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OPINION	:	No. 80-1006
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The Honorable Bruce Young, Member of the California Assembly, has requested an opinion on a question we have phrased as follows:

Where the city clerk makes an authorized tape recording of a city council meeting to facilitate the preparation of the minutes: (a) does the public have the right to inspect the tape or (b) receive copies of the tape and (c) when may such tape be destroyed?

CONCLUSION

Where the city clerk makes an authorized tape recording of a city council meeting to facilitate the preparation of the minutes: (a) any person has a right to inspect the tape which includes the right to listen to the tape on equipment provided by the city, (b) any person has a right to receive a copy of the tape which includes the right to buy a duplicate copy from the city or to make a duplicate copy on his own equipment but does not include the right to have a written transcript made, and (c) the tape recording may be destroyed at any time if the purpose for which it was made and retained was solely to

facilitate the preparation of the minutes of the meeting but if the tape was made or retained for the additional purpose of preserving its informational content for public reference it may not be lawfully destroyed except as expressly authorized by state law.

ANALYSIS

Our research has revealed no statutory requirement that city council meetings be tape recorded. The statute providing for records of city council meetings in general law cities is section 40801[1] which provides as follows:

> "The city clerk shall keep an accurate record of the proceeding of the legislative body and the board of equalization in books bearing appropriate titles and devoted exclusively to such purposes, respectively. The books shall have a comprehensive general index."

No doubt a tape recording of the city council meeting would be of great assistance to the city clerk in the preparation of the record required by section 40801. While such recording may not be done surreptitiously (see 62 Ops. Cal. Atty. Gen. 292) we know of no reason why a city council may not authorize the tape recording of its meetings. The request for this opinion indicates that the tape recordings which prompted the request were prepared pursuant to a resolution of the city council directing the city clerk to make the tape recordings to facilitate the preparation of the minutes.

The public's right to inspect and receive copies of records of public agencies is governed by the California Public Records Act ("the Act") set forth in section 6250 *et seq*. Section 6252 of the Act provides:

> "As used in this chapter:
>
> "(a) 'State agency' means every state office, officer, department, division, bureau, board, and commission or other state agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.
>
> "(b) 'Local agency' includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.

[1] Section references are to the Government Code unless otherwise indicated.

"(c) 'Person' includes any natural person, corporation, partnership, firm, or association.

"(d) 'Public records' includes 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 characteristics. 'Public records' in the custody of or maintained by the Governor's office means any writing prepared on or after January 6, 1975.

"(e) 'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents."

All cities, whether general law or chartered, are governed by the Act. (§ 625 2(b), *supra*.) Any "writing" containing information relating to the conduct of the public's business prepared, owned, used or retained by the city regardless of physical form or characteristics is a public record under the Act. (§ 6252(d), *supra*.) Any means of recording, including magnetic tape, is a "writing" within the meaning of the Act. (§ 6252(e), *supra*.) It is therefore clear that a tape recording of a city council meeting prepared by the city clerk to facilitate the preparation of the minutes of the meeting is a public record within the meaning of and governed by the Act.

Next we must examine section 6254 of the Act which provides in relevant part:

"Except as provided in Section 6254.7 [relating to data on sources of air pollution] nothing in this chapter shall be construed to require disclosure of records that are any of the following:

"(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

" . . . . . .

"(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to,

provisions of the Evidence Code relating to privilege. . . ."

A tape recording of a city council meeting prepared solely to facilitate the preparation of the minutes may well constitute notes or intra-agency memoranda within the meaning of section 6254(a). To escape disclosure under section 6254(a), however, they (1) must not be retained in the ordinary course of business, and (2) the public interest in withholding such records must clearly outweigh the public interest in disclosure. We can conceive of no legitimate public interest to be served by withholding the tape recordings of a public meeting of a city council. Section 54950 of the Ralph M. Brown Act declares that councils such as city councils exist to aid in the conduct of the people's business and it is the intent of the law that their actions be taken openly and that their deliberation be conducted openly. Similarly section 6250 declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. Absent some statute providing confidentiality for certain kinds of matters conducted at city council meetings we conclude that there is no public interest in withholding the tape recording of a city council meeting which outweighs the public interest in their disclosure. Thus, the tape recordings of the public sessions of a city council meeting are not exempted from disclosure by section 6254(a) of the Act.

Under section 62 54(k) public records are not subject to disclosure if their disclosure is exempted by state law. Section 54957.2 provides:

> "The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each executive session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7, Title 1), and shall be kept confidential. The minute book shall be available only to members of the legislative body or, if a violation of this chapter is alleged to have occurred at an executive session, to a court of general jurisdiction wherein the local agency lies. Such minute book may, but need not, consist of a recording of the executive session."

