



# Public Records Act Overview

*(including Police Records)*

City Clerks New Law and Elections Seminar  
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# Agenda

- Sunshine Laws
- Overview of Public Records Act
- Introduction to Electronic Records
- Review of Police Records
  - Review of National Lawyers Guild & Gov. Code § 6253.9
- Top 10 PRA Tips During COVID



## Sunshine Laws

# Sunshine Laws

- The Brown Act
  - Government Code § 54950 *et seq.*
- The Public Records Act
  - Government Code §6250 *et seq.*



## Overview of Public Records Act

# Overview of PRA

- “access to information concerning the conduct of the people’s business is a fundamental and necessary **right** of every person in this state”
- 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 of PRA

PRA Lifecycle – after a request is received...

- within 10 days, the City must respond with
  - **Production letter** – provides the record(s) and identifies any applicable exemptions
  - **Determination letter** – tells the requester the date on which they will get the record(s)
  - **Extension letter** – tells the requester that a determination letter will come within 14 days of the date of the letter

# Overview of PRA

PRA Lifecycle – after a request is received...

- Reasons that justify a 14-day extension
  - 1) the need to search for and collect the requested records from locations or organizations that are separate from the office processing the request
  - 2) the need to search for, collect, and review a large volume of records
  - 3) the need to consult with another agency having substantial interest in the determination of the request
  - 4) the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data

# Overview of PRA

- Recent & Significant Case Law Interpreting the PRA
  - *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488 - agencies are prohibited from charging a fee to redact police body camera footage in response to a PRA request
  - *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897 - law enforcement agencies cannot withhold peace officer records solely on the basis that they were prepared by another public agency or that they relate to another agency's employees
  - *Sander v. State Bar of California* (2018) - agencies don't have to generate new, substantive content to respond to a PRA request, but they do have to construct a record if information must be retrieved and exported from a separate record before the information is released

# Overview of PRA

- Recent & Significant Case Law Interpreting the PRA

- *San Jose v. Superior Court* (2017) 2 Cal.5th 608 - records in personal devices or personal email accounts are public records because to rule otherwise would create an unintended cloak of secrecy around the public's business
- *Marken v. Santa Monica-Malibu USD* (2012) 202 Cal.App.4th 1250 – disciplinary records are public records if the allegation “is well-founded and substantial in nature”
- *LA County Board of Supervisors v. ACLU* (2016) 2 Cal. 5th 282 – attorney invoices for current litigation are privileged communications exempt from disclosure

# Overview of PRA

- The PRA is **NOT**...
  - a retention policy
  - a destruction policy
  - a privacy policy
  - a usage policy



# Overview of PRA

- Disclosure has become a heavy burden
  - Includes personal devices and accounts (*San Jose*)
  - Introduces the threat of Civil Discovery (*City of Los Angeles*)
  - Accounts for unpredictable attorneys' fees (*Sukumar*)
  - Requires an Enterprise Systems Catalog (*Gov. Code § 6270.5*)



# Overview of PRA

- Common Exemptions
  - Public access to information must sometimes yield to personal privacy interests
    - 76 express exemptions, plus those incorporated by reference
  - When records contain both exempt and disclosable information, an agency must redact the reasonably segregable portions of the record, unless the burden of redacting the record becomes too great. (Gov. Code § 6253(a).)

# Overview of PRA

- Common Exemptions
  - Personnel, Medical Records (§ 6254(c))
  - Investigative Records (§ 6254(f))
  - Pending Litigation (§ 6254(b))
  - Voter Information (§ 6254.4)
  - Tax Payer Information (§ 6254(i))
  - Law Enforcement Records (Penal Code §832.7)
  - 6254(k) exemptions – anything exempt anywhere else
    - Attorney Client Privilege & Work Product
    - Trade Secrets
    - Copyrighted material
  - Catch-all exemption (§ 6255)

# Overview of PRA

- Common Pitfalls
  - Failing to adhere to the statutory timelines
  - Not properly interpreting the scope of a request
  - Not identifying all possible custodians of records
  - Improperly assessed fees for records

# Overview of PRA

- Common Pitfalls
  - **Failing to adhere to the statutory timelines**
  - Not properly interpreting the scope of a request
  - Not identifying all possible custodians of records
  - Improperly assessed fees for records

