

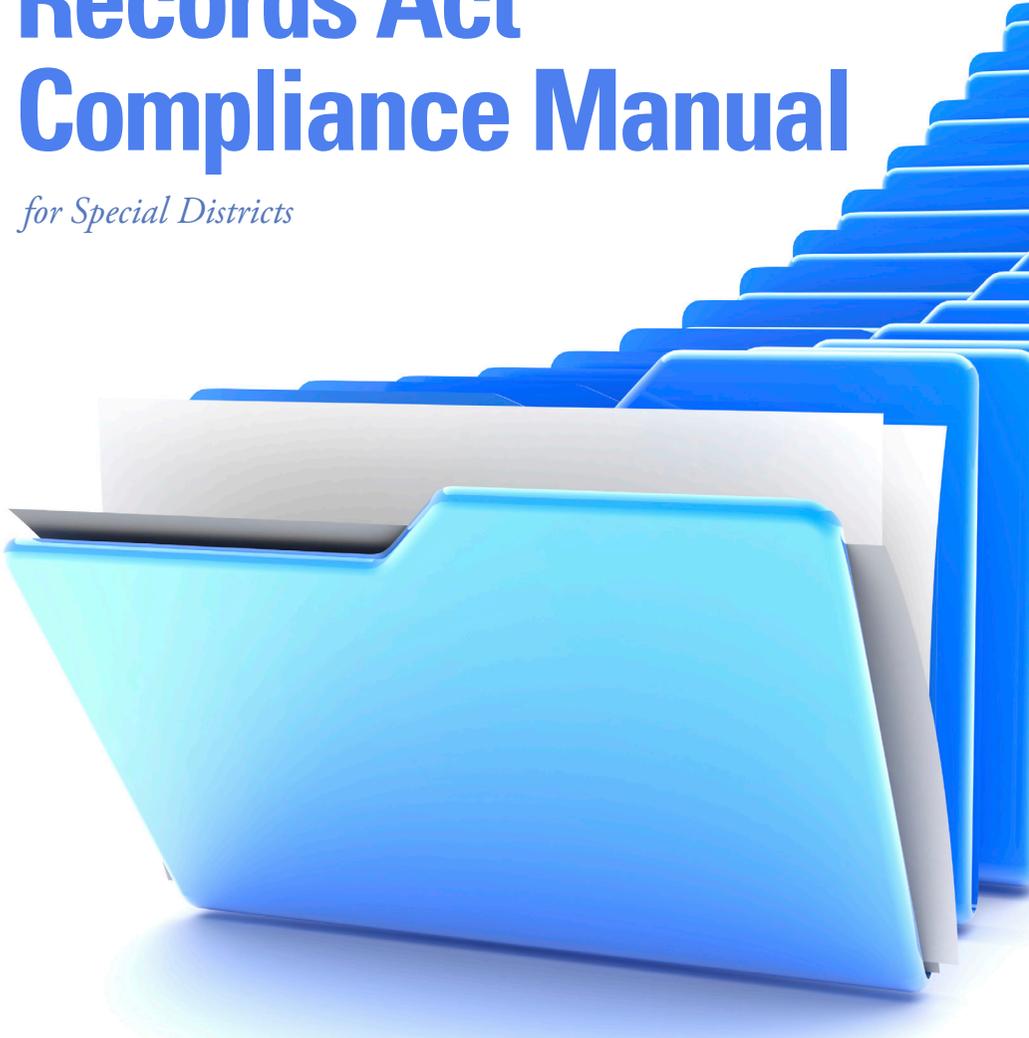


**California Special  
Districts Association**

*Districts Stronger Together*

# California Public Records Act Compliance Manual

*for Special Districts*





## Introduction

The California Public Records Act (CPRA) was originally enacted in 1968, and requires that governmental records be made accessible to the public upon request, unless otherwise exempted by law. This manual provides special districts with guidelines to fulfilling CPRA requests, including compliance tips for easy reference and a special section on disclosure of electronic records.

**Access to information concerning the conduct of the people's business by state and local agencies is a fundamental right of every person in California.**

This manual is a general summary of the CPRA as it applies to special districts and is not intended to provide legal advice on any specific CPRA request or issue. In addition, the statutory and case law summarized in this manual is subject to change. District staff should always seek the advice of agency legal counsel as to the application of the CPRA in a particular situation and to ascertain whether there have been recent changes to the CPRA by the Legislature or its interpretation by the courts.

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## Summary of the California Public Records Act<sup>1</sup>

Access to information concerning the conduct of the people's business by state and local agencies is a fundamental right of every person in California.<sup>2</sup> To ensure this right, the California Public Records Act ("CPRA")<sup>3</sup> gives every person the right to inspect any public record during a state or local agency's office hours.<sup>4</sup> If an agency receives a request to inspect an identifiable, disclosable record, the agency must promptly make the record available.<sup>5</sup> Requests for copies of identifiable, disclosable records must be responded to within prescribed periods and must also be promptly made available for anyone who pays the applicable agency duplication costs or the applicable statutory fee.<sup>6</sup> The agency must provide an exact copy unless it is impracticable to do so, although the agency must also redact any confidential or exempt information from the copy.<sup>7</sup> The CPRA covers requests for electronic and computer data; and public records that are stored in an electronic format must generally be made available in such electronic format if so requested.<sup>8</sup>

Although the fundamental precept of the CPRA is access to records, the CPRA exempts certain records from disclosure and requires agencies to keep certain other records confidential.<sup>9</sup>

**If an agency receives a request to inspect an identifiable, disclosable record, the agency must promptly make the record available.**

If an agency improperly withholds records, a member of the public may seek a court order to enforce the right to inspect or copy the records sought and may receive payment for court costs and attorney fees if such person prevails in the lawsuit.<sup>10</sup>

An agency may adopt regulations establishing procedures for requesting public records that allow for faster, more efficient, or greater access to records.<sup>11</sup>



Although the fundamental precept of the CPRA is access to records, the CPRA exempts certain records from disclosure and requires agencies to keep certain other records confidential.

## Application of CPRA to Special Districts

All special districts are subject to the CPRA, which refers to them as a “local agency.”<sup>12</sup> This includes all boards and commissions of a special district, including advisory boards. Private non-profit entities delegated legal authority by a district to carry out public functions are also subject to the CPRA if they are funded with public money.<sup>13</sup>

### ***Is a district required to adopt its own procedures or guidelines for complying with the CPRA?***

No, however, the adoption of local procedures consistent with the CPRA can be helpful in educating the public about the process.

