



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
EXECUTIVE DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
600
DISTRIBUTION DATE
April 3, 2018**

- 1. SUBJECT:** **RESPONSE TO PUBLIC RECORDS ACT REQUESTS**
- 2. PURPOSE:** To set forth the time frames and procedures for responding to requests for records under the California Public Records Act (PRA). (Government Code § 6250, et seq.)
- 3. BACKGROUND:** “Public records” are materials containing information related to the conduct of the public’s business that a state agency has in its possession. (Gov. Code, § 6252, subd. (e).) The PRA requires the Department of Fair Employment and Housing (DFEH) to make these records available for copying and inspection unless they are exempt from disclosure. (Gov. Code, § 6253.)

Among the materials that can be “public records” are documents DFEH obtains from complainants, respondents, and third parties in the course of receiving, investigating, conciliating, mediating, and prosecuting complaints alleging unlawful practices. When determining whether such a record is exempt from disclosure, DFEH weighs the rights of the public, the parties to an investigation, and DFEH’s obligations. For example, DFEH balances the public’s right to information with complainants’ rights to privacy because DFEH seeks and receives records containing sensitive, personal, and confidential information from complainants. (Cal. Const., Art. I, § 1.) DFEH may also withhold records in order to prevent a “chilling effect” on people who are victims of discrimination and who may wish to file complaints with DFEH. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1024.) Similarly, DFEH considers the privacy rights of respondents and third parties who submit confidential information to DFEH. (Cal. Const., Art. I, § 1.) Lastly, DFEH considers how public disclosure of records may interfere with its ability to perform its statutory obligations to investigate, conciliate, mediate, and prosecute complaints.

When in receipt of a request for the production of records, DFEH must meet various legal obligations regarding identification of exempt records and production of nonexempt records. The PRA requires DFEH to identify any exemptions that prohibit the production of records or specific portions of records. (Gov. Code, § 6255, subd. (a).) The PRA also mandates production of nonexempt records in specific time frames. (Gov. Code, § 6253.) This policy outlines DFEH’s procedures regarding identification of exemptions, timelines, and other matters related to DFEH’s compliance with the PRA.

4. PROCEDURES:

A. General Rules

- 1) The Custodian of Records for DFEH is responsible for responding to PRA requests, including requests from the media or government officials.¹
- 2) The Chief Counsel or Deputy Director of Executive Programs shall designate an attorney to advise staff regarding PRA requests. As necessary, DFEH staff responsible for responding to public records requests may refer questions to this attorney. The attorney may consult with the DFEH staff responsible for creating the record in order to determine whether the record sought is exempt from disclosure under the PRA.
 - a) Except as described in Section 4.A(5), below, the Custodian of Records shall consult with a designated DFEH attorney for complex public records requests or in any other circumstance where staff is unclear whether an exemption may be applicable.
- 3) Requests for the disclosure of information are often in writing. However, the PRA does not require a requestor to make a written request for the disclosure of information. Should the requestor not wish to provide a request in writing, the Custodian of Records will document the oral request. The documentation should include the specific request, date the request was made, and contact information if a response cannot be provided at the time of the request.
- 4) Prior to disclosing information, the Custodian of Records must determine the manner in which a request for records is being made, for example, by subpoena, letter, or e-mail. Where the request is in the form of a subpoena, the request will be handled by the Legal Division in accordance with Directive 603, "Response to Third-Party Subpoenas." A subpoena is not a PRA request.
- 5) The Custodian of Records must determine whether the request for information involves information that is in an open case file. An open case file is one in which an intake form (previously known as a pre-complaint inquiry) has been received, but there has not been

¹ All subsequent references to DFEH's "Custodian of Records" are also meant to include his or her designee(s).

a final resolution such as a case closure, final settlement in mediation, or final court judgment. Because releasing information regarding an open case file could compromise DFEH's investigation, mediation, or litigation efforts, records from these files will not be released until DFEH closes the case, except that DFEH will provide reports of summary information relating to the numbers and locations of cases filed, bases of complaints, types of harm, and demographic information. An open case file includes cases that have been closed, but for which the deadline for filing an administrative appeal has not passed, or which are pending resolution with DFEH's appeals unit. (Gov. Code, §§ 6254, subds. (c), (k), 6255; Evid. Code, §§ 1040, 1119.)

