

The State Agency Public Records Audit and Responsive Legislation

Summary

• **The Duty to Publish Guidelines**

Californians Aware's Public Records Audit of 31 state agencies that are expressly required to create, post and provide free copies of guidelines to help the public request records found that most of them failed this minimal requirement abysmally. Ninety percent failed to post the guidelines. Two thirds did not provide a copy to a visitor at their main offices, when requested to do so. Ten days after the request for a copy, more than half still failed to do so, and of those that did comply, some charged a fee.

This bill would require every state agency with a web site to post prominently on the home page a Public Information Center identifying a named person as responsible for intake of public records requests, showing his or her title and contact information. The center would also provide an HTML form citizens could use to submit public records requests on the site. And it would also be required to post on the site any guidelines for requesting public records, whether voluntarily or compulsorily developed.

The agencies' performance in other respects was no better. To quote from the report's findings:

• **Form 700 Statements of Economic Interests**

These forms, required to be filed by certain elected and appointed officials and key staff members with the employing agency under the Political Reform Act, are to be kept ready for release to the public at any time, the same day as requested. They are intended to show where the official's principal wealth comes from: investments, outside jobs and other activities that could show a conflict of interests.

"When asked to present the FPPC Form 700 for the agency's top-ranking employee, 74 percent of the agencies could not produce the form within one hour. Less than one-third could produce it in one day, and barely half produced the Form within 10 days." A similar audit of local agencies showed almost half producing the form in 20 minutes, 69 percent within one day and 88 percent in 10 days. Moreover, contrary to law, employees at 71 percent of the audited state agencies wanted to know the requester's identity, whom he was working for and why he wanted the information.

This bill would require the web site's Public Information Center to post the Form 700 most recently filed by every officer, employee or contractor required to do so. One explanation for the significant lag times shown in the audit is that officials had simply not filed their statements when required, and had to be tracked down and alerted. Compulsory Internet posting is the surest way to end that delinquency. It also gives the information seeker the anonymity of inquiry that the law has intended from the beginning.

- **Top Executive and Other Compensation**

“When requested to provide a copy of the document showing the total annual compensation of the agency’s top-ranking employee, only 29 percent could supply that record within 10 days. And after 20 days, only 55 percent had complied.” Comparable figures in the local agency audit showed 88 and 96 percent compliance, respectively.

This bill would require the web site’s Public Information Center to post all terms of every employment, consulting or other contract for services in effect in the current calendar year. What this means, in effect, is the top executive and other compensation paid by the agency. Between this affirmative, routine disclosure provision and the one to follow, hidden compensation scandals such as the one plaguing the University of California should be much less likely to arise.

- **Litigation Settlements**

“(O)nly 29 percent could supply a copy of that agency’s most recent litigation settlement agreement, where more than \$100,000 was paid to plaintiff(s), within 10 days. And just barely half (52 percent) could provide this document within 20 days.”

This bill would require the web site’s Public Information Center to post the full text of every settlement of litigation, and of every agreement to compensate any person for foregoing litigation, involving the agency as a party within the current calendar year. This requirement would tend to disclose the costliest acts and omissions in terms of liability in cases that the agency chooses to pay to forget rather than fight. It might also disclose litigation-averting payments where the agency is at risk of being blackmailed.

- **Public Records Released and Withheld**

While the audit did not deal with this issue, one of the great unknowns in deciding policy under the California Public Records Act is just what information is being requested from state government, what information is being released, and what information is being withheld—and why.

This bill would require the web site’s Public Information Center to post a copy of

- every record completely disclosed by the agency within the current calendar year or, in the case of very large releases, a copy of the requester’s own description of the records that were produced.

- every letter or other communication to a requester denying access to all or part of any record, sent within the current calendar year.

- **Archived Records**

While agencies should with little trouble be able to post up to a year’s worth of the documents required to be displayed in the Public Information Center, a way is needed to allow for reasonable public access without making the volume of information presented unwieldy.

This bill would require the web site’s Public Information Center to include a link to a term-searchable archive of the records posted in the center in preceding years.

• **Remedies**

A mandated governmental service is no stronger than its provisions for court enforcement.

This bill would allow any Californian to sue in his or her home county to compel a state agency to come into compliance with the Public Information Center’s provisions. A court finding that an agency was out of compliance could not only order compliance under pain of contempt, but at its discretion, order the agency to post in its Public Information Center, under the heading “Our Failure to Comply,” a copy of the court’s findings and order, for at least 30 days. The bill would also allow the plaintiff court-ordered attorney fee and cost recovery (including discovery costs) from the defendant state agency, either upon a judicial determination in the plaintiff’s favor or when filing the enforcement action is followed by the agency’s coming into compliance with the law. But this award of “prevailing plaintiff” fees and costs without a court proceeding would be permitted only if the plaintiff had sent the agency a litigation warning letter at least 30 days before filing—to no avail.

Corrective Legislation

Amendments to the California Public Records Act – Government Code Section 6250 *et seq.*

6253.4. (a) Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.

