

Appendix B--Disclosure of Public Records

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Appendix B – Disclosure of Public Records

Introduction

This section summarizes the laws covering the handling of records and outlines some of the procedures that DPR follows. There are two principal California laws governing the handling of government-held records. These laws are the Public Records Act (PRA) (Government Code section 6250 et seq.) and the Information Practices Act (IPA) (Civil Code section 798 et seq.).

In addition, Proposition 59 (Public Records, Open Meetings), passed in 2004, makes the public's right to records a constitutional right and requires that statutes be broadly construed if they further the public's access to records and narrowly construed if they limit that right.

CAC procedures

Each CAC should develop a procedure for handling requests for release of records and have it reviewed by county counsel. DPR is not in a position to provide case-specific legal advice to counties on this issue and only offers the following information as an example of how DPR handles requests for certain records.

Background

It should be presumed initially that all records, regardless of physical form or characteristics, including electronic records held by DPR and CACs, are public. This would include such records as notices of violation and notices of warning. Records relating to pesticide use by any person or agency, county pest control business and individual records, finalized civil penalty actions, cease and desist, seizure or quarantine orders, litigation involving the agency that has been finally adjudicated or otherwise settled, and most correspondence and memoranda. Computer software programs are not considered to be "records" as defined by the IPA.

Certain records precluded from disclosure

Some records, such as medical information and personnel information, are normally precluded from disclosure (release) to protect the privacy of individuals. In addition, information collected under assurance of confidentiality (confidential business information or trade secrets) may be protected from disclosure, as well. Other records, such as investigation files and some predecisional documents, are permitted to be held in confidence to facilitate efficient operation of the agency. Records may not be withheld from disclosure simply to protect the image or avoid embarrassment of the agency.

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Disclosure of Public Records, Continued

Governmental agencies withholding information

Government Code section 6255 requires agencies to justify withholding any record by showing the record in question is exempt or by making a determination that the facts of the particular case show the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

When the PRA request is in writing and the agency decides to deny the request, in whole or in part, the agency must respond to the requestor in writing within ten days. Included in this section is a sample letter that may be used for withholding a specific document. This sample letter is not appropriate for responding to subpoenas or similar processes as described below. In those cases, you should immediately inform your county counsel.

An agency may temporarily postpone or restrict inspection of public records under certain circumstances such as:

- The records, at the specific time, are required by staff or other agency officials to perform their duties.
- Supervision of the requester's inspection is, at that specific time, not possible.
- Other members of the public are waiting to inspect the records.

Request to inspect a public record

Any person who wishes to inspect a public record or obtain a copy of a public record must identify the record(s) specifically enough so it can be located. CACs may want to assist the requestor in limiting their request to focus on the records actually wanted.

The PRA requires the requestor to identify the time frame for which records are sought. CACs might also ask the requestor for such things as the particular chemical, a specific incident or incidents pertaining to a particular person or firm. It is not appropriate to ask a requestor about the reason why they want the requested document. The purpose for the request has no bearing on whether the document can be released pursuant to the PRA.

CACs may require the requestor to send a copy service to make copies if it is a large request that would be a burden for the agency to fulfill.

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Disclosure of Public Records, Continued

Agency may impose record inspection procedures

An agency may impose reasonable record inspection procedures such as requiring:

- Appointments for inspection of public records to ensure supervision of the inspection and availability of the records
 - Written requests to document more precisely for the record, what records are being requested
 - Advance notice as to which records will be inspected so that the agency can have the records available for inspection
 - That a staff member be present during the inspection for security of the records
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A. Principal Laws

What the PRA covers

The PRA covers how State and local government agencies maintain and disclose records. It encourages disclosure, although it contains approximately 30 specific exemptions. It is modeled after the Federal Freedom of Information Act. The agency must determine within ten days of receipt of the request whether to comply with the request and must "immediately" notify the requestor of that determination.

Some photocopy costs are reimbursable, e.g., **30** cents per page. "Time" costs are not recoverable.

What the PRA applies to

The PRA applies only to records that exist at the time the request is made. It does not require that the agency "create" any records. The agency is not required to provide, on an ongoing basis, documents that come into existence in the future.