When attempting to determine whether an intake form has been filed concerning any particular case, the Custodian of Records should locate the individual's or organization's name in question and alternative spellings of the name by:

- a) Conducting a search on DFEH's file storage system. If necessary, this search should include DFEH's previous file storage systems.
 - b) Conducting a general internet search, using reliable sources such as the California Secretary of State "Business Search."
- 6) The Custodian of Records can release reports which summarize data or information in DFEH's possession.
 - 7) When the Custodian of Records denies any request, the notification of denial of any request must be in writing. (Gov. Code, § 6255, subd. (b).) The denial must also include the names and titles or positions of each person responsible for the denial. (Gov. Code, § 6253, subd. (d).)

B. Fees for Records Requests

- 1) For most public records requests, DFEH will not charge requestors. However, if the requestor asks that DFEH provide records in paper format and the records that are responsive to this request amount to more than 10 pages, then DFEH will charge \$0.10 for each page
- 2) DFEH will not usually charge for public records requests that seek records in electronic format. However, DFEH may charge the requestor for the cost of any programming and computer services necessary to produce a copy of a record under either of the following circumstances:

- a) The request is for a record that is only produced at otherwise regularly scheduled intervals; or
 - b) The request requires data compilation, extraction or programming. (Gov. Code, § 6253.9, subd. (b).)
- 3) Payment of fees shall be made in the form of a check made payable to the "Department of Fair Employment and Housing." If DFEH does not receive payment within 30 days, the requestor must make a new records request.
 - 4) DFEH may waive the costs associated with requests from members of the media or other individuals. (See *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144.)

C. Time Frame for Written Response

- 1) The Custodian of Records must make a determination regarding whether the request, in whole or part, seeks copies of disclosable public records, and must include this determination in a written acknowledgement of the request to be sent within ten (10) calendar days from the date DFEH receives the request. (Gov. Code, § 6253, subd. (c).) Specifically, the Custodian of Records must state in the acknowledgement whether the request, in whole or in part, seeks copies of disclosable public records. (*Ibid.*) The acknowledgement must also include the estimated date and time when the records will be disclosed to the requestor. (*Ibid.*) The acknowledgement must be in writing by e-mail. If the e-mail address of the requestor is unavailable, the acknowledgement must be by U.S. Mail.
- 2) The PRA allows the Custodian of Records to extend the ten (10) day time period in which an agency must provide a determination regarding whether a request seeks disclosable records. (Gov. Code, § 6253, subd. (c).) However, the PRA only allows the Custodian of Records to extend this time limit for up to fourteen (14) additional days and in "unusual circumstances." (*Ibid.*) The PRA defines "unusual circumstances" as instances where additional time is needed to:
 - a) Search and collect documents;
 - b) Search, collect, and examine a voluminous number of distinct records that are the subject of one request;

- c) Consult with another agency having a substantial interest in the determination of the request; or
 - d) Compile data, to write programming language or a computer program, or to construct a computer report to extract data. (Gov. Code, § 6253, subds. (c)(1), (2),(3).)
- 3) When the Custodian of Records seeks an extension, they must provide the reason(s) for the extension and the date on which DFEH will send a determination. (Gov. Code, § 6253, subd. (c).) This information must be provided to the requestor within the initial ten (10) day period for providing an acknowledgement and response.

Whether the Custodian of Records has sought an extension or not, they must produce the documents within a reasonable period of time, generally within 20 calendar days following receipt of payment.

D. Content of Written Response

- 1) The written response shall indicate whether DFEH possesses any of the requested records and, if so, whether they will be produced or are exempt from production in whole or in part under the provisions of the PRA. (Gov. Code, § 6253, subd. (c).) In the event no records exist which are responsive to the request, the Custodian of Records will prepare DFEH's "Certification In Response to Public Records Request," and send it to the requestor. This form will be signed by the Custodian of Records and mailed the same day the determination has been made that no records exist.
- 2) The written response shall specify any photocopy charges that are to be paid to DFEH prior to obtaining copies of the requested records. (Gov. Code, § 6253, subd. (b).)
- 3) If the public records request is unclear, the Custodian of Records, rather than deny the request, will work with the requestor to clarify the request in an effort to assist the requestor to make a focused and effective request that reasonably describes an identifiable record or records, by doing the following, to the extent reasonable under the circumstances:
 - a) Identify records and information which are responsive to the request or to the purpose of the request, if stated.

- b) Describe the information technology and physical location in which the records exist.
- c) Provide suggestions for overcoming any practical basis for denying access to the records or information sought. (Gov. Code, 6253.1 subd. (a).)

The Custodian's duty will be satisfied if the Custodian is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.

- 4) If a public record is in an electronic format, DFEH must provide the record in the requested format if available. (Gov. Code, § 6253.9, subd. (a).)