### ***Can a district adopt guidelines or requirements that differ from the CPRA?***

Yes. The provisions of the CPRA are **minimum standards**.

Districts are free to adopt procedures that allow for faster or greater access to records than those prescribed in the CPRA.<sup>14</sup>



# Public Record Defined

The CPRA defines a “public record” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”<sup>15</sup>

## ***What constitutes a writing?***

A writing is defined as “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any form of communication or representation...and any record thereby created, regardless of the manner in which the record has been stored.”<sup>16</sup>

This definition is intended to cover every conceivable kind of record that is involved in the governmental process and pertains to any new form of record keeping instrument as it is developed. For example, information stored in an agency computer (e.g., email, spreadsheets, digital maps, etc.) is clearly included within the purview of a public record.<sup>17</sup>

## ***What constitutes retention of a writing?***

In order to be a public record, the agency must have the writing in its “possession,” which is generally understood to mean in the physical custody of the agency.<sup>18</sup> In many cases responsive records may be the possession of a district contractor. A reasonable search for requested records may require communication to such contractors to determine whether they are in possession of the requested records.<sup>19</sup>

## ***Is every writing in the custody of a public agency a public record under the CPRA?***

No. The mere custody or retention of a writing does not automatically make it a public record for the purposes of the CPRA. The key element is whether the writing is kept because it is necessary or convenient to the discharge of official duties.<sup>20</sup> Thus, items such as a shopping list or a letter to a public officer from a friend which is totally devoid of reference to governmental activities are not considered public records.<sup>21</sup>



### **Compliance Tip**

Some agencies have found it useful to adopt electronic records policies governing whether personal devices (computers, smart phones, etc.) may be used for agency business, and what records (for example emails, texts, etc.) and other attributes of the electronic information on such devices are considered “retained in the ordinary course of business” for purposes of the CPRA.

# Persons Who May Obtain Records

Any person or entity, including the media, for-profit businesses and other public entities, has the right to access public records.<sup>22</sup> The right to access records is not limited to persons who are constituents of a district. A person who lives in a different city, county or state can access district records under the CPRA.<sup>23</sup>

## ***Why does the CPRA make a distinction between “person” and “member of the public” in Section 6252?***

Under Section 6252(b) the definition of “member of the public” excludes “a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment.” This distinction is necessary because Section 6254.5 provides that an agency’s ability to consider a record confidential may be waived if that same record has already been disclosed to a “member of the public.” The distinction simply clarifies that a waiver will not occur if the record is shown to a government official acting in his or her official capacity.

## ***Do public officials have any special status in making CPRA requests?***

Generally, no. An elected member or officer of an agency is entitled to access to public records on the same basis as any other person. This means that the official must make a request under the CPRA and will only be given access to disclosable public records. One exception to this rule is for the District Attorney, who may not be denied access to certain investigative records that would otherwise be exempt.<sup>24</sup> Also, officials may access public records of their own agency that are otherwise exempt when authorized to do so as a part of their official duties.<sup>25</sup>

## ***Does the media or a person who is the subject of a public record have any special status in making CPRA requests?***

No. Neither the media nor a person who is the subject of a public record has any greater right of access to public records than a person with simply an “idle curiosity.”<sup>26</sup>



### **Compliance Tip**

A best practice is to inform incoming officials that they will only have special access to records to the extent necessary to carry out direction from the district’s board. For example, if they are appointed to the finance committee to review existing agreements, they will have access to those particular files. For all other records, the official must gain access in the same manner any member of the public would under the CPRA. Educating officials upfront helps manage their expectations and avoids issues down the road.



# Initial Agency Receipt and Review of Public Records Requests

## ***Types of requests.***

Members of the public may gain access to public records by (a) requesting to inspect records or (b) receiving a copy of identifiable records.<sup>27</sup>

## ***Manner of making requests.***

Public records requests may be made in writing (paper or electronic), and may be mailed, emailed, faxed, or personally delivered. Records requests may also be made orally, in person or by phone.

## ***Content of requests.***

A request need only indicate that a public record is sought and be focused enough to describe an existing, identifiable record. There is no duty under the CPRA to comply with requests that prospectively seek records (i.e., records that do not currently exist). Requests may describe writings by their content and do not require precise identification of the documents themselves.<sup>29</sup>



### **Compliance Tip**

The CPRA pertains to records and not “questions” that members of the public may have. The CPRA does not impose a duty to respond to questions, although if an identifiable record would answer a question or the information can readily be provided, the best transparency practice is to provide the record or answer the question.



### **Compliance Tip**

Although the CPRA does not require that request be in writing,<sup>28</sup> districts should, to the extent possible, insist that requests be in writing or provided on a district-developed form in order to identify the information sought, the date of the request, and to obtain contact information on the requester if necessary to seek clarification or to provide follow-up assistance. If a requester refuses, a member of the district should fill out a form on behalf of the requesting party to maintain consistent recordkeeping practices.

# Initial Agency Receipt and Review of Public Records Requests (continued)

## ***What happens if a records request is vague?***

If there is a question about the clarity of the request, the district must assist the member of the public to make a focused and effective request by doing all of the following, to the extent reasonable under the circumstances:

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request;
2. Describe the information technology and physical location in which the records exist; and
3. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.<sup>30</sup>

## ***When has a district helped enough in clarifying a request?***

A district has met its obligation to assist a requester if:

1. It is unable to identify the requested information after making a reasonable effort to elicit additional clarifying

information from the requester to help identify the records;

2. The records are made available;
3. The district determines an exemption applies; or
4. The district makes available an index of its records.<sup>31</sup>

## ***Does the purpose of the request make a difference?***

Generally, no. The purpose of the request is generally irrelevant.<sup>32</sup> Thus, requests by a commercial entity solely for commercial purposes, does not diminish the public interest inherent in the material requested.<sup>33</sup> As such, a district cannot condition disclosure on the requester providing a purpose for the records. However, courts have cautioned the public that the purpose of the CPRA is not primarily for facilitating research.<sup>34</sup> Moreover, understanding the purpose of the request can often facilitate retrieval of the records by narrowing or expanding the list of potential responsive records.



