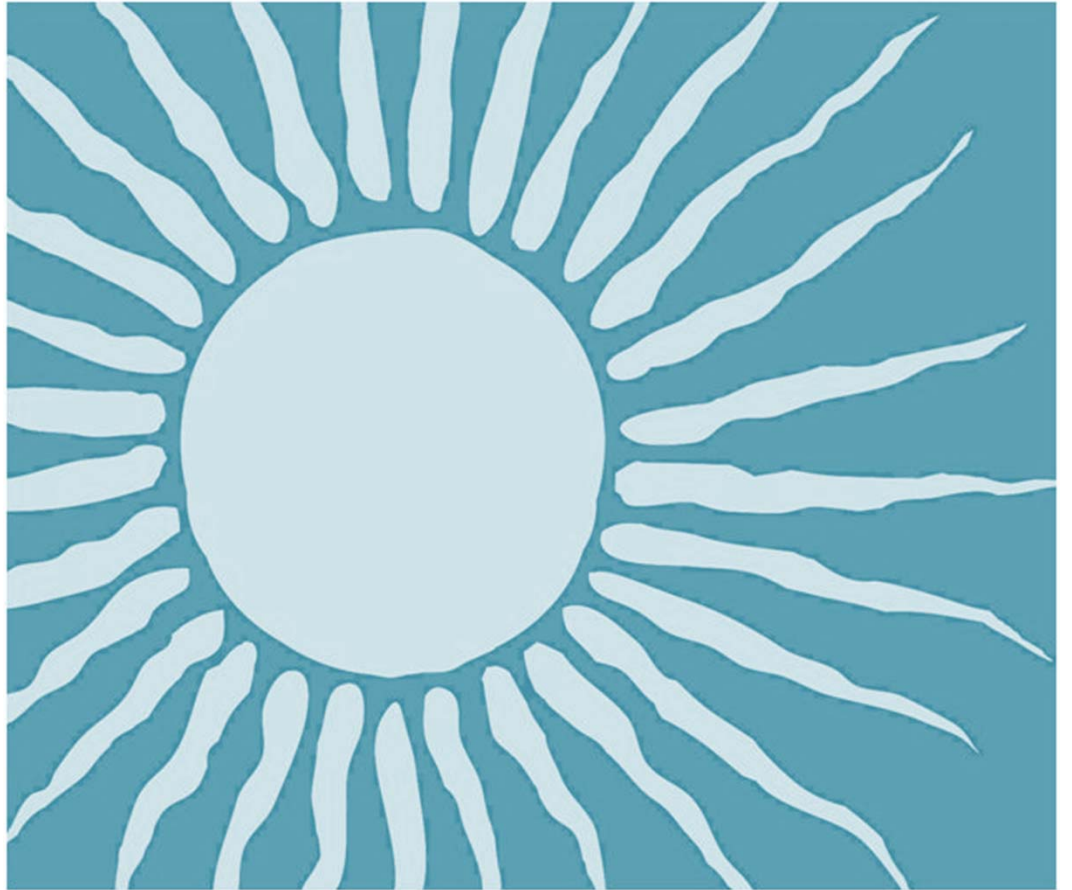


Government “Sunshine” Laws

Brown Act
Public Records Act
Freedom of
Information Act



THE BROWN ACT

Cal. Gov. Code §54950 et. seq.

Overview

- Heart of the 1954 Ralph M. Brown Act:
 - *All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meetings of the legislative body of a local agency, except as otherwise provided in this chapter.*
- Reconfirmed by constitutional initiative amendment, Prop 59, in 2004

What is a “Legislative Body”?

- Governing Body of Local Agency
 - Elected but not sworn individuals
- Commissions and Committees
 - Exception: “Ad hoc” Committees
- Certain Non-Profits



Meetings

- Types of meeting
 - Regular
 - Special
 - Emergency

REGULAR MEETING OF THE BOARD OF SUPERVISORS
ORANGE COUNTY, CALIFORNIA

Tuesday, September 11, 2012
9:30 A.M.

BOARD HEARING ROOM, FIRST FLOOR
333 W. Santa Ana Blvd., 10 Civic Center Plaza
Santa Ana, California

JOHN M. W. MOORLACH
CHAIRMAN
Second District

**SHAWN
NELSON**
VICE
CHAIRMAN
Fourth District

**BILL
CAMPBELL**
SUPERVISOR
Third District

INTERIM COUNTY EXECUTIVE
OFFICER
Robert J. Franz



**JANET
NGUYEN**
SUPERVISOR
First District

**PATRICIA
BATES**
SUPERVISOR
Fifth District

COUNTY COUNSEL
Nicholas S. Chrisos

CLERK OF THE BOARD
Susan Novak

County of Orange Mission Statement
Making Orange County a safe, healthy, and fulfilling place to live, work, and play, today and for generations to come,
by providing outstanding, cost-effective regional public services.

