

## Memorandum 2019-47

**California Public Records Act Clean-Up (Comments on  
Tentative Recommendation)**

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As directed by the Legislature,<sup>1</sup> the Commission<sup>2</sup> is working on a proposed recodification of the California Public Records Act (“CPRA”).<sup>3</sup> The goal is to make the CPRA more user-friendly, without changing its substance. Earlier this year, the Commission approved a tentative recommendation on this topic,<sup>4</sup> which was widely circulated for comment with a due date of August 26, 2019.

Thus far, the Commission has received the following comments:

*Exhibit p.*

- Jolie Houston, California Public Records Act Committee of the League of California Cities (8/23/19) ..... 1
- Whitney Prout, California News Publishers Ass’n (8/26/19) ..... 5

The comments are discussed below, as well as some issues identified by the staff.

The discussion is organized as follows:

- A. Description of the commenters.
- B. Overall reaction to the proposed recodification.
- C. Support for, or no position on, specific aspects of the proposed recodification.
- D. Mistakes that are easy to fix.
- E. Consistency.
- F. Organizational issues and related matters.
- G. Other concerns about specific aspects of the proposed recodification.

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1. See 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth & Chau)).

2. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

3. Gov’t Code §§ 6250-6276.48.

4. Tentative Recommendation on *California Public Records Act Clean-Up* (May 2019) (hereafter, “Recodification TR”). The tentative recommendation can be downloaded from the Commission’s website at <http://www.clrc.ca.gov/G400.html>.

## H. New legislation.

Unless otherwise specified, all further statutory references in this memorandum are to the Government Code.

### A. THE COMMENTERS

Despite extensive efforts to alert stakeholders to this study,<sup>5</sup> there were not many comments on the tentative recommendation, perhaps due to its length. Importantly, however, the comments are from major organizations representing important blocs of stakeholders that regularly work with the CPRA. The Commission much appreciates their input and is grateful for the time and effort that they put into carefully reviewing the 217-page tentative recommendation.

One of the comments is from Jolie Houston, writing on behalf of the CPRA Committee of the City Attorneys' Department of the League of California Cities, "an association of 478 California cities united in promoting the general welfare of cities and their citizens."<sup>6</sup> Members of this committee (hereafter, the "City Attorneys' CPRA Committee") are "experienced attorneys from public agencies and law firms specializing in municipal law."<sup>7</sup> As Ms. Houston explains:

The Committee drafted and published a comprehensive guide to the CPRA, "The People's Business," which is widely used by public agencies throughout California. In addition, the Committee members routinely update the public records sections of the Municipal Law Handbook, provide input and assistance on appellate cases involving CPRA issues, review and comment on legislation related to the CPRA, and participate in trainings and seminars about the CPRA for City Attorneys, City Clerks, Police Departments, and other public agency personnel.<sup>8</sup>

The other comment is from Whitney Prout, writing on behalf of the California News Publishers Association ("CNPA"), which is "the voice of the newspaper industry in California."<sup>9</sup> "More than 400 newspapers, including all of the major

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5. See, e.g., Memorandum 2017-37; Minutes (Aug. 2017), p. 5. In June 2019, the Recodification TR and a press release were posted to the Commission's website and distributed to its electronic and traditional mailing lists. In early August, the Commission posted and distributed a tentative recommendation consisting of conforming revisions for the proposed CPRA recodification. See Tentative Recommendation on *California Public Records Act Clean-Up: Conforming Revisions* (July 2019) (hereafter, "Conforming Revisions TR"). The press release for the Conforming Revisions TR included a reminder about the upcoming due date for comments on the Recodification TR.

6. Exhibit p. 1.

7. *Id.*

8. *Id.*

9. Exhibit p. 5.

daily newspapers published in this state, are CNPA members.”<sup>10</sup> CNPA “represents the interests of newspapers ... in legislative, regulatory, and judicial processes.”<sup>11</sup>

The Commission is fortunate to have received input from groups representing both sides of the CPRA process. Members of CNPA make CPRA requests; members of the City Attorneys’ CPRA Committee respond to CPRA requests.

## B. OVERALL REACTION TO THE PROPOSED RECODIFICATION

Neither of the comments expressly “supports” or “opposes” the Commission’s proposed CPRA recodification. Rather, the comments are framed in different terms.

### **Comment of the City Attorneys’ CPRA Committee**

The City Attorneys’ CPRA Committee “appreciates the opportunity to comment on the CLRC’s Tentative Recommendation” and “remains committed to offering as much professional assistance as you might need or want for this important project.”<sup>12</sup> The committee expresses support for certain aspects of the proposed recodification<sup>13</sup> and makes suggestions on other particular points<sup>14</sup> (including some suggestions that apply to the recodification as a whole).<sup>15</sup> Those comments on specific matters are discussed later in this memorandum. Aside from providing such input, the City Attorneys’ CPRA Committee simply thanks the Commission for “the generous opportunities” to participate in this study, and says the committee is available to answer any questions or “meet with CLRC staff” regarding the committee’s proposed recommendations.”<sup>16</sup>

### **Comment of CNPA**

CNPA’s comment is more negative. Although it “commends the Commission for its thorough and diligent work on this project,” and “recognizes and appreciates the tremendous effort made by the Commission in carrying out the

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10. *Id.*

11. *Id.*

12. Exhibit pp. 1, 4.

13. See Exhibit pp. 1, 3.

14. See Exhibit pp. 1-4.

15. See Exhibit p. 2.

16. Exhibit p. 4.

task assigned to it by the Legislature,” CNPA “does have concerns about the tentative recommendation” as a whole.<sup>17</sup> It explains:

As CNPA understands it, the underlying motivation of the Legislature in directing the Commission to study the California Public Records Act (CPRA) and prepare recommended legislation was to make the CPRA easier for the public to understand. Unfortunately, in CNPA’s opinion, the tentative recommendation does not accomplish this objective. *If the tentative recommendation were to be adopted, the CPRA would continue to be a long, complex, and often-times difficult to understand law.*

To be clear, *CNPA believes this result is dictated by the substance, rather than the form, of the CPRA, and no amount of non-substantive revision will meaningfully address the difficulty the public has in understanding the law.*<sup>18</sup>

Thus, in addition to commenting on specific aspects of the tentative recommendation,<sup>19</sup> CNPA encourages the Commission “to, at a minimum, include a discussion in its final recommendation of whether the benefits to the public of a non-substantive revision justify the burden the reorganization will place on practitioners and publishing companies.”<sup>20</sup> In offering this suggestion, CNPA, “recognizes that the Commission’s mandate was to make only non-substantive changes.”<sup>21</sup>

### **Analysis of CNPA’s Suggestion Regarding the Benefits and Burdens of a Nonsubstantive Recodification**

The preliminary part of the tentative recommendation already discusses the benefits and burdens of the proposed recodification, but that discussion is under the heading “Delayed Operative Date.” It says:

#### ***Delayed Operative Date***

Because of the breadth of the organizational changes that would be made by the proposed legislation, the Commission recommends that it be given a delayed operative date. The proposed legislation includes an uncodified provision to that effect, which would delay the operation of the proposed law by six months (i.e., until July 1, 2021).

This delayed operation would provide time for those who work closely with the affected statutes, including legal publishers, to adjust to the new organizational scheme before it takes effect. The

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17. Exhibit p. 5.

18. *Id.* (emphasis added).

19. See Exhibit pp. 6-13.

20. Exhibit pp. 5-6.

21. *Id.*

Commission's comments and the disposition and derivation tables in the Commission's report would also help ease the transition.

Although the proposed recodification would entail some transitional costs (such as updating manuals and regulations), the Commission believes that the long-term benefits of having a better organized, more user-friendly statutory scheme would soon outweigh those transitional costs. The CPRA would become more readily accessible and understandable to laypersons and other persons using it, thus furthering its underlying purposes. Importantly, the new statutory scheme would also afford ample room for future refinement of the CPRA, promoting sound development of the law.<sup>22</sup>

In light of CNPA's suggestion and related concerns, **the Commission might want to consider revising this discussion to some extent.** That could be done in many different ways, depending on the Commission's point of view after considering the input received thus far and any additional input it receives at or before the upcoming meeting.

In deciding how to approach this matter, it may be helpful to know that CNPA would like the operative date for the proposed recodification "delayed for at least one year (to January 1, 2022)."<sup>23</sup> CNPA explains that "[t]his will allow both practitioners and groups that publish guides for the public on the CPRA — such as CNPA — a more suitable amount of time to adjust to the revisions and to update publications."<sup>24</sup>

**One possibility would be to revise the discussion in the preliminary part as shown in ~~strikeout~~ and underscore below:**

**Delayed Operative Date, Transitional Costs, and Offsetting Benefits**

Because of the breadth of the organizational changes that would be made by the proposed legislation, the Commission recommends that it be given a delayed operative date. The proposed legislation includes an uncodified provision to that effect, which would delay the operation of the proposed law by ~~six months (i.e., until July 1, 2021)~~ one year (i.e., until January 1, 2022).

