

**PUBLIC RECORDS ACT
COMPLIANCE AUDIT
OF
CALIFORNIA STATE AGENCIES**

Conducted January 2006

by

Ryan P. McKee

PUBLIC RECORDS ACT COMPLIANCE AUDIT OF CALIFORNIA STATE AGENCIES

Conducted January 2006

Introduction: The object of the California Public Records Act ("CPRA;" Government Code Section 6250 *et seq.*), originally enacted in 1968, is to ensure the people's right to know how their state and local governments are functioning. Fashioned after the federal Freedom of Information Act, the CPRA's intent is made clear in its very first section:

"[T]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental right of every person in this state." Government Code Section 6250.

In addition, the voters amended California's Constitution in 2004 with the passage of Proposition 59, elevating the public's right to open government to a constitutionally protected right:

"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." California Constitution, Article 1, Section 3(b)(1).

The CPRA defines a "public record" as any recording in any form of communication or representation, relating to the conduct of the public's business, that is prepared, owned, used or retained by any governmental agency in the State, regardless of its form or physical characteristics.

Any person, company, corporation, firm, partnership or association has the right to inspect public records during normal business hours or to receive a copy of a record by paying the cost of duplication, except when the record is exempted from disclosure by state or federal law.

Governmental agencies are not allowed to delay the inspection of public records and, in all circumstances, must respond to a public records request within 10 calendar days. However, for records known to be disclosable, such as those to be requested in this audit, the law says access is to be provided "promptly," and not needlessly delayed for some portion of 10 days. The CPRA emphasizes that nothing "shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." Government Code Section 6253(b)-(d).

Additionally, the courts have found that an agency may not require a public records request to be in writing. "The California Public Records Act plainly does not require a written request." *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381.

Purpose of this Compliance Audit: In recent years, corruption or abuse of office has been a frequent topic of news stories and criminal prosecutions in state and local government, from the offices of the Secretary of State and the Insurance Commissioner; to the Board of Supervisors in San Bernardino county; to the cities of Carson, South Gate, Compton, Vernon, Inglewood, Colton and San Diego. Unlawful secrecy has also led to civil suits against the Los Angeles County Board of Supervisors, the school districts of Orange, Bonita, and Chino Valley, the Pasadena Area Community College District; the cities of Claremont and Sierra Madre; water agencies like Three Valleys MWD and San Antonio Water Company; quasi-governmental non-profits like the Hollywood Business Improvement District and the Entertainment Industry Development Corporation – and even to a little-noticed network of police agencies formed for mutual assistance in combating drug crimes. Complaints of violations of the open meeting laws in particular have reached such a volume that special divisions in several District Attorneys' Offices have been created solely to investigate them.

As for compliance with the California Public Records Act – often a powerful tool for uncovering governmental or even private sector shortcomings ranging from the questionable to the criminal (see report, “Stories Reported Thanks to Public Records”) – no public officer has been given authority to go to court to compel disclosure, as is the case with the open meeting laws. Two bills passed by the Legislature that would have given the Attorney General the authority to issue non-binding opinions on public agencies’ failure to provide records access were vetoed by Governor Davis. A report several years ago by the legislative joint task force concluded that the California Public Records Act was, for several reasons, toothless for want of penalties for non-compliance or other credible enforcement mechanisms.

Compliance Audits Elsewhere: Over the last decade, in California and elsewhere, various organizations – usually but not always newspapers – have increasingly conducted public records law compliance “audits” of (usually local) government agencies. Most of those have done so by sending people to visit agencies in person and ask to inspect or to obtain copies of specified records that should be available to the public immediately with minimum delay, and with no argument. The agencies’ responses are then compared in terms of promptness, copying costs, and no-questions-asked service. The results are then publicly reported. The effect is to give credit to the agencies who know their obligations to be open to the public and respond accordingly, and to give the rest a sense of where they need to improve. In California audits of this kind have been done in Los Angeles and Orange Counties, in Stockton, Vacaville, and most recently in Fresno, conducted by Californians Aware in the summer of 2005.

