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LEGAL UPDATE

July 2, 2019

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

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Subject: CPRA Request for Paid Administrative Leave Records
Memo No. 09-2019(CC)

A number of SCLS clients recently received California Public Records Act (“CPRA”) requests from NBC Bay Area seeking information about personnel on paid administrative leave.

While names of employees, work location, position, and dates of employment are generally considered public information, the context of this request as it relates to individual employees may implicate personal privacy interests exempt from disclosure under Gov. Code § 6254(c).

Case-by-case review of the individual circumstances surrounding potentially responsive employee information and documents is strongly encouraged. Clients may also wish to inform employees of any anticipated disclosures and provide employees a reasonable amount of time to intervene and oppose the disclosure.

Clients receiving a CPRA request of this kind are encouraged to review this Legal Update and contact our office with questions or for assistance in responding to the request.

Overview of the CPRA

“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.”¹

¹ 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).



The initial response to a CPRA request must be provided within 10 calendar days (subject to a 14-day extension in limited circumstances).² Responsive records are not required to be provided with the initial response but must be provided in a timely manner.

1. The initial response should include:
 - a. If the requested public records exist and will be produced; or
 - b. If the requested public records do not exist; or
 - c. If the requested public records exist but will not be produced based on a statutory exemption that allows the public entity to withhold what is otherwise a public record.
2. Identify the specific applicable exemption(s) in the initial response.
3. Provide an estimate of recoverable direct costs.
4. Provide a reasonable time-frame for disclosure.

The law favors disclosure of records. Therefore, wrongfully withholding records potentially subjects a public entity to liability for the requester’s attorneys’ fees. Thus, the decision to withhold records must be carefully evaluated and withheld documents must clearly qualify under a statutory exemption.

Common statutory exemptions include:

- Personal privacy (Gov. Code § 6254 (c)).
- The “catch-all exemption” (Gov. Code § 6255). The “catch-all exemption” requires that the responding agency set forth specific facts justifying the withholding to demonstrate that there is a public interest being served by nondisclosure of the records and that the public interest in withholding clearly outweighs the public interest served by the disclosure of the records.³

Despite statutory language excusing a public entity from creating new documents where a record does not exist, courts recently have held that in certain circumstances, agencies may be required to “create” records with responsive information in the possession of the agency where the burden of doing so does not outweigh the disclosure interests.⁴

² Gov. Code § 6253.

³ See *Los Angeles Unified Sch. Dist. v. Superior Court*, 228 Cal.App.4th 222 (2014).

⁴ See *ACLU v. Superior Court*, 3 Cal. 5th 1032, 1047 (2017). In that case, the court held that the LAPD and LASD must anonymize and/or redact bulk license plate data, rather than handing over the raw files as requested by the ACLU. The court stated, approvingly, “it takes just two computer clicks to export license plate data onto a spreadsheet or other type of document, which the parties can then modify. Accordingly, the trial court’s analysis should go beyond whether a method of removing exempt information is a native function of the system utilized by the LAPD. While real parties may not have designed their system to facilitate CPRA disclosure as a native function, randomizing license plate numbers or deleting columns from a spreadsheet, for example, would seem to impose little burden.” (Internal quotations omitted.)



Agencies are entitled to recover direct costs related to responding to a record request.⁵ Direct costs are limited to the costs for the copies. They do not include the time spent searching for records, reviewing records or preparing the documents for disclosure (time spent redacting the records is not recoverable). Agencies typically charge between \$0.10 and \$0.25 per page for paper copies as set by that agency's Board Policy or Administrative Regulation. Anticipated direct costs should be indicated in the initial response.

The law allows for cost recovery in electronic record production in extremely limited circumstances.⁶ However, these fee recovery provisions typically result in judicial intervention, and, if improperly applied, may allow for attorneys' fees for the requesting party. Currently, the California Supreme Court is reviewing a case, *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, (2018) 27 Cal.App.5th 937, to determine whether agencies can recover fees for redaction of electronic records. If your agency believes that it will incur significant cost in responding to a CPRA request for electronic records, please contact legal counsel.

Paid Administrative Leave

NBC Bay Area's request appears to generally include the below categories of information and records:

- A list of employees on paid administrative leave from January 1, 2015 to the present;
- Site of each respective employee on paid administrative leave;
- Position of each respective employee on paid administrative leave;
- Dates of each respective employee(s) paid administrative leave; and
- All documentation pertaining to employees that were placed on administrative leave.

We recommend consulting legal counsel before deciding to withhold or provide any information or documentation pursuant to this request. While names of employees, work location, position, and dates of employment are considered public information, the context of this request as it relates to individual employees may implicate personal privacy interests exempt from disclosure under Gov. Code § 6254(c). As stated above, case-by-case review of the individual circumstances surrounding potentially responsive employee information and document(s) is strongly encouraged. Clients may wish to inform employees of any anticipated disclosures and provide employees a reasonable amount of time to intervene.⁷

⁵ Gov. Code § 6253 (b).

⁶ The requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies: (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals or (2) The request would require data compilation, extraction, or programming to produce the record. Gov. Code § 6253.9 (b).

⁷ A number of court cases uphold the right for parties to intervene through a "reverse CPRA" action when they believe that their privacy rights may be infringed by an agency's decision to disclose records. In light of these types of cases, many unions request that employers seek "clear and affirmative consent" from employees before disclosing any information regarding an employee due to privacy or safety concerns; while such consent is not legally required, it is permissible.



Moreover, documentation pertaining to employees placed on administrative leave will in most circumstances include a combination of exempt and non-exempt information such that all documents should be reviewed on a case-by-case basis to determine what, if any, information should be redacted.

We remind all clients that when gathering information, the information may be contained in multiple documents (portions of which may be exempt from disclosure) and may be maintained in a combination of paper and electronic sources.

If you have any questions regarding responding to a request from NBC Bay Area or any other CPRA requests, our office is available to assist. Please contact us 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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