Vision Statement for Business Values - We strive to be a high quality model governmental agency that delivers services to the community in ways that demonstrate:

Meetings

- Hypo #1:

A priest, a rabbi and three Council members walk into a bar. Is this a meeting under the Brown Act?



Exceptions to the Meetings Rule

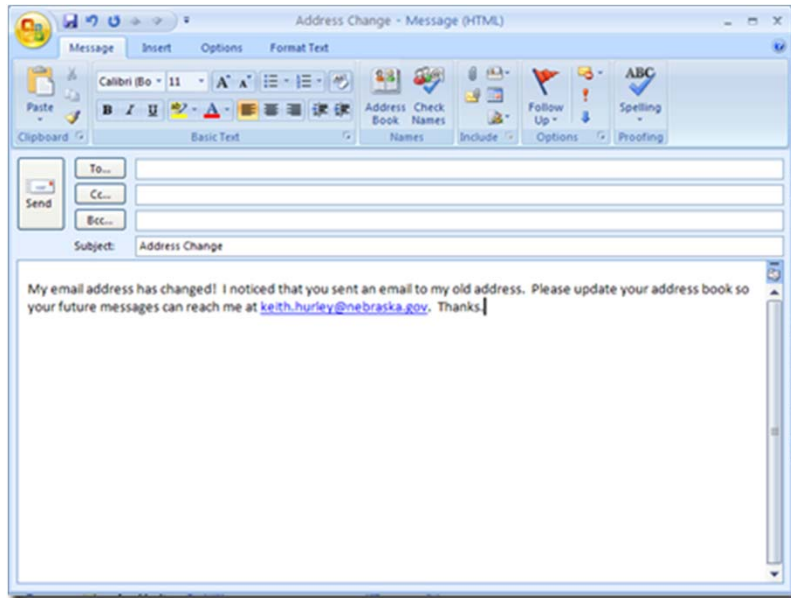
- Social/Ceremonial
- Conferences/Community Meetings
- Other Legislative Bodies and/or Standing Committees
- Independent Conduct

Serial Meetings



- Daisy Chain/Hub and Spoke
 - Hypo #2
- Allowable Ex Parte Communications and Briefings
 - Hypo #3

Serial Meetings



- Electronic communications create potential for serial meetings
 - Email
 - Blogs
 - Social Media

Teleconferencing

Allowed during meetings as long as certain procedures are followed



Closed Sessions



Permissible Subjects of Closed Session

- Real Estate Negotiations
- Anticipated or Pending Litigation
- Personnel
- Labor Negotiations

Closed Session Agenda Descriptions

NEWPORT BEACH CITY COUNCIL AGENDA
COUNCIL CHAMBERS - 3300 NEWPORT BOULEVARD
Closed Session - 5:00 p.m.
Regular Meeting - 7:00 p.m.
September 11, 2012

I. STUDY SESSION - 4:00 p.m.

II. CLOSED SESSION - After Study Session - Council Chambers Conference Room

- A. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION INITIATION OF LITIGATION (Government Code § 54956.9(c)): 1 matter
- B. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION SIGNIFICANT EXPOSURE TO LITIGATION (Government Code § 54956.9(b)): 1 matter

There is a significant exposure to litigation with Kenneth Kaplan based on his allegations of inverse condemnation related to the real property located at 1499 Monrovia Ave., Newport Beach, California (Section 54956.9(b)(3)(B)).

Closed Session Agenda Descriptions

C. CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Government Code § 54956.8): 2 matters

1. Property: 1499 Monrovia Ave., Newport Beach, CA
Agency negotiator: Dave Kiff
Negotiating parties: Kenneth Kaplan
Under negotiation: Instruction to negotiator will concern price and terms of payment
2. Property: Bayside Marina, 1137 Bayside Drive, Corona del Mar, CA 92625
Agency negotiator: Dave Kiff
Negotiating parties: The Irvine Company
Under negotiation: Instruction to negotiator will concern price and terms of payment

D. CONFERENCE WITH LABOR NEGOTIATORS (Government Code § 54957.6)

Heading Agency Designated Representatives: Dave Kiff, City Manager and Terri Cassidy, Human Resources Director; Negotiators

Employee Organizations: All Labor Associations: Association of Newport Beach Ocean Lifeguards (ANBOL); Newport Beach City Employees Association (NBCEA); Newport Beach Employees League (NBEL); Newport Beach Firefighters Association (NBFA); Newport Beach Fire Management Association (NBFMA); Lifeguard Management Association (NBLMA); Newport Beach Part Time Unit (UPEC, Local 777); Newport Beach Police Association (NBPA); Newport Beach Police Management Association (NBPMA); Newport Beach Professional and Technical Association (NBPTEA)

III. RECESS

IV. RECONVENED AT 7:00 P.M. FOR REGULAR MEETING

V. ROLL CALL

VI. CLOSED SESSION REPORT - City Attorney Harp announced that there were no reportable actions.

VII. PLEDGE OF ALLEGIANCE - Council Member Selich

VIII. INVOCATION - Reverend Robert Ross, Newport Universalist Society

Reporting Out of Closed Session

- Rule:
 - Council must “report out” most final decisions in open session.
- Hypo #4: *Council approves a settlement agreement in closed session. The other side has given conceptual approval but has not yet signed. Must Council report out?*

What to do if?

