



Chapter 4

Specific Document Types, Categories and Exemptions from Disclosure

Overview of Exemptions

This chapter discusses how to address requests for certain specific types and categories of commonly requested records and many of the most frequently raised exemptions from disclosure that may, or in some cases, must be asserted by local agencies.

Transparent and accessible government is the foundational objective of the PRA. This recently constitutionalized right of access to the writings of local agencies and officials was declared by the Legislature in 1968 to be a “fundamental and necessary right.” While this right of access is not absolute, it must be construed broadly.¹⁵³ The PRA contains approximately 76 express exemptions, many of which are discussed below, including one for records that are otherwise exempt from disclosure by state or federal statutes,¹⁵⁴ and a balancing test, known as the “public interest” or “catchall” provision. This “catchall” provision allows local agencies to justify withholding any record by demonstrating that on the facts of a particular case the public interest in nondisclosure clearly outweighs the public interest in disclosure.¹⁵⁵

When local agencies claim an exemption or prohibition to disclosure of all or a part of a record, they must identify the specific exemption to disclosure in the response.¹⁵⁶ Where a record contains some information that is subject to an exemption and other information that is not, the local agency may redact the information that is exempt (identifying the exemption), but must otherwise still produce the record. Unless a statutory exemption applies, the public is entitled to access or a copy.¹⁵⁷

¹⁵³ Cal. Const., art I, § 3(b)(2); *Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254.

¹⁵⁴ *State of California ex rel Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 785; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1422, fn. 5.

¹⁵⁵ Gov. Code, § 6255; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66–67; see also “Public Interest Exemption,” p. 54.

¹⁵⁶ Gov. Code, § 6255, subd. (a); *Long Beach Police Officers Assn. v. City of Long Beach*, *supra*, 59 Cal.4th at p. 67.

¹⁵⁷ *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329.

► PRACTICE TIP:

When evaluating a record to determine whether it falls within an exemption in the PRA, do not overlook exemptions and even prohibitions to disclosure that are contained in other state and federal statutes, including, for example, evidentiary privileges, medical privacy laws, police officer personnel record privileges, official information, information technology or infrastructure security systems, etc. Many of these other statutory exemptions or prohibitions are also discussed below.

Types of Records and Specific Exemptions

Architectural and Official Building Plans

The PRA recognizes exemptions to the disclosure of a record "which is exempted or prohibited [from disclosure] pursuant to federal or state law"¹⁵⁸ Under this rule, architectural and official building plans may be exempt from disclosure, because: (1) architectural plans submitted by third parties to local agencies may qualify for federal copyright protections;¹⁵⁹ (2) local agencies may claim a copyright in many of their own records; or (3) state laws address inspection and duplication of building plans by members of the public.

"Architectural work," defined under federal law as the "design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings,"¹⁶⁰ is considered an "original work of authorship," which has automatic federal copyright protection.¹⁶¹ Architectural plans may be inspected, but cannot be copied without the permission of the owner.¹⁶²

► PRACTICE TIP:

Some requesters will cite the "fair use of copyrighted materials" doctrine as giving them the right to copy architectural plans. The fair use rule is a defense to a copyright infringement action only and not a legal entitlement to obtain copyrighted materials.

The official copy of building plans maintained by a local agency's building department may be inspected, but cannot be copied without the local agency first requesting the written permission of the licensed or registered professional who signed the document and the original or current property owner.¹⁶³ A request made by the building department via registered or certified mail for written permission from the professional must give the professional at least 30 days to respond and be accompanied by a statutorily prescribed affidavit signed by the person requesting copies, attesting that the copy of the plans shall only be used for the maintenance, operation, and use of the building, that the drawings are instruments of professional service and are incomplete without the interpretation of the certified, licensed, or registered professional of record, and that a licensed architect who signs and stamps plans, specifications, reports, or documents shall not be responsible for damage caused by subsequent unauthorized changes to or uses of those plans.¹⁶⁴ After receiving this required information, the professional cannot withhold

¹⁵⁸ Gov. Code, § 6254, subd. (k).

¹⁵⁹ 17 U.S.C. § 17.

¹⁶⁰ 17 U.S.C. §§ 101, 102(A)(8).

¹⁶¹ 17 U.S.C. §§ 102(A)(8), 106.

¹⁶² 17 U.S.C. § 107.

¹⁶³ Health & Saf. Code, § 19851.

¹⁶⁴ *Ibid.*

written permission to make copies of the plans.¹⁶⁵ These statutory requirements do not prohibit duplication of reduced copies of plans that have been distributed to local agency decision-making bodies as part of the agenda materials for a public meeting.¹⁶⁶

The California Attorney General has determined that interim grading documents, including geology, compaction, and soils reports, are public records that are not exempt from disclosure.¹⁶⁷

Attorney-Client Communications and Attorney Work Product

The PRA 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 relating to privilege.”¹⁶⁸ The PRA’s exemptions protect attorney-client privileged communications and attorney work product, as well as, more broadly, other work product prepared for use in pending litigation or claims.¹⁶⁹

Attorney-Client Privilege

The attorney-client privilege protects from disclosure the entirety of confidential communications between attorney and client, as well as among the attorneys within a firm or in-house legal department representing such client, including factual and other information not in itself privileged outside of attorney-client communications.¹⁷⁰ The fundamental purpose of the attorney-client privilege is preservation of the confidential relationship between attorney and client. It is not necessary to demonstrate that prejudice would result from disclosure of attorney-client communications to prevent such disclosure.¹⁷¹ When the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney and client, the communication is protected by the privilege.¹⁷² Unlike the exemption for pending litigation, attorney-client privileged information is still protected from disclosure even after litigation is concluded.¹⁷³ But note, the attorney-client privilege will likely not protect communication between a public employee and his or her personal attorney if that communication occurs using a public entity’s computer system and the public entity has a computer policy that indicates the computers are intended for the public entity’s business and are subject to monitoring by the employer.¹⁷⁴

The attorney plaintiff in a wrongful termination suit and the defendant insurer may reveal privileged third-party attorney-client communications to their own attorneys to the extent necessary for the litigation, but may not publicly disclose such communications.¹⁷⁵

¹⁶⁵ *Ibid.*

¹⁶⁶ Gov. Code, § 54957.5.

¹⁶⁷ 89 Ops. Cal. Atty. Gen. 39 (2006).

¹⁶⁸ Gov. Code, § 6254, subd. (k).

¹⁶⁹ *Fairley v. Superior Court*, *supra*, 66 Cal. App. 4th 1414, 1420–1422; see also “Official Information Privilege,” p. 43.

¹⁷⁰ *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal. 4th 725, 733; *Fireman’s Fund Insurance Company v. Superior Court* (2011) 196 Cal. App. 4th 1263, 1272–1275; *Clark v. Superior Court* (2011) 196 Cal. App. 4th 37, 49–54.

¹⁷¹ *Costco Wholesale Corporation v. Superior Court*, *supra*, 47 Cal. 4th at p. 747.

¹⁷² *Clark v. Superior Court*, *supra*, 196 Cal. App. 4th at p. 51.

¹⁷³ *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 371–373; see “Pending Litigation or Claims,” p. 28.

¹⁷⁴ *Holmes v. Petrovich Development Co. LLC* (2011) 191 Cal. App. 4th 1047, 1071–1072.

¹⁷⁵ *Chubb & Son v. Superior Court* (2014) 228 Cal. App. 4th 1094, 1106–1109.

Attorney Work Product

Any writing that reflects an attorney's impressions, conclusions, opinions, legal research, or theories is not discoverable under any circumstances and is thus exempt from disclosure under the PRA. There is also a qualified privilege against disclosure of materials (e.g., witness statements, other investigative materials) developed by an attorney in preparing a case for trial as thoroughly as possible with a degree of privacy necessary to uncover and investigate both favorable and unfavorable aspects of a case.¹⁷⁶

Common Interest Doctrine

The common interest doctrine may also protect communications with third parties from disclosure where the communication is protected by the attorney-client privilege or attorney-work-product doctrine, and maintaining the confidentiality of the communication is necessary to accomplish the purpose for which legal advice was sought. The common interest doctrine is not an independent privilege; rather, it is a nonwaiver doctrine that may be used by plaintiffs or defendants alike.¹⁷⁷ For the common interest doctrine to attach, the parties to the shared communication must have a reasonable expectation that the information disclosed will remain confidential. Further, the parties must have a common interest in a matter of joint concern. In other words, they must have a common interest in securing legal advice related to the same matter and the communication must be made to advance their shared interest in securing legal advice on that common matter.¹⁷⁸

Attorney Bills and Retainer Agreements

The courts have established a narrower rule governing disclosure of attorney bills. An attorney's billing entries remain exempt from disclosure under the attorney-client privilege or attorney-work-product doctrine only insofar as they describe an attorney's impressions, conclusions, opinions, legal research, or strategy. Neither the attorney-client privilege nor the attorney work product doctrine categorically shields everything in a billing invoice from disclosure, even if the bills concern pending litigation. The court will look at whether, in pending or active matters, the billing entries are so closely related to the attorney-client communications that they "implicate the heartland" of the privilege.¹⁷⁹ Only substantive attorney communications such as legal conclusions, research, or strategy are protected.¹⁸⁰

Retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney-client privilege.¹⁸¹ A local agency's governing body may waive the privilege and elect to produce the agreements.¹⁸²

► PRACTICE TIP:

Some agencies simplify redaction of attorney bills and production of non-exempt bill information in response to requests by requiring that non-exempt portions of attorney bills, such as the name of the matter, the invoice amount, and date, be contained in separate documents from privileged bill text.

176 Code Civ. Proc., § 2018.030, subds. (a) & (b); Gov. Code, § 6254, subd. (k).

177 *OXY Resources LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889.

