



CALIFORNIA'S PUBLIC RECORDS ACT

**Schools Legal Service
Orange County Department of Education**

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INTRODUCTION

Recently, we have received a number of requests under the California Public Records Act. These requests have been for both paper records and electronic records. The purpose of this memorandum is to summarize the requirements of the California Public Records Act.

In general, the scope of the Public Records Act is very broad. Almost all records maintained by public agencies are public records with certain specified exceptions (e.g., student records, personnel, medical and litigation records or drafts) as discussed below.

Public agencies may only charge the direct cost of duplication for photocopying records, but if electronic records are involved and data compilation, extraction or computer programming to produce the record would be required, then the hourly rate of the employees involved to produce the record may be charged.¹

PURPOSE AND SCOPE OF THE PUBLIC RECORDS ACT

The purpose and scope of the Public Records Act² is to provide the public access to information concerning the conduct of the people's business. Public access to public records is a fundamental and necessary right of every person in California, but the right to access to information must be weighed against the right of individuals to privacy. In the November 2, 2004, election, the voters approved Proposition 59, which added to the California Constitution a provision guaranteeing the people of California the right of access to public records.³

DEFINITIONS UNDER THE PUBLIC RECORDS ACT

A. Statutory Definition of Public Records

Under the California Public Records Act, a local agency is defined as a county, city, school district, district, political subdivision, or any board, commission or agency. Public records do not include student records which are governed by other statutory provisions.⁴ Student records are generally confidential and not accessible to the general public except with respect to certain specified education officials and others.

Public records are defined as:

“(e) “Public records” includes any writing containing information relating to the conduct of the public's business prepared, owned,

¹ On June 3, 2014, California voters approved a ballot measure amending Article I, Section 3 and Article XIII B, Section 6 of the California Constitution. As a result, the state will no longer be obligated to reimburse local agencies for unfunded state mandates for any changes in the California Public Records Act.

² Government Code section 6250 et seq.

³ California Constitution, Article I, Section 3(b)(1).

⁴ See, Education Code sections 49061 et seq.; 20 U.S.C. Section 1232g.

used, or retained by any state or local agency regardless of physical form or characteristics.”⁵

A writing is defined as:

“(g) “Writing” means 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.”⁶

The California Public Records Act broadly requires public agencies to provide public access to public records:

“(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

“(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.”⁷

B. Inclusion of Electronic Records in Definition of Public Records

In Sierra Club v. Superior Court of Orange County,⁸ the California Supreme Court held that the O.C. Land Base is subject to disclosure in a GIS file format at the actual cost of duplication under the California Public Records Act. The court held that the GIS mapping software falls within the ambit of Government Code section 6254.9(a) which excludes computer software. However, the California Supreme Court held that a GIS formatted database like the O.C. Land Base is not excluded from the Public Records Act and is a public record unless otherwise exempt and must be produced upon request at the actual cost of duplication.⁹

⁵ Government Code section 6252(e).

⁶ Government Code section 6252(g).

⁷ Government Code section 6253.

⁸ 57 Cal.4th 157, 158 Cal.Rptr.3d 639 (2013).

⁹ Id. at 161.

The California Supreme Court noted that Government Code section 6254.9(a) excludes computer software from the definition of the public record. Section 6254.9(b) states that computer software includes computer mapping systems, computer programs and computer graphic systems. However, the court held that the GIS formatted O.C. Land Base is a public record subject to disclosure. The court held that the GIS mapping software is exempt from the Public Records Act, but not the GIS formatted data. The court held that computer mapping systems as set forth in Government Code section 6254.9 does not refer to or include basic maps and boundary information per se, but rather denotes unique computer programs to process such data using mapping functions. Therefore, the court held that parcel map data maintains an electronic format by a county assessor does not qualify as a computer mapping system, under the exemption provisions of Government Code section 6254.9.¹⁰

The court held that since O.C. Land Base is not excluded from the definition of a public record under Section 6254.9(b), and because the county does not argue that the database is otherwise exempt from disclosure, the County of Orange was ordered to produce the O.C. Land Base in response to the Sierra Club's request in any electronic format in which it holds the information at a cost not to exceed the direct cost of duplication.¹¹

C. Private Electronic Devices

In City of San Jose v. Superior Court,¹² the California Supreme Court unanimously held that when public employees use a personal account to communicate about the conduct of public business, the writings so created will, in many cases, be subject to disclosure under the California Public Records Act (CPRA).¹³ The court stated, "...we hold that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account."¹⁴ The court's decision may have a significant impact on the way districts conduct business. Districts should review their current practices and consult with legal counsel to discuss the impact of this decision.

In City of San Jose, a member of the public sought disclosure of 32 categories of public records from the City of San Jose, its redevelopment agency, and the agency's executive director, along with other elected officials and their staffs. The documents requested concerned redevelopment efforts in downtown San Jose, including e-mails and text messages sent or received on private electronic devices used by the Mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and e-mail accounts, but did not disclose communications made using the individuals' personal accounts.

The member of the public sought declaratory relief from the courts declaring that the California Public Records Act definition of "public records" encompasses all communications

¹⁰ Id. at 167-68.

¹¹ Id. at 176-77.

¹² ___ Cal.4th ___ (2017).

¹³ Government Code section 6250 et seq.

¹⁴ Id. at ___.

about official business, regardless of how they are created, communicated, or stored. The trial court ordered disclosure but the Court of Appeal reversed the trial court and blocked disclosure.

The California Supreme Court noted that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state.¹⁵ In 2004, voters added a provision to the California Constitution that stated, "The people have the right of access to information concerning the conduct of the people's business, and, therefore...the writings of public officials and agencies shall be open to public scrutiny."¹⁶

The California Supreme Court further stated that although public access to information must sometimes yield to personal privacy interests, openness in government is essential to the functioning of a democracy, and implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files so that there is a check against the arbitrary exercise of official power and secrecy in the public process.¹⁷

The California Supreme Court cited Government Code section 6253 and held that it creates 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.¹⁸ Every such record must be disclosed unless a statutory exception applies.¹⁹

The California Supreme Court observed that the California Public Records Act defines a public record as any writing containing information related to the conduct of the public's business, prepared, owned, used, or retained by a local agency, regardless of physical form or characteristics.²⁰ Under this definition, the California Supreme Court noted that a public record has four aspects:

1. A writing.
2. Content relating to the conduct of the public's business, which is
3. Prepared by, or
4. Owned, used, or retained by any state or local agency²¹

The California Public Records Act defines a writing 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, in any record thereby created, regardless of the manner in which the record has been stored.²² The

¹⁵ See, Government Code section 6250.

¹⁶ California Constitution, Article I, Section 3(b)(1).

¹⁷ International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court, 42 Cal.4th 319, 328-29 (2007); Commission on Peace Officer Standards and Training v. Superior Court, 42 Cal.4th 277, 288 (2007).

¹⁸ Sander v. State Bar of California, 58 Cal.4th 300, 323 (2013).

¹⁹ Ibid.

²⁰ Government Code section 6252(e).

²¹ City of San Jose v. Superior Court, ___ Cal.4th ___ (2017).

²² Government Code section 6252(g).

Supreme Court then went on to state that e-mail, text messaging, and other electronic platforms fall within the definition of a writing.²³

The California Supreme Court then analyzed the meaning of the term related to the conduct of the public's business. The court stated that generally, any record kept by an officer because it is necessary or convenient to the discharge of his official duty is a public record.²⁴ The California Supreme Court recognized that not all writings will be sufficiently related to public business and that sometimes it will be unclear whether a particular writing relates to the conduct of public business. The court suggested that the following factors could help resolve the question of writings kept in personal accounts:

1. The content of the writing itself.
2. The context in, or purpose for which, the document was written.
3. The audience to whom the document was directed.
4. Whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.²⁵

The California Supreme Court then focused on whether a writing communicated from a personal account is prepared by a local agency within the meaning of the California Public Records Act.²⁶ The court stated that if an agency employee prepares a writing that substantively relates to the conduct of public business, that writing satisfies the CPRA's definition of a public record. The court noted that public agencies can only act through their individual officers and employees and when employees are conducting agency business, they are working for the agency and on its behalf.²⁷ The California Supreme Court concluded:

“A writing prepared by a public employee conducting public agency business has been ‘prepared by’ the agency within the meaning of Section 6252(e), even if the writing is prepared using the employee’s personal account.”²⁸

The California Supreme Court then analyzed the meaning of the term in the California Public Records Act, “owned, used, or retained by any local agency.” The court held that documents otherwise meeting the California Public Records Act definition of public records do not lose their status as public records because they are located in an employee’s personal account. A writing retained by a public employee conducting agency business has been retained

²³ Id. at _____. For example, the court stated that an employee’s electronic musings about a colleague’s personal shortcomings will not be related to the conduct of the public’s business. However, an e-mail to a superior reporting a co-worker’s mismanagement of an agency project might well be a public record. Id. at _____.