WHAT TO DO IF...

A Meeting Is Closed That Should Be Open...

- Refuse to leave, and use this Guide to Check the law, to protest, and to enforce all notice requirements.
- Leave only if ordered by law enforcement.
- Call your editor or lawyer at once.

An Illegal Closed Meeting Has Been Held...

- Ask participants what happened, and get reports of actions taken and copies of contracts approved.
- Call FAP, Society of Professional Journalists, or the California First Amendment Coalition.
- Write a story or letter to the editor about it.
- Contact the District Attorney under section 54959, or take legal action under section 54960(a) against violations or a "gag rule" imposed on a body's members.
- A court may: (1) force the agency to make and preserve tapes of closed sessions (§54960(b)); (2) declare actions taken null and void (§54960.1); (3) award costs and attorneys fees (§54960.5).

Public Participation



Hypo #5: What if the Council has “closed the public hearing” but the item is scheduled for approval at the following meeting?

Public Participation

- What do I do if discussion goes off agenda?
 - Speak up
 - Tell the media
 - Send written notice with
30 days of action (or 90 days
if closed session)
 - Consider litigation



Brown Act Suspension – AB 1464

Suspends

- 72-hour agenda requirement
- Closed session descriptions
- Reporting out of closed sessions
- Providing copies of certain closed sessions items

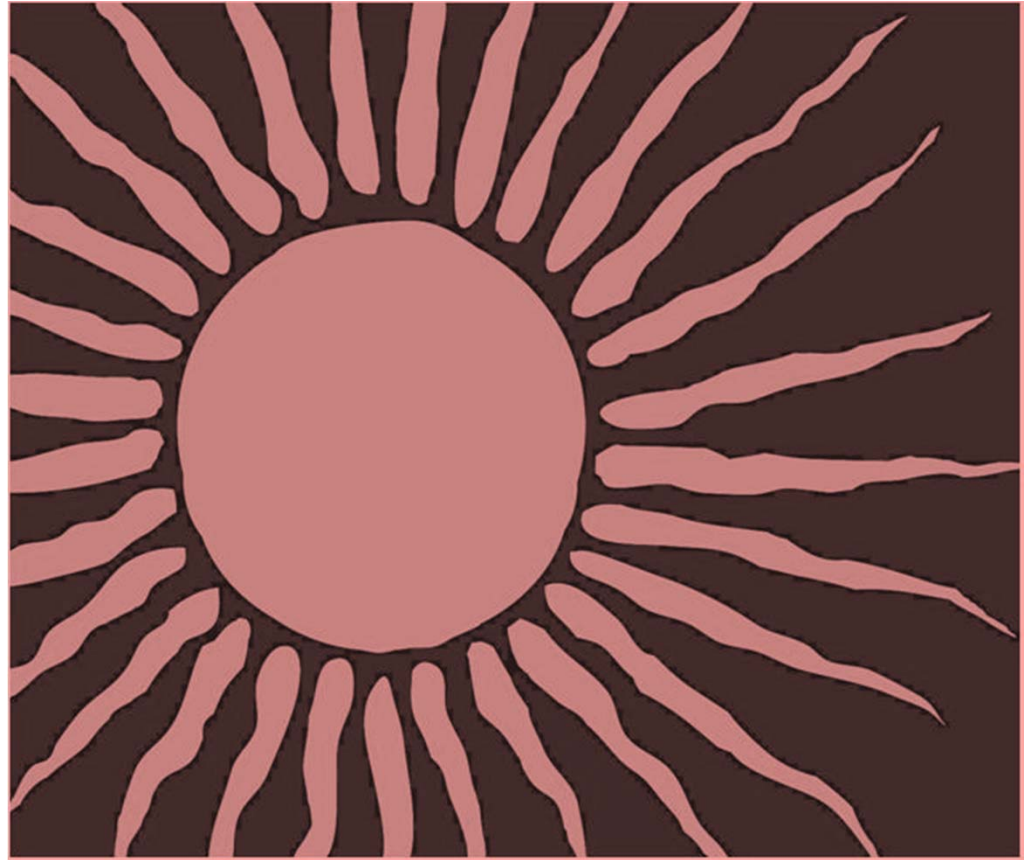
Reasons not to panic

- Most if not all jurisdictions are continuing to comply
- Prop 30 (Gov. Brown's tax initiative) would make Brown Act items non-reimbursable

Local Sunshine Laws

- Brown Act is a floor - not a ceiling
- Jurisdictions
 - Alameda, Benicia, Berkeley, Contra Costa County, Gilroy, Milpitas, Oakland, Riverside, San Bernardino County, San Francisco, Vallejo
 - Brea (Nov. 2012 vote)





THE PUBLIC RECORDS ACT

Cal. Gov. Code §6250 et. seq.

