

Admin.

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Memorandum 97-20

Commission Records Policy

The increasing use of electronic forms of communication and recordkeeping prompted the staff to review how electronic records are treated under public records law.

This research revealed no substantial problems in applying public records law to electronic communications. The principal governing statutes were all adopted after the advent of computers and have been amended since to address specific computer record issues. See, generally, Gov't Code §§ 14740-14769 (State Records Management Act); Gov't Code §§ 6250-6270 (Public Records Act); Civ. Code §§ 1798-1798.77 (Information Practices Act of 1977).

However, the research did reveal that the requirements of public records law are numerous, sometimes unclear, and often involve agency discretion in implementation.

It is therefore administratively useful to summarize relevant public records law and establish Commission policies and procedures relating to that law.

The attached document is a proposed appendix to the CLRC Handbook of Practices and Procedures. The appendix discusses applicable law and establishes Commission policies and procedures regarding:

- General records management practice.
- Records disposition.
- Management and disclosure of personal data.
- Public inspection and copying of public records.

It is submitted for your information and approval.

Respectfully submitted,

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Staff Counsel

APPENDIX L. RECORDS MANAGEMENT POLICY

INTRODUCTION

Because the Commission is a government agency, its records are subject to regulation under a number of statutes.

Record maintenance and disposition are governed by the State Records Management Act (SRMA)¹ and statutes imposing criminal penalties for the improper destruction or alteration of records.² Management and disclosure of personal data is governed by the Information Practices Act of 1977 (IPA).³ Public disclosure of records is mandated by the Public Records Act (PRA).⁴

Commission record management practices are also subject to the constitutional protection of individual privacy.⁵

This document discusses applicable law and establishes Commission policy regarding:

- General records management practice.
- Records disposition.
- Management and disclosure of personal data.
- Public inspection and copying of public records.

This policy does not address Commission publications or state forms.

GENERAL RECORDS MANAGEMENT

Records Maintenance

Commission records are maintained as follows:

(1) Administrative records are filed according to the most current version of the CLRC Administrative Filing System.

(2) Study and bill files (memoranda, reports, correspondence, and background material relating to a particular study topic or Commission recommended bill) are filed by subject.

(3) Unique electronic records (those without a paper copy on file) are stored on hard disk and are subject to regular backup.

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1. Gov't Code §§ 14740-14769.
 2. Gov't Code §§ 6200-6203.
 3. Civ. Code §§ 1798-1798.77.
 4. Gov't Code §§ 6250-6270.
 5. Cal. Const. art. I, § 1.

(4) Confidential administrative records are filed separately in a locked drawer, with access limited to confidential employees.

(5) Vital records⁶ are backed up with off-site copies.

(6) Notwithstanding the foregoing, preliminary drafts and notes are not records and may be retained or discarded as convenient.⁷

Procedures Mandated by Regulation

The Commission will comply with valid, applicable regulatory requirements.⁸ Because these requirements change over time, this document cannot comprehensively list them.⁹

RECORDS DISPOSITION

Records Retention Schedule

A record may not be destroyed or otherwise disposed of unless the Department of General Services (DGS) determines that the record has no further administrative, legal, or fiscal value and the Secretary of State has determined that the record is inappropriate for preservation in the State Archives.¹⁰

These determinations are made in advance, for identified classes of records, by filing a Records Retention Schedule with DGS. This schedule is reviewed by DGS and the State Archives.

Approval of a retention period for a class of documents constitutes a determination by DGS that the documents have no further administrative, legal, or fiscal value beyond the approved period.

The Secretary of State reviews the schedule and identifies, for each class of records, whether the records are appropriate for preservation in the State Archives.

6. As defined in the Records Retention Schedule, in compliance with Government Code Section 14750(b); SAM Section 1665.

7. Preliminary materials lack the dignity and character of completed acts or documents and therefore are not public records. See *People v. Olson*, 232 Cal. App. 2d 480, 487, 42 Cal. Rptr. 760, 764-65 (1965). See also 64 Ops. Cal. Atty. Gen. 317 (1981) (tape recording not a public record if intended only to facilitate preparation of minutes).