Thus, tape recording of executive sessions of a city council meeting are exempted from the disclosure provisions of the Act by sections 6254(k) and 54957.2.

The right to inspect a public record is established by section 6253 of the Act which provides:

> "Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as hereafter provided. Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section."

While inspection of a writing normally reveals its informational content, a visual inspection of a tape recording does not. In 57 Ops. Cal. Atty. Gen. 307, 311(1974) we considered whether the right to inspect a microfilmed public record included the right to view the same through a microfilm "reader" provided by the public agency. We concluded that it did observing that otherwise "the public would have to bring their own mechanical device to get access to the information in the record" and this obviously was not the legislative intent. We reiterate the underlying rationale for that conclusion, that a person's right to inspect a public record includes the right to gain access to the informational content of such record without having to provide the mechanical equipment necessary to gain such access. We conclude that a person's right to inspect a tape recording of a public session of a city council meeting, includes the right to listen to the tape using equipment provided by the city.

The right to obtain a copy of a public record is governed by sections 6256 and 6257 which provide:

> Section 6256. "Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency."

> Section 6257. "A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable."

Section 6256 expressly provides that the right to receive a copy of a public record includes the right to be provided with an "exact copy" unless this is impractical. An exact copy of a tape recording is a duplicate tape with the same information recorded thereon. Whether the city must provide such a duplicate tape on payment of the requisite fee depends on whether it is practical for the city to do so. This is a question of fact in each case. The availability of equipment, facilities and personnel to make such a duplicate would be important factors to determine practicality. If the person requesting the copy provides his own equipment to record the sound while he listens to the original tape a practical means of providing the exact copy is thus provided. We conclude that the right to receive

a copy of a tape recording which is a public record includes the right either to be provided with a duplicate copy of the tape provided by the public agency on payment of the requisite fee where this is practical or to record the sound on equipment provided by the requester while the original tape is being played in response to a request to inspect the tape where it is impractical for the city to provide such duplicate.

Nothing in the California Public Records Act or any other law of which we are aware requires a public agency to transform a public record in one form into a record or copy in an entirely different form on the request of the person requesting a copy. There is no duty imposed by law on the city clerk to transcribe the tape recording of a city council meeting into a written record of every word spoken at such meeting. Under section 40801 the clerk's duty is to "keep an accurate record of the proceeding" of the legislative body in books devoted exclusively to such purposes. This does not require a verbatim account. Minutes recording the substance of the proceedings is all that section 40801 requires. (*Cf.* § 54957.2.) We conclude that the right to inspect a tape recording which is a public record does not include the right to purchase a transcript of the tape.

Where, however, the city prepares a transcript of the tape recording for other purposes, such a transcript may become an independent public record under the provisions of the California Public Records Act. In such case a person would have a right to receive a copy of such transcript under section 6256 on payment of the requisite fee.

We should note that both the right to inspect and to receive copies of public records under the Act are subject to an implied rule of reason. The custodian of public records may impose regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in record archives. (*Bruce v. Gregory* (1967) 65 Cal. 2d 666, 676.) The same rule of reasonableness also applies to the right to receive copies. While access to all public records must be provided public agencies may impose reasonable restrictions on general requests for voluminous classes of documents restricting copies to specific requests for copies of specific documents. (*Rosenthal v. Hansen* (1973) 34 Cal. App. 3d 754, 761.)

When may a tape recording of a city council meeting made by the city clerk to facilitate the preparation of the minutes be destroyed? Nothing in the Public Records Act purports to govern the destruction of records. As stated in *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal. App. 3d 661, 668:

> "[The] Act itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records.

Its sole function is to provide for disclosure."

The destruction of public records is governed by a much older statute, namely sections 6200 and 6201 (formerly Pen. Code, § 113) which provide:

Section 6200

> "Every officer having the custody of any record, map, or book or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the state prison for two, three, or four years."

Section 6201

> "Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars ($100), or by both such fine and imprisonment."

Exceptions to this prohibition against the destruction of public records have been enacted which authorize certain public agencies to destroy public records in specified circumstances. The statute applicable to cities is section 34090 which provides as follows:

> "Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required.
>
> "This section does not authorize the destruction of:
>
> "(a) Records affecting the title to real property or liens thereon.
>
> "(b) Court records.
>
> "(c) Records required to be kept by statute.

"(d) Records less than two years old.

"(e) The minutes, ordinances, or resolutions of the legislative body or of a city' board or commission.