The Act Provides a Fundamental Right of Access to Information

- *Right to inspect records unless exemption applies*
- *Right to prompt availability of copies of these records*

The Basics

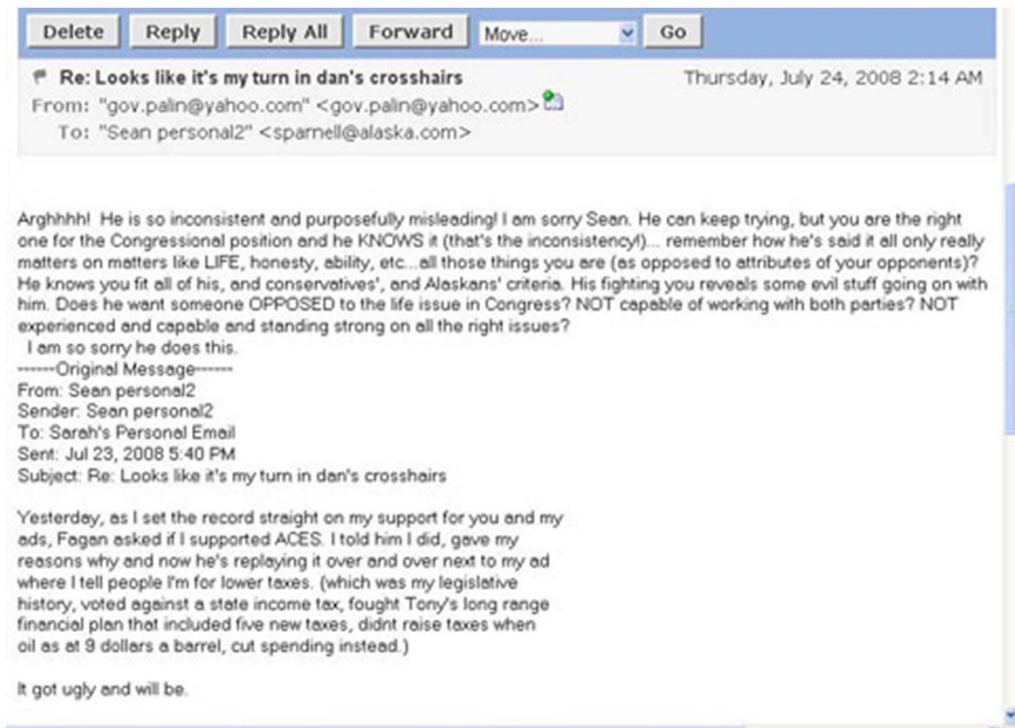
- Which agencies are covered?
 - State agencies
 - Local agencies
 - Nonprofits that are covered by the Brown Act

The Basics

- What are public records?
 - Broad definition: *“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.”*
- Hypo #6: *Government employee is an activist on the side in her local community. Are her emails relating to her community activities public records under the PRA?*

The Basics

- HYPO #7:
Government employee regularly uses Yahoo account to conduct government business. Are her emails subject to disclosure under the PRA?



Making and Responding to the Request

- Request can be made orally or in writing

TIP: Put your request in writing unless you have a good relationship with a staff person and know exactly what you want.

Content of the Request

- Request must “reasonably describe an identifiable record or records.”

TIP: State whether you want electronic files in their native format.

	A	B	C	D	E	F	G	H
1	06/23/05	21:02:05	Lot: 0950052 00	Lcc: IAIMR 0000	Operator: 385932			
2	DATE	TIME	LE_THK_T	MAX_THK_T	TE_THK_T	CHORD_T	LE_THK_N	MAX_T
3			0.0096	0.0096	0.0096	0.0161	0.0096	0.00
4			0.0091	0.0091	0.0091	0.0156	0.0091	0.00
5			-0.0001	-0.0001	-0.0001	-0.0156	-0.0001	-0.00
6			-0.0001	-0.0001	-0.0001	-0.0161	-0.0001	-0.00
7	6/27/2005	0:07:06	0.0045	-0.0024	0.0036	0.0078	0.0059	-0.00
8	6/27/2005	0:07:13	0.0026	-0.003	0.0036	0.0047	0.0029	-0.00
9	6/27/2005	0:07:22	0.0014	-0.0034	0.0033	0.0055	0.0016	-0.00
10	6/27/2005	0:07:32	0.0032	-0.0038	0.0016	-0.0018	0.0032	-0.00
11	6/27/2005	0:07:39	0.0027	-0.0029	0.0039	0.0019	0.004	-0.00
12	6/27/2005	0:07:59	0.0028	-0.0038	0.0022	0.0012	0.003	-0.00
13	6/27/2005	0:08:08	0.0012	-0.0045	0.0022	0.0021	0.0025	-0.00
14	6/27/2005	0:08:15	0.004	-0.0019	0.0036	0.0103	0.0053	-0.00
15	6/27/2005	0:08:24	0.0031	-0.0029	0.0034	0.0038	0.0033	-0.00
16	6/27/2005	0:08:30	0.0031	-0.0028	0.0036	0.0092	0.004	-0.00
17	6/27/2005	0:08:37	0.0008	-0.0021	0.0014	0.0053	0.005	-0.00

