"Public Interest in Nondisclosure is Greater than Public Interest in Disclosure": How the California Public Records Act's "Catch-All" Exemption Incentivizes Lawbreaking by Government Records Custodians

KATE NUCCI*

TABLE OF CONTENTS

INTRODUCTION

Much legal literature discusses the federal Freedom of Information Act. Most of it ranges in tone from concerned to hopeless; none more so than the House Committee on Oversight and Government Reform's 2016 report on the law, succinctly titled "FOIA Is Broken: A Report."[1]

* J.D., Georgetown University Law Center, (expected 2027); B.A., University of California, Los Angeles (2021).

1. *FOIA is Broken: A Report*, Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong. (2016).

Some work, too, looks at various state sunshine laws—Texas,[2] Illinois,[3] South Carolina,[4] Florida.[5] But surprisingly few scholars have taken a swing at the informational transparency landscape of the nation's most populous state[6]—few legal scholars, at least.[7] This is especially notable because California's public records law has a particular provision, known colloquially as the "catch-all exemption," that doesn't appear in FOIA and has a significant impact on how many records requests play out. The exemption deserves a deeper examination.

This Note will attempt to undertake one. First, it will briefly touch on the history and purpose of both the California Public Records Act and FOIA, the state law's predecessor and inspiration. It will then compare the two laws with the aim of examining the roots of California's catch-all exemption, explaining why such an exemption was explicitly written *out* of the federal law (with unclear success). Finally, it will look to California agencies' misuse of the catch-all exemption and several of its fellow highly discretionary exceptions, and it will discuss how the exemptions' ambiguity and the law's overall lack of enforcement mechanisms result in a system by which government records custodians, in direct contravention of the spirit of CPRA, regularly deny records requests for unjustifiable reasons such as inconvenience or self-protection.[8]

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2. *See, e.g.*, Alexandra Schmitz, *Don't Mess with the Texas Public Information Act: The Threat to Government Transparency Posed by* Boeing v. Paxton *and How to Fix It*, 50 TEX. TECH L. REV. 249 (2018).

3. *See, e.g.*, Sarah Klaper, *The Sun Peeking around the Corner: Illinois' New Freedom of Information Act as a National Model*, 10 CONN. PUB. INT. L.J. 63 (2010).

4. *See, e.g.*, Jennifer Jokerst, *Let the Sun Shine: Reforming South Carolina's Freedom of Information Act to Promote Transparency and Open Government*, 65 S.C. L. REV. 795 (2014).

5. *See, e.g.*, Ira P. Robbins, *Explaining Florida Man*, 49 FLA. ST. U. L. REV. 1 (2021).

6. In the past twenty-odd years, those that have were actually primarily worried about the *strength* of the California Public Records Act. That would seem to be a good sign, but, alas, it's a mirage. The flawed framework of the act provides plenty of support for both their concerns *and* those expressed in this Note. *See* Alexandra B. Andreen, *The Cost of Sunshine: The Threat to Public Employee Privacy Posed by the California Public Records Act*, 18 CHAP. L. REV. 869, 870 (2015) (raising concerns about advertisers' use of public records requests); Nora Culver, *A Proposed Amendment to the California Public Records Act: Balancing Privacy and Public Access*, 45 SANTA CLARA L. REV. 127, 128 (2004) (questioning whether city officials' salaries should be publicly available); Nader Mousavi & Matthew J. Kleiman, *When the Public Does Not Have a Right to Know: How the California Public Records Act is Deterring Bioscience Research and Development*, 4 DUKE L. & TECH. REV. (2005).

7. As will be discussed later, California journalists have led the charge against unnecessary governmental secrecy for decades.

8. To provide a personal example, in 2020, while I was a journalism intern at the *Voice of San Diego*, an investigative news nonprofit, I requested the San Diego district attorney's office communications regarding San Diego Police Department enforcement of a 1918 city code that unconstitutionally banned "seditious language." I'd received a tip that the DA's office learned several years prior about police use of the law and had taken no action. The city denied my request, claiming attorney-client privilege, deliberative process privilege, and the catch-all exemption. In doing so, it informed me that "public interest in nondisclosure [was] greater than public interest in disclosure." I was only at the organization for a couple months, but my supervisors and colleagues, who of course had much greater experience with the city's records office, were extraordinarily unsurprised at the response and had plenty tales of their own to pass along.

A. THE IMPORTANCE OF FREE INFORMATION

"Records don't stonewall or spin. They seek neither power nor favor. They don't whine, chisel or avoid your phone calls. They might contain inaccuracies, but they are incapable of lying."[9]

As noted, much has already been said about the necessity of public access to government records. But there can never be too much.