### **Compliance Tip**

It is permissible, and can be helpful where a request is vague, to inquire as to the purpose of the request, which may help narrow the focus of the request.



### **Compliance Tip**

Many members of the public are not adept at making a records request. If there is any uncertainty as what records the requester is seeking, seek clarification immediately by calling or writing the requester. It could save considerable time in identifying the responsive records actually desired.

# District Obligations to Search for Public Records

## ***Reasonable effort to search for records.***

A district must make a reasonable effort to search for requested records.<sup>35</sup> The CPRA does not establish a specific test, but in general, a request should be referred for review and a response to the department, office, or person(s) most likely to be in possession of a record based on the general subject matter of the request.

## ***Does it make a difference if a request involves searching for or the production of a huge volume of data?***

Generally, no. The cost of complying with a request is generally not a sufficient ground for refusing to respond to a request.<sup>36</sup> On the other hand, a voluminous request or a search that requires looking for the proverbial “needle in the haystack” may constitute an

undue burden under the balancing test of Section 6255, if the public interest served by the request is minimal compared to the scarce public resources necessary to comply with the request.<sup>37</sup>

## ***Is a district required to create a document or compile a list in response to a CPRA request?***

Generally, no. A district’s obligation is to make records available that are responsive to a request, not to create documents or to compile lists that otherwise do not exist. One exception to this rule is with respect to the extraction of information from electronic records provided that the requester pays the reasonable cost of the necessary programming and computer services.<sup>38</sup>



### **Compliance Tip**

Where a request may be onerous or voluminous, consider asking the requester to modify the request (e.g., by reducing the time frame or scope of the request). While a requester is under no obligation to do so, many requesters are amenable to suggestions, particularly if they understand that producing a smaller sampling of records may help them refine subsequent requests. Be sure to note in writing when a request has been voluntarily modified.



### **Compliance Tip**

Although the CPRA creates no duty to answer specific questions or compile lists, if the information can readily be compiled, sometimes it may save a district time and money to simply create a document with the responsive information instead of monitoring the inspection or providing copies of responsive records. When a district creates a record or responds to a question rather than producing existing records, consider noting that this was done as a reasonable accommodation under unique circumstances and clarifying that the district was under no obligation to do so. This should help manage a requester’s expectations should they make additional requests.



## Time Periods to Respond to Requests

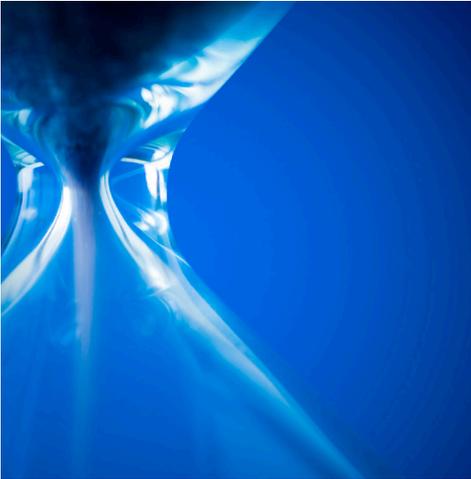
### ***10-day initial response to requests for copies of records.***

A district must determine within 10 calendar days starting after the date of receipt of a request whether the request seeks copies of identifiable public records that may be disclosed and must promptly notify the requester of this determination. If the request is received after business hours or on a weekend or holiday, the next business day may be considered the date of receipt. Similarly, if the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request. If there are identifiable public records, then the determination must state the estimated time and date when records may be available for inspection or copying.<sup>39</sup>

### ***Extension of initial response time for copy requests.***

In unusual circumstances, the time limit to initially respond may be extended by written notice from the head of a district or his or her designee to the person making the request setting forth the reasons for the extension and the date on which a determination is expected to be made. No such notice may specify a date that would result in an extension of more than 14 days. "Unusual circumstances" include (a) the need to search for records in field facilities or separate offices, (b) the need to search through a voluminous amount of records, (c) the need to consult with another agency with a substantial interest in the record, and (d) the need to compile data or to create a computer program to extract the data.<sup>40</sup>

A district must determine within 10 calendar days starting after the date of receipt of a request whether the request seeks copies of identifiable public records that may be disclosed and must promptly notify the requester of this determination.



***Timing of response to requests to inspect records.***

The CPRA does not establish any time frame for responding to requests to simply inspect records. It is generally assumed, however, that a district may either utilize the same time periods for requests for copies to respond to inspection requests or is afforded at least a reasonable period of time to identify, retrieve and review requested records prior to disclosing them for inspection.

***Time period for disclosing a record.***

The 10-day initial response and 14-day extension are the time periods for notifying a requester as to whether the district has public records in its possession that are responsive to a

request. The CPRA does not require that records actually be produced within these time periods. However, the CPRA does require that records be made available “promptly” once a determination has been made that the district retains records that are responsive to a request.<sup>41</sup>

***When may records be inspected at the district?***

Once a district has had a reasonable period of time to identify, retrieve and review requested records, the responsive records so identified should be made available for inspection “at all times during the office hours” of the district.<sup>42</sup>



**Compliance Tip**

If there are legitimate, extenuating circumstances other than the three “unusual circumstances” described in Section 6253(c) that preclude a district from fully responding to a request within these time periods (e.g., a computer shut down, or a key employee is absent during the response time), the district should attempt to obtain an extension from the requester after describing the circumstances and offering to provide the records that have been identified up to that point, if any.



## Permissible Responses to Requests

After conducting a reasonable search for requested records, a district has a limited number of potential responses. If the search yields no responsive records, the district must inform the requester. If the district locates a responsive record, it must determine whether to: (a) disclose the record; (b) disclose the record in redacted form; or (c) withhold the record.

If the district does not have the record, or has decided to disclose it in redacted form or withhold the record, the district must respond in writing and identify the name and title of each official responsible for the decision. If access to a record is denied in whole or in part, the denial notification must cite the specific exemption under the CPRA or other state or federal law, and, if applicable, demonstrate that on balance, there is a predominant public interest in non-disclosure under Section 6255.<sup>43</sup>



Writings subject to inspection include electronically stored information (e.g., email); however, the CPRA is silent on how the inspection of such information must be accommodated.

