

By Jonathan H. Anshell

Obtaining Government Records under the Public Records Act

The aim of the law is broad disclosure, but it contains limitations and a catch-all provision

A motorist is stopped and handcuffed by the police. The motorist is then released and no charges are filed. Should the motorist be allowed to review police records regarding the detention? A parent whose children are attending a day care center wants to know whether the employees of the day care center have criminal histories. Should the parent be allowed to review the government records on the employees who are licensed by the state to work at the center? When a taxpayer-funded university sells high-priced luxury boxes at its stadium, does the public have a right to know who purchased them and how much they paid?

In 2001, California courts considered each of these questions regarding access by the public to government records. The resulting decisions reflect the tension between the public's hunger

for information and the government's frequent claim of confidentiality. When asked to resolve this tension, the courts have ordered disclosure under circumstances in which a perceived public safety benefit or an issue of governmental accountability favored it. If disclosure was perceived as threatening public safety, disclosure was denied.

Public access to government records in California is governed by the California Public Records Act, which is codified at Government Code Sections 6250 through 6270. The PRA was modeled on a federal law, the Freedom of Information Act.¹ In light of the PRA's roots in FOIA, "federal legislative history and judicial construction of the FOIA may be used in construing [the PRA]."²

Section 6250 of the Government Code articulates a policy of broad disclosure underlying the PRA and provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."³ To implement that right, Section 6253 provides that "every person has a right to inspect any public record," subject only to the express limitations contained elsewhere in the PRA.⁴ In prac-

tice, this provision is frequently invoked by news organizations, which have the same standing as individual citizens to seek government records.⁵

The PRA identifies specific exemptions from disclosure,⁶ which one court described as "islands of privacy upon the broad seas of enforced disclosure."⁷ Those protected categories include, among others, records regarding litigation to which a public agency is a party,⁸ personnel or medical records on agency employees,⁹ records concerning law enforcement investigations,¹⁰ and records that are protected from disclosure pursuant to other provisions of federal or state law, such as evidentiary privileges.¹¹ Under general interpretive principles of the PRA, these exemptions are to be narrowly construed, with the burden placed on the government to demonstrate that a requested record falls within a protected category.¹²

In addition to the express exemptions from disclosure, the PRA contains a "catch-all" exemption that permits a public agency to withhold its records from inspection when "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."¹³ Like the express exemptions of Section 6254, the courts have narrowly construed the catch-all exemption, placing the burden on the government agency opposing a PRA request "to justify the need for non-disclosure."¹⁴

The courts have applied the catch-all exemption to deny disclosure if production of the

records could compromise the safety of police officers, government officials, or ordinary citizens. Examples of information that was held to be protected from disclosure include the identities of confidential law enforcement informants,¹⁵ the governor's daily appointment schedule,¹⁶ the California Highway Patrol's internal manuals regarding the safety and security of officers,¹⁷ and home address and telephone information of complainants regarding airport noise.¹⁸

To request public records under the PRA, an interested party may write an informal letter to the agency holding the records in question. If that request is denied, the requesting party may seek a court order for disclosure of the records by filing a verified petition for declaratory or injunctive relief.¹⁹

A prevailing plaintiff is entitled to an award of reasonable costs and attorney's fees against the opposing public agency—and the agency, in turn, is entitled to an award of its reasonable costs and attorney's fees if the plaintiff's case is found to be "clearly frivolous."²⁰ Superior court decisions on petitions for public records are reviewable by petition for writ of mandate to the court of appeal under a de novo standard of review.²¹

Law Enforcement

The PRA's disclosure exemptions apply to a wide range of police records. Indeed, in 2001 the California Supreme Court in *Haynie v. Superior Court*²² reaffirmed the sphere of confidentiality for law enforcement. The *Haynie* case has its roots in an

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incident that took place in July 1999, when a Los Angeles County sheriff's deputy stopped a van moments after a citizen reported seeing three Asian teenagers carrying pistols and getting into a similar vehicle. Elgin Haynie, the 42-year-old African-American driver of the van stopped by the sheriff's deputy, was handcuffed, questioned along with his three passengers, and then released. No charges were filed against Haynie or any of his companions. Haynie filed a tort claim with Los Angeles County and submitted a complaint to the Los Angeles County Sheriff's Department alleging that he was injured while being questioned and required hospitalization for several days after his roadside detention.²³

