

CALIFORNIA PUBLIC RECORDS ACT

■ California Public Records Act (“PRA”)

- Previously found in Cal. Gov’t Code § 6250, et seq.
- Under AB 473 (2021) PRA is recodified and reorganized effective January 1, 2023, and will be found in Cal. Gov’t Code § 7920.000, et seq.

■ Under the PRA:

- A **public record** is defined 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 its physical form or characteristics.” Gov’t Code § 6252(e)
- Members of public can request copies of public records from State and local government agencies.
- Responding agency must conduct a reasonable search for responsive records.
- Agency must promptly respond to the requester as to the whether it has responsive records and will comply with the request.
- Agency must produce non-exempt responsive records and generally can only charge the cost of duplicating the records.

PRA ADMINISTRATION IS COSTLY

- Number of records that are created and maintained by governmental agencies has grown due to new laws and technological developments.
- Many records held by agencies contain confidential information such as medical information, social security and drivers license numbers, records of pending investigations, which cannot be disclosed.
- Under Proposition 42 (2014), State does not need to reimburse local governments for the cost of complying with open government laws such as the PRA.
- In the event of a lawsuit, local agency has burden of proof that records not produced are exempt from disclosure and if the local agency loses, the local agency must pay the requester's attorneys' fees and costs.

COORDINATED, DUPLICATIVE PRA DEMANDS

- Local agency may receive numerous similar sounding form requests seeking voluminous records.
- Requests are sometimes accompanied with demands that a litigation hold be placed on records along with the mass filing of similar sounding claims for damages.
- Such requests may be coordinated with organizers encouraging followers to include a suggested list of records.
- Even though requests are similar, each requester may have different demands and interpretations of the requests.
- This situation has become much more frequent in the election context following the 2020 election.
- Washington Post reports that election officers throughout the country have reported that record requests have quadrupled since 2018. (WaPo, 9-11-22)

HIGH FREQUENCY PRA LITIGANTS

- Characterized by serial requesters sending numerous requests to agencies quickly followed by lawsuits if there is any delay in production or suggestion that records may be withheld.
- For example, a frequent requester asks for a crime victim's name from the wrong office of an agency. An employee in that office mistakenly advised requester that they need a subpoena. The next day, the requester filed a CPRA petition in the superior court, even though agency's attorney had asked requester in a prior CPRA matter to contact her for help with any other CPRA requests before filing suit. Agency quickly provides requested record, but requester nonetheless seeks attorneys' fees.
- Possible legislative remedy could be to create notice and cure provisions similar to those applicable to "high frequency litigants" in disability access lawsuits.

PRA LAWSUITS AS A DISCOVERY VEHICLE

- The key issues in a PRA case are whether the responding agency has responsive records and, if so, whether the agency wrongfully withheld them.
- The PRA states that: “The court shall decide the case after examining the record in camera, ... papers filed by the parties and any oral argument and additional evidence as the court may allow.”
- In *City of Los Angeles v. Superior Ct.*, 9 Cal. App. 5th 272 (2017), court held that discovery was permissible in a PRA case to assess an agency's good faith in searching for records.
- In *Western Resources Legal Center v. San Benito County* (2022), trial court allowed broad discovery of the records requested through the PRA, plus discovery into subject matter of the requested records. Case is now before the Court of Appeal.

COST RECOVERY FOR PRA REQUESTS

- Under the California PRA, agencies can only recover the “direct costs of duplication.” Cal. Gov't Code §§ 6253, 6253.9.
- Nonchargeable ancillary costs under the California Public Records Act (PRA) include staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information.
- Increasingly, with electronic records, requesters will ask for voluminous electronic record to be emailed or downloaded to avoid any duplication costs.
- Possible legislative remedies could include updating cost recovery provisions of the PRA to better enable agencies to recover PRA administration costs.
 - Federal FOIA provides for three types of fees that may be assessed in response to FOIA requests: search, review, and duplication. Also, the fees that may be charged to a particular requester are dependent on the requester's fee category. 5 U.S.C. § 552(a)(4).
 - State Survey of Public Record Fee is provided.