This Audit of California’s *state* government agencies, a first of its kind, tested how they respond to very simple requests to view and for copies of obviously disclosable and readily available public documents.

Audit Item 1: Records Access Guidelines

The thirty-two (32) agencies selected for audit were chosen because Section 6253.4 of the CPRA expressly identifies each by name as being required to perform as follows:

The following state agencies "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." Government Code Section 6253.4(a). (Emphasis added.)

The CPRA further states: "Public records are open to inspection at all times during the office hours of the state [agency;]" and, guidelines established for the accessibility of records "shall not operate to limit the hours public records are open to inspection." Government Code Sections 6253(a), 6253.4(b).

Audit Item 2: Form 700 Statements of Economic Interests

This open records requirement also aids the public's ability to insure that their public officials are free from conflicts-of-interest in their decision-making. The Political Reform Act (Government Code Sections 81000-91015) requires most state and local government officials to publicly disclose personal economic interests, and to refrain from decisions where a conflict lies. The Act generally prohibits state and local officials, employees, and candidates from accepting gifts of more than \$320 annually from a single source, or more than \$10 a month from a registered lobbyist.

The Fair Political Practices Commission ("FPPC"), responsible for enforcement of the Act's provisions, provides its Form 700 (Statement of Economic Interests) for use by public officials in their annual reporting. The Act makes all Form 700s available for public inspection during the agency's regular business hours and expressly prohibits the agency from placing any conditions on persons seeking access to the forms, or from requesting any information or identification from those persons:

"Every report and statement filed pursuant to this title is a public record open for public inspection and reproduction during regular business hours ... **No conditions whatsoever shall be imposed** upon persons desiring to inspect or reproduce reports and statements filed under this title, **nor shall any information or identification be required of these persons**. Copies shall be provided at a charge not to exceed ten cents (\$0.10) per page." Government Code Section 81008(a). (Emphasis added.)

Part 1 of this audit requested immediate access to view a Form 700 and to receive a copy of the agency's "guidelines for accessibility of records."

Audit Item 3: Employment Contracts

The CPRA makes every employment contract of a public official or employee open to inspection, without regard to the requester's reason for wanting that information:

"**Every employment contract** between a state and local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255." Government Code Section 6254.8. (Emphasis added.)

The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." Government Code Section 6257.5.

Audit Item 4: Litigation Settlements

The courts have concluded that litigation settlement agreements, entered into by California public agencies, are public records open to inspection: "[D]ocuments relating to settlement of a private personal injury claim with public funds constitute 'writings' containing information regarding 'the conduct of the public business,' subject to public inspection and disclosure under the CPRA." *Register Division of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal.App.3d 893, 901 (4th Dist., 1984). "We conclude that assurances of confidentiality by the County regarding the settlement agreement are inadequate to transform what was a public record into a private one." *Id.* at 909.

Part 2 of this audit requested copies of an employment contract or similar document(s) reflecting the total compensation of the state agency's top-ranking employee, and a recent litigation settlement agreement.

Testing Methods: The records requester ("Auditor"), Ryan P. McKee, an 18-year old college student, personally visited the main office of each of the 32 State agencies, as identified by the California Secretary of State's Roster of Constitutional Officers, State Agencies, Departments, Boards, and Commissions, and asked to see the employee responsible for handling public record requests.

Once directed to that individual, the Auditor provided the Part 1 - 3x5" card shown here ----- >

He also asked to be directed to where the agency's "guidelines for accessibility of records" are posted. He recorded the time entering and leaving the office, any response to his requests, and any information that was requested from him.

When Part 1 was complete, he left his Part 2 – 8½ x 5½" signed, written request for copies of public records, shown here - - - - >

He then recorded when the agency notified him the documents were ready to be picked up, or when postmarked if he received the records by mail.

Public Records Request:

- (a) to view the most recent FPPC Form 700 (Statement of Economic Interests) for this public agency's top-ranking employee;
- (b) for a copy of this public agency's written guidelines for accessibility of public records.