## Rules Regarding the Inspection of Records

### ***May a district impose reasonable restrictions on the time and manner of inspection?***

Yes. The right of inspection is not an inflexible demand on the district irrespective of the consequences. There is an implied rule of reason that enables a district to formulate regulations necessary to protect the safety of the records against theft, mutilation, or accidental damage, to prevent inspection from interfering with the orderly function of the district's office and its employees, and generally to avoid chaos in record archives.<sup>44</sup>

### ***Reasonable inspection regulations may include:***

1. A mutually agreeable time for the inspection during district office hours to minimize impacts on and interference with staff and their duties or the use of the records requested.
2. Requiring proof of the identity of the requester.
3. Staff monitoring of the inspection.



### ***How can the public inspect computer records?***

Writings subject to inspection include electronically stored information (e.g., email); however, the CPRA is silent on how the inspection of such information must be accommodated. Transferring such electronic records to a standalone computer at the offices of the district for viewing is one possible response.



## Special Rules for the Disclosure of Electronic Records

### ***What special rules apply to electronic records?***

1. In general, an electronic record must be provided to a requester in an electronic format when so requested if the requested format is one that has been used by the district to make a copy for its own use.<sup>45</sup>
2. The cost of duplication is limited to the direct cost of producing a copy of a record in an electronic format (e.g., the cost of the disk, thumb drive or other electronic storage device).<sup>46</sup>
3. A requester bears the cost of producing a copy of the record, including cost to construct a record, and the cost of programming and computer services whenever:
  - a. The record is produced only at otherwise regularly scheduled intervals.
  - b. The request requires data compilation, extraction, or programming to produce the record.<sup>47</sup>
4. If a record does not exist in electronic format, a district is not required to produce an electronic version of the record.<sup>48</sup>
5. If a requester requests a paper copy of an electronic record, a district cannot insist on making records available only in an electronic format.<sup>49</sup>



**Metadata generally does not appear in the text but is still embedded in the document. Such metadata may include information that a district may have a right, and, in some cases, a duty to withhold.**

***In what format must a copy of an electronic record be provided? (The issue of hidden data: Word vs. PDF.)***

At first glance, Section 6253.9(a) appears to be straightforward in its requirements:

- (1) The agency shall make the information available in any electronic format in which it holds the information.*
- (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.*

As such, if a district has a document in Word format, there appears to be a presumption in the CPRA that the record must be provided to the requester in Word. However, a district should consider what other information might be embedded in such a Word document. Word documents contain “metadata” – data about data. In this context, it is information that is generated by the software program when the document is created, viewed, copied, edited, printed, stored, or transmitted. Metadata generally does not appear in the text but is still embedded in the document. Such metadata may include information that a district may have a right, and, in some cases, a duty to withhold.

Some examples are:

***Preliminary drafts or deliberative information.*** Many records undergo editing by the drafter or other colleagues and supervisors, and thus reflect the author’s and district’s thought process. Such information could be exempt from disclosure under Section 6254(a) [preliminary drafts, memos] or under Section 6255(a) [deliberative process privilege].

***Privacy rights.*** Earlier versions of a document may include sensitive personal information such as home addresses, Social Security numbers, medical or financial information, etc. Such information could be exempt from disclosure under Article I, Section 1 of the California Constitution, Section 6254(c) [personnel, medical and other files], and under Section 6254(f) [investigatory files].

***Attorney-client privilege.*** A record may contain communications, edits, or changes made based on confidential communication between district staff and its attorneys. Such information could be exempt from disclosure under Section 6254(k).

There is no requirement to release an electronic record if its release would jeopardize or compromise the security or integrity of the original record or of

## Special Rules for the Disclosure of Electronic Records (continued)

any proprietary software. Examples of this include records created with proprietary software – the code of which could be revealed through disclosure, or even the possibility that the records could be manipulated or altered from the original text.<sup>50</sup>

### ***In what format must a copy of a public record be posted on a district website or other Internet resource.***

Under Section 6253.10, if a district maintains an “Internet Resource,” (e.g., an Internet website, Internet webpage, or Internet web portal), which the district describes or titles

as “open data,” and the district voluntarily posts a public record on that Internet resource, the district must post the public record in an open format that meets all of the following requirements: (a) retrievable, downloadable, indexable, and electronically searchable by commonly used Internet search applications; (b) platform independent and machine readable; (c) available to the public free of charge and without any restriction that would impede the reuse or redistribution of the public record; and (d) retains the data definitions and structure present when the data was compiled, if applicable.<sup>53</sup>



### **Compliance Tip**

The format in which an electronic record is maintained should be carefully reviewed and considered before such record is released in an electronic format. In light of concerns and potential inadvertent disclosures arising from metadata, agencies should consider providing electronic records in PDF format. PDF, which stands for “Portable Document Format,” is essentially a picture of a document that contains no embedded metadata. Arguments in support of providing electronic records in PDF format include: (1) the ability to segregate exempt portions of records under Section 6253(a); (2) the burden that would be imposed on a district if it also had to review all metadata in an electronic record under Section 6255; and (3) the judicially created implied rule of reason. Nevertheless, whether such a response is appropriate under the CPRA remains an open issue.



### **Compliance Tip**

District developed “computer software” (including computer mapping systems, programs, and graphic systems) are not considered public records and are therefore exempt from disclosure.<sup>51</sup> However, the computer software exemption cannot be used expansively to exempt base maps and GIS-formatted databases created by the computer software.<sup>52</sup>

# Charges For Copies of Records

Except with respect to the costs of copying records or compiling and programming electronic records, the public records process is largely cost-free to the requester. No fees may be charged to reimburse district costs incurred to search, review, redact, or respond to a request, including staff time to monitor the inspection of records.<sup>54</sup>

## ***Permissible copying charges.***

A district may charge a requester the direct costs of duplication or a statutory fee, if applicable, for copies of public records.

1. Direct costs of duplication means the cost of running the copying machine or scanner and conceivably also the expense of the person operating it. It does not include staff time associated with the ancillary tasks of retrieval (including from off-site storage), inspection, or redacting the record.<sup>55</sup>
2. A statutory fee is one expressly established pursuant to a federal or state statute and not a district ordinance or resolution. For example, the Government Code establishes a retrieval fee of no more than \$5.00 and a copy fee of no more than \$.10 per page for copies of an official's or employee's FPPC Form 700 Statement of Economic Interests.<sup>56</sup>



## **Compliance Tips**

Under Proposition 26,<sup>57</sup> a district must be able to justify that the cost of its copying fees reflect the actual duplication costs. As a result, a district should consider preparing a cost study to identify the appropriate fee. Alternatively, the district can set the fee to a value that is below the actual duplication cost.