The agency may recover the actual costs of services needed to create "custom records" if it chooses to do so.

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Disclosure of Public Records, Continued

What the IPA covers CACs, as local governmental agencies, are not subject to the provisions of the IPA but are encouraged to comply with its intent.

The IPA covers how State agencies maintain and disclose records. It is designed to place constraints on how State agencies collect, maintain, and disseminate personal information (as defined by the Act) about individuals. It applies to written records in any form and has approximately 25 conditions of disclosure. An agency must meet one of those conditions before disclosing any personal information covered by the Act. It is patterned after the Federal Privacy Act.

B. Subpoenas and Other Compulsory Legal Processes

Definition “Compulsory legal processes” may include court orders, subpoena for production of records, and the demands for inspection of records related to a lawsuit involving the agency.

Applicability The PRA and IPA may not be applicable to these processes. The time frame for compliance may be short. An affidavit from the record preparer or "custodian of the records" may be required. This affidavit takes time to prepare, so when it is required, the turnaround time for actual collection of records may be extremely short. Draft documents and documents containing personal information can be demanded. An order may compel the agency to create documents and assemble information. Some costs may be reimbursable. You should follow both the letter and spirit of the order and may want to seek the advice of your county counsel.

Release of information Generally, release, pursuant to a compulsory legal process, is not considered "disclosure." The document retains any protected status it may have had. This is important since normally, any disclosure of a record constitutes a waiver of its protected status under the PRA. Disclosure of protected information by the CAC to the respondent as evidence in an ACP proceeding is a disclosure made through a legal proceeding and is required by law; the record retains its protected status and the CAC may refuse to disclose it in the future.

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Disclosure of Public Records, Continued

C. DPR-Specific Records Policy Guidance

Introduction Specific DPR policies relating to records availability for inspection or copying (if requested) follow. These policies reflect certain restrictions necessary to comply with the IPA or an exemption under the PRA. They are presented here for consideration by CACs.

Illness reports (pesticide-related conditions) When a request is for a report pertaining to a particular person (or regarding a pesticide episode involving so few persons that their identities are known or easily could be ascertained) and the requester is a member of the public, DPR will release only the name of the exposed person and the name, address, and phone number of the exposed person's physician.

Personal information that identifies or describes the exposed person (i.e., the exposed person's physical description, Social Security number, home address, home telephone number, medical information or diagnosis, and statements made by or attributed to that person) cannot be disclosed by DPR (Civil Code section 1798.24).

If the requester is a member of the public who has obtained signed written consent from the exposed person, DPR will release only the personal information authorized by the written consent. The written consent must have been obtained not more than 30 days before the request, or within the time limit agreed to by the exposed person in the written consent (Civil Code section 1798.24(b)). If the requester is the person to whom the record pertains or is that person's representative, such as an attorney, and DPR has received sufficient proof of identity, DPR will release the entire record.

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Disclosure of Public Records, Continued

Investigation records

Generally, DPR will not release files on pending investigations to the public. It is a privilege of the agency to hold these records; usually, there is no violation if released. These records may be released in specific cases where the public interest served by the release clearly outweighs the value to the operation of the agency in retaining it confidential. In addition, documents that find their way into the file that are otherwise public documents, should be released upon request (notices of violation, permits, fumigation summaries, fire department incident reports, etc.). However, with certain statutory exceptions, if any document is released to one person, it must be released to any requestor (Government Code section 6254(f) and section 6254.5).

The right not to disclose certain items in investigation files may continue even after the investigation is completed. There are portions of the file that must be protected, for example, medical information or other information the disclosure of which would constitute an invasion of privacy and the identity of confidential informants. Some information in the investigator's narrative report, such as staff analysis of the evidence and recommendations for action, may also be withheld based on the deliberative process privilege.

Communication between department attorneys concerning the evidence or the case is also protected. Once again, any document that is normally a public document cannot be withheld just because it has been made part of the investigative file. However, unless DPR can identify a public benefit to nondisclosure that outweighs the benefit of disclosure, factual information contained in the file after the file has been closed and an action taken, should be disclosed.

