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Public Law 101 Conference

PRA, Part I (General Overview)

Wednesday, November 15, 2023
1:00 p.m. – 2:00 p.m.

Speakers: Joli Houston, Partner
Berliner Cohen

Conference Reference Materials

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Ms. Houston practices in the areas of land use and public law with an emphasis on municipal law. She joined Berliner Cohen in 1998. Ms. Houston represents private land use clients in a wide variety of land use and regulatory approvals. Ms. Houston is the City Attorney for Los Altos and serves as the Assistant City Attorney for Gilroy. From August 2016 until October 2018, Ms. Houston served as the Interim City Attorney for the City of Merced, served as District Counsel for the Sanitary District No. 1 of Marin County for four years, and was formerly the Deputy City Attorney for the City of Santa Clara. For five years she served as the Chair of the League of California Cities, Public Records Act Committee.



The California Public Records Act

Part I (Public Trust Track)

Presented By:

Jolie Houston

Partner, Berliner Cohen &
Los Altos City Attorney &
Gilroy Assistant City Attorney

Sources of Law

- ▶ California Constitution, Article 1, section 3, subdivision B (Prop 59).
- ▶ Applicable Public Records Act (PRA) statutes
- ▶ California Government Code section 7920.000-7930.170 (formerly GC 6520-6276.48).
- ▶ Adopted local policies.

Purpose of PRA

- ▶ Provides access to local agency records about the conduct of the public's business.
 - ▶ It is a fundamental and necessary right to the people of California.
 - ▶ This right is balanced by individual privacy rights.

Purpose of PRA

- ▶ Access to information allows the public to monitor local agency activities.
- ▶ Access is the right to inspect public records and the right to obtain copies of public records.
- ▶ Local agency cannot deny access to public records based on the requester or the intended use of records.

PRA's Definitions

- ▶ Public Record-

- ▶ A public record is any writing that is owned, used or retained by the local agency in the conduct of its official business.

- ▶ Writing-

- ▶ Any means of recording information including paper, audio tape, video tape, DVD, computer disks, **emails ...**

Emails/Electronic Records

- ▶ Emails are *writings* for purposes of the PRA.
- ▶ That does not mean they are *public records*.
- ▶ Emails retained by local agency in the ordinary course of business *may* be public records.
- ▶ There may be exemptions that apply.

PRA Request

- ▶ PRA request may be oral or in writing.
- ▶ If oral- document request in writing
 - ▶ Confirms date received;
 - ▶ May help clarify request; and
 - ▶ Provides a way of disseminating request to various departments.

PRA Request

- ▶ PRA request does not have to identify a “specific” record.
 - ▶ May be identified by a general description- project name, agenda topic, budget item.
 - ▶ Focused requests assist local agency in locating records.
- ▶ Vague requests may be:
 - ▶ Burdensome to local agency; or
 - ▶ Non-responsive to requester.

PRA Request

- ▶ Local agency has a duty to:
 - ▶ Assist the public identify the records requested and to help focus the request;
 - ▶ Describe the information technology or physical location in which the record exists; and
 - ▶ Suggest other ways to assist the requester to overcome any practical basis for denying the request.

Local agency search

- ▶ Local agency must make a reasonable effort to locate requested records.
- ▶ No bright-line test- what is reasonable depends on the facts and circumstances of each request.

Local agency search

- ▶ Electronic records-
 - ▶ Local agency not required to keep records in electronic format- *But*
 - ▶ Record must be provided in the electronic format used by the local agency, if requested.

PRA Record Inspection

- ▶ Public records may inspected at anytime during normal business hours.
 - ▶ This does not mean that the requester has a right to demand to see a record and immediately gain access.
 - ▶ Right to inspect is balanced by an implied rule of reason to protect public records.

PRA Responses

- ▶ Local agency should provide records “promptly” which means 10 *calendar* days to respond to the requester that it will comply with the request.
 - ▶ Starts with the first calendar day *after* receipt.
 - ▶ If received after hours, on a weekend or holiday, the next business day is considered the deadline.
- ▶ The time limit to respond is not necessarily the same time to disclose the records.

