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Navigating the Catch-All Exemption

Strategies for Balancing Transparency with the Public's Interest

CAL CITIES

NEW LAW AND ELECTIONS SEMINAR 2025

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Christine Wood is a partner and member of Best Best & Krieger LLP's (BBK) Special Districts practice group and has investigated and reported on allegations involving high-level appointed and elected officials over the course of her career. She has significant experience providing legal opinions and advice to municipalities on a wide range of issues, conducting investigations that support legal strategy and risk mitigation, and litigating cases involving the California Public Records Act and E-Discovery. Christine was also the first leader of BBK's Advance Record Center, a team of lawyers and paralegals at BBK who focus on advising and assisting California government agencies responding to CPRA requests.

Agenda

- CPRA Overview
 - Fundamental Rights
 - History & Beginnings
- Catch-All Exemption
- Case Studies
 - The Scope of Public Interest (*Deukmenijan*)
 - “Clear Overbalance” (*Michaelis*)
 - Deliberative Process (*Times Mirror*)
- Best Practices

California Public Records Act

Overview

Overview – Fundamental Right of Privacy

- California Constitution Art. I, § 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**.”



Overview – Fundamental Right of Access

- California Constitution Art. I, § 3, subdiv. (b)(1)

“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”



Overview – Right of Access vs. Right of Privacy

- California Constitution Art. I, § 3, subdiv. (b)(3)

“Nothing in this subdivision [declaring a fundamental right of access] supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.”



Overview – History & Beginnings

- The CPRA was enacted in 1968, with the purposes of
 - Safeguarding government accountability
 - Promoting maximum disclosure of the conduct of government operations
 - Acknowledging that secrecy is antithetical to democratic government

CPRA
Enacted
1968



Present

Overview – History & Beginnings

The CPRA Modeled after and expanded on federal Freedom of Information Act (FOIA)

- Because of this relationship between FOIA and the CPRA, FOIA legal principles are persuasive in analyzing the CPRA.

“The [CPRA] was modeled on the 1967 federal Freedom of Information Act (81 Stat. 54), and the judicial construction and legislative history of the federal act serve to illuminate the interpretation of its California counterpart.”

Am. C.L. Union Found. v. Deukmejian (1982) 32 Cal. 3d 440, 447

- While there is no catch-all provision in FOIA, it does have two exemptions that are intended to protect personal privacy interests
 - Exemption 6 - Protects information that would constitute a clearly unwarranted invasion of personal privacy of the individuals involved.
 - Exemption 7(c) - Protects records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a third party/parties (in some instances by revealing an investigative interest in them).

Overview – History & Beginnings

- Codified in Gov. Code § 7920.000, *et seq.*
 - Recently recodified from Gov. Code § 6250, *et seq.*
- Gov. Code § 7921.000

“In enacting this division, 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.”

Catch-All Exemption

Overview – Exemptions

- The CPRA provides express exemptions for specific types or categories of records, the majority of which are intended to preserve the fundamental privacy rights.
 - Generally speaking, all public records are subject to disclosure unless they are expressly exempt. (Gov. Code § 7922.000)
- The CPRA also incorporates confidentiality, privileges, and other restrictions on disclosure from laws outside the CPRA, including federal and state law. (Gov. Code § 7927.705)



Confidential

Confidentiality is a duty of confidence

Confidentiality is once information

Overview – California Public Records Act

Effects of the CPRA

- Public writings shall be open to public scrutiny
- Members of the public may inspect or obtain a copy of identifiable public records
- “Members of the public” and “public records” are broadly defined
- Agencies must assist the member of the public in making a focused and effective request

Overview – The Catch-All Exemption

- The public interest exemption, also known as the “catch-all” exemption, is codified in Gov. Code § 7922.000, and provides
 - “An agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this division, 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.***”



Overview – The Catch-All Exemption

- What is “public interest”?
 - The CPRA does not identify *specific* public interests that may justify withholding a record.
 - The nature of the public interests contemplated may be inferred from the other exemptions, but other interests may also be considered.

“While the specific exemptions set forth . . . may be helpful in identifying certain interests to be protected under [the catch-all], they are not exclusive. Nothing in the text or the history of [Section 7922.000] limits its scope to specific categories of information or established exemptions or privileges.”