Haynie later submitted a public records request to the sheriff's department seeking all documents related to his detention, including officers' notes, witness statements, and other material containing information regarding the decision to detain Haynie. After the sheriff's department refused to produce these records, Haynie filed a verified petition to compel their disclosure.²⁴

The Los Angeles Superior Court denied Haynie's petition, finding the records in question to be protected under the PRA's exemption for records of law enforcement investigations.²⁵ On appeal, Haynie argued that his detention was not an "investigation" within the meaning of Government Code Section 6254(f), because there was no real or concrete prospect of law enforcement proceedings against him at the time he was detained. The court of appeal agreed and issued a writ of mandate directing the superior court to vacate its denial of Haynie's petition.²⁶

The California Supreme Court reversed the court of appeal's decision,²⁷ holding that Section 6254(f)'s protection for records of law enforcement investigations extends beyond situations "where the likelihood of enforcement has ripened into something concrete and definite" and includes "everyday" and "routine" police activity.²⁸ Handed down just three weeks after the September 11 attacks amid highly charged public sentiments regarding security and law enforcement, the *Haynie* opinion described a series of dangers that could arise from a limited view of the PRA's exemption for records of law enforcement investigations:

Limiting the section 6254(f) exemption... would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it....

Complainants and other witnesses whose identities were disclosed might disappear or refuse to cooperate. Suspects, who would be alerted to the investigation, might flee or threaten

witnesses. Citizens would be reluctant to report suspicious activity. Evidence might be destroyed.²⁹

Alluding to another moment in history in which routine police activity took on national significance, the *Haynie* court observed that "[o]ne 'third rate burglary,' for example, ultimately toppled a president."³⁰ This reference to the Watergate scandal is not without irony. President Richard Nixon was "toppled" not by police work alone but by a *Washington Post* investigation that ultimately linked the Watergate burglary to the Nixon administration—the sort of investigative reporting that could be curtailed by *Haynie's* broad grant of confidentiality to police records.

While expanding the application of Section 6254(f) to include virtually all records of police activity, the *Haynie* court stopped short of abrogating the longstanding rule, articulated in *Uribe v. Howie*, that a public agency may not "shield a record from public disclosure regardless of its nature, simply by placing it in a file labelled 'investigatory.'"³¹

Uribe arose from a PRA request for reports filed by farmers regarding their use of pesticides. The county agricultural commissioner from whom the records were requested resisted disclosure, arguing that the reports were compiled for law enforcement purposes. Rejecting this argument, the *Uribe* court held that the reference in Section 6254(f) to "investigatory or security files" applies only "when the prospect of enforcement proceedings is concrete and definite. It is not enough that an agency may label its file 'investigatory' and suggest that enforcement proceedings may be initiated at some unspecified future date or were previously considered."³²

Rather than revisit the issue the *Uribe* court considered, the supreme court in *Haynie* distinguished *Uribe* by pointing to the fact that *Uribe* interpreted Section 6254(f)'s reference to "investigatory or security files," not its reference to "[r]ecords of investigations."³³ So while recognizing that Section 6254(f) does not protect all files remotely connected to law enforcement from disclosure under the PRA, the *Haynie* court cast a broad cloak of protection over documents generated by a law enforcement agency, such as police officers' notes and reports regarding a traffic stop and detention. Still intact are the access rights granted by the court in *Uribe*, including third-party documents or public submissions that are not linked to a concrete and definite prospect of law enforcement proceedings.

Competing Interests

Although the disclosure policies and requirements set forth in the PRA grant no favor to public interests over private inter-

ests, application of the PRA reveals that disclosure is more likely to be compelled when the interest at stake is public and has an impact on an identifiable group. This practice is exemplified when an agency withholds information about an individual from a group representing a public interest.

In 2001, the court of appeal underscored this trend in a case involving government records of day care workers. Thousands of parents entrust their children to licensed day care facilities in California. As a result of a PRA request submitted in the fall of 2000, KCBS-TV in Los Angeles discovered that the California Department of Social Services (DSS) had licensed at least 8,700 convicted criminals to work in day care centers during a five-year period. Until the decision of the court of appeal in *CBS Broadcasting Inc. v. Superior Court*,³⁴ the DSS refused to disclose the identities of those workers with criminal backgrounds. In contrast to the supreme court's emphasis in *Haynie* on public safety to support denial of a PRA request, *CBS Broadcasting* illustrates that public safety concerns may, in appropriate cases, override a state agency's claim of confidentiality.

