

First Supplement to Memorandum 2017-48

**California Public Records Act Clean-Up: Revised Tentative Outline
(Public Comment)**

The Commission¹ has received two new comments relating to this study:

Exhibit p.

- Jolie Houston, CPRA Committee of City Attorneys’ Department,
League of California Cities (9/5/17) 1
- Randi Johl, California City Clerks Association (9/6/17) 5

Both comments are discussed in this supplement. Unless otherwise indicated, all statutory references in this supplement are to existing sections of the Government Code.

COMMENT OF LEAGUE OF CALIFORNIA CITIES

Jolie Houston has submitted a second letter² to the Commission on behalf of the California Public Records Act Committee of the City Attorneys’ Department of the League of California Cities (hereafter, “League”), commenting on the study generally, as well as on specific decisions made by the Commission to date.

Nonsubstantive Nature of Proposed Recodification

The League acknowledges and appreciates the Commission’s expressed intent that its proposed recodification in this study of the California Public Records Act (hereafter, “CPRA”) will be nonsubstantive. Nevertheless, the

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. The first letter was attached as an exhibit to Memorandum 2017-24, and discussed at pages 5-9 of that memorandum.

League again expresses its concern that the recodification might not be “entirely nonsubstantive in nature.”³

Specifically, the League is concerned that the proposed recodification will have “far-reaching impacts” that the Commission has not considered.⁴ As an example, the League points to publications, guidebooks, and reference materials relied upon by many local agencies that the League believes will be rendered obsolete and useless. In particular, the League identifies a guide that it published only months ago, which was specifically designed to closely track the CPRA’s existing statutory scheme.⁵

The League’s guide is impressive, and the staff expects it will serve as a valuable resource for both practitioners and anyone else with an interest in the CPRA. Its text is organized by subject matter in a manner that makes it easily readable, with citations to sections of many different California codes, appellate opinions, constitutional provisions, and other material, solely in footnotes. However, the logical organization of the *text* sheds some light on why the Legislature has directed this study: The sections of the CPRA cited in footnotes corresponding to the text do not appear sequentially ordered at all.

The legislative resolution requesting the Commission to undertake this study expressly directed the Commission to prepare recommended legislation, “as soon as possible,” that would “[o]rganize the existing provisions [of the CPRA] in such a way that similar provisions are located in close proximity to one another.”⁶ It would be impossible for the Commission to comply with that directive without recodifying the CPRA, because the CPRA is not currently organized in that manner. Moreover, it would be difficult to dispute that this requested reorganization, if done well, will produce a more user-friendly statute.

In light of the number of people who will benefit over the long-term from a revised CPRA that is much easier to read and understand, the short-term need to update secondary reference material appears to be an unfortunate but outbalanced consequence. Because the proposed recodification will make no substantive changes to existing law, authors and publishers will only need to update citations to provisions of the CPRA. When they do that updating, the

3. Exhibit p. 1.

4. *Id.*

5. See *The People’s Business, A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT* (April 2017), available at <<https://www.cacities.org/Resources/Open-Government/THE-PEOPLE’S-BUSINESS-A-Guide-to-the-California-Pu.aspx>>.

6. 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)).

detailed disposition table the Commission includes with each recodification will facilitate that task.

Richard McKee Transparency Act

The Commission previously decided to defer consideration of whether to examine the Richard McKee Transparency Act (Educ. Code §§ 89913-89919) in this study.⁷

The League continues to recommend that the Commission not incorporate the McKee Act into the CPRA. The League remains concerned that such incorporation might cause confusion as to the respective application of the two acts.⁸

The Commission should keep the League’s position in mind as it goes forward with this study.

Relocation of Nearby Provisions Relating to Public Records

The Commission previously decided not to incorporate in the proposed recodification provisions relating to public records that are presently located just outside the CPRA (Chapters 3, 3.01, 3.1, 3.2, and 3.3 of Title 1 of Division 10), and to instead cross-refer and use “signpost” provisions in the recodification to direct readers to those provisions.⁹

The League supports this decision.¹⁰

Article I, Section 3(b) of the California Constitution

The Commission previously decided not to incorporate any provisions of Article I, Section 3(b) of the California Constitution (the “Sunshine Amendment”) in the proposed recodification, but instead refer to those provisions as appropriate in Comments in the proposed recodification.¹¹

The League supports this decision.¹²

Relocation of Statutory Provisions Relating to Retention of Public Records

In August, the Commission decided that its proposed CPRA recodification should not incorporate record retention requirements presently located outside

7. Minutes (Feb. 2017), p. 3.

8. Exhibit p. 2.

9. Minutes (Aug. 2017), p. 5.

10. Exhibit p. 2.

11. Minutes (Aug. 2017), p. 5.

12. Exhibit p. 2.

the CPRA. Instead, the Commission decided to refer to those statutory requirements at appropriate places in the recodification.¹³

The League views that as a step forward, but would prefer to have the record retention requirements incorporated in the CPRA. The League urges the Commission to reconsider its decision.¹⁴

However, the Legislature only authorized the Commission to study and recodify the CPRA, a statute governing *disclosure* of public records, and “related provisions.”¹⁵ *Retention* of public records seems sufficiently distinct from the subject matter of the CPRA as to be outside the scope of the resolution authorizing this study. Relocating the record retention provisions would also significantly complicate this study, likely delaying its completion.

