



The Public Records Act Requests from a Risk Management Perspective

Presented by:
Neal Meyers, Esq.
Meyers Fozi, LLP

WEBINAR
DECEMBER 6, 2016
10:00 AM TO 11:30 AM

Presentation Outline

- ▶ California Public Records Act Basics
- ▶ How to Manage Risks Associated with Responding to a PRA request
 - ▶ Risk Management /Legal Counsel Screening
 - ▶ Avoiding Privilege and Privacy Waivers
 - ▶ District Wide Review
 - ▶ Preservation and Documentation

PUBLIC RECORDS ACT BASICS

“Public Record”? -- (Gov. Code § 6252(e))

- ▶ Any writing,
- ▶ Containing information relating to the public’s business,
- ▶ Prepared, used, retained in the course of business,
...**regardless** of physical form or characteristics.

Writing...

“Writing” means “handwriting, typewriting, printing, photo-stating, photographing and

EVERY OTHER MEANS OF RECORDING

upon any form of communication or
representation...

(Gov. Code § 6252(g).)

FORMS OF PUBLIC RECORDS...

Papers

Optical Disks

Maps and Drawings

CDs/DVDs

Books

Computerized Data

Exhibits

Voicemail

Photographs

Email

Microforms

Video and Audio Tapes

PRIVATE DEVICES OF PUBLIC OFFICIALS?

▶ *City of San Jose v. Superior Court*

- ▶ Are the email, text messages and other content on PRIVATE devices of public employees and officials related to agency business subject to disclosure under the PRA?
- ▶ Lower Court: PRA does NOT extend to writings sent or received on private devices
- ▶ Now before California Supreme Court -- will be argued in December 2016

WHAT IS THE TYPICAL *TYPE* OF PUBLIC RECORD?

- ▶ Agendas, Minutes, Staff Reports, Consultant Reports
- ▶ Financial Records
- ▶ Mail and Correspondence
- ▶ Communications with Public
- ▶ Internal Staff E-mails and Communications
- ▶ Contracts (Including Employment Contracts)
- ▶ Executed Settlement Agreements

YES -- THESE ARE PUBLIC RECORDS

- ▶ Employee names, salaries, employing departments, hiring and termination dates
- ▶ Employee Contracts
- ▶ Settlement Agreements
- ▶ Student Information? (*Morgan Hill Case* -- California Dept. of Ed.)
- ▶ Harassment Investigations? (*Caldecott v. Superior Court*; *BRV v. Superior Court*)
 - ▶ Subject to privacy and privilege redactions

Fishing for Records -- San Diego

For crying out loud

Holy sh**

Holy cow

Holy crap

Oh my God

Oh my Goodness

OMG OMFG

Oops Shoot Yikes

What a disaster

Hit the fan

Perception

issue

Screw up

Screwed up

Uncomfortable

Big Trouble

!!!

What is Not A Public Record?

- ▶ Needs to be an *Existing* Document
- ▶ No Duty to Create a Document (No Requirement to Summarize)
- ▶ Is the Record Required to be Kept?
 - ▶ Necessary or Convenient to District Business?

Many Exemptions

- Closed session minutes and legal memoranda and other materials distributed in a closed session
- Records protected by the attorney-client privilege
- Personnel, student, medical & insurance records that would constitute an unwarranted invasion of privacy
- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy...weigh the public's interest in disclosure against protection of privacy interests. (Gov't. Code § 6254, subdivision (c))

More Exemptions

- Preliminary drafts, draft notes or draft interagency and intra-agency memoranda
- Pending litigation
- Student records -- FERPA; Ed. Code (*Morgan Hill Case*)
- Medical Records -- HIPAA; State Law
- Catch-all (“public interest served by not disclosing clearly outweighs public interested served by disclosure”)
-and more

The Request

- ▶ Who? Anyone
- ▶ How? Form does not matter. Oral, written, email
- ▶ To Whom? Anyone in the Agency. Duty to be helpful
- ▶ Where? Administration, School Site, Classroom

The Written Response

- ▶ How Much Time? 10 Days
- ▶ Extension? 14 More Days if “unusual circumstances”
- ▶ Total Statutory Time to respond: 24 Days if Extension Requested
- ▶ Expenses
 - ▶ Staff Costs? NO
 - ▶ Copy Costs? YES -- Actual Costs

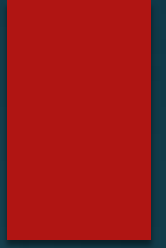
What if 24 days isn't enough?