178 Compare *Citizens for Ceres v. Superior Court* (2012) 217 Cal.App.4th 889, 914–922 (common interest doctrine inapplicable to communications between developer and city prior to approval of application because, pre-project approval, parties lacked a common interest) with *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222–1223 (sharing of privileged documents with project applicant prepared by county's outside law firm regarding CEQA compliance was within common interest doctrine).

179 *County of Los Angeles v. Superior* (2016) 2 Cal.5th 282, 288.

180 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639; *U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189; *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127.

181 Bus. & Prof. Code, § 6149 (a written fee contract shall be deemed to be a confidential communication within the meaning of section 6068(e) of the Business & Professions Code and section 952 of the Evidence Code); Evid. Code §952 ("Confidential communication between client and lawyer"); Evid. Code §954 (attorney-client privilege).

182 Evid. Code, § 912. See also Gov. Code, § 6254.5 and "Waiver," p. 26.

CEQA Proceedings

Increasingly, potential litigants have been submitting public records requests as a prelude to or during preparation of the administrative record for challenges to the adequacy of an agency's California Environmental Quality Act (CEQA) process or certification of CEQA documents. While there are no specific PRA provisions directly addressing CEQA proceedings, these requests can present multiple challenges as they may seek voluminous amounts of records, such as email communications between staff and consultants, or confidential and privileged documents.

► PRACTICE TIP:

A request to prepare an administrative record for a CEQA challenge does not excuse or justify ignoring or delaying responses to a CEQA-related PRA request. A failure to properly or fully respond to the PRA request can lead to claims of violations of the PRA and a demand for attorneys' fees being included in a CEQA lawsuit. Local agencies should, therefore, exercise the same due diligence when responding to CEQA-related PRA requests as they do with any other type of PRA request. As with any litigation or potential litigation, local agencies should also consider invoking internal litigation holds and evidence preservation practices early on in a contentious CEQA process.

Two particularly challenging issues that arise with CEQA-related PRA requests are whether and to what extent a subcontractor's files are public records subject to disclosure, and whether the deliberative process privilege or public interest exemption apply to the requested documents.

In determining whether a subcontractor's files are public records in the actual or constructive possession of the local agency, the court will look to the consultant's contract to determine the extent to which, if any, the local agency had control over the selection of subcontractors, and how they performed services required by the primary consultant.¹⁸³

► PRACTICE TIP:

Examine your contracts with consultants and clearly articulate who owns their work product, and that of their subcontractors.

Requests for materials that implicate the deliberative process privilege or public interest exemption are commonly made in CEQA-related PRA requests. While it may seem obvious that local agency staff and their consultants desire and in fact need to engage in candid dialogue about a project and the approaches to be taken, when invoking the deliberative process privilege to protect such communications from disclosure the local agency must clearly articulate why the privilege applies by more than a simple statement that it helps the process.¹⁸⁴ Likewise, when invoking the public interest exemption to protect documents from disclosure, local agencies must do more than simply state the conclusion that the public's interest in nondisclosure is clearly outweighed by the public interest in disclosure.¹⁸⁵

► PRACTICE TIP:

When evaluating whether the deliberative process privilege applies to documents covered by a PRA request during a pre-litigation CEQA process, keep in mind the close correlation between the drafts exemption, discussed below, and the deliberative process privilege.

¹⁸³ *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 710–712.

¹⁸⁴ See *Deliberative Process Privilege* p. 32.

¹⁸⁵ *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307. See also, "Public Interest Exemption," p. 54.

Code Enforcement Records

Local agencies may pursue code enforcement through administrative or criminal proceedings, or a combination of both. Records of code enforcement cases for which criminal sanctions are sought may be subject to the same disclosure rules as police and other law enforcement records, including the rules for investigatory records and files, as long as there is a concrete and definite prospect of criminal enforcement.¹⁸⁶ Records of code enforcement cases being prosecuted administratively do not qualify as law enforcement records.¹⁸⁷ However, some administrative code enforcement information, such as names and contact information of complainants, may be exempt from disclosure under the official information privilege, the identity of informant privilege, or the public interest exemption.¹⁸⁸

Deliberative Process Privilege

The deliberative process privilege is derived from the public interest exemption, which provides that a local agency may withhold a public record if it can demonstrate that “on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.”¹⁸⁹ The deliberative process privilege was intended to address concerns that frank discussion of legal or policy matters might be inhibited if subject to public scrutiny, and to support the concept that access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence are essential to effective governance in a representative democracy. Therefore, California courts invoke the privilege to protect communications to decisionmakers before a decision is made.¹⁹⁰

In evaluating whether the deliberative process privilege applies, the court will still perform the balancing test prescribed by the public interest exemption.¹⁹¹ In doing so, courts focus “less on the nature of the records sought and more on the effect of the records’ release.”¹⁹² Therefore, the key question in every deliberative process privilege case is “whether the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”¹⁹³ “Accordingly, the ... courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not.”¹⁹⁴ Protecting the predecisional deliberative process gives the decision-maker “the freedom ‘to think out loud,’ which enables him [or her] to test ideas and debate policy and personalities uninhibited by the danger that his [or her] tentative but rejected thoughts will become subjects of public discussion. Usually the information is sought with respect to past decisions; the need is even stronger if the demand comes while policy is still being developed.”¹⁹⁵

Courts acknowledge that even a purely factual document would be exempt from public scrutiny if it is “actually ... related to the process by which policies are formulated” or “inextricably intertwined” with “policy-making processes.”¹⁹⁶ For example, the

186 Gov. Code, § 6254, subd. (f); *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783–784; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068–1069; see “Law Enforcement Records,” p. 35.

187 *State of California ex rel. Division of Industrial Safety v. Superior Court*, *supra*, 43 Cal.App.3d at pp. 783–784. See, e.g., 6254, subd. (a); 5 U.S.C. 1325783788788; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.

188 *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; see “Official Information Privilege,” p. 43, “Identity of Informant Privilege,” p. 45, and “Public Interest Exemption,” p. 54.

189 *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1338.

190 *Ibid.*; 5 USC § 552(b)(5).

191 *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172.

192 *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at pp. 1338, 1342.

193 *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at p. 1342, citing *Dudman Communications v. Dept. of Air Force* (D.C.Cir.1987) 815 F.2d 1565, 1568.

194 *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151–152.

195 *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at p. 1341, citing *Cox, Executive Privilege* (1974) 122 U Pa L Rev 1383, 1410.

196 *Jordan v. United States Dept. of Justice* (D.C.Cir.1978) 591 F.2d 753, 774; *Ryan v. Department of Justice* (D.C.Cir.1980) 617 F.2d 781, 790; *Soucie v. David* (D.C.Cir.1971) 448 F.2d 1067, 1078.

California Supreme Court applied the deliberative process privilege in determining that the Governor's appointment calendars and schedules were exempt from disclosure under the PRA even though the information in the appointment calendars and schedules was based on fact.¹⁹⁷ The Court reasoned that such disclosure could inhibit private meetings and chill the flow of information to the executive office.¹⁹⁸

Drafts

The PRA exempts from disclosure "[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."¹⁹⁹ The "drafts" exemption provides a measure of privacy for writings concerning pending local agency action. The exemption was adapted from the FOIA, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."²⁰⁰ The FOIA "memorandums" exemption is based on the policy of protecting the decision making processes of government agencies, and in particular the frank discussion of legal or policy matters that might be inhibited if subjected to public scrutiny.²⁰¹

The "drafts" exemption in the PRA has essentially the same purpose as the "memorandums" exemption in the FOIA. The key question under the FOIA test is whether the disclosure of materials would expose a local agency's decision-making process in such a way as to discourage candid discussion within the local agency and thereby undermine the local agency's ability to perform its functions.²⁰² To qualify for the "drafts" exemption the record must be a preliminary draft, note, or memorandum; that is not retained by the local agency in the ordinary course of business; and the public interest in withholding the record must clearly outweigh the public interest in disclosure.²⁰³

The courts have observed that preliminary materials that are not customarily discarded or that have not in fact been discarded pursuant to policy or custom must be disclosed.²⁰⁴ Records that are normally retained do not qualify for the exemption. This is in keeping with the purpose of the FOIA "memorandums" exemption of prohibiting the "secret law" that would result from confidential memos retained by local agencies to guide their decision-making.

► PRACTICE TIP:

By adopting written policies or developing consistent practices of discarding preliminary deliberative writings, local agencies may facilitate candid internal policy debate. Consider including in such policies when a document should be considered to be "discarded," which might prevent the need to search through bins of documents segregated and approved for destruction under the policies, yet awaiting appropriate shredding and disposal. Such policies and practices may exempt from disclosure even preliminary drafts that have not yet been discarded, so long as the drafts are not maintained by the local agency in the ordinary course of business, and the public interest in nondisclosure clearly outweighs the public interest in disclosure.

197 *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at p. 1338.

198 *Ibid.*

199 Gov. Code, § 6254, subd. (a).

200 Gov. Code, § 6254, subd. (a); 5 U.S.C. § 552, subd. (b)(5).

201 *Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d 1325, 1339–1340.

202 *Id.* at p. 1342.

203 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 711–712.

204 *Id.* at p. 714.