8. See Gov't Code § 14750(c). See, generally, State Administrative Manual (SAM) §§ 1600 *et seq.*, 4800 *et seq.*

9. Putting aside the question of whether particular DGS requirements are invalid as underground regulations (see Gov't Code § 11340.5) examples of applicable requirements include the establishment and maintenance of a Records Retention Schedule (see SAM § 1665), the preparation of a records inventory every five years (see SAM § 1666), and establishment of an information technology Operational Recovery Plan (see SAM §§ 4843-4845).

10. See Gov't Code § 14755. As discussed, notes and preliminary drafts are not records and may be retained or discarded as convenient. See *supra* note 7.

Records Disposition

Records are periodically reviewed to determine whether they have passed their retention period.

If a record has passed its retention period and has been identified as appropriate for retention in the State Archives it will be forwarded to State Archives.

If a record has passed its retention period and has not been identified as appropriate for retention in the State Archives it may be destroyed, discarded or retained as convenient.

Note that there is an exception to the regular disposition rules for rulemaking files. DGS may never authorize the destruction of a rulemaking file.¹¹ Any rulemaking file transferred to the State Archives must be accompanied by instructions that the contents of the file not be altered by the Secretary of State.¹²

Mailing List Maintenance

The mailing list is corrected at least annually to remove those persons who no longer wish to receive Commission materials.¹³

At least annually, a copy of the mailing list is made and retained as a record of the prior state of the mailing list.

PERSONAL INFORMATION

Introduction

Under the Information Practices Act, personal information in agency records is entitled to special protections.¹⁴

“Personal information” is any information that identifies or describes an individual, including statements made by or attributed to the individual.¹⁵ “Records” are defined as groupings of information that are maintained by reference to an “identifying particular” of an individual (such as the person’s name or identification number).¹⁶

Under this definition our study and bill files are not “records” because they are organized by subject rather than by the identity of the correspondent.

Our mailing list, personnel files, and general correspondence files are

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11. Gov’t Code § 14755(c).
 12. Gov’t Code § 11347.3(f).
 13. Gov’t Code § 14911.
 14. See Civ. Code §§ 1798-1798.77.
 15. Civ. Code § 1798.3(a).
 16. Civ. Code § 1798.3(g).

“records” because they are organized by reference to identifying personal information.

Collection

Where feasible the Commission will collect personal information directly from the individual to whom it pertains.¹⁷ When the source of personal information is not the individual to whom it pertains, the identity of the source of the personal information shall be recorded along with the information.¹⁸

Before the Commission collects personal information for a purpose other than identification and communication with the individual, notice will be provided as specified in Civil Code Section 1798.17.

Management

The Commission will maintain only relevant and necessary personal information in its records.¹⁹

The Commission will appoint one person to ensure compliance with the IPA and devise appropriate safeguards to ensure the security and integrity of records containing personal information.²⁰

Any person may request the correction of inaccurate personal information in Commission records.²¹

Any person may request to have that person’s name and address removed from the Commission mailing list.²² The Commission will honor all such requests.

Prohibition on Disclosure

The Commission may not disclose personal information, in a manner that links the information to the individual, except under enumerated exceptions.²³ Exceptions of particular relevance to the Commission are discussed *infra*.²⁴

17. Civ. Code § 1798.15.

18. Civ. Code § 1798.16.

19. Civ. Code § 1798.14.

20. See Civ. Code § 1798.21-1798.22.

21. See Civ. Code § 1798.35. If, for some reason, the Commission decides not to make the requested correction, notice will be provided to the requester, who will have an opportunity to appeal the decision. See Civ. Code §§ 1798.35-1798.37.

22. Civ. Code § 1798.62.

23. Civ. Code § 1798.24.

24. Other possibly relevant exceptions include disclosure mandated by law (§ 1798.24(f)), disclosure for statistical research (§ 1798.24(h)), disclosure pursuant to subpoena or other compulsory legal process (§ 1798.24(k)), and disclosure pursuant to a search warrant (§ 1798.24(l)).