Times Mirror Co. v. Superior Ct. (1991) 53 Cal. 3d 1325, 1339

Overview – The Catch-All Exemption

- “Public Interest” vs Private Interests
 - While there may exist public and private interest in the disclosure or nondisclosure of a record, “it is the public interest, not the private interest of the requesting party, that is considered and the public agency bears the burden of clearly demonstrating a need for nondisclosure.”

Coronado Police Officers Ass'n v. Carroll (2003) 106 Cal. App. 4th 1001, 1013

Overview – The Catch-All Exemption

- Balancing the Interests
 - “The burden of proof is on the proponent of nondisclosure, who must demonstrate a **‘clear overbalance’** on the side of confidentiality. . . . Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.” *CBS Broad. Inc. v. Superior Ct.* (2001) 91 Cal. App. 4th 892, 908, 110 Cal. Rptr. 2d 889 (2001)



Overview – The Catch-All Exemption

- Assertions must be fact-specific
 - “Each request for records must be ‘considered on the facts of the particular case’ in light of the competing ‘public interests.’” *Times Mirror Co. v. Superior Ct.* (1991) 53 Cal. 3d 1325, 1339
 - While the public interest in non-disclosure may be similar for different records of the same category, the public interest in disclosure may vary significantly (e.g., records related to allegations of misconduct against high-ranking public officials vs similar records for temporary staff)

Overview – The Catch-All Exemption

- Keep in mind, the burden is on the agency asserting the exemption to demonstrate that, on the facts of the particular case, the balance of the interests favors non-disclosure.

Case Studies



The Scope of Public Interest (*Deukmenijan*)

Am. C.L. Union Found. v. Deukmejian (1982) 32 Cal. 3d 440

- Facts
 - ACLU sought to inspect and copy certain index cards and computer printouts held by the California Department of Justice. Specifically, 100 index cards and 100 computer printouts.
 - The information contained in cards had been compiled by a network of various law enforcement agencies.
 - The information on the printouts had been scraped from information that was already public record.

The Scope of Public Interest (*Deukmenijan*)

- Argument
 - The ACLU's stated purpose for the request "was to determine generally the nature of the information contained on the LEIU cards and stored in the IOCI computers, not to ascertain the entries relating to any particular person."
 - DOJ denied the request. In addition to asserting that the records contained exempt intelligence information, the DOJ asserted that "the burden of segregating exempt and nonexempt information outweighs the benefits of disclosure."
 - The index cards contained, "among other data, the individual's name, alias, occupation, family members, vehicles, associates, arrests, modus operandi, and physical traits."

The Scope of Public Interest (*Deukmenijan*)

- The Court explained:
 - “Section [7922.000] has no counterpart in the federal Freedom of Information Act, and imposes on the California courts a duty which does not burden the federal courts - the duty to weigh the benefits and costs of disclosure in each particular case. We reject the suggestion that in undertaking this task the courts should ignore any expense and inconvenience involved in segregating nonexempt from exempt information.
 - Section [7922.000] speaks broadly of the “public interest,” a phrase which encompasses public concern with the cost and efficiency of government. To refuse to place such items on the section [7922.000] scales would make it possible for any person requesting information, for any reason or for no particular reason, to impose upon a governmental agency a limitless obligation. Such a result would not be in the public interest”

The Scope of Public Interest (*Deukmenijan*)

- In its analysis the court examined the public interests in nondisclosure vs disclosure for each category of records:
 - Index Cards:
 - Non-Disclosure: The burden of segregating exempt from nonexempt information would be substantial as it was difficult for the DOJ to determine what material might be confidential without conferring with the agencies that had created the reports.
 - Disclosure: The “utility of disclosure . . . is questionable: the deletion of personal identifiers will make it impossible for the ACLU to learn if a particular person is . . . listed on the basis of inaccurate or unsubstantiated rumor”
 - Printouts:
 - Non-Disclosure: Little burden, as the information is non-confidential. DOJ only needs to remove personal identifiers.
 - Disclosure: Because the only exempt information is personal identifying information, the utility of the disclosure is preserved.

The Scope of Public Interest (*Deukmenijan*)

- The court held that the index cards were exempt under the catch-all, but that the printouts must be produced.
- Key Takeaways:
 - The courts analysis shows the importance of analysis the facts of the particular case for *each record*, even in the same request.
 - The scope of what constitutes a public interest is broad, and not limited to privacy concerns. Government efficiency and other matters of public policy may be rightly considered.
 - The holding serves to illustrate that the cost and inconvenience of analyzing and redacting records is a valid public interest to be considered under the catch-all exemption.

