



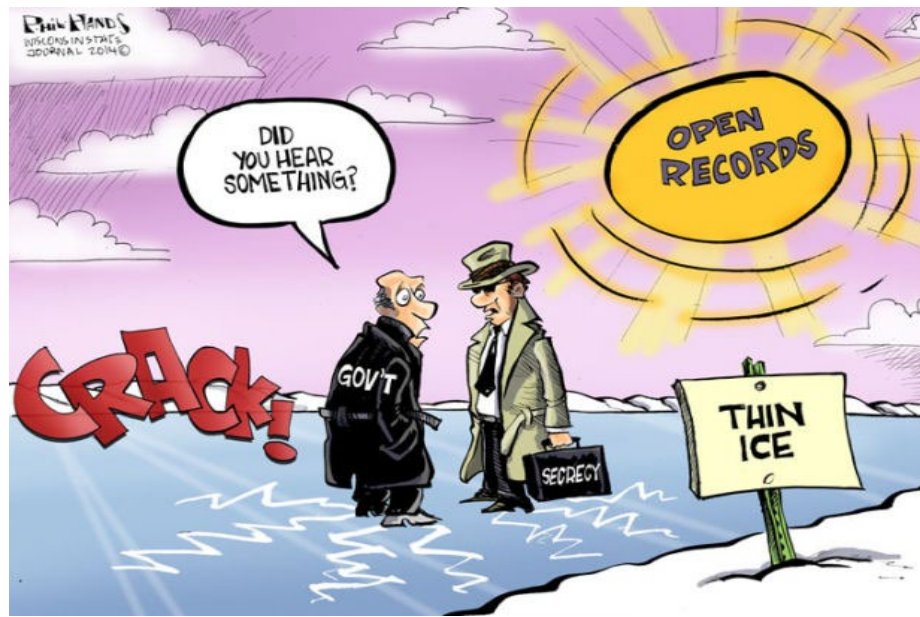
PUBLIC RECORDS ACT — THE BASICS AND BEYOND

IOLERO Community Advisory Council

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CALIFORNIA PUBLIC RECORDS ACT

- **Public Records Act:** The CPRA governs the public's access to government records. (Cal. Gov. C. § 7920.000 *et seq.*)

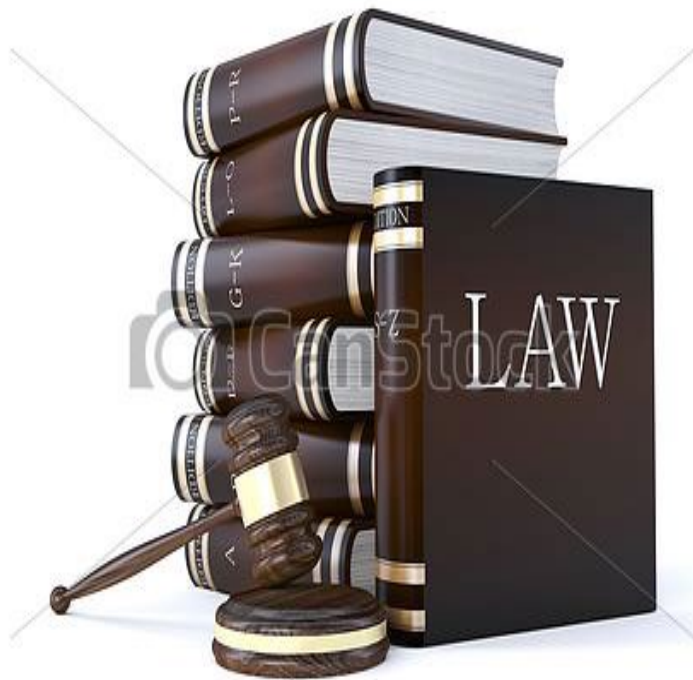


CALIFORNIA CONSTITUTION



- **Proposition 59:** made access to public records a constitutional right (Cal. Const. art. I § 3.)

PUBLIC POLICY OF CPRA



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- “[T]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (Cal. Gov. C. § 7921.000.)

THE GOLDEN RULE



- All local agency records must be disclosed to the public, upon request, unless those records are specifically made exempt. (Cal. Gov. C. § 7922.525.)

SCOPE OF CPRA



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WHAT ARE PUBLIC RECORDS?