The staff recommends that the Commission reaffirm its previous decision on this point.

In its report for this study, however, the Commission could raise the possibility of having it conduct a separate study on relocating the record retention provisions. **Does the Commission have any interest in that idea?**

Attorney General Opinions

The Commission previously decided that the proposed recodification should include statutory language regarding its effect on an Attorney General opinion interpreting the CPRA or determining its constitutionality.¹⁶

The League supports this decision.¹⁷

Adding Definition of “Prompt”

The Commission previously decided not to add a definition of the word “prompt” in the proposed recodification.¹⁸

The League supports this decision.¹⁹

Section 6253

At the August meeting, a representative of the California News Publishers Association (“CNPA”) suggested that subdivisions (a) and (b) of Section 6253 are

13. Minutes (Aug. 2017), p. 5.

14. Exhibit p. 2.

15. See 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)).

16. Minutes (Aug. 2017), p. 6.

17. Exhibit p. 3.

18. Minutes (Aug. 2017), p. 6.

19. Exhibit p. 3.

to some extent redundant. In response, the staff said it would consider CNPA's suggestion when preparing a proposed recodification of Section 6253 for the Commission to consider later in this study.²⁰

The League says there is no redundancy in these provisions.²¹ It asserts that *any* modification of the language in Section 6253(a)-(b) would constitute a substantive change to existing law.²²

The staff will consider the League's comments, as well as CNPA's, when preparing a proposed a recodification of Section 6253.

Section 6254.16

Section 6254.16 relates to disclosure of utility customer information. In the attached letter, the League says the substance of that section belongs where the staff initially proposed to place it, in proposed "Chapter 10. Personal Information" of the tentative outline for recodifying the CPRA.

Due to comments from CNPA about the scope of Section 6254.16, however, Memorandum 2017-48 (also on the agenda for the upcoming meeting) raises the possibility of renaming that chapter as "Chapter 10. Personal Information and Customer Records."²³

It would be helpful to hear whether the League has any objection to using that broader, more inclusive name, which would provide greater flexibility for future evolution of the CPRA.

Section 6255

At the August meeting, CNPA questioned the staff's tentatively proposed placement of the provision(s) that would continue Section 6255, the CPRA "catchall exemption." The Commission directed the staff to look into the issue, and bring it back to the Commission for further consideration.²⁴

The staff has since proposed significant revisions of the tentative outline to address the issue.²⁵ The League, likely unaware of this new staff proposal, has made a different recommendation regarding placement of the provision(s) continuing Section 6255.²⁶

20. Minutes (Aug. 2017), p. 6.

21. Exhibit p. 3.

22. Exhibit p. 3.

23. See Memorandum 2017-48, pp. 1-2.

24. Minutes (Aug. 2017), p. 7.

25. See Memorandum 2017-48, pp. 4-5.

26. Exhibit p. 3.

It would be helpful to know the League’s reaction to the staff’s new proposed placement of the provision(s) continuing Section 6255, as set forth in Memorandum 2017-48.

Enforcement Provisions

In response to another CNPA comment at the Commission’s August meeting, the Commission decided not to attempt to clarify the existing statutory language of Sections 6258 and 6259, two sections that relate to enforcement of the CPRA.²⁷ At the same time, the Commission decided to shorten the title of the proposed part in which those sections would be continued: The title would be “Part. 4. Enforcement,” rather than the staff’s originally proposed title, “Part 4. Enforcement of the Right to Inspect or Receive a Public Record.”

The League supports the Commission’s decision not to clarify the language of Sections 6258 and 6259.²⁸ However, that support appears in part to be based on retention of the originally proposed title for Part 4.

The Commission decided to rename Part 4 because CNPA’s representative pointed out that the rights to “inspect or receive” a public record may not be the only rights a person may seek to enforce under the CPRA.²⁹ For example, a person might also seek to enforce the CPRA rules on duplication costs.

The staff sees no disadvantage to use of the more inclusive and flexible title “Enforcement.”

The staff recommends that the Commission affirm its previous decision to use the name “Part. 4. Enforcement.”