Subject of information. The Commission may disclose personal information to any of the following:

- (1) The individual to whom the information pertains.²⁵
- (2) A guardian, conservator, or representative of that person.²⁶
- (3) Any other person, if the subject of the information consents in writing at least 30 days before the disclosure.²⁷

Comment letters. Disclosure of comment letters is consistent with the purpose for which they are collected and is necessary to the performance of the Commission's statutory duties. Information regarding disclosure of comment letters is routinely maintained.²⁸ Where practicable, the Commission will provide advance notice that public comment letters will be disclosed.

State Archives & DGS. The Commission may disclose personal information to the State Archives on transmission of the document containing the information for preservation. Personal information may also be disclosed when submitting a document to DGS for review as to the document's continuing administrative, legal, or fiscal value.²⁹

Records subject to inspection under PRA. The Commission may disclose personal information pursuant to the Public Records Act.³⁰ See *Inspection and Copying of Public Records*, *infra*.

Required Disclosure

Any person who inquires must be told whether there is personal information relating to that person in Commission records.³¹

Subject to specific exceptions,³² any person may inspect records containing personal information pertaining to that person.³³ This right supersedes exemptions in the PRA.³⁴ Otherwise exempt information must be deleted by staff before inspection will be allowed.³⁵

25. Civ. Code § 1798.24(a).

26. Civ. Code § 1798.24(c).

27. Civ. Code § 1798.24(b).

28. This information can be found by reference to the memo accompanying distributed comment and the "mailtrack" report for that memo. These records comprise the accounting required by Civil Code section 1798.25.

29. Civ. Code § 1798.24(j).

30. See Civ. Code §§ 1798.24(g), 1798.75.

31. Civ. Code § 1798.32.

32. Civ. Code §§ 1798.38-1798.40.

33. Civ. Code § 1798.34.

34. Civ. Code § 1798.70.

35. Civ. Code § 1798.43.

Relevant exceptions to the required disclosure of personal information include:

- (1) Confidential recommendations relating to employment.³⁶
- (2) Documents relating to the settlement of a grievance or complaint.³⁷

INSPECTION OF PUBLIC RECORDS

Introduction

The Public Records Act (PRA) provides for public inspection of public records.³⁸

The definition of “public record” under the PRA is extremely broad, encompassing virtually any memorialization of information prepared, owned, used, or retained by a state agency.³⁹ This definition is broad enough to include computer records such as text files, Email, and databases.

There are a number of specific exemptions limiting the right of access to public records.⁴⁰ Relevant exemptions are discussed, *infra*.

Exemptions

Preliminary drafts and internal memoranda.⁴¹ Preliminary drafts, notes, and inter- and intra-agency memoranda are exempt from disclosure if both of the following are true:

- (1) They are not retained in the ordinary course of business.⁴²
- (2) The public interest in withholding the records clearly outweighs the public’s interest in disclosure.⁴³

The Commission does not retain preliminary drafts, notes, and memoranda in the ordinary course of business. It is in the public’s interest that preliminary Commission deliberations be free from disclosure, in order to facilitate free and candid deliberation. Therefore, preliminary Commission notes, drafts, and memoranda are exempt from disclosure under the PRA.

36. Civ. Code § 1798.38.

37. Civ. Code § 1798.40(d).

38. Gov’t Code § 6253.

39. See Gov’t Code §§ 6252(d) & (e).

40. See Gov’t Code §§ 6253.7, 6254-6254.7, 6254.9-6254.11, 6254.13-6254.13, 6255.

41. See Gov’t Code § 6254(a).

42. The Commission interprets the phrase “retained in the ordinary course of business” as excluding preliminary drafts, notes, and memoranda temporarily stored on electronic media solely for data security and backup purposes.

43. The public’s interest in withholding preliminary materials is to provide a measure of agency privacy for written discourse concerning pending matters. See *Citizens for a Better Environment v. Department of Food and Agriculture*, 171 Cal. App. 3d 704, 712, 217 Cal. Rptr. 504, 509 (1985).

