



Contra  
Costa  
County

To: Board of Supervisors

From: LEGISLATION COMMITTEE

Date: April 12, 2016

Subject: AB 1707 (Linder) Public Records Act Request Responses

**RECOMMENDATION(S):**

ADOPT an "Oppose" position on AB 1707 (Linder), as introduced: Public Records: Response to Request, a bill that would require a written response identifying type of record withheld as exempt and the specific exemption that justifies withholding that type of record, as recommended by the Legislation Committee. (No fiscal impact)

**FISCAL IMPACT:**

No immediate fiscal impact.

**BACKGROUND:**

At its March 14, 2016 meeting, the Legislation Committee considered the recommendation from the Clerk of the Board Jami Napier to recommend a position of "Oppose" to the Board of Supervisors on Assembly Bill (AB) 1707, which would require a response to a written request for public records be in writing regardless of whether the request was in writing. The bill would require that written response additionally to include a list that contains the title or other identification of each record requested but withheld due to an exemption and the specific exemption that applies to that record. Because local agencies would be required to comply with this new requirement, this bill would impose a state-mandated local program.

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY ADMINISTRATOR

☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **04/12/2016** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

**VOTE OF SUPERVISORS**

AYE: John Gioia, District I Supervisor  
Candace Andersen, District II Supervisor  
Mary N. Piepho, District III Supervisor  
Karen Mitchoff, District IV Supervisor  
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: April 12, 2016

David Twa, County Administrator and Clerk of the Board of Supervisors

By: Stacey M. Boyd, Deputy

Contact: L. DeLaney,  
925-335-1097

cc:

The Legislation Committee voted unanimously to recommend a position of Oppose to the full Board of Supervisors.

Attachment B is the letter from the California State Association of Counties (CSAC) to the author, opposing the bill.

The California Association of Clerks and Election Officials' (CACEO) Clerk of the Board Legislative Committee recently voted to OPPOSE AB 1707. The members were not concerned about adding the requirement that an agency respond in writing to even an oral CPRA request when a record or portion of a record is withheld, since the bill appears to reflect current practice in many or most member counties.

However, the members were very concerned that the bill would impose an unreasonable burden upon clerks and county counsels who would have to create a "privilege log" when responding in writing to a request in which records and portions of records are withheld. As one member of the Committee pointed out, the bill also would be precedent-setting in the CPRA in that it would require agencies to create a new record that does not currently exist. This view seems consistent with some county counsels' reading of the bill.

This legislation could also increase the difficulty in responding to record requests and could increase exposure to litigation (with potential for attorney fee awards). Even more important, there is a belief by some that it would not assist the public requesting records (except to aid in their litigation) or otherwise make privileged documents disclosable.

Status: 03/29/2016 From ASSEMBLY Committee on JUDICIARY: Do pass to Committee on LOCAL GOVERNMENT.

## BACKGROUND: (CONT'D)

### 2015 CA A 1707: Bill Analysis - 03/24/2016 - Assembly Judiciary Committee

#### SYNOPSIS

Under the California Public Records Act (PRA), all public records are open to public inspection unless a statutory exemption provides otherwise. When an agency withholds requested records from public inspection, existing law requires it to justify the withholding by "demonstrating" that the record withheld is exempt under an express provision of the PRA. According to the author, however, agencies often fail to adequately "demonstrate" why records are withheld. For example, according to a recent report in the Fresno Bee, a school district denied a request by simply stating that the records requested were exempt under "one or more of the following exemptions," and then proceeded to list five code sections from the Government Code. The author believes that in order to truly "demonstrate" that a record is subject to an exemption, as existing law requires, the agency must do more than just list applicable code sections; it must make some linkage between the records or types of records withheld and the specific exemption that applies to those records. Without this linkage, persons or entities making a PRA request will not know which exemptions applied to which requested records, or why. This bill, therefore, would require the agency's written response to identify at least the type or types of records withheld, and the specific exemption that applies to each type. The bill is supported by the ACLU, the California Newspaper Publishers Association, and the Electronic Frontier Foundation, among others. The bill is opposed by several individual cities and counties, the associations that represent them, and other public agencies. Opponents claim that this measure will impose significant costs and burdens on local agencies. However, several of the letters of opposition respond to the bill as introduced or to earlier proposed amendments. It is unclear to what extent the recent amendments address all of the opposition concerns, but they would seem to go a long way in that direction. The bill will move to the Assembly Committee on Local Government should it advance out of this Committee.