In 2019, San Diego investigative journalists reported that smart street light cameras, approved by the city council in 2016 to save energy and collect data on environmental conditions and traffic flows, were also being used by the San Diego Police Department in criminal investigations. The police department quickly reassured them that the camera footage was only used in investigations of serious criminal acts, such as homicides; in turn, several councilmembers claimed that they had no knowledge the program was being used in that manner at all.[10]

Internal records indicated otherwise on both counts.[11]

First, although the cameras were primarily used in major crime investigations, police also accessed the footage in investigations of illegal dumping and vandalism offenses—at least thirty-five times searching it for evidence of looting and property destruction in the wake of the 2020 George Floyd protests, according to police requests to access camera data stored on a third-party server. And second, city councilmember schedules confirmed that the San Diego Police Department scheduled individual meetings with every local representative to discuss law enforcement use of the smart street light program a year prior.[12]

This is obviously far from the only time that records have caught the officials that drafted them out in a lie. The George Washington University's National Security Archive has tracked down and released records detailing misdeeds such as the Central Intelligence Agency's assassination plots against Fidel Castro[13] and the inclusion of Martin Luther King Jr. on the National Security Agency's watch list.[14] In 2010, eight California officials were arrested for corruption after the *Los Angeles Times* accessed city council minutes, employment contracts, and

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9. DAVID CUILIER & CHARLES N. DAVIS, THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS 8 (2d ed. 2020).

10. *See* Jesse Marx, *Public, Council Were in the Dark on Police Access to 'Smart' Streetlights*, VOICE OF SAN DIEGO, April 15, 2019. https://www.voiceofsandiego.org/topics/news/san-diego-considered-giving-police-realtime-access-to-streetlight-cameras/.

11. *See* Jesse Marx, *Years Into Smart Streetlights Program, Council Will Write Surveillance Rules*, VOICE OF SAN DIEGO, July 20, 2020. https://voiceofsandiego.org/2020/07/09/years-into-smart-streetlights-program-council-will-write-surveillance-rules/ [https://perma.cc/78W8-T94A].

12. *Id.*

13. *See The CIA's Family Jewels*, THE NAT'L SEC. ARCHIVE (updated June 26, 2007). https://nsarchive2.gwu.edu/NSAEBB/NSAEBB222/index.htm [https://perma.cc/5FLT-F9KR].

14. *See* Nat Jones, *FOIA Request Filed for National Security Agency Watch List that Included "Threats" MLK, Muhammad Ali, and Senator Church*, UNREDACTED: THE NAT'L SEC. ARCHIVE BLOG (Sep. 16, 2013). https://unredacted.com/2013/09/25/foia-request-filed-for-national-security-agency-watch-list-that-included-threats-mlk-muhammad-ali-and-senator-church/ [https://perma.cc/L67W-5GS4].

expenses revealing serious salary discrepancies.[15] *USA Today* learned in 2018, with records it could only acquire after judicial appeal, that state and federal authorities vastly undercount deaths among migrants crossing the southern U.S. border.[16]

In their highly regarded guidebook *The Art of Access*, journalism professors David Cuilier and Charles Davis proclaim that "[d]ocuments and data are used in 91 percent of the best investigative reporting stories in the nation, with about 70 percent of those stories resulting in new laws, official investigations, arrests and resignations."[17]

Access to government records, in sum, is essential for a healthy society. Wrote U.S. Supreme Court Justice Louis Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman[.]"[18] Corruption festers in the dark.

I. OVERVIEW OF THE FEDERAL AND STATE PUBLIC RECORDS ACCESS LAWS

A. STRUCTURE AND PURPOSE OF FOIA

After World War II, the public looked to create a weapon against the sort of corruption that grows in powerful, insular government agencies. That weapon, FOIA, passed in 1967—twenty-one years, it is important to note, after the Administrative Procedure Act paved the way as "Congress' first formulation of a general statutory plan to protect citizens' right of access to information held by government agencies."[19] CPRA, meanwhile, became law in 1968. The state act was only a year behind FOIA and largely based on it.[20]

Both laws represented a drastic sea change in records access in their respective jurisdictions. Unlike prior acts, each established the *affirmative* right of each its citizens to access the records of the governmental officials their tax dollars employ, barring an applicable exemption.[21] In other words, each aspired to establish public access to the government's inner workings as the default state. As Cuilier and Davis describe it to their students: "[I]t's not your job to prove that a

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15. Jeff Gottlieb & Ruben Vives, *Bell city manager might be highest paid in nation: $787,637 a year*, L.A. TIMES (July 14, 2010), https://web.archive.org/web/20100722021336/http://latimesblogs.latimes.com/lanow/2010/07/bell-city-manager-might-highest-paid-in-nation-787637-a-year.html [https://perma.cc/WA4A-AF5Q]; *Ex-city manager among 8 arrested in Bell scandal*, L.A. DAILY NEWS (Aug. 28, 2017), https://www.dailynews.com/2010/09/21/ex-city-manager-among-8-arrested-in-bell-scandal/[https://perma.cc/XQ2C-UUXV].