This delayed operation would provide time for those who work closely with the affected statutes, including legal publishers, to adjust to the new organizational scheme before it takes effect. The

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22. Recodification TR at 16-17 (footnote omitted).

23. Exhibit p. 6.

24. *Id.*

Commission's comments and the disposition and derivation tables in the Commission's report would also help ease the transition.

Although the proposed recodification would entail some transitional costs (such as updating manuals and regulations), the Commission believes that the long-term benefits of having a better organized, more user-friendly statutory scheme would soon outweigh those transitional costs. The CPRA would become more readily accessible and understandable to laypersons and other persons using it, thus furthering its underlying purposes.

The Commission recognizes that the CPRA would remain a long, complex statute, subject to many exemptions and intricacies. That is inevitable due to the nonsubstantive nature of this study and, more fundamentally, the difficulties inherent in effectively balancing the competing policies at stake in this substantive area.

Absent sweeping substantive changes, the CPRA will never be simple to use, particularly for laypersons. The proposed recodification would, however, make the CPRA simpler to use than it is now. For example:

- Because similar provisions would be grouped together and the material would be reorganized in a logical manner, it would be easier for most CPRA users to find pertinent material than at present.
- The CPRA "roadmaps" in the comments would likewise help CPRA users locate pertinent material.
- Because excessively long code sections would be divided into short sections limited to a single subject, CPRA users could focus on relevant material, without having to waste time reading through irrelevant material.

Importantly, the new statutory scheme would also afford ample room for future refinement of the CPRA, promoting sound development of the law. It would no longer be necessary to squeeze new material into awkward statutory locations, work with and constantly revise overlong statutes, or resort to confusing and unsystematic numbering. The Legislature could place new material where it logically belongs and is easy to find and reference. That would not only aid CPRA users, but would also facilitate clear and effective expression of the substantive policies at stake.

**To be consistent with this approach, the uncodified provision on the operative date would have to be revised as follows:**

SEC. \_\_\_\_\_. This act becomes operative on ~~July 1, 2021~~ January 1, 2022.

The one-year delayed operative date would still be within the typical range for a major recodification.<sup>25</sup>

**Would the Commission like to make the revisions described above? Would it prefer to respond in some other manner to CNPA’s general concerns regarding the proposed recodification and/or CNPA’s specific concern about the operative date?**

#### C. SUPPORT FOR, OR NO POSITION ON, SPECIFIC ASPECTS OF THE PROPOSED RECODIFICATION

Most of the remainder of this memorandum describes and analyzes the input from CNPA and the City Attorneys’ CPRA Committee on specific aspects of the proposed recodification. The memorandum also discusses a few other issues that the staff identified.

We begin with a simple matter. In their comments, CNPA and the City Attorneys’ CPRA Committee express support for certain aspects of the proposed recodification, or state that they have no position on a certain point. In particular:

- *Statements of Legislative Intent.* The City Attorneys’ CPRA Committee “appreciates that the tentative recommendation includes sections 7920.110, 7920.115, and 7920.120 and comments accompanying amended sections, which emphasize that the changes made by the CLRC are not intended to be substantive.”<sup>26</sup>
- *Proposed Section 7920.510.* CNPA agrees with how the Commission handled the drafting issue raised in the Note accompanying proposed Section 7920.500, which defines “local agency.”<sup>27</sup>
- *Proposed Section 7920.535.* CNPA agrees with how the Commission handled the drafting issues raised in Note #1 and Note #2 accompanying proposed Section 7920.535, which defines “public safety official.”<sup>28</sup>

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25. For examples of recodifications with a 6-month delayed operative date, see *The Enforcement of Judgments Law*, 15 Cal. L. Revision Comm’n Report 1667 (1980); *New Probate Code*, 20 Cal. L. Revision Comm’n Reports 1001 (1990); *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003).

For examples of recodifications with a one-year delayed operative date, see *Family Code*, 22 Cal. L. Revision Comm’n Reports 1 (1992); *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm’n Reports 217 (2009); *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm’n Reports 235 (2010).

26. Exhibit p. 1.

27. Exhibit p. 8.

28. Exhibit pp. 8-9.

- *Proposed Section 7921.700.* CNPA does not have a position on the best location for the material that would be recodified in proposed Section 7921.700, relating to a request by a district attorney. Because the provision is “not for use by the general public,” CNPA believes that either of the locations discussed in the Note accompanying proposed Section 7921.700 would be appropriate.<sup>29</sup>
- *Proposed Section 7922.210.* CNPA agrees with the Commission’s decision to use the terms “official filing” and “public filing” in proposed Section 7922.210, instead of the terms “official record” and “public record.”<sup>30</sup>
- *Proposed Section 7924.700.* The City Attorneys’ CPRA Committee agrees with the Commission’s decision to recodify the substance of Section 6254.7(c) (relating to housing or building violations) in a separate article, instead of placing that material in the same article as the rest of the substance of Section 6254.7 (relating to pollution).<sup>31</sup> CNPA “does not have a position” on this matter.<sup>32</sup>
- *Proposed Section 7927.205.* The Note accompanying proposed Section 7927.205 discusses the possibility of making certain technical corrections in Section 11126, as described in greater detail in Memorandum 2017-50. CNPA reviewed those proposed corrections and “believes that these revisions are appropriate.”<sup>33</sup>

In addition, CNPA agrees with the Commission’s approach to the CPRA index (the alphabetical list of exemptions that is currently codified as Sections 6276.01-6276.48). CNPA writes:

CNPA believes that, at least for the time, the index should be left in alphabetical order to avoid creating further confusion for practitioners familiar with the CPRA in its existing form. CNPA is not aware of many members of the general public that regularly utilize the index to the CPRA and thus does not believe that reorganizing the index by topic, or otherwise, would be of great utility.

... [V]arious comments throughout [the proposed recodification of the CPRA index] seek comment on the Commission’s revisions to cross-references that are out-of-date due to the amendment or repeal of the cross-referenced law. CNPA believes that the Commission’s revisions to account for the changes in the cross-referenced codes are appropriate and make the index of more use because they increase accuracy.<sup>34</sup>

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29. Exhibit p. 10.

30. *Id.*

31. Exhibit p. 3.

32. Exhibit p. 12.

33. *Id.*

34. Exhibit p. 13.

It is helpful to know where CNPA and the City Attorneys' CPRA Committee stand on these points. **The Commission should keep their views in mind going forward, in case anyone suggests different treatment of the issues in question.**

#### D. MISTAKES THAT ARE EASY TO FIX

The commenters spotted some mistakes in the tentative recommendation, as did the staff. Specifically, **the following technical corrections are needed:**

- *Global correction.* The phrase "Except as provided in Sections 7924.510, 7924.700, and 7927.605" appears repeatedly in the tentative recommendation, but the cross-reference to proposed Section 7927.605 is incorrect. Both CNPA and the City Attorneys' CPRA Committee point out that it should be replaced with a cross-reference to proposed Section 7929.610, which would continue the substance of Section 6254.13.<sup>35</sup>
- *Comment to proposed Section 7920.000.* The correct parallel citation for *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* is "980 P.2d 337," not "980 P.2d 330."
- *Proposed Section 7920.500.* CNPA correctly points out that this section should cross-refer to "Article 3 (commencing with Section 7928.200) of Chapter 14 of Part 5," instead of "Article 3 (commencing with Section 7928.200) of Chapter 5."<sup>36</sup>
- *Comment to proposed Section 7920.525.* In the last sentence, "7920.535" should be replaced with "7920.540." Also, a close quote should be inserted after "records."
- *Proposed Section 7922.575.* The City Attorneys' CPRA Committee correctly points out that proposed Section 7922.575(b)(1) should cross-refer to proposed Section 7922.570, instead of proposed Section 7922.520.<sup>37</sup>
- *Comment to proposed Section 7922.640.* The second sentence (referring to the definition of "public record") should be moved to the end of the comment.
- *Comment to proposed Sections 7922.680 and 7922.725.* In the last sentence, a close quote should be inserted after "records."
- *Comment to proposed Section 7923.120.* CNPA correctly points out that the second sentence should be deleted (that sentence belongs in the preceding comment and was inadvertently duplicated in this one).<sup>38</sup>

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35. See Exhibit pp. 2 (City Attorneys' CPRA Committee), 7 (CNPA).

36. See Exhibit p. 8.

37. See Exhibit p. 2.

38. See Exhibit p. 11.

- *Comment to proposed Section 7928.200.* CNPA correctly points out that the first sentence should refer to “former Section 6254.21(g)” and the second sentence should refer to “former Section 6254.21(e),” instead of *vice versa*.<sup>39</sup>
- *Comment to proposed Section 7930.000.* In the last sentence, “7920.535” should be replaced with “7920.540.”
- *Disposition table.* The entry for “6259 (except (c) 1st sent intro cl)” should precede the entry for “6259(a) 1st sent.”