E. Manner and Content of Records Production

- 1) The Custodian of Records shall conduct a thorough search of DFEH's case management system and other locations where records may be kept to find all records that are responsive to requests before producing documents. Whenever there may be responsive records in nongovernmental accounts of DFEH employees, the Custodian of Records shall communicate the request to relevant employees and ask these employees to search their own personal accounts and devices for responsive material.
- 2) In the event that the Custodian of Records suspects that an employee has failed to upload records from a personal account to DFEH's case management system or other common locations, the Custodian of Records shall follow the California Supreme Court's recommendations in *City of San Jose v. Superior Court of Santa Clara County*. The PRA does not require agencies to undertake "extraordinarily extensive or intrusive searches." (*City of San Jose v. Superior Court of Santa Clara County* (2017) 2 Cal. 5th 608 at p. 18.) The PRA requires that agencies disclose all records that it can locate "with reasonable effort." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.)" (*City of San Jose v. Superior Court of Santa Clara County*, supra, at p. 18.) "As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material." (*City of San Jose v. Superior Court of Santa Clara County*, supra, at p. 19.) Once the employee finds records responsive to the request, they must immediately notify the Custodian of Records.

- 3) In the unusual situation where the employee believes the writings in their nongovernmental accounts are not “records” for the purposes of the PRA and therefore not disclosable, they must notify the Custodian of Records. Then, the Custodian of Records must consult with the staff attorney designated to advise staff regarding public records requests to make a determination on a case-by-case basis.
- 4) Similarly, if the employee believes that their privacy rights are implicated, they must immediately notify the Custodian of Records. “Privacy concerns can and should be addressed on a case-by-case basis. (See *International Federation*, *supra*, 42 Cal.4th at p. 329.)” (*City of San Jose v. Superior Court of Santa Clara County*, *supra*, at p. 17). The Custodian of Records must therefore consult with the attorney designated to advise staff regarding public records requests to make a determination on a case-by-case basis. The staff attorney, in consultation with the Chief Counsel, will determine what records are disclosable.
- 5) A public record must be disclosed unless it is exempt pursuant to the PRA. The Custodian of Records must specifically identify the exemption(s) under which a record, or portion of a record, is withheld. (Gov. Code, §§ 6253, 6254.) The PRA incorporates the many privileges and confidentiality provisions from other state and federal laws. (Gov. Code, § 6254, subd. (k).) There are many provisions of California law that may apply depending on the type of public record in DFEH’s possession. (See, e.g., Gov. Code, §§ 6275-6277.) Typical documents in DFEH files that are exempt from disclosure under the PRA include:
 - a) Records relating to unemployment compensation. (Gov. Code, § 6276.46.)
 - b) Records relating to workers compensation claims such as “individually identifiable information,” which means any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity. (Gov. Code, § 6276.14.)
- 6) In all other circumstances, the decision to produce a record, or segregable portion of that record, involves the balancing of the public’s right to monitor the functioning of their government against an individual’s constitutional right of privacy. (Gov. Code, § 6255.)
- 7) **Note:** It is always proper to release unredacted copies of a record to the provider of the document. (Civ. Code, § 1798.34.)

- 8) The Custodian of Records must consider the source of the record; the identity of the requestor; and the status of the requestor to determine what portions of the records are exempt from disclosure. For example, DFEH may provide to a complainant his or her social security number. However, DFEH cannot provide a third party the complainant's social security number. The guidelines to be used in determining the portions of the record exempt from disclosure are set forth below.

F. Records from Federal Entities and Through DFEH's Office of Compliance Programs

- 1) All records received from the U.S. Equal Employment Opportunity Commission in the course of investigating a case or determining whether to investigate a case must be withheld. (Gov. Code, §§ 6254, subd. (k) and 6255; 42 U.S.C. § 2000e-5 (b).) EEO-1 reports are not to be produced including, but not limited to, the federal identification number or other information that would identify the reporting entity included on an EEO-1 report. (Gov. Code, §§ 6254, subd. (k) and 6255; 42 U.S.C. § 2000e-8 (d), (e).)
- 2) All records received from the U.S. Department of Housing and Urban Development (HUD) in the course of investigating a case must be withheld. (Gov. Code, §§ 6254, subd. (k) and 6255; 24 C.F.R. § 115.308.) However, information relevant to DFEH's participation in HUD's Fair Housing Assistance Program (FHAP) will be produced. (24 C.F.R. § 115.308.)
- 3) Records received through an investigation conducted by DFEH's Office of Compliance Programs (OCP) are subject to the same guidelines stated in sections "F" and "G" of this directive. (Gov. Code, §§ 6254, subd. (k) and 6255; 2 C.C.R § 11116, subd. (b).) However, information involving trade secrets received through OCP will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; 2 C.C.R § 11116, subd. (b).)