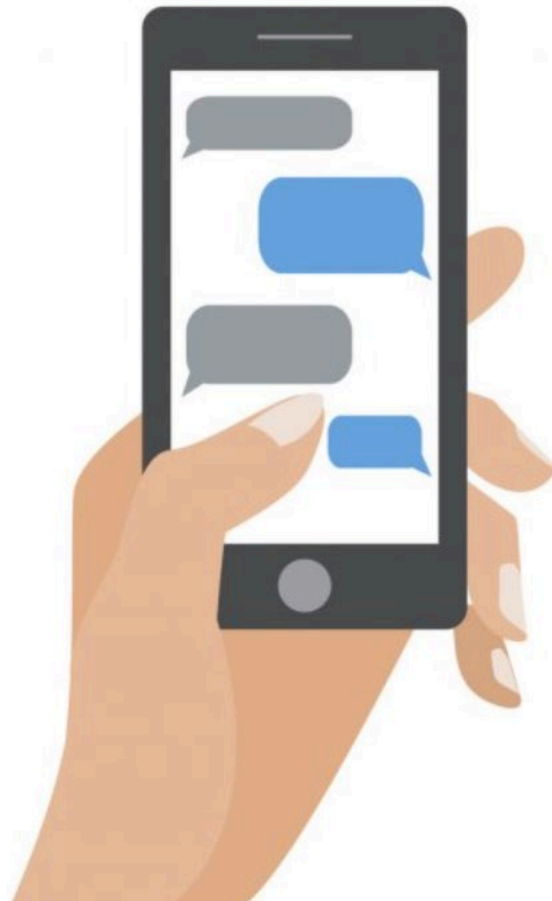


PUBLIC RECORDS DEFINED

- **“Public Record”** means:
 - Any writing
 - Containing information relating to the conduct of the public’s business
 - Prepared, owned, used, or retained by any state or local agency
 - Regardless of physical form or characteristic

Cal. Gov. C. § 7920.530

WHAT CONSTITUTES A WRITING?



WRITINGS DEFINED

- A **“writing”** means “any handwriting, typewriting, printing, photostating, photography, photocopying, transmitting by electronic mail or facsimile, and any other means of recording upon any tangible thing any form of communication or representation . . . and any record thereby created” (Cal. Gov. C. § 7920.545.)

WRITINGS INCLUDE



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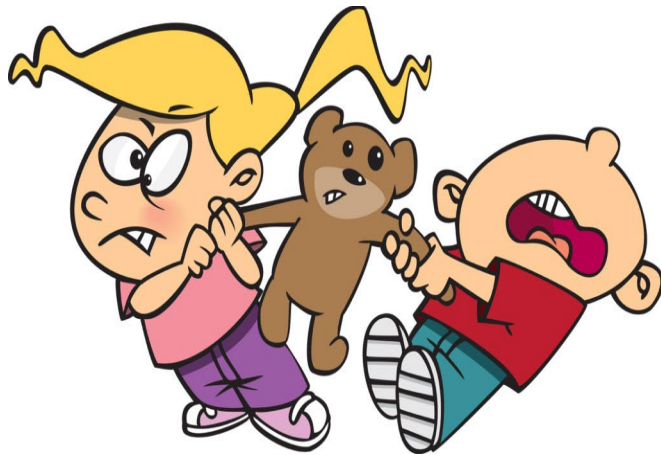
- Handwritten notes, computer printouts, photographs
- Compact discs, flash drives, files on computer hard drives, files in the “cloud”
- Audio and video recordings, including recordings of Zoom and Teams meetings
- Emails, text messages, and chats on Zoom and Teams

THE PEOPLE'S BUSINESS

- Public records *must* contain information about the people's business
- To determine if record relates to the people's business examine:
 - Content of record
 - Context/purpose for which it was written
 - Audience
 - Whether record prepared by employee acting or purporting to act within scope of employment



PREPARED, OWNED, USED, OR RETAINED



- In the context of the CPRA, “possession” not limited to physical custody; the courts have held it means both actual and constructive possession.
- **Constructive Possession**
 - Third party records may be “constructively” in possession of a local agency
 - “[A]n agency has constructive possession of records if it **has the right to control the records**, either directly or through another person.” (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 623 [emphasis added].)

PREPARED, OWNED, USED, OR RETAINED

- *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608
 - Plaintiff sued City for failure to disclose documents on personal devices arguing CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated, or stored. (*Id.* at 615.)
 - City argued communications on personal devices did not fall within the definition of "public record." (*Id.* at 624.)
 - **Court disagreed.**
 - Court noted that for the purposes of the CPRA, the term "constructive possession" means "the right to control the records." (*Id.* at 623.)
 - Court held that a government employee communication that "otherwise meets [the] CPRA's definition of 'public records' do[es] not lose this status because [it is] located in an employee's personal account. A writing retained by a public employee conducting agency business has been 'retained by' the agency within the meaning of section 7920.530, even if the writing is retained in the employee's personal account." (*Id.*)

HOW IS A RECORDS REQUEST MADE?



"We need you to fill out this form again...and this time don't skip the embarrassing parts."

FORM OF REQUEST

- No required format for a CPRA request.
- Request does not need to be in writing.
- If the request is unclear, the agency must assist the requestor to identify responsive records.