16. Rob O'Dell et al., *"Mass Disaster" grows at the U.S.-Mexico border, but Washington doesn't seem to care*, THE DESERT SUN (accessed Jan. 15, 2025). https://www.usatoday.com/border-wall/story/mass-disaster-grows-u-s-mexico-border/1009752001/ [https://perma.cc/9XU2-7XXX].

17. CUILLIER & DAVIS, *supra* note 9, at 8.

18. CUILLIER & DAVIS, *supra* note 9, at 5 (citing Louis Brandeis, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT (1933)).

19. Edward M. Schaffer, *A Look at the California Records Act and Its Exemptions*, 4 GOLDEN GATE U. L. REV. 203, 204 (1974).

20. *Id*. at 210-11.

21. *See* CAL. GOV'T CODE § 7921.000 (West); Freedom of Information Act, 5 U.S.C. § 552.

record should be made public. It is the government's job to prove that it should be made secret."[22]

FOIA explicitly delineates nine exceptions to this default: exempted from mandatory disclosure is (1) information that could risk the national defense; (2) information that is "related solely to the internal personnel rules and practices of an agency"; (3) information legally protected from disclosure by another law; (4) trade secrets or other commercial or financial information; (5) communications "within or between agencies, including those protected by" the deliberative process privilege, attorney-work product or attorney-client privilege, or presidential communications privilege; (6) information that "would invade another individual's personal privacy" if disclosed; (7) investigatory files generated for law enforcement purposes that meet one of several other requirements; (8) information compiled by agencies "that concerns the supervision of financial institutions"; and (9) "geological information on wells."[23]

FOIA's structure was highly intentional. For example, its purpose, to "protect the right of the public to information," was "textually embedded" in its preamble.[24] These "statements are largely accepted as interpretive aides."[25] As a whole, the act is highly "textually detailed" and it even "tells the judiciary how to approach ambiguity—in favor of disclosure."[26]

It also established *de novo* judicial review, "the most aggressive judicial review standard available."[27] This review standard, according to a review of legislative history by article author Margaret B. Kwoka, was believed by "many in Congress" to be "one of FOIA's most important features."[28] Further, the act also placed the burden of proof on recalcitrant government agencies to demonstrate why an exemption applies.[29] In creating these requirements, FOIA "made courts the final arbiters over information disclosure, instructing them to enforce a presumption of open access to government records."[30]

FOIA also forbade nondisclosure solely because only parts of a record are entitled to an exemption, instead requiring redaction of protected material.[31] It provided that some attorneys' fees could be recovered against the government after a

22. CUILLIER & DAVIS, *supra* note 9, at 25.
23. 5 U.S.C. § 552(b)(1)-(9).
24. John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REG. 575, 581-82 (2019).
25. *Id.* at 582.
26. *Id.* at 605.
27. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 712–13 (2002).
28. Margaret B. Kwoka, *Deference,* Chenery*, and FOIA*, 73 MD. L. REV. 1060, 1067 (2014).
29. *See id.*
30. Brinkerhoff, *supra* note 24, at 594.
31. 5 U.S.C. § 552(b).

successful appeal against a records request denial.[32] And it dictated that the exemptions themselves were not mandatory; they *could* be appropriately applied where the releasing agency felt necessary, but a record falling under an exemption could still be disclosed.[33]

In sum, FOIA was clearly meant as "a major structural and doctrinal shift toward transparency."[34] Applied correctly, it "represents one of the strongest government accountability measures Congress has ever adopted."[35] (In practice, it is rather "a sad, disappointing story of a second-best, not very good alternative."[36]).

Congress' intentions for the act, aside from being explicit in the language and structure of the law itself, are also easily inferred both from the circumstances the act was directed at addressing and from the judicial and legislative history from the years immediately following its passage.

The law was a direct response to "the near-exclusive control that agencies held over their records before FOIA's enactment," despite the APA's weak attempt at promoting transparency.[37]

And very soon after the passage of the Act at least one district court, the Southern District of New York, immediately attempted to revert back. In 1969, it ruled in *Consumers Union of U.S., Inv. v. Veterans Administration* that its equity powers allowed it to affirm nondisclosure of the raw scores of hearing aid tests, even though none of the enumerated exemptions applied, because "the danger of the public being misled by releasing the quality point scores and the disruption of the VA programs that releasing the scoring scheme would cause outweighs any benefits."[38]

Congress immediately responded with an amendment to the Act that removed all doubt: Only the nine explicit exemptions were still good law. FOIA was unquestionably meant to exchange "amorphous balancing with clear rules."[39] "As one agency official complained," a near-contemporaneous commentator wrote, "it was a 'simple, self-executing word formula' that allowed agencies to withhold information only as 'specifically stated' in nine discrete, exclusive exemptions."[40]

B. STRUCTURE AND PURPOSE OF CPRA

Meanwhile, by 1968 California was already a leader of the nationwide trend toward free public records access. And, as it so often is, the state had long since

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32. § 552(a)(4)(E)(i). This appeared in the act's first amendment. *See* Schaffer, *supra* note 19, at 208.

33. BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW 11 (updated June 27, 2024).

34. Brinkerhoff, *supra* note 24, at 595.

35. Kwoka, *supra* note 28, at 1061.

36. Mark Fenster, *FOIA as an Administrative Law*, *in* TROUBLING TRANSPARENCY: THE FREEDOM OF INFORMATION ACT AND BEYOND 52-70, (David Pozen & Michael Schudson eds. Columbia University Press, 2018).

37. Brinkerhoff, *supra* note 24, at 593.

38. Consumers Union v. Veterans Admin., 301 F. Supp. 796, 808 (S.D.N.Y. 1969); *See* Schaffer, *supra* note 19, at 206.

39. Brinkerhoff, *supra* note 24, at 596.

40. *Id*. (footnote omitted).

become bogged down and tangled up by competing interests during that decades-long fight.

Its first flirtation with an affirmative right of access came in 1872. That year, the codification of a common law action evolved into a state law requirement that "public records and other matter in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection of any citizens of the state."[41]

The negative common law, however, lingered. In 1938, the California Supreme Court refused to accede to the language of the 1872 law as written and ruled that public policy could warrant nondisclosure of a record even where no enumerated exemptions applied.[42] The California legislature responded with "a series of attempts to loosen the legal straight-jacket that bound public records" that included the passage of the Brown Act in 1953.[43]

In 1967, still seeking a broader solution to the problem of inaccessible records, the California legislature assembled journalists, lawyers, and professional associations into its new Open Records Advisory Committee.[44] The committee, leaning heavily on FOIA, would assist it in drafting what would ultimately become the CPRA.[45]

With a key difference. Unlike FOIA, the CPRA ended up with a proviso that harkened back to that 1983 California Supreme Court decision after its drafters, in essence, wrote the common law balancing test—asking whether public policy of a record is better served by disclosure or nondisclosure—into the law proper. This "catch-all" appears in what is now Section 7922 of the act:

> An agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter *or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*[46]

Interestingly, the catch-all exemption appears not as an explicit exemption of its own, living among other such exemptions like attorney-client communications and work product, but instead as a broader rule governing agency execution of the law; implicitly placing greater importance on the balancing test by implying it should serve as an overarching theme of agency decisions, not just as one of several exemptions to be taken into consideration.

Further, compare Section 7922 to a similar use of the test in Section 7927.500, which mirrors FOIA's Exemption 5: "[P]reliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the

41. Schaffer, *supra* note 19, at 211 (quoting Stats. 1951, c. 655, p.1851, § 23).
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. Cal. Gov't Code § 7922.000 (West 2023) (emphasis added).

ordinary course of business, *provided that the public interest in withholding such records clearly outweighs the public interest in disclosure*."[47] This balancing test is clearly meant to be restrictive, serving to narrow the exemption by at least theoretically requiring the government to determine whether an exception is necessary.

But the result of Section 7922 in particular was a state public records act that, as a whole, appeared to mimic FOIA but was actually in theory drastically weaker than it.[48] The emphasis CPRA's drafters placed on following in FOIA's footsteps makes this an especially odd result.[49]

C. CALIFORNIA COURTS' FURTHER EXPANSION OF THE CPRA

Beyond the plain language of the statute, California courts further expanded the catchall provision's applicability in a series of cases dating back to at least 1995.

There was a chance to limit the impact of the exemption and preserve CPRA's overall purpose, but it appears to have been missed. In 1995, the California Court of Appeals for the Fourth District in *City of Hemet v. Superior Court* determined that the government could only turn to CPRA's catch-all exemption as a last resort, after it had considered all the act's explicit exemptions in sections 7923.600-7929.610[50] and deemed each inapplicable to the records at issue. It pointed out that CPRA already "contains no fewer than twenty-four express exemptions" and that "[g]iven the Legislature's concern to provide specific exemptions for a plethora of limited and obscure categories, it is very unlikely that it would have left" police records, which Hemet was attempting to avoid disclosing, "to be covered only by the vague catch-all of section 7922."[51]

But this perspective didn't stick. In 2017, despite the existence of a similar (but distinct) provision under Section 6254(c) that was applicable to the disclosure question at bar, the Supreme Court of California in *City of San Jose v. Superior Court* analyzed Section 7922 independently and held it created "a balance between the public's interest in disclosure and the individual's privacy interest."[52] On that basis, it upheld an agency's refusal to provide the names, addresses, and

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47. *Compare* Cal. Gov't Code § 7927.500 (West 2022), *with* 5 U.S.C. § 552(b)(6).

