



PUBLIC RECORDS and SUBPOENAS

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ACCESS TO PUBLIC RECORDS IS A FUNDAMENTAL RIGHT

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.”

Government Code §6250

- Modeled on the Federal Freedom of Information Act (FOIA)

NOTE:

It does not matter who is requesting the records or the purpose of the request.

WHAT IS A PUBLIC RECORD?

“Public records’ includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”

Government Code §6252(e)

“Writing” includes any record, regardless of how stored

- Written, printed, photographic
- Recordings
- Electronic information and data

Government Code §6252(g)

Location of record on a private device does not protect it from disclosure

TYPES OF REQUESTS

A request can be *verbal* **or** *written* for:

- Inspection of records

and/or

- Copying of records including electronic copies

RESPONSE REQUIRED “PROMPTLY” BUT NO LATER THAN 10 CALENDAR DAYS

The agency “***shall***, within **10 days** from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request ***of the determination and the reasons there for.***”

Government Code §6253(c)

CALCULATING DEADLINES: Civil Code §7, and §10

NOTE: PUT RESPONSE IN WRITING!

14 DAY UNUSUAL CIRCUMSTANCE EXTENSION

The 10 day response time can be extended by 14 days **ONLY** if one of the following exists:

“(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.”

Government Code §6253(c).

14 DAY EXTENSION PROCEDURE

- *Written* notice to requester by Department head or designee
- State reasons for extension
- State the date a determination is expected (not later than 24 days from date of request)

WRITTEN RESPONSE TO REQUEST

- Respond in writing
 - If search reveals no records requester must be informed
 - If search reveals some records, then determine whether to disclose or withhold records and
 - Notify requester of date and time records will be available for inspection or amount of charge for copying records that must be paid **before** copying
- OR
- Notify requester of denial of request with explicit reasons for denial and name and title of person who made determination to deny request

LIMITED BASIS FOR DENYING REQUEST

1. No responsive records
2. Records are exempt under CPRA exemptions or state or federal law
3. Direct Requester to the responsive public record posted on an internet web site

PROVIDE ASSISTANCE TO IDENTIFY RECORD

Agency *shall* do all of the following to the extent reasonable under the circumstances:

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
 - Notify any other departments that may have responsive records
 - These requirements are deemed to have been satisfied **if** the agency is unable to identify the requested information **after** making a reasonable effort to elicit additional clarifying information from the requester that will help identify the records.
Government Code §6253.1
2. Describe the information technology and physical location in which the records exist.
3. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

EXEMPTIONS TO DISCLOSURE

- Must be specifically identified in writing
- If not claimed, they may be PERMANENTLY waived
- May redact exempt information from portions of record, then disclose redacted record
- No duty to create log of withheld records

TIMING OF DISCLOSURE

- Specific time for *responding* to request
(10 days, 14 day extension)
- **No specific time for *disclosing* records**
 - Initial response should estimate when records will be made available
 - Must be “prompt” and agency must not delay or obstruct inspection or copying

INSPECTION: WHEN and WHERE

- Records are subject to inspection at all times during office hours
- Reasonable regulation allowed
 - Custodian can formulate regulations :
 - to protect the records against theft, mutilation, or damage
 - to prevent inspection from interfering with orderly functions of the office
 - to avoid chaos in record archives

NO DUTY TO CREATE RECORDS

The agency has no duty to create a record that does not exist at the time of the request.*

NO DUTY:

- TO CREATE RECORDS
- TO CREATE LISTS
- TO ANSWER INTERROGATORIES
- TO COMPLETE SURVEYS

***EXCEPTION:** Computerized records discussed below.

COMPUTERIZED RECORDS

- Any agency that has information that constitutes an identifiable public record not exempt from disclosure that is in an electronic format *shall* make that information available in an electronic format when requested and, when applicable, shall comply with the following:
 - The agency shall make the information available in any electronic format in which it holds the information.
 - Each agency shall provide a copy of an electronic record in the format requested, if the requested format is one that has already been used by the agency to create copies.
 - The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

COMPUTERIZED RECORDS

When *either* of the following applies:

- The request would require data compilation, extraction, or programming to produce the record. (National Lawyers Guild v. City of Hayward, (2020) 9 Cal.5th488)
 - Redaction and extraction are not the same
 - Extraction is the exception to the duty to create records. A new record is created by pulling disclosable data from a database to present it in a understandable way.
- The request seeks electronic records which are produced only at regularly scheduled intervals and the request is received between intervals.