Elections

Voter Registration Information

Voter registration information, including the home street address, telephone number, email address, precinct number or other number specified by the Secretary of State for voter registration purposes is confidential and cannot be disclosed except as specified in section 2194 of the Elections Code.²⁰⁵ Similarly, the signature of the voter shown on the voter registration card is confidential and may not be disclosed to any person, except as provided in the Elections Code.²⁰⁶ Voter registration information may be provided to any candidate for federal, state, or local office; to any committee for or against an initiative or referendum measure for which legal publication is made; and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State.²⁰⁷

A California Driver's License, California ID card, or other unique identifier used by the State of California for purposes of voter identification shown on the affidavit of voter registration of a registered voter, or added to voter registration records to comply with the requirements of the federal Help America Vote Act of 2002, is confidential and may not be disclosed to any person.²⁰⁸

When a person's vote is challenged, the voter's home address or signature may be released to the challenger, elections officials, and other persons as necessary to make, defend against, or adjudicate a challenge.²⁰⁹

A person may view the signature of a voter to determine whether the signature matches a signature on an affidavit of registration or a petition. The signature cannot be copied, reproduced, or photographed in any way.²¹⁰

Information or data compiled by local agency officers or employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets is not a disclosable public record and may not be provided to any person other than those local agency officers or employees who are responsible for receiving and processing those requests.²¹¹

Initiative, Recall, and Referendum Petitions

Nomination documents and signatures filed in lieu of filing fee petitions may be inspected, but not copied or distributed.²¹²

Similarly, any petition to which a voter has affixed his or her signature for a statewide, county, city, or district initiative, referendum, recall, or matters submitted under the Elections Code, is not a disclosable public record and is not open to inspection except by the local agency officers or employees whose duty it is to receive, examine, or preserve the petitions.²¹³ This prohibition extends to all memoranda prepared by county and city elections officials in the examination of the petitions indicating which voters have signed particular petitions.²¹⁴

If a petition is found to be insufficient, the proponents and their representatives may inspect the memoranda of insufficiency to determine which signatures were disqualified and the reasons for the disqualification.²¹⁵

²⁰⁵ Gov. Code, § 6254.4, subd. (a).

²⁰⁶ Gov. Code, § 6254.4.

²⁰⁷ Elec. Code, § 2194.

²⁰⁸ Elec. Code, § 2194.

²⁰⁹ Elec. Code, § 2194, subd. (c).

²¹⁰ Elec. Code, § 2194, subd. (c)(2).

²¹¹ Gov. Code, § 6253.6.

²¹² Elec. Code, § 17100.

²¹³ Elec. Code, §§ 17200, 17400.

²¹⁴ Gov. Code, § 6253.5.

²¹⁵ Gov. Code, § 6253.5.

Identity of Informants

A local agency also has a privilege to refuse to disclose and to prevent another from disclosing the identity of a person who has furnished information in confidence to a law enforcement officer or representative of a local agency charged with administration or enforcement of the law alleged to be violated.²¹⁶ This privilege applies where the information purports to disclose a violation of a federal, state, or another public entity's law, and where the public's interest in protecting an informant's identity outweighs the necessity for disclosure.²¹⁷ This privilege extends to disclosure of the contents of the informant's communication if the disclosure would tend to disclose the identity of the informant.²¹⁸

Information Technology Systems Security Records

An information security record is exempt from disclosure if, on the facts of a particular case, disclosure would reveal vulnerabilities to attack, or would otherwise increase the potential for an attack on a local agency's information technology system.²¹⁹

Disclosure of records stored within a local agency's information technology system that are not otherwise exempt under the law do not fall within this exemption.²²⁰

Law Enforcement Records

Overview

Law enforcement records are generally exempt from disclosure.²²¹ That is, the actual investigation files and records are themselves exempt from disclosure, but the PRA does require local agencies to disclose certain information derived from those files and records.²²² For example, the names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer's safety (e.g., if there is a specific threat to an officer or an officer is working undercover).²²³

The type of information that must be disclosed differs depending upon whether it relates to, for example, calls to the police department for assistance, the identity of an arrestee, information relating to a traffic accident, or certain types of crimes, including car theft, burglary, or arson. The identities of victims of certain types of crimes, including minors and victims of sexual assault, are required to be withheld if requested by the victim or the victim's guardian, if the victim is a minor.²²⁴ Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.²²⁵ Certain information that may be required to be released may be withheld where the disclosure would endanger a witness or interfere with the successful completion of the investigation. These exemptions extend indefinitely, even after the investigation is closed.²²⁶

216 Evid. Code, § 1041

217 Evid. Code, § 1041; *People v. Navarro* (2006) 138 Cal.App.4th 146, 164.

218 *People v. Hobbs* (1994) 7 Cal.4th 948, 961–962.

219 Gov. Code, § 6254.19

220 Gov. Code, § 6254.19; see also Gov. Code, § 6254, subd. (aa).

221 Gov. Code, § 6254, subd. (f).

222 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068; 65 Ops. Cal. Atty. Gen. 563 (1982).

223 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 63–68.

224 Gov. Code, § 6254, subd. (f)(2).

225 *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174.

226 *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048, 1052; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 361–362; *Office of the Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695 (Office of the Attorney General has discretion to determine which investigatory records are subject to disclosure in connection with its investigations, and investigatory records in that context may include some documents that were not prepared as part of, but became subsequently relevant to, the investigation).

Release practices vary by local agencies. Some local agencies provide a written summary of information being disclosed, some release only specific information upon request, while others release reports with certain matters redacted. Other local agencies release reports upon request with no redactions except as mandated by statute. Some local agencies also release 911 tapes and booking photos, although this is not required under the PRA.²²⁷

► **PRACTICE TIP:**

If it is your local agency's policy to release police reports upon request, it is helpful to establish an internal process to control the release of the identity of minors or victims of certain types of crimes, or to ensure that releasing the report would not endanger the safety of a person involved in an investigation or endanger the completion of the investigation.

Exempt Records

The PRA generally exempts most law enforcement records from disclosure, including, among others:

- Complaints to or investigations conducted by a local or state police agency;
- Records of intelligence information or security procedures of a local or state police agency;
- Any investigatory or security files compiled by any other local or state police agency;
- Customer lists provided to a local police agency by an alarm or security company; and
- Any investigatory or security files compiled by any state or local agency for correctional, law enforcement, or licensing purposes.²²⁸

► **PRACTICE TIP:**

Many departments that choose not to release entire reports develop a form that can be filled out with the requisite public information.

Information that Must be Disclosed

There are three general categories of information contained in law enforcement investigatory files that must be disclosed: information which must be disclosed to victims, their authorized representatives and insurance carriers, information relating to arrestees, and information relating to complaints or requests for assistance.

Disclosure to Victims, Authorized Representatives, Insurance Carriers

Except where disclosure would endanger the successful completion of an investigation or a related investigation, or endanger the safety of a witness, certain information relating to specific listed crimes must be disclosed upon request to:

- A victim;
- The victim's authorized representative;
- An insurance carrier against which a claim has been or might be made; or
- Any person suffering bodily injury, or property damage or loss.

The type of crimes listed in this subsection to which this requirement applies include arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime defined by statute.²²⁹

²²⁷ *Haynie v. Superior Court*, *supra*, 26 Cal.4th 1061 (911 tapes); 86 Ops.Cal.Atty.Gen. 132 (2003) (booking photos).

²²⁸ Gov. Code, § 6254, subd. (f); *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 (coroner and autopsy reports).

²²⁹ Gov. Code, § 6254, subd. (f).

The type of information that must be disclosed under this section (except where it endangers safety of witnesses or the investigation itself) includes:

- Name and address of persons involved in or witnesses to incident (other than confidential informants);
- Description of property involved;
- Date, time, and location of incident;
- All diagrams;
- Statements of parties to incident; and
- Statements of all witnesses (other than confidential informants).²³⁰

Local agencies may not require a victim or a victim's authorized representative to show proof of the victim's legal presence in the United States to obtain the information required to be disclosed to victims.²³¹ However, if a local agency does require identification for a victim or authorized representative to obtain information disclosable to victims, the local agency must, at a minimum, accept a current driver's license or identification card issued by any state in the United States, a current passport issued by the United States or a foreign government with which the United States has a diplomatic relationship, or a current Matricula Consular card.²³²

The Vehicle Code addresses the release of traffic accident information. A law enforcement agency to whom an accident was reported is required to disclose the entire contents of a traffic accident report to persons who have a "proper interest" in the information, including, but not limited to, the driver(s) involved in the accident, or the authorized representative, guardian, or conservator of the driver(s) involved; the parent of a minor driver; any named injured person; the owners of vehicles or property damaged by the accident; persons who may incur liability as a result of the accident; and any attorney who declares under penalty of perjury that he or she represents any of the persons described above.²³³ The local enforcement agency may recover the actual cost of providing the information.

Information Regarding Arrestees

The PRA mandates that the following information be released pertaining to every individual arrested by the local law enforcement agency, except where releasing the information would endanger the safety of persons involved in an investigation or endanger the successful completion of the investigation or a related investigation:

- Full name and occupation of the arrestee;
- Physical description including date of birth, color of eyes and hair, sex, height and weight;
- Time, date, and location of arrest;
- Time and date of booking;
- Factual circumstances surrounding arrest;
- Amount of bail set;
- Time and manner of release or location where arrestee is being held; and
- All charges the arrestee is being held on, including outstanding warrants and parole or probation holds.²³⁴

As previously stated, a PRA request applies only to records existing at the time of the request.²³⁵ It does not require a local

²³⁰ Gov. Code, § 6254, subd. (f); *Buckheit v. Dennis* (ND Cal. 2012) 2012 U.S. Dist. LEXIS 49062 (noting that Government Code section 6254, subd. (f) requires disclosure of certain information to a victim. Suspects are not entitled to that same information).

²³¹ Gov. Code, § 6254.30.

²³² Gov. Code, § 6254.30.

²³³ Veh. Code, § 20012.

²³⁴ Gov. Code, § 6254, subd. (f)(1).

²³⁵ Gov. Code, § 6254, subd. (c).

agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

► **PRACTICE TIP:**

Most police departments have some form of a daily desk or press log that contains all or most of this information.