Confidential attorney-client communications. A client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.⁴⁴

Records that are privileged under the Evidence Code are exempt from disclosure under the PRA.⁴⁵

Any confidential communication between the Commission and an attorney representing the Commission is privileged and not subject to disclosure under the PRA. A communication need not regard pending litigation to be exempt.⁴⁶

Pending litigation. Records pertaining to pending litigation or claims to which the Commission is a party are exempt from disclosure under the PRA.⁴⁷

Correspondence with the Governor's office. Correspondence from or to the Governor or employees of the Governor's office are exempt from disclosure under the PRA.⁴⁸

Home addresses. Home addresses of Commissioners and Commission staff are exempt from disclosure under the PRA.⁴⁹

Computer software. Computer software developed by the Commission is not a public record and is exempt from disclosure.⁵⁰ Examples include templates, macros, and database layouts.

Personnel records. Personnel records are exempt from disclosure under the PRA where disclosure would constitute an unwarranted invasion of personal privacy.⁵¹ The Commission will resist disclosure of these records, releasing them only if a court determines that the intrusion into personal privacy is warranted.

Public interest. There is a catch-all exemption for records where the public's interest in disclosure is clearly outweighed by the public's interest in withholding the record.⁵² Commission staff will generally make this determination on a case by case basis. But, see, Confidential Communications, *infra*.

Confidential communications. Public comment offered on a condition of confidentiality will be disclosable under the PRA only after all identifying

44. Evid. Code § 954.

45. Gov't Code § 6254(k).

46. See *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 369-73, 20 Cal. Rptr. 2d 330, 333-35 (1993).

47. Gov't Code § 6254(b).

48. Gov't Code § 6254(l).

49. Gov't Code § 6254.3.

50. Gov't Code § 6254.9.

51. Gov't Code § 6254(c).

52. Gov't Code § 6255.

information has been deleted from the disclosed copy.⁵³

The public has a strong interest in the Commission receiving candid commentary relating to its proposals. This interest clearly outweighs the public's interest in disclosing the identity of a commentator who will only communicate with the Commission confidentially.⁵⁴

Protection of personal data. In general, an agency may voluntarily disclose records that are exempt from mandatory disclosure under the PRA.⁵⁵ This general rule is superseded by the IPA's prohibitions on disclosure of personal data,⁵⁶ and is subject to the Constitution's protection of privacy.⁵⁷

Disclosure of personal data. With certain exceptions, records pertaining to an individual must be disclosed to that individual under the IPA, even if they are exempt from disclosure under the PRA.⁵⁸ See discussion, *supra*.

Mailing list. The Commission mailing list may not be inspected or copied for a commercial purpose.⁵⁹ A "commercial purpose" is one that has financial

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53. The Commission's policy regarding confidential communications is as follows:

The Commission does not ordinarily receive communications on a confidential basis. The Commission will solicit a communication on a confidential basis only where the Commission has made a determination that the information contained in the communication is necessary for a Commission study and might not reasonably be obtainable without providing confidentiality. An unsolicited request for confidentiality will be considered by the Commission on an individual basis, applying the same standard of necessity. The notice on the cover of a Commission tentative recommendation should state that any comments received will be considered at a public meeting.

A communication received under a Commission assurance of confidentiality will be considered by the Commission without knowledge of the identity of the author of the communication. The Commission staff will summarize the contents of the communication, quote from the communication, reproduce the communication with identifying markings deleted, or handle the communication in another appropriate way to protect the identity of the author from disclosure. The staff will protect the identity of the author of a communication received under a Commission assurance of confidentiality from disclosure. The staff will mark Commission files as confidential, segregate Commission files, destroy the communication, or take other appropriate action to preserve the author's identity from disclosure. This could be accomplished by filing confidential communications in a separate drawer or by referring to the existence of a confidential communication in the study file to which the communication relates. The staff will resist judicial proceedings to require disclosure of any communication received by the Commission under an assurance of confidentiality.

See CLRC Handbook of Practices and Procedures, § 2.6. Notwithstanding this policy, confidential records will not be disposed of in violation of Government Code Section 14755.

54. See Gov't Code § 6255; See also *Johnson v. Winter*, 127 Cal. App. 3d 435, 437-39, 179 Cal. Rptr. 585, 587-88 (1982) (confidential data may be withheld under section 6255 to promote collection of candid information).