Dear Public Records Administrator:

I request true and correct copies of the following public records:

1. the Employment Contract and/or similar document(s) that reflect the total annual compensation of this state agency's top-ranking employee; and
2. the most recent litigation settlement agreement, involving this state agency, which includes a payment of \$100,000 or more to the plaintiff(s).

Please call me (909-239-8493) when these documents are ready for my pick up. I assure this agency that I will pay the costs of duplication when I pick up these copies. In the alternative, the agency can mail the copies to the address below, and I will immediately reimburse the costs of duplication and mailing.

Respectfully,

Ryan McKee P.O. Box 8466, La Verne, CA 91750 (909)239-8493

All the information accumulated was then transferred to a computer file and the results tabulated.

All initial contacts in this 32-agency audit were performed over three days: January 17, 19, & 20, 2006. One agency was eliminated (Department of Youth Authority), because it had been merged with the Department of Corrections.

Agencies that refused to accept the requests for records during the first visit to their main office were sent follow-up written requests, mailed on January 24, 2006.

Data was accumulated and recorded for each agency during the 30-day period following the initial in-person visits to the main offices of all of the agencies. The audit concluded on February 19, 2006.

Results/Responses: Given news reports of several public records audits of *local* agencies, such as the latest done last fall by Californians Aware, one might expect an audit of these 31 *state* agencies to produce similar results, with 50 to 75% failing to properly respond to simple public records requests.

In this auditor's experience, having performed, just 14 months earlier, a similar audit of 52 *local* agencies within eastern Los Angeles and western San Bernardino counties, only 11 (21%) performed precisely as the law required.

Yet quite surprisingly, the present audit of 31 *state* agencies (all identified by name within the CPRA) found *none* complied exactly as the law requires, and many ignored almost entirely their duties as mandated by the CPRA and the Political Reform Act.

GRADES FOR STATE AGENCY PERFORMANCE

Before attempting to evaluate the quality of the responses of these state agencies to the requests for public records, the Auditor created a 100-point grading scale based upon point deductions for each failure to conform as commanded by the CPRA and Political Reform Act, and also for exceeding reasonable times for producing the records requested.

In a previous audit of 52 *local* agencies, where the verbal request was to view an FPPC Form 700 and the employment contract of the CEO, this auditor found that 48% produced both documents within 20 minutes (33% within only 12 minutes).

Since Part 1 of this present Audit requested to view records even less demanding (a FPPC Form 700 and the agency's written Guidelines for records access), this Auditor concluded that any time over 1 hour necessary to provide these documents was an excessive delay, and deserved a deduction in the score.

Additionally, each failure to provide one of the four documents requested was given a 20-point deduction, with *each* unlawful request for information made to the Auditor (his identity, affiliation, or a reason for seeking the records), prior to being allowed to view the documents requested in Part 1, was given a 5-point deduction, up to a maximum of 10 points.

Finally, points were deducted for an agency's failure to respond to the Part 2 written request within the CPRA's 10-day limit. And no credit was given for any document provided by an agency after 20 days.

Expectations of this Records Audit:

- 1) Guidelines for Records Access - - - - - posted for public in agency's main office
- 2) FPPC Form 700 provided for viewing & Guidelines for Records Access provided free - within 1 hour (without requesting any additional information from Auditor)
- 3) Salary Document & Settlement provided - - - within 10 days

Grading Scale	Point Deductions	(100 points possible)
100 = A+	Guidelines Not Posted in Agency Office	= -10 points
95 = A	Each free Copy of Guidelines & Form 700 to view	
90 = A-	provided within: 1 hour of request	= -0
85 = B+	1 hour to 1 day of request	= -5
80 = B	2 – 5 days of request	= -10
75 = B-	6 – 10 days of request	= -15
70 = C+	> 10 days or not at all	= -20
65 = C	Information Requested of Auditor - -	
60 = C-	Assessed at -5 for each request for:	
55 = D+	Identity, Affiliation, or	
50 = D	Why Records Being Sought = -10 (maximum)	
45 = D-	- - - - -	
40 = F+	Each Salary Document or Settlement Agreement	
35 = F	Provided - within 10 days	= -0
0-30 = F-	within 11-20 days	= -10