Complaints or Requests for Assistance

The Penal Code provides that except as otherwise required by the criminal discovery provisions, no law enforcement officer or employee of a law enforcement agency may disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim of or witness to the alleged offense.²³⁶

Subject to the restrictions imposed by the Penal Code, the following information must be disclosed relative to complaints or requests for assistance received by the law enforcement agency:

- The time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto;
- To the extent the crime alleged or committed or any other incident is recorded, the time, date, and location of occurrence, and the time and date of the report;
- The factual circumstances surrounding crime/incident;
- A general description of injuries, property, or weapons involved; and
- The names and ages of victims, except the names of victims of certain listed crimes may be withheld upon request of victim or parent of minor victim. These listed crimes include various Penal Code sections which relate to topics such as sexual abuse, child abuse, hate crimes, and stalking.²³⁷

Requests for Journalistic or Scholarly Purposes

Where a request states, under penalty of perjury, that (1) it is made for a scholarly, journalistic, political, or governmental purpose, or for an investigative purpose by a licensed private investigator, and (2) it will not be used directly or indirectly, or furnished to another, to sell a product or service, the PRA requires the disclosure of the name and address of every individual arrested by the local agency and the current address of the victim of a crime, except for specified crimes.²³⁸

Coroner Photographs or Video

No copies, reproductions, or facsimiles of a photograph, negative, print, or video recording of a deceased person taken by or for the coroner (including by local law enforcement personnel) at the scene of death or in the course of a post mortem examination or autopsy may be disseminated except as provided by statute.²³⁹

²³⁶ Pen. Code, § 841.5, subd. (a).

²³⁷ Gov. Code, § 6254, subd. (f)(2).

²³⁸ Gov. Code, § 6254, subd. (f); Pen. Code, § 841.5; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32.

²³⁹ Code Civ. Proc., § 129.

Mental Health Detention Information

All information and records obtained in the course of providing services to a mentally disordered individual who is gravely disabled or a danger to others or him or herself, and who is detained and taken into custody by a peace officer, are confidential and may only be disclosed to enumerated recipients and for the purposes specified in state law.²⁴⁰ Willful, knowing release of confidential mental health detention information can create liability for civil damages.²⁴¹

► **PRACTICE TIP:**

All information obtained in the course of a mental health detention (often referred to as a “5150 detention”) is confidential, including information in complaint or incident reports that would otherwise be subject to disclosure under the PRA.

Elder Abuse Records

Reports of suspected abuse or neglect of an elder or dependent adult, and information contained in such reports, are confidential and may only be disclosed as permitted by state law.²⁴² The prohibition against unauthorized disclosure applies regardless of whether a report of suspected elder abuse or neglect is from someone who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not for compensation (a mandated reporter), or from someone else.²⁴³ Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.²⁴⁴

Juvenile Records

Records or information gathered by law enforcement agencies relating to the detention of, or taking of, a minor into custody or temporary custody are confidential and subject to release only in certain circumstances and by certain specified persons and entities.²⁴⁵ Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.²⁴⁶

► **PRACTICE TIP:**

Some local courts have their own rules regarding inspection and they may differ from county to county and may change from time to time. Care should be taken to periodically review the rules as the presiding judge of each juvenile court makes their own rules.

Different provisions apply to dissemination of information gathered by a law enforcement agency relating to the taking of a minor into custody where it is provided to another law enforcement agency, including a school district police or security department, or other agency or person who has a legitimate need for information for purposes of official disposition of a case.²⁴⁷ In addition, a law enforcement agency must release the name of and descriptive information relating to any juvenile who has escaped from a secure detention facility.²⁴⁸

240 Welf. & Inst. Code, §§ 5150, 5328.

241 Welf. & Ins. Code, § 5330.

242 Welf. & Inst. Code, § 15633.

243 Welf. & Inst. Code, § 15633.

244 Welf. & Inst. Code, § 15633.

245 Welf. & Inst. Code, §§ 827, 828; see Welf & Inst. Code, § 827.9 (applies to Los Angeles County only); see also *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767 (release of information regarding minor who has been temporarily detained and released without any further proceedings.)

246 Welf. & Inst. Code, § 827.

247 Welf & Inst. Code, § 828, subd. (a); Cal. Rules of Court, rule 5.552(g).

248 Welf & Inst. Code, § 828, subd. (b).

Child Abuse Reports

Reports of suspected child abuse or neglect, including reports from those who are “mandated reporters,” such as teachers and public school employees and officials, physicians, children’s organizations, and community care facilities, and child abuse and neglect investigative reports that result in a summary report being filed with the Department of Justice, are confidential and may only be disclosed to the persons and agencies listed in state law.²⁴⁹ Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.²⁵⁰

Library Patron Use Records

All patron use records of any library that is supported in whole or in part by public funds are confidential and may not be disclosed except to persons acting within the scope of their duties within library administration, upon written authorization from the person whose records are sought, or by court order.²⁵¹ The term “patron use records” includes written or electronic records that identify the patron, the patron’s borrowing information, or use of library resources, including database search records and any other personally identifiable information requests or inquiries.²⁵² This exemption does not extend to statistical reports of patron use or records of fines collected by the library.²⁵³

Library Circulation Records

Library circulation records that are kept to identify the borrowers, and library and museum materials presented solely for reference or exhibition purposes, are exempt from disclosure.²⁵⁴ Further, all registration and circulation records of any library that is (in whole or in part) supported by public funds are confidential.²⁵⁵ The confidentiality of library circulation records does not extend to records of fines imposed on borrowers.²⁵⁶

Licensee Financial Information

When a local agency requires that applicants for licenses, certificates, or permits submit personal financial data, that information is exempt from disclosure.²⁵⁷ One frequent example of this is the submittal of sales or income information under a business license tax requirement. However, this exemption does not apply to financial information filed by an existing licensee or franchisee to justify a rate increase, presumably because those affected by the increase have a right to know its basis.²⁵⁸

Medical Records

California’s Constitution protects a person’s right to privacy in his or her medical records.²⁵⁹ Therefore, the PRA exempts from disclosure “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”²⁶⁰ In addition, the PRA exempts from disclosure “[r]ecords, the disclosure of which is exempted or prohibited pursuant

249 Pen. Code, §§ 11165.6, 11165.7, 11167.5, 11169.

250 Pen. Code, § 11167.5, subd. (a).

251 Gov. Code, § 6267.

252 Gov. Code, § 6267.

253 Gov. Code, § 6267.

254 Gov. Code, § 6254, subd. (j).

255 Gov. Code, § 6254, subd. (j).

256 Gov. Code, § 6254, subd. (j).

257 Gov. Code, § 6254, subd. (n).

258 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 779–780.

259 Cal. Const., Art. I, § 1.

260 Gov. Code, § 6254, subd. (c).

to federal or state law,”²⁶¹ including, but not limited to, those described in the Confidentiality of Medical Information Act,²⁶² physician/patient privilege,²⁶³ the Health Data and Advisory Council Consolidation Act,²⁶⁴ and the Health Insurance Portability and Accountability Act.²⁶⁵

► **PRACTICE TIP:**

Both subdivision (c) and subdivision (k) of Government Code section 6254 probably apply to most records protected under the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act, and the Health Insurance Portability and Accountability Act. In addition, individually identifiable health information is probably also exempt from disclosure under the “public interest” exemption in Government Code section 6255.

Health Data and Advisory Council Consolidation Act

Any organization that operates, conducts, owns, or maintains a health facility, hospital, or freestanding ambulatory surgery clinic must file reports with the state that include detailed patient health and financial information.²⁶⁶ Patient medical record numbers, and any other data elements of these reports that could be used to determine the identity of an individual patient are exempt from disclosure.²⁶⁷

Physician/Patient Privilege

Patients may refuse to disclose, and prevent others from disclosing, confidential communications between themselves and their physicians.²⁶⁸ The privilege extends to confidential patient/physician communication that is disclosed to third parties where reasonably necessary to accomplish the purpose for which the physician was consulted.²⁶⁹

► **PRACTICE TIP:**

Patient medical information provided to local agency emergency medical personnel to assist in providing emergency medical care may be subject to the physician/patient privilege if providing the privileged information is reasonably necessary to accomplish the purpose for which the physician was, or will be, consulted, including emergency room physicians.

261 Gov. Code, § 6254, subd. (k).

262 Civ. Code, § 56 *et seq.*

263 Evid. Code, § 990 *et seq.*

264 Health & Saf. Code, § 128675 *et seq.*

265 42 U.S.C. § 1320d.

266 Health & Saf. Code, §§ 128735, 128736, 128737.

267 Health & Saf. Code, § 128745, subd. (c)(6).

268 Evid. Code, § 994.

269 Evid. Code, § 992.

Confidentiality of Medical Information Act

Subject to certain exceptions, health care providers, health care service plan providers and contractors are prohibited from disclosing a patient's individually identifiable medical information without first obtaining authorization.²⁷⁰ Employers must establish appropriate procedures to ensure the confidentiality and appropriate use of individually identifiable medical information.²⁷¹ Local agencies that are not providers of health care, health care service plans, or contractors as defined in state law may possess individually identifiable medical information protected under state law that originated with providers of health care, health care service plans, or contractors.²⁷²

Health Insurance Portability and Accountability Act

Congress enacted the Health Insurance Portability and Accountability Act in 1996 to improve portability and continuity of health insurance coverage and to combat waste, fraud, and abuse in health insurance and health care delivery through the development of a health information system and establishment of standards and requirements for the electronic transmission of certain health information.²⁷³ The U.S. Department of Health and Human Services Secretary has issued privacy regulations governing use and disclosure of individually identifiable health information.²⁷⁴ Persons who knowingly and in violation of federal law use or cause to be used a unique health identifier, obtain individually identifiable health information relating to an individual, or disclose individually identifiable health information to another person are subject to substantial fines and imprisonment of not more than one year, or both, and to increased fines and imprisonment for violations under false pretenses or with the intent to use individually identifiable health information for commercial advantage, personal gain, or malicious harm.²⁷⁵ Federal law also permits the Health and Human Services Secretary to impose civil penalties.²⁷⁶

Workers' Compensation Benefits

Records pertaining to the workers' compensation benefits for an individually identified employee are exempt from disclosure as "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy."²⁷⁷ The PRA further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law.²⁷⁸ State law prohibits a person or public or private entity who is not a party to a claim for workers' compensation benefits from obtaining individually identifiable information obtained or maintained by the Division of Workers' Compensation on that claim.²⁷⁹

270 Civ. Code, § 56.10, subd. (a), 56.05, subd. (g). "Provider of health care" as defined means persons licensed under Business & Professions Code section 500 *et seq.*, or Health & Safety Code section 1797 and following, and clinics, health dispensaries, or health facilities licensed under Health and Safety Code section 1200 *and following*. "Health care service plan" as defined means entities regulated under Health & Safety Code section 1340 and following. "Contractor" as defined means medical groups, independent practice associations, pharmaceutical benefits managers, and medical service organizations that are not providers of health care or health care service plans.