48. "In theory" is the key phrase here. In practice, CPRA requests are often more productive than FOIA requests for the simple reason that, as previously noted, the federal government is truly terrible at timely records disclosure. *See FOIA is Broken: A Report, Staff of H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2016). Further, excellent research has been done arguing that, contrary to FOIA's clear text and purpose, the federal court system has re-injected common law and Administrate Practice Act norms into the Act. *See* Brinkerhoff, *supra* note 24, at 575; Kwoka, *supra* note 28, at 1060. *See also* Rebecca Silver, *The Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 732 (2006); Nathan Slegers, *De Novo Review under the Freedom of Information Act: The Case against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 210 (2006).

49. *See Schaffer*, *supra* note 19, at 212 (explaining how the CPRA is "[m]odled after the Federal Freedom of Information Act").

50. Cal. Gov't Code § 7923.600-7929.610 (West 2023). These were formerly housed under § 6254.

51. City of Hemet v. Superior Court, 44 Cal. Rptr. 2d 532, 539 (Cal. Ct. App. 1995).

52. City of San Jose v. Superior Court, 389 P.3d 848, 859 (Cal. 2017).

telephone numbers of citizens who lodged airport noise complaints with the city of San Jose—even though the records were likely the sort for which the legislature could have predicted a disclosure request.[53]

This represented a significant expansion of the catch-all exemption's scope that had been underway, albeit less explicitly, since the *Hemet* decision. The *Hemet* rule essentially imposed an initial step to the Section 7922 catchall test: It required a record be so unique that a request for its disclosure could not have been anticipated by the legislature. *City of San Jose* removed that first step, freeing the government to lean on Section 7922 whenever desired. The police records disclosed under *Hemet*, for example, would be subject to an entirely different, more complex analysis under *City of San Jose*. The result has been a steady reliance on the provision by the government.

Although less dramatically, California also expanded the exemption by locating the state's "deliberative process" exemption in Section 7922, not Section 6254.

The deliberative process exemption does not explicitly appear in either FOIA or CPRA, but it has been recognized by the highest authorities in both systems.[54] It mirrors the legal discovery privilege of the same name, which lets agencies withhold documents that involve "predecisional" deliberation as part of an agency's decision-making process under the ethos that to do otherwise would stifle the agency's capacity to operate.[55]

Both California and the federal government have applied the privilege to records requests, but they went about it in different ways. The U.S. Supreme Court located FOIA's deliberative process exemption under Exemption 5, which covers governmental inter- or intra-agency memorandums or letters.[56] California, on the other hand, read it into Section 7922—despite the fact that the CPRA has its own exemption provision, Section 7927.500, that appears very similar to FOIA's Exemption 5.[57] Like Exemption 5, Section 7927.500 covers "interagency or intra-agency memoranda," and it also protects "[p]reliminary drafts" and "notes," all if "the public interest in withholding those records clearly outweigh the public interest in disclosure."[58] This allowed them to expand the reach of the deliberative process privilege beyond simply "inter or intra-agency memoranda," "letters" and "notes."[59]

The issue became somewhat relevant in *Times Mirror Company v. Superior Court*, a 1991 state case still cited regularly.[60] The case saw the *Los Angeles Times* seek the California governor's past appointment calendars and schedules

53. *See Hemet*, 44 Cal. Rptr. 2d at 538-39.
54. *See* United States Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 263 (2021).
55. *See id.*
56. *See* Brinkerhoff, *supra* note 24, at 582.
57. Cal. Gov't Code § 7927.500.
58. *See id.*
59. *See id.*
60. Times Mirror Co. v. Superior Ct., 813 P.2d 240 (Cal. 1991).

under CPRA after its request for the records was rejected by the state. The governor's office had denied the request under then-section 6254(i), which protected "correspondence of and to the Governor or employees of the Governor's office,"[61] and under section 7922's catch-all exemption.[62]

On appeal, the court did not address whether it considered calendars to be "inter or intra-agency memoranda" under section 6254(a); but it rejected the similar contention that the governor's calendars constituted "correspondence" under section 6254(i). In doing so, the court upheld the denial of the records solely on the basis of the deliberative process privilege in the catch-all exemption, stating that:

> Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent.[63]

Despite acknowledging a public interest in access to government access evidence as to "whether the Governor was, in fact, receiving a broad range of opinions, and ultimately whether the state's highest elected officer was attending diligently to the public business," the *Times Mirror Company* court ultimately held that public interest clearly weighed in favor of nondisclosure. The court justified its holding by claiming that "[t]he deliberative process privilege is grounded in the unromantic reality of politics" and that "[t]o disclose *every* private meeting or association of the Governor and expect the decision making process to function effectively, is to deny human nature and common sense and experience."[64]

Had the deliberative process privilege been located in section 6254(a), the court would have at least had to analyze first whether the governor's calendars were inter- or intra-agency memoranda—and considering it held that calendars were not "correspondence," it is highly probable that would have been the court's final stop, possibly leading to a different outcome. However, the court avoided this step by instead relying on a broadened understanding of Section 7922. As a result, *any* government materials—not just communications—can be withheld under the deliberative process privilege.