> 20 days or not at all = -20

Notable Findings

Part 1 Results -- Request made in person to view a Form 700 and receive a copy of the Guidelines:

- (a) The most striking discovery was that 90% of the state agencies failed to post, in their main office, a copy of the Guidelines for Accessibility of Public Records (Government Code Section 6253.4(a)). Two-thirds could not provide a copy of those Guidelines when requested by the Auditor during his visit to the agency's main office. Even 10 days after the visit to agency offices, more than half still had failed to provide the Guidelines; and some that did comply, illegally charged the Auditor a fee for the copy of the Guidelines.
- (b) When asked to present the FPPC Form 700 for the agency's top-ranking employee, 74% 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. (In contrast, the Auditor's previous audit of 52 local agencies found almost half could produce the Form 700 in 20 minutes, 69% produced it within one day, and 88% provided it within 10 days.)
- (c) Employees at 71% of the state agencies wanted to know some information from the Auditor (his name, who he was working for, or why he wanted to view the record) before allowing him to see the Form 700. (This result proved similar to the 52-local agency audit, where 65% asked for some information from the Auditor.)

Part 2 Results -- Request in writing for copies of a Settlement Agreement and a Salary Document:

- (a) When requested to provide a copy of the document showing the total annual compensation of that state agency's top-ranking employee, only 29% could supply that record within 10 days. And after 20 days, only 55% had complied with this written request. (Yet, in the 52-local agency audit, 88% had complied within 10 days, and 96% had furnished the record within 20 days.)
- (b) Similarly, only 29% 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%) could provide this document within 20 days. (No comparison can be made with the local agency audit, as this document was not requested there.)

The Best:

Grade: A Of all the State agencies surveyed, **Cal STRS** proved the best. Filing Officer James Musante and Staff Counsel Robert Van Der Volgen gave immediate attention to the requests, providing Guidelines and Form 700 within 46 minutes and the Compensation Document and Settlement Agreement in less than one day. The only thing that kept STRS from a perfect score was the receptionist who, after being shown a card identifying the Part 1 records requested, asked to know who the Auditor worked for before calling Mr. Musante to assist in providing the records.

Grade: A- Two other agencies were very close behind, only failing to have the Guidelines posted in their office. Human Resource Analyst Melanie Wong and Supervising Staff Counsel Christopher Pederson of the **California Coastal Commission** cooperated in providing the Part 1 documents in only 20 minutes and the Part 2 records within 8 days of the written request. And at the **Department of Toxic Substances Control**, Associate Government Program Analyst Mark Abrams and Senior Staff Counsel Joan Markoff cooperated to produce the Part 1 documents in 24 minutes and the Part 2 records within 6 days.

No other agency received better than a grade of C+.

The Worst:

Grade: F- Several agencies performed miserably:

By far, the very worst experience for this Auditor was provided, ironically, by the **Department of Consumer Affairs**. First, a female employee in the Consumer Information Center of the Consumer and Relations Division grilled the Auditor for more than 20 minutes demanding to know who he was, why he wanted the records, and what agency he worked for (a demand repeated three times). Twice asked to identify herself, she refused, saying she would not reveal her name because the Auditor refused to identify the agency he was working for. A male employee, also refusing to identify himself, provided the Auditor with a "Procedure to Subpoena Records" form and said to call the phone number on that form. Both employees refused to accept either of the Auditor's requests for records and refused to date-stamp them for him. The Auditor then mailed both requests to the department, and over the next 24 days received no response of any kind.

Three agencies, the **Department of Motor Vehicles**, the **Department of Social Services**, and the **Department of Justice** (the office responsible for counseling and representing many if not most state agencies on the Public Records Act), would not even let the Auditor enter the building that is their main office; each saying that without a previously made appointment with someone in that office, the public was not allowed to enter. The Auditor then made both the requests by mail. Only Social Services responded (11 days after receiving the mailed requests). However, the more than \$300,000 Settlement provided was filled with redactions, eliminating the Case Number and Plaintiffs' names in probable violation of the law. But, in the case of the other two departments, 24 days after the receipt of those mailed requests, neither had responded in any manner.