SUMMARY: Requires that a public agency's written denial of a request for public records to provide a more specific explanation when it withholds requested public records. Specifically, this bill:

- 1) Provides that when a public agency withholds a record requested pursuant to the Public Records Act, the written response demonstrating that the record in question is exempt under an express provision of the Public Records Act shall identify the type or types of record withheld and the specific exemption that justifies withholding that type of record.
- 2) Finds and declares that because people have the right of access to information concerning the conduct of the people's business, requiring local agencies to identify which statutory exemption applies to the type or types of record withheld furthers the purpose the California Public Records Act.

## EXISTING LAW:

- 1) Requires state and local agencies to make public records available for inspection, unless an exemption from disclosure applies. (Government Code Section 5250 et seq.)
- 2) Requires an agency to justify withholding any record that is responsive to a public records request by demonstrating that the record in question is exempt under express provisions of the Public Records Act or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. Specifies that a response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing. (Government Code Section 6255 (a)-(b).)

## FISCAL EFFECT: Unknown

COMMENTS: This bill seeks to strike a reasonable balance between the public's right to inspect public records against the ability of public agencies to withhold exempt documents without imposing unreasonable and costly burdens on those public agencies. Under the California Public Records Act (PRA), all public records are open to public inspection unless an express statutory exemption provides otherwise. When a public agency withholds requested records from public inspection, existing law requires the agency to justify its decision by "demonstrating" that the record is exempt under an express provision of the PRA.

The author and supporters of this bill, however, suggest that the public agencies too often fail to adequately "demonstrate" why records were withheld. For example, according to a recent report in the Fresno Bee, a school district denied the newspaper's PRA request by asserting that the records requested were exempt under "one or more of the following exemptions," and then listed five Government code sections and subdivisions. (Fresno Bee, March 5, 2016.) Supporters of this bill - including the California Newspaper Publishers Association (CNPA), whose members must often make public record requests - contend that this kind of response is all too common. The author believes that in order to truly "demonstrate" that a record is subject to an exemption, as existing law requires, the agency must do more than merely list applicable code sections; it must make some linkage between the records or types of records withheld and the specific exemption that applies to those records. Otherwise, the persons or entities making PRA requests will not know which exemptions apply to which requested records, or why. This leaves the requester with little or no information about how to refine a future request or, alternatively, decide whether to seek a writ of mandate, compelling the agency to provide the responsive records.

This bill, therefore, would flesh out the existing requirement that an agency must "justify" a withholding by "demonstrating" that the record in question is subject to an

express exemption. Under this bill, the agency would be required, in its written response, to identify the type or types of records withheld, and the specific exemption that applies to each type. Such an approach seems fully consistent with the implied intent of existing law, for it is difficult to imagine how an agency could "demonstrate" why a record was withheld if did not, at the very least, identify which exemptions applied to the types of records requested but withheld.

**Bills as Amended Does Not Require a "Log" or "List" of Responsive Documents:** The primary contention of the opponents of this bill is that it would require agencies to expend much more time, effort, and money responding to PRA requests and less time performing its essential public duties. To a certain extent, this criticism has been mitigated, at least in part and for some opponents, by recent amendments. As introduced, this bill would have required an agency to identify each record (and presumably each document) with a "title" and to list the corresponding exemption that applied next to that "title." This approach did indeed seem impractical in many ways. Not only would it have been needlessly time consuming - especially where an entire group or type of record was subject to the same exemption - the very "title" of the document could have revealed exempt information. To be sure, agency staff responding to a request could modify the "title" so as to redact or otherwise shield exempted information, but this would be very time consuming and of minimal public benefit. In addition, not all records or documents have obvious "titles," which would effectively require agency staff to create a title. Finally, and perhaps most significantly, the requirement that an agency list all document "titles" with corresponding exemptions would seem to require the agency to create the equivalent of the "privilege log" that is sometimes required in responses discovery requests. With one recently enacted exception, however, the provisions of the PRA do not require an agency to create records; the PRA only requires the agency to make existing records in its possession available for inspection and copying. In 2001, the California Supreme Court held that the existing language of the PRA does not require an agency to create any kind of "log" or "list" of responsive but exempt records. The Court suggested that the Legislature could amend the PRA to require such a list, but opined that as a policy matter such a requirement "would be burdensome and of scant public benefit." (*Haynie v. Superior Court* (2001) 26 Cal. 4th 1061, 1074-1075.)