# Overview of PRA

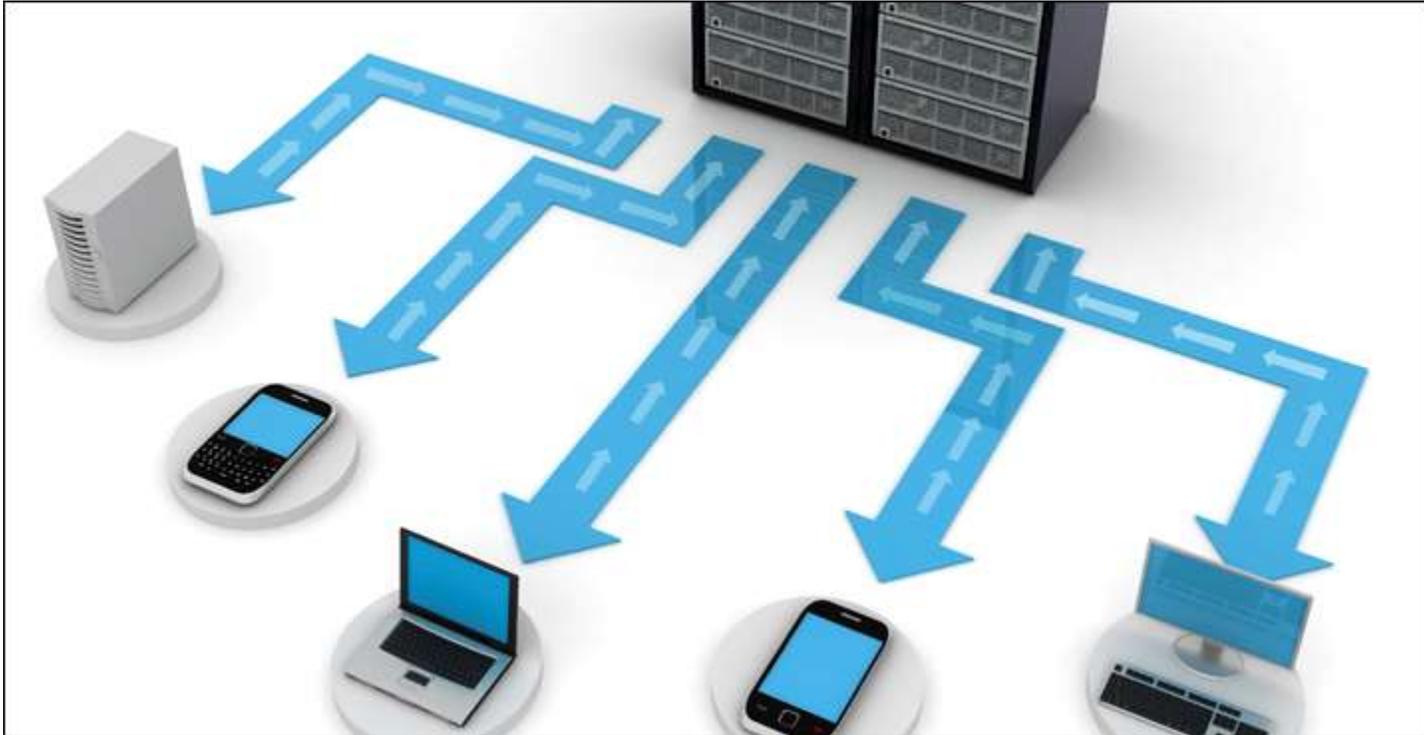
## *Failing to adhere to the statutory timelines*

- Scenario
  - You get a PRA request on Friday, December 21st, 2018, at 4:00pm—just before the City closes for the holiday. When is the first communication due to the requester?

