



Analysis of Amended Bill

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Sponsor:

Bill Number: AB 289

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Amended: March 21, 2019,
and April 24, 2019

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Related Bills: See Legislative
History

Subject: California Public Records Act/ Ombudsperson

Summary

This bill would, under the Government Code, establish the California Public Records Act Ombudsperson, as specified.

This analysis only addresses the provisions of the bill that impact the department's programs and operations.

Recommendation – No position.

Summary of Amendments

The March 21, 2019, amendments replaced intent language with the provisions discussed in this analysis.

The April 24, 2019, amendments added a coauthor, added definitions, replaced the term “ombudsman” with “ombudsperson,” and made other clarifying changes.

This is the department’s first analysis of this bill.

Reason for the Bill

The reason for this bill is to bring more transparency, fairness, and accountability to the California Public Records Act (CPRA) by establishing an ombudsperson who can conduct an independent review as to whether a state agency properly denied a records request in compliance with the CPRA.

Effective/Operative Date

This bill would be effective on January 1, 2020, and operative as of that date.

Program Background

Information received, generated, and maintained by the Franchise Tax Board (FTB) is generally considered confidential unless specifically provided otherwise by statute. The FTB has stringent departmental policies and procedures regarding privacy and disclosure. All employees receive training annually about ensuring the confidentiality of taxpayer information and are given updated procedures on a regular basis. Any violation of these policies and procedures is subject to disciplinary action, punishable by law, or both.

The CPRA provides access to public information the FTB maintains unless the records are exempt from disclosure by law. This may include written or electronic information.

The FTB is exempt from disclosing certain types of information, such as:

- Personnel, medical, or similar files for FTB employees.
- Test questions and scoring keys for employment exams.
- Preliminary drafts of documents not retained by the department.
- Records pertaining to pending litigation.
- Confidential tax return information.

State Law

Current state tax law provides that information collected on income tax returns is considered confidential and, unless specifically available for other uses, must be used only to administer the income tax laws. The FTB may disclose taxpayer information only in limited circumstances and only to specific agencies as authorized by law. Improper disclosure of federal tax information is punishable as a felony, and improper disclosure of state tax information is punishable as a misdemeanor.

Current state law, under the CPRA,¹ generally requires that state and local agencies make available for inspection “public records,” unless otherwise exempted. State law specifically exempts income tax return information that would be prohibited from disclosure under the Revenue and Taxation Code (R&TC) from disclosure under the CPRA.²

¹ Government Code (GC) section 6251.

² R&TC section 19542.

Pursuant to the rules of the CPRA, public agencies generally must provide copies of disclosable public records within 10 days. The requestor generally must reimburse the state for the cost of duplication of paper or electronic copies.

The CPRA provides that any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce the right to inspect or to receive a copy of any public record or class of public records.

If the superior court determines that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why the record is not disclosable. If the court finds that the public official's decision to refuse disclosure is unjustified under the CPRA³, the judge shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, the judge shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

The CPRA defines the following terms, among others: "member of the public," "person," "public agency," "public record," "state agency," "unusual circumstances," and "writing."

This Bill

This bill would, under the GC, establish within the California State Auditor's Office, a CPRA Ombudsperson (ombudsperson), appointed by the California State Auditor. The ombudsperson, upon request for review, would determine whether the denials of original requests complied with the CPRA, and issue written opinions of determination.

The ombudsperson would be required to do the following:

- Create a process that allows members of the public to submit a request for review if the member believes that a state agency improperly denied an original request.
- Determine, within 30 days from receipt of a request for review, whether the original request, in whole or in part, sought copies of disclosable public records that were in the possession of the state agency and whether the agency's denial of the request complied with the CPRA. In unusual circumstances, the 30-day time limit may be extended by written notice to the member of the public who submitted the request for review and the state agency, setting forth

³ Government Code sections 6254 or 6255.

the reasons for the extension and the date on which a determination is reasonably expected to be dispatched. During the review, a state agency that is the subject of a review request would be required to provide the ombudsperson access to all relevant information, documents, and other records upon which the agency relied in denying the original request, or that the ombudsperson requests to assist in its review of the agency's determination.

- Promptly notify, upon completion of its review, the member of the public who submitted the request and the state agency of its determination and the reasons therefor.
- Maintain a copy of any written opinion and post the opinion on its internet website. The ombudsperson shall not disclose any records that are exempt from disclosure by express provisions of law, including, but not limited to, the CPRA.

