

## Top 10 Points to Remember about Exemptions from the California Public Records Act

### 1. Most CPRA exemptions are discretionary.

The main exemption section in the Act, for example—Government Code §6254—does not prohibit disclosure of the records it lists, but simply provides that “nothing in this chapter shall be construed to *require* disclosure” of them. Accordingly officials misstate the law in many cases when they say, “We can’t give that out.” It depends on the particular rule governing particular types of information. They may have the discretion to decide in favor of disclosure in the public interest.

### 2. Exemptions are waived by selective disclosure.

Generally, once a particular record has been provided to a “member of the public,” access may not be denied to others, even though an exemption might have otherwise applied (Government Code §6254.5). A member of the public is anyone other than a governmental officer, employee or agent receiving the record in his or her official capacity. So, for example, an inspection, audit or investigation report shared with the subject investigated would, in all but a handful of cases, be a public record although, if not shared with the subject, it might have been exempt from public disclosure (see 7 below).

### 3. An exempt part does not justify withholding the whole.

Pursuant to Government Code §6253, subd. (a), any non-exempt (public) part of a record must be made available after any exempt information has been redacted (removed or obliterated). This rule applies unless redaction is impossible because the public and confidential material are so tightly interwoven as to be “inextricably intertwined” *Northern California Police Practices Project v. Craig*, 90 Cal. App. 3d 116 (1979), or unless multiple redactions applied to a large number of requested records would leave them so bereft of substantive information relevant to the requester’s purpose that the benefit to him or her would be “marginal and speculative.” *American Civil Liberties Union Foundation of Northern California Inc. v. Deukmejian*, 32 Cal. 3d 440 (1982).

### 4. Drafts are not inherently and entirely exempt.

The word “draft,” even if accurately descriptive of a document, does not exempt it from disclosure. Government Code §6254, subd. (a) applies only to “preliminary” drafts, notes or memos “that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.” Moreover, the exemption applies only if the record was created to inform or advise a particular administrative or executive decision. Also, the document must be of the kind customarily disposed of: “If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed.” *Citizens for A Better Environment v. Department of Food and Agriculture*, 171 Cal. App. 3d 704 (1985)

Finally, the exemption applies only to the “recommendatory opinion” of its author, making a judgment or offering advice as a conclusion based on a set of facts. Those facts, however, remain accessible to the public, and only the author’s conclusion is protected (see *Citizens* above).

### 5. Litigation documents may be withheld while the case is alive.

Government Code §6254, subd. (b) exempts “Records pertaining to pending litigation to which the public agency is a party, or to claims . . . , until the pending litigation or claim has been finally adjudicated or otherwise settled.” This exemption includes communications between the agency and its attorney, which are privileged in any event as long as the agency wishes to assert the privilege (see 8 below). Otherwise, “a document is protected from disclosure only if it was specifically prepared for use in litigation.” *City of Hemet v. Superior Court*, 37 Cal.App.4th 1411 (1995) The claim itself is not exempt. *Poway Unified School District v. Superior Court*, 62 Cal.App.4th 1496 (1998) And when a case

has been fully adjudicated (no appeal possible) or settled, records covered by this exemption that are not communications between the agency and its attorney—for example, communications between the agency and the other party—become accessible to the public.

**6. Personal information may be withheld if release would unjustifiably invade privacy.**

The CPRA allows withholding of “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy” (Government Code §6254, subd. (c)). The rule covers more than “personnel” files and reaches any information in government records linked to an identified or readily identifiable individual. But it allows withholding only where the person in question has an objectively reasonable expectation of privacy, which would not apply, for example, to resume-type “information as to the education, training, experience, awards, previous positions and publications” of a public employee. *Eskaton Monterey Hospital v. Myers*, 134 Cal.App.3d 788 (1982) Even when a privacy expectation would be normally reasonable, disclosure may be justified—“warranted”— and required if the public interest in having it known outweighs the public interest to the contrary.

For example, when a public official denied taking an unlawful personnel action, “access to records proving it then became in the public interest.” *Braun v. City of Taft*, 154 Cal. App. 3d 332 (1984) Likewise, the actual pay of a non-contract public employee is not automatically public, but disclosure may be warranted depending on the extent to which it would “shed light on the public agency's performance if its duty” *Teamsters Local 856 v. Priceless, LLC*, 112 Cal.App.4th 1500 (2003) But pay and other particulars in police and other peace officers’ personnel files are made confidential under Penal Code §§ 832.5-832.8, and are not accessible under the CPRA. *City of Hemet v. Superior Court*, 37 Cal.App.4th 1411 (1995) Complaints about the performance of public employees other than peace officers are public if they lead to disciplinary action, *AFSCME v. Regents*, 80 Cal. App. 3d 913 (1978). or even, discipline or not, if they are “well-founded” or reasonably reliable in terms, for instance, of their substance, frequency and/or sources *Bakersfield City School District v. Superior Court*, 118 Cal.App.4th 1041 (2004).