II. PROBLEMS OF AN EXPANDED CPRA AND PROPOSED SOLUTIONS

A. SECTION 7922 PROMOTES CORRUPTION

In practice, several issues with the catch-all exemption become immediately apparent.

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61. *Id.* at 241 (quoting Cal. Gov't Code § 6254(i)).
62. *Id.* at 251.
63. *Id.*
64. *Id.* at 252.

First, the broad nature of the exemption replaces a bright-line test with a mess of competing considerations. It opposes the very sentiment of the act's preamble, destroying the "default" that all records public unless an exception applies. In their book *redacted,* journalist Jesse Marx and Professor Lily Irani describe a lawyer with long-time experience fighting records nondisclosure under CPRA who explains that litigation involving the exception "becomes a truly subjective fight."[65]

To be sure, the provision is not *entirely* subjective. A judge hearing a CPRA case must at least conduct an *in camera* review of the records being disputed,[66] and they can only rule for the government if there is "clear overbalance on the side of confidentiality."[67] But even so, research on the federal version of the law shows that generally "courts place little weight on the interests of FOIA's plaintiffs,"[68] and a similar analysis can be conducted with respect to CPRA.

In the absence of the bright-line rule, the plaintiff faces an uphill battle. First, the government, with its greater resources, is better equipped than most plaintiffs to carry out lengthy, complex litigation.[69]

Further, without the records in question already in hand, the plaintiff may struggle to demonstrate the public interest in disclosure. Although the burden of proving the public interest in nondisclosure is technically on the government, it can "give the court a body of evidence that would not necessarily be available to a member of the public."[70]

The government can also argue, rarely inaccurately, that it is simply too overburdened to fulfill large requests; and it can do so in the knowledge that the court system is often sympathetic to the claim.[71] For example, the *Times* court also provided a familiar, albeit unpersuasive, justification for its ruling, following up its primary reasoning with the statement that "whatever merit disclosure might otherwise warrant in principle is simply crushed under the massive weight of the [Los Angeles] Times's request in this case: the newspaper seeks almost five years of the Governor's calendars and schedules, covering undoubtedly thousands of meetings, conferences and engagements of every conceivable nature."[72] This reasoning directly parallels the findings in *FOIA's Common Law*, and it very clearly obstructs an affirmative public right to government information.[73]

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65. LILY IRANI & JESSE MARX, *REDACTED* 88 (Taller California, 2020).

66. *Id.*

67. City of Hemet v. Superior Court, 44 Cal. Rptr. 2d 532, 539 (Cal. Ct. App. 1995) (citing Black Panther Party v. Kehoe, 117 Cal. Rptr. 106, 114 (Cal. Ct. App. 1974)).

68. Brinkerhoff, *supra* note 24, at 597. Though it does not have a specific provision allowing it, federal courts often apply an informal balancing test when applying FOIA. *See id.*

69. Kwoka, *supra* note 28, at 1082-83 (explaining in particular how the government's ability, in FOIA cases, to raise successive new arguments allows it to drag litigation out to the extent of a complainant's resources).

70. IRANI & MARX, *supra* note 56, at 88.

71. *Id.* at 21.

72. Times Mirror Co. v. Superior Ct., 813 P.2d 240, 252 (Cal. 1991).

73. *See* Kwoka, *supra* note 28. California courts have since upheld use of the exemption in cases in which the burdensomeness of a request clearly outweighs the public interest in disclosure; but they have set the bar

Second, and most importantly, Section 7922's subjectivity, and the difficulty that subjectivity poses in litigation, provides government attorneys a shield behind which they can abuse their power to withhold records. This results in corruption. Lots of corruption.

As demonstrated, the courts themselves are inconsistent in their application of the balancing tests; government attorneys, or attorney-directed civil servants, are even more so. Whether they are actively self-serving or simply susceptible to noble cause corruption, government agencies are incentivized not to release damning records and face few consequences for failing to do so, safe in the knowledge that vast majority of CPRA request denials will never reach a district or superior court. This imbalance of incentives poses the greatest threat to public integrity. Asking government agencies to determine what information fits the guidelines for release is asking the watchman to watch himself.