A district may delay copying records until the requester pays the district's approved copying charge or any applicable statutory fee. To that end, a district should provide the requester with an estimate of the cost of copying the records and ask for a deposit of that amount before proceeding with any copying, particularly with respect to voluminous requests. An alternative procedure for large copying jobs is to require the requester to use a mobile copying service.<sup>58</sup>

The CPRA does not address whether a district may charge a requester for mailing or delivering copies of records to a location other than the district's office. Presumably it can because the district's duty only extends to making copies "available" (i.e., at the district's office) to the requester under Section 6253(b).<sup>59</sup>

# Exemptions From Disclosure

## ***How should the district respond if there is an applicable exemption?***

If a record falls within one of the exemptions listed in the CPRA, or is withheld because the public interest in nondisclosure clearly outweighs the public interest in disclosure, the district must notify the requester of the reasons for withholding the record, but is not required to provide a list or “privilege log” of each record withheld.<sup>60</sup>

## ***What if only part of a record is exempt from disclosure?***

If only part of a record is exempt from disclosure, the district must redact (line out) the document to allow disclosure of the non-exempt portions of the record.<sup>61</sup>

## ***What are the general categories of exemptions?***

There are three general categories of exemptions:

1. Express exemptions. These exemptions are specifically identified in the CPRA.
2. Information that is confidential or

privileged under other law. Pre-existing privileges or protections recognized in other law (e.g., the attorney-client privilege and attorney work product privilege) are incorporated by reference into the CPRA as an express exemption.<sup>62</sup>

3. Balancing test. The CPRA contains a catch-all provision that weighs whether the public interest served by not disclosing a record clearly outweighs the public interest served by disclosure of the record.<sup>63</sup>

## ***May a district disclose a record listed as exempt in the CPRA?***

Generally, yes. Most exemptions are discretionary. Unless there is a clear statutory prohibition in the CPRA or under other law, a district is allowed to give more extensive access even though an exemption may be asserted.



### **Compliance Tip**

A district should keep copies of records that are not disclosed because in the event of a legal challenge, the district will need to show the court that the records withheld actually fell within the exemption relied upon.



### **Compliance Tip**

The fact that it is time-consuming to redact a record does not eliminate the need to do so, unless the resulting redacted record would be of little value to the requester.



**The draft/memo exemption is based on the policy of protecting the decision making process, particularly legal and policy matters that might otherwise be inhibited.**

### **Can there be selective disclosure?**

No. If a record is disclosed to a “member of the public” – a person with no particular official role or special legal entitlement to it – that record cannot be withheld from other members of the public.

There are some exemptions from the selective disclosure prohibition, however, such as disclosures made pursuant to the Information Practices Act,<sup>64</sup> and disclosures made to another governmental agency that agrees to treat the records as confidential.<sup>65</sup>

### **What exemptions are most relevant to special districts?**<sup>66</sup>

1. Preliminary and temporary drafts, notes and memoranda.
2. Pending litigation documents.
3. Private personal information.
4. Investigative, security, and intelligence information.
5. Privileged and otherwise confidential information.
6. The public interest balancing test.

### **Preliminary drafts and memoranda.**<sup>68</sup>

The draft/memo exemption is based on the policy of protecting the decision making process, particularly legal and policy matters that might otherwise be inhibited. In general, it applies to documents that are “pre-decisional” or “deliberative” (i.e., the contents contribute to the reaching of some administrative or executive determination). The key question is whether the disclosure of the materials would expose a district’s decision-making process in such a way as to discourage candid discussion within the district and thereby undermine the district’s ability to perform its functions.<sup>69</sup> Documents that only contain factual information such as preliminary grading plans do not fall under this exemption.<sup>70</sup>

Records that qualify for the “draft” exception must:

1. be a preliminary draft, note, or memorandum;
2. not be customarily retained “in the ordinary course of business;” **and**
3. the public interest in withholding the record must clearly outweigh the public interest in disclosure.<sup>71</sup>



### **Compliance Tip**

CPRA exemptions are narrowly construed, and a district opposing disclosure bears the burden of proving that one or more exemptions apply in a particular case.<sup>67</sup>



### **Compliance Tip**

Not all drafts are exempt. If a district retains drafts of a document even after the final version is completed, then those drafts are being retained by the public agency in the ordinary course of business and therefore are not true preliminary drafts under this exemption. These drafts may be exempt on another basis, however.

## Exemptions From Disclosure (continued)

### ***Pending litigation records.***<sup>72</sup>

In general, this exemption only applies to documents (1) created by the district, (2) after the commencement of the litigation, (3) for the district's use in the litigation. It does not apply to records that were created in the ordinary course of the district's business or for other purposes prior to the litigation. Records that would not be exempt under this definition include:

- A claim form filed under the Government Claims Act.
- A deposition transcript ordered by the agency, unless there are some other applicable confidential or privilege exemption.<sup>73</sup>

This exemption has been extended to litigation documents sought by persons not party to the litigation, which documents the parties to the litigation did not intend to be revealed outside of the litigation (e.g., letters from the litigant's attorney to the agency's attorney).<sup>75</sup>

Once the litigation is concluded, the exemption no longer applies. However, the attorney-client privilege may be ongoing and may provide an alternative basis for nondisclosure.

### ***Personnel, medical or similar records.***<sup>76</sup>

#### ***1. What records are exempt?***

- a. The personnel files of a public agency's own employees.
- b. Records of other persons for whom an agency maintains personally significant information.

#### ***2. Are all records in a personnel file exempt?***

No. The fact that information is in a personnel file does not necessarily make it exempt information. For example, the kind of information that would be included in a resume, curriculum vitae or job application which demonstrate a person's fitness for his or her job in terms of education, training or work experience ordinarily are not exempt from disclosure.<sup>77</sup>



### **Compliance Tip**

In order for this exemption to apply, a district must be able to prove that the primary purpose of the record was for use in the defense of litigation.<sup>74</sup>



### **Compliance Tip**

Settlement agreements must be disclosed if requested, including all monetary and other terms of the settlement.