CBS Broadcasting arose from a news investigation by KCBS-TV into the safety of California's licensed child care facilities. As part of that investigation, CBS requested that the DSS provide a list of convicted criminals who were allowed to work in licensed day care centers between 1995 and 2000, as well as a list of the facilities that employed them.

The DSS refused to disclose the names and day care center locations CBS requested, claiming that disclosure could lead the public to "mistakenly assume the worst about [a] child care provider" who "only has a conviction for a minor crime that happened years ago."³⁵ Instead, the DSS offered a description of the procedure it followed in evaluating the requests of convicted criminals for permission to work in child care facilities, as well as a summary of statistics regarding that evaluation process. Notably, the DSS conceded that it had granted permission to no fewer than 8,700 convicted criminals between 1995 and 2000 alone.³⁶

The superior court denied CBS's petition to compel disclosure of the requested information, citing concerns that news coverage might not include information that would ensure balanced reporting. Specifically, the court expressed the fear that the coverage may omit "the rehabilitative efforts that [an] individual had made" before applying for permission to work in a child care center despite a prior criminal conviction.³⁷

The court of appeal reversed and directed the superior court to order disclosure of the lists CBS requested.³⁸ The court ruled that the

lists were not “personnel, medical or similar files” protected from disclosure under Section 6254(c). The court also noted that information about a criminal conviction, and the identities of persons licensed to work in child care facilities, are matters of public record.³⁹

In addition, the court ruled that the lists CBS requested did not constitute confidential information about criminal history that is protected from disclosure under the Penal Code⁴⁰ and the PRA.⁴¹ Reiterating its observation that criminal convictions are matters of public record, the court distinguished the lists CBS sought from “privileged information, such as the date of birth of [an] individual, and his or her physical description.”⁴²

Finally, the court rejected the contention by the DSS that the catch-all exemption⁴³ justified withholding the information. The court explained that, to the extent an individual has any privacy interest in his or her criminal history, “he or she has subjected himself or herself to public review by virtue of applying for a license to work at, operate, or own a child care facility.” Although the fear that the requesting party might misuse the information being sought is not a recognized ground for denial of a PRA request, the DSS raised this specter to justify its position. In response, the court reiterated the rule that the purpose of a party requesting information under the PRA cannot be considered by a court evaluating the request.⁴⁴

The Fifth Appellate District reached a similar conclusion in *California State University v. Superior Court*.⁴⁵ That case emerged from a request by the *Fresno Bee* newspaper for records regarding the sale of luxury boxes at the Save Mart Center, a sports arena to be constructed at California State University at Fresno. The university denied the *Bee*’s request, claiming that “[d]onors expect that the University will keep their donations private,” and that disclosure of luxury box donors could cause the university to “lose the benefit of many donations.”⁴⁶ The superior court granted the *Bee*’s petition to compel disclosure of the information about the Save Mart Center luxury boxes.

The court of appeal affirmed, holding that the catch-all exemption did not justify nondisclosure. First, the court emphasized the public interest in the information the *Bee* requested:

[D]isclosure allows the public to discern whether its resources have been spent for the benefit of the community or only a limited few. The public also should be able to determine whether any favoritism or advantage has been afforded certain individuals or entities...and whether any discriminatory treatment exists.⁴⁷

The court then contrasted the public interest in disclosure with the university’s claim that disclosure would violate its donors’ privacy. Noting that “[t]he purchase of luxury suites is more akin to a commercial transaction” than to unconditional charitable donations, the court concluded that “the individuals who purchased luxury suites in the Save Mart Center, a public facility, entered into the public sphere. By doing so, they voluntarily diminished their own privacy interests.”⁴⁸

Guidance for Practitioners

PRA requests and petitions may be required in many areas of legal practice, from civil litigation to labor and employment disputes to real estate matters. *CBS Broadcasting* and *California State University* both offer encouragement for counsel seeking information about decision making by the government and interactions between the government and the private sector. At the same time, the supreme court’s decision in *Haynie* sounds a distinctly more cautionary note to counsel seeking government records containing information that at least arguably pertains to law enforcement investigations.