The government has already demonstrated willingness to use FOIA's narrower exemptions for absurd reasons.[74] For example, *The Art of Access*, a 1974 weekly international terrorism report published by the CIA that was originally released with partial redactions, was discovered in whole in 2003. The information initially redacted in the report "revealed an internal office joke about a potential terrorist attack on the North Pole by the 'Group of the Martyr of Ebenezer Scrooge.'"[75]

"If public officials like these are so brazen at trying to keep public records secret with outrageous excuses, imagine how often they deny valid requests through seemingly benign reasons," write Cuillier and Davis.[76] In another section, they note, "Agencies make exemption claims unsupported by the law all the time. They bend and twist exemptions to suit their needs, and they bet the house you'll take the denial, sigh and walk away."[77]

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high. In *Bertoli v. City of Sebastopol*, an attorney attempted to use CPRA to an absurd extent after his client, a fifteen-year-old girl, was grievously injured in an automobile accident that might have been caused by the poor condition of an intersection. His pursuit of records was so aggressive that the appellate court affirmed the trial court's determination that public interest in a functional government was greater than public interest in nondisclosure. However, it reversed the trial court's award of costs to the city government, finding the city hadn't proved the attorney had submitted his PRA requests "for an improper purpose (such as harassment or delay)" and that, absent illegality, "the petitioner's motive in making the request is essentially irrelevant." In doing so, *Bertoli* established a stronger preference for disclosure despite associated costs than *City of San Jose*, though with more limited impact because the case only reached the appellate level. Bertoli v. City of Sebastopol, 182 Cal. Rptr. 3d 308, 308 (Cal. Ct. App. 2015).

74. For more, look no further than the House of Representatives Committee on Oversight & Government Reform's take on FOIA. In a 2016 report, the committee compared, side-by-side, publicly released records that had been partially redacted under claims of exemptions and the unredacted versions of those records. Most redactions were made under the deliberative process privilege, "which has come to be known as the 'withhold it because you want to' exemption," it noted. And were illegal. *See supra* note 1.

75. *See* CUILLIER & DAVIS, *supra* note 9, at 105.

76. *Id.*

77. *Id.*

The situation only worsens when the unclear, highly subjective Section 7922 enters the picture. Lay members of the public faced with denials that cite obviously incorrect exemptions have a much better chance to hold their governments accountable than those they are faced with the beige statement that "public interest in nondisclosure is greater than public interest in disclosure." The latter requesters must be willing to risk significant time and money for a very uncertain victory that requires the court to essentially side with them on a judgment call.[78] Practically, therefore, requesters are left at the mercy of records custodians—the very outcome FOIA and CPRA were designed to mitigate.

The incentive structures of public access laws are not set up for success, either. Cuillier and Davis report that "[a] 2007 study of the penalties and response requirements of state public records laws showed that 38 of the 50 states had meager and inadequate repercussions for illegally withholding records."[79] In turn, a study out of the University of Amherst found, for example, that public records requests submitted by journalists were more regularly delayed than other requests as agencies sought "time to rebut critical stories."[80] The study determined that "agencies face two competing pressures: the legal requirement to disclose information vs. the pressure to control information to manage public perceptions and save face."[81]

California is obviously not exempt from corruption.[82] In 2024, in a lawsuit brought by the Association of Deputy District Attorneys for Los Angeles against Los Angeles District Attorney George Gascon that accused him of "repeatedly and deliberately violating the California Public Records Act" by either ignoring requests or rejecting them with repeated citations to "unfounded and non-existent legal justifications."[83] These claims also appeared in a series of settlements by San Diego District Attorney Mara Elliott's office over five years, from 2018-2022.[84]

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78. *See, e.g.*, Times Mirror Co. v. Superior Ct., 813 P.2d 240, 240 (Cal. 1991); *compare to Bertoli*, 182 Cal. Rptr. 3d at 308.

79. *See* CUILLIER & DAVIS, *supra* note 9, at 154.

80. *Id.* at 152.

81. *Id.*

82. For another example, the San Francisco Chronicle also reported in 2024 that it had been waiting more than ten months for the Alameda district attorney's office to release basic prosecution data. The newspaper was seeking to examine, for example, "whether [DA Pamela Price was] charging a larger or smaller share of violent crimes such as assaults and robberies that police bring to her office for review, or diverting more people to rehabilitative and treatment programs," information usually readily available to reporters. Note that the issue in that case was delay, not a claimed exemption. *See* Susie Neilson & Daniel Lempres, *Almeda DA Pamela Price's charging record is still a mystery – after nearly a year. Here's Why*, San Francisco Chronicle (March 1, 2024). https://web.archive.org/web/20240424190803/https://www.sfchronicle.com/bayarea/article/pamela-price-alameda-attorney-18677716.php.