**The staff regrets these mistakes and will fix them in the next draft of the proposed recodification.**

#### E. CONSISTENCY

The City Attorneys’ CPRA Committee says that the whole tentative recommendation “should be reviewed with an eye towards ensuring consistency.”<sup>40</sup> It explains that “[u]sing consistent terminology will assist courts and practitioners in interpreting and applying the Act.”<sup>41</sup>

The committee gives two examples of inconsistent usage in the tentative recommendation:

- “Year-end” vs. “yearend”
- “Record” vs. “records”

Those examples are discussed below, as well as some other inconsistencies that the staff spotted.

#### “Year-End” vs. “Yearend”

The City Attorneys’ CPRA Committee notes that “some statutory provisions use the term ‘yearend,’ while others use ‘year-end.’”<sup>42</sup> A search of the tentative recommendation reveals that the phrase “yearend basis” is used three times in proposed Section 7928.710(c) and the phrase “year-end basis” is used once in the same subdivision:

(c) Notwithstanding subdivision (b), the following information contained in records described in subdivision (b) regarding alternative investments in which public investment funds invest is subject to disclosure pursuant to this division and shall not be considered a trade secret exempt from disclosure:

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39. See Exhibit pp. 12-13.

40. Exhibit p. 2.

41. *Id.*

42. *Id.*

....  
(4) The dollar amount, on a fiscal *yearend* basis, of cash distributions received by the public investment fund from each alternative investment vehicle.

(5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.

....  
(8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.

(9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.<sup>43</sup>

Neither "year-end" nor "yearend" appear elsewhere in the tentative recommendation.

The usage of "year-end" and "yearend" in proposed Section 7928.710(c) is identical to the current usage of those terms in Section 6254.26(b). There does not appear to be any grammatical basis, however, for using "year-end" in one place and "yearend" in three other places.

A search of the codes reveals that "year-end" is preferred when the term is used as a modifier.<sup>44</sup> **Unless the Commission otherwise directs, the staff will replace "yearend" with "year-end" in proposed Section 7928.710(c)(4), (c)(5), and (c)(8).**

#### **"Record" vs. "Records"**

The City Attorneys' CPRA Committee also notes that "some statutory provisions refer to 'records,' while others refer to a 'record.'"<sup>45</sup> That is true; there are many examples in the tentative recommendation.<sup>46</sup>

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43. Emphasis added.

44. See Cal. Const. art. XVI, § 1.3 ("year-end state budget deficit"); Bus. & Prof. Code § 7139.3 ("year-end reports"); Educ. Code § 54444.4 ("year-end assessment"); Gov't Code §§ 13031 ("year-end finance reports"), 13300.5 ("year-end reports"), 16418 ("year-end reporting"); Lab. Code § 177.3 ("year-end balance"); Pub. Res. Code § 37042 ("year-end state budget deficit"); Welf. & Inst. Code § 4629.5 ("year-end performance contract reports").

45. Exhibit p. 2.

46. See, e.g., proposed Sections 7920.530 (defining "public records"), 7920.550 (using "record" in two places), 7921.010 (using "record" in three places and "records" in two places), 7921.300 (using "record" in three places), 7921.305 (using "records" in two places), 7922.000 (using "record" in four places).

In general, the Commission prefers to draft statutes using the singular form, rather than the plural.<sup>47</sup> That approach tends to be more clear and precise.

The use of singular as opposed to plural form does not make any difference in meaning, because most codes include a provision stating that the singular includes the plural and *vice versa*. That is true of the Government Code, where the CPRA is located.<sup>48</sup>

Although the Commission prefers to use the singular form, it sometimes deviates from that general approach in the context of a nonsubstantive recodification.<sup>49</sup> When an existing provision is drafted in the plural form, converting it to the singular form sometimes requires considerable rewording, which might alarm one or more stakeholders despite the many steps that the Commission takes to ensure that its recodification is nonsubstantive. Rather than running the risk of generating such concern, the Commission sometimes elects to retain the existing language, even though it is in the plural form.<sup>50</sup>

In drafting the tentative recommendation for this study, the staff admittedly did not try hard to singularize the many references to “records” that now appear in the CPRA. It was easier and seemed safest to take a conservative approach and stick with the existing language.

**Would the Commission like the staff to put more effort into such rewording when it prepares the next draft of the proposed recodification?**

### References to the Internet

In reviewing the tentative recommendation (before receiving any comments), the staff noticed that it is inconsistent in how it refers to materials on the internet. There are a number of variations:

- “Internet” vs. “internet”
- “Web site” vs. “Website” vs. “website”

There are also some references to “Internet Web portal” and “Internet Resource.”<sup>51</sup>

In large part, the tentative recommendation tracks the current usage in the CPRA. For example, if a code section currently refers to an “Internet Web site,”

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47. See, e.g., Memorandum 2008-39, pp. 1-2 (discussing use of plural versus singular form in drafting deadly weapons recodification).

48. See Section 13 (“The singular number includes the plural, and the plural the singular.”).

49. See, e.g., Memorandum 2008-39, pp. 1-2.

50. See, e.g., *id.*

51. See proposed Section 7922.680 & corresponding article heading.

the proposed recodification of that section also refers to an “Internet Web site.”<sup>52</sup> Similarly, if a code section currently refers to an “Internet website,” the proposed recodification of that section also refers to an “Internet website.”<sup>53</sup>

The discrepancies also arose in another way: The staff tracked the existing statutory language when drafting the text of the proposed recodified provisions (which usually refers to a “Web site”), but followed the more common practice of using the term “website” when preparing the comments and the preliminary part.

Searching the codes reveals numerous provisions that use the phrase “Internet Web Site.” There are only a few deviations.

Searching the pending and just-enacted bills gives a different result. They consistently use the phrase “internet website.”<sup>54</sup>

It appears that the Office of Legislative Counsel recently changed its stylistic rule regarding references to the internet. The staff will try to confirm this now that the legislative session is over.

Such a change would be consistent with developments in other sectors. For example, Wikipedia says:

While “web site” was the original spelling (sometimes capitalized “Web site,” since “Web” is a proper noun when referring to the World Wide Web), this variant has become rarely used, and “website” has become the standard spelling. All major style guides, such as *The Chicago Manual of Style* and the *AP Stylebook*, have reflected this change.<sup>55</sup>

**Assuming that the Office of Legislative Counsel now prefers to use “internet website” in statutory text, the staff will follow that approach in preparing the next draft of the proposed CPRA recodification.** That will match the staff’s own drafting preference, so we will follow it throughout the comments and preliminary part as well.

#### **“Department of Motor Vehicles” vs. “DMV” in Leadlines**

In reviewing the tentative recommendation, the staff also noticed that the leadline for proposed Section 7927.405 is: “Residence or mailing address in

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52. See, e.g., Section 6270.5; proposed Section 7922.715.

53. See, e.g., Section 6253.8; proposed Section 7924.900.

54. AB 34 (Ramos) (2019 Cal. Stat. ch. 282); AB 377 (Eduardo Garcia & Mayes) (enrolled); SB 47 (Allen) (awaiting enrollment).

55. See <https://en.wikipedia.org/wiki/Website#Spelling> (footnotes omitted).

records of *Department of Motor Vehicles*.<sup>56</sup> In contrast, the leadline for proposed Section 7929.600 is: “Results of test in *DMV* study of physical or mental factors affecting driving ability.”<sup>57</sup>

The leadlines in the proposed recodification are not law.<sup>58</sup> They are just brief descriptors that the Commission includes in its publications to assist readers. Other publishers of California statutory materials use their own descriptors.

In general, the Commission tries to keep a leadline short, while accurately reflecting the content of the code section in question. Given that longstanding practice and the wide usage of the acronym “DMV,” the best way to achieve consistency in this instance would be to replace “Department of Motor Vehicles” with “DMV” in the leadline for proposed Section 7927.405. **Unless the Commission otherwise directs, the staff will make that revision in the next draft of the proposed recodification.**

#### “Alphabetical List” vs. “Alphabetical Index”

Another issue relates to use of the phrase “alphabetical list of exemptions,” as opposed to “alphabetical index of exemptions.” The proposed recodification uses these phrases in a consistent but less-than-ideal manner:

- Many of the comments in the proposed recodification refer to proposed Sections 7930.000-7930.215 (i.e., proposed “Part 6. Other Exemptions From Disclosure,” which would recodify all of Article 2 of the CPRA) as an “alphabetical *list* of many CPRA exemptions.”<sup>59</sup> However, proposed Sections 7930.000 and 7930.005 are not part of the alphabetical list; they are instructions on how to use the alphabetical list. **It would be better to refer to proposed Sections 7930.000-7930.215 as an “alphabetical *index* of many CPRA exemptions.”**
- The comments to proposed Sections 7930.000 and 7930.005 (the instructions on how to use the alphabetical list) refer to “the alphabetical *index* in the next chapter” (i.e., proposed Sections 7930.100-7930.215).<sup>60</sup> **It would be better to refer to proposed Sections 7930.100-7930.215 as “the alphabetical *list* in the next chapter.”**

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56. Emphasis added.

