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The California Public Records Act: Challenges in the Electronic Age

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The California Public Records Act: Challenges in the Electronic Age

By: Ruthann G. Ziegler

Introduction

California enacted the California Public Records Act ("CPRA")[1] in 1968. While the State Legislature has amended the CPRA to recognize some aspects of technology, there are still enormous areas of uncertainty as to exactly what a public agency must produce in response to a CPRA request. A public agency faces a significant financial burden should a court determine that the public agency has incorrectly withheld records which should have been produced; thus, a public agency often must commit enormous quantities of staff time to respond to a CPRA request. This paper identifies the key elements of the underlying law, as well as the challenges and uncertainties under the CPRA in light of current technology.

Overview of California Public Records Act

The CPRA has one fundamental premise: "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[2] The CPRA applies to public agencies, which includes both local and state agencies.[3] Local agencies include cities, counties, special districts, and school districts[4]; state agencies include "every state office, department, division, bureau, board, and commission or other state body or agency, but excludes the Legislature and the courts.[5] Public records, subject to the CPRA, are: "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 characteristic."[6] Finally, a "writing" is "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[7]

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[1] California Government Code sections 6250 *et seq;* hereafter, all statutory references are to the California Government Code.

[2] Section 6250.

[3] Section 6252(d).

[4] Section 6252(a).

[5] Section 6252(f).

[6] Section 6252(e).

[7] Section 6252(g).

The definition of "public record" is thus quite broad. It "is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities."[8]

Any person may request a record. A "person" is "any natural person, corporation, partnership, limited liability company, firm or association."[9] A requestor does not have to identify the purpose for which he/she is requesting the record[10]; the requestor does not even have to provide his/her name. The requestor can be an attorney suing the public entity, using the CPRA to obtain records regardless of whether the requestor is using the CPRA to obtain records not otherwise obtainable through conventional discovery. [11] Furthermore, the public entity has an affirmative duty to assist the requesting party.[12] The public entity has to respond to the request within ten calendar days, although the records do not have to be produced within that period.[13]

The public entity can recoup only its actual costs for producing the records.[14] This generally excludes staff time spent in locating or reviewing the records.[15] The amount of time spent in responding to a CPRA request can be considerable.[16]

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[8] *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774, citations omitted.

[9] Section 6252(c).

[10] Section 6257.5

[11] *Los Angeles Unified School District v. Superior Court* (2007) 151 Cal.App.4th 759.

[12] Section 6253.1; *State Board of Equalization v. Superior Court* (1992) 10 Cal. App. 4th 1177.

[13] Section 6253(c).

[14] Section 6253 (b).

[15] *North County Parents Organization. Department of Education* (1994) 23 Cal.App.4th 144.

[16] *Crews v. Willows Unified School District* C066633 (Third District Court of Appeal) July 17, 2013.

The penalty for a public entity's failure to produce requested documents is significant. If a requestor files a verified petition alleging noncompliance with the CPRA and is determined to be the prevailing party, the court **shall** award reasonable attorney's fees and costs to the petitioner.[17] This mandatory award of attorney's fees is highly unusual; it also serves as a significant incentive, or threat, relating to compliance.

The CPRA excludes several dozen categories of documents from production[18], such as personnel records, where production "would constitute an unwarranted invasion of personal privacy"[19], preliminary drafts 'that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure"[20], and records "the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code, relating to privilege.[21] Not surprisingly, because of the complexity of the exceptions and the risk of litigation resulting in the mandatory award of attorney's fees, public agencies often call upon legal counsel for assistance, resulting in additional expense to the public agency.[22]

Challenges with Compliance with the CPRA in the Electronic Age

A. Issues as to the Form of the Record, not the Content of the Record

[17] Section 6259(d); *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.3d 806.

[18] See section 6254 (a)-(ad); sections 6254.1-6254.29, inclusive.

[19] Section 6254(c).

[20] Section 6254(a).

[21] Section 6254(k).

[22] See e.g., *Crews, supra.*

The CPRA requires a public agency to produce only existing, identifiable records.[23] But, with computers able to create documents, what is and is not an existing records is less than clear. In *Sierra Club v. Superior Court of Orange County*[24], the court considered whether Orange County's "OC Landbase" (a large database of information about land parcels in the County, maintained in a GIS file format, was subject to disclosure at its actual cost of duplication or was excluded as computer software, under Section 6254.9(a), which includes computer mapping systems.[25] The County offered to produce the records "underlying the OC Landbase, including assessment rolls, parcel maps, tract maps, survey records, lot line adjustments, and transfer deeds." The county offered to provide the records either printed on paper or in Adobe PDF format. However, the County declined to produce the records in a GIS file format, saying Sierra Club would have to pay a licensing fee and agree to the terms of a license's nondisclosure and distribution. Thus, the issue related to the format in which the information would be produced, not necessarily as to whether the underlying information was or was not a public record.[26] Sierra Club filed suit. Both the trial court and the appellate court ruled in favor of the County, finding that the GIS-formatted files were "computer mapping systems" and thus not a public record subject to disclosure.