²⁴ Braun v. City of Taft, 154 Cal.App.3d 332, 340 (1984).

²⁵ Id. at _____.

²⁶ See, Government Code section 6252(e).

²⁷ See, Suesuki v. Superior Court, 58 Cal.2d 166 (1962); Alvarez v. Felker Manufacturing Company, 230 Cal.App.2d 987, 998 (1964); Reno v. Baird, 18 Cal.4th 640, 656 (1998); California Association of Health Facilities v. Department of Health Services,

¹⁶ Cal.4th 284, 296-97 (1997).

²⁸ City of San Jose v. Superior Court, ____ Cal.4th ____ (2017).

by the agency within the meaning of Government Code section 6252(e), even if the writing is retained in the employee's personal account.²⁹

The California Supreme Court rejected the City's interpretation of the California Public Records Act as requiring the documents to be in the City's e-mail accounts. The court expressed concern that the City's interpretation would allow evasion of the California Public Records Act simply by the use of a personal account. The court stated:

“If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation ‘would not only put an increasing amount of information beyond the public's grasp, but also encourage government officials to conduct the public's business in private.’”³⁰

The California Supreme Court said that open access to government records is essential to verify that government officials are acting responsibly and held accountable to the public they serve. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. The whole purpose of the California Public Records Act is to ensure transparency in government activities. The court then stated, “If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.”³¹

The California Supreme Court noted that any personal information not related to the conduct of public business or material falling under a statutory exemption can be redacted from public records that are produced or presented for review.³² The court also rejected the City's concerns that the search of public records in employees' accounts would itself raise privacy concerns because the public agency would have to demand the surrender of employees' electronic devices and passwords to their personal accounts. The court stated that searches can be conducted in a manner that respects individual privacy.³³ The court went on to state that public agencies may develop their own internal policies for conducting searches and made the following observations:

1. Once an agency receives a California Public Records Act request, it must communicate the scope of the information requested to the custodians of its records.
2. If the Public Records Act request seeks public records held in employees' non-governmental accounts, the public agency should communicate the request to the employee in question.

²⁹ *Id.* at ____.

³⁰ *Id.* at ____.

³¹ *Id.* at ____; citing *CBS, Inc. v. Block*, 42 Cal.3d 646, 651 (1986).

³² *Id.* at ____; *see*, Government Code section 6253(a).

³³ *Id.* at ____.

3. The public agency may reasonably rely on the employee in question to search their own personal files, accounts, and devices for responsive material.³⁴

The California Supreme Court further stated that agencies can adopt policies that will reduce the likelihood of public records being held in employee's private accounts. Public agencies may require that employees transmit a copy to their government accounts of all communications touching on public business. Public agencies may also require that officers and employees use their government accounts for all communications touching on public business.³⁵ The court noted that federal agency employees must follow such procedures to ensure compliance with the Freedom of Information Act.³⁶ The California Supreme Court concluded by stating:

“Consistent with the legislature’s purpose in enacting CPRA, and our Constitution mandate to interpret the Act broadly in favor of public access...we hold that a City employee’s writings about public business are not excluded from the CPRA simply because they have been sent, received, or stored in a personal account.”³⁷

In summary, the California Supreme Court has held that writings related to the conduct of public business prepared, sent, received, or stored in the personal account of a public official or employee are public records subject to disclosure. Therefore, we would recommend that districts review their current practices and policies to identify whether the district needs to modify or change its current practices or policies to ensure disclosure of all public records and to protect the privacy of its board members and employees. In reviewing district policies, districts may wish to consider requiring board members and employees use district e-mail accounts when conducting public business. Requiring the use of district e-mail accounts will reduce the need to search personal e-mail accounts. After conducting this internal review, we would recommend that districts contact legal counsel to discuss the adoption of policies or procedures or the modification of current policies or procedures that will meet the requirements of the California Supreme Court’s decision in City of San Jose v. Superior Court.

³⁴ Federal courts applying the Freedom of Information Act have approved of individual employees conducting their own searches and segregating public records from personal records, so long as the employees have been properly trained in how to distinguish between the two. See, Ethyl Corp. v. U.S. Environmental Protection Agency, 25 F.3d 1241, 1247 (4th Cir. 1994). A federal employee who withholds a document identified as potentially responsive may submit an affidavit providing the agency and reviewing court with sufficient factual basis upon which to determine whether the contested items were agency records or personal materials. Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 481 (2nd Cir. 1999). The Washington Supreme Court adopted a procedure under its state public records law holding that employees who withhold personal records from their employer must submit an affidavit with facts sufficient to show the information is not a public record and that so long as the affidavits give the requestor and the trial court a sufficient factual basis to determine that the withheld material is indeed nonresponsive, the public agency has performed adequate search under state law. Nissen v. Pierce County, 357 P.3d 45, 57 (Wash. 2015).

³⁵ Id. at ____.

³⁶ See, 44 U.S.C. Section 2911(a), which prohibits use of personal electronic accounts for official business, unless messages are copied or forwarded to an official account; 36 C.F.R. 1236.22(b), requiring that federal agencies ensure official e-mail messages in federal employees’ personal accounts are preserved in the federal agency’s recordkeeping system.

³⁷ City of San Jose v. Superior Court, ____ Cal.4th ____ (2017).

D. Definition of Party Under Public Records Act

In League of California Cities v. Superior Court,³⁸ the Court of Appeal held that a party may file a petition for the issuance of an extraordinary writ to challenge an order of the trial court either directing or refusing disclosure under the Public Records Act³⁹.

In League of California Cities, a nonparty to the action, League of California Cities, filed a petition for an extraordinary writ in the Court of Appeal arguing it was a real party in interest that would be irreparably damaged by the trial court's order to disclose records allegedly protected from disclosure by the attorney-client privilege and attorney work product doctrine. The Court of Appeal concluded that the term "party," as used in the California Public Records Act, is not limited to an actual party to the action. Accordingly, the Court of Appeal held that the League of California Cities, even though it was a nonparty in the trial court, had standing to file a petition challenging the trial court's order.⁴⁰

The Court of Appeal further concluded that the trial court erred by not conducting an in camera review of the documents as requested by the party asserting that the documents were exempt from disclosure. Accordingly, the Court of Appeal granted the petition and remanded the matter back to the trial court for further proceedings.⁴¹

INSPECTION AND PHOTOCOPYING OF PUBLIC RECORDS

A. Inspection and Copying of Records

Public records are open to inspection at all times during the office hours of the local agency, and every person has the right to inspect any public record, with limited exceptions. The district may request but not require an individual to identify themselves and make a written request. Any reasonable portion of a record must be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.⁴²

Except for public records exempt from disclosure, each local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, must make the records promptly available to any person upon payment of fees covering the district's costs of duplication. Upon request, an exact copy must be provided unless the agency is unable to make an exact copy.⁴³

³⁸ 241 Cal. App.4th 976 (2015).

³⁹ Gov. Code section § 6259(c).

⁴⁰ Id. at 981-982.

⁴¹ Id. at 982.

⁴² Government Code section 6253.

⁴³ In Los Angeles Unified School District v. Superior Court, 151 Cal.App.4th 759, 60 Cal.Rptr.3d 445 (2007), the Court of Appeal held that a public agency such as the City of Long Beach could make a public records request of the Los Angeles Unified School District. The court held that the Los Angeles Unified School District was required to produce records relating to a school construction project requested by the City of Long Beach.

Government Code section 6253(f) states that in addition to maintaining public records for public inspection during the office hours of the public agency, a public agency may comply with the requirements of Section 6253 to ensure that public records are open to inspection at all times by posting any public record on its Internet Web site and, in response to a request for a public record posted on the Internet Web site, directing a member of the public to the location on the Internet Web site where the public record is posted. However, if after the public agency directs a member of the public to the Internet Web site, the member of the public requesting the public record requests a copy of the public record due to an inability to access or reproduce the public record from the Internet Web site, the public agency shall promptly provide a copy of the public record.