- ▶ Under the code, the requesting party may initiate a civil action for failure to timely respond to PRA request.
- ▶ However, if timing is in issue, the best course is to keep an open line of communication with the requesting party, and see if they will agree to an extension beyond 24 days to respond.
- ▶ Any such agreement should be confirmed in writing.
- ▶ The PRA is clear, however, that nothing in the Act “shall be construed to permit an agency to delay or obstruct the inspection or copying of public records”. Accordingly, the responding agency should treat the deadlines imposed by the PRA as stringent.

The Production of the Documents: Timing

- ▶ The PRA does not specify a deadline for disclosing records. Copies of records must be provided “promptly.” (Gov. Code § 6253(b))
- ▶ The PRA does not address the circumstances under which requesters must be permitted to inspect records, but it is generally assumed that the same standard of promptness applies.
- ▶ The PRA states that nothing therein “shall be construed to permit an agency to delay or obstruct the inspection or copying of public records.” (Gov. Code § 6253(d).)
- ▶ Neither the 10-day response period nor the additional 14-day extension may be used to delay or obstruct the inspection or copying of public records. (Gov. Code § 6253(d).)

RISK MANAGEMENT



PRA's As Pre-Litigation Tools

- ▶ Immediate Discovery. No Lawsuit Required. No Litigation Controls.
- ▶ PRA- 10 days to respond + 14 under unusual circumstances
 - ▶ Rushed response
 - ▶ Objections Limited
 - ▶ Inadvertent Waivers
 - ▶ Often handled at Staff Level without litigation/attorney review
- ▶ Code of Civil Procedure -- 30 days + 5 if mailed
 - ▶ Objections
 - ▶ Meet and Confer process
 - ▶ Resolve through motion without penalty if a good faith dispute
 - ▶ Attorney review

Once Disclosed the Documents Belong to Everyone

- ▶ The motive and purpose for the request is irrelevant...
- ▶ The question instead is whether disclosure serves a public purpose
- ▶ [T]here is no practical way of limiting the use of the information, **once it is disclosed**, to the purpose asserted by the requestor. Indeed, there is no way of assuring that the information will not be used by the requestor for other purposes, or, for that matter, will not be used by third parties who manage to obtain the information once it has been disclosed to [the requestor]

▶ *Caldecott v. Superior Court* (2015)

Watch Out For Waiver

- ▶ “[N]otwithstanding any other provisions of law, whenever a state or local agency discloses a public record which is otherwise exempt from [the Public Records Act], to any member of the public, this disclosure **shall constitute a waiver** of the exemptions. (Gov’t Code 6254.5)
- ▶ *Ardon v. Superior Court (City of Los Angeles)* (2016)
 - ▶ Classic case of a sloppy disclosure containing privileged documents
 - ▶ Supreme Court holds that City’s inadvertent disclosure of documents in response to Public Records Act request did not waive attorney-client and work product privileges.
 - ▶ Burden is on agency to show inadvertence (Putting Genie back in the bottle)

The Response -- RISK MANAGEMENT

- ✓ Initial Screening
 - ✓ Risk management?
 - ✓ District Counsel?
- ✓ Privacy review
- ✓ Privilege review
- ✓ Completeness review
- ✓ Document Control
 - ✓ Bate Stamp
 - ✓ Maintain in database for retrieval?

Take Away

- ▶ Watch Out -- The Public Records Act promotes transparency, but it also has become a tool to obtain unfiltered information sometimes without the benefit of risk management or legal review.
- ▶ Districts need to provide the information as required, but it must also have a system in place to screen the request and elevate it to risk management and/or legal review if it has potential litigation implications.