The personnel exemption was developed to protect intimate details of personal and family life, not business judgments and relationships.<sup>78</sup> With some exceptions, employees may request and obtain their own personnel file.<sup>79</sup> Employee performance evaluations and personal performance goals are considered exempt.<sup>80</sup>

**3. *What kind of information about government job applicants is public?***

No court has yet directly addressed this question; however, the privacy interests of an applicant against disclosure, especially if the applicant has not been hired and has asked for, or applied upon assurances of, the confidential treatment normally accorded such processes, probably outweigh the public interest in disclosure.

**4. *What kind of information about a current employee's job status is public?***

Letters or memoranda of a public employee's appointment to a position, rescission, reclassification, etc., are not exempt. They contain no personal information, regard business transactions and are manifested in the public employee's employment terms.

Employment contracts for public officials and employees are public records and are not exempt under the provisions of Sections 6254 and 6255.<sup>81</sup>

In general, public employees do not have a reasonable expectation

of privacy in their names, salary information, and dates of employment.<sup>82</sup> The public has a strong interest in knowing how the government spends its money, and as such, public employees (including retirees) should have reduced expectations of privacy with respect to their public salary and compensation.<sup>83</sup>

**5. *What information about a government employee's misconduct is public?***

Complaints against the conduct of public employees, if they are submitted in confidence are probably protected from disclosure by the official information privilege under Evidence Code section 1040 in order to protect the interests of the complaining party. The public interest dictates disclosure of complaints against non-law enforcement personnel, however, if the complaint deals with serious matters, and (a) is confirmed by the district's investigation, or (b) there is reasonable cause to believe the complaint is well founded.<sup>84</sup>



**Compliance Tip**

Elected and appointed officials' home addresses and telephone numbers are considered private and may not be posted on the district's website without the official's express written permission.<sup>85</sup>

## Exemptions From Disclosure (continued)

### **Law enforcement investigation and intelligence records.**<sup>86</sup>

This exemption generally protects crime reports, investigative files, intelligence files and security procedures, including records of code enforcement cases for which criminal sanctions are sought. Once the investigatory exemption applies, it applies indefinitely, even after the investigation is closed.<sup>87</sup>

### **Privileged, confidential or otherwise exempt records.**<sup>88</sup>

**Mini-catchall exemption.** Subsection 6254(k) is sort of a mini-catchall exemption in that it exempts from disclosure records that are prohibited or otherwise exempt from disclosure under federal or state law. This includes records that are privileged under the California Evidence Code, the attorney-client privilege, attorney work product privilege, and the extensive list of exempt records set forth in Sections 6275 – 6276.48. It also includes the copying of architectural plans and drawings protected by federal copyright law and state law without permission of the professional who signed the plans or the owner of the documents and the owner of the building.<sup>89</sup>

**The attorney-client privilege.** The attorney-client privilege preserves the confidential relationship between attorney and client. Unlike other exemptions which are narrowly construed, 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 representing such client, including factual information and other information not in itself privileged outside of attorney-client communications.<sup>90</sup> Attorney-client privileged information remains protected from disclosure after litigation is concluded, unlike the pending litigation exemption.

### **The public interest exemption.**<sup>91</sup>

Public agencies and officials also have some rights of privacy. Based on the facts of a particular situation, a district may withhold a record if it can demonstrate the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

### **The deliberative process exemption.**

Over the years, a judicially created exemption has been developed that protects certain contacts or communications between public officials and with the public. This privilege is



#### **Compliance Tip**

The amounts paid to attorneys by a district are not protected by the attorney-client privilege.

based on the policy of protecting the decision-making process, and the recognition that public officials need to have access to a range of opinions and points of view and to discuss matters in confidence before making a decision or taking action. The key question is whether disclosure of the records would discourage candid discussion and ultimately undermine an agency's ability to perform its functions. Examples include:

1. A request for five years' worth of information from the governor's appointment calendars was barred by Section 6255, because such scrutiny would interfere with the governor's deliberative processes and deter members of the public from conferring with him without bestowing any overriding benefit on the public.<sup>92</sup>
2. The phone numbers dialed by city council members on official business over a year's time was found exempt.<sup>93</sup>
3. The names and qualifications of applicants for appointment to a vacant county supervisor seat were found exempt.<sup>94</sup>

***In what other situations has the public interest favored nondisclosure?***

1. Public interest in an agency obtaining the most favorable result in contract negotiations outweighs disclosure of proposals before contract negotiations are completed, but before final

approval of contract, in order to ensure compliance with contracting procedures.<sup>95</sup>

2. Public interest in preventing chilling effect on complaints and protecting privacy outweighs disclosure of identities of complainants regarding airport noise.<sup>96</sup>
3. Public interest in preventing regulated businesses from circumventing effective compliance investigations by obtaining auditors' procedural manuals outweighs any public interest in disclosure of the manuals.<sup>97</sup>

***In what situations has the public interest in disclosure outweighed government or privacy interests?***

1. Disclosure of the names of officers involved in shootings outweighs concerns of potential retaliation or harassment of the officers and their families, unless there is a showing of a specific safety concern such as revealing an officer's undercover identity.<sup>98</sup>
2. Disclosure of gross salaries of public agency employees who earned at least \$100,000 that would contribute to the public's understanding and oversight of government operations outweighs potential privacy concerns of individuals, including potential commercial exploitation of list.<sup>99</sup>
3. Disclosure of personnel records where grounds for complaint against employee are well-founded. A finding of the truth of the complaint