B. Fees for Copying

The amount of fees that may be charged by a public agency to make a copy of a record is limited to the direct cost of producing the record.⁴⁴ Direct cost does not include the ancillary tasks associated with retrieval, inspection and handling of the file from which the copy is extracted.⁴⁵ The same rule would apply to copies made from electronic records.⁴⁶

An additional fee may be charged if there is a cost to construct the record including the cost of programming and computer services to produce a copy of the record. The fee may include data compilation, extraction or programming to produce the record.⁴⁷ An hourly rate covering the salary of employees required to construct a record, including the cost of programming and computer services necessary to compile data, extract data, or computer programming to produce a record, may be charged.⁴⁸

In California Public Records Research, Inc., v. County of Stanislaus,⁴⁹ the Court of Appeal held that the County of Stanislaus must reduce the fees it charges for copies of official records. The County of Stanislaus charged the fee of \$3.00 for the first page and \$2.00 for each subsequent page. The plaintiffs alleged that the County violated Government Code section 27366, which states that copy fees shall be set by the board of supervisors in an amount necessary to recover the direct and indirect costs of providing the product or service.

The trial court ruled in the County's favor and allowed the County to factor in the cost of estimated staff time for processing a copy request. The Court of Appeal reversed, holding that there was a complete lack of evidence to support the County's fees. The Court of Appeal held that the County's board of supervisors abused its discretion when it set the copying fees.

⁴⁴ Government Code section 6253; North County Parents Organization v. Department of Education, 23 Cal.App.4th 144, 148 (1994).

⁴⁵ 85 Ops.Cal.Atty.Gen. 225, 227-229 (2002).

⁴⁶ Government Code section 6253.9(a).

⁴⁷ 88 Ops.Cal.Atty.Gen. 153 (2005); County of Santa Clara v. Superior Court, 170 Cal.App.4th 1301 (2009).

⁴⁸ Id., at 160.

⁴⁹ 246 Cal.App.4th 1432 (2016).

C. Timelines

Each local agency, upon a request for a copy of records, shall, within 10 days of receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and must promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension of more than 14 days. When the agency dispatches the determination the agency shall state the estimated date and time when the records will be made available.⁵⁰

The Public Records Act defines “unusual circumstances” as:

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.⁵¹

D. Assistance to Members of the Public

When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist a member of the public to make a focused and effective request that reasonably describes an identifiable record or records, must do all of the following to the extent reasonable under the circumstances:

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request.

⁵⁰ Government Code section 6253.

⁵¹ Government Code section 6253(c).

2. Describe the information technology and physical location in which the records exist.
3. Provide suggestions for overcoming any practical basis for denying access to the records sought.⁵²

The requirements to assist the public are deemed to be satisfied if the public agency is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requestor that will help identify the record or records. The requirement to assist the public in identifying the record does not apply if the public agency makes the record available, or if the agency determines that the request should be denied, and bases that determination on an exemption to the Public Records Act, or the public agency makes available an index of its records.⁵³

E. Attorneys' Fees

In Crews v. Willows Unified School District,⁵⁴ the Court of Appeal reversed the trial court's decision awarding attorneys' fees to the Willows Unified School District pursuant to Government Code section 6259(d) which provides for an award of attorney fees and costs to the public agency in the event of a clearly frivolous Public Records Act case. The trial court awarded attorney fees in the amount of \$53,926.00 and \$2,669.50 in costs.

The Court of Appeal noted that Government Code section 6259 does not define the term "clearly frivolous." The court stated that the California Supreme Court in In re Marriage of Flaherty,⁵⁵ held that an appeal that is simply without merit is not by definition frivolous and should not incur sanctions. The Supreme Court held that an appeal may be deemed frivolous only when prosecuted for an improper motive such as to harass the respondent or for purposes of delay or when so lacking in merit that any reasonable attorney would agree the appeal is totally without merit.⁵⁶ The Court of Appeal concluded that the Public Records Act request by Crews was not completely lacking in merit or brought for an improper purpose. The court stated:

"In sum, Crews's PRA petition is not utterly devoid of merit or taken for an improper purpose. Consequently, his action was not frivolous and he should not have been ordered to pay attorney fees and costs to the District under Section 6259, subdivision (d)."⁵⁷

In Bertoli v. City of Sebastopol,⁵⁸ the Court of Appeal held that the plaintiff's lawsuit was not clearly frivolous. Therefore, the Court of Appeal reversed the lower court's decision and denied attorneys' fees and costs to the City of Sebastopol.

⁵² Government Code section 6253.1.

⁵³ Government Code section 6253.1.

⁵⁴ 217 Cal.App.4th 1368, 159 Cal.Rptr.3d 484 (2013).

⁵⁵ 31 Cal.3d 637, 183 Cal.Rptr. 508 (1982).

⁵⁶ Id. at 650-651.

⁵⁷ 217 Cal.App.4th 1368, 1385 (2013).

⁵⁸ 233 Cal.App.4th 353 (2015).

The Court of Appeal characterized the Plaintiff's actions as overly aggressive, unfocused and poorly drafted to achieve their desired outcomes but not clearly frivolous. The Court of Appeal noted that under the California Public Records Act, a request that requires an agency to search an enormous volume of data for a needle in a haystack or which compels the production of a huge volume of material may be objectionable, as unduly burdensome.⁵⁹ The court stated:

“Indeed, under the PRA, a governmental agency is only obliged to disclose public records that can be located with reasonable effort and cannot be subjected to a ‘limitless’ disclosure obligation.”⁶⁰

In San Diegans for Open Government v. City of San Diego⁶¹, the Court of Appeal upheld the trial court's finding that the plaintiff was the prevailing party entitled to attorney's fees and costs.

The Court of Appeal found that the plaintiff submitted a Public Records Act request to the City for all email communications pertaining to the City's official business sent to or from City Attorney Goldsmith's personal email account during certain periods of time. The City refused to produce any email communications, stating that the emails in City Attorney Goldsmith's personal account were not owned, used, prepared or retained by the City and did not qualify as public records.

The trial court entered a judgment in favor of the plaintiff on its claim under the California Public Records Act and granted the plaintiff declaratory relief against the City. The trial court found that the City did not produce documents stored in its email systems because it improperly narrowed the request to email messages maintained on a private server and should have sought clarification or attempt to provide a partial response. The trial court granted plaintiff's request for attorney's fees as the prevailing party under the California Public Records Act, finding that the City disclosed public records as a result of the action and could have avoided litigation had it not improperly narrowed the request but instead sought clarification.

The Court of Appeal held that a plaintiff prevails under the California Public Records Act when it files an action which results in the defendant releasing a copy of a previously withheld document.⁶²

The Court of Appeal rejected the City's claim that it did not understand the plaintiff's request for emails included emails stored in the City computer system, and noted that the City conceded that private emails stored on City servers would be considered public records. The City declined to produce any documents claiming it did not retain them, and the Court held that

⁵⁹ Id. at 370-372.

⁶⁰ Id. at 372.

⁶¹ 247 Cal.App.4th 1306 (2016).

⁶² Los Angeles Times v. Alameda Corridor Transportation Agency, 88 Cal.App.4th 1381, 1391 (2001).

the City should actually have looked for emails on the City's server. Based on the trial court's findings, the Court of Appeal upheld the award of attorney's fees.

In Sukumar v. City of San Diego,⁶³ the Court of Appeal held that plaintiff Sukumar should be deemed to be a prevailing party entitled to an attorney fee award. The Court of Appeal held that the plaintiff prevailed within the meaning of the California Public Records Act (CPA)⁶⁴ when he filed an action that results in defendant releasing a copy of a previously withheld document.⁶⁵

The Court of Appeal held that even though plaintiff did not achieve a favorable final judgment in the Public Records Act litigation, a defendant's voluntary action in providing public records that is induced by plaintiff's lawsuit will still support an attorney fee award on the rationale that the lawsuit spurred defendant to act or was a catalyst speeding defendant's response.⁶⁶

The superior court denied the plaintiff's Motion for Attorney's Fees. The Court of Appeal reversed because the undisputed evidence established that the City produced, among other things, five photographs of Sukumar's property and 146 pages of e-mails directly as a result of court-ordered depositions in the litigation. The Court of Appeal remanded the matter back to the superior court to determine the amount of attorney's fees to which the plaintiff is entitled.

The City of San Diego represented to the court in original litigation that it had produced all records requested. However, when an aide to a city councilmember was served with a deposition notice, the City Attorney asked the employee to check again to see if there were any records. The City employee then found the additional records.

The Court of Appeal held that there was no intentional delay on the part of the City, but held that under the Public Records Act, the plaintiff is considered a prevailing party entitled to attorney's fees. If litigation was the motivating factor for the production of documents, the court stated, "The key is whether there is a substantial causal relationship between the lawsuit and the delivery of the information."

Based on these facts, the Court of Appeal ruled that the plaintiff was a prevailing party entitled to attorney's fees and remanded the matter back to the superior court to determine the amount of reasonable attorney's fees and costs the plaintiff will be entitled to under Government Code section 6259(d).

⁶³ 14 Cal.App. 5th 451 (2017).