"This section shall not be construed as limiting or qualifying in any manner the authority provided in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed."[2]

We must first determine whether the tape recordings of city council meetings made by the city clerk are public records within the meaning of these statutes. Normally, when similar words or phrases are used in two statutes in para materia they will be construed to have the same meaning. (*Hunstock v. Estate Development Corp.* (1943) 22 Cal. 2d 205.) This rule of construction is inapplicable however where the Legislature has indicated that the words or phrases used in the two statutes have different meanings. A number of cases hereinafter referred to have interpreted the word "record" as it is used in sections 6200 and 6201. These cases preceded the enactment of the Public Records Act in 1968. We believe it is significant that the definitions contained in section 6252 of the Act, *supra*, including the definition of" public records" are limited in their application by the introductory phrase "as used *in this chapter* . . . ." (Emphasis added.) Thus the Legislature expressly chose not to adopt the meaning of the word "record" as it was used in sections 6200 and 6201 and interpreted by the cases. At the same time the Legislature also made it clear that the statutory definition of "public records" in the act was not intended to change the interpretation of those words used in other statutes.

To ascertain the meaning of the word "record" as it is used in sections 6200 and 6201 we must apply the same rules of statutory construction used by the courts. The applicable rules were summarized in *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230 as follows:

"We begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose; a construction making some

[2] Section 34090.5 provides for the destruction of original records after photographic copies suitable for permanent storage have been made.

> words surplusage is to be avoided. When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (Citations and quotations omitted.)

The word "record" is not defined in sections 6200, 6201, or 34090. The dictionary defines the noun "record" as something that serves to record and the verb "record" to make an objective lasting indication of in some mechanical or automatic way. The noun is more specifically defined as something to which sound has been transferred by mechanical, usually electronic means and so registered as to be capable of subsequent reproduction by a specially designed instrument. (Webster's Third New Internat. Dict., p. 1898.) We have found no case which defines "city record" as those words are used in section 34090. A number of cases have defined the word "record" as it is used in sections 6200 and 6201. In *People v. Tomalty* (1910) 14 Cal. App. 224, 231, the court, in construing Penal Code section 113 (now § 6200) stated:

> "In order that an entry or record of the official acts of a public officer shall be a public record it is not necessary that such record be expressly required by law to be *kept*, but it is sufficient if it be necessary or convenient to the discharge of his official duty. Any record required by law to be *kept* by an officer, or which he *keeps* as necessary or convenient to the discharge of his official duty, is a public record' (citation)." (Emphases added.)

The *Tomalty* case has been cited with approval in *People v. Shaw* (1941) 17 Cal. 2d 778, 811; *People* v. Pearson (1952) 111 Cal. App. 2d 9, 18; and *Loder v. Municipal Court* (1976) 17 Cal. 3d 859, 863–864. The *Pearson* case amplified the *Tomalty* definition of public record with these words:

> "A paper written by a public "official in the performance of his duties or in recording the efforts of himself and those under his command or written plans of future work is a public record and is properly in the *keeping* of the office." (Emphasis added.)

People v. Olson (1965) 232 Cal. App. 2d 480, 486 provided further definition of public records as used in section 6200 (and Pen. Code, § 799, the statute of limitations referring thereto) stating:

> "The mere fact that a writing is in the possession of a public officer or a public agency does not make it a public record." (Citing cases.)

> "A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." (Citing cases.)

In an attempt to synthesize a definition of the word "record" as it is used in sections 6200 and 6201 from the ordinary import of the word as revealed by the dictionary and the judicial interpretations cited above, we commence with the thing which is the physical substance of the record. A thing which serves as an objective lasting indication of a writing, event or other information is a record thereof under the broader dictionary definitions. We note that section 6200 is directed at "any record." (Emphasis added.) We believe the use of the word "any" evidences a legislative intention to include every kind of thing which could serve as a record regardless of its physical form.

However, not every thing which could serve as a record is covered by sections 6200 and 6201. Looking to the words used in section 6200 we see that only those records which are in the custody of an officer are covered by that section. The words "filed or deposited in any *public* office" indicate that the officers referred to therein are public officers.

Further limitations on the scope of the "records" covered by sections 6200 and 6201 are derived from the definition of public records announced in *People v. Tomalty*, *supra*, 14 Cal. App. 224. In that case the court stated that "any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." We see in this language alternative requirements. If a law requires the record to be kept it is a "record" without more, within the meaning of sections 6200 and 6201. But even if there is no such law it may still be a public record under the *Tomalty* definition. That definition provides a two-pronged test, the first directed at the informational content of the record, and the second at the conduct of the officer with respect to the record. With respect to informational content *Tomalty* requires that the record must be necessary or convenient to the discharge of the officer's official duties. With respect to the officer's conduct, *Tomalty* requires that he "keep" the record.

