

Holding public agencies accountable under the California Public Records Act ("CPRA")

When public agencies unlawfully withhold public records, you have options to enforce your clients' rights

By Alex Ballard

The California Public Records Act ("CPRA") enshrines the public's access to records held by public agencies. You may be familiar with submitting a CPRA request to a public agency, but what happens when the public agency does not comply? You have the right to file a petition ordering compliance with the California Public Records Act. This is a critical tool – especially in the pre-litigation phase – to obtain records that you and the public are entitled to. Let's help you understand how you can enforce your rights to public records when agencies don't comply with the CPRA.

What is the California Public Records Act?

The Legislature had declared a fundamental right of access to information concerning the conduct of the People's business. The California Public Records Act was signed into law in 1968 to allow the public to access public records maintained by various levels of local, county, and state agencies. As explained in *Iloh v. Regents of University of California* (2023) 87 Cal.App.5th 513, 523, the CPRA was modeled after the federal Freedom of Information Act (FOIA) for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies.

> In 2023, the Legislature passed legislation that renumbered and reorganized the entire CPRA within the Government Code – the CPRA can now be found at Government Code section 7920, et seq.

What is a public record?

The CPRA defines "public record" broadly. Specifically, a "public record" is "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." (Gov. Code, § 7920.530.)

A "writing" is "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by

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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." (Gov. Code, § 7920.545.)

The public records must contain "information relating to the conduct of the public's business." (Gov. Code, § 7920.530.) Therefore, primarily personal records with few, if any, mentions of agency business are typically not public records subject to disclosure.

But agencies cannot necessarily avoid disclosure by stating that the public records being sought are not in their "physical possession." Courts have routinely found that records both physically and constructively possessed by the public agency are subject to CPRA disclosure.

This is important because, given the broad definition of "writings," public records subject to the CPRA include records in many forms, including electronic media. In the ever-expanding digital age, courts have increasingly found that electronic media, including metadata, may constitute public records subject to CPRA disclosure.

Access to public records

The CPRA 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." (Gov. Code, § 7921.000.) The CPRA provides the public access with two key rights: (1) to inspect public records and (2) to receive copies of available public records.

1. Right to Inspect Public Records: "Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided." (Gov. Code, § 7922.525(a).)

2. Right to Prompt Availability of Copies of Public Records: "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so." (Gov. Code, § 7922.530, subd. (a).)

As explained in *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1088, any request for public records under the CPRA must present a reasonably focused and specific request, so that the public agency will have an opportunity to promptly identify and locate such records and to determine whether any exemption to disclosure applies.

Limits of public access – Exemptions from disclosure

Importantly, public entities still can withhold records from disclosure should the records at issue fall into an exempt category identified by the Legislature. It is these areas of exemption that often provide the fodder for a Petition Ordering Compliance with the CPRA. The public agency bears the burden of proving an exemption applies, so they must identify the legal basis upon which they are denying access to public records. The CPRA identifies several grounds upon which a public entity can exempt records from disclosure. These include, but are not limited to:

- Medical records
- Certain personnel records
- Certain law enforcement records
- Evidence Code privileges
- "Public interest" exemption (i.e., the public interest in not disclosing the record clearly outweighs the public interest in disclosure)
- Deliberative process privilege

Many of these exemptions are contained across Codes, including the Evidence Code, Penal Code, among others. It is important to be familiar with the complex array of grounds upon which an agency can withhold records. Only then will you know if it is a lawful withholding of records or gamesmanship by the public agency.

Enforcing rights under the California Public Records Act

The CPRA establishes a right for the public to both (1) inspect public records and (2) receive copies of public records. When a request for public records is made to an agency, the agency has 10 days to respond to the request. However, an agency can extend their response time by an additional 14 days in a written notice explaining the reasons for the extension. Where issues often arise are: (1) an agency is needlessly delaying the disclosure of public records and/or (2) an agency has denied the disclosure of public records.

Luckily, the CPRA provides for an enforcement mechanism through the judicial system. Through this process, any member of the public can petition the court to order that the agency comply with the CPRA. Many people submit a CPRA request and are met with gamesmanship from the public agency. Often, just taking the step of filing the petition with the court will make the public agency turn over the public records at issue. However, the gamesmanship often continues and forces you to litigate the access to public records further.