⁶⁴ Government Code section 6250, et seq.

⁶⁵ See, Belth v. Garamendi, 232 Cal.App.3d 896, 898 (1991).

⁶⁶ Id. at 901.

EXEMPT RECORDS

A. Enumerated Exemptions

The California Public Records Act includes two categories of exemptions. The first category of exemptions is the enumerated exemptions in Government Code section 6254, and the second category is the general exemption section in Government Code section 6255.⁶⁷ In Section 6254, the Legislature listed a number of express exemptions.

Exempt records include:

1. Preliminary drafts, notes, or interagency or intraagency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.
2. Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to the Tort Claims Act, until the pending litigation or claim has been finally adjudicated or otherwise settled.
3. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.⁶⁸

The home addresses, home telephone numbers, personal cellular telephone numbers, and birth dates of public agency employees are not to be deemed to be public records and are not open to public inspection, except as follows:

1. To an agent or family member of the individual to whom the information pertains.
2. To an officer or employee of another public agency, when necessary for the performance of its official duties.
3. To an employee organization pursuant to regulations and decisions of PERB, except that the home addresses and any phone numbers of employees performing law enforcement related functions and the birth date on file with the employer shall not be disclosed.
4. To an agent or employee of a health benefit plan providing health services or administering claims for health services to employees and their enrolled dependents for the purpose of providing the

⁶⁷ City of San Jose v. Superior Court, 74 Cal.App.4th 1018, 1019 (1999).

⁶⁸ Government Code section 6254.

health services or administering claims for employees and their enrolled dependents.

5. Upon written request of any employee, the public agency shall not disclose the employee's home address, home telephone number, personal cellular telephone number, or birth date to an employee organization, and the agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.⁶⁹

B. General Exemption – Public Interest

Government Code section 6255 allows a government agency to withhold records if it can demonstrate that, on the facts of the particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. This exemption contemplates a case-by-case balancing process, with the burden of proof on the proponent of non-disclosure to demonstrate a clear need for confidentiality.⁷⁰ When the public interest in non-disclosure of records is outweighed by disclosure of the records, the courts will direct the government to disclose the requested information.⁷¹

In County of Santa Clara v. Superior Court,⁷² the Court of Appeal held that the County of Santa Clara must produce its geographic information system (GIS) base map to the party requesting the documents. The Court of Appeal broadly interpreted the Public Records Act and held that the public's interest in disclosure outweighed the public's interest in non-disclosure.

C. Specific Exemptions – Drafts and Notes

Government Code section 6254(a) states that nothing in the California Public Records Act shall be construed to require disclosure of records that are, "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."

In Citizens for a Better Environment v. Department of Food and Agriculture,⁷³ the Court of Appeal interpreted the meaning of Government Code section 6254(a). The Court of Appeal concluded:

"The Department failed to show that certain records were 'not retained...in the ordinary course of business'; these records must be disclosed in their entirety. Regarding the remaining records, we

⁶⁹ Government Code section 6254.3.

⁷⁰ Michaelis, Montanari & Johnson v. Superior Court, 38 Cal.4th 1065, 1071 (2006).

⁷¹ City of San Jose v. Superior Court, 74 Cal.App.4th 1018, 1019 (1999).

⁷² 170 Cal.App.4th 1301 (2009).

⁷³ 171 Cal.App.3d 704, 217 Cal.Rptr.504 (1985).

hold that only the recommendations to the Department concerning the action to be taken are exempt but that the factual report of the investigations and what was found must be disclosed.”⁷⁴

The Department of Food and Agriculture has the primary responsibility for enforcement of the federal pesticide use law. It shares this responsibility with the agriculture commissioner of each county acting under its direction and supervision.⁷⁵

In November 1980, Citizens for a Better Environment requested that the Department supply copies of all documents from 1977 regarding its evaluations of pesticide surveillance and enforcement activities in several California counties. The request included final and draft reports, staff drafts and reports, notes of conversations and meetings, and any county or federal documents in the department’s possession which concern matters of pesticide surveillance and enforcement. The Department responded that evaluations were conducted only in Contra Costa and San Francisco and that the reports were in process and would not be completed before the end of January 1981. The Department claimed the documents were exempt under Government Code section 6254(a).⁷⁶

The Department stated in a declaration to the trial court that the writings presently maintained by the Department were the basis for the reports to be published later and that they consist of individual team member’s impressions and opinions of the operations of the county agriculture departments which were visited, inspected and evaluated. The Department declared that the use of the writings is limited to the preparation of the draft or drafts which ultimately result in the reports of the Department and that they are not normally retained after the report is completed.⁷⁷

The trial court reviewed the documents in camera pursuant to Evidence Code section 915 and Government Code section 6259. The trial court ruled that the documents were exempt from disclosure.⁷⁸

Following the trial court’s ruling, the final reports were completed. The final reports contained few comments or recommendations and do not reveal what evidence, if any, was gathered by the monitors. The final reports do not say how the investigation was conducted, who or what was investigated, or when the investigations took place.⁷⁹

The Court of Appeal reviewed the writings. The documents contain a checklist form identical to the form used for the final reports. The documents are annotated with handwritten notes and appear to have been prepared during on-site visits to the counties. Each file contains other handwritten documents also apparently prepared on-site. The San Francisco file contains a

⁷⁴ Id. at 707.

⁷⁵ Id. at 707-08.

⁷⁶ Id. at 708.

⁷⁷ Id. at 709.

⁷⁸ Ibid.

⁷⁹ Id. at 710.

type written document stamped “draft” which tracks the categorical format of the final reports but does so in a narrative style stating county practices found by the investigator. The court noted that these documents consist of recommendations for improvement of county operations and proposals for the disposition of the items on the checklist forms of the final reports. The Court of Appeal ruled that these matters are not subject to disclosure.⁸⁰

However, the Court of Appeal also ruled that these documents also provide a wealth of detail concerning the methodology of the Department inspection in monitoring visits and the facts concerning the county operations as perceived by the monitors. The Court of Appeal ruled that these documents were subject to disclosure.⁸¹

The Court of Appeal noted that the California Public Records Act expresses a policy favoring disclosure of public records.⁸² The Court of Appeal also noted that the policy of disclosure can only be accomplished by narrow construction of the statutory exemptions.⁸³

The Court of Appeal reviewed the provisions of Government Code sections 6254(a) and noted that there were three statutory conditions for exemption:

1. The records must be a preliminary draft, note, or memorandum.
2. The record is not retained by the public agency in the ordinary course of business.
3. The public interest in withholding must clearly outweigh the public interest in disclosure.⁸⁴

The burden of proof and of persuasion of the existence of each of these conditions is on the Department of Food and Agriculture. The purpose of the exemption is to provide a measure of agency privacy through written discourse concerning matters pending administrative action. The Court of Appeal discerned this purpose from reading the statute and reviewing its antecedents.⁸⁵

The Court of Appeal noted that the California Public Records Act is modeled after the federal Freedom of Information Act (FOIA). Although the wording in the California Public Records Act is different than the Freedom of Information Act, the Court of Appeal noted that the key to all the cases is that the exemption protects the deliberative materials produced in the process of making agency decisions but not factual materials and not agency law. The purpose of the exception is to foster robust discussion within the agency of policy questions pending administrative decisions. The means to achieve this is an exemption from disclosure of those

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Id. at 711.

⁸³ Id. at 711. See also, San Gabriel Tribune v. Superior Court, 143 Cal.App. 3d 762, 773, 192 Cal.Rptr. 415 (1983).

⁸⁴ Id. at 711-12.

⁸⁵ Id. at 712.

portions of predecisional writings containing advisory opinions, recommendations and policy deliberations. However, the Court of Appeal held that memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context are not exempt from disclosure.⁸⁶

The Citizens for Better Environment conceded in the lower court that the records that they were seeking were preliminary drafts, notes or interagency or intra-agency memoranda and that the records are documents produced in the course of a deliberative process of evaluating compliance of a county with state criteria of an effective pesticide law enforcement program. However, the Citizens for Better Environment argued that the second condition of Government Code section 6254(a) has not been met. This condition requires that the records are documents which are not retained by the Department in the ordinary course of business. If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed. Thus, the agency controls availability of a forum for expression of controversial views on policy matters by its policy and custom concerning retention of preliminary materials.⁸⁷

The Court of Appeal also considered the third condition in Government Code section 6254(a) – whether the public interest in withholding the records clearly outweighs the public interest in disclosure. The court noted that in determining whether there is a public interest in disclosure the nature of the information in the documents must be considered. In Citizens for Better Environment, the factual matters in the preliminary documents concerned the conduct of county officials in enforcing the pesticide use laws and the conduct of state officials in the investigation and supervision of that task. The court ruled that these are grave public matters in which the public has a substantial interest in disclosure.⁸⁸

The Court of Appeal went on to discuss the public interest in withholding such records. The court ruled that the phrase “public interest in withholding such records,” must be narrowly construed. If it were to be broadly construed it would render the California Public Records Act superfluous.⁸⁹

The Court of Appeal held that memoranda consisting of factual material or severable factual material along with deliberative material may be disclosed without doing violence to the public interest in withholding such records. The Court of Appeal ruled that it is a simple matter to separate the actual descriptions of what went on, such as the times and places of the inspections and the observations made at those places, from the recommendations made on the basis of those facts. The court ruled that to the extent that the notes and memoranda refer to things that were seen and heard by the team members, they contain what may be considered factual material.⁹⁰

⁸⁶ Id. at 712-13. See also, NLRP v. Sears, Roebuck & Co., 421 U.S., 132, 149, 155, 95 S.Ct. 1504 (1975); EPA v. Mink, 410 U.S. 73, 87-89, 93 S.Ct 82 (1973).