Then **the requester** shall bear the cost of producing a copy of the record

- including the cost to construct a record
- the cost of programming
- computer services necessary to produce a copy of the record

COMPUTERIZED RECORDS

- Agency not required to reconstruct a record in an electronic format if the agency no longer has the record available in an electronic format.
- If the request is for information in other than electronic format, and the information is also in electronic format, the agency may inform the requester that the information is available in electronic format.
- Agency not permitted to make information available *only* in an electronic format.

FEES THAT *CAN* BE CHARGED

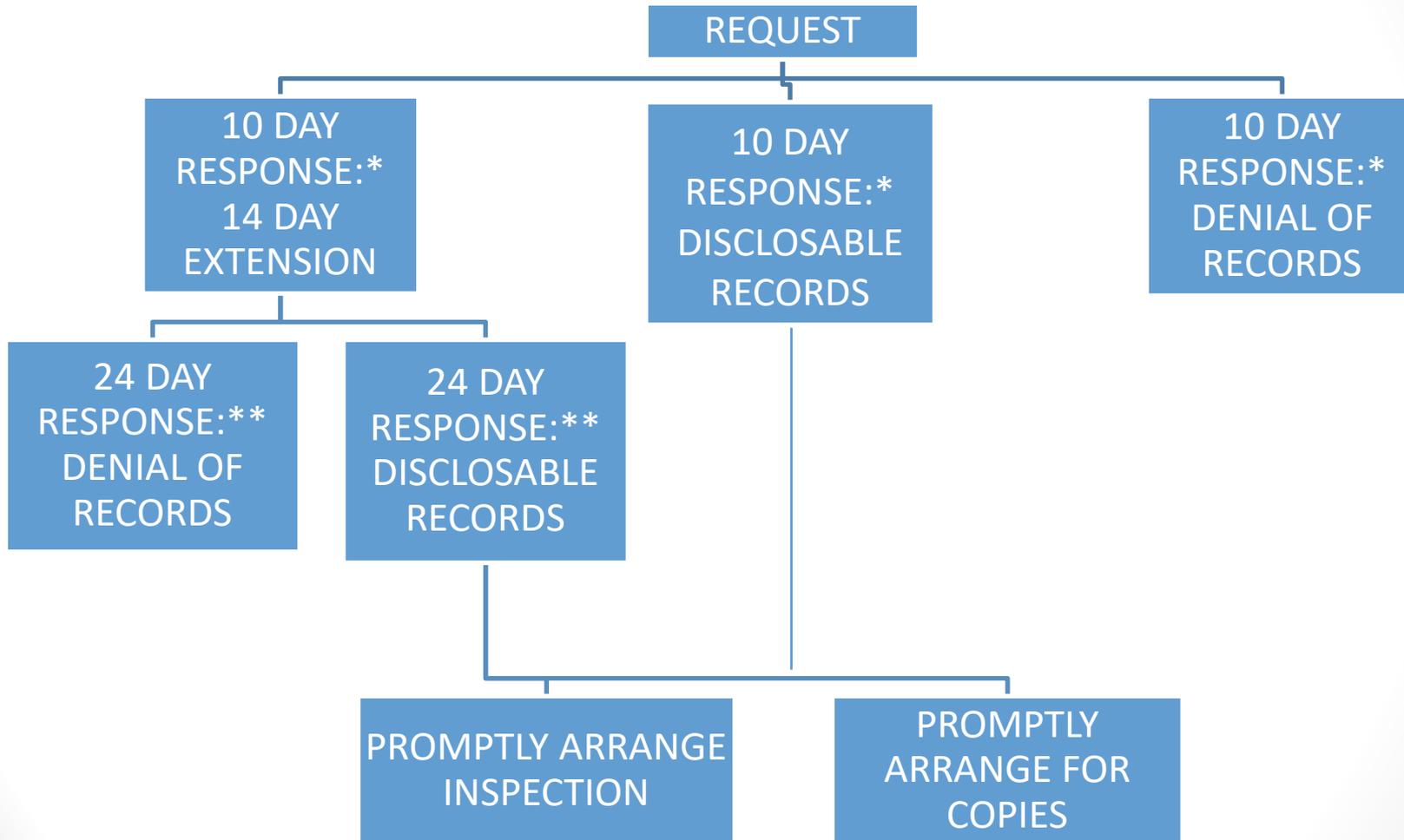
- If a copy is sought the agency can charge the “direct costs of duplication” or a “statutory fee” if applicable. *Government Code §6253(b)*
- Agency can choose to waive or reduce the charge/fee. *Government Code §6223(e)*
- “Direct costs of duplication” include the costs of reproduction and cost of staff time expended in making the copy.
- Data compilation extraction or programing for electronic records. *Government Code §6253.9*
- Board of Supervisors Approved Fee found in County Clerk Fee Schedule: \$1.00 for first page, \$0.10 each additional page