57. Emphasis added.

58. See, e.g., Cal. Code Commission, *Drafting Rules and Principles for the Use of California Code Commission Draftsmen*, 1947-48 Report, app. G, at 27 (“With the exception of the original code sections of the 1872 codes and except for a few isolated instances, the section headings appearing in privately published editions of the codes are not part of the official text, but have been added by the editors.”).

59. Emphasis added.

60. Emphasis added.

**Unless the Commission otherwise directs, the staff will make these revisions in the next draft of the proposed recodification.**

### **Other Consistency Issues**

Going forward, the staff will continue to review the proposed recodification for inconsistencies. We would appreciate any suggestions about this matter.

## F. ORGANIZATIONAL ISSUES AND RELATED MATTERS

The comments from CNPA and the City Attorneys' CPRA Committee include some suggestions about organizational issues and related matters. Those suggestions are discussed below, in the order they arise in the tentative recommendation.

### **CNPA's Suggestion Regarding Proposed Section 7920.505 ("Former Section 6254 Provisions"), Recodification of Section 6254, and Convenient Cross-Referencing of CPRA Exemptions**

CNPA points out that the tentative recommendation "handles the difficult task of breaking up the provisions of existing Section 6254, which is regularly referenced in other provisions of the CPRA, into different sections without making substantive change by creating new Section 7920.505."<sup>61</sup> That new provision would be a list of all the new code sections that recodify material from former Section 6254. As CNPA notes, "[p]rovisions of the CPRA that currently reference Section 6254 generally will ... instead refer to Section 7920.505."<sup>62</sup>

CNPA "understands the simplicity of this approach and recognizes that if Section 6254 is to be broken up without making substantive change there is probably no other feasible means of accomplishing the task."<sup>63</sup> Because new Section 7920.505 will only include provisions that were part of Section 6254 at the time of recodification, however, CNPA is concerned that later-created exemptions, which would otherwise have been included in Section 6254, will be "left in limbo."<sup>64</sup> CNPA warns that this "could result in an increase in cross-references to other Sections in future legislation, which is contrary to directive given to the Commission in ACR 148 (Chau)."<sup>65</sup>

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61. Exhibit p. 7.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

### *CNPA's Suggested Solutions*

To forestall such a proliferation of cross-references, CNPA urges the Commission to “include a signpost in the comment to Section 7920.505,” which would encourage the Legislature to add “a new subdivision to Section 7920.505 in the future to list new CPRA exemptions, so that Section 7920.505 can continue to serve as a convenient cross-reference for CPRA exemptions generally.”<sup>66</sup> In the alternative, CNPA says “it may be appropriate to consider whether the Legislature needs to make minor substantive changes to the CPRA, and other laws that reference Section 6254, to instead make a more general reference to records exempt from disclosure pursuant to the CPRA.”<sup>67</sup>

### *Analysis of CNPA's Suggested Solutions*

As CNPA recognizes, proposed Section 7920.505 is a drafting tool. It provides a shorthand way for the Commission to cross-refer to the existing substance of Section 6254, which would be recodified in many different code sections. Using this shorthand makes it possible to readily update the many statutes that cross-refer to the entirety of Section 6254, without making any substantive change.

CNPA is implicitly suggesting that proposed Section 7920.505 should also serve an additional purpose: It should provide a convenient means of cross-referring to all of the exemptions codified in the CPRA. CNPA further implies that a cross-reference to Section 6254 currently accomplishes that purpose, or at least that the Legislature has been using cross-references to Section 6254 to accomplish that purpose.

In fact, however, Section 6254 is already imperfect as a means of referring to all of the exemptions codified in the CPRA, much less all of the CPRA exemptions that are sprinkled throughout the codes. At one time Section 6254 contained all of the CPRA exemptions, but that is no longer true. Any statute cross-referring to Section 6254 alone is now underinclusive for this purpose.

**As CNPA suggests, it might therefore be a good idea for the Legislature to revisit each statute that cross-refers to “Section 6254” and determine whether the intent was, or should be, to cross-refer to all CPRA exemptions.** If so, then the Legislature should consider replacing the cross-reference to “Section 6254” with what CNPA describes as “a more general reference to records exempt from disclosure pursuant to the CPRA.” Such a revision would more clearly and

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66. *Id.*

67. *Id.*

accurately convey the intended meaning and would not require updating as the CPRA evolves.

This type of reform might entail some minor substantive changes or trigger concerns about such changes; it seems too risky to attempt in the context of this purely nonsubstantive study. As CNPA suggests, however, **the Commission’s report could alert the Legislature to the possibility of undertaking such a reform.** In particular, the Commission could mention that possibility in the preliminary part of its report and/or in the list of “Minor Clean-Up Issues for Possible Future Legislative Attention.”

**Does the Commission agree with this idea in concept?** If so, the staff will prepare implementing language for the Commission to consider at the next meeting.

#### **CNPA’s Suggestion Regarding Recurring Cross-References to Recodifications of Sections 6254.7 and 6254.13**

CNPA also raises another issue that stems from the proposed reorganization of Section 6254. That issue relates to the introductory clause of Section 6254, which qualifies each of the many CPRA exemptions set forth in that section. It says:

6254. Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:

(a) Preliminary drafts ....

In effect, this introductory clause mandates that the disclosure requirements of Section 6254.7 (relating to pollution and to building violations) and Section 6254.13 (relating to test materials for statewide testing of students in public schools) override all of Section 6254’s exemptions from disclosure.

The proposed recodification would separate those exemptions into many different code sections. To preserve the effect of the introductory clause, it would be repeated in many of the new sections, with revisions updating the cross-references to Sections 6254.7 and 6254.13.<sup>68</sup>

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68. Section 6254.7 corresponds to proposed Sections 7924.510 (relating to pollution) and 7924.700 (relating to building violations). Section 6254.13 corresponds to proposed Section 7929.610. As previously noted, the tentative recommendation erroneously refers in many places to proposed Section 7927.605 (the continuation of Section 6254.15) instead of Section 7929.610 (the continuation of Section 6254.13). The staff apologizes for this mistake and will correct it in the next draft of the proposed recodification.

### *CNPA's Position*

CNPA points out that “the recurring cross references to the re-codifications of Sections 6254.7 and 6254.13 run counter to the direction given in ACR 148 (Chau) to avoid unnecessary cross references and eliminate duplicative provisions.”<sup>69</sup> CNPA encourages the Commission to “consider whether including ‘notwithstanding’ language in Sections 7924.510, 7924.700, and 7929.610 is a more efficient approach than including ‘except as provided’ language in every re-codification of Section 6254’s provisions.”<sup>70</sup> “To the extent this would be considered a substantive change, CNPA believes it is appropriate for the Commission to flag the issue for consideration by the Legislature.”<sup>71</sup>

### *Analysis of CNPA's Position*

CNPA’s suggested approach is attractive, because it would greatly reduce the number of cross-references in the proposed recodification. It could be implemented by making four sets of changes to the tentative recommendation.

**First, proposed Section 7924.510 and the corresponding Comment could be revised as follows:**

7924.510. Notwithstanding the provisions listed in Section 7920.505:

(a) Any information, analysis, plan, or specification that discloses the nature, extent, quantity, or degree of an air contaminant or other pollution that any article, machine, equipment, or other contrivance will produce, which any air pollution control district or air quality management district, or any other state or local agency or district, requires any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance, is a public record.

(b) All air or other pollution monitoring data, including data compiled from a stationary source, are public records.

(c) Except as otherwise provided in subdivision (d) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, a trade secret is not a public record under this section or Section 7924.700.

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69. Exhibit p. 8.

70. *Id.*

71. *Id.*

(d) Notwithstanding any other provision of law, all air pollution emission data, including those emission data that constitute trade secrets as defined in subdivision (f), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data that constitute trade secrets and that are used to calculate emission data are not public records.

(e) Data used to calculate the costs of obtaining emissions offsets are not public records. At the time that an air pollution control district or air quality management district issues a permit to construct to an applicant who is required to obtain offsets pursuant to district rules and regulations, data obtained from the applicant consisting of the year the offset transaction occurred, the amount of offsets purchased, by pollutant, and the total cost, by pollutant, of the offsets purchased is a public record. If an application is denied, the data shall not be a public record.

(f) As used in this section, "trade secret" may include, but is not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information that satisfies all of the following requirements:

(1) It is not patented.

(2) It is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value.

(3) It gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

**Comment.** In combination with Sections 7924.700 and 7929.610, the introductory clause of Section 7924.510 continues the introductory clause of former Section 6254 without substantive change.

Subdivision (a) of ~~Section 7924.510~~ continues former Section 6254.7(a) without substantive change.

Subdivision (b) ....