⁸⁷ Id. at 714.

⁸⁸ Id. at 715.

⁸⁹ Id. at 715-16.

⁹⁰ Id. at 716-17.

The Court of Appeal ruled that only opinions which are recommendations may be withheld. The court stated, “A statement of opinion concerning whether county conduct, policy or practice conforms to the law or whether the Department should endorse, rebuke, or take some other action in view of the conduct, policy or practice is ‘recommendatory’ and meets the definition for withholding.”⁹¹

The Court of Appeal reviewed the documents in question and observed that the documents include the times and places of the investigations and the observations made. The court ruled that this was factual matter that must be disclosed.⁹²

EMPLOYMENT CONTRACTS AND SALARY INFORMATION

In International Federation of Professional and Technical Engineers v. Superior Court,⁹³ the California Supreme Court held that the Public Records Act requires the City of Oakland to disclose the name, job title and gross salary of all city employees who earned \$100,000 in a fiscal year. The California Supreme Court overruled an earlier Court of Appeal decision and held that public employees do not have a reasonable expectation of privacy in their gross salary.⁹⁴

The California Supreme Court held that openness in government is essential to the functioning of a democracy and that implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, the court held that individuals must have access to government files. The court noted that the Public Records Act 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.⁹⁵ In addition, the voters in 2004 added a provision to the California Constitution that states that the people have the right of access to information concerning the conduct of the people’s business and therefore, the writings of public officials and agencies must be open to public scrutiny.⁹⁶

The court noted that courts must balance the disclosure of public records against the privacy rights of individuals. The court stated:

“This exemption requires us to balance two competing interests, both of which the Act seeks to protect – the public’s interest in disclosure and the individual’s interest in personal privacy. Balancing these interests, we conclude that disclosure of the salary

⁹¹ Id. at 717.

⁹² Id. at 714.

⁹³ 42 Cal.4th 319, 64 Cal.Rptr.3d 693 (2007).

⁹⁴ See, Teamsters Local 856 v. Priceless, LLC, 112 Cal.App.4th 1500, 5 Cal.Rptr. 3d 847 (2003). We summarized this case in a memo dated December 23, 2003 (OPAD 03-91). That memo should now be disregarded and is superseded by this memo as International Federation overrules the Priceless decision.

⁹⁵ See, Government Code section 6250.

⁹⁶ See, California Constitution, Article I, Section 3(b)(1).

information at issue in the present case would not constitute an unwarranted invasion of personal privacy.”⁹⁷

The court held that counterbalancing any interest that public employees may have in avoiding the disclosure of their salaries is the strong public interest in knowing how the government spends its money. The court drew an analogy to the Brown Act and noted that under the Brown Act employees’ salaries must be discussed in open session.⁹⁸

Thus, the California Supreme Court concluded that the City of Oakland must provide the names, job titles and gross salaries of all City employees who earned \$100,000 or more in fiscal year 2003-2004 to the Contra Costa newspapers.

PERSONNEL FILES AND DISCIPLINARY RECORDS

A. Disclosure of Employee Disciplinary Records

The Court of Appeal in Bakersfield City School District v. Superior Court⁹⁹ held that a local newspaper may have access to the disciplinary records of a school district employee. The school employee was under investigation by local enforcement in a highly publicized investigation of a violent crime.

On July 24, 2003, the Bakersfield Californian, the local newspaper, filed a court action under the California Public Records Act,¹⁰⁰ seeking disclosure of disciplinary records that the Bakersfield City School District currently maintained regarding the district employee.

On September 5, 2003, a Superior Court judge reviewed the personnel records of the employee in court. As to some of the records, the Superior Court denied disclosure after concluding that the records were not substantial in nature and that there was no reasonable cause to believe the complaints were well founded. However, as to complaints regarding an incident that allegedly occurred on February 20, 1996, which the court described on the record as “sexual type conduct, threats of violence and violence” the court found that the complaint was substantial in nature and that there was reasonable cause to believe the complaint was well founded. The Superior Court did not make any findings with regard to the truth of the allegations or truth of complaints that were in the document but ruled that the documents must be produced after being redacted to exclude names, addresses and telephone numbers of all persons mentioned except for the employee.¹⁰¹

⁹⁷ Id. at 329-330.

⁹⁸ Id. at 331-334; see, San Diego Union v. City Council, 146 Cal.App.3d 947 (1983).

⁹⁹ 118 Cal.App.4th 1041, 13 Cal.Rptr.3d 517 (2004). See also, Caldecott v. Superior Court, 243 Cal.App.4th 212 (2015), in which the Court of Appeal remanded the matter back to the Superior Court to review in camera the records in dispute to determine if they are protected by the attorney-client privilege. The Court of Appeal held that case was not moot even though plaintiff possessed some of the records because plaintiff wanted to make the records public.

¹⁰⁰ Government Code sections 6250 et seq.

¹⁰¹ Id. at 1043-1044.

After reviewing the redacted documents, the court ordered seven pages of the document to be disclosed but ordered the documents to remain sealed to permit the Bakersfield City School District the opportunity to appeal to the Court of Appeal.¹⁰²

The Court of Appeal reviewed the provisions of the California Public Records Act, Government Code sections 6250, et seq. and noted that there is a strong policy in favor of disclosure of public records in California. Any refusal to disclose public information must be based on a specific exception to that policy. The burden of proof is on the proponent of nondisclosure to demonstrate a clear reason not to disclose the documents.

The Court of Appeal noted that Government Code section 6254(c) provides for an exemption for personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. The Court of Appeal held that the “personnel exemption” was developed to protect intimate details of personal and family life, not business judgments and relationships.¹⁰³

The Court of Appeal noted that in American Federation of State Employees v. Regents of the University of California,¹⁰⁴ the Court of Appeal ruled that where complaints of public employees’ wrongdoing and a resulting disciplinary investigation reveal allegations of a substantial nature and there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public’s right to know.

The Court of Appeal ruled that in determining whether a particular document supports a reasonable conclusion that the complaint was well founded, the trial court or Superior Court is required to examine the documents presented to determine whether they reveal sufficient indications of reliability to support a reasonable conclusion that the complaint was well founded. The Court of Appeal held that the Superior Court must balance the competing concerns of a public employee’s right to privacy and the public’s interest in disclosure.¹⁰⁵

In Bakersfield City School District, the Court of Appeal held that the trial court properly concluded that the documents reviewed provided a sufficient basis upon which to reasonably conclude that the complaint in question was well founded. The Court of Appeal held that exemption from disclosure is evaluated on a case by case basis and where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government agency to disclose the requested information.¹⁰⁶

The Court of Appeal noted that the trial court redacted the records to eliminate all identifying information about the alleged victim and the witnesses. Therefore, the Court of

¹⁰² Id. at 1044.

¹⁰³ See, Braun v. City of Taft, 154 Cal.App.3d 332, 343-344 (1988).

¹⁰⁴ 80 Cal.App.3d 913, 918 (1978).

¹⁰⁵ Id. at 1046.

¹⁰⁶ Ibid.