**7. Law enforcement investigative files may be withheld, but not the basic facts.**

With respect to police and other criminal justice law enforcement agencies, Government Code §6254, subd. (f) applies to records that “encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred. If a violation or potential violation is detected, the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency.” *Haynie v. Superior Court*, 26 Cal.4th 1061 (2001) But the exemption also applies to “any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes,” including investigations by state or local regulatory agencies. If the investigation does not have one of these purposes, the exemption does not apply. *Register Division of Freedom Newspapers Inc. v. County of Orange*, 158 Cal. App. 3d 893 (1984). The exemption may be asserted no matter how old and dead the investigation may be. *Williams v. Superior Court*, 5 Cal. 4th 337 (1993) But unless disclosure would threaten the successful completion of an investigation or the safety of a person involved, an agency must disclose the basic “who/what/where/when” facts in crime, incidents and arrest reports, including requests for assistance, at least with respect to “contemporaneous police activity” rather than attempts to obtain information about an officer’s long-term performance that would otherwise be confidential (see 6 above) *County of Los Angeles v. Superior Court*, 18 Cal.App.4th 588 (1993).

**8. Information that is privileged or confidential otherwise is exempt.**

Numerous other laws outside the CPRA either prohibit disclosure of certain information, limit its disclosure to certain persons, purposes or both, or give the agency discretion over release. Moreover, the Evidence Code contains a number of privileges that allow information to be withheld even from a court proceeding. The CPRA incorporates these laws and privileges as exemptions from disclosure (Government Code §6254, subd. (k)). The attorney-client privilege, for example, allows communications between a public agency and its lawyers to be kept confidential (see 5 above). But a federal court has

observed that “the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected” (*Clarke v. American Commerce National Bank*, 974 F.2d 127 (1992)). The official information privilege allows a public official to withhold information submitted to him or her in confidence, until and unless it has been expressly relied upon in the making of a decision, if the public interest in such secrecy outweighs the public interest in disclosure. *San Gabriel Valley Tribune v. Superior Court*, 143 Cal.App.3d 762 (1983). Government agencies may acquire business or industry information protected by the trade secret privilege, but to be protected, the formula, pattern, compilation, process, device, method, etc. must derive independent value from not being known to the public or a competitor, and must be subject to reasonable efforts to maintain its secrecy otherwise (Civil Code §3426.1, subd. (d)).

#### **9. The “balancing test” may justify non-disclosure in well-defined instances.**

Even if no specific exemption in the CPRA applies, information may be withheld “by demonstrating ... 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.” As the wording suggests, this exemption is applicable on a case-by-case basis, and in particular a targeted request for a particular record will be circumstantially easier to justify in the public interest than a wholesale request for a large volume of records. *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal.3d 440 (1986), *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991).

**10. The deliberative process privilege may apply to pre-decisional records.** While the deliberative process privilege originates with the common law and is not codified in California statutes, its policy has been recognized as supporting, in certain circumstances, a withholding of access under the “balancing test” (see 9 above). Its rationale is the same as that underlying the draft exemption (see 4 above), namely the need of government officials and their advisors to discuss policy options freely and frankly in the course of developing a decision, without fear of political recrimination upon disclosure. But unlike the draft exemption with its limited application, the privilege invoked under the balancing test applies to documents that are not preliminary drafts or memos but that otherwise would impede or chill candid pre-decisional deliberation. Cases so far have applied the privilege in a balancing test to deny disclosure, concluding that:

- The pragmatic chill on candor and effectiveness of the governor’s consultations with visitors resulting from wholesale disclosure of his appointment calendars, and risk to his security posed by wholesale disclosure of his travel itineraries, outweigh the arguable public interest in understanding patterns of access to and influences affecting state’s chief executive. *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991)
- With respect to a request filed during the pendency of an appointive decision, avoiding the interference with the governor’s exercise of his or her prerogative to make appointments to fill vacancies on boards of supervisors that would result from disclosing information submitted by applicants for appointment—and thus deterring the full and candid flow of information supporting that decision—outweighs the voters’ interest in knowing who is applying for the normally elective position and what qualifications they are citing in their favor. *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159 (1998)
- With respect to a request for such records filed five months after the governor made the appointive decision, the same factors outweigh the voters’ interest in an appointment to the board of a county emerging from bankruptcy. *Wilson v. Superior Court*, 51 Cal.App.4th 1136 (1997).
- Disclosing the telephone numbers of persons with whom a city council member has spoken over a year’s time equates to revealing the substance or direction of the member’s judgment and mental process, and the inhibiting intrusion posed by such disclosures outweighs the public interest in learning which private citizens are influencing the member’s decisions, especially where no misuse of public funds or other improprieties are alleged. *Rogers v. Superior Court*, 19 Cal.App.4th 469 (1993).