In response to opposition concerns about the "title" and "list" requirement, concerns which mirrored the Court's dictum in *Haynie*, the author agreed to remove the "title" and "list" requirement. As recently amended, the bill simply requires that the agency, in its written response, to identify the records or types of records withheld and the specific exemption that applies to each type. That is, an agency could no longer list statutory exemptions and say that "one or more" of the listed exemptions applied to the records requested but withheld. Under this bill, an agency would need to state which exemptions applied to which records or types of records requested. This would not require an agency to create a "log" listing every record alongside a corresponding exemption. It would, however, require the agency to show which exemptions applied to which types of records withheld. For example: an agency could explain that certain types of contracts requested were subject to the trade secret exemption; or that the types of personnel records

requested were subject to the medical information exemption; or that the correspondence requested was subject to the pending litigation exemption, and so on. This kind of written response seems fully consistent with the intent of existing law, which already requires an agency to "demonstrate" why records in question were withheld, not merely list code sections that apply to the request as a whole. That the PRA already implicitly requires more than a form letter (i.e. a response that identifies the responsive documents at least by type) is also suggested by the requirement in current that the agency make reasonable efforts to assist the requester in refining his or her request in order to identify responsive and disclosable records. (Government Code Section 6253.1.) Without identifying the records and the exemptions that apply to those records, the agency would not have all of the information it would need to help the requester formulate a successful request for records. Clearly, the intent of the PRA is not only to make records available for public inspection, but to assist persons in finding relevant records and avoiding denials. It is difficult to imagine how a person could refine a request (with the assistance of the agency) if he or she did not know precisely why a prior request for specific documents was denied.

**Recent Amendments Appear to Strike Reasonable Balance:** As recently amended, this bill seeks an appropriate balance to a difficult practical problem. On the one hand, it seems unreasonably burdensome to require an agency to create a list identifying each responsive record that has been withheld with the specific exemption that applies placed next to the record. On the other hand, it seems equally unreasonable, and inconsistent with the purpose of the PRA, for an agency's written response to consist of a form letter that merely lists the statutory exemptions that may apply to the request as a whole, without making any effort to break down the request and explain which exemption applies to which types of responsive records.

Without question, the PRA imposes burdens on public agencies by requiring them to make all public records open to inspection, unless the record is subject to an express exemption. This not only requires agency staff to locate and retrieve responsive documents, it requires them to assess whether the records are subject to an exemption, which may not always be obvious. The PRA even requires the agency, within reason, to assist the requester in making a relevant and successful request. Moreover, in the provision amended by this bill, the PRA requires the agency to justify any withholding by "demonstrating" that the record withheld is subject to an express exemption. These duties impose burdens and costs, and the Legislature should be mindful of not adding to these burdens and costs unless doing so serves an important public benefit. Yet in enacting the PRA, the Legislature has already determined that access to public records is an essential feature of a democracy, even if it comes with some burdens and costs.

**ARGUMENTS IN SUPPORT:** According to the author, it is sometimes necessary and appropriate for a public agency to deny a public records request when the records in question contain information that is subject to a statutory exemption. However, the author also believes that, in the event of a denial, the agency should adequately explain why the

request was denied. Yet too often, the author contends, "denial notifications only contain a list of exemptions that may apply to the documents requested. The list does not include information detailing the types of documents being withheld, or the exemptions that apply. Under the current system, an applicant is unable to examine for him or herself whether the document should indeed be exempt."

ACLU supports this bill because it supports government transparency. As an organization that is "concerned with fair and responsive government," the ACLU "frequently utilizes the PRA to gather important information about public entities." ACLU claims that government agencies "frequently respond to a PRA request with a form letter listing various exemptions from disclosure for all requested documents without stating whether responsive documents exist, what they are, or which exemption allegedly applies." ACLU believes that "AB 1707 would give a requester the information necessary to determine whether an agency has records responsive to the request, and appropriately advise the requester whether a legitimate exemption authorizes withholding the records." Finally, ACLU adds that the clarification afforded by AB 1707 "is consistent with the design and purpose of the PRA, would avoid unjustified obstructions, and would eliminate costly and would eliminate costly litigation in an already overburdened court system."