G. Guidelines for Record Production: Third-Party Request

- 1) In order to protect the identity of complainants, DFEH will not produce records of a case in response to an inquiry based on the complainant's name unless presented with clear evidence that the complainant or their representative has publicly disclosed the complaint. (Gov. Code, § 6255.) If the complainant or their representative has so disclosed the complaint, the complainant's name will not be redacted from the record when it is disclosed.

If a third party requests records of a case filed by named

complainant against named respondent, and it is not clear whether the complainant or their representative has publicly disclosed the complaint, DFEH will not produce records in response to that request.

- 2) If a third party requests a copy of a complaint or case filed against a named respondent, and it is not clear whether the complainant or their representative has publicly disclosed the complaint, DFEH will produce records, but will redact the name of the complainant.
- 3) The name of an individual respondent will be redacted, unless the respondent is a corporation or a public employee acting in their official capacity. (Gov. Code, § 6255.)
- 4) The name(s) and/or other identifying information of any third-party witness(es) will be redacted unless the third-party witness is an elected or appointed official or judicial officer acting in their official capacity. (Cal. Const., Art. I, § 1; Gov. Code, § 6255.)
- 5) In order to protect their right to privacy and prevent the “chilling” of future complaints, home addresses, home or cell phone numbers, email addresses, bank account numbers, social security numbers, driver’s license numbers, citizenship status, and dates of birth for all individuals will be redacted. (Cal. Const., Art I, § 1; Gov. Code, §§ 6254, subd. (c); 6255; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018, 1024.)
- 6) Personal information, the disclosure of which would constitute an unwarranted invasion of privacy, will not be produced. Specifically, all personnel/employment files, medical files, and banking/financial records will not be produced. (Gov. Code, § 6254, subd. (c).)
- 7) Any information gathered in the course of efforts to eliminate an unlawful practice through settlement efforts, such as conference, conciliation, and persuasion will not be produced. (Gov. Code, §§ 6254, subd. (k), and 12963.7; Evid. Code, § 1040.)
- 8) Records that reflect notes, memoranda, legal analysis, mental impressions, or legal opinions of any DFEH attorney will not be produced. (Gov. Code, § 6254, subd. (k); Code Civ. Proc., § 2018.030; Evid. Code, §§ 1040 and 952 et seq.)
- 9) Information that reflects an attorney-client communication with DFEH Legal Division staff will not be produced. Such documents are protected by the deliberative process privilege, the official information privilege, and the attorney-client privilege. (Gov. Code, §§ 6254, subd. (k) and 6255; Evid. Code, §§ 1040 and 952 et seq.)

- 10) Because disclosure could jeopardize pending and future investigations, information that reflects official information communications between DFEH Enforcement Division staff will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; Evid. Code, § 1040.) Similarly, outlines, guides, reports, and other similar correspondence between DFEH Enforcement Division staff will not be produced because they are also protected by the official information privilege. (*Ibid.*)
- 11) Records pertaining to pending litigation to which DFEH is a party will not be produced. Such documents are exempt from disclosure until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254, subd. (b).)
- 12) Preliminary drafts, notes or interagency or intra-agency memoranda that are not retained by DFEH in the ordinary course of business will not be produced, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure. Such documents may be exempt from disclosure under the deliberative process privilege, the official information privilege, and the attorney work product doctrine. (Gov. Code, §§ 6254, subd. (a), (k) and 6255; Evid. Code, § 1040; Code Civ. Proc., § 2018.030.) Preliminary drafts, notes or interagency or intra-agency memoranda that are retained by DFEH in the ordinary course of business may be disclosed if they are not exempt under the exemptions listed in this directive and in the PRA.
- 13) Records of investigations received from other state or local agencies for correctional, law enforcement or licensing purposes will not be produced. Such documents are exempt from disclosure. (Gov. Code, § 6254, subd. (f).)
- 14) Records that were provided to DFEH with a promise of confidentiality will not be produced. Such documents are exempt from disclosure. (Evid. Code, § 1040.) **Note:** The promise of confidentiality means DFEH agreed to keep the information confidential at the time it was received. A party cannot unilaterally designate information as confidential.
- 15) Records relating to a mediation conducted by the DFEH Dispute Resolution Division will not be produced. (Gov. Code, § 6254, subd.(k); Evid. Code, § 1119.)
- 16) Records or information related to visa applications, including law - enforcement certification documents, will not be produced to third-party requestors, except for aggregate information regarding the number of certification requests the Department has received. (8 U.S.C. § 1367; Cal. Const., Art I, § 1; Gov. Code, §§ 6254, subds.