# Overview of PRA

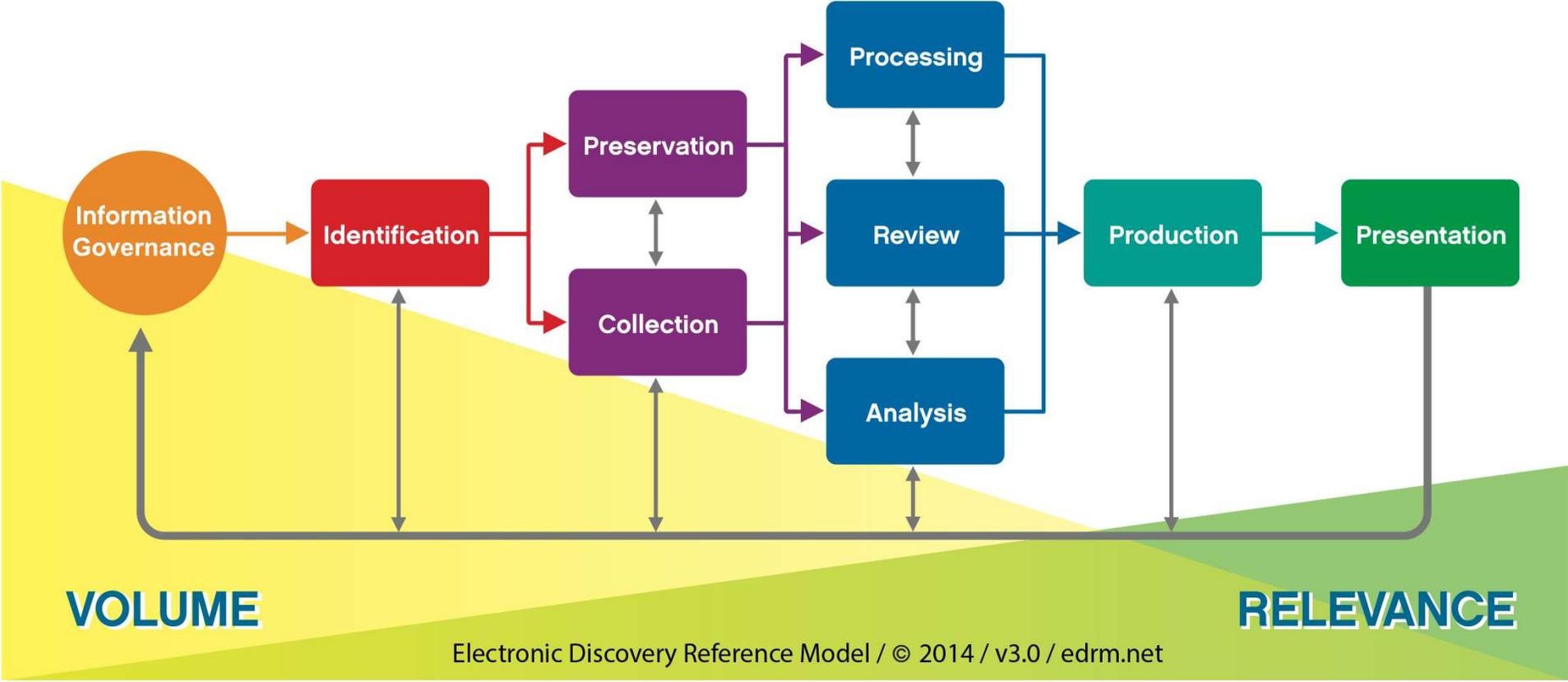
## *Failing to adhere to the statutory timelines*

- Scenario
  - You get a PRA request on Friday, December 21st, 2018, at 4:00pm—just before the City closes for the holiday. When is the first communication due to the requester?
  - Answer: December 31, 2018



## Intro to e-Records

# Electronic Discovery Reference Model



# Intro to e-Records

A writing is defined as “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.**”

(Gov Code § 6252(g))

# Intro to e-Records

A local attorney and civic activist, sought communications from the Mayor, council members and staff concerning a local development project, which had been developed with private and public money. His request under the Public Records Act explicitly sought “voicemails, emails and texts messages sent or received on private electronic devices” of these officials and employees.



(Source: *San Jose* (2017) 2 Cal.5th 608)

# Intro to e-Records

The City produced some documents, but took the position that “since the City does not prepare, own, use or retain [the language of the PRA] any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records.”



(Source: San Jose (2017) 2 Cal.5th 608)

# Intro to e-Records

## California Supreme Court decision

“Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act).”