**Second, similar changes could be made to proposed Section 7924.700 and the corresponding Comment:**

7924.700. Notwithstanding the provisions listed in Section 7920.505:

(a) A record of a notice or an order that is directed to the owner of any building and relates to violation of a housing or building

code, ordinance, statute, or regulation that constitutes a violation of a standard provided in Section 1941.1 of the Civil Code is a public record.

(b) A record of subsequent action with respect to a notice or order described in subdivision (a) is a public record.

**Comment.** In combination with Sections 7924.510 and 7929.610, the introductory clause of Section 7924.700 continues the introductory clause of former Section 6254 without substantive change.

~~Section 7924.700 continues~~ Subdivisions (a) and (b) continue former Section 6254.7(c) without substantive change. For a special rule applicable to a trade secret, see ....

**Third, the Comment to proposed Section 7929.610 could be revised like so:**

**Comment.** Section 7929.610 continues former Section 6254.13 without substantive change. In combination with Sections 7924.510 and 7924.700, Section 7929.610 also continues the introductory clause of former Section 6254 without substantive change.

For additional guidance ....

The text of proposed Section 7929.610 would not require any revisions, because it already begins with the phrase “Notwithstanding the provisions listed in Section 7920.505” (the introductory clause of Section 6254 and the introductory clause of Section 6254.13 are essentially redundant with respect to the substance of Section 6254.13).

**Finally, each provision recodifying an exemption from Section 6254 could be revised to delete the phrase “Except as provided in Sections 7924.510, 7924.700, and 7927.605.”** For example, proposed Section 7927.700 could be revised as follows:

7927.700. ~~Except as provided in Sections 7924.510, 7924.700, and 7927.605, this~~ This division does not require disclosure of personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

This 4-prong approach would be substantively equivalent to current law, but it would track the existing language less closely than the tentative recommendation. That might trigger concerns that could be hard to dispel, even though unwarranted.

**Despite that risk, the 4-prong approach implementing CNPA’s suggestion deserves serious consideration.** In addition to reducing the number of cross-references in the CPRA, it would make it unnecessary to place cross-references to the substance of Section 6254.7 (relating to pollution and to building violations) and the substance of Section 6254.13 (relating to test materials for statewide testing of students in public schools) in close proximity to exemptions that seem unrelated (e.g., the exemption for “[s]tatements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.”<sup>72</sup>).

As CNPA points out, **another alternative would be to stick with the approach in the tentative recommendation, but alert the Legislature to the possibility of implementing CNPA’s suggested approach later, as a separate reform.** That would be a more cautious, yet slower and more burdensome way to potentially achieve the same end result.

**What is the Commission’s preference on this matter?**

**“Part 2. Disclosure and Exemptions Generally” and “Part 3. Procedures”  
(Proposed Sections 7921.000-7922.210; 7922.500-7922.725)**

Parts 2 and 3 of the proposed recodification are organized as follows:

Part 2. Disclosure and Exemptions Generally

Chapter 1. Right of Access to Public Records

Chapter 2. General Rules Governing Disclosure

Article 1. Nondiscrimination

Article 2. Voluntary Disclosure

Article 3. Disclosure to District Attorney and Related Matters

Chapter 3. General Rules Governing Exemptions From Disclosure

Article 1. Justification for Withholding of Record

Article 2. Social Security Numbers and Related Matters

Part 3. Procedures

Chapter 1. Request for a Public Record

Article 1. General Principles

Article 2. Procedural Requirements Generally

Article 3. Information in Electronic Format

Article 4. Duty to Assist in Formulating Request

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72. Section 6254(n), which corresponds to proposed Section 7925.005.

## Chapter 2. Agency Regulations, Guidelines, Systems, and Similar Matters

### Article 1. Agency Regulations and Guidelines

### Article 2. Internet Resources

### Article 3. Catalog of Enterprise Systems

CNPA has concerns about this approach.

#### *CNPA's Position*

CNPA sees no “reason why these provisions should be divided into two different Parts as they include provisions that relate to baseline rules regarding requests for and disclosure of any public record.”<sup>73</sup> According to CNPA, “[s]eparating provisions that relate to the general rules governing requests and disclosure into two different Parts ... makes it more difficult for members of the public to find key provisions of the CPRA.”<sup>74</sup>

To illustrate this concern, CNPA points out that proposed Section 7922.000 (the CPRA catch-all exemption) is in “Part 2. Disclosure and Exemptions Generally,” while proposed Sections 7922.535 (“agency’s duty to respond within a specific timeframe”) and 7922.600 (“agency’s duty ... to assist a requester in identifying responsive records”) are in “Part 3. Procedures.” CNPA says that all three of these provisions are “generally applicable rules of disclosure.”

CNPA “believes that Parts 2 and 3 should be merged into one Part, entitled ‘Disclosure and Exemptions Generally.’”<sup>75</sup> CNPA further writes that if the two Parts are kept separate, “Part 3 should, at a minimum, be renamed to give a better indication as to its actual content.”<sup>76</sup> It explains:

The term “Procedures” is misleading because Part 3 actually includes important substantive rights of requesters, such as the right to be charged no more than the actual cost of duplication for a copy of a public record (Section 7922.530) and the right to receive information in an electronic format (Section 7922.570).

Moreover, there is little meaningful difference between procedural and substantive rights in the context of the CPRA as violation of a procedural rule can often result in a harm that is substantive in nature. For example, an undue delay in disclosing records, in violation of new Section 7922.500 (existing Section 6253(d)), can have the same substantive effect as not providing the

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73. Exhibit p. 6.

74. *Id.*

75. *Id.*

76. *Id.*

records at all if the requester was seeking the records for a time-sensitive matter (such as a newspaper seeking records for a news story).<sup>77</sup>

### *Analysis of CNPA's Concerns*

No organizational approach to a recodification will be perfect. There is almost always some potential for overlap and imprecision in grouping statutes.

Importantly, however, the headings in a code are not law; they have no substantive effect. As Section 6 provides: "Title, division, part, chapter, article, and section headings *do not in any manner affect the scope, meaning, or intent of the provisions of this code.*"<sup>78</sup>

Nonetheless, code headings do affect ease of use. **Commissioners should reexamine Parts 2 and 3 of the proposed recodification and reassess whether the statutory material is organized in a user-friendly manner.**

#### **Possible responses to CNPA's concerns include:**

- (1) Leave the organization of Parts 2 and 3 as is.
- (2) Relabel "Part 3. Procedures," as CNPA suggests. For example, the Commission could change the heading to "Part 3. Procedures and Related Matters" or "Part 3. Procedures and Procedural Rights."
- (3) Merge "Part 2. Disclosure and Exemptions Generally" with "Part 3. Procedures," as CNPA suggests.
- (4) Follow some other approach.

**If the Commission chooses Option #3 (merging Parts 2 and 3), then it will need to further decide how to accomplish the merger.** One possibility would be to reorganize the material as shown in ~~strikeout~~ and underscore below:

#### Part. 2. Disclosure and Exemptions Generally

##### Chapter 1. Right of Access to Public Records

##### Chapter 2. General Rules Governing Disclosure

###### Article 1. Nondiscrimination

###### Article 2. Voluntary Disclosure

###### Article 3. Disclosure to District Attorney and Related Matters

##### Chapter 3. General Rules Governing Exemptions From Disclosure

###### Article 1. Justification for Withholding of Record

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<sup>77</sup>. *Id.*

<sup>78</sup>. Emphasis added.

Article 2. Social Security Numbers and Related Matters

~~Part 3. Procedures~~

~~Chapter 1~~ 4. Request for a Public Record

Article 1. General Principles

Article 2. Procedural Requirements Generally

Article 3. Information in Electronic Format

Article 4. Duty to Assist in Formulating Request

~~Chapter 2~~ 5. Agency Regulations, Guidelines, Systems, and Similar Matters

Article 1. Agency Regulations and Guidelines

Article 2. Internet Resources

Article 3. Catalog of Enterprise Systems

It is not clear whether these revisions would resolve CNPA's concern; further revisions might also be necessary.

**How would the Commission like to proceed on this point?** Additional input on it from CNPA or other sources would be helpful.

**"Part 4. Enforcement" (Proposed Sections 7923.000-7923.510; Existing Sections 6258 and 6259)**

In the proposed recodification, "Part 4. Enforcement" consists of two chapters. The first chapter is entitled "General Principles." It would continue the substance of Section 6258, but it would divide that material into two different code sections:

Chapter 1. General Principles

§ 7923.000. Right to seek enforcement of request

§ 7923.005. Court to set schedule that promotes prompt decision

The second chapter is entitled "Procedure." It would continue the substance of Section 6259, but it would divide that material into two different articles ("Article 1. Petition to Superior Court" and "Article 2. Writ Review"), each of which would consist of several different code sections:

Chapter 2. Procedure

Article 1. Petition to Superior Court

§ 7923.100. Verified petition and order to show cause

§ 7923.105. Material to be considered by court  
§ 7923.110. Decision and order  
§ 7923.115. Costs and attorney fees  
§ 7923.120. Failure to obey order as grounds for contempt

Article 2. Writ Review

§ 7923.500. Order reviewable by petition for extraordinary writ  
§ 7923.505. Time for filing writ petition  
§ 7923.510. Stay of judgment or order

As discussed below, the City Attorneys' CPRA Committee has concerns about this organizational approach.