Appeal ruled that the confidentiality expectations of the victims or the witnesses were not compromised and the disclosure will not have a chilling effect on future complaints.¹⁰⁷

B. Disclosure of Investigative Reports

In BRV, Inc. v. Superior Court,¹⁰⁸ the Court of Appeal upheld the release of an investigative report that reviewed allegations of misconduct by the school district superintendent. Even though the report tended to exonerate the superintendent, the court held that the release of the report was warranted. The court in BRV also ordered that the documents be redacted to exclude names, addresses and telephone numbers of individuals other than the employee who was the subject of the complaint.¹⁰⁹

In Marken v. Santa Monica – Malibu Unified School District,¹¹⁰ the Court of Appeal held that the school district was required to disclose an investigatory report that concluded that a teacher had more likely than not engaged in sexual harassment in violation of the school district’s policy and the school district’s written reprimand of the teacher. In Marken, the school district hired an attorney to conduct an investigation after a parent complained that the teacher had sexually harassed her daughter. The attorney was unable to interview students but based on several other interviews, the investigator made partial findings and determined that sexual harassment had probably occurred. Two years later, another parent requested copies of all public records concerning the investigation. The district informed Marken that it intended to comply with the request.

Marken then sued the school district seeking an order to prevent the disclosure. The Court of Appeal ruled that a school district employee has standing to sue the school district to prevent disclosure under the California Public Records Act.¹¹¹

The Court of Appeal noted that not every claim of misconduct is substantial or well-founded, and thus not every complaint must be disclosed because of the potential impact of an unjustified accusation on the reputation of an innocent public employee. However, if the information in the school district’s files is reliable and, based on the information, the court can determine that the complaint is well-founded and substantial, the information must be disclosed.¹¹² The court went on to state that the school district concluded that Marken’s misconduct violated the school district’s policy prohibiting the sexual harassment of students and the district issued a written reprimand of the teacher. Therefore, the court concluded as follows:

“In light of the investigator’s factual findings, the District’s conclusion based on those findings that Marken had violated its board policy prohibiting the sexual harassment of students and

¹⁰⁷ Id. at 1046-1047.

¹⁰⁸ 143 Cal.App.4th 742 (2006).

¹⁰⁹ Id. at 759.

¹¹⁰ 202 Cal.App.4th 1250, 136 Cal.Rptr.3d 395 (2012).

¹¹¹ Id. at 1255-57, 1262-71.

¹¹² Id. at 1275.

imposition of discipline, the exemption for mandatory disclosure in Section 6254, subdivision (c), is inapplicable; and release of the investigation report and disciplinary record (redacted as directed by the Superior Court) is required under the CPRA. Under governing case law, summarized above, the public's interest in disclosure of this information – the public's right to know – outweighs Marken's privacy interest in shielding the information from disclosure."¹¹³

C. Nondisclosure of Personal Performance Goals

In contrast, in Versaci v. Superior Court,¹¹⁴ the Court of Appeal ruled that the Palomar Community College District was not required to disclose the personal performance goals of its former superintendent under the California Public Records Act.¹¹⁵ The Court of Appeal held that the personal performance goals of the former superintendent were exempt from disclosure in that the former superintendent's privacy interest in her evaluation process, including her personal performance goals, outweighed the public's interest in disclosure.

In May 2001, the Palomar Community College District hired Sherrill Amador, Ed.D., as its superintendent and president under a four-year contract beginning July 1, 2001. Paragraph 4 of the employment contract provided that the former superintendent would receive an annual written evaluation by the governing board of the community college district no later than May 1, of each year. The evaluation was based on overall performance and mutually agreed upon goals and objectives established each year prior to July 1 and would also include a mid-term progress meeting. The contract provided that all evaluations would be held in closed session.¹¹⁶

In June 2002, in a closed session, Dr. Amador and the Board mutually established Dr. Amador's personal performance goals for the 2002-2003 academic year. The District included the goals in her personnel file and maintained their confidentiality. Between January and May, 2003, the Board held closed sessions to evaluate Dr. Amador's performance. At a May 13 open session the Board reported that Dr. Amador's overall evaluation was satisfactory and that in light of budgetary constraints, she agreed to forego one-half of the raise to which she was entitled. The Board minutes of the meeting indicated that the Board directed Dr. Amador to focus on building relationships and improving morale, with progress to be monitored on an ongoing basis.¹¹⁷

At a May 27, 2003 open session, the Board voted three to two to extend Dr. Amador's contract through June 2007, and to increase her compensation by 2.5 percent. In June 2003, Versaci asked the District, under the Public Records Act, for a copy of the eleven annual job goals of Dr. Amador for the 2002-2003 academic year. The District denied the request based on

¹¹³ Id. at 1276.

¹¹⁴ 127 Cal.App.4th 805, 26 Cal.Rptr.3d 92, 196 Ed.Law Rep. 629 (2005).

¹¹⁵ Government Code sections 6250, et seq.

¹¹⁶ Id. at 811.

¹¹⁷ Ibid.

provisions of the Act and Dr. Amador's right of privacy under Article I, Section 1 of the California Constitution.¹¹⁸

In November 2003, Versaci petitioned the Superior Court to compel disclosure of the information under the Act. Versaci argued that Section 6254.8 mandates disclosure of Dr. Amador's performance goals because they were terms of her employment contract and that there was no exemption under the Public Records Act allowing the District to withhold the information.¹¹⁹

The Superior Court denied the petition and Versaci appealed. On November 13, 2003, Dr. Amador announced her retirement from the District effective July 1, 2004.¹²⁰

The Court of Appeal noted that the disclosure of public records involves two fundamental but competing interests: prevention of secrecy in government and protection of individual privacy. The Court of Appeal noted that under Government Code section 6254, a public agency may invoke an exemption for several types of public records from disclosure including personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. If an employment contract between a state or local agency and any public official or public employee is involved, it is considered a public record.¹²¹

The Court of Appeal rejected the argument that because paragraph four of the employment contract refers to goal setting in conjunction with Dr. Amador's yearly performance evaluations, the written goals are "key terms" of the contract that must be disclosed under Section 6254.8. The Court of Appeal noted that there is no secrecy regarding Dr. Amador's compensation and that the Board announced in open session the result of its evaluations (i.e., whether it found her performance satisfactory or granted a pay raise or contract extension).¹²²

The Court of Appeal concluded that Dr. Amador's personal performance goals were not part of the contract and that a mere reference in paragraph four of the employment contract to future goal setting in conjunction with Dr. Amador's evaluation process does not clearly and unequivocally evidence the parties' intent to incorporate the yet to be determined goals into the contract.¹²³

The Court of Appeal rejected Versaci's position that essentially any topic the employment contract mentions is incorporated into the contract. The Court of Appeal concluded that Dr. Amador's personal performance goals constituted a personnel file or other similar file and the disclosure of her personal performance goals would be an invasion of her personal privacy. The Court of Appeal noted that there was a substantial amount of information available

¹¹⁸ Id. at 811-12.

¹¹⁹ Id. at 812.

¹²⁰ Ibid.

¹²¹ Id. at 813-14; see, also, Government Code section 6254.8.

¹²² Id. at 814-15.

¹²³ Id. at 815-17.

to assist the public in assessing the trustee’s conduct with respect to Dr. Amador as well as determining whether Dr. Amador achieved her goals.¹²⁴

The Court of Appeal concluded Dr. Amador had a reasonable expectation of privacy in her performance goals and that it was common practice to keep personal performance goals confidential. The Court of Appeal also noted that the Brown Act authorizes a public agency to meet in closed session regarding the evaluation of performance of a public employee.¹²⁵ The underlying purpose of the personnel exception is to protect the employee from public embarrassment and to permit free and candid discussion of personnel matters by a local governmental body.¹²⁶ The Court of Appeal held that under the employment contract, Dr. Amador’s personal performance goals were an integral part of the confidential evaluation process. The Court of Appeal stated:

“There is an inherent tension between the public’s right to know and the public interest in protecting public servants, as well as protecting private citizens, from unwarranted invasion of privacy . . . On certain occasions, the public’s right to disclosure must yield to the privacy rights of governmental agencies . . . We conclude that this is such a case, as Dr. Amador’s privacy interest in her entire evaluation process – including her personal performance goals – outweighs the public minimal interest in the matter.”¹²⁷

ELECTRONIC RECORDS

Under Government Code section 6253.9, a public agency that has information that constitutes an identifiable public record not exempt from disclosure that is in an electronic format must make that information available in electronic format when requested by any person. The public agency must make the information available in any electronic format in which it holds the information or in the format requested if the requested format is one that has been used by the public agency to create copies for its own use or for provision to other agencies. The cost of duplication is limited to the direct cost of producing a copy of the record in an electronic format.¹²⁸

The public agency may charge an individual requesting public records the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:

1. In order to comply with the request, the public agency would be required to produce a copy of an electronic record and the record is

¹²⁴ Id. at 817-21.

¹²⁵ Id. at 821; see, also, Government Code section 54957(b)(1).

¹²⁶ San Diego Union v. City Council, 146 Cal.App.3d 947, 955 (1983).

¹²⁷ Id. at 822.

¹²⁸ Government Code section 6253.9(a).

one that is produced only at otherwise regularly scheduled intervals.