“Clear Overbalance” (*Michaelis*)

Michaelis, Montanari & Johnson v. Superior Court (2006)
38 Cal.4th 1065

- Facts:

- Law firm Michaelis, Montanari & Johnson requested proposals to lease an airplane hangar facility received by City of Los Angeles Department of Airports (aka “LAWA”).
- At the time of the request, the proposal submission deadline had passed, but LAWA had yet to negotiate with or select a successful proposer.

“Clear Overbalance” (*Michaelis*)

- LAWA informed the proposer that while the proposals would ultimately be public record, it would abide by its practice to only produce those records after the contract had been awarded.
 - LAWA cited Los Angeles Administrative Code § 10.15(f)(6), which provided that the names of proposers would be made public upon opening of the proposals, but other information related to the proposals would only be available after award.
 - LAWA’s stated basis for this policy was that producing the proposals prior to award “‘would irretrievably corrupt the process and harm not only the respondents, but also city taxpayers who may not receive the best value in return for the expenditure of their tax dollar,’ because the successful proposer could gain a negotiating advantage if it knew the details of the unsuccessful proposals.”
- LAWA provided the names of the proposers, but denied the request with regard to the proposals.
- Requester filed a writ, seeking immediate disclosure of the proposals.

“Clear Overbalance” (*Michaelis*)

- The trial court denied the writ pursuant to the catch-all exemption, holding that the public interest in nondisclosure clearly outweighs the public interest in disclosure because disclosing contents of the proposals prior to the ultimate selection of the successful proposer would adversely impact the city's negotiating position.
- Requester appealed that decision.

“Clear Overbalance” (*Michaelis*)

- The Court of Appeal overturned, holding that LAWA had “failed to demonstrate there is a ‘**clear overbalance**’ in favor of delaying disclosure.”
 - The majority found LAWA’s rationale for non-disclosure to be “vague and speculative” and held that the public had a “**significant interest**” in knowing, prior to completion of the negotiating process, whether LAWA had acted properly and in accordance with its own guidelines.

Clear Overbalance" (*Michaelis*)

- The dissent in the Court of Appeal opinion, however, ultimately proved instructive to the Supreme Court.
- Justice Mosk argued that substantial evidence supported the trial court's findings that little if any public benefit would derive from *premature* disclosure of the competing proposals, and that such disclosure could impair the city's selection and negotiating process.
 - He reasoned that because the records would be ultimately be disclosable, the public's interest in disclosure of the records prior to award was minimal, as the ability to monitor LAWA's abeyance to its procurement policies would not be diminished by the delay in production. Accordingly, there was a *clear overbalance* in the interest in non-disclosure, *prior to award*.

“Clear Overbalance” (*Michaelis*)

- The Supreme Court reversed the Court of Appeal, ultimately agreeing with Justice Mosk’s argument in his dissent.
 - The Court found that while the “public may have a legitimate and substantial interest in scrutinizing the process leading to the selection of the winning proposal,” there was “no compelling reason why public scrutiny of this process cannot as effectively take place after LAWA’s negotiations are completed.”
 - Balanced against the “substantial public benefits from delaying disclosure” the Court found a clear overbalance in favor of nondisclosure prior to the conclusion of the negotiation process.

“Clear Overbalance” (*Michaelis*)

- Key Takeaways

- The standard for non-disclosure under the catch-all exemption’s balancing test is a “clear overbalance” in favor of the public’s interest in non-disclosure.
- When asserting the catch-all exemption, agencies should not only be prepared to articulate the public interest in non-disclosure, but also the public interest in disclosure.
- The “facts of the particular case” are not limited to the content of the record and identities of the parties, but may include any other relevant considerations, including the *timing* of the disclosure.

Deliberative Process (*Times Mirror*)

Times Mirror Company v. Superior Court (1991) 53 Cal.3d 1325

- Facts

- LA Times requested the Governor's "appointment schedules, calendars, notebooks and any other documents that would list [the Governor's] daily activities as governor from [his] inauguration in 1983 to the present."
- The Governor's office denied the request, initially asserting that the requested materials were exempt correspondence under Gov. Code § 7928.000 (formerly 6254(l))
- Times filed a writ, seeking to enforce production
- In opposition to the suit, the Governor's office also claimed the records were exempt under the catch-all, as "release of his appointment calendars and schedules would (1) create a risk to his personal security, and (2) inhibit the free and candid exchange of ideas necessary to the decision-making process."