At the **Employment Development Department** security escorted the Auditor to the Legal Office, which provided nothing but accepted both requests. Eleven days later the Assistant Chief Counsel David Paulson replied by mail with a generic letter, saying EDD requires an additional 14 days to respond because the request *may* require search, collection, examination of records at separate offices. However, 20 days after his letter, still no records had been supplied.

At the **Department of Health Services**, Filing Officer Karen Moreno said it would take too long to retrieve the Form 700; she would mail it. Reluctantly, she accepted both requests saying they really

weren't acceptable and should be a full-page letter to the legal division. In a response 13 days later, the Form 700 was the only document she provided. After 30 days, no other response was received.

Despite returning a second day to the **Department of Mental Health**, at the urging of Department staff, Gail Schurr, Secretary to Public Records Coordinator Steve Appel, said he still wasn't in and no one could respond to the Auditor's requests. The Auditor left both requests with main office (Room 151) staff, assured they would be forwarded to Mr. Appel. Seventeen days later Mr. Appel called to ask what the Auditor was going to do with the information. During the phone conversation, Mr. Appel gave his assurance that the records would be mailed within the following 2 days. Yet still, 31 days after the Auditor's first appearance at the DMH office to make his requests, Mr. Appel had provided *absolutely nothing* in response. (Mr. Appel is the same records coordinator who asserted earlier this year that the Atascadero State Hospital's "funny papers" – its informal term for special incident reports compiled by hospital employees witnessing assaults against staff and patients at the mental facility – could not be reproduced or quoted directly from by the San Luis Obispo County *Tribune*, contending that the State owns the copyright on the "creative sparks" within those reports.)

After CalPERS Receptionist Marty Gelarei refused to accept the records requests, saying the Auditor could not make public records requests at that office and was *required* to submit them on the Internet, the Auditor then made the requests by mail. However, 24 days after CalPERS received the mailed requests, the Auditor had received absolutely no response.

Last, but certainly not the least among the transparency scofflaws, is the **California Public Utilities Commission**. Once in the door, the Auditor was directed to Central Filing on the 2nd floor, where Juan Bautista, *refusing* to look at the card describing the records being requested, *required* the Auditor to fill out the form, "Public Request for Central Files Services," asking the Auditor's name, address, phone number and affiliation. Once Mr. Bautista saw what documents were being requested, he directed the Auditor to Human Resources on the 3rd floor, which in turn directed the Auditor to the 5th floor, where Executive Assistant Karen Amato in the Executive Division provided nothing, but did accept both requests for records. It was 9 days later when Suzy Hong, Legal Division, provided the Form 700 and the Guidelines. But it was 24 days after the initial requests that Ms. Hong finally responded to the requests for the compensation and settlement documents, saying these records amounted to 100 pages and would be forwarded *only* after her receipt of \$52.00, which included a copying charge of 20¢ per page, plus \$32.00 for retrieval/review/clerical, 2 hrs. @ \$16.00/hr. The Auditor notes that the PUC's own "Procedures for Obtaining Information and Records" (General Order No. 66-C) makes no mention of such a charge for retrieval/review/clerical services, only a charge for duplication. Moreover, a charge for such has been recognized as unlawful since 1994, when the Fourth District Court of Appeal, interpreting Government Code Section 6253's authorization to charge a copying fee "covering direct costs of duplication," ruled in *North County Parents v. Dept. of Education*, 23 Cal.App.4th 144, "The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it. **'Direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling** of the file from which the copy is extracted." *Id.* at 148. (Emphasis added.)

Educational Follow-up To help these government agencies understand their responsibilities and to aid them in making whatever adjustments may be necessary, each will receive a copy of this Audit overview and conclusions, the three-page summary of the audit's results and grades, along with a page showing how that particular agency performed.

In the near future, the Auditor will ask each agency what steps it has taken to improve on its CPRA compliance, and to reassure the public of its right of access to that agency's public records.