When the request is for records that involve many persons and the requester has not named the persons or does not know the identities of the persons (i.e., a request for all pesticide episode investigation reports for a certain time period), the personal information regarding the persons to whom the medical information pertains (i.e., person's name, Social Security number, physical description, home address, and telephone number), other than the medical information itself, will be deleted before the records are released. Medical information may be released on the basis there is no invasion of personal privacy because the information disclosed is not linked to the person to whom it pertains (Government Code section 6254(c); Civil Code section 1798.24).

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Disclosure of Public Records, Continued

Complaint confidentiality

It is DPR's position that under the balancing test required by the catch-all exemption of the PRA, the public interest served by keeping the identity of a complainant from disclosure far outweighs the public's interest in disclosure. This position is supported by case law in California (*City of San Jose v. The Superior Court* (1999), 74 Cal. App. 4th 1008). The rationale used to protect the complainants in each of these cases is clearly applicable to the pesticide setting. The identity of a person making a formal employee complaint is required to be protected, unless the complainant specifically requests that it be released (Labor Code section 6309).

Case law in California protects the name, address, and statements of a confidential informant (Government Code section 6255). There are several simple procedures that may be followed to protect the confidentiality of an individual who requests it or when it is otherwise required:

- Avoid including the name of the complainant in any investigative report.
- If reference to the complainant is necessary to the narrative, simply state "a complaint was received."
- The statements of the complainant can be included in the report without referencing the fact that he/she was the initial complainant.
- If the issue comes to a hearing and the case can be made against the respondent without the testimony of the complainant, there is no need to release any information concerning the complaint or the identity of the complainant to the respondent as part of the proceeding.

Permits and notices to apply pesticides

DPR is not aware of previous written policy relating to disclosure of permits and notices of intent for either agricultural or structural (fumigation) applications.

Pesticide use reports

Pesticide use reports are a public record. This issue was decided by the courts in a 1971 case (*Uribe v. Howie*, 19 C.A.3d 194; 96 Cal.Rptr.493) in which a farmworker with physical disorders attributed to pesticides was refused permission to inspect monthly pesticide use reports by the CAC. On appeal, the court pointed out that no trade secrets were involved, the reports could not be deemed to be within the crop report or law enforcement exemptions of Government Code section 6254, and that the public interest lay more in disclosure.

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Disclosure of Public Records, Continued

Confidential records

The following documents are protected from disclosure and are not open to inspection by the public:

- Personnel files. Their disclosure may constitute an unwarranted invasion of personal privacy (Government Code section 6254(c)).
- Records of complaints. The name, address, and statements of a confidential informant are protected (Government Code section 6254(f)). See *Complaints* above for more information.
- Preliminary drafts, notes, or interagency or intra-agency memos which are not retained in the ordinary course of business, provided the public interest in withholding the records clearly outweighs the public interest in disclosure (Government Code section 6254(a)). If these records are retained, they are presumed to have been retained in the ordinary course of business, and are not protected from disclosure.
- Data designated as a trade secret pursuant to Government Code section 6254.2 (related to pesticide safety and efficacy data) and Government Code section 6254.7 (related to air pollution control data). DPR's legal staff will make the determination as to whether a particular document is a trade secret. This issue comes up mainly with registration data.
- Information acquired in confidence where the public interest served by not making the record public clearly outweighs the public interest in disclosure (Evidence Code section 1040(b)(2) and Government Code sections 6254(f) and 6255). DPR's legal staff will make the determination in these cases.

NOTE: Records that are protected from public disclosure may be released to other agencies that agree to treat the material as confidential without losing their protected status.

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Disclosure of Public Records, Continued

Sample letter

[Your county letterhead]

[Date]

Dear *[requestor]*:

This is in response to your recent request for documents under the provisions of the Public Records Act Government Code section 6252, et seq.

The document(s) that you have requested *[describe request]* *[are enclosed/will be made available for your inspection and copying.]* *[Please call this office to make the appropriate arrangements for inspection and copying.]*

There are certain documents covered by your request that have been withheld under Government Code section 6255, as the public interest served by not disclosing those document(s) outweighs the public interest served by such disclosure.

Please contact me if you have any questions.

[Commissioner signature block]

[Optional courtesy copy: county counsel]
