

BILL ANALYSIS

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Department, Board, Or Commission	Author	Bill Number
Franchise Tax Board	Leno	AB 1393

SUBJECT

Public Record Disclosure/State Agency Internet Web Sites/Public Records Center/Authorize Persons To Request To Inspect Or Receive Public Records

SUMMARY

This bill would require a state agency to include specific information on its web site about requesting copies of public records.

PURPOSE OF BILL

According to the author's staff, the purpose of this bill is to ensure the public has access to the public records to which they are entitled.

EFFECTIVE/OPERATIVE DATE

This bill would be effective January 1, 2008, with the provisions related to the online access to public records requests operative on or after January 1, 2009.

ANALYSIS

FEDERAL/STATE LAW

The Freedom of Information Act (FOIA) generally provides that any person has the right to request access to federal agency records or information. All agencies of the Executive Branch of the United States (U.S.) Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by law. Federal agencies are given 20 days to determine whether the agency is able to comply with the information request and notify the requestor of their determination. FOIA directs each federal agency to provide an electronic access mechanism for disseminating records to the public and requires the federal government to publish a list of its systems of records. The U.S. Department of Justice's Office of Information and Privacy is the principal contact point within the executive branch for advice and policy guidance on matters pertaining to the administration of FOIA. The U.S. Department of Justice's Internet site maintains a list of principal FOIA contacts for each federal agency. The list contains the name of the principal contact, address, phone, and, in some instances, the e-mail address. Each federal agency is responsible for meeting its FOIA responsibilities for its own records.

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Under the California Public Records Act (PRA), every person is allowed to inspect and obtain copies of public records that are not exempt from disclosure. If a portion of the record is confidential, the person generally may obtain the remainder of the record after that portion has been redacted.

Currently, the PRA requires that all state and local agencies make public records available for public inspection during office hours, unless exempted by law. The act further requires that if a state agency withholds any public record, it must demonstrate that: (1) the record was exempt from disclosure, or (2) the public interest for nondisclosure outweighed the public interest for disclosure.

Within ten days after receiving a request for a record, each agency must determine whether the request seeks public records that are in the agency's possession and can be disclosed. In unusual circumstances, the ten-day time limit may be extended. The agency then must provide the requester with a written notice explaining the reasons for the extension and the date on which a determination can be expected to be provided. Upon request of an identifiable record, the agency is required to make the record available promptly to the requester once the duplicating or statutory fee is paid.

In addition, Executive Order S-03-06 signed by Governor Schwarzenegger on March 29, 2006, requires state agencies to establish or review their written guidelines for accessibility of records, identify and designate members of their staff who are primarily responsible for receiving and responding to PRA requests, and submit a written certification to the Legal Affairs Secretary that the designated staff members have been trained on the responsibilities and requirements of the PRA.

THIS BILL

This bill would require every state agency that maintains an Internet site to include on the homepage, prominently displayed so it is easily visible without scrolling when viewing the homepage, the words "Public Information Center." Those words would be followed by or would link to another page showing all of the following:

- Under the words "Whom to Contact," the title, mailing address, telephone number, and e-mail address of the public information officer or other person(s) to whom requests for inspection or copying of records or informal requests for simple factual information should be directed.
- Under the words "How to Request Records," the written procedures in the form of regulations for accessing public records at the agency and a form in HTML language or comparable alternative technology, for submitting online requests consisting of all the following labeled fields:
 - Today's date.
 - My name (optional).

- My contact information including at least one of the following:
 - 1) My e-mail address
 - 2) My postal address
 - 3) My telephone number
- I am interested in the following records or information.
- Where can I inspect these records?
- Send me copies of the records.
- Send me a fee estimate before copying.

The submitted form would be designed to send a copy of the request immediately and automatically to the e-mail address listed on the form, if the email address was provided by the submitter. These requirements are operative as of January 1, 2009.

This bill would provide for the establishment of an advisory task force that would be convened by the Department of Justice to consider and make recommendations for a statutory standard governing the postings of requests and denials and public documents that are subject to disclosure. The bill prescribes the membership of the task force and also prescribes the issues the task force is to consider. The bill would require the task force to report its findings and recommendations to the Governor and the Legislature by no later than January 1, 2009, at which time the task force would cease to exist.