FEES THAT *CANNOT* BE CHARGED

No fees for

- Searching for record
- Reviewing a record
- Redacting a record
- Assisting requester
- Responding to request
- Overseeing requester's inspection of record
- Inspection of record

FLOW CHART FOR DEPARTMENTAL REVIEW



*WITHIN 10 CALENDAR DAYS OF DATE OF RECEIPT

**WITHIN 24 CALENDAR DAYS OF DATE OF RECEIPT (10 DAYS PLUS 14 DAYS EXTENSION)

CPRA ENFORCEMENT

- Anyone may institute legal proceedings to enforce right to inspect or receive copy of record
- No requirement to meet and confer with agency
- Costs associated with any legal proceedings are borne by the Department
- Once suit filed, if person prevails award of attorney's fees against agency is **MANDATORY** (Considered prevailing if agency voluntarily discloses withheld records)
- Agency can only recover attorneys' fees if agency prevails AND case is clearly frivolous (unlikely)
- Agency is not entitled to initiate action to determine whether documents subject to exemption(City of Los Angeles v. Metropolitan Water District, (2019) 42 Cal.APP.5TH 290.)

EXEMPTIONS FROM DISCLOSURE

Two types of exemptions:

1. Specific exemptions
 - Within the CPRA (*Government Code §6254*)
 - Pursuant to state and federal law (*Government Code §6254(k)*)
2. Catch all exemption (*Government Code §6255*)

NARROW CONSTRUCTION

Records are to be disclosed absent express exemption.

- All exemptions are construed narrowly.
- If a document contains exempt and non-exempt information and the agency can redact the exempt information, the redacted document must be disclosed.

EXEMPTION - DRAFTS

Preliminary drafts, notes, memoranda are exempt from disclosure

Caveat

- Only if not retained in ordinary course of business

and

- Public interest in withholding outweighs public interest in disclosure

Purpose

Applies to pre-decisional records which contribute to the reaching of some administrative or executive determination to protect decision making processes of government agencies. The intent is to protect frank discussion of legal or policy matters that might be inhibited if subject to scrutiny so as to undermine the agency's ability to perform its functions

EXAMPLES OF STATE AND FEDERAL LAW EXEMPTIONS

- Attorney-client communications and work-product privilege
- Deliberative Process Privilege

Allowed if disclosure would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and undermine the agency's ability to perform its functions

- Protects creative debate and candid consideration of alternatives
- Protects public from confusion from premature exposure to discussions occurring before policies settled on
- Protects integrity of decision-making process, officials should be judged on what they decide, not for matters considered before deciding
- FOIA Case: Deliberative process privilege protects in-house draft biological opinions on proposed rules that are pre-decisional from disclosure, even if the drafts reflect the agencies' last views about a proposal. (United States Fish and Wildlife Service et. al. v. Sierra Club, Inc, (2020) 141 S.Ct. 777.)