Deliberative Process (*Times Mirror*)

- The trial court denied the writ, agreeing with the Governor's justifications for non-disclosure.
- The Court of Appeal reversed, holding that the records did not constitute correspondence under the Act; that disclosure would not implicate the deliberative process of government "because information relating to the content of meetings is not sought"; and that any security risk to the Governor, however slight, could not be evaluated without examining the documents themselves.

Deliberative Process (*Times Mirror*)

- The Supreme Court heard the matter, and in its review analyzed the federal “executive privilege,” offering that it was interchangeable with the “deliberative process privilege” and ultimately based upon a traditional common law privilege that attached to confidential intraagency advisory opinions, a privilege which was later codified in FOIA’s exemption 5.
 - Congress’s purpose for adopting this exemption “was that frank discussion of legal or policy matters might be inhibited if subjected to public scrutiny, and that efficiency of Government would be greatly hampered if, with respect to such matters, government agencies were forced to operate in a fishbowl.”

Deliberative Process (*Times Mirror*)

- “In short, the courts' focus in exemption 5 cases is less on the nature of the records sought and more on the effect of the records' release. The key question in every case is ‘whether the disclosure of materials would expose an agency's decision-making process *in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.*’”

Deliberative Process (*Times Mirror*)

- Based upon its review of the federal privilege, the Court held that “the public interest in withholding disclosure of the Governor's appointment calendars and schedules is considerable.”
- It then considered whether that interest clearly outweighed the interest in disclosure.
- Times asserted, and the court agreed, that “in a democratic society, the public is entitled to know how [the Governor] performs his duties, including the identity of persons with whom he meets in the performance of his duties as Governor.”

Deliberative Process (*Times Mirror*)

- In considering the balance of the interests, the Court stated “The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it... To disclose every private meeting or association of the Governor and expect the decision-making process to function effectively, is to deny human nature and contrary to common sense and experience.”
- The Court also acknowledged that the breadth of the request (5 years of calendar records) was a factor in its analysis.

Deliberative Process (*Times Mirror*)

- Ultimately, the Court held that the public's interest in nondisclosure clearly outweighed the interest in disclosure in this case
 - The Court was careful to note, however, that there may be circumstances when similar records would *not* be exempt, particularly when the "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"

Deliberative Process (*Times Mirror*)

- Key Takeaways

- The Deliberative Process Privilege is a common law privilege that is contained within the catch-all exemption.
- The privilege applies to pre-decisional records that reflect a decision-maker's decision-making processes.
- Even purely factual records may fall within the privilege if they are actually related to or "inextricably intertwined" with policy-making processes.
- The catch-all exemption contemplates not only the nature and content of records, but also the effect of their release.

Best Practices

Is a Record Disclosable?

- Step #1: Is the document a public record?
 - A “public record” is writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency.
- Step #2: Do any express exemptions apply?
- Step #3: Apply the balancing test.
 - The public interest in non-disclosure must clearly outweigh the interest for disclosure.

Catch-All Exemption Basics – Public Interest

- What is the public interest in disclosure for this record at this time?

- Examples:

- ❖ Scrutiny of government efficiency and legal & policy compliance
 - ❖ Ensuring that governmental conduct is not occurring under shroud of secrecy
 - ❖ Fundamental right of access

- What is the public interest in non-disclosure?

- Examples:

- ❖ Fundamental right of privacy
 - ❖ Ensuring governmental efficiency and economy
 - ❖ Avoiding chilling effect on essential governmental processes (e.g., Deliberative Process Privilege)

Catch-All Exemption Basics – Balancing

- Be prepared to articulate the balance of the interests
- Make sure to consider all relevant facts of this particular case, for this particular record
 - Examples:
 - Content of the record
 - Identities of the parties in the record
 - Identity of the requester
 - Timing and circumstances of potential disclosure



Common Types of Records Withheld Under the Catch-All Exemption

- Personal identifying information
- Identities of reporting parties (particularly in non-criminal context)
- Pre-decisional deliberative materials for agency decision-makers (Deliberative Process Privilege)

QUESTIONS?

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