

PUBLIC RECORDS ACT



WHAT ARE PUBLIC RECORDS?

The term “public records” includes any record relating to the public’s business which is retained by or in the possession of any state or local agency. This definition is purposefully broad to protect the public’s interest in remaining informed regarding the actions of government.

WHAT’S A RECORD?

Includes:

- > Photocopies
- > Handwritten notes
- > Letters
- > Reports
- > Digital storage
- > Electronic mail
- > Facsimiles
- > Other recorded items

EMAIL AND ELECTRONIC MESSAGES

Emails and other electronic communications constitute “public records” if they relate to conduct of public business. These communications are generally subject to disclosure under the Public Records Act unless they fall under an exemption. Importantly, this can include electronic communications on private accounts or devices (including texts, emails, and communications on social media platforms) depending on the content and context of the communications.

Public agencies may wish to consider adopting policies and implementing best practices around electronic communications by both employees and members of the governing board, including requiring use of email addresses provided by the agency, segregating personal communications, and how and whether emails, texts and other electronic communications addressing government business should be stored and maintained.

EXEMPT RECORDS (Partial List)

- > Preliminary drafts and notes not ordinarily retained in the normal course of business, subject to the balancing test for the “catch-all” exemption discussed below
- > Documents prepared for pending litigation
- > Certain personnel and medical files (but not all personnel records are exempt)
- > Certain information from police reports
- > Test questions, scoring keys, and other exam data
- > Records prohibited from disclosure by California or federal law, such as student records
- > Privileged records protected from disclosure by California or federal law, such as attorney-client communications
- > Employee home addresses and telephone numbers

“CATCH-ALL” EXEMPTION

Documents may be withheld if the agency determines that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

WHO MAY REQUEST A PUBLIC RECORD?

Any “person,” including non-citizens, corporations, partnerships and other businesses, firms and associations. Requests for records must be reasonable and describe an identifiable record.

DEALING WITH UNCLEAR REQUESTS

Public agencies must “assist” the person making the request so that the request is focused, effective, and reasonably describes an identifiable record or records. This includes assisting 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; describing the information technology and physical location in which the records exist; and providing suggestions for overcoming any practical basis for denying access to the records.

RESPONSE TIMELINES

Each agency, upon a request for a copy of records, 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 therefor. This does not equate to a requirement that the records be produced within 10 days. Production should be made in a reasonable time frame.

In unusual circumstances, the 10-day time limit may be extended by written notice to the person making the request, setting forth the legal reasons for the extension and the date on which a determination is expected. The resulting extension cannot be more than an additional 14 days.

CHARGING FOR COPIES

Generally, public agencies may charge a requestor only the direct cost of copying records in response to a Public Records Act request. Importantly, this does not include the administrative costs of searching for, reviewing, or redacting responsive records.

TIPS FOR MANAGING PUBLIC RECORDS ACT REQUESTS

- > **Respond Promptly:** Agencies should be reasonably prompt in responding to requests (promptness depends on the nature of the request).
- > **Duty to Assist:** Agencies must provide assistance to the person requesting the records. If the request is vague or ambiguous, help the person articulate what records s/he is seeking and explain what records the agency has.
- > **Provide Existing Documents:** A public agency has no duty to create new records, provide a summary of existing records, or create new formats in response to a records request.
- > **Segregating or Redacting Confidential Information:** If a record contains confidential and non-confidential information, agencies should generally provide reasonably segregated or redacted portions of the record.
- > **Exemptions:** Know the legal exemptions or where to find them.
- > **Consistency:** Maintain a consistent policy or practice when allowing the inspection of records and in charging copy costs.
- > **Access is a Fundamental Right:** Remember, the overall purpose of the Public Records Act is to provide the citizens with the basis to know their government’s business.
- > **Know the Agency’s Policies and Practices:** This includes understanding how emails sent to and from employees and board members regarding government business will be treated.
- > **Utilize Counsel when Necessary:** Failure to promptly and properly respond to a Public Records Act request can, and often does, lead to costly litigation. Importantly, a requester who prevails in an action against a public agency to enforce the Public Records Act is often entitled to recover their attorney’s fees and costs. While complying with the Public Records Act can pose a burden on a public agency and its staff, failure to comply is often more costly. Lozano Smith attorneys are available to assist our public agency clients with all manner of Public Records Act questions and concerns.

DISCLAIMER: As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this document does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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