55. Gov't Code § 6253.1.

56. Civ. Code § 1798.24.

57. Cal. Const. art. I, § 1

58. See Civ. Code §§ 1798.30-1798.44, 1798.70.

59. See Civ. Code §§ 1798.60, 1798.75.

gain as a major objective.⁶⁰ “Commercial purpose” does not include the gathering of newsworthy facts by a publisher or broadcaster.⁶¹

Privacy. The Commission may not disclose records so as to violate the protection of privacy guaranteed by the California Constitution.⁶²

Only two types of Commission records contain potentially private information:

(1) Home addresses of Commissioners and Commission staff. These are already exempt from disclosure under the PRA and IPA and will not be disclosed.

(2) Personnel files. The Commission will resist disclosure of these records, releasing them only if a court determines that the intrusion into personal privacy is warranted.⁶³

Partial disclosure. An otherwise disclosable record containing exempt information is not exempt from disclosure. Instead, the reasonably segregable portions of the record must be provided after deletion of the portions which are exempt by law.⁶⁴ Where the segregation of exempt information is so administratively burdensome that the public’s interest in disclosure is clearly outweighed by the public’s interest in withholding the records, the records are entirely exempt from disclosure.⁶⁵

RECORD INSPECTION AND COPYING PROCEDURES

Authority

Agencies are free to adopt procedures governing the inspection and copying of public records.⁶⁶ These procedures must be consistent with governing law and may not limit the hours during which records are available for inspection.⁶⁷

60. Civ. Code § 1798.3(j).

61. *Id.*

62. Cal. Const. art. I, § 1.

63. The constitutional right to privacy must be balanced against the public’s interest in disclosure of public records. This balancing is similar to that conducted under Government Code Section 6254(c) to determine whether the disclosure of personnel records is warranted. *Braun v. City of Taft*, 154 Cal. App. 3d 332, 346-47, 201 Cal. Rptr. 654 (1984).

64. Gov’t Code § 6257.

65. See *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal. 3d 440, 452-45, 651 P.2d 822, 829-30, 186 Cal. Rptr. 235, 242-43 (1982); Gov’t Code § 6255.

66. Gov’t Code § 6253(a).

67. Gov’t Code § 6253(b).

Inspection

Commission records are available for inspection during regular business hours.

Commission staff will provide reasonable assistance in locating files relevant to the purpose of the inspection and will remove exempt materials before permitting inspection.

In order to safeguard electronic data, inspection of electronic records will be on a free-standing computer, with no access to the Commission's local area network, or to original files. Relevant records will be installed, along with software sufficient to read them, prior to inspection.

Preparations necessary for inspection may result in unavoidable delay. A party seeking to inspect Commission records is therefore strongly encouraged to make arrangements for inspection in advance.

Copying

Response time. The Commission will provide a copy of an identifiable record within ten days of receiving a request.⁶⁸

Form of copy. Where a record exists in both paper and electronic form, the copy will be provided in the form specified by the requester, unless impracticable.

Computer records will be provided on diskette, in Mac-OS or DOS format.

Word processing files will be provided as text files, Word files, or Adobe Acrobat files (.pdf), at the preference of the requester.

Database files will be provided in tab-delimited form.⁶⁹

Cost of copying. Under the PRA, the Commission is entitled to recoup direct costs of copying by requiring prepayment of these costs by the requester.⁷⁰

The cost for paper copies of records requested under the PRA is \$0.50 per page.

The cost for paper copies of records containing personal information pertaining to the requester is \$0.10 per page.⁷¹

The cost of copying electronic records onto diskettes provided by the Commission is \$0.50 per diskette.

There is no cost to copy electronic records onto diskettes provided by the

68. Gov't Code § 6256.

69. Database layout files are computer programs created by Commission staff and are therefore not public records subject to disclosure. Gov't Code § 6254.9. An agency may provide copies of computer files in any form. Gov't Code § 6256. Virtually all database programs are capable of reading tab-delimited files.

70. Gov't Code § 6257.

71. Civ. Code § 1798.33.

requester.

Payment of copying costs must be by check made out to the California Law Revision Commission.

No commercial use of mailing list. No copies of the Commission mailing list will be provided unless the requester signs a statement certifying that the list will not be used for commercial purposes.⁷²

72. Civ. Code § 1798.60.