*Position of the City Attorneys' CPRA Committee*

According to the City Attorneys' CPRA Committee, "Part 4 unnecessarily separates concepts that are currently consolidated under former sections 6258 and 6259."<sup>79</sup> It explains:

Although the Committee understands the CLRC's intent in making the table of contents clear, by breaking up previously consolidated sections, the tentative recommendation makes it more difficult for public records requesters to understand their rights, as requesters will need to read multiple sections in order to understand the enforcement process.<sup>80</sup>

The City Attorneys' CPRA Committee thus "recommends that the CLRC revise the Act to consolidate sections 7923.000 and 7923.005, and sections 7923.100-7923.510."<sup>81</sup>

*Analysis of the Committee's Concern*

In requesting this study, the Legislature directed the Commission to "[r]educe the length and complexity of current sections."<sup>82</sup> Short code sections are the preferred drafting technique of the Legislature,<sup>83</sup> the Legislative Counsel,<sup>84</sup> this Commission,<sup>85</sup> and the California Code Commission.<sup>86</sup>

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79. Exhibit p. 2.

80. *Id.*

81. *Id.*

82. 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)); see also 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth)).

83. Joint Rule 8 ("Bills that are not amendatory of existing laws shall be divided into short sections, where this can be done without destroying the sense of any particular section, to the end that future amendments may be made without the necessity of setting forth and repeating sections of unnecessary length.").

84. Legislative Counsel of California, Legislative Drafting Manual 26-28 (1975).

85. Memorandum 1976-24; First Supplement to Memorandum 1985-64.

As the tentative recommendation explains, there are good reasons for that preference:

Excessively long sections can obscure relevant details of law, especially if a single section addresses several different subjects. A better approach is to divide the law into a larger number of smaller sections, with each section limited to a single subject.

Short sections have numerous advantages. They enhance readability and understanding of the law, and make it easier to locate and refer to pertinent material. In contrast to a long section, a short section can be amended without undue technical difficulties and new material can be inserted where logically appropriate, facilitating sound development of the law.<sup>87</sup>

Sections 6258 and 6259 currently provide:

6258. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.

6259. (a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

(b) If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

(c) In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the

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86. *Drafting Rules and Principles*, *supra* note 58, at 4.

87. Recodification TR at 14 (footnotes omitted).

issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of an order or judgment shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court shall be cited to show cause why he or she is not in contempt of court.

(d) The court shall award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the requester's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

(e) Nothing in this section shall be construed to limit a requestor's right to obtain fees and costs pursuant to subdivision (d) or pursuant to any other law.

As code sections go, these provisions are not egregiously long. Section 6259 is complex, however, stating many different procedural rules. Section 6258 is shorter, but also states more than one such rule.

For the reasons discussed above, the staff decided to split up the substance of these two sections in drafting the tentative recommendation. The Commission agreed with that drafting decision.

The City Attorneys' CPRA Committee is essentially suggesting that (1) the substance of Section 6258 should remain in a single code section and (2) the substance of Section 6259 should remain in a single code section. **Commissioners should reexamine proposed Sections 7923.000-7923.005 (recodifying the substance of Section 6258) and proposed Sections 7923.100-7923.510 (recodifying the substance of Section 6259) and consider whether consolidating the statutory material as suggested would be an improvement.**

Such consolidation would be relatively easy to accomplish, but the key question is whether it would be more user-friendly, and more consistent with the Legislature's objectives, than the approach taken in the tentative recommendation. Would having to read multiple sections really "mak[e] it more difficult for public records requesters to understand their rights," as the City

Attorneys' CPRA Committee contends? With regard to Section 6259 in particular, the staff is not convinced that recodification as a single, complex section would be more readily understandable than recodification as several short, simple sections.

**“Article 1. Law Enforcement Records Generally” (Proposed Sections 7923.600-7923.625; Existing Section 6254(f))**

Section 6254 is by far the longest code section in the CPRA and subdivision (f) is by far the longest subdivision in Section 6254. That subdivision provides:

6254. Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:

....

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, this subdivision does not require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in

an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2)(A) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(B) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the names and images of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, and of that victim's immediate family, other than a family member who is charged with a criminal offense arising from the same incident, may be withheld at the victim's request until the investigation or any subsequent prosecution is complete. For purposes of this subdivision, "immediate family" shall have the same meaning as that provided in paragraph (3) of subdivision (b) of Section 422.4 of the Penal Code.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, if the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation

purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. This paragraph shall not be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(4) Notwithstanding any other provision of this subdivision, commencing July 1, 2019, a video or audio recording that relates to a critical incident, as defined in subparagraph (C), may be withheld only as follows:

(A)(i) During an active criminal or administrative investigation, disclosure of a recording related to a critical incident may be delayed for no longer than 45 calendar days after the date the agency knew or reasonably should have known about the incident, if, based on the facts and circumstances depicted in the recording, disclosure would substantially interfere with the investigation, such as by endangering the safety of a witness or a confidential source. If an agency delays disclosure pursuant to this paragraph, the agency shall provide in writing to the requester the specific basis for the agency's determination that disclosure would substantially interfere with the investigation and the estimated date for disclosure.

(ii) After 45 days from the date the agency knew or reasonably should have known about the incident, and up to one year from that date, the agency may continue to delay disclosure of a recording if the agency demonstrates that disclosure would substantially interfere with the investigation. After one year from the date the agency knew or reasonably should have known about the incident, the agency may continue to delay disclosure of a recording only if the agency demonstrates by clear and convincing evidence that disclosure would substantially interfere with the investigation. If an agency delays disclosure pursuant to this clause, the agency shall promptly provide in writing to the requester the specific basis for the agency's determination that the interest in preventing interference with an active investigation outweighs the public interest in disclosure and provide the estimated date for the disclosure. The agency shall reassess withholding and notify the requester every 30 days. A recording withheld by the agency shall be disclosed promptly when the specific basis for withholding is resolved.

(B)(i) If the agency demonstrates, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording, the agency shall provide in writing to the requester the specific basis for the expectation of privacy and the public interest served by withholding the recording and may use redaction technology, including blurring or distorting images or audio, to obscure those specific portions of the recording that protect that interest. However, the redaction shall not interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording and the recording shall not otherwise be edited or altered.

(ii) Except as provided in clause (iii), if the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction as described in clause (i) and that interest outweighs the public interest in disclosure, the agency may withhold the recording from the public, except that the recording, either redacted as provided in clause (i) or unredacted, shall be disclosed promptly, upon request, to any of the following:

(I) The subject of the recording whose privacy is to be protected, or their authorized representative.

(II) If the subject is a minor, the parent or legal guardian of the subject whose privacy is to be protected.

(III) If the subject whose privacy is to be protected is deceased, an heir, beneficiary, designated immediate family member, or authorized legal representative of the deceased subject whose privacy is to be protected.

(iii) If disclosure pursuant to clause (ii) would substantially interfere with an active criminal or administrative investigation, the agency shall provide in writing to the requester the specific basis for the agency's determination that disclosure would substantially interfere with the investigation, and provide the estimated date for the disclosure of the video or audio recording. Thereafter, the recording may be withheld by the agency for 45 calendar days, subject to extensions as set forth in clause (ii) of subparagraph (A).

(C) For purposes of this paragraph, a video or audio recording relates to a critical incident if it depicts any of the following incidents:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury.

(D) An agency may provide greater public access to video or audio recordings than the minimum standards set forth in this paragraph.

(E) This paragraph does not alter, limit, or negate any other rights, remedies, or obligations with respect to public records regarding an incident other than a critical incident as described in subparagraph (C).

(F) For purposes of this paragraph, a peace officer does not include any peace officer employed by the Department of Corrections and Rehabilitation.

The tentative recommendation would place the entire substance of Section 6254(f) in a separate article (“Article 1. Law Enforcement Records Generally”) in Chapter 1 of Part 5 of the proposed recodification. That article would be divided into five sections. Under this approach, it was easy to update the many cross-references to Section 6254(f) throughout the codes, because each one could simply be replaced with a cross-reference to the new article.

When initially presenting this approach for the Commission’s consideration, the staff expressed some frustration regarding the degree of statutory clean-up its draft would achieve:

*In drafting the new article, ... the staff felt constrained to take a particularly conservative approach to recodifying Section 6254(f). The five sections in that article would very closely track the existing content, wording and organization of Section 6254(f). We were reluctant to make even little revisions to improve clarity, because the existing text is hard to follow in places. Taking a particularly conservative approach seemed the only way to avoid generating concerns about the possibility of a substantive change and potentially jeopardizing enactment of the whole CPRA recodification.*

*That approach is less than ideal; it would not go as far as we would like to make the substance of Section 6254(f) user-friendly. It would be an improvement over existing law, because the substance of Section 6254(f) would be near other CPRA provisions dealing with similar subject matter .... The substance of Section 6254(f) would also be split into manageable pieces, making it more readable.*

But Section 6254(f) includes potentially confusing and unclear language, which the attached draft would preserve untouched....