271 Civ. Code, § 56.20.

272 Civ. Code, § 56.05, subd. (g).

273 Health Insurance Portability and Accountability Act of 1996, Pub L No. 104-192, § 261 (Aug. 24, 1996) 110 Stat 1936; 42 U.S.C. 1320d.

274 42 U.S.C. § 1320d-1 - d-3, Health and Human Services Summary of the Privacy Rule, May, 2003. The final privacy regulations were issued in December, 2000 and amended in August, 2002. The definitions of "health information" and "individually identifiable health information" in the privacy regulations are in 45 C.F.R. 160.103. The general rules governing use and disclosure of protected health information are in 45 C.F.R. 164.502.

275 42 U.S.C. § 1320d-6. Federal law defines "individually identifiable health information" as any information collected from an individual that is created or received by a health care provider, health plan, employer or health care clearing house, that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual, and that identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

276 42 U.S.C. § 1320d-5.

277 Gov. Code, § 6254, subd. (c).

278 Gov. Code, § 6254, subd. (k).

279 Lab. Code, § 138.7, subd. (a). This state statute defines "individually identifiable information" to mean "any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity."

Certain information may be subject to disclosure once an application for adjudication has been filed.²⁸⁰ If the request relates to pre-employment screening, the administrative director must notify the person about whom the information is requested and include a warning about discrimination against persons who have filed claims for workers' compensation benefits. Further, a residential address cannot be disclosed, except to law enforcement agencies, the district attorney, other governmental agencies, or for journalistic purposes. Individually identifiable information is not subject to subpoena in a civil proceeding without notice and a hearing at which the court is required to balance the respective interests—privacy and public disclosure. Individually identifiable information may be used for certain types of statistical research by specifically listed persons and entities.²⁸¹

Official Information Privilege

A local agency may refuse to disclose official information.²⁸² "Official information" is 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."²⁸³ However, the courts have somewhat expanded on the statutory definition by determining that certain types of information, such as police investigative files and medical information, are "by [their] nature confidential and widely treated as such" and thus protected from disclosure by the privilege.²⁸⁴ Therefore, "official information" includes information that is protected by a state or federal statutory privilege or information, the disclosure of which is against the public interest, because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.²⁸⁵

The local agency has the right to assert the official information privilege both to refuse to disclose and to prevent another from disclosing official information.²⁸⁶ Where the disclosure is prohibited by state or federal statute, the privilege is absolute. In all other respects, it is conditional and requires a judge to weigh the necessity for preserving the confidentiality of information against the necessity for disclosure in the interest of justice. This is similar to the weighing process provided for in the PRA — allowing nondisclosure when the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure.²⁸⁷ As part of the weighing process a court will look at the consequences to the public, including the effect of the disclosure on the integrity of public processes and procedures.²⁸⁸ This is typically done through *in camera* judicial review.²⁸⁹

There are a number of cases interpreting this statute.²⁹⁰ While many of the cases interpreting this privilege involve law enforcement records, other cases arise out of licensing and accreditation-type activities. The courts address these types of cases on an individualized basis and further legal research should be done within the context of particular facts.

► PRACTICE TIP:

Although there is no case law directly on point, this privilege, along with the informant privilege, may be asserted to protect the identities of code enforcement complainants and whistleblowers.

280 Lab. Code, §§ 5501.5, 138.7.

281 Lab Code, §138.7.

282 Evid. Code, § 1040.

283 Evid. Code, § 1040, subd. (a).

284 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 373–374.

285 *White v. Superior Court* (2002) 102 Cal.App.4th.Supp. 1, 6.

286 Evid. Code, § 1040, subd. (b).

287 Gov. Code, § 6255.

288 *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 126.

289 The term "*in camera*" refers to a review of the document in the judge's chambers outside the presence of the requesting party.

290 *Department of Motor Vehicles v. Superior Court*, *supra*, 100 Cal.App.4th 363; *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal. App.4th 810; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759.

Pending Litigation or Claims

The PRA exempts from disclosure “(r)ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to [the California Government Claims Act] until the pending litigation or claim has been finally adjudicated or otherwise settled.”²⁹¹ Although the phrase “pertaining to” pending litigation or claims might seem broad, the courts nevertheless have construed the exemption narrowly, consistent with the underlying policy of the PRA to promote access to public records. Therefore, the claim itself is not exempt from disclosure — the exemption applies only to documents specifically prepared by, or at the direction of, the local agency for use in existing or anticipated litigation.²⁹²

It may sometimes be difficult to determine whether a particular record was prepared specifically for use in litigation or for other purposes related to the underlying incident. For example, an incident report may be prepared either in anticipation of defending a potential claim, or simply for risk management purposes. In order for the exemption to apply, the local agency would have to prove that the dominant purpose of the record was to be used in defense of litigation.²⁹³ However, attorney payment and billing records related to ongoing litigation are not subject to the pending litigation exemption, because such records are not primarily prepared for use in litigation.²⁹⁴

It is important to remember that even members of the public that have filed a claim against or sued a local agency are entitled to use the PRA to obtain documents that may be relevant to the claim or litigation. The mere fact that the person might also be able to obtain the documents in discovery is not a ground for rejecting the request under the PRA.²⁹⁵

The pending litigation exemption does not prevent members of the public from obtaining records submitted to the local agency pertaining to existing or anticipated litigation, such as a claim for monetary damages filed prior to a lawsuit, because the records were not prepared by the local agency.²⁹⁶ Moreover, while medical records are subject to a constitutional right of privacy, and generally exempt from production under the PRA and other statutes,²⁹⁷ an individual may be deemed to have waived the right to confidentiality by submitting medical records to the public entity in order to obtain a settlement.²⁹⁸

Once the claim or litigation is no longer “pending,” records previously shielded from disclosure by the exemption must be produced, unless covered by another exemption. For example, the public may obtain copies of depositions from closed cases,²⁹⁹ and documents concerning the settlement of a claim that are not shielded from disclosure by other exemptions.³⁰⁰ Exemptions that may be used to withhold documents from disclosure after the claim or litigation is no longer pending include the exemptions for law enforcement investigative reports, medical records, and attorney-client privileged records and attorney work product.³⁰¹ Particular records or information relevant to settlement of a closed claim or case may also be subject to nondisclosure under the public interest exemption to the extent the local agency can show that the public interest in nondisclosure clearly outweighs the public interest in disclosure.³⁰²

291 Gov. Code, § 6254, subd. (b).

292 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420–1421; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1420.

293 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1419.

294 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67. See also the Attorney-Client Privilege, p. 29.

295 *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.

296 *Poway Unified Sch. Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1502–1505.

297 See Medical Privacy Laws, p. 40.

298 *Poway Unified Sch. Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1505.

299 *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083, 1089.

300 *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901.

301 See, e.g., *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

302 Gov. Code, § 6255.

► **PRACTICE TIP:**

In responding to a request for documents concerning settlement of a particular matter, it is critical to pay close attention to potential application of other exemptions under the PRA. Additionally, if the settlement is approved by the legislative body during a closed session, release of the settlement documents are governed by the Brown Act. It is recommended that you seek the advice of your local agency counsel.

There is considerable overlap between the pending litigation exemption and both the attorney-client privilege³⁰³ and attorney-work-product doctrine.³⁰⁴ However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney-client privilege or work product protection.³⁰⁵ Moreover, while the exemption for pending litigation expires once the litigation is no longer pending, the attorney-client privilege and attorney-work-product doctrine continue indefinitely.³⁰⁶

Personal Contact Information

Court decisions have ruled that individuals have a substantial privacy interest in their personal contact information. However, a fact-specific analysis must be conducted to determine whether the public interest exemption protects this information from disclosure, i.e., whether the public interest in nondisclosure clearly outweighs the public interest in disclosure.³⁰⁷ Application of this balancing test has yielded varying results, depending on the circumstances of the case.

For example, courts have allowed nondisclosure of the names, addresses, and telephone numbers of airport noise complainants.³⁰⁸ In that instance, the anticipated chilling effect on future citizen complaints weighed heavily in the court's decision. On the other hand, the courts have ordered disclosure of information contained in applications for licenses to carry firearms, except for information that indicates when or where the applicant is vulnerable to attack or that concern the applicant's medical or psychological history or that of members of his or her family.³⁰⁹ Courts have also ordered disclosure of the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance,³¹⁰ and the names of donors to a university affiliated foundation, even though those donors had requested anonymity.³¹¹

► **PRACTICE TIP:**

In situations where personal contact information clearly cannot be kept confidential, inform the affected members of the public that their personal contact information is subject to disclosure under the PRA.