Content of the Request



- Agency is required to assist the public to make a focused and effective request that describes identifiable records.

TIP: Request a meeting with agency staff to help narrow your request.

Response

- Inspection

TIP: If you urgently need to review a discrete number of documents or a planner's project file, you may want to drop by City Hall to inspect them.

- Deadlines to Provide Copies of Documents

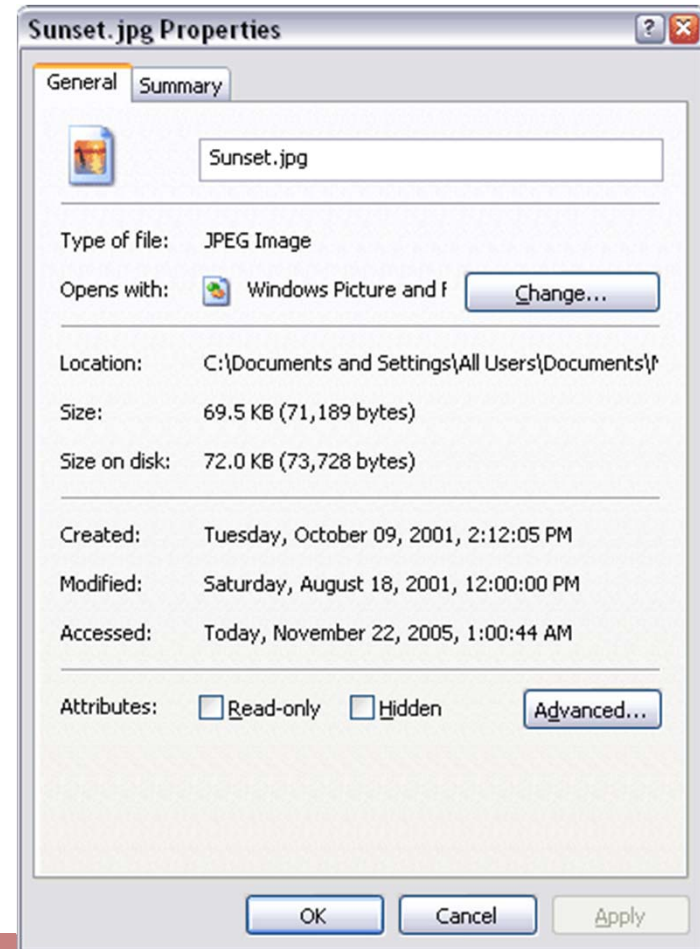
- 10 calendar days to respond
- Agency may extend the 10-day initial response time by an additional 14 days in “unusual circumstances”
- Act does not provide a deadline for producing the documents but says they must be made “promptly available”

Agency May Withhold Exempt Records

- Burden is on the agency wishing to deny access to records to provide the legal basis for its position.
- Agency is not required to provide a “privilege log.”
- Agency has a duty to redact exempt information and provide public with non-exempt portion.
- Many exemptions are discretionary.

Emerging Issue: Metadata

- What is it?
 - Electronic documents contain embedded information regarding the time the document was created, by whom, editors, etc.
- HYPO #8: *Is metadata a public record?*



Cost of Providing Copies of Records



- Agencies may charge a fee “covering direct costs of duplication” or a statutory fee.
- HYPO #9: *Can I avoid copying charges by requesting documents be emailed to me in PDF format?*

Commonly Used Exemptions

- Attorney-Client Privilege & Attorney Work Product
 - Waiver
 - Common interest privilege
- Pending Litigation



Commonly Used Exemptions

- “Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding records clearly outweighs the public interest in disclosure.”
- HYPO #11: *Are interagency emails exempt under the “preliminary drafts” exemption?*

Commonly Used Exemptions

- Law Enforcement Records
 - Investigation files and records are exempt from disclosure
- Certain information must be disclosed unless disclosure would endanger the investigation.