IMPLEMENTATION CONSIDERATIONS

The bill would require that when a desktop monitor is used the Public Record Center link must be prominently displayed and viewable on the home page of the web site without scrolling. Because of the variances in users' screen resolutions, FTB cannot ensure that a taxpayer can view the link without scrolling and is unable to implement the provisions of this bill.

LEGISLATIVE HISTORY

AB 2927 (Leno, 2005/2006) would have implemented similar provisions relating to the accessibility of public records, including referrals to the Attorney General (AG) for review of a denied request and court awards for an agency acting in bad faith. This bill was vetoed by Governor Schwarzenegger. In the veto message, Governor Schwarzenegger stated, "In addition, the provision allowing the Attorney General to review denials of public records requests is unduly burdensome. The Attorney General is the attorney for most State agencies and advises agencies on responding to such requests and thus this bill creates an inherent conflict of interest." The complete veto message is attached in Appendix A.

AB 1014 (Papan, Stats. 2001, Ch. 355) requires a state or local agency to estimate the date and time when a public record that can be disclosed would be made available. This law also requires a state or local agency to identify, describe, and assist the requester with reasonable options to obtain records responsive to their request or inquiry.

AB 2799 (Shelley, Stats. 2000, Ch. 982) requires a denial of requests for public records to be in writing.

SB 48 (Sher, 1999/2000) and SB 2027 (Sher, 1999/2000) would have amended the California Public Records Act to require that state agencies justify the withholding of any record by demonstrating in writing that a record is exempt from disclosure or the public interest is served by not making the record public. These bills would have established a procedure to allow any person to appeal to the AG if a state or local agency denies access to a public record or subverts the intent of the bill by actions short of denial of inspection. SB 48 was vetoed by Governor Davis. The veto message states, "SB 48 creates an Attorney General appeal process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments. Consequently, this bill could result in uneven legal representation and increased use of costly outside counsel by the agency or department. Finally, the costs to comply with this bill would be borne by the General Fund and would likely be significant. The bill sets up a bureaucratic reporting mechanism, involving the preparation, posting and mailing of AG opinions on the merits of a state agency's decision to withhold requested information. The costs to comply with this bill would be borne by the General Fund and would likely be significant." The complete veto message for both bills is attached in Appendix A.

AB 179 (Bowen, 1997/1998) would have required any agency that has public information to provide the information in an electronic format upon request and that direct costs of duplication include the costs related to duplicating the electronic record. This bill was vetoed by Governor Wilson.

The veto message states, "A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it 'unreasonable.' Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done." The complete veto message is attached in Appendix A.

FISCAL IMPACT

The department anticipates a first-year cost of approximately \$302,000 for the following: to create the online form; to conduct usability programming; to test and maintain the web page; and to obtain equipment to store, secure, and verify e-mail addresses. In addition, the department anticipates on-going annual costs of \$283,000 for additional staff to handle anticipated increases in PRA requests in the Disclosure Section and one new Personnel Year in the Legal Department to provide legal assistance and guidance to Disclosure staff. It was recommended that the bill be amended to include appropriation language that would provide funding to implement this bill. Lack of an appropriation will require the department to secure the funding through the normal budgetary process, which would delay implementation of this bill.

ECONOMIC IMPACT

This bill would not impact state income tax revenues

VOTES

Assembly Floor – Ayes: 75, Noes: 3
Senate Floor – Ayes: 40, Noes: 0

LEGISLATIVE STAFF CONTACT

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Appendix A
Prior Legislation Veto Messages

BILL NUMBER: AB 2927

VETOED DATE: 09/30/2006

To the Members of the California State Assembly:

I am returning Assembly Bill 2927 without my signature. An open and accessible government is critical to instill confidence in the governed. Indeed the people recently voted overwhelmingly to amend California's Constitution to make access to public records a fundamental right. That is why I issued Executive Order S-03-06 which directs all state departments to post PRA request guidelines in a conspicuous public place at all office locations and to identify and designate staff to handle the requests and ensure appropriate training in PRA compliance for designated staff members. As a result of the order, all executive branch agencies have reviewed their public records procedures.

