



September 21, 2023

Initiative 23-0015A1

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Hon. Rob Bonta
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Sep 21 2023

Attention: Ms. Anabel Renteria
Initiative Coordinator

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

Dear Attorney General Bonta:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative related to public access to state and local government records (A.G. File No. 23-0015, Amendment #1).

BACKGROUND

California Public Records Act (CPRA)

Overview of CPRA. The State Constitution guarantees the public the right to access information related to the government doing business. The CPRA provides a statutory framework for this constitutional right to inspect and obtain copies of government records (“public records”) from more than 5,500 state and local government entities, excluding the Legislature and the judicial branch which are subject to other state laws. Such public records include written documents, photographs, audio, or videos prepared or retained by a government entity. Under existing law, government entities generally are not specifically required to obtain and retain copies of records from third-party contractors or vendors.

Records Exempt From CPRA. The CPRA allows for certain public records, or specific information in them, to not be disclosed. Specifically, some information must be withheld or redacted (such as Social Security numbers) while other information may be withheld or redacted. In such cases, state law requires entities to justify the withholding of any disclosable public record.

Process for Providing Records. The law requires (1) state and local government entities to make public records available for inspection and provide copies of such records when requested, (2) some state and local entities to develop and publicly post written guidelines for accessing

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public records, and (3) state and local government entities to work with requestors to scope their request. In addition, the law specifies other requirements, including:

- ***Time Line.*** Upon receiving a request for records, the government entity generally is required to determine within ten days whether it possesses records that are eligible to be disclosed as well as the estimated date those records will be made available. This deadline may be extended by up to 14 days under certain circumstances. Depending on the complexity of the request (for example, whether a large amount of documents need to be gathered, withheld, or redacted), it can take a government entity days or months to provide the requested records.
- ***Records Provided.*** The law requires government entities to provide (1) exact copies of records, to the extent possible, and (2) upon request, electronic records in an electronic format. In certain cases, a government entity may be required to post certain information online.
- ***Fees.*** Government entities are permitted to charge fees to cover the direct costs of physically or electronically duplicating records. Such direct costs generally do not include staff time. The extent to which such fees are charged varies by state and local government entity.

Retention of Records. The length of time a record is kept by a government entity differs by entity and type of record. Most state government entities are required to comply with the State Records Management Act, which requires (1) the Secretary of State (SOS)—and its State Archives Division (State Archives)—to approve record retention and destruction policies for each entity (which also incorporates any specific retention periods required by state law) and to determine which records have archival value and (2) each state entity to appoint a staff member to be trained by the SOS to coordinate record management within the entity. While local governments are not subject to this act, state law generally requires local governments to retain records for at least two years unless otherwise specified in law. Records may be stored physically or electronically on-site in government facilities or on government equipment, or off-site in leased or other private facilities.

Judicial Process for Disputes. The law authorizes people to ask the courts to enforce their right to access public records. The trial courts are required to decide if records were improperly withheld. Parties may seek expedited review—but not a standard appeal—by the appellate courts. This means that the appellate courts may choose not to review it. Additionally, people who believe they will suffer harm from a government entity disclosing public records may seek court intervention to prevent disclosure of their information.

Legislative Open Records Act (LORA)

Overview of LORA. The LORA—rather than the CPRA—provides public access to legislative records. The law requires legislative committees to keep and make public certain information for all bills and resolutions—for example, committee staff analyses, written testimony or commentary, and background material. Other legislative records—such as certain preliminary drafts and notes, correspondence to individual members and their staff, and records

of complaints to or investigations conducted by the Legislature—may be withheld. Records may also be withheld if the Legislature is able to demonstrate that the public interest is better served by not disclosing the record. In addition to LORA, another state law requires the electronic and public posting of key legislative information—including the legislative hearing schedules; the text, committee analyses, and history of all bills; and video recordings of legislative proceedings for up to 20 years.

Process for Providing Records. The law requires the Legislature to make legislative records available for inspection. Each legislative committee also is required to develop written guidelines for accessing the records in their possession. Upon receiving a request for records, the Legislature must provide written justification if any records are being withheld within (1) four working days if the Legislature is in session and (2) ten working days if the Legislature is not in session. Actual provision of all requested records depends on the breadth and complexity of the request. Finally, LORA authorizes the Legislature to charge fees, up to \$0.10 per page, to reimburse its actual costs for making copies of records.

Retention of Records. The Legislature is not subject to the State Records Management Act. However, state law requires the Legislature to provide for the retention and storage of committee and other specific records that are not sent to the State Archives for preservation.

Judicial Process for Disputes. The law authorizes people to ask the courts to enforce their right to access legislative records. The trial courts are required to decide if records were improperly withheld. Parties may ask the appellate courts to review the trial court decision.

PROPOSAL

CPRA

Increases Records Available to Public. The measure increases the amount and types of records eligible to be disclosed to the public in several ways, including by (1) limiting the ability of a state or local government entity to withhold or redact certain information; (2) defining public record to include information from private contractors and vendors relating to their work on behalf of, or services provided to, public agencies; (3) requiring that government entities regularly obtain and keep copies of public records generated by their contractors and vendors; and (4) requiring that government entities justify the withholding or redaction of any records by providing clear and convincing evidence of all of the reasons why the information is not subject to disclosure. In addition, upon written request, the measure requires government entities to provide a detailed description of how the entity searched its records and the estimated number of records withheld or redacted by specific categories.

