

## THE ABC'S OF PRIVACY & PUBLIC RECORDS

- **Two Competing Interests: Access to Public Records and Privacy**

*"The Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."* (California Government Code section 6250; see also California Constitution, Article I, Section 3(b))

### **CALIFORNIA PUBLIC RECORDS ACT (PRA) (Gov. Code Section 6250)**

- The Legislative intent says that: "access to information concerning the conduct of the people's business is a ***fundamental and necessary right of every person in this state.***"
- Proposition 59, passed November, 2004. Created Constitutional right of access to public meetings and public records. PRA rules still apply (Prop. 59 expressly grandfathered existing exemptions).
  - ***Presumption*** favoring disclosure of public record: If a record is a "public record" as defined, then there is a presumption that the public has a right of access to that record.
  - Statutory ***exemptions*** allowing for non-disclosure must be read narrowly.

### WHAT IS A "PUBLIC RECORD"?

- ***Public Record:*** includes "Any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained" by the University, "regardless of physical form or characteristics."

Note: This includes not just the records that we create, but *any record in our possession.*

Purely personal email or other records (shopping list, birthday card) would not be considered “public records,” because they are not related to the conduct of the public’s business. But if there is any relation to University business at all, they are “public records.”

- **Writing:** includes “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

Note: This is a broad definition that includes any form in which information can be retained. This includes handwritten notes, e-mail, and information contained in databases.

## EXEMPTIONS FROM DISCLOSURE

“Public records” must be disclosed upon request, unless a specific exemption applies. Exemptions must be narrowly interpreted.

Key exemptions include:

- **Preliminary drafts, notes, or memoranda** not retained in ordinary course of business. Retained drafts are subject to disclosure.
- Records relating to **“pending litigation”**. Pending litigation narrowly defined by courts: documents must be specifically prepared for litigation in which the university is a party.
- **Personnel, medical, or similar files** where the disclosure would constitute an **“unwarranted invasion of privacy.”**

- **Police** files, including investigatory or security files compiled by any state or local police agency.
- **Real estate appraisals** may be withheld until the property is acquired.
- Exemptions based on prohibitions of disclosure under federal or state law, including provisions in Evidence Code relating to privilege.
  - Includes doctor-patient and **attorney-client/attorney work product** privileges.
  - Includes "**Official Information**" privilege (Evidence Code 1040). "Official information" is "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made" However, the University must also balance the public interest in non-disclosure vs. the public interest in disclosure.
  - Includes "**Trade Secret**" privilege (Evidence Code 1060). "Trade Secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
  - Includes any other state or federal law protecting records: HIPAA, FERPA, etc.
- "**Catch-all**" or "**Balancing Test**" Exemption: Public Interest in Non-Disclosure
  - Applies to protect records, even when there is no other exemption that would apply, where: "on the facts of the particular case the

public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

- Balance the *public* interest in disclosure against the public interest (not strictly the University's interest) in withholding.
- Courts do not like to allow the use of the public interest exemption, read it very narrowly.
- Includes the "Deliberative Process" privilege, to protect candid internal pre-decisional deliberations. (California cases have relied on this privilege to protect: Governor's calendars, telephone records, application materials submitted to Governor by persons seeking appointment to board of supervisors, list of persons considered for a police captain position).
- Includes "burdensomeness." A request might be so burdensome, and the public interest in the material so small, that the balancing test might allow us to deny the request. This is very unusual. In most cases, we have to comply even if it is burdensome.

## PROCEDURAL REQUIREMENTS

- The PRA says that public records are open to inspection at all times during the office hours of the state agency. However, we do not generally permit requestors to look through University files that have not been reviewed for any needed redactions. Rather, we ask the requestor to submit a request in writing (email is acceptable), and we will provide a written response.
- Statute allows **10 calendar days** to respond to a request with a determination letter (can be extended to 24 days for voluminous/complex requests). The records themselves need not be released in 10 days, but they must be compiled in a reasonable amount of time after the determination letter is sent.

- The University is required to “assist the member of the public make a focused and effective request that reasonably describes an identifiable record.”
- The University does not have to create new records or answer questions. The PRA simply requires access and disclosure of existing records. However, we are required to extract data from a database upon request.
- Requestor may **inspect** records at no cost. **Copies** must be provided upon request, for a per-page copying fee (which may not exceed the direct cost of duplication). Staff time for reviewing and redacting documents, searching for files, etc. is not considered to fall within the “direct cost of duplication.”
- The University can also charge for **computer programming** time required to create a record that requires data extraction or manipulation.
- Whenever the University discloses a record which is otherwise exempt from disclosure to any member of the public, the disclosure will be construed as a **waiver** of any exemption, so the document cannot be withheld from another member of the public. (California Government Code section 6254.5)
- The University may not consider the identity of the requestor or the purpose for the request, in making its determination. For this reason, we do permit anonymous PRA requests.
- **Emails** are just like any other record: subject to disclosure unless there is a specific exemption. Delete emails that are not required to be retained under the University record retention policy, so long as there is no ongoing business need to retain them. However, do not delete emails or purge other records where a request for access has been made, or where there is a “litigation hold” requiring you to retain all relevant documents. Be conscious of the content of the email records you are creating and retaining; you may want to use

the phone for very sensitive communications.