They have been revamped to improve performance and compliance and extensive training has been provided to state agency staff. These efforts address the problem this bill is attempting to fix. In addition the provision allowing the Attorney General to review denials of public records requests is unduly burdensome. The Attorney General is the attorney for most State agencies and advises agencies on responding to such requests and thus this bill creates an inherent conflict of interest. I will continue to require the highest standards of compliance with the Public Records Act throughout the executive branch.

Sincerely,

Arnold Schwarzenegger

BILL NUMBER: SB 48

VETOED DATE: 10/09/1999

To Members of the California State Senate:

I am returning Senate Bill No. 48 without my signature.

This bill would authorize the Attorney General to issue an opinion on the validity of a State or local agency's denial of a request for information under the California Public Records Act.

I am signing Assembly Bill No. 427 which clarifies that no state agency, commissioner, or officer, shall employ legal counsel other than the Attorney General, or one of his assistants or deputies, in any matter in which they are interested, or a party to, as a result of office or official duties.

Therefore, under SB 48, should the Attorney General issue an opinion adverse to a state agency or department which ultimately leads to litigation, the Attorney General may not be able to represent an agency that it has already opined against.

SB 48 creates an Attorney General appeals process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments. Consequently, this bill could result in uneven legal representation and increased use of costly outside counsel by the agency or department.

Finally, the costs to comply with this bill would be borne by the General Fund and would likely be significant. Therefore, I am vetoing this bill.

Sincerely,

GRAY DAVIS

BILL NUMBER: SB 2027

VETOED DATE: 09/29/2000

To Members of the California State Senate:

I am returning Senate Bill No. 2027 without my signature.

The bill would create a procedure for a person to request the Attorney General (AG) to review a denial by a public agency of a written request for disclosure of information under the Public Records Act, and would set up the time limits for the AG to complete the review. The bill would establish penalties of up to \$100 per day if a public agency declines to comply with a request for disclosure of information and the court determines that the agency acted in bad faith. The AG would be required to mail a copy of the opinion to the requester and to the denying agency, maintain copies for public inspection, publish the opinions annually in a special volume of AG Opinions, and made the opinions available on the Internet.

While proponents of this bill contend that a weakness of the Public Records Act is the lack of recourse when state agencies refuse to comply, this bill does not address that issue. Instead the bill sets up a bureaucratic reporting mechanism, involving the preparation, posting and mailing of AG opinions on the merits of a state agency's decision to withhold requested information. The costs to comply with this bill would be borne by the General Fund and would likely be significant. Therefore, I am vetoing this bill.

I do, however, believe that state agencies should be fully responsive to legitimate public record requests. Accordingly, I am directing my Secretary of State and Consumer Affairs, Aileen Adams to conduct a review of all state agencies' performance in responding to PRA requests and to make recommendations on appropriate procedures to ensure a timely response.

Sincerely,

GRAY DAVIS

BILL NUMBER: AB 179

VETOED DATE: 10/12/1997

To the Members of the California Assembly:

I am returning Assembly Bill No. 179 without my signature.

This bill would amend the California Public Records Act to require state agencies to provide "a copy of an electronic record in the form requested, unless, in light of surrounding circumstances, it is not reasonable to do so...." It does not change the public's right of access to government documents, but only restricts the agency's discretion as to the form of the document made available.

Government agencies receive hundreds of Public Records Act requests every month. They are most often not from ordinary citizens, but from political candidates or special interest groups searching for information. Government employees spend thousands of hours each year responding to the requests-segregating the requested documents from exempt documents, such as those which invade other citizens' personal privacy. Taxpayers pay for the time expended searching for and segregating these records. However, state agencies are presently permitted to determine the form in which computer data is provided.

This bill creates a new inflexible mandate by requiring the agency to provide the electronic data in the form requested, unless it is "unreasonable" to do so, without ever defining the breadth of that exemption, thereby leaving it open to litigation. A request that an electronic record be provided in a particular form may require additional expense, burden, and time to segregate the public data from the exempt data, but the bill provides no guidance whether or to what extent that additional burden makes it "unreasonable."

Agencies should make available to the public all documents to which public access is granted. But we need not add costs and rigidity to these obligations by specifying the form in which it will be done.

Cordially,

PETE WILSON