Filing a Petition for Writ of Mandate

Under the CPRA, anyone can file a Petition for Writ of Mandate to enforce their rights to access public records. The CPRA provides relief to petitioners when a local agency denies access or copies of public records, or unreasonably delays access to public records. You can file an action to enforce your rights under the CPRA in the superior court of the county where the records are maintained.

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There is no specific deadline by which a Petition for Writ of Mandate must be filed to enforce your rights under the CPRA, but best practice suggests that you comply with general timeframes for seeking a writ of mandate as you may still be subject to limitations periods. In a typical action under the CPRA, the parties will file written arguments with the court to explain why the records should be disclosed or withheld. Eventually, the court will conduct a hearing to allow oral argument on the case.

Further, in litigating these issues, you have the right to seek discovery under any action brought to enforce your CPRA rights. The general scope and limitations of discovery still apply in this action, pursuant to the Civil Discovery Act. You must be thorough in litigating a CPRA action to ensure you adequately present all the reasons for which disclosure is justified.

Proving the case and the court's role

The petitioner bears the burden of proving that a request for reasonably identifiable public records was made to a public agency and the agency unlawfully withheld the requested records. The public agency may assert affirmative defenses in response, meaning that it bears the burden of proving it was either justified in withholding the records, provided adequate assistance to the requestor to identify records, or was unable to identify any responsive records after a reasonable search.

During the CPRA action, the parties will submit filings to support their positions, participate in oral argument, and supply other forms of evidence. In addition to all of this, the court will decide whether the public agency was justified in withholding the requested records based on an in-camera review. This means that the judge will review the records at issue outside the presence of others to preserve the privacy of the documents should they not be deemed subject to disclosure.

If the court decides that the public agency has unlawfully withheld public records, the court will likely order the records to be disclosed or require the public agency to show cause as to why the records should not be disclosed. Should the court determine that the withholding of public records was justified by the agency, it will issue an order directing that the records not be disclosed to the public. The court may also find that certain portions of the records should be disclosed, while others were properly withheld.

Attorneys' fees and costs for the prevailing party

One of the benefits of bringing an action under the CPRA is the ability to obtain attorneys' fees. In a CPRA action, attorneys' fees can be awarded to a "prevailing party." Generally, courts have the discretion to deny fees when a plaintiff obtains a result so minimal and insignificant as to justify a finding that the plaintiff did not prevail, which may occur when the requester obtains only partial relief. However, as the petitioner, if you prevail in the action, the judge must award you court costs and reasonable attorney's fees – this is a mandatory requirement.

But when is a petitioner the prevailing party? Courts have found that the petitioner is the prevailing party when they have succeeded on any issue in the litigation and achieved some of the public benefits sought in the lawsuit. Some courts have even found that the petitioner may still be entitled to attorneys' fees even in the absence of a favorable court ruling. As explained by the court in *Pasadena Police Officers Assn. v. City of Pasadena* (2018) 22 Cal.App.5th 147, 168, litigation under the CPRA is one of the rare instances where a losing party may still be deemed a prevailing party entitled to an award of attorneys' fees because the petitioner has prevailed within the meaning of the CPRA when they filed an action that "results in [respondent] releasing a copy of a previously withheld document."

Is there cause for concern in the event you do not prevail in the CPRA action? Likely not. Should the public agency prevail in the CPRA action, they may only obtain an award of court costs and attorneys' fees when the court determines that the petitioner's case was utterly devoid of merit or taken for improper motive. Given that only frivolous cases will meet this standard, you should not be surprised that it is very uncommon for courts to award court costs and attorneys' fees to the public agency.

Conclusion

Ultimately, the CPRA provides powerful tools to secure public records pre-litigation and hold public agencies accountable to the people. Not only are we seeking these records for the benefit of our clients, but for the benefit of the public at large. Seeking court costs and attorneys' fees should you prevail in a CPRA action are not just compensation for your time and expense – it is a check on public agencies' failure to be transparent as required by law. When you are pursing recourse under the CPRA, think of all the individuals out there who are victims of the gamesmanship of public agencies in this process. Ultimately, we all benefit from enforcing public access to records.


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