The "keeping" requirement of *Tomalty*, for records not required by law to be kept, requires further analysis. It suggests that things which could serve as records which were not meant to be kept by the officer in whose custody they are would not be public records under the *Tomalty* definition. Such things as pencilled drafts, stenographic notes and the like come to mind. We think it unlikely that the Legislature intended to make the destruction of such things a felony when it enacted sections 6200 and 6201. We believe the Legislature had in mind those records which are made or retained as a memorial of their informational content for public reference. This is suggested by the following language in

the *Tomalty* case:

> "The purpose of our statute seems to be to protect the public archives from destruction, mutilation, alteration and falsification, and not to conclude or affect private rights. This is apparent by the omission, as an ingredient of the offense, of any fraudulent purpose or intent to injure anyone."

We think it is also suggested by the language from *People v. Olson*, *supra*, 232 Cal. App. 2d 480 that:

> "A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference."

The means used to prepare preliminary memoranda can be as varied as the means used to preserve the contents of a final document. The only essential differences are the purposes for which they are prepared or retained and the manner of their use. Thus, to determine whether a thing is a public record under the *Tomalty* definition we must look not to its physical nature but rather to its informational content, the purpose for which it was prepared or retained, and the manner of its use. We conclude that for a thing, not required by law to be kept, to be a record within the meaning of sections 6200 and 6201 it must have been made or retained by the public officer for the purpose of preserving its informational content for future reference. We believe this requirement was implicit in the use of the verb "keep" in the *Tomalty* definition, and thus represents not a change in, but only a more specific articulation of that definition.

To summarize, we conclude that a "record" within the meaning of sections 6200 and 6201, as interpreted by judicial decisions, is properly defined as a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.

Applying this definition of record to the tape recording of city council meetings by the city clerk to facilitate the preparation of the minutes we have no doubt that such a tape recording is a thing which constitutes an objective lasting indication of an event which is in the custody of a public officer. As we noted at the outset, we know of no law which requires such tape recordings to be made or kept. We have also noted that a tape recording of a city council meeting would be a convenient aid in the discharge of the city

clerk's duty to prepare the minutes of the city council meeting. What is not clear however in the request for this opinion is whether the tape recording of the city council meeting was made and retained solely for the purpose of preparing the minutes or whether it was made or retained for the additional purpose of preserving its information content for public reference. This is a question of fact which cannot be resolved in this opinion. We must therefore state our conclusion in the alternative. If the purpose for which the tape recording of the city council meeting was made and retained is solely to assist the city clerk in the preparation of the minutes of the city council meeting it is not a "record" within the meaning of sections 6200 and 6201. On the other hand, if the tape recording was made or retained for the additional purpose of preserving its informational content for public reference it is a "record" within the meaning of sections 6200 and 6201.

If a tape recording is a "record" within the meaning of sections 6200 and 6201 it may lawfully be destroyed only if and in the manner expressly authorized by state law. Section 34090 provides such authority in the case of cities. The mode prescribed is the measure of the power. (*People v. Zamora* (1980) 28 Cal. 3d 88, 98.)

With respect to charter cities we note that article XI, section 5(a), provides:

> "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

Whether a charter city is subject to the state laws governing the destruction of public records depends on whether that subject is a "municipal affair." This question was considered and resolved in the negative in the case of *In re Shaw* (1939) 32 Cal. App. 2d 84. In that case the defendants had been convicted of violating Penal Code section 113 and sought their release on habeas corpus claiming that Penal Code section 113 had been superseded by a provision in the Los Angeles city charter. The court denied the writ stating at page 86:

> "This contention is not well founded for the reason that the acts here charged for many years have been denounced by the laws of the State of California and designated as a felony, and it cannot now be said that the commission of such acts is strictly and solely a municipal affair of the city of Los Angeles.

> "The people of the state are primarily interested in the prevention of such crimes as are here charged, and the fact that the freeholders' charter of the city of Los Angeles designates some parts of the acts charged in the indictments as a misdemeanor only, cannot save the petitioners from a prosecution for the commission of the felony charged under the state law."

We conclude that a tape recording of a city council meeting by a city clerk may lawfully be destroyed at any time if the purpose for which it was made and retained was solely to facilitate the preparation of the minutes of the meeting. If the tape was made or retained for the additional purpose of preserving its informational content for public reference it may not lawfully be destroyed except as expressly authorized by state law.

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