PRA Responses

- ▶ Local agency may extend time period an additional 14 calendar days if it needs to:
 - ▶ Search for and collect records requested from field offices;
 - ▶ Search for, collect and examine voluminous amounts of records
- ▶ Consult with another agency having an substantial interest in the request; and/or
- ▶ If electronic records, to compile data or write a program.

PRA Response

- ▶ No other reasons can be used for extension of time.
- ▶ Must also state the anticipated date of the response.
- ▶ Cannot use the 10-day response time or the 14-day extension to delay or obstruct.

Fees for Copies

- ▶ Local agency may charge the direct costs of duplication and includes:
 - ▶ Pro-rata cost of duplication system; and
 - ▶ Pro-rata cost of equipment (operator).
- ▶ Direct costs do not include:
 - ▶ Research
 - ▶ Retrieval
 - ▶ Redaction

Exemptions

- ▶ *Attorney Client and Attorney Work Product*
 - ▶ GC section 7927.705 (formerly GC 6254(k)) exempts: “Records, the disclosure of which is exempted or prohibited pursuant to federal law or state law, including, but not limited to, provisions of the evidence code relating to privilege.”

Fairley v. Super. Ct. (1998) 66 Cal.App.4th 1414

Exemptions

- ▶ The attorney-client privilege protects from disclosure the entirety of confidential communications between attorney and client, including factual and other information not in itself privileged outside the attorney-client communications.

Costco Wholesale Corporation v. Superior Court (2009), 47 Cal.4th 725.

Exemptions

- ▶ Drafts GC 7927.500 (formerly GC 6254(a))
 - ▶ The PRA exempts “[p]reliminary 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.”

Exemptions

- ▶ The purpose of the Drafts Exemption is to:
 - ▶ Provide the local agency some privacy for its writings pending local action or approval; and
 - ▶ Protect the local agency's decision-making processes.
- ▶ To qualify the record must be:
 - ▶ Preliminary draft, note or memorandum;
 - ▶ Not retained in ordinary course of business; and
 - ▶ The public interest in withholding must clearly outweigh the public interest in disclosure

Exemptions

- ▶ Related to Drafts Exemption is the *Deliberative Process Exemption* (GC 7922.00 formerly GC 6255)
 - ▶ It is part of the Public Interest or “Catchall” exemption (discussed infra)
 - ▶ Deliberative Process is also based on the policy of protecting the decision-making processes of the local agency.

Exemptions

- ▶ The PRA does not require that a local agency create a privilege log or a list that identifies the specific records being withheld. The local agency's response only needs to identify the legal grounds for nondisclosure.

Haynie v. Superior Court (2001) 26 Cal.4th 1061;

Sander v. Superior Court (2018) 26 Cal. App. 5th 561

Exemptions

- ▶ *Personnel Records* GC 7927.700 (formerly GC 6254(c))
 - ▶ PRA exempts “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”
 - ▶ Police Personnel Records are covered in Part 2

Exemptions

▶ *Personnel Records*

- ▶ Public employees do not have a reasonable expectation of privacy in their names, salary information and their dates of employment.

International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319.

Exemptions

- ▶ *Public Interest Exemption- Balancing Test*
GC 7922.000 (formerly GC 6255)
 - ▶ Protects records where the public interest in nondisclosure clearly outweighs the public interest in disclosure.
 - ▶ Must be based on the public in general, not local agency convenience.

Exemptions

- ▶ Three step test:
 - ▶ The public interest in disclosure;
 - ▶ The public interest in nondisclosure; and
 - ▶ Less intrusive alternatives to satisfy the public interest in disclosure.
San Jose v. Superior Court (1999) 74 Cal.App.4th 1008.
- ▶ “Close calls” usually do not qualify for the exemption.

Enforcement

- ▶ Judicial Review
GC 7923.000-7923.005, 7923.100-7923.500 (formerly GC 6258, 6259) or
- ▶ By writ of mandate or injunctive relief

Enforcement

- ▶ If plaintiff prevails, plaintiff receives costs and attorneys' fees.
- ▶ If lawsuit results in the voluntary disclosure of records by local agency, then plaintiff prevails.
- ▶ Local agency only receives attorneys' fees if lawsuit "totally frivolous."

Questions?

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