## Exemptions From Disclosure (continued)

- contained in the personnel records or the imposition of employee discipline is not a prerequisite to disclosure.<sup>100</sup>
4. Disclosure of license agreements (including names and addresses) of persons purchasing luxury suites at sports arena outweighs privacy concerns of persons who purchased the suites.<sup>101</sup>
  5. Disclosure of a list of convicted criminals who received an exemption from the Department of Social Services to work in licensed day care facilities outweighs potential privacy concerns of those individuals because the public has a right to review how a government conducts business, and whether such licenses are issued properly.<sup>101</sup>
  6. Monitoring effectiveness of water rationing program outweighs water district's interest in protecting reputations of those given citations for exceeding water allocation.<sup>103</sup>
  7. Monitoring how public funds are spent outweighs county's interest in keeping settlements confidential to discourage unmeritorious claims.<sup>104</sup>
  8. Confirming facts surrounding questioned personnel practices outweighs city's interest in encouraging individuals to apply for municipal employment, where requested information is not a matter of personal privacy.<sup>105</sup>
  9. Monitoring city's contracting for services and regulation of contractor's fees charged to residents outweighs city's interest in encouraging contractors to submit proprietary information justifying the need for rate increases.<sup>106</sup>
  10. Monitoring regulation of the application of dangerous pesticides outweighs applicators' proprietary interests in spray report data and county concerns that reports would not be candid if disclosed.<sup>107</sup>

### ***Homeland security exemptions.***<sup>108</sup>

These exemptions apply to agency assessments of vulnerability to a terrorist attack or other criminal acts, as well as critical infrastructure information associated with such assessments.



### **Compliance Tip**

These post 9/11 amendments did not clearly address the extent to which public records pertaining to the planning and implementation of a vulnerability assessment are exempt, but given the strong government interest in implementing such assessments, it is fair to assume that many such details may remain confidential other than the costs of such work.



### ***More exemptions.***

Other CPRA exemptions relevant to special districts include:

- voter registration information;<sup>109</sup>
- signatures on petitions for initiatives, referenda and recall;<sup>110</sup>
- real estate appraisals prior to conclusion of property acquisition;<sup>111</sup>
- income tax information on most individuals and businesses;<sup>112</sup>
- trade secrets and proprietary information; and<sup>113</sup>
- utility customer information.<sup>114</sup>

### ***Waiver of exemptions.***

Under Section 6254.5, if a public agency member, agent, officer or employee acting within the scope of his or her responsibilities discloses a public record, such disclosure waives the exemption of Sections 6254, 6254.7 or similar provisions of law.

However, Section 6254.5 sets forth a number of circumstances where disclosure will not result in a waiver. These include disclosures made: (a) under the Information Practices Act or through discovery; (b) in legal proceedings or as otherwise required by law; (c) within the scope of disclosure under other statutory schemes; (d) contrary to formal action of the legislative body that retains the record and the disclosure is not otherwise required by law; and (e) to any governmental agency that agrees to treat the disclosed material as confidential.

If a disclosure occurs by mistake or through inadvertence, an agency may take the position that the disclosure of an otherwise exempt public record does not constitute a waiver under Section 6254.5.<sup>115</sup>

# Enforcing the CPRA

## ***What happens if a district fails to properly respond to a CPRA request?***

The ultimate legal leverage for obtaining records under the CPRA is a civil action to obtain a court order for their release. There is no criminal sanction for simply refusing to provide records to a requester, although it is a felony to destroy public records.<sup>116</sup>

## ***Can a district preemptively go to court and have a record declared nondisclosable?***

No. The litigation initiative is always with the requester. A public agency may not go to court on its own to obtain a declaratory judgment that a record is not subject to disclosure because such litigation would be a burden on the public seeking the information.<sup>117</sup>

## ***If a district denies access to records, must the requester appeal to some higher authority in the district before taking legal action?***

No. Once a requester has been denied access to records it is not necessary to seek administrative review prior to going to court.

## ***What is the legal process for a requester seeking to enforce the CPRA?***<sup>118</sup>

1. The requester must file a verified petition in the superior court of the county where the records are situated and are being withheld.
2. The court will establish an expedited trial schedule with the object of securing a decision as the earliest possible time.
3. The court may order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.
4. The withheld record(s) may be disclosed “in camera” (i.e., in the judge’s chambers) to preserve confidentiality until a final decision is made.
5. The judge will decide the case after examining the record(s), reviewing all papers filed by the parties, and listening to any oral argument or additional evidence as the judge may allow.
6. If the judge finds the decision to refuse disclosure is not justified under the applicable exemption, the judge will order the public official to make the record public.
7. If the judge determines that the public official was justified in refusing to make the record public, the judge will return the item to the public official without disclosing its contents with an order supporting the decision refusing disclosure.
8. The review of the decision of a superior court judge is by petition to the court of appeal for the issuance of an extraordinary writ against the superior court. (This is why the “Superior Court” is named as the respondent in many CPRA appellate decisions.) Such an appeal must be sought within 20 days of the trial judge’s order or such further time not to exceed 20 more days.

9. If a party wishes to prevent the disclosure of public records pending appellate review, that party must ask for a stay of the order or judgment.

### **Costs and attorney fees.**

The CPRA mandates that a court award costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in the litigation. A plaintiff prevails when he or she files an action which results in the defendant agency releasing a copy of a previously withheld document. Prevailing on access to just one disputed record may be sufficient to justify an award of attorney fees.<sup>119</sup>

A court may award court costs and reasonable attorney fees to the public agency only if the court finds that the plaintiff's case is clearly frivolous.<sup>122</sup> However, obtaining such fees against the plaintiff is difficult unless the court finds that the case is "utterly devoid of merit or [caused] by an improper motive" such as an intent to harass the agency.<sup>123</sup> In other words, a court must determine that "any reasonable attorney" would agree that the request is "totally without merit."<sup>124</sup>



### **Compliance Tip**

An award of attorney fees may depend on a court's determination of whether the litigation caused the agency to disclose documents. Courts may consider a timely effort to respond to a vague document request as proof that litigation did not cause any disclosure.<sup>120</sup> In contrast, courts may also consider an agency's lack of diligence in determining whether the litigation caused the agency's compliance with the CPRA.<sup>121</sup>



## Conclusion

While the general precept of the CPRA –access to public records – appears straightforward, as demonstrated in the prior sections, compliance is not always that simple. The following are some general tips to help district staff negotiate the intricacies of the law:

1. Adopt a local policy and guidelines to ensure consistent procedures.
2. Document the date of receipt of requests.
3. Route the request to the district’s designated employee for CPRA compliance, who in turn should notify all affected departments and employees.
4. Early retrieval and review of records allows time for an appropriate response.
5. If the purpose or scope of the request is unclear, contact the requester to find out what information is really needed.
6. The fact that a request is burdensome and requires a lot of staff time and effort is not a valid basis for denial.
7. If the request is for a record in an electronic format, ensure that the disclosure will not compromise the security of any proprietary software or contain metadata that may be exempt or privileged from disclosure.
8. Refer questioned items to the district’s legal counsel.
9. Respond timely to requests.
10. If a denial is made, identify in writing the appropriate exemption or privilege.
11. Do not overcharge for copies.
12. Treat difficult and repetitive requests professionally.