Cleaning up ambiguities like these seems too risky to attempt in the context of this strictly nonsubstantive study. In some instances, the proper interpretation might be relatively clear to the Commission, particularly after doing some research. But even if the Commission were convinced that its interpretation was correct, others might disagree and that could derail the proposed

recodification, regardless of the merits of the Commission's interpretation.<sup>88</sup>

The staff queried whether (1) the recodification should attempt to do more to make the substance of Section 6254(f) user-friendly, or (2) the recodification should be even more conservative and track existing law almost verbatim (recodifying the substance of Section 6254(f) in a single code section).<sup>89</sup> The staff also asked whether the tentative recommendation should suggest the possibility of conducting a follow-up study focusing solely on the substance of Section 6254(f).<sup>90</sup>

The Commission considered those possibilities and approved the content and placement of the staff's draft.<sup>91</sup> The Commission also decided not to "seek additional authority from the Legislature to conduct a substantive follow-up study of existing Section 6254(f)."<sup>92</sup>

Both CNPA and the City Attorneys' CPRA Committee have concerns about the proposed recodification of Section 6254(f). CNPA's concern focuses on one specific aspect of that recodification; the City Attorneys' CPRA Committee's concern relates to the entire substance of Section 6254(f). We start by examining the latter concern, and then discuss the more specific issue raised by CNPA.

#### *Concern of the City Attorneys' CPRA Committee*

The City Attorneys' CPRA Committee "strongly believes" that dividing Section 6254(f) into proposed Sections 7923.600-7923.625 "will result in substantive changes to existing law."<sup>93</sup> The committee points out that "[t]here is extensive case law regarding the interpretation of 6254(f) in its current form with analysis that turns on specific words used in particular contexts."<sup>94</sup> The committee warns that "[b]y breaking 6254(f) apart into separate sections and changing the context, CLRC risks undermining judicial interpretations of 6254(f)."<sup>95</sup>

To illustrate this concern, the City Attorneys' CPRA Committee refers to the California Supreme Court's decision in *Haynie v. Superior Court*.<sup>96</sup> Among other

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88. Memorandum 2018-26, pp. 4-6 (emphasis added).

89. *Id.* at 6-7.

90. *Id.* at 7.

91. Minutes (May 2018), p. 5.

92. *Id.*

93. Exhibit p. 3.

94. *Id.*

95. *Id.*

96. 26 Cal. 4th 1061, 31 P.3d 760, 112 Cal. Rptr. 2d (2001).

things, *Haynie* holds that Section 6254(f)(2) “specifies the *information* — not the *records* — that must be provided ....”<sup>97</sup> The City Attorneys’ CPRA Committee says that in reaching this conclusion, the court analyzed paragraph (f)(2) “in the context of section 6254(f) as a whole, comparing its component parts.”<sup>98</sup> The committee cautions that if the components of Section 6254(f) were separated, “the court may not have reached the same conclusion.”<sup>99</sup>

#### *Analysis of the Committee’s Concern*

The committee’s *Haynie* illustration does not seem to give sufficient credit to the court. In construing statutes, courts routinely examine the entire statutory scheme, not just an isolated code section. That is especially likely where, as here, the potentially relevant code sections would be consolidated in a single article, with accompanying Comments explaining that they are derived from the same predecessor statute.

Moreover, proposed Section 7920.110(a) would make clear that a “judicial decision interpreting a previously existing provision is relevant in interpreting any provision of this division ... which restates and continues that previously existing provision.” *Haynie* would thus be relevant in interpreting the substance of proposed Section 7923.615, just as *Haynie* is relevant in interpreting Section 6254(f)(2), which now contains the material that would be recodified in proposed Section 7923.615.

As discussed at length in the preliminary part,<sup>100</sup> the proposed recodification also includes many other assurances that it would not make any substantive change. Given those protections, it seems unlikely that the proposed splitting of the material in Section 6254(f) would affect how a court interprets that material.

Nonetheless, Section 6254(f) is an especially important, complicated, and widely used provision of the CPRA. The cautiousness of the City Attorneys’ CPRA Committee is understandable, though the approach it advocates would conflict with the Legislature’s instruction to “[r]educe the length and complexity of current sections.”<sup>101</sup>

**Commissioners should think hard about the suggestion to recodify the entire substance of Section 6254(f) in a single code section, bearing in mind that**

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97. *Id.* at 1072 (emphasis in original).

98. Exhibit p. 3.

99. *Id.*

100. See Recodification TR at 5-10.

101. 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)); see also 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth)).

the City Attorneys' CPRA Committee "strongly believes" such an approach is necessary to prevent any substantive change. The approach could be implemented as follows:

**§ 7923.600. Law enforcement exemption**

7923.600. (a)(1) Except as provided in Sections 7924.510, 7924.700, and 7929.610, this division does not require the disclosure of records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, this section does not require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

(2) Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this section.

(b) Notwithstanding any other provision of this section, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the

individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2)(A) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 287, 288, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this section may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(B) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the names and images of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, and of that victim's immediate family, other than a family member who is charged with a criminal offense arising from the same incident, may be withheld at the victim's request until the investigation or any subsequent prosecution is complete. For purposes of this section, "immediate family" shall have the same meaning as that provided in paragraph (3) of subdivision (b) of Section 422.4 of the Penal Code.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this section, the current address of every individual arrested by the agency and the current address of the victim of a crime, if the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code. However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 287, 288, 288.2, 288.3, 288.4, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly, or furnished to another, to sell a product or service to

any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. This paragraph shall not be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(4) Notwithstanding any other provision of this section, commencing July 1, 2019, a video or audio recording that relates to a critical incident, as defined in subparagraph (C), may be withheld only as follows:

(A)(i) During an active criminal or administrative investigation, disclosure of a recording related to a critical incident may be delayed for no longer than 45 calendar days after the date the agency knew or reasonably should have known about the incident, if, based on the facts and circumstances depicted in the recording, disclosure would substantially interfere with the investigation, such as by endangering the safety of a witness or a confidential source. If an agency delays disclosure pursuant to this paragraph, the agency shall provide in writing to the requester the specific basis for the agency's determination that disclosure would substantially interfere with the investigation and the estimated date for disclosure.

(ii) After 45 days from the date the agency knew or reasonably should have known about the incident, and up to one year from that date, the agency may continue to delay disclosure of a recording if the agency demonstrates that disclosure would substantially interfere with the investigation. After one year from the date the agency knew or reasonably should have known about the incident, the agency may continue to delay disclosure of a recording only if the agency demonstrates by clear and convincing evidence that disclosure would substantially interfere with the investigation. If an agency delays disclosure pursuant to this clause, the agency shall promptly provide in writing to the requester the specific basis for the agency's determination that the interest in preventing interference with an active investigation outweighs the public interest in disclosure and provide the estimated date for the disclosure. The agency shall reassess withholding and notify the requester every 30 days. A recording withheld by the agency shall be disclosed promptly when the specific basis for withholding is resolved.

(B)(i) If the agency demonstrates, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording, the agency shall provide in writing to the requester the specific basis for the expectation of privacy and the public interest served by withholding the recording and may use redaction technology, including blurring or distorting images or audio, to obscure those

specific portions of the recording that protect that interest. However, the redaction shall not interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording and the recording shall not otherwise be edited or altered.

(ii) Except as provided in clause (iii), if the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction as described in clause (i) and that interest outweighs the public interest in disclosure, the agency may withhold the recording from the public, except that the recording, either redacted as provided in clause (i) or unredacted, shall be disclosed promptly, upon request, to any of the following:

(I) The subject of the recording whose privacy is to be protected, or their authorized representative.

(II) If the subject is a minor, the parent or legal guardian of the subject whose privacy is to be protected.

(III) If the subject whose privacy is to be protected is deceased, an heir, beneficiary, designated immediate family member, or authorized legal representative of the deceased subject whose privacy is to be protected.

(iii) If disclosure pursuant to clause (ii) would substantially interfere with an active criminal or administrative investigation, the agency shall provide in writing to the requester the specific basis for the agency's determination that disclosure would substantially interfere with the investigation, and provide the estimated date for the disclosure of the video or audio recording. Thereafter, the recording may be withheld by the agency for 45 calendar days, subject to extensions as set forth in clause (ii) of subparagraph (A).

(C) For purposes of this paragraph, a video or audio recording relates to a critical incident if it depicts any of the following incidents:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury.

(D) An agency may provide greater public access to video or audio recordings than the minimum standards set forth in this paragraph.

(E) This paragraph does not alter, limit, or negate any other rights, remedies, or obligations with respect to public records regarding an incident other than a critical incident as described in subparagraph (C).