2. The request would require data compilation, extraction or programming to produce the record.¹²⁹

The Public Records Act does not require a public agency to reconstruct a record in an electronic format if the public agency no longer has the record available in an electronic format.¹³⁰ If the request is for information in other than electronic format, and the information also is in electronic format, the public agency may inform the individual requesting the information that the information is available in an electronic format.¹³¹ However, a public agency is not allowed to make information available only in an electronic format.¹³²

A public agency is not required to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.¹³³ The scope of public access to records held by any agency is the same for electronic records as for all other records.¹³⁴

ATTORNEY-CLIENT PRIVILEGE

A. Billing Statements and Invoices

In Los Angeles County Board of Supervisors v. Superior Court,¹³⁵ the California Supreme Court held that legal invoices are protected by the attorney-client privilege and are therefore exempt from disclosure under the California Public Records Act in most circumstances. The California Supreme Court held that invoices for work in pending and active legal matters are so closely related to attorney-client communications that the invoices are exempt from disclosure in their entirety. However, in matters that are no longer pending, fee totals may not be privileged if the fee totals on the invoice do not communicate substantive information related to the legal consultation, or risk exposing information that was communicated for the substantive purpose of legal consultation.

The California Supreme Court had to balance the confidentiality of the attorney-client privilege¹³⁶ against the need for public disclosure under the California Public Records Act.¹³⁷ In a prior case, the California Supreme Court recognized that the attorney-client privilege applies to public entities and the provisions of the California Public Records Act makes the attorney-client privilege applicable to public records.¹³⁸

¹²⁹ Government Code section 6253.9(b).

¹³⁰ Government Code section 6253.9(c).

¹³¹ Government Code section 6253.9(d).

¹³² Government Code section 6253.9(e).

¹³³ Government Code section 6253.9(f).

¹³⁴ Government Code section 6253.9(g).

¹³⁵ ___ Cal.4th ___ (2016).

¹³⁶ See, Evidence Code section 952.

¹³⁷ Government Code section 6250 et seq.

¹³⁸ See, Roberts v. City of Palmdale, 5 Cal.4th 363, 370 (1993).

B. The Evidence Code

The Evidence Code defines the attorney-client privilege.¹³⁹ The Evidence Code defines a client for the purpose of the privilege as a “person” which includes a public entity.¹⁴⁰ The courts have interpreted the Evidence Code to grant public agencies the right to assert the attorney-client privilege.¹⁴¹

The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential. Under the Evidence Code, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer.¹⁴² Confidential communication is defined as including a legal opinion formed and the advice given by the lawyer in the course of the attorney-client privilege. The attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship, even if the communication does not relate to pending litigation. The privilege applies not only to communications made in anticipation of litigation, but also the legal advice when no litigation is threatened.¹⁴³ Thus, the communication from an attorney advising a public entity may be exempt from disclosure under both the California Public Records Act and the Evidence Code.¹⁴⁴

C. The Brown Act

The Brown Act¹⁴⁵ authorizes the legislative body of a local agency, based on advice of its legal counsel, to hold a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.¹⁴⁶ The Brown Act goes on to state that for purposes of the Brown Act, all expressions of the lawyer-client privilege, other than those provided in the Brown Act, are hereby abrogated and the Brown Act is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to the Brown Act.¹⁴⁷ However, the abrogation does not apply to the California Public Records Act.¹⁴⁸

In addition, the Brown Act prohibits a person from disclosing confidential information that has been acquired by being present in a closed session to a person not entitled to receive the confidential information, unless the legislative body authorizes the disclosure of that confidential information.¹⁴⁹ The Brown Act defines “confidential information” as a communication made in

¹³⁹ Evidence Code section 950 et seq.

¹⁴⁰ See, Evidence Code sections 951 and 175.

¹⁴¹ *Roberts v. City of Palmdale*, 5 Cal.4th 363, 370, 20 Cal.Rptr.2d 330 (1993).

¹⁴² *Id.* at 371; see, also, Evidence Code section 954.

¹⁴³ *Id.* at 371; see, also, Evidence Code section 952.

¹⁴⁴ *Id.* at 372.

¹⁴⁵ Government Code section 54950 et seq.

¹⁴⁶ Government Code section 54956.9.

¹⁴⁷ Government Code section 54956.9.

¹⁴⁸ See, *Roberts v. City of Palmdale*, 5 Cal.4th 363, 377, 20 Cal.Rptr.2d 330, 338 (1993).

¹⁴⁹ Government Code section 54963(a).

a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under the Brown Act.¹⁵⁰

D. Memos Drafted by Attorney

In Roberts v. City of Palmdale, the California Supreme Court reviewed the provisions of the California Public Records Act, the Evidence Code, and the Brown Act and concluded that the language in the Brown Act stating that all expressions of the lawyer-client privilege, other than those provided in the Brown Act, are hereby abrogated, and that the Brown Act is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings under the Brown Act was limited to closed session meetings and did not apply to the attorney-client privilege under the California Public Records Act or the Evidence Code.¹⁵¹ The California Supreme Court concluded:

“We see nothing in the legislative history of the amendment [to the Brown Act] suggesting the Legislature intended to abrogate the attorney-client privilege that applies under the Public Records Act, or that it is intended to bring written communications from counsel to governing body within the scope of the Brown Act’s open meeting requirements.”¹⁵²

The California Supreme Court observed that the public’s interest in open government must be balanced against the attorney-client privilege and the need for the efficient administration of justice. The purpose of the attorney-client privilege is to allow the client the ability to confer and confide in an attorney having knowledge of the law. The court held that the attorney-client privilege is vital to the effective administration of justice, and that the privilege promotes forthright legal advice, eliminates meritless litigation, and encourages full and frank communication between attorneys and their clients, thereby promoting a broader public interest in the observance of law and the administration of justice.¹⁵³ The California Supreme Court stated:

“A city council needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who also seeks legal counsel, even though the scope of confidential meetings is limited by this state’s public meeting requirements...The public interest is served by the privilege because it permits local government agencies to seek advice that may prevent the agency from becoming embroiled in litigation, and it may permit the agency to avoid unnecessary controversy with various members of the public.

¹⁵⁰ Government Code section 54963(b).

¹⁵¹ Id. at 374-377.

¹⁵² Id. at 377.

¹⁵³ Id. at 380.

“The balance between the competing interest in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act. We see no reason to disturb the equilibrium achieved by that legislation. We conclude that although the Brown Act limits the attorney-client privilege in the context of local governing body meetings, it does not purport to abrogate the privilege as to written legal advice transmitted from counsel to members of the local governing body.”¹⁵⁴

In Ardon v. City of Los Angeles,¹⁵⁵ the California Supreme Court held that an inadvertent release of exempt privileged documents and memos to opposing counsel did not waive the exemption under the Public Records Act. The Supreme Court held that Government Code section 6254.5 applies to an intentional, not an inadvertent, disclosure. The Court held that a government entity’s inadvertent release of privileged documents under the Public Records Act does not waive the attorney-client privilege.¹⁵⁶

The California Supreme Court directed the Reporter of Decisions to publish the Court of Appeal opinion in Newark Unified School District v. Superior Court of Alameda County.¹⁵⁷ In Newark Unified School District v. Superior Court, the Court of Appeal held that in order to harmonize the provisions of Government Code section 6254.5 with Evidence Code section 912, an inadvertent waiver did not effect a waiver of the attorney-client and work-product privileges. The Court of Appeal held that Government Code section 6254.5 does not apply to an inadvertent release of privileged documents.¹⁵⁸

RETENTION OF PUBLIC RECORDS

We have been asked what the legal requirements are for retaining records in California. Under California law, there are public records and pupil or student records. Below we have summarized the requirements for both public records and student records.

A. Destruction of Records

In general, it is not permissible to destroy public records.¹⁵⁹ School districts and county offices of education are authorized to destroy records in accordance with Title 5 regulations.¹⁶⁰

¹⁵⁴ Id. at 380-381.

¹⁵⁵ 62 Cal.4th 1176 (2016).

¹⁵⁶ Id. at 1186.

¹⁵⁷ 386 P.2d 1005 (March 17, 2016).

¹⁵⁸ 245 Cal.App.4th 887 (2015).

¹⁵⁹ Government Code section 6200.

¹⁶⁰ Education Code section 35253.

In addition, school districts and county offices of education may photograph, microfilm, or make electronic copies of records.¹⁶¹

B. Classification of Records

The Title 5 regulations, with respect to district records, require the district superintendent to review and classify all district records as either permanent, optional, or disposable. Following classification, the records must be retained or destroyed in accordance with the applicable regulations.