If the ombudsperson determines that the state agency improperly denied disclosure of the public record or records, the ombudsperson shall require the state agency to provide the public record or records to the member of the public who submitted the request for review. The ombudsperson may require any state agency determined to have improperly denied a request for public records to reimburse the ombudsperson for its costs to investigate the request for review.

An opinion issued by the ombudsperson would not affect the right of a person to enforce their right to inspect or to receive a copy of any public record through court action.⁴ A member of the public would not be required to exhaust the administrative remedies available through the ombudsperson prior to filing a legal action. However, if a person elects to bring a court action without seeking a request for review, the ombudsperson shall not proceed with the review.

A person may withdraw, by written notice, their request for review if the withdrawal notice is received by the ombudsperson prior to the issuance of an opinion.

The ombudsperson may also provide and/or post written information, guidance, and advice to both public agencies and members of the public regarding the CPRA.

On or before January 1, 2021, and every year thereafter, the ombudsperson would be required to report to the Legislature specified information. The report would be required to comply with Section 9795.⁵

⁴ Pursuant to Sections 6258 and 6259.

⁵ GC section 9795 generally specifies whether the report must be provided as a printed or electronic copy and to whom the report must be provided.

This bill would incorporate definitions from the current CPRA for the following terms and phrases: "CPRA," "member of the public," "public agency," "state agency," and "unusual circumstances." This bill also would define the following terms and phrases:

- "Ombudsperson" would mean the CPRA Ombudsperson created pursuant to this bill.
- "Original request" would mean a request for records retained by a state agency made by a member of the public pursuant to the CPRA.
- "Request for review" would mean a request for the ombudsperson to review a denial by a state agency of an original request.

Implementation Considerations

Department staff has identified the following implementation considerations for purposes of a high-level discussion; additional concerns may be identified as the bill moves through the legislative process. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

This bill would allow the ombudsperson to independently determine whether records are disclosable without providing the state agency the opportunity for review or appeal of the ombudsperson's determination. Without input from the FTB, this bill could potentially result in the inadvertent disclosure of confidential records and the posting of that information on the ombudsperson's website. For clarity and to protect confidentiality, it is recommended that the bill be amended to require, prior to disclosure of the records in question, that the ombudsperson consult with the state agency and establish a process for the state agency to review and appeal the ombudsperson's determination.

This bill's requirement for a state agency to provide the ombudsperson "all relevant information, documents, and other records" could be broadly interpreted to exceed "public records." This provision could be inconsistent with existing disclosure laws. For clarity and consistency with the author's intent, it is recommended that the bill be amended.

The bill uses terms and phrases that are undefined, i.e., "disclosable public records," "records," "records retained," and "costs to investigate." The absence of definitions to clarify these terms could lead to disputes and would complicate the administration of this bill. For clarity and ease of administration, it is recommended that the bill be amended to clearly define the terms and phrases.

This bill uses the defined term "public record" interchangeably with "record." For clarity and to ensure the ombudsperson's review relates to "public records" as defined in the CPRA and specified exemptions to the CPRA, it is recommended that the bill be amended.

Legislative History

Research of California legislation found no legislation similar to the provisions of this bill.

Other States' Information

The states surveyed include *Florida, Illinois, Massachusetts, Michigan, Minnesota, and New York*. These states were selected due to their similarities to California's economy, business entity types, and tax laws.

All of the states surveyed have public record laws similar to the CPRA providing for the disclosure of public records. *Florida, Michigan, and Minnesota* laws lack a public records ombudsperson similar to the position that would be created by this bill.

Illinois law created the "Office of Public Access Counselor (PAC)." The PAC, an attorney appointed by the Attorney General, reviews and opines on all denials of public records requests.

Massachusetts law allows anyone denied access to public records to appeal the decision to the Supervisor of Records within the Office of the Secretary of the Commonwealth of Massachusetts.

New York law created the Committee on Open Government that oversees and advises on New York's Freedom of Information Law, including issuing advisory opinions.

Fiscal Impact

This bill would not significantly impact the department's costs.

Economic Impact

Revenue Estimate

This bill would not impact the state's income or franchise tax revenue.

This analysis does not account for changes in employment, personal income, or gross state product that could result from this bill or for the net final payment method of accrual.

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