Taken together, these PRA decisions offer lessons to the practitioner who is called upon to obtain government records. To withstand a government assertion that the information requested falls within the PRA’s exemptions, particularly in the law enforcement arena, a request for records should anticipate the most likely objections and, if feasible, refrain from seeking information that the PRA expressly delineates as confidential. CBS successfully employed this strategy in *CBS Broadcasting* by confining its request to the names and employers of convicted criminals working in licensed day care centers without requesting details of specific criminal histories or preconviction information found in rap sheets.

Similarly, a PRA request should anticipate resistance on the basis of the catch-all exemption and be framed to defeat the assertion that the public interest served by nondisclosure outweighs any public interest in disclosure. Although a PRA request is not required to state the purpose or interest it serves, counsel should set forth in any request the broadest and most compelling interest that could be served by disclosure of the records in question. The requesting party should employ the same approach that the *Fresno Bee* successfully employed in *California State University*, which involved underscoring the degree to which businesses or persons whose names are contained in public records have voluntarily entered the public sphere and assumed the risk that their identities, and the nature of their dealings with the govern-

ment, could be disclosed under the PRA. ■

¹ Freedom of Information Act, 5 U.S.C. §§552 *et seq.*
² *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1016 (1999) (quoting *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1338 (1991)).
³ GOV’T CODE §6250.
⁴ GOV’T CODE §6253(a). Section 6252 defines “state agency” to include every organ of state government except the legislature and judiciary, and defines “public records” as including “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state agency regardless of physical form or characteristics.”
⁵ *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 774 (1983).
⁶ GOV’T CODE §6254.
⁷ *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 653 (1974).
⁸ GOV’T CODE §6254(b).
⁹ GOV’T CODE §6254(c).
¹⁰ GOV’T CODE §6254(f).
¹¹ GOV’T CODE §6254(k).
¹² *Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1420 (1998) (“The general policy reflected in the [PRA] can only be accomplished by narrow construction of the statutory exemptions.”).
¹³ GOV’T CODE §6255.
¹⁴ *New York Times v. Superior Court*, 218 Cal. App. 3d 1579, 1585 (1990).
¹⁵ *American Civil Liberties Union v. Deukmejian*, 32 Cal. 3d 440, 444 (1982).
¹⁶ *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1345-46 (1991).
¹⁷ *Northern Cal. Police Practices Project v. Craig*, 90 Cal. App. 3d 116, 118-19 (1979).
¹⁸ *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1014 (1999).
¹⁹ GOV’T CODE §§6258, 6259.
²⁰ GOV’T CODE §6259(d).
²¹ GOV’T CODE §6259; *CBS Inc. v. Block*, 42 Cal. 3d 646, 651 (1986); *Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1420 (1998).
²² *Haynie v. Superior Court*, 26 Cal. 4th 1061 (2001).
²³ *Id.*
²⁴ *Id.* at 1066.
²⁵ GOV’T CODE §6254(f).
²⁶ *Haynie*, 26 Cal. 4th at 1064.
²⁷ *Id.* at 1070-71.
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.* at 1070.
³¹ *Uribe v. Howie*, 19 Cal. App. 3d 194, 213 (1971).
³² *Id.* at 212-13.
³³ *Haynie*, 26 Cal. 4th at 1069.
³⁴ *CBS Broad. Inc. v. Superior Court*, 91 Cal. App. 4th 892 (2001).
³⁵ *Id.* at 896.
³⁶ *Id.*
³⁷ *Id.* at 904.
³⁸ *Id.* at 909 (citing *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1018 (1999)).
³⁹ *Id.* at 907.
⁴⁰ PENAL CODE §11142.
⁴¹ GOV’T CODE §6254(k).
⁴² *CBS*, 91 Cal. App. 4th at 907-08.
⁴³ GOV’T CODE §6255.
⁴⁴ *CBS*, 91 Cal. App. 4th at 909 (citing *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1018 (1999)).
⁴⁵ *California State Univ. v. Superior Court*, 90 Cal. App. 4th 810 (2001).
⁴⁶ *Id.* at 819.
⁴⁷ *Id.* at 833.
⁴⁸ *Id.*