(Not exhaustive list)

PUBLIC INTEREST EXEMPTION

(General Catch-All Exemption)

Public interest in nondisclosure must clearly outweigh the public interest in disclosure

- Burden on the agency
- Requires clear overbalancing on side of confidentiality

Examples:

- speculative security concerns insufficient;
- disclosure of Governor's appointment calendar might curtail flow of information by inhibiting meeting with certain groups;
- prison building plans and security information withheld

Subpoena

An order issued by a court for a person to appear and testify at a deposition or trial, and or for the production of records.



Who can issue a Subpoena?

- An Attorney, a self-represented individual, or a service hired by an attorney.
- Subpoenas can be issued in criminal cases, civil, and government agencies conducting their own investigations.

Required Contents of the Subpoena:

- The name of the court that issued the subpoena.
- Date, time and place of the court hearing.
- Citation of the title of action and case number.
- The identity of the person to whom the subpoena is directed.
- Production of documents or for attendance at hearing, trial or deposition.
- There are penalties for an individual who receives a subpoena and does not respond to its direction.



Are there different types of Subpoenas?

Yes-there are three distinct types:

1. Witness Subpoena
2. Subpoena Duces Tecum
3. Deposition Subpoena



1. Witness Subpoena

- A *Witness Subpoena* is a writ or order requiring a specific person to appear and testify in court as a witness.
- Subpoenas to appear at trial must identify a specific person and must be served upon that person.



2. Subpoena Duces Tecum

Orders the Person subpoenaed to produce books, documents, or other records under his/her control at a specified time and place. It may also require the person to accompany the records and testify as a witness.

Subpoena Duces Tecum

- Meaning: ‘subpoena for production of evidence’.
- A court summons ordering the recipient to appear before the court and ***produce documents*** or other tangible evidence.
- A copy of an affidavit shall be served before trial, showing good cause for the production of the matters. (CA CIV PRO § **1985(b)**).

3. Deposition Subpoena

- Requires a non-party to provide copies of business records to, or appear before, a subpoenaing party.
- A deposition subpoena differs from a subpoena duces tecum in that production of and testimony regarding the records revolve around the informal discovery process before trial, rather than around a court hearing as it is for a subpoena duces tecum.

A deposition subpoena is used to:

- Compel the witness to appear to testify at a deposition.
- Compel a person or records custodian to produce business records for copying.
- Compel a person to appear at a deposition to testify and produce documents, electronically-stored information, or tangible things.



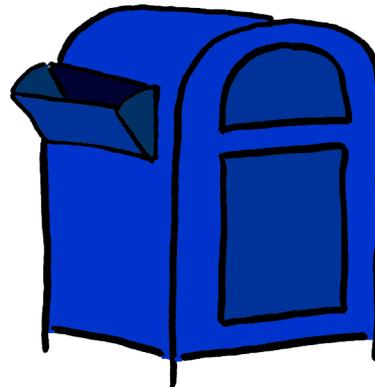
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Subpoena Service :

- A subpoena must be served on the individual ordered to appear.
- It must be served within a “reasonable time”.
- At least 10 days before the compliance date set, (+5 days) if service by US mail.
- At least 5 days before serving the subpoena **on the witness** (+5 days) if service by US mail.



Subpoenas for County Records

- Only the Clerk of the Board of Supervisors may accept service of government claims, summonses, and complaints on behalf of the County of Riverside and any County agency.
- Employees must not accept subpoenas for County records unless specifically authorized to do so.
- Regardless of the location of those records, they must be directed to appropriate department or agency that maintains the records.
- Do not accept service on behalf of another employee. Contact County Counsel's Office for instructions, as necessary.
- Any questions should be directed to County Counsel's Office.

ANY QUESTIONS?