From the Files of the KPD

Excerpt From March 2010

•10-860 On 3/1/10 at 1022 hrs., Officer Ramos took an auto burglary report from a resident on Norwood Ct.
•10-876 On 3/2/10 at 1350 hrs., Officer Wilson took an identity theft case from a business owner on Arlington Ave.
•10-902 On 3/4/10 at 0200 hrs., Officer Stegman recovered a stolen vehicle from Berkeley on Willamette Ave.
•10-951 On 3/7/10 at 0830 hrs., Officer Ramos took a hit & run accident report from a resident on Willamette Ave.
•10-957 On 3/8/10 at 0907 hrs., Officer Wilson took a residential burglary report on Purdue Ave., where two bicycles were stolen.
•10-961 On 3/8/10 at 1805 hrs., Officer Ramos recovered a stolen vehicle on Kenilworth Rd.
•10-1050 On 3/14/10 at 1051 hrs., Officer Wilson took a vandalism report (graffiti to a street sign).
•10-1067 On 3/15/10 at 1100 hrs., Officers Wilson, Ramos, & Barrow, with the assistance of Chief Harman, took two residential burglars into custody. They also recovered almost \$10,000 in stolen property.
•10-1068 On 3/15/10 at 1652 hrs., Officer Khan took a report of grand theft from



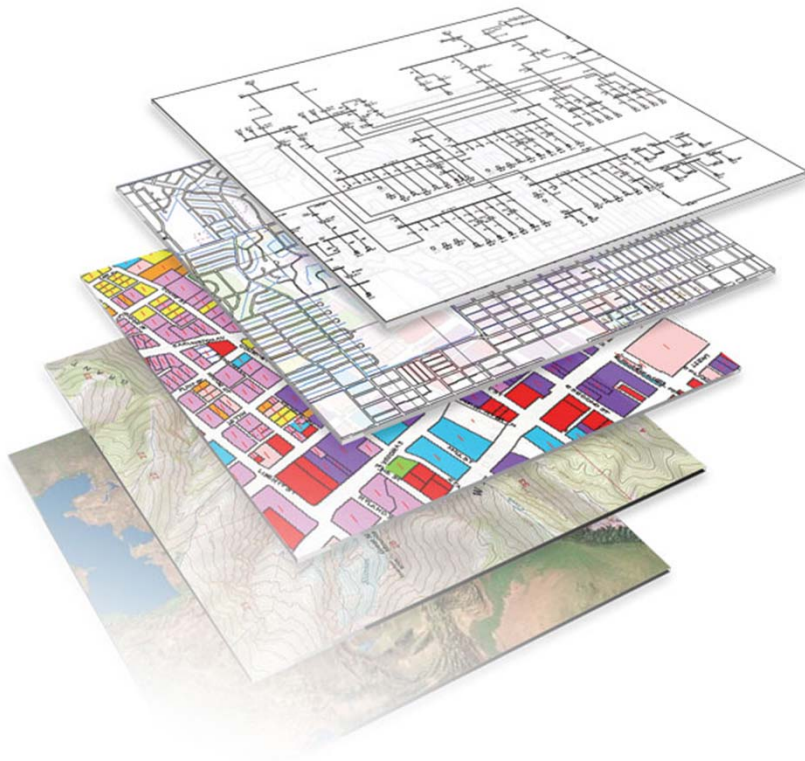
•10-1138 – On 3-19-2010, at approximately 1254 hours, Officer Martinez took a report of a stolen bicycle from the 200 block of Amherst Avenue. A resident left an expensive mountain bike unsecured in the front yard and discovered it had been stolen the next morning.
•10-1140 – On 3-19-2010, at approximately 1831 hours, FTO Medina and Reserve Officer Colon responded to the unit block of Arlington Ave. to a report of a hit & run collision. It appears the suspect vehicle sideswiped the victim vehicle while it was legally parked in the lane of Arlington Avenue.
• 10-1257 – On 3-26-2010, at approximately 2031 hours, FTO Medina and Reserve Officer Colon responded to the unit block of Kingston Rd. to a report of identity theft. A resident suffered a few thousand dollars of fraudulent debt and several thousand more attempted fraudulent debt. The fraud is mainly associated with airline tickets. *(That's right, officer – I knew something was wrong when they tried to charge me for my carry-on bag. Everyone knows you don't have to pay extra for carry-on luggage! Those vultures – charging for carrion!)*

Commonly Used Exemptions

- Personnel, medical and similar files
 - Avoids unwarranted invasion of privacy into personnel files of public employees



Commonly Used Exemptions



- Computer software and computer mapping systems
- HYPO #11: *Does the computer software exemption prohibit disclosure of GIS database without a license agreement?*

Commonly Used Exemptions

- Public interest “catch-all” exemption
 - Agency may withhold records where “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”

TIP: Anticipate this exemption and state the public interests at stake in your PRA request.

