Public Records Act Requests and Pending Litigation

Presented to

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Public Records Act Request While Lawsuit is Pending

The fact that a lawsuit is pending does not necessarily prevent a party to the suit from making a request under the Public Records Act.

Public Records Act vs. Civil Discovery

Different scope and procedures apply to a Public Records Act request that present both disadvantages and advantages to the requesting party, as compared to civil discovery.
Disadvantages to Requesting Party

- All privileges that apply to civil discovery also apply to Public Records Act Requests:
  - The PRA exempts from production “records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” (Gov. Code §6254(k).)

- But not all exemptions under the Public Records Act apply to civil discovery. (Gov. Code §6260; Marylander v. Superior Court (2000) 81 Cal.App.4th 1119.)
Public Records Act Exemptions That Do Not Apply in Civil Discovery

PRA exempts “preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.” (Gov. Code §6254(b).)
Public Records Act Exemptions That Do Not Apply in Civil Discovery

Analogous civil discovery exemption covers only those documents protected by the “official information” privilege:

“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” where “there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” (Evidence Code §1040; Marylander v. Superior Court (2000) 81 Cal.App.4th 1119.)
Public Records Act Exemptions That Do Not Apply in Civil Discovery

“Balancing of interests” exemption applicable only to PRA requests:

“The agency shall justify withholding any record by demonstrating 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.” (Gov. Code §6255.)
Public Records Act Exemptions That Do Not Apply in Civil Discovery

Gov. Code §§ 6253.2 through 6254.17 exempt numerous types of records for various public policy reasons.
Other Disadvantages to the Requesting Party

- A public agency need only provide documents that exist – no requirement to prepare a document or answer substantive questions. (Gov. Code §6252(e).)

Other Disadvantages to the Requesting Party

The document requested under the PRA must meet the definition of “public record:”

“any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.” (Gov. Code §6252(e).)
Other Disadvantages to the Requesting Party

If the public agency refuses to produce a record, the requesting party must file suit to compel production. (Gov Code §6258.)

In civil discovery, the requesting party need only make a motion to compel in the pending litigation, which has a shorter time line. (See e.g. Code Civ. Proc. §§ 2031.310, 2031.320.)
Advantages of Making a Public Records Act Request

- Request can be made during discovery “hold” at the outset of a case.
- Request can be made after discovery “cutoff,” or during/after trial.
- Request can be made even if motion to compel in the civil case has been denied. (County of Los Angeles v. Superior Court (Axelrad) (2000) 82 Cal.App.4th 819.)
Advantages of Making a Public Records Act Request

- Records *may* be obtained more quickly under PRA request.
- “Walk-in” verbal requests are proper – records are open to inspection “at all times” during office hours and must be made available “promptly.” (Gov. Code §6253(a), (b).)
- Agency must respond within 10 days with a determination as to whether records are to be produced (14-day extension available under certain circumstances). (Gov. Code §6253(c).)
- Civil discovery response times vary from 10 to 30 days, and can be longer.
Advantages of Making a Public Records Act Request

A PRA request is less expensive to prepare:

- No attorney need be involved
- Simple letter, e-mail or verbal request is sufficient to require agency to comply. (Los Angeles Times v. Alameda Corridor Transportation Authority (2001) 88 Cal.App.4th 1381.)

- Civil discovery requires that the request be prepared in a particular format.
Advantages of Making a Public Records Act Request

Party making a PRA request need not show relevance, or any reason for the request. (Gov. Code §6257.5.) Requesting party need not have a personal interest in the information requested (“stealth” requests on behalf of others).

Party in civil discovery may be required to show “relevance to subject matter” of litigation or “reasonably calculated to lead to discovery of admissible evidence.” (Code Civ. Proc. §2017.010.)
Advantages of Making a Public Records Act Request

Public agency has an obligation to assist the requesting party:

- must assist in narrowing the focus of the request, identifying documents
- must assist in describing IT and physical location of documents
- must assist in providing suggestions “for overcoming any practical basis for denying access to the records or information sought.” (Gov. Code §6253.1(a).)

No such formal requirements for civil discovery, other than “meet and confer.”
Advantages of Making a Public Records Act Request

Harder for public agency to recover attorneys’ fees if request unsuccessful:

   Agency may only recover fees under PRA only if requesting party’s case is “clearly frivolous.” (Gov. Code §6259(d).)

   Court in civil discovery dispute must award fees to prevailing party unless losing party acted with “substantial justification” or sanctions would be “unjust.” (See, e.g. Code Civ. Proc. §2030.010.)
The “Pending Litigation” Exemption Under the Public Records Act

An agency need not disclose “records pertaining to pending litigation to which the public agency is a party . . . until the pending litigation has been finally adjudicated or is otherwise settled.” (Gov. Code §6254(b).)
The “Pending Litigation” Exemption

This exemption has been narrowly construed by the courts:

It applies only to documents specifically prepared by, or at the direction of, the local agency for use in litigation; includes documents prepared in anticipation of litigation. (Fairly v. Superior Court (1998) 66 Cal.App.4th 1414.)

It is not, however, limited to documents prepared by agency counsel. (City of Los Angeles v. Superior Court (1996) 41 Cal.App.4th 1083.)
Can an Agency Object to a PRA Request Because a Lawsuit is Pending?

Yes, under limited circumstances.

Example: a request for an appraisal while an eminent domain lawsuit is pending. (Gov. Code §6254(h).)
Can an Agency Object to a PRA Request Because a Lawsuit is Pending?

Hypothetical

A project opponent sues the lead agency for failure to comply with CEQA. Prior to preparation of the administrative record, the opponent makes a Public Records Act request for numerous documents relating to the project.

Can the agency refuse to comply with the request?
Can an Agency Object to a PRA Request Because a Lawsuit is Pending?

Hypothetical

Prior to the date for exchange of expert witness information in a pending suit involving a public agency, one party makes a PRA request for all documents read, considered or relied upon by any expert witness retained by the public agency.

Can the agency refuse to comply with the request?
Can an Agency Object to a PRA Request Because a Lawsuit is Pending?

Hypothetical

Prior to the expiration of the initial hold on civil discovery, the plaintiff in a lawsuit with a public agency submits a Public Records Act request for all documents relevant to the issues in the case.

Can the agency refuse to comply with the request because the hold on discovery is still in place?

Public Records Act requests are often time sensitive.

Agency may take up to 24 days to provide a substantive response, and may not have to produce documents until later.

Lawsuits are rare, and there is almost always time to negotiate, or the issue may become moot.

Caution: Agency may not deliberately delay or obstruct. Be sure there is a good faith basis for any objection. (Gov. Code §6253(d).)
Questions?

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