303 Evid. Code, § 950 *et seq.*; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.

304 Code Civ. Proc. § 2018.030.

305 *City of Los Angeles v. Superior Court*, *supra*, 41 Cal.App.4th 1083, 1087.

306 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 (attorney-client privilege); *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 61–63 (work-product doctrine); *Costco Wholesale Corp. v. Superior Court*, *supra*, 47 Cal.4th 725. *But see Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282 (holding that the attorney-client privilege protects the confidentiality of invoices for work in pending and active legal matters, but that the privilege may not encompass invoices for legal matters that concluded long ago).

307 Gov. Code, § 6255, subd. (a).

308 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.

309 Gov. Code, § 6254, subd. (u)(1).

310 *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.

311 *California State Univ., Fresno Ass'n, Inc., v. Superior Court* (2001) 90 Cal.App.4th 810.

Posting Personal Contact Information of Elected/Appointed Officials on the Internet

The PRA prohibits a state or local agency from posting on the Internet the home address or telephone number of any elected or appointed officials without first obtaining their written permission.³¹² The prohibition against posting home addresses and telephone numbers of elected or appointed officials on the Internet does not apply to a comprehensive database of property-related information maintained by a state or local agency that may incidentally contain such information, where the officials are not identifiable as such from the data, and the database is only transmitted over a limited-access network, such as an intranet, extranet, or virtual private network, but not the Internet.³¹³

The PRA also prohibits someone from knowingly posting on the Internet the home address or telephone number of any elected or appointed official, or the official's "residing spouse" or child, and either threatening or intending to cause imminent great bodily harm.³¹⁴ Similarly, the PRA prohibits soliciting, selling, or trading on the internet the home address or telephone number of any elected or appointed official with the intent of causing imminent great bodily harm to the official or a person residing at the official's home address.³¹⁵

In addition, the PRA prohibits a person, business, or association from publicly posting or displaying on the Internet the home address or telephone number of any elected or appointed official where the official has made a written demand to the person, business, or association to not to disclose his or her address or phone number.³¹⁶

Personnel Records

The PRA exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."³¹⁷ In addition, the public interest exemption may protect certain personnel records from disclosure.³¹⁸ In determining whether to allow access to personnel files, the courts have determined that the tests under each exemption are essentially the same: the extent of the local agency employee's privacy interest in certain information and the harm from its unwarranted disclosure is weighed against the public interest in disclosure. The public interest in disclosure will be considered in the context of the extent to which the disclosure of the information will shed light on the local agency's performance of its duties.³¹⁹

Decisions from the California Supreme Court have determined that local agency employees do not have a reasonable expectation of privacy in their name, salary information, and dates of employment. This interpretation also applies to police officers absent unique, individual circumstances.³²⁰

312 See Gov. Code, § 6254.21, subd. (f) (containing a non-exhaustive list of individuals who qualify as "elected or appointed official[s]").

313 91 Ops.Cal.Atty.Gen. 19 (2008).

314 Gov. Code, § 6254.21, subd. (b).

315 Gov. Code, § 6254.21, subd. (d).

316 Gov. Code, § 6254.21, subd. (c).

317 Gov. Code, § 6254, subd. (c).

318 Gov. Code, § 6255; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755; see also, *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.

319 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 335; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 300; *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 231; *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, 755; *American Fed'n of State, County & Mun. Employees (AFSCME), Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913 914–916.

320 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court*, *supra*, 42 Cal.4th 319, 327; *Commission on Peace Officer Standards & Training v. Superior Court*, *supra*, 42 Cal.4th 278, 289–293.

In situations involving allegations of non-law enforcement local agency employee misconduct, courts have considered the following factors in determining whether disclosure of employment investigation reports or related records would constitute an unwarranted invasion of personal privacy:

- Are the allegations of misconduct against a high-ranking public official or a local agency employee in a position of public trust and responsibility (e.g., teachers, public safety employees, employees who work with children)?
- Are the allegations of misconduct of a substantial nature or trivial?
- Were findings of misconduct sustained or was discipline imposed?

Courts have upheld the public interest against disclosure of “trivial or groundless” charges.³²¹ In contrast, when “the charges are found true, or discipline is imposed,” the public interest likely favors disclosure.³²² In addition, “where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists.”³²³ However, even if the local agency employee is exonerated of wrongdoing, disclosure may be warranted if the allegations of misconduct involve a high-ranking public official or local agency employee in a position of public trust and responsibility, given the public’s interest in understanding why the employee was exonerated and how the local agency employer treated the accusations.³²⁴

With respect to personnel investigation reports, although the PRA’s personnel exemption may not exempt such a report from disclosure, the attorney-client privilege or attorney-work-product doctrine may apply.³²⁵ Further, discrete portions of the personnel report may still be exempt from disclosure and redacted, such as medical information contained in a report or the names of third party witnesses.³²⁶

The courts have permitted persons who believe their rights may be infringed by a local agency decision to disclose records to bring a “reverse PRA action” to seek an order preventing disclosure of the records.³²⁷

Peace Officer Personnel Records

Peace officer personnel records, including internal affairs investigation reports regarding alleged misconduct, are both confidential and privileged. They clearly fall within the category of records, “the disclosure of which is exempted or prohibited pursuant to federal or state law”³²⁸

The discovery and disclosure of the personnel records of peace officers are governed exclusively by statutory provisions contained in the Evidence Code and Penal Code. Peace officer personnel records and records of citizen complaints “...or information obtained from these records...” are confidential and “shall not” be disclosed in any criminal or civil proceeding except by discovery pursuant to statutorily prescribed procedures.³²⁹ The appropriate procedure for obtaining information in the

321 *AFSCME, Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913, 918.

322 *Ibid.*

323 *Ibid.*

324 *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 223–224; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1275–1276; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 759; *Bakersfield City Sch. Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045–1047; *AFSCME, Local 1650 v. Regents of University of California* (1978) 80 Cal.App.3d 913, 918.

325 See “Attorney-client Communications and Attorney Work Product,” page 29; *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1035–1036. But see *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, where on the facts of that case, an investigation report that arguably was privileged was ordered disclosed.

326 *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, 759 (permitting redaction of names, home addresses, phone numbers, and job titles “of all persons mentioned in the report other than [the subject of the report] or elected members” of the school board); *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, *supra*, 202 Cal.App.4th 1250, 1276 (permitting redaction of the identity of the complainant and other witnesses, as well as other personal information in the investigation report).

327 *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, *supra*, 202 Cal.App.4th 1250, 1264–1271. See also “Reverse PRA Litigation,” p. 59.

328 Gov. Code, § 6254, subd. (k); Pen. Code, §§ 832.7–832.8; *International Fed’n of Prof. & Tech. Eng’rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 341; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1431.

329 Pen. Code, § 832.7; Evid. Code, §§ 1043, 1046.

protected peace officer personnel files is to file a motion commonly known as a “Pitchess” motion, which by statute entails a two-part process involving first a determination by the court regarding good cause and materiality of the information sought and a subsequent confidential review by the court of the files, where warranted.³³⁰

Peace officer personnel files are not protected from disclosure, however, when the district attorney, attorney general, or grand jury are investigating the conduct of the officers, including when the district attorney conducts a *Brady* review of files for exculpatory evidence relevant to a criminal proceeding.³³¹ The other notable exception arises where an officer publishes factual information concerning a disciplinary action that is known by the officer to be false. If the information is published in the media, the employing agency may disclose factual information about the discipline to refute the employee’s false statements.³³²

Peace officer “personnel records” include personal data, medical history, appraisals, and discipline; complaints and investigations relating to events perceived by the officer or relating to the manner in which his or her duties were performed; and any other information the disclosure of which would constitute an unwarranted invasion of privacy.³³³ The names, salary information, and employment dates and departments of peace officers have been determined to be disclosable records absent unique circumstances.³³⁴ Additionally, official service photographs of peace officers are subject to disclosure and are not exempt or privileged as personnel records unless disclosure would pose an unreasonable risk of harm to the peace officer.³³⁵ The names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer’s safety (e.g., if there is a specific threat to an officer or an officer is working undercover).³³⁶ Video captured by a dashboard camera is not a personnel record protected from disclosure.³³⁷

While the Penal and Evidence Code privileges are not per se applicable in federal court, federal common law does recognize a qualified privilege for “official information” and considers government personnel files to be “official information.”³³⁸ Moreover, independent reports regarding officer-involved shootings are not exempt from disclosure, though portions of the report culled from personnel information or officers’ statements made in the course of an internal affairs investigation of the shooting are protected and may be redacted from the report.³³⁹ Such a qualified privilege in federal court results in a very similar weighing of the potential benefits of disclosure against potential disadvantages.³⁴⁰

330 See, e.g., *People v. Mooc* (2001) 26 Cal.4th 1216; *People v. Thompson* (2006) 141 Cal.App.4th 1312; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135.

331 Pen. Code, § 832.7, subd. (a); *People v. Superior Court* (2015) 61 Cal.4th 696.

332 Pen. Code, § 832.7, subd. (d).

333 Pen. Code, § 832.8.

334 *International Fed’n of Prof. & Tech. Eng’rs, Local 21, AFL-CIO v. Superior Court*, *supra*, 42 Cal.4th 319, 327; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 289–293.

335 *Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 700–705.

336 *Long Beach Police Officers Ass’n v. City of Long Beach* (2014) 59 Cal.4th 59, 75; 91 Ops.Cal.Atty.Gen. 11 (2008) (the names of peace officers involved in critical incidents, such as ones involving lethal force, are not categorically exempt from disclosure, however, the balancing test may be applied under the specific factual circumstances of each case to weigh the public interests at stake).

337 *City of Eureka v. Superior Court* (2016) 1 Cal.App.5th 755, 763–765. See also “Law Enforcement Records,” p. 35.