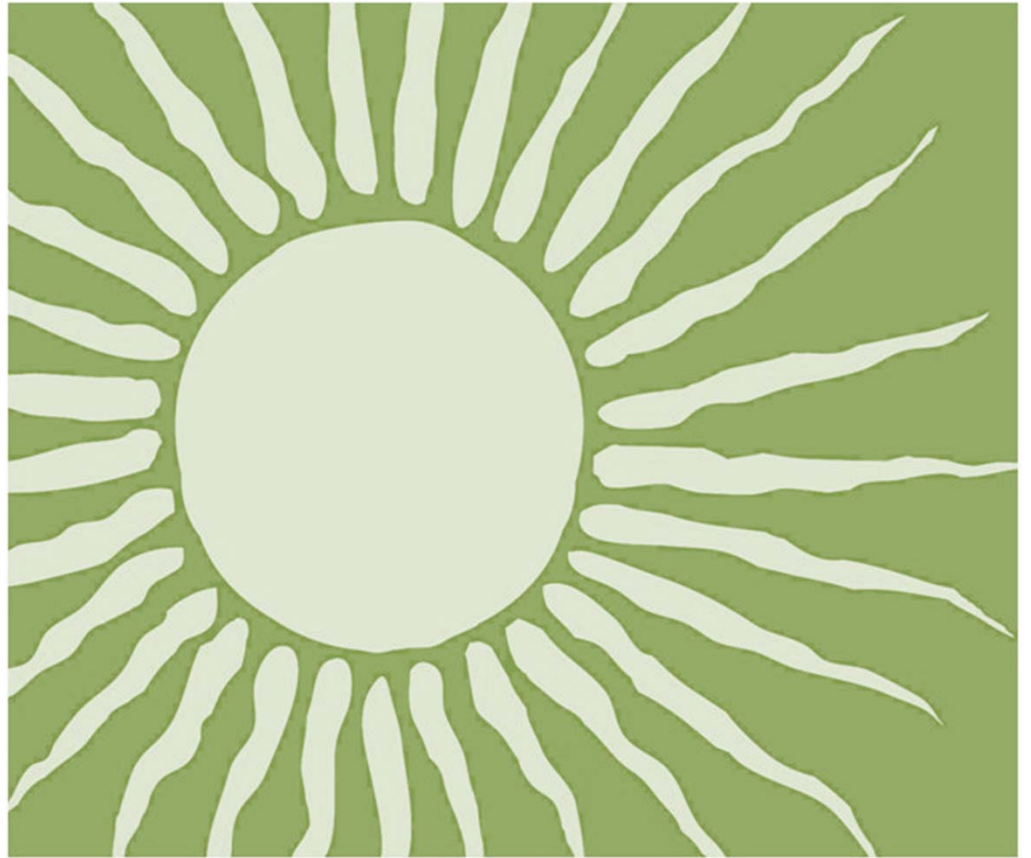
Commonly Used Exemptions

- Deliberative process privilege
 - Purpose: Protect decision-making processes of government agencies by protecting against disclosure of the mental processes of decisionmakers
- HYPO #12: *Does deliberative process privilege cover documents prepared by staff?*

What to do if your request is denied

IF YOUR REQUEST IS DENIED

- Keep a log of to whom you speak and the stated reason for the denial.
- Write a news story or Letter to the Editor about the denial.
- Consult your supervisor or lawyer.
- Employ the following six-step DENIAL strategy:
 - D = Discretionary:** Exemptions are permissive, never mandatory. Ask the agency if it will waive the exemption and release the record.
 - E = Explanation:** Insist that the agency explain in a written denial why the exemption applies to the requested record.
 - N = Narrow Application:** The Act favors access. Exemptions must be narrowly construed.
 - I = Isolate:** Request the release of any non-exempt portions of the record.
 - A = Appeal:** State your rights, using this guide, and ask to speak to a higher agency official.
 - L = Lawsuit:** File suit to enforce your rights. If you win, the agency must pay your costs and legal fees. (§6259(d)); *Belth v. Garamendi* (1991) 232 Cal.App.3d 896.



THE FREEDOM OF INFORMATION ACT

5 United States Code (USC) §552

FOIA Basics

- CPRA modeled on FOIA, so they are very similar
- Applies to:
 - The executive branch, including all agencies, departments, and the military
 - Does NOT apply to Congress or the federal courts
- Like CPRA, FOIA covers all public records that are not specifically exempt from disclosure.

Avoid FOIA if Possible

- Publicly-available documents
- Ask agency staff


FOIA Requests

- Step #1
 - Identify the Agency
 - www.access.gpo.gov
- Step #2
 - Know the Agency's requirements
 - <http://www.foia.gov/report-makerequest.html>
- Step #3
 - Submit a formal request in writing

Put it in Writing: the FOIA Request

- Describe the requested documents – be clear and specific
- Request paper or electronic production
- State the fee category
- Include your contact information
- State FOIA's requirements

Put it in Writing: Agency Form



U.S. ENVIRONMENTAL PROTECTION AGENCY

Freedom of Information Act (FOIA)

[Recent Additions](#) | [Contact Us](#) Search: ☐ All EPA ☒ This Area

You are here: [EPA Home](#) » [FOIA](#) » Online Request Form

Freedom of Information Act (FOIA) Online Request Form for EPA Documents

This form is used for making requests for EPA documents.