Requires Provision of Records Within Certain Time Frames and Limits Charging of Fees. The measure requires all government entities to establish and publicly post written guidelines for accessing public records—including a description of where public records are stored and the system used to search for records. The measure also requires government entities to provide a requestor with details of how records will be searched in order to allow the requestor to modify their request. In addition, the measure changes the time lines and fees associated with a request, including:

- ***Time Line.*** Requiring all government entities to (1) determine whether they possess disclosable records within ten calendar days or 14 calendar days under “extraordinary” circumstances that the measure specifies does not include a search of a large number of electronic files (including e-mails) and (2) provide public records within 30 calendar days or on a rolling basis but no later than 90 days under “extraordinary” circumstances (such as requiring programming to extract data).
- ***Fees.*** The measure limits the fees charged by government entities to the direct cost of providing the record or \$0.10 per page (whichever is less), the actual cost of any digital storage device, and the actual costs of mailing or delivery. The measure prohibits government entities from charging requestors any other fees.

Requires Public Posting of Certain Information. The measure requires government entities to post various records on their website within ten calendar days of the records becoming final or available to the entity. Examples of such records include: records of certain court and administrative proceedings, claims and settlements, proposed regulations, and cost estimates for proposed legislation. The measure also requires government entities to post an annual report providing data on the number of record requests received, the timeliness of responses, and the number of staff primarily responsible for responding to such requests.

Requires Retention of Records for Specified Period. The measure requires all government entities to retain all public records for at least five years, unless a longer retention period is specified by state law.

Changes Judicial Process for Disputes. The measure changes the judicial processes for resolving public records disputes including by allowing people challenging a trial court order supporting the non-disclosure of records by a government entity to seek appellate court review through a standard appeal.

LORA

Requires Legislative Members Publicly Disclose Certain Meetings and Events. No later than five calendar days after occurrence, the measure requires each legislative member to post on their website the date, time, location, and purpose of (1) public or fundraising events that they or their staff attended or organized and (2) lobbying meetings they attended. In the case of lobbying meetings, the measure also generally requires the disclosure of the names and affiliations of those attending a meeting.

Increases Records Available to Public. The measure increases the amount and type of legislative records eligible to be disclosed to the public in several ways, including by requiring (1) legislative committees to maintain additional records (such as written correspondences related to regulatory issues), (2) individual Members of the Legislature to keep similar information as legislative committees, and (3) certain records related to legislative member or staff misconduct complaints and investigations be subject to disclosure. The measure requires the Legislature to justify the withholding or redaction of records with clear and convincing evidence that the information is not subject to disclosure.

Requires Provision of Records Within Certain Time Frames and Limits Charging of Fees.

Upon the filing of a legislative records request, the measure requires the Legislature to (1) determine whether there are disclosable records within ten calendar days or 14 calendar days for extraordinary circumstances, and (2) provide records within 30 calendar days or on a rolling basis but no more than 90 days if there are extraordinary circumstances (such as requiring programming to extract data). The measure limits the fees that the Legislature can charge a requestor to the direct cost of providing the record or \$0.10 per page (whichever is less). The measure prohibits the Legislature from charging requestors any other fees.

Requires Retention of Legislative Records for Specified Period. The measure requires the Legislature to retain legislative records for at least five years, unless a longer retention period is specified by state law. The measure also makes legislative records subject to the State Records Management Act. This means that SOS would oversee the Legislature's record retention policies and that the Legislature would need to appoint records management coordinators.

FISCAL EFFECTS

Increased State and Local Government Costs. This measure would increase costs across the more than 5,500 state and local government entities in California. Much of the costs would be associated with staff time to comply with the measure. Additionally, government entities would incur technology and storage costs to retain public and legislative records for five years, as well as to manage and search such records. A portion of these costs could be higher in the short run. In addition, the measure's provisions related to records created by private contractors and vendors potentially could result in fewer contractors and vendors doing business with government entities, which could increase government contracting costs. The increased costs resulting from the measure could partially be offset by charging fees for the direct costs of providing copies of records, fewer or less complex record requests being submitted to government entities (for instance, due to online posting requirements), fewer court cases arising, or increased efficiencies in processing requests. In part due to the increase in the amount and types of records subject to disclosure and the new time lines, many state and local entities would require additional staff. As a result, we estimate that this measure would result in net increased costs on state and local governments—likely reaching over \$1 billion annually depending on how this measure is implemented. The specific impact on individual state and local government entities will depend on existing policies and systems for providing access to records and for retaining and managing records, as well as how the entity chooses to implement this measure. Specifically related to the Legislature, the California Constitution limits how much the Legislature can spend on its own operations. The measure's effect on the Legislature's operations would depend on how the Legislature decides to meet these new requirements, but could be in the tens of millions of dollars. Because of the constitutional limit on the Legislature's expenditures, these increased costs could displace existing operations or services of the Legislature.

Summary of Major Fiscal Effects. This measure would have the following major fiscal effects:

- Increased net state and local government costs, likely reaching over \$1 billion annually, to meet new time frames and requirements for providing public access to government and legislative records and to retain such records for five years.

Sincerely,



for Gabriel Petek
Legislative Analyst



for Joe Stephenshaw
Director of Finance