338 *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033–1034, cert denied (1991) 502 U.S. 957; *Miller v. Pancucci* (C.D.Cal. 1992) 141 F.R.D. 292, 299–300.

339 *Pasadena Peace Officers Ass’n v. Superior Court* (2015) 240 Cal.App.4th 268, 288–290. See also “Law Enforcement Records,” p. 35.

340 Evid. Code, § 1043 *et seq.*; *Guerra v. Bd. of Trustees* (9th Cir. 1977) 567 F.2d 352; *Kerr v. United States Dist. Court for Northern Dist.* (9th Cir. 1975) 511 F.2d 192, *aff’d*, (1976) 426 U.S. 394; *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515.

Employment Contracts, Employee Salaries, & Pension Benefits

Every employment contract between a local agency and any public official or local agency employee is a public record which is not subject to either the personnel exemption or the public interest exemption.³⁴¹ Thus, for example, one court has held that two letters in a city firefighter's personnel file were part of his employment contract and could not be withheld under either the local agency employee's right to privacy in his personnel file or the public interest exemption.³⁴²

With or without an employment contract, the names and salaries (including performance bonuses and overtime) of local agency employees, including peace officers, are subject to disclosure under the PRA.³⁴³ Public employees do not have a reasonable expectation that their salaries will remain a private matter. In addition, there is a strong public interest in knowing how the government spends its money. Therefore, absent unusual circumstances, the names and salaries of local agency employees are not subject to either the personnel exemption or the public interest exemption.³⁴⁴

In addition, the courts have held that local agencies are required to disclose the identities of pensioners and the amount of pension benefits received by such pensioners, reasoning that the public interest in disclosure of the names of pensioners and data concerning the amounts of their pension benefits outweighs any privacy interests the pensioners may have in such information.³⁴⁵ On the other hand, the courts have found that personal information provided to a retirement system by a member or on a member's behalf, such as a member's personal email address, home address, telephone number, social security number, birthday, age at retirement, benefits election, and health reports concerning the member, to be exempt from disclosure under the PRA.³⁴⁶ With regard to the California Public Employees' Retirement System (CalPERS), the identities of and amount of benefits received by CalPERS pensioners are subject to public disclosure.³⁴⁷

► PRACTICE TIP:

If a member of the public requests information regarding CalPERS from a local agency, make sure to check the terms of any agreement that may exist between the agency and CalPERS for confidentiality requirements.

Contractor Payroll Records

State law establishes requirements for maintaining and disclosing certified payroll records for workers employed on public works projects subject to payment of prevailing wages.³⁴⁸ State law requires contractors to make certified copies of payroll records available to employees and their representatives, representatives of the awarding body, the Department of Industrial Relations, and the public.³⁴⁹ Requests are to be made through the awarding agency or the Department of Industrial Relations, and the requesting party is required to reimburse the cost of preparation to the contractor, subcontractors, and the agency through

341 Gov. Code, § 6254.8; Gov. Code, § 53262, subd. (b).

342 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.

343 *International Fed'n of Prof. & Tech. Engrs, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th 319, 327.

344 *Commission on Peace Officer Standards & Training v. Superior Court, supra*, 42 Cal.4th 278, 299, 303.

345 *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 472.

346 *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 1004.

347 Gov. Code, § 20230; See also *SDCERS v. Superior Court* (2011) 196 Cal.App.4th 1228, 1238–1239, citing with approval 25 Ops. Cal. Atty. Gen. 90 (1955), which exempts from disclosure employee election of benefits. For peace officer election of benefits see Pen. Code, §§ 832.7 - 832.8 and *International Fed'n of Prof. & Tech. Engrs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 343.

348 Lab. Code, § 1776.

349 Lab. Code, § 1776, subd. (b).

which the request is made prior to being provided the records.³⁵⁰ Contractors are required to file certified copies of the requested records with the requesting entity within ten days after receipt of a written request.³⁵¹

However, state law also limits access to contractor payroll records. Employee names, addresses, and social security numbers must be redacted from certified payroll records provided to the public or any local agency by the awarding body or the Department of Industrial Relations.³⁵² Only the employee names and social security numbers are to be redacted from certified payroll records provided to joint labor-management committees established pursuant to the federal Labor Management Cooperation Act of 1978.³⁵³ The name and address of the contractor or subcontractor may not be redacted.³⁵⁴

The Department of Industrial Relations Director has adopted regulations governing release of certified payroll records and applicable fees.³⁵⁵ The regulations: (1) require that requests for certified payroll records be in writing and contain certain specified information regarding the awarding body, the contract, and the contractor; (2) require awarding agency acknowledgement of requests; (3) specify required contents of awarding agency requests to contractors for payroll records; and (4) set fees to be paid in advance by persons seeking payroll records.³⁵⁶

Test Questions and Other Examination Data

The PRA exempts from disclosure test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided in the portions of the Education Code that relate to standardized tests.³⁵⁷ Thus, for example, a local agency is not required to disclose the test questions it uses for its employment examinations. State law provides that standardized test subjects may, within 90 days after the release of test results to the test subject, have limited access to test questions and answers upon request to the test sponsor.³⁵⁸ This limited access may be either through an in-person examination or by release of certain information to the test subject.³⁵⁹ The Education Code also requires that test sponsors prepare and submit certain reports regarding standardized tests and test results to the California Postsecondary Education Commission.³⁶⁰ All such reports and information submitted to the Commission are public records subject to disclosure under the PRA.³⁶¹

Public Contracting Documents

Contracts with local agencies are generally disclosable public records due to the public's right to determine whether public resources are being spent for the benefit of the community as a whole or the benefit of only a limited few.³⁶² When the bids or proposals leading up to the contract become disclosable depends largely upon the type of contract.

350 Lab. Code, § 1776, subd. (c).

351 Contractors and subcontractors that fail to do so may be subject to a penalty of \$25 per worker for each calendar day until compliance is achieved. Lab. Code, §1776, subds. (d) & (g).

352 Lab. Code, § 1776, subd. (e); *Trustees of Southern Cal. IBEW-NECA Pension Plan v. Los Angeles Unified School District* (2010) 187 Cal.App.4th 621.

353 Lab. Code, § 1776, subd. (e).

354 Lab. Code, § 1776, subd. (e).

355 Lab. Code, § 1776, subd. (i); see Lab. Code, § 16400 *et seq.*

356 8 C.C.R. §§ 16400, 16402.

357 Gov. Code, § 6254, subd. (g).

358 Ed. Code, § 99157, subd. (a) *Brutsch v. City of Los Angeles* (1982) 3 Cal.App.4th 354.

359 Ed. Code, §§ 99157, subds. (a) & (b).

360 Ed. Code, §§ 99153, 99154.

361 Ed. Code, § 99162.

362 *Cal. State Univ., Fresno Ass'n., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 833.

For example, local agency contracts for construction of public works and procurement of goods and non-professional services are typically awarded to the lowest responsive, responsible bidder through a competitive bidding process.³⁶³ Bids for these contracts are usually submitted to local agencies under seal and then publicly opened at a designated time and place. These bids are public records and disclosable as soon as they are opened.

Other local agency contracts for acquisition of professional services or disposition of property are awarded to the successful proposer through a competitive proposal process. As part of this process, interested parties submit proposals that are evaluated by the local agency and are used to negotiate with the winning proposer. While the public has a strong interest in scrutinizing the process leading to the selection of the winning proposer, a local agency's interest in keeping these proposals confidential frequently outweighs the public's interest in disclosure until negotiations with the winning proposer are complete.³⁶⁴ If a winning proposer has access to the specific details of other competing proposals, then the local agency is greatly impaired in its ability to secure the best possible deal on its constituents' behalf.

Some local agencies pre-qualify prospective bidders through a request for qualifications process. The pre-qualification packages submitted, including questionnaire answers and financial statements, are exempt from disclosure.³⁶⁵ Nevertheless, documents containing the names of contractors applying for pre-qualification status are public records and must be disclosed.³⁶⁶ In addition, the contents of pre-qualification packages may be disclosed to third parties during the verification process, in an investigation of substantial allegations or at an appeal hearing.

► **PRACTICE TIP:**

Local agencies should clearly advise bidders and proposers in their Requests for Bids and Requests for Proposals what bid and proposal documents will be disclosable public records and when they will be disclosable to the public.

Real Estate Appraisals and Engineering Evaluations

The PRA requires the disclosure of the contents of real estate appraisals, or engineering or feasibility estimates, and evaluations made for or by a local agency relative to the acquisition of property, or to prospective public supply and construction contracts, but only when all of the property has been acquired or when agreement on all terms of the contract have been obtained.³⁶⁷ By its plain terms, this exemption only applies while the acquisition or prospective contract is pending. Once all the property is acquired or agreement on all terms of the contract have been obtained, the exemption will not apply. In addition, this exemption is not intended to supersede the law of eminent domain.³⁶⁸ Thus, for example, this exemption would not apply to appraisals of owner-occupied residential property of four units or less, where disclosure of such appraisals is required by the Eminent Domain Law or related laws such as the California Relocation Assistance Act.³⁶⁹

► **PRACTICE TIP:**

If the exemption for real estate appraisals and engineering evaluations does not clearly apply, consider whether the facts of the situation justify withholding the record under Government Code section 6255.