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[23] Section 6253(b).

[24] S 194708 (July 8, 2013).

[25] *Id.*

[26] The *Sierra Club* court noted: "Amicus curia representing a variety of media and open-government groups explain the functionality and value of the database at issue: 'using software available on the open market and the GIS-formatted landbase that is at issue in this case, any interested person can layer other publicly available electronic datasets on top of the landbase and perform a computer-assisted analysis of those datasets in ways that are simply not possible without the base layer….For example…a property owner can use GIS-formatted landbase data to locate other similar parcels and see whether [the owner's] taxes are higher or lower than those being paid by others, or to determine whether zoning decisions are similar as to comparable properties, which in turn can shed light on the fairness of a government's taxing or zoning decisions…." (*Id.*)

The Supreme Court reversed. The Court initially noted that "all public records are subject to disclosure unless the Legislature has *expressly* provide to the contrary."[27] The Court also noted a 2000 amendment to the CPRA, requiring "electronic data [to be made] available in whatever format it is normally maintained by the agency."[28] Essentially, the Court found a difference between computer software, which did not have to produced, and computer data which the Court found to include the GIS data in GIS format, as requested by the Sierra Club.[29] The County was ordered to produce the data in GIS format, at the actual costs of duplication, notwithstanding the county's evidence that it had spent over $3 million in the previous five years maintaining the OC Landbase.[30]

It is not unusual for a public agency to receive CPRA requests for a broad variety of information contained in computer records. The question which this case leaves open how far must a public agency go in generating data, to respond to a CPRA request. Another key point of this case is that it was not the data itself, but the format in which it was provided, which proved critical to the case.

Another case indirectly addressed the format in which the public records would be produced. In *Crews v. Willows Unified School District*[31], the appellate court found that petitioner was not liable to the public agency for its attorney's fees for having filed a frivolous action under the CPRA.[32] Petitioner requested all emails to and from the District Superintendent for a one year period and, although requested by the District, refused to narrow the scope of his request. Ultimately, the District produced approximately 60,000 emails, on multiple CDs, requiring almost 200 hours of District staff time, in PDF format. However, Crews had initially requested the emails in "the ***exact*** electronic format that the e-mails are held in (also known as Native Format)."[33] The court recognized that Native Format would include any metadata associated with the document, including "the name of the person who created the document, the date and time it was created, how many times it has been edited, the name of the last person to edit the document, and the date and time of the last revision."[34] Fortunately for the District, the court found that Crews had consented to receiving the documents in PDF format.

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[27] *Id.*

[28] *Id.*; see section 6253.9(a)(1)

[29] *Id.*

[30] *Id.*

[31] Supra.

[32] *Id.*

[33] *Id.*

[34] *Id.*, fn 2.

However, not all public agencies may be so fortunate. It is only a matter of time before the issue of whether metadata is part of the public record, or not, is litigated. Certainly, a reasonable approach is that the public record is complete without the inclusion of the who-when-what information provided by metadata. Yet, if the courts take an approach similar to the Supreme Court in the Sierra Club case, that the records are to be produced in the *exact* format in which they are maintained and that not just the record, but also the format is key, then production of public records with metadata included may be the next requirement under the CPRA.

B. Records in the Agency's Possession.

The CPRA requires the public agency to produce records in the agency's possession.[35] Obviously, if the public agency has destroyed a record, the public agency cannot produce that record. In the pre-email era, things were simpler. Communication was by letters or faxes which either made their way into files or into trashcans. And, once into a trashcan, the record no longer existed and could not be produced. But, in the electronic era, does a trashcan even exist?

Many public agencies have record retention policies dictating the length of time that various records will be kept, including emails. Some agencies also have programs which automatically delete emails which are older than a specified period of time. Depending on how computer functions, including backup programs. are maintained, the deleted emails may be recoverable from servers. While there has been no published California cases on this point, it is not clear when electronic records are no longer in the public agency's possession such that they do not have to be produced. Is it sufficient that agency staff deleted the email from his/her inbox, thus taking an action equivalent to throwing the record in the trashcan? Or, must the staff member also empty his/her deleted box? Or, when a public agency receives a CPRA request, specifically asking for all emails including those which can be found on the agency's server, must the agency conduct various searches to find any and all responsive emails?[36]

[35] Section 6252(e).

[36] It should be noted that the federal and state discovery rules about e-discovery only apply to litigation, and not to CPRA requests.

Conclusion

There are a variety of unanswered questions as to the CPRA in the electronic era. Under the *Sierra Club* case, it appears that not only the record but also its format is relevant to production of records. Whether metadata has to be produced is an unanswered question. Without a doubt, responding to a CPRA request can be time-consuming and costly for a public agency, especially with the risk of litigation and attorney's fees even if only one document is found that the public agency should have produced. Perhaps the bottom line is where does the public wish the limited time, staff, and money of public agencies to be spent.

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