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LEGAL UPDATE

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To: Superintendents/Presidents/Chancellors, Member
Community College Districts

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Subject: Responding to Post-Janus Public Records Act Requests
Memo No. 07-2018(CC)

Following the U.S. Supreme Court’s decision in *Janus v. AFSCME*¹, many of our clients have reported receiving California Public Records Act (“CPRA”) requests from third parties, such as the Freedom Foundation, seeking information about employees represented by unions.² Many of our clients have also received correspondence from employee organizations, such as the California Teachers Association, who express concerns about the intent of these third parties, specifically, that they seek this information in order to discourage union membership. These employee organizations have sent many of our clients their recommended responses to the CPRA requests.

This legal update provides guidance regarding how districts should respond to CPRA requests post-*Janus*.

Overview of the CPRA

As a reminder, “public records” include any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by public agencies “regardless of physical form or characteristics.”³ If the information sought is in an electronic format, the requestor may ask for the information to be provided in an electronic format.⁴

¹ *Janus v. Am. Fed’n of State, Cty., and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.

² See Gov. Code § 6250 *et seq.*

³ Gov. Code § 6252, subd (e). A “writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. Gov. Code § 6252, subd. (g).

⁴ Gov. Code § 6253.9. The public entity may charge the requestor for various costs associated with producing records in an electronic format.



A public agency that receives a CPRA request generally must respond to the requestor within 10 calendar days, although an extension of 14 calendar days is permissible under unusual circumstances.⁵ In this initial response, the public agency must inform the requestor (1) if public records exist and will be produced, or (2) if the requested public records do not exist, or (3) if public records exist but will not be produced based on a statutory exception which allows the public entity to withhold what is otherwise a public record. The records that will be disclosed should be provided in a timely manner, but not necessarily within the 10- (or 24-) calendar day initial response period.

The law favors disclosure, and refusing to disclose a record requires a statutory justification. Of importance, a CPRA requestor may recover attorney fees if a public entity withholds records which a court later deems should have been provided. Therefore, withholding records comes with the risk of attorneys' fees, and the decision to withhold records should be well-founded on a statutory exception.

As a preliminary issue, at least one union has asserted that a school district needs "clear and affirmative consent" from employees before disclosing any information regarding an employee due to privacy or safety concerns, and claims that districts are obligated to inform employees about any CPRA request and give each employee an opportunity to object. We are unaware of any legal authority to support this assertion.

As a separate issue, we encourage districts to establish a mechanism and/or policy whereby employees can easily inform the district of unique circumstances that require their workplace or other potentially sensitive information be kept confidential (i.e. the employee is a victim of domestic abuse). If an employee demonstrates a legitimate safety or privacy concern, the district could then properly withhold that information *relative to that employee*. However, we recommend you consult legal counsel should this situation arise.

Analysis of Specific Requests

Listed below are the various categories of information referenced in the recently circulated CPRA requests from the Freedom Foundation and guidance for responding to each specific item sought.

Employee name:

This is a public record and no exception permits withholding this record. *Such information should therefore be disclosed.*

⁵ Gov. Code § 6253.



Employee work e-mail address:

This is a public record and whether an exception permits withholding this record depends upon (1) whether the record is otherwise publicly available, and (2) the public agencies' interests in preventing disclosure. *Please see further explanation below. We recommend consulting legal counsel if you are unsure of how to respond.*

Public agencies that list employee e-mail addresses on their websites should disclose this information, as these districts cannot argue that there is a basis to decline information that has already been made publicly available. Indeed, a recent amendment to the CPRA permits directing a requesting party to the website where public records are maintained in lieu of providing copies of those records.⁶

For those public agencies that do not publish individual employees' e-mail addresses, a statutory exception may exist under what is called the "catch-all exception." This exception requires that the public agency justify withholding any record by demonstrating that under the facts of the particular case, the public interest served by *not* disclosing the record clearly outweighs the public interest served by disclosure of the record.⁷ The public agencies' interest in not disclosing such records might include its interest in preventing receipt of outside e-mails, which sometimes have malware and other malicious software embedded in them or in an attachment, and prevents the malware from being inadvertently triggered by employees and exposing an agency's entire e-mail system to an attack. Second, once e-mail addresses are made publicly available, this may increase the volume of non-agency related e-mail and may distract employees from work responsibilities. Evidence that would assist a public agency in relying upon this exception would include that the agency does not make employee e-mail addresses available as a matter of routine, and/or that the agency has adopted board policies or otherwise promulgated to staff that employees should not use work e-mail for non-work communication.

We believe that asserting the "catch-all" exception will in some instances be defensible, depending on the specific facts. And, as noted above, any withholding of records comes with the risk of attorneys' fees, if a judge disagrees that the public's interest is better served by disclosure than withholding.

Employee position/job title:

This is a public record and no exception permits withholding this record. *Such information should therefore be disclosed.*

⁶ Gov. Code § 6253, subd. (f).

⁷ Gov. Code § 6255, subd. (a).



Employee work mailing address:

This is a public record to the degree this information is listed publicly. *The mailing address for the school district or school where the employee works should be disclosed.*

If the request asks for a more specific employee mailing address that is not generally listed publicly, there is an argument for declining to provide this information similar to the arguments in the “employee work e-mail address” section above. *We recommend consulting legal counsel if you receive such a request and are unsure of how to respond.*

Employee hire date:

This is a public record and no exception permits withholding this record. *Such information should therefore be disclosed.*

Name of union representing the employee:

Whether a *position* is part of a bargaining unit represented by a union or not, along with the union’s name, is disclosable. *The name of the union that represents a unit member employee should be disclosed.*

However, if a request asks for information about whether a specific individual is a union member (i.e. whether an employee opted in to union membership and decided to pay union dues), that information may be protected from disclosure due to the privacy interests of the individual employee. *We recommend consulting legal counsel if you receive such a request.*

Employee work site:

Generally, this is a public record and no exception permits withholding this record except in rare circumstances. *This information should therefore be disclosed unless there is a known reason for keeping the information confidential, such as a protective court order.*

Employee work telephone number:

The main listed telephone number of the District or the school is a public record and no exception permits withholding this record. *Such information should therefore be disclosed.*

Specific office or classroom phone numbers may be withheld, depending on whether the information is otherwise publicly available and whether the negative impact to the district or employee outweighs the interest in disclosing this record. *We recommend that you consult legal counsel if you receive such a request.*



Employee home address:

Such requests should be denied. See Government Code section 6254.3.

Employee personal telephone or cell number:

Such requests should be denied. See Government Code section 6254.3.

Conclusion

As discussed above, a district that refuses to provide any requested records could be the target of a lawsuit by the requesting party. If the plaintiff in such a lawsuit prevails, the district is likely to be ordered to pay the requestor's attorneys' fees. Therefore, those districts that are inclined to deny requests should consult with legal counsel prior to responding to the request.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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