The California Newspaper Publishers Association (CNPA) similarly stresses that, even though current law requires agencies to identify specific exemptions that justify withholding a specific record, the agencies often respond to a PRA request with a form letter that lists various exemptions that the agency "believes applies to the entire cache of requested records without identifying which exemption applies to which record." CNPA claims that such a response "subverts the purpose of the act - to give the people meaningful access to public records - and forces the requester to go to court to learn why certain records were denied and which exemption applies." In this respect, CNPA, like many of the other supporters, suggests that in the long run this bill may lessen the burden on agencies, requesters, and courts by allowing requesters to get necessary information without going to court to challenge a denial.

The Electronic Frontier Foundation (EFF) supports this bill for substantially the same reasons as those noted above; it additionally observes that AB 1707 will move the state closer to what is required under the federal Freedom of Information Act (FOIA), after which the CPRA is modeled. Under federal law, according to EFF, "it has become general practice to cite specific exemptions for each redaction made in a public record." EFF counters the arguments made by government agencies about the added costs and burdens by suggesting that "the bill may conserve recourses as well. If a member of the public chooses to challenge a CPRA request denial in court, this bill would allow the requester to narrow the challenge to specific documents, thus limiting the scope of litigation for both the government and the requester."

ARGUMENTS IN OPPOSITION: Several individual cities in California, as well as the

League of California cities, oppose this bill because, they contend, it will pose "significant operational challenges, increased costs and a potential for increased litigation for cities already struggling to comply with the California Public Records Act (CPRA)." As noted above in the analysis, most of the letters received by the Committee appear to be in response to the bill as introduced or to a set of earlier proposed amendments that are significantly different than the most recent amendments. Nonetheless, whatever form additional requirements may take, the cities remind us that any additional requirements will impose burdens and costs on already limited resources. Many of the letters submitted by the cities point out that they "already struggle to comply with the 10-day response period associated with the CPRA." Moreover, cities contend that in recent years the volume of requests have increased, so much so that "many cities large and small have already had to hire additional staff dedicated solely to review documents in association with CPRA requests." Other objections by the cities that submitted letters of opposition address the provision, no longer in the bill, that would have required the agency to supply a "log" or "list" of responsive titles as part of the denial response. The bill is also opposed by counties, county associations, and miscellaneous local, regional, and state entities for substantially the same reasons as those put forth by the cities.

#### REGISTERED SUPPORT / OPPOSITION:

##### **Support**

ACLU  
California Newspaper Publishers Association  
Electronic Frontier Foundation  
Firearms Policy Coalition  
San Diegans for Open Government  
Socrata  
Sierra Club

##### **Opposition**

Association of California Water Agencies  
California Association of Clerks and Election Officials  
California Association of Counties  
City Clerks Association of California  
City of Burbank  
City of Belvedere  
City of Chico  
City of Chino  
City of Chino Hills  
City of Coachella  
City of Colton  
City of Corona  
City of Costa Mesa

City of Cypress  
City of Danville  
City of Desert Hot Springs  
City of Downey  
City of Dublin  
City of Eastvale  
City of Glendora  
City of Indian Wells  
City of Laguna Hills  
City of Lakeport  
City of Lakewood  
City of La Quinta  
City of Los Alamitos  
City of Los Altos  
City of Martinez  
City of Menifee  
City of Murrieta  
City of Napa  
City of Newark  
City of Newport Beach  
City of Norco  
City of Norwalk  
City of Ontario  
City of Pinole  
City of Poway  
City of Rancho Cucamonga  
City of Riverbank  
City of Rocklin  
City of Roseville  
City of Salinas  
City of San Dimas  
City of San Marino  
City of Santa Maria  
City of Santa Monica  
City of South Lake Tahoe  
City of Temecula  
City of Torrance  
City of Union City  
League of California Cities  
Sacramento Municipal Utility District (SMUD)  
San Joaquin Board of Supervisors  
One Individual

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334

CONSEQUENCE OF NEGATIVE ACTION:

Contra Costa County would not have a position on the bill.

ATTACHMENTS

Attachment A: AB 1707 bill text

Attachment B: CSAC Oppose