- The University is not required under the Act to search for deleted email messages that may still be stored somewhere in a back-up or archive system. However, the same would not necessarily be true of records sought in litigation pursuant to the discovery process (e.g. through a subpoena).

## **CALIFORNIA INFORMATION PRACTICES ACT (IPA) (Civil Code 1798)**

The IPA codifies the right to privacy guaranteed in the California Constitution (Article I, Section 1)

- Three Major Concerns in the IPA:
  - **Collection**. What information can an agency legitimately collect on individuals (and how?)
  - **Disclosure**. What information can be disclosed to 3<sup>rd</sup> parties ***without*** the consent of the individual to whom the record pertains?
  - **Access**. What rights does an individual have to see personal information maintained by an agency that pertains to that individual?
- **“Personal Information”**: defined very broadly to include “any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.”

## How the IPA Deals with its Three Basic Concerns:

### COLLECTION

- “**Relevant and necessary**”. Each agency shall maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency.
- Collect information directly from the individual whenever possible, and maintain a record of the source of information
- Must provide a **privacy notice** to individual when collecting information about individual [§1798.17]. This is a cumbersome administrative requirement. The notice must include the purpose for collecting the information, whether it is mandatory to provide the information, any disclosures that will be made, etc. Model privacy notices are in RMP-8.

### DISCLOSURE TO THIRD PARTIES WITHOUT CONSENT OF INDIVIDUAL

- No disclosure of personal information **unless** specific statutory basis for disclosure (22 listed exemptions)
- Key disclosure categories
  - **To the individual** to whom information pertains
  - With the **consent** of the individual
  - To guardian or conservator of the individual
  - To those officers, employees, attorneys, agents, or volunteers of the agency, **if disclosure is:**
    - Necessary and relevant in the ordinary course of the performance of official duties, and is related to the purpose for which the information was acquired.

- To person or agency where transfer is necessary for transferee agency to perform constitutional or statutory duties. E.g. EEOC, DFEH.
- To government entities when **required by state or federal law**
- **Pursuant to the Public Records Act.** [Note: this is the basis for releasing employee compensation or other information that would otherwise be deemed to be “personal information.” Because it does not constitute an “unwarranted invasion of personal privacy,” it is required to be disclosed under the PRA, and therefore permitted to be disclosed under the IPA]
- Where compelling circumstances exist which affect **health or safety** of individual (but must simultaneously notify the individual)
- To any person pursuant to a **subpoena**, court order, or other compulsory process (but must attempt to notify the individual in advance of compliance)
- Pursuant to a search warrant
- To law enforcement or regulatory agency when required for an investigation
- Several others relating to various agencies

#### ACCESS BY THE INDIVIDUAL

- Every individual has broad access rights to records containing personal information about themselves, with very limited exceptions. Includes, but is not limited to, University employees.



- **Inspection** within 30 days of request (60 days if archived). Copies within 15 days of inspection. Can charge \$0.10/page for duplication if copies are requested (but may not charge for collecting, compiling, or redacting the records)
- Right to **amend** record if inaccurate, or insert statement in the record if amendment denied
- There are only very limited categories where the University can deny inspection by individual:
  - Criminal investigations exemptions
  - Records maintained for purpose of an investigation of individual's fitness for licensure or public employment, or of a grievance or complaint. But only to not compromise investigation or a related investigation. Once investigation is over, then must disclose.
  - Pertains to physical or psychological condition of the individual if disclosure would be harmful to the individual. [But must disclose to individual's health care professional.]
  - Attorney-client privileged material
  - Academic Peer Review (identity of confidential reviewers)
  - Personal information (about others) intertwined in the record should be redacted
  - Identities of Confidential sources of information (people promised confidentiality when writing letters of reference, etc.) can be protected

## OTHER RELATED LAWS AND POLICIES

Resources include: Office of the General Counsel (including campus counsel), UCOP and campus Information Practices Coordinators

- Academic Personnel Records - Academic Personnel Manual (APM) Section 160 (based very closely on the IPA)  
<http://www.ucop.edu/acadadv/acadpers/apm/apm-160.pdf>
- Student records – Federal Education Rights and Privacy Act (FERPA) (Generally provides even greater privacy protection than IPA)  
<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc130.html>
- Medical records - Confidentiality of Medical Information Act (CMIA) (California Civil Code section 56)
- Medical records – Health Insurance Portability and Accountability Act (HIPAA) <http://www.universityofcalifornia.edu/hipaa/welcome.html>
- Electronic Communications (E-Mail, Internet) - UC Electronic Communications Policy <http://www.ucop.edu/ucophome/policies/ec/>
- Federal Freedom of Information Act (FOIA) (5 U.S.C. Section 552) – Generally does not apply to the University, but the PRA is modeled on FOIA. If someone makes a request to the University under FOIA, it is treated as a request under the PRA
- Federal Privacy Act (Social Security Number Coverage) (5 U.S.C. Section 552a)
- Business and Finance Bulletin RMP-8  
<http://www.ucop.edu/ucophome/policies/bfb/rmp8toc.html>
- Security Breach Notification  
<http://www.ucop.edu/irc/itsec/campusplans.html>
- Disposition Schedule (systemwide): On the web at:  
<http://www.ucop.edu/recordsretention/>