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## Endnotes

1. This manual is a general summary of the CPRA as it applies to special districts and is not intended to provide legal advice on any specific CPRA request or issue. In addition, the statutory and case law summarized in this manual is subject to change. District staff should always seek the advice of agency legal counsel as to the application of the CPRA in a particular situation and to ascertain whether there have been recent changes to the CPRA by the Legislature or its interpretation by the courts.
2. Cal. Const., art. I, §3(b).
3. Gov. Code §§6250-6276.48. Unless otherwise noted, all subsequent references are to the Government Code.
4. §6253(a).
5. §6253(b).
6. §6253(c).
7. §§6253(a) and (b).
8. §§6252(g), 6254.9(d), 6253.9.
9. See §6254 and following.
10. §§6258 and 6259.
11. §§6253(e), 6253.4.
12. §6252(a).
13. See Op. Cal. Atty. Gen. No. 01-401 (2002). The Attorney General Opinions referred to in this manual may be obtained online at: <https://oag.ca.gov/opinions/search>.
14. §6253(e).
15. §6252(e).
16. §6252(g).
17. §6254.9(d); see *California State University v. Superior Court* (2001) 90 Cal.App.4th 810.
18. §6253(c).
19. §6253.3; See *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385.
20. *California State University v. Superior Court* (2001) 90 Cal. App.4th 810.
21. *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762; *California State University v. Superior Court* (2001) 90 Cal. App.4th 810.
22. §6253; *Los Angeles Unified School District v. Superior Court* (2007) 151 Cal.App.4th 759 [public agencies are considered "persons" under the CPRA].

23. *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.
24. See §§6262, 6264, and 6265.
25. *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271; *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App. 661.
26. *Marylander v. Superior Court* (2002) 81 Cal.App.4th 1119.
27. §6253.
28. *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.
29. *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.
30. §6253.1.
31. §6253.1.
32. §6257.5; *California State University v. Superior Court* (2001) 90 Cal.App.4th 810.
33. *Connell v. Superior Court* (1999) 56 Cal.App.4th 601.
34. *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.
35. *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177.
36. See *CBS Broadcasting, Inc. v. Superior Court* (2001) 91 Cal.App.4th 892 [estimated cost of over \$43,000 to respond to request did not justify refusal to provide identifiable records].
37. See *American Civil Liberties Union Foundation of Northern Cal. v. Deukmejian* (1982) 32 Cal.3d 440. [where redaction of 100 crime-related index cards would be onerous and the value of the redacted records would be minimal, nondisclosure was justified].
38. §6253.9(b).
39. §6253(c).
40. §6253(c).
41. §6253(b).
42. §6253.
43. §6253(d).
44. *Bruce v. Gregory* (1967) 65 Cal.2d 666.
45. §6253.9(a).
46. §6253.9(a)(2).
47. §6253.9(b).
48. §6253.9(c).
49. §6253.9(e).
50. §6253.9(f).
51. §6254.9.
52. *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.
53. See Assembly Bill (AB) 169 signed by the Governor on October 10, 2015.
54. §6253(b).
55. *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301; *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144.
56. §81008.
57. See Cal. Const., arts. XIII, XIIIID.

## ENDNOTES (CONTINUED)

58. §6253(b).
59. See § 54954.1 of the Brown Act authorizing payment of a fee for mailing a copy of an agenda or agenda packet not to exceed the cost of the service.
60. *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.
61. §6253(a).
62. §6254(k).
63. §6255.
64. See Civil Code §1798 and following.
65. §6254.5.
66. §6254.
67. *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.
68. §6254(a).
69. *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.
70. See Op.Cal.Atty.Gen. No. 05-1004 (2006).
71. *Citizens for a Better Environment v. Dept. of Food and Agriculture* (1985) 171 Cal.App.3d 704.
72. §6254(b).
73. *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083.
74. *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414.
75. *Board of Trustees of Cal. St. Univ. v. Superior Court* (2005) 132 Cal.App.4th 889.
76. §6254(c).
77. *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788.
78. *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.
79. §6254(c) and Labor Code §1198.5.
80. *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805.
81. §6254.8.
82. *Int'l Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319.
83. See *Sonoma County Employees' Retirement Assn v. Superior Court* (2011) 198 Cal.App.4th 986; *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440; *San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228.
84. *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250; *Bakersfield City School Dist. V. Superior Court* (2004) 118 Cal.App.4th 1041.
85. §6254.21.
86. §6254(f).
87. *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048.
88. §6254(k).
89. See Health & Safety Code § 19851.
90. *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37.
91. §6255.
92. *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.
93. *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.
94. *California First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159.

95. *Michealis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065.
96. *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.
97. *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788.
98. *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59.
99. *Int'l Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319.
100. *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041.
101. *California State University v. Superior Court* (2001) 90 Cal.App.4th 810.
102. *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892.
103. *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.
104. *Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893.
105. *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.
106. *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.
107. *Uribe v. Howie* (1971) 19 Cal.App.3d 194.
108. §6254(aa) and (ab).
109. §6254.4.
110. §6253.5.
111. §§6254(h); 7267.2(b).
112. §6254(i).
113. §§6254(k), 6255; Evid. Code, §§1040 & 1060; and Civ. Code §3426 and following.
114. §6254.16.
115. See *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436 [finding that the employee must have acted “within the scope of his or her...employment” for there to be a “waiver,” and that the inadvertent release of information was outside the proper scope of the employee’s duties].
116. §6258.
117. *Filarsky v. Superior Court (City of Manhattan Beach)* (2002) 28 Cal.4th 419.
118. §§6258 and 6259.
119. *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.
120. *Motorola Communications and Electronics v. Department of General Services* (1997) 55 Cal.App.4th 1340.
121. *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385.
122. §6259.4.
123. *Crews v. Willows Unified School District* (2013) 217 Cal.App.4th 1368.
124. *Bertoli v. City of Sebastopol* (2015) 233 Cal. App.4th 353.



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