(Source: San Jose (2017) 2 Cal.5th 608, 614)



# Intro to e-Records

## Public Record Defined → 4-part test

- (1) a writing
- (2) with content relating to the conduct of the public's business
- (3) prepared *or*
- (4) owned, used, or retained by any state or local agency

(Source: San Jose (2017) 2 Cal.5th 608, 617)

# Intro to e-Records

## Court-Cited Policies & Procedures

- prohibit use of personal electronic accounts for official business unless messages are copied or forwarded to an official account ([citing 44 USC. § 2911(a)])
- require that agencies ensure official email messages in employees' personal accounts are preserved in the agency's recordkeeping system ([citing 36 CFR § 1236.22(b)])
- encourage a policy that official emails be preserved in employees' personal accounts as well ([citing *Landmark Legal Foundation v. EPA* (2015) 82 F.Supp.3d 211, 225-226])

(Source: *San Jose* (2017) 2 Cal.5th 608, 628)

# e-Records Best practices

- Recognize there are inherent risks in using your personal device.
- Use your City email account whenever conducting City business.
- Don't use text messages to conduct substantive City business.
- If you happen to receive a City-related email in your personal account, forward it to your City account and respond from there.
- Retain communications on your personal device in accordance with the City's document retention policy.
- **BE CONSISTENT!!!**



## Review of Police Records

# Review of Police Records

- *Pitchess* Motions
- Penal Code §832.7
  - SB 1421 – establishes an exception to Penal Code §832.7 and identifies critical incidents for which police records may be disclosable
- Gov Code § 6254(f)
  - AB 748 – amends the PRA (adds Gov Code 6254(f)(4)) to require a more immediate release of audio and video footage depicting critical incidents

# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

- Gov Code § 6253.9
  - *requires* an agency to make an electronic record available in the format in which its kept or in another form already provided or created (subd. a)
  - *prohibits* an agency from making information available only in an electronic format (subd. e)
  - *clarifies* that an agency
    - ...does not have recreate an electronic record it no longer has (subd. c)
    - ...can give the requester an option of paper or electronic record, if the option exists (subd. d)
    - ...does not have to compromise the security of an original record or its proprietary software (subd. f)

# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

- Gov Code § 6253.9 (continued)
  - *allows* an agency to charge the requester the cost of programming and computer services necessary to produce a copy of the record if the request requires **data compilation**, **extraction**, or **programming** to produce the record (subd. b)
    - What is **data compilation**?
    - What is **extraction**?
    - What is **programming**?



# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

- What is **extraction**??
  - TCourt → “extraction” is required if an agency cannot produce the record without taking data from an existing record
  - CofA → “extraction” deals with the redaction of records
    - based this on an analysis of what the Legislature intended
  - Sup Ct → “extraction” involves constructing a new records after retrieving responsive data from an unproducible government database

*....but wait !!!!!*

# *National Lawyers Guild*

I thought an agency did not  
have to create a record that  
does not exist??

*Gov. Code § 6252(e) & Sander v. State Board*



# Review of Police Records

*National Lawyers Guild & Gov Code § 6253.9*

Reconciling the *Sander* and *National Lawyers Guild* Rules

*constructing & compiling a record*

≠

*creating a record*

# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

- What is **NOT extraction??**
  - time spent searching for responsive emails in an email inbox
  - time spent searching for electronic files in network share folders
  - time spent redacting exempt material from otherwise disclosable records

# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

- What about cost to the public agency??
  - PRA compliance may be expensive, but “we are not convinced that shifting redaction costs to requesters is the ....”
  - “Even if higher costs to the agency mean slower disclosure rates or greater inconvenience to the requester, these burdens on access are insignificant if the alternative is no access at all.”
  - Any unique burden associated with producing body cam footage is something only the Legislature can address.
  - Other options to consider...
    - Is the exempt material is reasonably segregable? (§ 6253(a))
    - Can the agency help the requester narrow the request? (§ 6253.1(a)(3))
    - Does the public interest in nondisclosure outweigh the public interest in disclosure? (§ 6255)

# Review of Police Records

## *National Lawyers Guild & Gov Code § 6253.9*

### Key Takeaways

1. Recognize this applies to all electronic records, not just body cam footage. Remember, the Court interpreted § 6253.9(b)(2).
2. Be ready to ask the requester to narrow the request. It can't hurt!
3. Look for ways to digitize records upfront and curb the volume of PRA requests. Point them to your website.
4. If you have a body cam program, have in place e-discovery solutions for redacting audio and video footage.
5. Be OK with rolling productions, but be consistent and reasonable with timing and volume of productions.
6. Do the upfront work of estimating what it will cost to fulfill the PRA request. Build your evidentiary record.
7. Consult legal counsel early in regards to electronic records.

