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ASSOCIATION OF CHIEF BUSINESS OFFICIALS (ACBO) SPRING CONFERENCE

Exposed! New Cases and Your Personal Devices under the Public Records Act

5/23/2017

PRESENTED BY:


Eileen O'Hare-Anderson & Felipe R.
Lopez

Exposed! New Cases and Your Personal Devices under the Public Records Act
Association of Chief Business Officials (ACBO) Spring Conference | May 23, 2017
Presented by: Felipe R. Lopez, Cerritos College & Eileen O'Hare-Anderson, LCW

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Today's Agenda

- What Records Are Covered
- Responding to PRA Requests
- Exemptions under the PRA
- Producing the Records
- Recent Cases

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What Records are Covered?

Public Records Act

- The California Public Records Act
 - Government Code Section 6250 et seq.
- Public Policy Favors Disclosure
- The Act Recognizes Privacy Interests in Certain Records
- Provides Numerous Exemptions to Disclosure

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Requests for Copies

- A Member of the Public Has a Right
- To Receive Exact Photocopies of Public Records When:
 - Request Describes an Identifiable Record
 - Requester Pays Copy Costs
 - Providing an Exact Copy Is Possible
 - Agency Is Not Obligated to Reconstruct Unavailable Computer Data

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Public Records Covered by the Act

- The Act Applies
 - To “Any Writings”
 - Relating to the Business of the District
 - Prepared, Owned, Used, or Retained by District
 - Regardless of Physical Form or Characteristics
 - Paper
 - Electronic
 - Microfiche
 - In the Archives

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Inspection of Public Records

- Public Records
 - Subject to Inspection
 - During Business Hours
- District May Adopt Procedures for Making Public Records Available

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Right to Assistance from Agency

- District Must Assist Requester
 - Make a Focused and Effective Request
 - Reasonably Describes an Identifiable Record
 - Identify Responsive Records or Information
 - Provide Suggestions for Overcoming Any Practical Basis for Denying Records

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Responding to PRA Requests

Responding to a Records Request

- Must Respond
 - Whether or Not to Comply
 - Notify the Requester of Such Determination
 - Within 10 Days After Receipt of the Request
 - In “Unusual Circumstances” Can Extend 14 Additional Days

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True, False, or Maybe

Sue, a community member, approaches the VP of Administrative Services Office staff. She makes a PRA request for information related to a controversial land purchase. The employee asks for her name, occupation, and address. She refused to give it. The employee then asks why Sue wants the records. She refused to answer. If Sue refuses to provide this information, the employee can refuse her request.

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True, False, or Maybe

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Exemptions under the PRA

Exempt Records

- Numerous Exemptions to the Disclosure Requirement
 - Narrowly Construed
 - District Will Have the Burden to Prove the Exemption Applies

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Exempt Records

- Common Exemptions:
 - Draft Documents
 - Personnel Files
 - Pending Litigation Records
 - Peace Officer Records
 - Student Records
 - Except for Directory Information
 - Catch-all Exemption
 - Attorney Client Privilege

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Case Study

District's governing board has an employee who takes notes during closed session on specific issues. One of the unions has made a PRA request for all this employee's notes written during closed session meetings with the District's labor negotiator.

Will the union get the records?

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Catch-All Exemption

- Where No Specific Exemption Exists
- District Must Show
 - Based on the Facts of the Particular Case
 - The Public Interest Served By Not Disclosing
 - Clearly Outweighs the Public Interest Served By Disclosure of the Record

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Waiver of Exemption

- Generally, if District Discloses a Public Record
 - Exempt from the Disclosure
 - Waived the Exemption
- Several Exceptions to General Rule
- More on This in a Minute

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Attorney Fees and Costs

- The Court *Shall*
 - Award Costs and Reasonable Attorney's Fees
 - To Prevailing Plaintiff
- Paid By the Public Agency
- Local Agency May Be Entitled to Attorney Fees/Costs for Clearly Frivolous Action

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Recent Cases

Public Records Act

- Inadvertent Release of Attorney-Client or Attorney Work Product Privileged Documents under the PRA Does Not Constitute Waiver.

Newark Unified School District v. Superior Court of Alameda County (2016) 366 P.3d 1005; *Ardon v. City of Los Angeles* (2016) 366 P.3d 996.

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Case Study

Joe makes a PRA request for communications sent or received on Trustee's and employee's personal devices. The District agreed to produce records stored on its servers, but refused to produce records sent from personal devices and stored on personal servers.

Should the District produce the records?

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Personal Email and Phone

- Writings concerning public business are public records even if they are sent, received, or stored on an employee's personal email, phone, or computer

City of San Jose v. Superior Court (2017)
2 Cal.5th 608.

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Personal Email and Phone

- Must Conduct Reasonable Searches
- Districts Can Develop Internal Policies:
 - Then Can Rely on Employees
 - To Search Their Own Personal Files, Accounts, and Devices
 - For Responsive Material

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Personal Email and Phone

- Can Adopt Policies Requiring Employees to:
 - Not Use Personal Accounts for Public Business
 - or
 - Copy Communications to Their District Accounts When They Do So

28 | LCW | LIEBERT CASSIDY WHITMORE

Thank You!

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29 | LCW | LIEBERT CASSIDY WHITMORE