SPECIFICITY



- The request should reasonably describe an identifiable record
- Need not identify exact record
- May identify records by general content

SPECIFICITY (CONT'D)

- Request must be sufficiently precise to permit agency to locate records
 - Specific and focused requests facilitate prompt disclosure by government—*Rogers v. Superior Court, supra*, 19 Cal.App.4th at 481.



DEADLINE TO RESPOND

- Within **10 calendar days** of receipt of the request:
 - Determine whether the request seeks copies of disclosable public records.
 - Provide written response to the person or entity making the request.
 - State the estimated date when responsive, non-exempt records may be available.



DEADLINE TO RESPOND



- Local agency may unilaterally extend period to make this determination for up to **14 calendar days** if there is a need to:

- Coordinate multiple departments
- Communicate with field offices or consultants
- Examine voluminous records

Cal. Gov. C. § 7922.535 (b)

WITHHOLDING RECORDS



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WITHHOLDING RECORDS

➤ Exemptions

- Source of Exemption **must** be either:
 - Expressly set forth in the CPRA **or**
 - Imported into CPRA from other provisions of state or federal law (Cal. Gov. C. § 7927.705.)

➤ Public Interest Balancing Test

- Section 7922.000 of the CPRA (“Catch-All Exemption”)
- Must demonstrate that interest served by not disclosing the record **clearly outweighs** the public interest served by disclosure (See *ACLU Foundation of Southern California v. Superior Court* (2017) 3 Cal.5th 1032, 1043.)
- Local agency bears burden of proof

EXEMPTIONS



EXEMPTIONS—DRAFTS

- Exemption not absolute
- Applies to “[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”

Cal. Gov. C. § 7927.500.



EXEMPTIONS—PENDING LITIGATION

- Exempts records prepared in connection with litigation
- Exemption lasts *only until* litigation is finally adjudicated or otherwise settled



Cal. Gov C. §7927.200.

EXEMPTIONS—INVESTIGATORY RECORDS



- Protects investigatory records used for law enforcement, licensing, or correctional purposes
- Actual investigation files and records exempt from disclosure, but CPRA requires local agency to disclose certain information derived from those files and records
 - Cal. Gov. C. § 7923.600 through 7923.630

EXEMPTIONS—PRIVILEGED INFORMATION



- CPRA specifically exempts from disclosure “records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code on privilege.”
 - (Cal. Gov. C. § 7927.705.)

PRIVILEGED INFORMATION: ATTORNEY-CLIENT

- **Attorney-Client Privilege**
 - Applies to legal advice in litigation and non-litigation contexts
 - *Merely copying legal counsel on communication does not guarantee confidentiality*
 - Purpose of communication must be to obtain legal advice or be otherwise related to representation on matter

PRIVILEGED INFORMATION: OFFICIAL INFORMATION

- Imported into CPRA from Evidence Code § 1040.
- “Official Information” statutorily defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed to the public prior to the time the claim of privilege is made.” (Cal. Evid. C. § 1040(a).)
- If disclosure prohibited by state or federal statute, the privilege is absolute
- In all other instances, the privilege is conditional and requires balancing “[the] necessity for preserving the confidentiality of information ... outweighs the necessity for disclosure in the interest of justice.” (Cal. Evid. C. § 1040(b)(2).)

PRIVILEGED INFORMATION: DELIBERATIVE PROCESS

- Protects public officials' thought processes
- **Not absolute**
- Requires application of balancing test



EXEMPTIONS—PROPRIETARY INFORMATION



- Generally asserted by businesses contracting with local agency to protect proprietary information
- Four possible exemptions:
 - Official Privilege Exemption
 - Trade Secret
 - Copyrighted Material
 - Balancing Test (Gov. C. § 7922.000)

EXEMPTIONS—OTHER EXPRESS EXEMPTIONS

- Personnel, medical, and similar information
 - Cal. Gov. C. § 7927.700.
- Real estate appraisals and engineering studies
 - Cal. Gov. C. § 7928.705.
- Taxpayer information gathered in connection with the collection of local taxes
 - Cal. Gov. C. § 7925.000 and Rev. and Tax. C. § 7056.
- Library circulation records
 - Cal. Gov. C. § 7927.100.
- Records of Native American graves, cemeteries, and sacred places and records
 - Cal. Gov. C. § 7927.000.

EXEMPTIONS—BALANCING TEST

- CPRA provides a “catchall” exemption—also known as the public interest balancing test (or simply the “balancing test”)—which permits a local agency to withhold a record if the local agency demonstrates on the facts of a particular case that the public interest served by nondisclosure clearly outweighs the public interest in disclosure.

Cal. Gov. C. § 7922.000.

ADDITIONAL RESOURCES

➤ AG Materials:

➤ Summary of CPRA:

https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/summary_public_records_act.pdf

➤ League of California Cities The People's Business: A Guide to the California Public Records Act:

<https://www.calcities.org/docs/default-source/advocacy/the-people%27s-business-2017.pdf>

QUESTIONS

