as follows:

- Direct costs of duplication (some agencies find it helpful to produce oversized records for inspection, with the requester copying the records);
- Costs for programming related to extraction of electronic records; but
- No recovery of costs associated with review of law enforcement body cam footage or video redaction.³¹

Legal Implications if the local agency fails to respond and/or inadequately responds

The consequences of an untimely response to a CPRA request, lack of due diligence in locating requested records and/or refusal to produce public records may include:

- An award of attorneys' fees to plaintiffs who prevail; fee awards can be substantial;
- Local agencies may incur their own costs to defend CPRA litigation;
- As with the ADA and Prop. 65 plaintiffs, there are repeat filers of CPRA litigation on the lookout for local agencies who make unintentional errors in responding (or failing to respond) to a CPRA request;
- Plaintiffs do not need to establish the three elements of the "private attorney general" test to receive an award of attorneys' fees because fees are automatically awarded to prevailing plaintiffs;³² and
- The local agency may be awarded attorneys' fees if the request is found to be clearly frivolous.³³

As a practical consideration, local agencies can be characterized as opaque or evasive if they do not timely respond and/or meet all requirements for responding to records requests, which can result in unfavorable press coverage for agencies.

³¹ Govt. Code §6253(b); *North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144, 148; *National Lawyers Guild v. City of Hayward* (2020) 9 Cal. 5th 488.

³² Govt. Code §6259(d).

³³ Govt. Code §6259(d).