

ADSC Essential Hour

August 13, 2021



Strengthening California Cities
through Advocacy and Education

CPRA Module

Your First Public Records Act
Request and Response

Jolie Houston – City Attorney, Los Altos
Donald Larkin - City Attorney, Morgan Hill
Kelly Trujillo - Assistant City Attorney, Livermore
Stephanie Duck – Deputy City Attorney, Santa Cruz

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Attorney Development & Succession Committee

- **Develop and enhance**
 - the diverse set of legal, technical, practical, and interpersonal skills necessary to succeed as a city attorney or senior member of a City Attorney's Office
- **Provide opportunities**
 - for members to build and expand their knowledge of both substantive and essential skills integral to municipal law practice
- **Engage and connect**
 - more experienced municipal practitioners with newer attorneys to encourage departmental contribution, connectivity, and continuity; mentoring; effective knowledge transfer; and succession planning
- **Encourage**
 - municipal law practice in our law schools through panel discussions, internships, and mentorship

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Attorney Development & Succession Committee

- **Subcommittees**
 - Substantive Law
 - Essential Skills
 - Law School Outreach

- **Upcoming Events**
 - Essential Hour: Brown Act
 - November 2021

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Panelists

Jolie Houston, Assistant City Attorney, Gilroy, Berliner Cohen, Chair, City Attorneys Department California Public Records Act Committee

Don Larkin, Morgan Hill City Attorney, City Attorneys Department California Public Records Act Committee

Kelly Trujillo, Assistant City Attorney, City of Livermore

Stephanie Duck, Deputy City Attorney, City of Santa Cruz

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Introduction

This Essential Element Module will provide a helpful introduction to the CPRA and will assist practitioners to:

- Advise local agency clients about processing and responding to CPRA requests;
- Remain accountable and transparent to their community members and other members of the public; and
- Safeguard confidential and privileged information as necessary to preserve effective local agency business and to protect individual privacy rights; and
- Protect the government's need to function effectively.



Background

California Public Records Act
(Government Code §§ 6250 et seq.)

- The purpose of the CPRA is to give the public access to information that enables them to monitor the functioning of their government.
- The Legislature in enacting the CPRA struck a balance among competing, yet fundamental interests: government transparency, privacy rights, and government effectiveness.

California Constitution Art I Section 3

- “The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

Public Records Act Basics

- Applies to all state and local agencies
- What are public records under the CPRA?
 - “Writings” containing information relating to conduct of the local agency’s business;
 - “Prepared, owned, used, or retained” by the local agency even if on an employee’s or public official’s personal device or account;
 - Writing is broadly defined and includes electronic information such as email, text messages, and audio/video recordings.

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Public Records Act Basics

- “Fundamental and necessary” right of access
 - Right to **inspect** during a local agency office hours
 - Right to prompt availability of **copies** of public records

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Practice Pointers – Reviewing a Request

- A CPRA request must reasonably describe an identifiable record.
- The request may be in writing (including email) or oral.
- The local agency cannot require the requester to put the request in writing or to utilize the local agency's CPRA request system.
- The request must be focused and clear enough so that the local agency can decipher what record or records are being sought.
- The requester does not have to justify or explain the reason his or her request for records or identify themselves.

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Pop Quiz!

What should you do if request is over broad or vague (i.e. "all City Council emails 2010 – present," or "City Council emails")?

- a) Deny request for being vague and/or overbroad.
- b) Process as is, pulling all responsive documents.
- c) Contact requester to try to assist with narrowing request.

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Practice Pointers – Deadlines for Responding

- Once a CPRA request is received, the local agency should respond to the request:
 - 10 days to respond, with a 14-day extension for specific circumstances;
 - Response is required within 10 or 14-day extension timeframe – disclosure of the public records may be later;
 - Local agency should assist the requester to make a focused and effective request (put such assistance in writing); and
 - Disclose of public records on a “rolling basis” may expedite a large or difficult request.
 - For example, if request to too large or overbroad, cannot simply deny request, rather produce on rolling basis.

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Pop Quiz!

What if requestor does not respond to a request to narrow or clarify request?

- a) Deny request for being overbroad.
- b) Process as is, pulling all responsive documents.
- c) Re-state understanding of request (preferably in writing) and search for records as re-stated.

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Practice Pointers – Locating Records

- The local agency should initiate a good faith and reasonable search for responsive documents to determine:
 - The type or nature of the records requested;
 - Whether a review of personal electronic devices will be necessary to respond to the request;
 - Which department/staff member/city official/consultant/agents have access to records responsive to the request;
 - Reminder: there is no duty to create a record that does not exist!

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Pop Quiz!

What if I get a request for employee emails, and the employee is on vacation and cannot search for responsive document before 10-day deadline?

- a) Deny the request.
- b) Request an extension under Gov. Code section 6253(c).
- c) Provide response with approximate date responsive records will be sent.

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Practice Pointers – Reviewing Records

- Is the record responsive to the request?
- Is the record a public record?
- Is there content in the responsive documents that may be privileged, confidential, or otherwise privileged/exempt information?
- Does any portion of responsive documents need to be redacted?

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Practice Pointers – Exemptions from Disclosure

- Under the CPRA there are over 75 listed exemptions to protect both the public's right of privacy and the need for efficient and effective government.
- Exemption examples include protection of the attorney-client privilege, deliberative process, certain law enforcement records, drafts, and certain personnel records;
- "Catch all" exemption where the local agency should demonstrate that on the facts of the particular case, the public interest in non-disclosure clearly outweighs the interest in disclosure; and
- The local agency should identify any applicable exemption from disclosure in its response, but there is no duty to create a privilege log or identify the specific records that have been withheld.

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Practice Pointers – Responding to a Request

Form of Response

- Under the CPRA, the local agency should respond to a request as follows:
 - Advise whether the local agency will disclose, withhold and/or redact the record;
 - Identify any applicable exemptions;
 - No duty to create a record that does not exist at time of request;
 - No duty to create a privilege log;
 - Generally, when a local agency discloses an otherwise exempt public record to any member of the public, the disclosure constitutes a waiver of the applicable exemption for all other requests for the same record;
 - However, an inadvertent disclosure may not waive the applicable exemption;
 - If there is a denial, the name and position of the person denying the records the CPRA request should be included.

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Pop Quiz!

When responding to a CPRA request, do you need to provide a log of the documents withheld and under what exemption?

- a) Yes
- b) No

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Practice Pointers – (Very) Limited Cost Recovery

- The CPRA limits the costs associated with providing a response that local agencies may recover as follows:
 - Direct costs of duplication;
 - Some agencies find it helpful to produced certain oversized records with the requester copying those records;
 - Costs for programming related to extraction of electronic records; but
 - No recovery for costs associated with review of law enforcement body cam footage or video redaction.

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Practice Pointers – Failure to Respond; Inadequate Responses

- The consequences of an untimely response to a CPRA request, lack of due diligence in locating requested records and/or refusal to produce public records may include:
 - Attorneys' fees to prevailing party
 - Attorneys' fees can be substantial
 - Unfavorable press coverage

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campcalcities@gmail.com



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