The following state and local bodies shall establish written guidelines for accessibility of records. A copy of these guidelines shall be posted in a conspicuous public place at the offices of these bodies, and a copy of the guidelines shall be available upon request free of charge to any person requesting that body's records:

- Department of Motor Vehicles
- Department of Consumer Affairs
- Department of Transportation
- Department of Real Estate
- Department of Corrections
- Department of the Youth Authority
- Department of Justice
- Department of Insurance
- Department of Corporations
- Department of Managed Health Care
- Secretary of State
- State Air Resources Board
- Department of Water Resources
- Department of Parks and Recreation
- San Francisco Bay Conservation and Development Commission
- State Board of Equalization
- State Department of Health Services
- Employment Development Department
- State Department of Social Services
- State Department of Mental Health
- State Department of Developmental Services

State Department of Alcohol and Drug Abuse
Office of Statewide Health Planning and Development
Public Employees' Retirement System
Teachers' Retirement Board
Department of Industrial Relations
Department of General Services
Department of Veterans Affairs
Public Utilities Commission
California Coastal Commission
State Water Resources Control Board
San Francisco Bay Area Rapid Transit District
All regional water quality control boards
Los Angeles County Air Pollution Control District
Bay Area Air Pollution Control District
Golden Gate Bridge, Highway and Transportation District
Department of Toxic Substances Control
Office of Environmental Health Hazard Assessment

(b) Every state agency that publishes an Internet web site shall include on the home page of that site, prominently displayed without scrolling, the words "Public Information Center," which shall be followed by, or shall link to on another page, the following:

(1) Under the words "Whom to Contact," The name, title, mailing address, phone number and e-mail address of the public information officer or other person or persons to whom requests for inspection or copying of records pursuant to the California Public Records Act, or informal requests for simple factual information, should be directed.

(2) Under the words "How to Request Records," the written guidelines authorized or required under subdivision (a), and an HTML form for submitting online requests under the California Public Records Act, consisting of the following labeled fields:

- i. Today's date
- ii. My name (optional)
- iii. My e-mail address (optional)
- iv. My postal address (optional)
- v. My phone number (optional)

vi. I am interested in the following records or information

vii. Where can I inspect these records?

viii. Send me copies of the records without inspection.

ix. Send me a fee estimate before copying.

The HTML form shall be designed to send a copy of the request immediately and automatically to the e-mail address from which it was sent.

(3) Within twenty-four hours after its filing, under the words "Officials' Economic Interests," the most current statement of economic interests filed by every officer, employee or consultant of the agency required to file such reports under Sections 87200 or 87300.

(4) Within 24 hours after its effective date, under the words "Officials' Employment or Consulting Contracts," all terms of every employment, consulting or other contract for services to which the agency and any individual are or have been parties in the current calendar year.

(5) Within 24 hours after its effective date, under the words "Lawsuit Settlements," the full text of every settlement of litigation, and of every agreement to compensate any person for foregoing litigation, involving the agency as a party within the current calendar year.

(6) Under the words "Records Disclosed This Year," a copy of every record disclosed by the agency without redaction within the current calendar year or, if the volume of records disclosed pursuant to a particular request exceeds [amount to be determined] pages, a copy of the requester's own description of the records that were produced.

(7) Under the words "Records Withheld This Year," a copy of every letter or other communication to a requester denying access to all or part of any record, sent within the current calendar year.

(7) Beginning January 1 of the second year after the effective date of this subdivision,

under the word "Archive," a link to a term-searchable archive of the items posted under paragraphs (3), (4), (5) and (6) in preceding years.

(8) Beginning three months from the effective date of this subdivision, any agency determined by the court to have failed to comply with the requirements of paragraphs (1) or (2), or to have fallen more than 15 days behind in posting or archiving the information required under paragraphs (3), (4), (5), (6), (7) or (8), in addition to any other remedy to bring the agency into compliance with this subdivision, may be ordered by a court to post, immediately after the heading "Public Information Center," under the words "Our Failure to Comply," a copy of the court's findings in such a compliance action. The duration of such posting shall rest with the sound discretion of the court, but in no case should be less than 30 days.

(c) Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public. The guidelines and regulations adopted pursuant to this section shall not operate to limit the hours public records are open for inspection as prescribed in Section 6253.

6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter, or to enforce the duty of a state agency to post information in its office and on its Internet web site, if any, in compliance with Section 6253.4. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

6259.1. (a) Whenever it is made to appear by verified petition to the superior court of the county wherein the plaintiff resides that a state agency has failed to comply with the requirements of Section 6253.4, the court shall order the officer or person charged with posting the information as required by that section, or if no such person has been appointed, the senior officer in the agency, to effectuate compliance forthwith or show cause why he or she should not do so. The court shall decide the case after examining papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the agency has failed to comply with Section 6253.4, he or she shall order the officer or person ordered to show cause to effectuate compliance forthwith.

(c) Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.

(d) The court shall award court and discovery costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. For the purposes of this subdivision, a plaintiff prevails in the litigation, even in the absence of a judicial determination in his or her favor, if his or her filing of the enforcement action is followed by the agency's coming into compliance with Section 6253.4, providing that the

plaintiff has made a written demand for compliance, sent to the agency at least 30 days prior to the filing date of the enforcement action, including an unambiguous statement of the alleged facts of noncompliance and a warning that an enforcement action might follow. The costs and fees shall be paid by the state agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

(e) Commencing three months from the effective date of this subdivision, any agency determined by the court to have failed to comply with the requirements of paragraphs (1) or (2), or to have fallen more than 15 days behind in posting or archiving the information required under paragraphs (3), (4), (5), (6), (7) or (8), in addition to any order to bring the agency into compliance with this subdivision, may be ordered to post on its home page, immediately after the heading "Public Information Center," under the words "Our Failure to Comply," a copy of the court's findings and order. The duration of such posting shall rest with the sound discretion of the court, but in no case may be less than 30 days.

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