Article 2 of the CPRA

The Commission previously deferred a decision on how to recodify Article 2 of the CPRA (§§ 6275-6276.48), sections citing numerous exemptions from disclosure.³⁰

The League supports that decision.³¹ The League also continues to recommend that the provisions cited in Article 2 should not be moved into the CPRA.

27. Minutes (Aug. 2017), p. 7.

28. Exhibit p. 4.

29. Minutes (Aug. 2017), p. 7.

30. Minutes (Aug. 2017), p. 7.

31. Exhibit p. 4.

The staff will remind the Commission of the League’s position when the Commission turns to Article 2 later in this study.

COMMENTS OF CALIFORNIA CITY CLERKS ASSOCIATION

Randi Johl is the legislative director of the California City Clerks Association (hereafter, “Association”). On behalf of the Association, Ms. Johl relates that the membership and Executive Board of the Association, and of the City Clerks Department of the League of California Cities, are virtually identical, and that the two organizations work very closely together.³² Ms. Johl further advises that at this time, the Association is supportive of the comments and suggestions discussed above in this supplement, submitted by Ms. Houston on behalf of the CPRA Committee of the City Attorneys’ Department of the League of California Cities.

Respectfully submitted,

Steve Cohen
Staff Counsel

32. Exhibit p. 5.



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

September 5, 2017

VIA EMAIL

Steve Cohen
California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
Email: scohen@clrc.ca.gov

Re: California Law Revision Commission Study of California Public Records Act

Dear Mr. Cohen:

I write on behalf of the California Public Records Act Committee (“Committee”) of the City Attorneys’ Department of the League of California Cities (“League”), an association of 475 California Cities united in promoting the general welfare of cities and their citizens, regarding the California Law Revision Commission’s (“CLRC”) study of the California Public Records Act (“CPRA”). The Committee appreciates the opportunity to comment on Memorandum 2017-24 and Memorandum 2017-39 (“Draft Minutes”), and we look forward to working with CLRC on this CPRA revision project.

1. Overarching Concerns about the Revision Project

The Committee acknowledges and appreciates the CLRC’s consideration of the Committee’s comments contained in its February 14, 2017 letter (“Letter”). However, the Committee remains concerned that, through no intention of CLRC, the CPRA revision project might not be entirely nonsubstantive in nature.

Although the CLRC anticipates that this new organizational scheme “attempts to reorganize the CPRA in a clear, logical, user-friendly manner,”¹ the Committee remains concerned that recodifying the CPRA will have far-reaching impacts that the CLRC has not considered. For example, many local agencies have publications, guidebooks and reference materials that will become useless.

For the Committee, the proposed reorganization of the CPRA will essentially make the recent 2017 edition of the *People’s Business, a Guide to the California Public Records Act* (“*Guide*”), obsolete and useless to the local agencies across California that heavily rely upon it. It should be emphasized that the Committee spent over two years revising the *Guide* and it was specifically designed to closely track the statutory scheme of the existing CPRA.

¹ Memorandum 2017-24 p. 5

2. Committee's Comments on Memorandum 2017-24 and Draft Minutes

The Committee understands that many of the questions posed in Memorandum 2017-24 were discussed and/or addressed during CLRC's August 4, 2017 meeting. However, we would like to provide input regarding the following issues presented in it, which we believe may still be unresolved and provide our comments on the Draft Minutes.

Although not mentioned in the Draft Minutes, the Committee continues to recommend that the CLRC does not combine the Richard McKee Transparency Act with the general provisions of the CPRA. As noted in our Letter, the Committee is very concerned that doing so might interject unnecessary confusion into the application of Richard McKee Transparency Act and/or the CPRA.

Location of the CPRA within the Government Code

The Committee is aware that the CLRC "approved the concept of relocating the CPRA to a new division ('Division 10. Inspection of Records' of 'Title 1. General' of the Government Code."² However, the CLRC "decided against relocating the content of the nearby chapters relating to public records (Chapters 3, 3.01, 3.1, 3.2, and 3.3)."³ Instead the CLRC decided to cross-reference these chapters "where appropriate in the Commission's Comments to code sections in the recodified CPRA."⁴ The Committee agrees with this proposed change.

Constitutional Right of Access

Although mentioned in our Letter and raised in Memorandum 2017-24, the CLRC did not specifically address the Committee's concern about how the "revision project will affect or conflict with Proposition 59, the 'sunshine amendment' to the Constitution of California."⁵ The Committee agrees with the CLRC's decision to refer to Article I, Section 3(b) of the California Constitution, "at appropriate places in its Comments" but not add it in the proposed legislation to maintain "the nonsubstantive character of the Commission's proposal."⁶

Retention of Records

In its Letter, the Committee requested that the CLRC consider relocating the record retention requirements to follow the CPRA records disclosure requirements. However, the CLRC "decided to refer to them [retention of public records provisions] at appropriate places in its Comments to the proposed legislation."⁷ The Committee appreciates that this change was made, but believes that it will not be as effective to alert readers of the CPRA to the retention provisions. The Committee continues to recommend that the retention provisions should be relocated to follow the CPRA disclosure requirements.