363 Pub. Contract Code, § 22038.

364 Gov. Code, § 6255; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1077.

365 Pub. Contract Code, §§ 10165, 10506.6, 10763, 20101, 20111.5, 20209.7, 20209.26, 20651.5.

366 Pub. Contract Code, § 20101, subd. (a).

367 Gov. Code, § 6254, subd. (h).

368 Gov. Code, § 6245, subd. (h).

369 Gov. Code, § 7267.2, subd. (c).

Recipients of Public Services

Disclosure of information regarding food stamp recipients is prohibited.³⁷⁰ Subject to certain exceptions, disclosure of confidential information pertaining to applicants for or recipients of public social services for any purpose unconnected with the administration of the welfare department also is prohibited.³⁷¹ This latter prohibition does not create a privilege.³⁷²

Leases and lists or rosters of tenants of the Housing Authority are confidential and shall not be open to inspection by the public, but shall be supplied to the respective governing body on request.³⁷³ A Housing Authority has a duty to make available public documents and records of the Authority for inspection, except any applications for eligibility and occupancy which are submitted by prospective or current tenants of the Authority.³⁷⁴

The PRA exempts from disclosure records of the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information in accordance with section 18081 of the Health and Safety Code.³⁷⁵

Taxpayer Information

Where information that is required from any taxpayer in connection with the collection of local taxes is received in confidence and where the disclosure of that information would result in unfair competitive disadvantage to the person supplying the information, the information is exempt from disclosure.³⁷⁶ Sales and use tax records may be used only for administration of the tax laws. Unauthorized disclosure or use of confidential information contained in these records can give rise to criminal liability.³⁷⁷

► PRACTICE TIP:

Make sure to check your local agency's codes and ordinances with respect to local taxes when determining what information submitted by the taxpayer is confidential.

Trade Secrets and Other Proprietary Information

As part of the award and administration of public contracts, businesses will often give local agencies information that the businesses would normally consider to be proprietary. There are three exemptions that businesses often use to attempt to protect this proprietary information — the official information privilege, the trade secret privilege, and the public interest exemption.³⁷⁸

³⁷⁰ Welf. & Inst. Code, § 18909.

³⁷¹ Welf. & Inst. Code, § 10850.

³⁷² *Jonon v. Superior Court* (1979) 93 Cal.App.3d 683, 690.

³⁷³ Health & Saf. Code, § 34283.

³⁷⁴ Health & Saf. Code, § 34332, subd. (c).

³⁷⁵ Gov. Code, § 6254.1.

³⁷⁶ Gov. Code, § 6254, subd. (i); see also Rev. & Tax. Code, § 7056.

³⁷⁷ Rev. & Tax. Code, §§ 7056, 7056.5.

³⁷⁸ See, e.g., *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

However, California's strong public policy in favor of disclosure of public records precludes local agencies from protecting most business information. Both the official information privilege and the public interest exemption require that the public interest in nondisclosure outweigh the public interest in disclosure. While these provisions were designed to protect legitimate privacy interests, California courts have consistently held that when individuals or businesses voluntarily enter into the public sphere, they diminish their privacy interests.³⁷⁹ Courts have further found that the public interest in disclosure overrides alleged privacy interests. For example, a court ordered a university to release the names of anonymous contributors who received license agreements for luxury suites at the school's sports arena. Another court ordered a local agency to release a waste disposal contractor's private financial statements used by the local agency to approve a rate increase.³⁸⁰

The trade secret privilege is for information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³⁸¹

However, even when records contain trade secrets, local agencies must determine whether disclosing the information is in the public interest. When businesses give local agencies proprietary information, courts will examine whether disclosure of that information serves the public interest.³⁸²

The PRA contains several exemptions that address specific types of information that are in the nature of trade secrets, including pesticide safety and efficacy information,³⁸³ air pollution data,³⁸⁴ and corporate siting information (financial records or proprietary information provided to government agencies in connection with retaining, locating, or expanding a facility within California).³⁸⁵

Other exemptions cover types of information that could include but are not limited to trade secrets — for example, certain information on plant production, utility systems development data, and market or crop reports.³⁸⁶

► **PRACTICE TIP:**

Issues concerning trade secrets and proprietary information tend to be complex and fact specific. Consider seeking the advice of your local agency counsel in determining whether records requested are exempt from disclosure.

379 *Cal. State Univ., Fresno Ass'n, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 834; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762, 781.

380 *Cal. State Univ., Fresno Ass'n, Inc. v. Superior Court, supra*, 90 Cal.App.4th 810; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762.

381 Civ. Code, § 3426.1, subd. (d). This trade secret definition is set forth in the Uniform Trade Secrets Act ("UTSA"). However, Civil Code section 3426.7, subd. (c) states that any determination as to whether disclosure of a record under the Act constitutes a misappropriation of a trade secret shall be made pursuant to the law in effect before the operative date of the UTSA. At that time, California used the Restatement definition of a trade secret, which was lengthy. See *Uribe v. Howie* (1971) 19 Cal.App.3d 194. Accordingly, it is not clear that the trade secret definition that applies generally under the UTSA is the trade secret definition that applies in the context of a public records request.

382 *Uribe v. Howie, supra*, 19 Cal.App.3d 194, 213.

383 Gov. Code, § 6254.2.

384 Gov. Code, § 6254.7.

385 Gov. Code, § 6254.15.

386 Gov. Code, § 6254, subd. (e).

Utility Customer Information

Personal information expressly protected from disclosure under the PRA includes names, credit histories, usage data, home addresses, and telephone numbers of local agencies' utility customers.³⁸⁷ This exception is not absolute, and customers' names, utility usage data, and home addresses may be disclosable under certain scenarios. For example, disclosure is required when requested by a customer's agent or authorized family member,³⁸⁸ or an officer or employee of another governmental agency when necessary for performance of official duties,³⁸⁹ by court order or request of a law enforcement agency relative to an ongoing investigation,³⁹⁰ when the local agency determines the customer used utility services in violation of utility policies,³⁹¹ or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.³⁹²

Utility customers who are local agency elected or appointed officials with authority to determine their agency's utilities usage policies have lesser protection of their personal information because their names and usage data are disclosable upon request.³⁹³

Public Interest Exemption

The PRA establishes a "public interest" or "catchall" exemption that permits local agencies to withhold a record if the agency can demonstrate that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.³⁹⁴ Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test.³⁹⁵ The PRA does not specifically identify the public interests that might be served by not making the record public under the public interest exemption, but the nature of those interests may be inferred from specific exemptions contained in the PRA. The scope of the public interest exemption is not limited to specific categories of information or established exemptions or privileges. Each request for records must be considered on the facts of the particular case in light of the competing public interests.³⁹⁶

The records and situations to which the public interest exemption may apply are open-ended and, when it applies, the public interest exemption alone is sufficient to justify nondisclosure of local agency records. The courts have relied exclusively on the public interest exemption to uphold nondisclosure of:

- Local agency records containing names, addresses, and phone numbers of airport noise complainants;
- Proposals to lease airport land prior to conclusion of lease negotiations;
- Information kept in a public defender's database about police officers; and
- Individual teacher test scores, identified by name, designed to measure each teacher's effect on student performance on standardized tests.³⁹⁷

The public interest exemption is versatile and flexible, in keeping with its purpose of addressing circumstances not foreseen by the Legislature. For example, in one case, the court held local agencies could properly consider the burden of segregating exempt

387 Gov. Code, § 6254.16.

388 Gov. Code, § 6554.16, subd. (a).

389 Gov. Code, § 6254.16, subd. (b).

390 Gov. Code, § 6254.16, subd. (c).

391 Gov. Code, § 6254.16, subd. (d).

392 Gov. Code, § 6254.16, subd. (f).

393 Gov. Code, § 6265.16, subd. (e).

394 Gov. Code, § 6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337–1339.

395 *CBS Broadcasting, Inc. v. Superior Court* 91 Cal.App.4th 892, 908.

396 *Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d 1325, 1338.

397 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065; *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001; *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222.

from nonexempt records when applying the balancing test under the public interest exemption.³⁹⁸ In that case, the court held that the substantial burden of redacting exempt information from law enforcement intelligence records outweighed the marginal and speculative benefit of disclosing the remaining nonexempt information. In another case, the court applied the balancing test to the time of disclosure to hold that public disclosure of competing proposals for leasing city airport property could properly await conclusion of the negotiation process.³⁹⁹

The requirement that the public interest in nondisclosure must “clearly outweigh” the public interest in disclosure for records to qualify as exempt under the public interest exemption is important and emphasized by the courts. Justifying nondisclosure under the public interest exemption demands a clear overbalance on the side of confidentiality.⁴⁰⁰ Close calls usually do not qualify for an exemption. There are a number of examples of cases where a clear overbalance was not present to support nondisclosure under the public interest exemption. The courts have held that the following are all subject to disclosure under the public interest exemption balancing test:

- The identities of individuals granted criminal conviction exemptions to work in licensed day care facilities and the facilities employing them;
- Records relating to unpaid state warrants;
- Court records of a settlement between the insurer for a school district and a minor sexual assault victim;
- Applications for concealed weapons permits;
- Letters appointing then rescinding an appointment to a local agency position;
- The identities and license agreements of purchasers of luxury suites in a university arena; and
- GIS base map information.⁴⁰¹

The public interest exemption balancing test weighs only public interests — the public interest in disclosure and the public interest in nondisclosure. Agency interests or requester interests that are not also public interests are not considered.⁴⁰² For example, the courts have held that the public’s interest in information regarding peace officers retained in a database by the public defender in the representation of its clients is slight, and the private interests of the requesters (the police officers listed in the database) were not to be considered in determining whether the database was exempt from disclosure.⁴⁰³

398 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

399 *Michaelis, Montanari & Johnson v. Superior Court, supra*, 38 Cal.4th 1065.

400 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 657.

401 *CBS Broadcasting Inc., v. Superior Court* (2001) 91 Cal.App.4th 892; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *Copley Press, Inc., v. Superior Court* (1998) 63 Cal.App.4th 367; *CBS, Inc. v. Block* (1986) 42 Cal.App.3d 646; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *California State University, Fresno Assn. v. Superior Court* (2001) 90 Cal.App.4th 810; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301. See also, the discussion of GIS information in Chapter 6 at page 51.

402 *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1015–1016.

403 *Id.*