# Police Records Best Practices

1. Collect relevant material before receipt of an SB 1421 request.
2. Over-identify records during collection phase (records “relating to” the incident).
3. Follow an established record retention schedule in compliance with state law (and ensure you have set retention periods for audio/visual recordings).
4. Remember your agency is available to help establish a focused and effective request under the PRA (no “flying blind” necessary in record review).
5. Begin to keep a list/log of incidents triggered by SB 1421.
6. Procure video redaction software, or identify e-discovery vendors who can assist you.
7. Pick your battles. Know the law and what’s required, but don’t be unreasonable or inflexible.

# Police Records Best Practices

8. Communicate with requesters if you have any uncertainty or question, or to request reasonable accommodations.
9. Approach each request methodically.
  - What's being requested?
  - Do we have an incidents triggered by the request?
  - What records are in our possession related to the incidents?
  - Which of these records are disclosable?
  - Do we need to provide notice to an officer?
    - If so, set the production date allowing (brief, but reasonable) time for the officer to respond to the notice.
  - While waiting for the officer to respond, prepare records.
  - Consider a rolling production schedule.
  - Produce records and keep a copy of the production.



## Bonus: Top 10 PRA Tips During COVID

# Tip #1

- Be careful to respond to every PRA request you receive.



## Tip #2

- Be consistent with responses.



## Tip #3

- Do not rest on “unusual circumstances” as a reason for noncompliance.



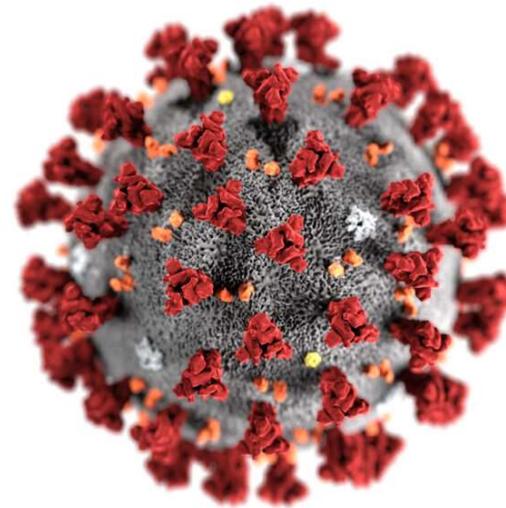
## Tip #4

- Have a written procedure that details how the agency will handle PRA requests.



## Tip #5

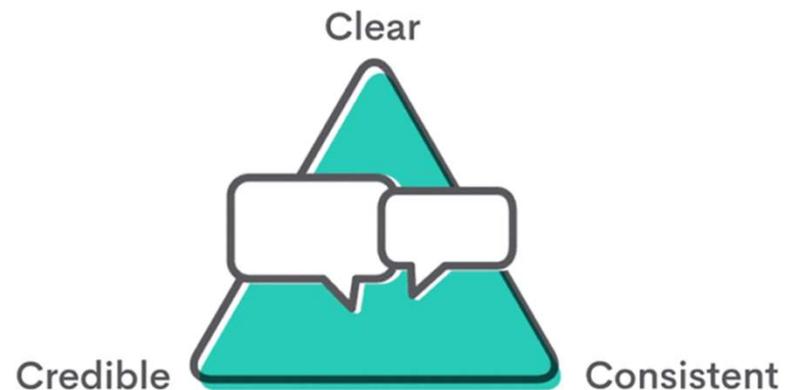
- Prioritize COVID-related requests as there might be a greater public interest.



# Tip #6

If denying a request,  
be...

- clear
- consistent
- credible



## Tip #7

- When appropriate, use exemptions applicable to the crisis.



## Tip #8

- Bifurcate requests when possible and necessary to be responsive.



## Tip #9

- Remember to consider direct costs.



# Tip #10

- Watch for schemes & traps.





**ARC: ADVANCED  
RECORDS CENTER**



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- **Advice & Guidance:**

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