The Title 5 regulations state the district superintendent or a person designated by the district superintendent shall classify documents as Class 1–Permanent, Class 2–Optional, or Class 3–Disposable. Records of a continuing nature (useful for administrative, legal, fiscal, or other purposes over a period of years) are not to be classified until such usefulness has ceased. A pupil’s cumulative record, if not transferred, is a continuing record until the pupil ceases to be enrolled in the district.¹⁶² An original record may be photographed, microphotographed, or otherwise reproduced on film and the copy then must be classified as a Class 1, Class 2, or Class 3 document.

C. Permanent Public Records

With respect to permanent records, the original of each record or one exact copy thereof must be retained indefinitely.¹⁶³ Permanent records include the following:

1. Annual reports;
2. Official budget;
3. Financial report of all funds, including cafeteria and student body funds;
4. Audit of all funds;
5. Average daily attendance, including period 1 and period 2 reports;
6. Other major annual reports including information relating to property, activities, financial condition or transactions and those declared by board minutes to be permanent;

¹⁶¹ Education Code section 35254. Education Code section 35254 states: “The governing board of any school district may make photographic, microfilm, or electronic copies of any records of the district. The original of any records of which a photographic, microfilm, or electronic copy has been made may be destroyed when provision is made for permanently maintaining the photographic, microfilm, or electronic copies in the files of the district, except that no original record that is basic to any required audit shall be destroyed prior to the second July 1st succeeding the completion of the audit.” [Emphasis added.]

¹⁶² Cal. Code. Regs., Title 5, section 16022.

¹⁶³ Cal. Code. Regs., Title 5, section 16023.

7. Official actions, such as minutes of board meetings, rules, regulations, policies or resolutions not set forth verbatim in the minutes but included by reference;
8. Elections, including the call for the election, recall elections, issuance of bonds, changes in maximum tax rates, reorganization or any other purpose;
9. Records transmitted by another agency but pertaining to the agency's action with respect to district organization;
10. Personnel records, all detailed records relating to employment, assignment, amounts and dates of services rendered, termination or dismissal of an employee in any position, sick leave record, rate of compensation, salaries or wages paid, deductions or withholdings made and the person or agency to whom such amounts were paid. In lieu of the detail records, a complete proven summary payroll record for every employee of the school district containing the same data may be classified as Class 1-Permanent, and the detail records may then be classified as Class 3-Disposable;
11. Information of a derogatory nature, only if it becomes final after the time for filing a grievance has lapsed or the document has been sustained by the grievance process;
12. The pupil records of enrollment and scholarship for each pupil;
13. All records pertaining to any accident or injury involving a minor for which a claim of damages has been filed, including any policy of liability insurance relating to the claim, except that these records cease to be Class 1-Permanent records one year after the claim has been settled or the statute of limitations has run; and
14. All detailed records relating to land, buildings and equipment. In lieu of such detailed records, a complete property ledger may be classified as Class 1-Permanent, and the detailed records may then be classified as Class 3-Disposable, if the property ledger includes all fixed assets and equipment inventory and for each unit of property the date of acquisition or augmentation, the person from whom acquired, an adequate description or identification, and the amount paid, and comparable data if the unit is disposed of by sale, loss, or otherwise.¹⁶⁴

¹⁶⁴ Cal. Code. Regs., Title 5, section 16023.

Any record worthy of temporary preservation but not classified as Class 1–Permanent may be classified as Class 2–Optional and shall then be retained until reclassified as Class 3–Disposable.¹⁶⁵ All records not classified as Class 1–Permanent or Class 2–Optional shall be classified as Class 3–Disposable, including but not limited to detail records relating to records basic to audit and periodic reports.¹⁶⁶ A Class 3–Disposable record shall not be destroyed until after the third July 1 succeeding the completion of the annual audit required by Education Code section 41020 or of any other legally required audit, or after the ending date of any retention period required by any agency other than the state of California, whichever date is later. A continuing record shall not be destroyed until the fourth year after it has been classified as Class 3–Disposable.¹⁶⁷ Unless otherwise specified, all Class 3–Disposable records shall be destroyed during the third school year after the school year in which they originated (e.g. 2006-07 records may be destroyed after July 1, 2010).¹⁶⁸

D. Mandatory Permanent Pupil Records

Section 432 defines Mandatory Permanent Pupil Records as those records which schools have been directed to compile by California statute or regulation. The Mandatory Permanent Pupil Record includes the following:

1. Legal name of pupil;
2. Date of birth;
3. Method of verification of birth date;
4. Sex of pupil;
5. Place of birth;
6. Name and address of parent of minor pupil;
7. Address of minor pupil if different than the above;
8. An annual verification of the name and address of the parent and the residence of the pupil;
9. Entering and leaving date of each school year and for any summer session or other extra session;
10. Subjects taken during each year, half year, summer session or quarter;

¹⁶⁵ Cal. Code. Regs., Title 5, section 16024.

¹⁶⁶ Cal. Code. Regs., Title 5, section 16025.

¹⁶⁷ Cal. Code. Regs., Title 5, section 16025.

¹⁶⁸ Cal. Code. Regs., Title 5, section 16027.

11. If marks or credits are given, the mark or number of credits toward graduation allowed for work taken;
12. Verification of or exemption from required immunization;
13. Date of high school graduation or equivalent.¹⁶⁹

E. Mandatory Interim Pupil Records

The Mandatory Interim Pupil Records include the following:

1. A log or record identifying those persons (except authorized school personnel) or organizations requesting or receiving information from the record. The log or record shall be accessible only to the legal parent or guardian or the eligible pupil, or a dependent adult pupil, or an adult pupil, or the custodian of records;
2. Health information, including Child Health Developmental Disabilities Prevention Program verification or waiver;
3. Participation in special education programs including required tests, case studies, authorizations, and actions necessary to establish eligibility for admission or discharge;
4. Language training records;
5. Progress slips and/or notices as required by Education Code sections 49066 and 49067;
6. Parental restrictions regarding access to directory information or related stipulations;
7. Parent or adult pupil rejoinders to challenged records and to disciplinary action;
8. Parental authorizations or prohibitions of pupil participation in specific programs;
9. Results of standardized tests administered within the preceding three years.¹⁷⁰

All other pupil records are defined as Permitted Pupil Records.

¹⁶⁹ Cal. Code. Regs., Title 5, section 432.

¹⁷⁰ Cal. Code. Regs., Title 5, section 432.

In addition, Education Code section 48918(k) states that records of expulsions shall be a non-privileged disclosable public record and, "... the expulsion order and the causes therefore shall be recorded in the mandatory interim record and shall be forwarded to any school in which the pupil subsequently enrolls upon receipt of a request from the admitting school for the pupil's school records."

F. Destruction of Pupil Records

Mandatory Permanent Pupil Records must be preserved in perpetuity by all California schools. Mandatory Interim Pupil Records may be determined to be disposable when the student leaves the district or when their usefulness ceases. Destruction of Mandatory Interim Pupil Records may be destroyed during the third school year after the school year in which they originated. Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil's completion of or withdrawal from the educational program.¹⁷¹

SUMMARY

As discussed above, almost all records maintained by public agencies are public records except for student records, personnel records, medical records, litigation records and drafts of documents.

Public agencies may only charge the direct cost of duplication for photocopying records, but if electronic records are involved and data compilation, extraction or computer programming to produce the record would be required, then the hourly rate of the employees involved to produce the record may be charged.

Invoices or billings from the school district's law firm may contain confidential information. Therefore, in our opinion, to the extent that invoices or billings from the school district's law firm contains confidential information regarding legal advice and litigation strategy, that information may be redacted from the billing statements that are produced to a member of the public under the California Public Records Act. Information such as the names of students, parents, employees, and information and descriptions on the billings that would reveal the attorney's legal advice to the school district may be redacted.

In summary, with respect to public records, permanent records (Class 1) must be retained indefinitely. A Class 2 record is worthy of temporary preservation and shall be retained until reclassified as Class 3 – Disposable.¹⁷² A Class 3-Disposable record may be destroyed during the third school year after the school year in which the document originated (e.g., 2006-07 records may be destroyed after July 1, 2010).

With respect to pupil records, Mandatory Permanent Pupil Records must be kept indefinitely. Mandatory Interim Pupil Records may be determined to be disposable when the

¹⁷¹ Cal. Code. Regs., Title 5, sections 437 and 16027.

¹⁷² Cal. Code. Regs., Title 5, section 16024.

student leaves the district or when their usefulness ceases and may be destroyed during the third school year after the school year in which they originated (e.g., 2006-07 records may be destroyed after July 1, 2010). Permitted Pupil Records may be destroyed when their usefulness ceases, which is defined as six months following the pupil's completion of or withdrawal from the educational program.