(c) and (k); Gov. Code, § 6255; Evid. Code, § 1040; and City of San Jose v. Superior Court (1999) 74 Cal.App.4th 1008, 1018, 1024.)

H. Guidelines for Record Production: Complainant/Complainant's Representative and Respondent/Respondent's Representative Request

- 1) If the requestor provided, prepared, or received the document in an unredacted state, the document does not need to be redacted regardless of the information contained in the document. If none of the above applies, the document will be redacted as set forth below.
- 2) The name(s) and/or other identifying information of any third-party witness(es) will be redacted, unless the third-party witness is an elected or appointed official or judicial officer acting in the official capacity. (Cal. Const., Art. I, § 1; Gov. Code, § 6255.)
- 3) If the complainant or complainant's representative is the requestor, home addresses, home or cell phone numbers, email addresses, bank account numbers, social security numbers, driver's license numbers, citizenship status, and dates of birth for all respondents and witnesses will be redacted. (Cal. Const., Art. I, § 1; Gov. Code, §§ 6254, subd. (c); 6255.)
- 4) If the respondent or respondent's representative is the requestor, home addresses, home or cell phone numbers, email addresses, bank account numbers, social security numbers, driver's license numbers, citizenship status, and dates of birth for all complainants, witnesses, and any co-respondents will be redacted. (Cal. Const., Art. I, § 1; Gov. Code, §§ 6254, subd. (c); 6255.)
- 5) Personal information, the disclosure of which would constitute an unwarranted invasion of privacy, will not be produced. Specifically, all personnel/employment files, medical files, and banking/financial records will not be produced. (Gov. Code, § 6254, subd. (c).)
- 6) Any information gathered in the course of efforts to eliminate an unlawful practice through settlement efforts, such as conference, conciliation, and persuasion will not be produced. (Gov. Code, § 6254, subd. (k) and 12963.7; Evid. Code, § 1040.)
- 7) Records that reflect notes, memoranda, legal analysis, mental impressions, or legal opinions of any DFEH attorney will not be produced. (Gov. Code, § 6254, subd. (k); Code Civ. Proc., § 2018.030; Evid. Code, §§ 1040 and 952 et seq.)

- 8) Information that reflects an attorney-client communication with DFEH Legal Division staff will not be produced. Such documents are protected by the deliberative process privilege, the official information privilege, and the attorney-client privilege. (Gov. Code, §§ 6254, subd.(k) and 6255; Evid. Code, §§ 1040 and 952 et seq.)
- 9) Because disclosure could jeopardize pending and future investigations, information that reflects official information communications between DFEH Enforcement Division staff will not be produced. (Gov. Code, §§ 6254, subd. (k) and 6255; Evid. Code, § 1040.) Similarly, outlines, guides, reports, and other similar correspondence will not be produced because they are also protected by the official information privilege. (*Ibid.*)
- 10) Records pertaining to pending litigation to which DFEH is a party will not be produced. Such documents are exempt from disclosure until the pending litigation has been finally adjudicated or otherwise settled. (Gov. Code, § 6254, subd. (b).)
- 11) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by DFEH in the ordinary course of business will not be produced, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure. Such documents may be exempt from disclosure under the deliberative process privilege, the official information privilege, and the attorney work product doctrine. (Gov. Code, §§ 6254, subd. (a), (k) and 6255; Evid. Code, § 1040; Code Civ. Proc., § 2018.030.) Preliminary drafts, notes or interagency or intra-agency memoranda that are retained by DFEH in the ordinary course of business may be disclosed if they are not exempt under the exemptions listed in this directive and in the PRA.
- 12) Records of investigations received from other state or local agencies for correctional, law enforcement, or licensing purposes will not be produced. Such documents are exempt from disclosure. (Gov. Code, § 6254, subd. (f).)
- 13) Records that were provided to DFEH with a promise of confidentiality will not be produced. (Evid. Code, § 1040.)
Note: The promise of confidentiality means DFEH agreed to keep the information confidential at the time it was received. A party cannot unilaterally designate information as confidential.
- 14) Records relating to a mediation conducted by the DFEH Dispute Resolution Division will not be produced. (Gov. Code, § 6254, subd. (k); Evid. Code, § 1119.)

15) Records or information related to visa applications, including law-enforcement certification documents, will be produced only to the party that requested the certification. (8 U.S.C. § 1367; Cal. Const., Art I, § 1; Gov. Code, §§ 6254, subds. (c) and (k); Gov. Code, § 6255; Evid. Code, § 1040; and City of San Jose v. Superior Court (1999) 74 Cal.App.4th 1008, 1018, 1024.)

5. APPROVAL:



Kevin Kish, Director

April 3, 2018

Date