83. *ADDA Sues DA Gascon for Repeated Violations of the California Public Records Act*, ASS'N OF DEPUTY DIST.ATT'YS BD. STATEMENTS (Sep. 12, 2024) https://www.laadda.com/2024/09/12/adda-sues-da-gascon-for-repeated-violations-of-the-california-public-records-act/#:~:text=Los%20Angeles%2C%20September%2011%2C%202024,the%20federal%20Freedom%20of%20Information.

84. Jeff McDonald, *San Diego is paying hundreds of thousands to settle public-records lawsuits*, The San

It would be difficult to support the proposition that these were unintentional. In 2019, California's journalist population was thrown into an uproar after a state senator, on behalf of Elliott, introduced an amendment to CPRA that would have shifted the burden to plaintiffs to prove that a government agency "knowingly, willfully and without substantial justification failed to respond to a request for records."[85] If enacted, the law would have functionally allowed an agency to block public access to government records, and then require requesters—who lacked access to government records—to prove it had done so intentionally; a task that would likely require, well, access to government records.

Elliott's office then withheld email communications with that state senator regarding the proposed amendment. Elliott cited the attorney work product exemption, which, like the discovery privilege, only applies to materials prepared specific to and in advance of litigation.[86]

B. A SOLUTION: ENFORCEMENT OF ETHICS RULES 1.2(d) AND 8.4(c)-(d)

Under administrative law doctrine, citizens are generally limited to bringing civil suit in trial courts against a lawbreaking government agency. In the context of CPRA requests, however, decisionmakers regarding agency records are sometimes attorneys, and attorneys are required to follow the California Bar Association's code of ethics. One possible solution could therefore be to appeal not to the courts, but to the Bar, after particularly egregious CPRA violations.

This Note does not suggest that all, or even most, CPRA cases involving attorney decision-makers should raise the specter of disbarment. But when an attorney such as Elliott has repeatedly failed to fulfill their duty to the public, there is no reason to leave the option off the table. Government lawyers "should have heightened responsibility because they themselves are government officials,"[87] and access to public records is one of the most powerful tools citizens have to hold their governments to account. The issue is important and the consequence is reasonable.

Diego Union-Tribune (Dec. 27, 2022) https://web.archive.org/web/20221227135916/https://www.latimes.com/california/story/2022-12-27/san-diego-cpra-public-records-lawsuits [https://perma.cc/BHU7-2JQN].

85. Sara Libby, *Hueso, City Attorney Pushing Law to Make Enforcement of Public Records Act Far More Difficult*, Voice of San Diego (Feb. 26, 2019) https://voiceofsandiego.org/2019/02/26/hueso-city-attorney-pushing-law-to-make-enforcement-of-public-records-act-far-more-difficult/ [https://perma.cc/9SAU-9ZJ8].

86. Request 19-904, City of San Diego NextRequest Portal (closed March 11, 2020), https://sandiego.nextrequest.com/requests/19-904 [https://perma.cc/5MLU-5RE6]; *see* County of Los Angeles v. Superior Court (Axelrad), 98 Cal. Rptr. 2d. 564, 574 (Cal. Ct. App. 2000) (ordering that a trial court should have determined whether withheld government records "were specifically prepared by the County for use in litigation," as, if they were, "the records [were] protected from disclosure under the pending litigation exemption").

87. Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 151, 160 (2019) (citing Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000)).

In addition, the California State Bar's Rules of Professional Conduct include the requirements that lawyers "shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is . . . a violation of any law, rule, or ruling of a tribunal."[88] The rules likewise proscribe engagement "in conduct that is prejudicial to the administration of justice" and "in conduct involving dishonesty . . . or intentional misrepresentation."[89] So when district attorneys intentionally claim an exemption that does not apply to withhold government records, they violate the California Public Records Act by engaging in intentional misrepresentation, leaving them open to ethics claims under PRC 8.4(c) and (d).When they direct civil servants to do so, they are vulnerable to an ethics claim under PRC 1.2(d).

Lawyers that serve the government play a crucial role as a gatekeeper for upholding the rule of law, especially when they operate in executive agencies that face limited judicial oversight.[90] When government attorneys protect their individual agencies by withholding public records, they "fail to uphold their ethical and professional obligations" because they have "mis-identif[ied] their client"; as government lawyers, they "ultimately work for 'a *sovereignty* whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, . . . [is] that justice shall be done.'"[91]

88. CALIFORNIA RULES OF PROF'L CONDUCT R. 1.2.1.

89. CALIFORNIA RULES OF PROF'L CONDUCT R. 8.4(c)-(d).

90. *See* Margaret Tarkington, *Introduction: The Ethics of Lawyers in Government*, 52 IND. L. REV. 265, 265 (2019).

91. *Id*. at 269 (citing Berger v. United States, 295 U.S. 78, 88 (1935)).