² Draft Minutes p. 5

³ Draft Minutes p. 5

⁴ Draft Minutes p. 5

⁵ Memorandum 2017-24 p. 6

⁶ Draft Minutes p. 5.

⁷ Draft Minutes p. 6

Nonsubstantive Reform

The Committee appreciates that the CLRC will add additional statutory language in the proposed legislation that specifically refers to Attorney General Opinions interpreting the CPRA or determining its constitutionality.⁸

Definition of “Prompt”

The Committee agrees with the CLRC’s decision not add a definition of “prompt” because the CPRA does not currently define it.⁹ The Committee strongly believes that there is no need to define “prompt.” Currently, Government Code section 6253(c) mandates that the local agency “shall promptly notify the person making the request” and imposes a 10-day fixed time that the local agency shall determine whether the request seeks disclosable public records.¹⁰ Further, the Committee believes that by adding a new definition to Government Code section 6253 would be a substantive change to the existing CPRA, and could have unintended consequences and possible litigation.

Government Code § 6253

Regarding Government Code section 6253(a) and (b) being redundant,¹¹ the Committee strongly opposes removing either subsection (a) or (b) from Government Code section 6253. These two subsections set forth the *fundamental purpose* of the CPRA to provide access to information about the conduct of the public’s business. These sections set forth the two ways to gain access under the CPRA to public records by: (1) inspecting the records at the local agency’s office (or website); or (2) obtaining a copies of the public records from the local agency. The Committee believes that any modification to Government Code section 6253 would be a substantive change to the existing CPRA.

Government Code § 6254.16

Currently Government Code section 6254.16 expressly applies to personal information maintained by utilities regarding its customers. The Committee recommends that if is relocated, then Chapter 10 would be appropriate.

Government Code § 6255

The Committee recommends that Government Code section 6255 or the “catchall exemption”¹² if relocated, should be added to Chapter 13, Private Records, Privileged Materials, and Other Records Protected by Law from Disclosure.”

⁸ Draft Minutes p. 6

⁹ Draft Minutes p. 6

¹⁰ Government Code § 6253 (c): “Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor.”

¹¹ Draft Minutes p. 6

¹² Draft Minutes p. 7

Enforcement

The Committee agrees with the CLRC's decision "not to attempt to clarify the language used in Sections 6258 and 6259."¹³ The Committee believes that "Part 4. Enforcement of the Right to Inspect or Receive a Public Record" sufficiently describes a member of the public's right to enforce the CPRA. Typically, a CPRA enforcement action will be brought against a local agency for its failure to provide access to public records, either the right to inspect or copy, which may also include a legal challenge to the local agency's use of exemptions for nondisclosure of records as provided by the CPRA and case law.

Article 2 of the CPRA

The Committee continues to recommend that the CLRC not remove Article 2 from the CPRA, or move the provisions of law cited in Article 2 into the main text of the CPRA. We encourage the CLRC to defer decision on the precise treatment of Article 2 until later in this study.¹⁴

Conclusion

Thank you for the opportunity to comment on the CLRC revision project. The Committee looks forward to working closely with the CLRC in the future. Please do not hesitate to contact me with any questions and/or to discuss this matter further.

Very Truly Yours,

BERLINER COHEN



JOLIE HOUSTON

Chair, California Public Records Act Committee,
League of California Cities

Email: jolie.houston@berliner.com

(408) 286-5800

¹³ Draft Minutes p 7

¹⁴ Memorandum 2017-24 p. 9. The Draft Minutes acknowledge that the "decision on the best means of handling this material" is being deferred. Draft Minutes p. 7.

**EMAIL FROM RANDI JOHL,
CITY OF TEMECULA, CITY CLERK,
CALIFORNIA CITY CLERKS ASSOCIATION, LEGISLATIVE DIRECTOR**

(SEPTEMBER 6, 2017)

Hi Steve – I believe I may have responded earlier but just wanted to make sure. The members of the California City Clerks Association and the City Clerks Department of the League of California Cities is virtually identical, as are the Executive Board Members for each. As such we work very closely with the City Attorneys Department of the League. At this time, we are supportive of the comments and suggestions made by Ms. Houston on behalf of the CPRA City Attorneys group. Please add me to the email subscription as indicated below for this study and we will continue to monitor future correspondence and weigh in as needed. Thank you.