Complete details about the FOIA process are explained in the [Reference Guide](#).

CAUTION: Any information you submit is not secure, and could be observed by a third party.

Your Name

Company/Organization

Mailing Address

City

State

ZIP Code

E-Mail Address*

* Providing an e-mail address allows EPA to communicate with you electronically when appropriate. You will also receive an e-mail confirmation of this request.

Phone Number

Fax Number

Description of Records

Provide a description of the records you are seeking in a way that will permit EPA to identify and locate them. If you are seeking records relating to a facility, site or regulated entity, please include the complete name and address of each property you are inquiring about.

For site specific FOIA requests, please check [MyProperty](#) before filing your FOIA request.

Description

Fees

Select the amount you agree to reimburse the Agency for fees incurred to process your request. Refer to the [FOIA Reference Guide](#) for complete details.

Need Immediate Assistance?

Call the National FOIA Hotline at:
(202) 566-1667
Or [Your Local FOIA Office](#)

FOIA Home

FOIA & Open Gov

Basic Information

Make a Request

FOIA Status

FOIA Contacts

Electronic FOIA Request Form

Reference Guide

Policy and Guidance

Reading Rooms

Annual Reports

Conferences & Trainings

Privacy Act

Timeline of Process – the Law

- An agency must respond **within 20 days** notifying the requester whether they will comply with the request.
- In *unusual circumstances*, the agency may extend the response time by **10 days** but must provide a written notice.
- The clock does not start until the request is routed to the correct agency/office, which can take up to **10 days**.

Timeline of Process – the Reality

- Agencies do not often follow the required timeline.
- Within 20 days, the agency often sends a letter acknowledging the request, but not always.

TIP: “the squeaky wheel gets the grease”

FOIA Fee Categories



– Commercial Use (duplication, search, and review)



– Educational or noncommercial scientific institution or a representative of the news media (duplication)



– Other (search and duplication)

Fee Waivers

- “Documents shall be furnished without any charge or at charge reduced below the fees established... if disclosure of the information is in the public interest because it is *likely to contribute significantly to the public understanding of the operations or activities of the government* and is *not primarily in the commercial interest of the requester.*”



Address fees in your request

- State which Fee Category you fit into.
- Request a fee waiver and make your case.
- State the maximum amount of fees you are willing to pay.

9 FOIA Exemptions

- National Security/
Foreign Policy Classified
Data
- Internal Personnel
Policies
- Data exempt from
disclosure under other
statutes
- Confidential Proprietary
Data
- Non-discoverable
Internal Gov't Comm.
- Private Personal Data
- Investigation/Law
Enforcement Records
- Financial Regulation
Records
- Geological and
Geophysical Data

Confidential Proprietary Data

- aka Trade Secrets
- Commercial matter is confidential if disclosure will:
 - Impair the Govt's ability to obtain info in the future; or
 - Cause substantial harm to the competitive position of the person providing the information.
- An agency must give the commercial entity notice that the information has been requested and allow them to object to disclosure.

Non-discoverable Internal Government Communications

- “Inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency”
- Types:
 - Deliberative Process Privilege
 - Attorney-Client Privilege
 - Attorney Work Product

Appeal

- Each Agency has specific requirements.
- You may appeal:
 - Denials of a requested fee waiver or fee category
 - Failure to respond in a timely manner
 - Failure to disclose documents
- Appeal **required** to exhaust administrative remedies

Resources

- All Topics
 - The Right to Know: A Guide to Public Access and Media Law (2007). Published by the California Newspaper Publishers Association and California First Amendment Coalition. To order, contact CNPA at (916) 288-6000 or www.cnpa.com or CFAC at www.cfac.org. (\$30 for nonmembers)
- Brown Act
 - League of California Cities, Open & Public IV: A Guide to the Ralph M. Brown Act (Rev. July 2010). Available at: <http://www.cacities.org/opengovernment>
 - California Attorney General's Office, The Brown Act (2003). Available at: <http://oag.ca.gov/sites/all/files/pdfs/publications/brownAct2003.pdf>
- Public Records Act
 - League of California Cities, The People's Business: A Guide to the California Public Records Act; Supplemental Update (August 2011). Available at: <http://www.cacities.org/opengovernment>
 - California Attorney General's Office, Summary of the California Public Records Act (2004). Available at: http://oag.ca.gov/sites/all/files/pdfs/publications/summary_public_records_act.pdf
- FOIA
 - United States Department of Justice (www.foia.gov)
 - Kristin Adair and Catherine Nielsen, "Effective FOIA Requesting for Everyone: A National Security Archive Guide" (2009), available at http://www.gwu.edu/~nsarchiv/nsa/foia/foia_guide.html.

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