(F) For purposes of this paragraph, a peace officer does not include any peace officer employed by the Department of Corrections and Rehabilitation.

**Comment.** Section 7923.600 continues former Section 6254(f) without substantive change.

For other provisions relating to the law enforcement exemption to the California Public Records Act (“CPRA”), see Sections 7923.650 and 7923.655. For additional CPRA provisions relating to crimes, weapons, or law enforcement, see Sections 7923.700-7923.805; see also Sections 7921.700-7921.710 (disclosure to district attorney and related matters). For CPRA provisions on security measures and related matters, see Sections 7929.200-7929.215.

For other special rules applicable to specific types of public records, see Sections 7924.000-7929.005, 7929.400-7929.610; see also Sections 7922.000 (CPRA catch-all exemption), 7930.000-7930.215 (alphabetical list of many CPRA exemptions).

For general rules governing disclosure of public records, see Sections 7921.300-7921.710. For general rules governing exemptions from disclosure, see Sections 7922.000-7922.210. For procedural rules governing requests for public records and related matters, see Sections 7922.500-7922.725; see also Sections 7923.000-7923.510 (enforcement).

For legislative findings and declarations underlying the CPRA, see Section 7921.000. For restrictions on an agency’s ability to transfer a public record or otherwise relinquish control over its disclosure, see Sections 7921.005 and 7921.010. For inspection and copying of a public record, see Sections 7922.525 and 7922.530.

For the effect of the CPRA, see Section 7920.200; see also Sections 7920.100-7920.120 (effect of CPRA recodification). For references to some other bodies of law governing public records, see Section 7920.000 Comment.

See Sections 7920.510 (“local agency”), 7920.520 (“person”), 7920.530 (“public records”), 7920.540 (“state agency”).

**Does the Commission want to recodify Section 6254(f) in a single code section, as the City Attorneys’ CPRA Committee suggests?**

If the Commission decides to follow the suggested approach, it would be advisable to explain that decision in the preliminary part of the Commission’s report. For example, the Commission could insert the following new paragraph at the end of the discussion of “Short, Simple Sections” on pages 14-15 of the tentative recommendation:

Although short sections have numerous advantages, the Commission reluctantly decided to recodify all of the CPRA’s law enforcement exemption (Section 6254(f)) in a single code section. That provision is especially important, complicated, and widely used. The Commission experimented with dividing its substance into a number of short sections, but that approach generated stakeholder concerns about the risk of a substantive change. In light of those concerns, the Commission dropped the attempt to divide

the substance of Section 6254(f). If the recodification is enacted, the Legislature might want to consider the possibility of pursuing another reform, which would focus specifically on dividing the substance of Section 6254(f) into manageable sections and making it more user-friendly.

**If the Commission decides to recodify Section 6254(f) in a single code section, does it also want to include a discussion of that drafting decision in its report, along the lines shown above?**

The next part of this memorandum discusses CNPA's concern about how the tentative recommendation proposes to recodify Section 6254(f). The Commission will only have to consider that concern if it decides to stick with the approach in the tentative recommendation, instead of recodifying Section 6254(f) in a single code section.

*CNPA's Concern*

Subdivision (a) of proposed Section 7923.615 would recodify the substance of (1) the first sentence of Section 6254(f)(2)(A) and (2) the third unnumbered paragraph of Section 6254(f) (with respect to Section 6254(f)(2)).<sup>102</sup> It reads:

7923.615. (a) Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public, subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation. To the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, this includes all of the following:

- (1) The time, date, and location of occurrence.
- (2) The time and date of the report.
- (3) The name and age of the victim.
- (4) The factual circumstances surrounding the crime or incident.
- (5) A general description of any injuries, property, or weapons involved.

CNPA agrees that this recodification would be nonsubstantive, but it "finds the structure of subdivision (a) confusing."<sup>103</sup> CNPA recommends the following revision:

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102. The substance of the third unnumbered paragraph of Section 6254(f) would also be continued in proposed Sections 7923.610 (with respect to Section 6254(f)(1)) and 7923.620(a) (with respect to Section 6254(f)(3)).

7923.615. (a)(1) Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public, subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto, including, to except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation. To the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, ~~this includes all of the following:~~

- (1) (A) The time, date, and location of occurrence.
- (2) (B) The time and date of the report.
- (3) (C) The name and age of the victim.
- (4) (D) The factual circumstances surrounding the crime or incident.
- (5) (E) A general description of any injuries, property, or weapons involved.

(2) Paragraph (1) does not require disclosure of a particular item of information to the extent that disclosure would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation.<sup>104</sup>

CNPA says this revision would more closely track the existing language of Section 6254(f)(2)(A), and “would be easier for a member of the public to understand.”<sup>105</sup>

#### *Analysis of CNPA’s Concern*

Section 6254(f)(2)(A) is a complicated provision and recodifying it in a clear manner is challenging. CNPA’s suggested revisions do not seem to alter the substance of Section 6254(f)(2)(A) or proposed Section 7923.615(a). **Commissioners should consider whether those revisions would make the proposed provision more clear.**

A third alternative would be to track the existing language even more closely, like so:

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103. Exhibit p. 11.

104. *Id.* In its comment, CNPA does not propose to relabel paragraphs (1)-(5) as subparagraphs (A)-(E). The staff presumes this was an oversight and has taken the liberty of correcting it here.

105. *Id.*

7923.615. (a)(1) Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public the information described in paragraph (2), except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation.

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, subdivision (a) applies to the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded:

(A) The time, date, and location of occurrence.

(B) The time and date of the report.

(C) The name and age of the victim.

(D) The factual circumstances surrounding the crime or incident.

(E) A general description of any injuries, property, or weapons involved.

### **How would the Commission like to proceed?**

#### **Proposed Section 7924.305**

Proposed Section 7924.305 presents another organizational issue. In the tentative recommendation, it is one of several sections in “Article 1. Pesticide Safety and Efficacy Information Disclosable Under the Federal Insecticide, Fungicide, and Rodenticide Act.” That article would recodify the substance of Section 6254.2, which is long and complicated. Proposed Section 7924.305(a)-(d) would recodify Section 6254.2(b)-(f), as follows:

7924.305. (a) The Director of Pesticide Regulation, upon the Director’s initiative, or upon receipt of a request pursuant to this division for the release of data submitted and designated as a trade secret by a registrant or applicant, shall determine whether any or all of the data so submitted is a properly designated trade secret. *In order to assure that the interested public has an opportunity to obtain and review pesticide safety and efficacy data and to comment prior to the expiration of the public comment period on a proposed pesticide registration, the director shall provide notice to interested persons when an application for registration enters the registration evaluation process.*

(b) If the director determines that the data is not a trade secret, the director shall notify the registrant or applicant by certified mail.

(c) The registrant or applicant shall have 30 days after receipt of this notification to provide the director with a complete justification and statement of the grounds on which the trade secret privilege is

claimed. This justification and statement shall be submitted by certified mail.

(d) The director shall determine whether the data is protected as a trade secret within 15 days after receipt of the justification and statement or, if no justification and statement is filed, within 45 days of the original notice. The director shall notify the registrant or applicant and any party who has requested the data pursuant to this division of that determination by certified mail. If the director determines that the data is not protected as a trade secret, the final notice shall also specify a date, not sooner than 15 days after the date of mailing of the final notice, when the data shall be available to any person requesting information pursuant to Section 7924.300.

(e) ....<sup>106</sup>

A Note in the tentative recommendation points out that the italicized sentence establishes a notice requirement for a proposed pesticide registration. The Note asks whether that requirement belongs in the CPRA or should be recodified elsewhere.

CNPA says it has no position on whether that sentence should be recodified outside the CPRA.<sup>107</sup> The City Attorneys' CPRA Committee recommends that proposed Section 7924.305(a) be recodified elsewhere.<sup>108</sup> In particular, the committee suggests recodifying that material in "Chapter 2. Pesticides" (Sections 12751-13192) of Division 7 of the Food and Agricultural Code.<sup>109</sup>

It is unclear whether the committee is referring to all of proposed Section 7924.305(a) or only to the sentence shown in italics above. The staff presumes the latter, because the first sentence of proposed Section 7924.305 (requiring the Director of Pesticide Regulations to determine whether data requested by a member of the public was properly designated as a trade secret) clearly belongs in proximity to subdivisions (b)-(d) of that section (specifying the procedure to follow if the director determines that the requested data was not properly designated as a trade secret).

In light of the committee's suggestion, the staff examined "Chapter 2. Pesticides." The chapter contains an article entitled "Registration" (Food & Agric. Code §§ 12811-12838), which at first glance appeared to be a natural place to put the italicized sentence requiring notice of a proposed pesticide registration.

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106. Emphasis added.

107. Exhibit p. 11.

108. Exhibit p. 3.

109. *Id.*

On closer examination, however, the staff was not sure how to integrate that notice requirement into the chapter. We are not familiar enough with pesticide law to readily determine the best treatment of the provision.

Rather than getting sidetracked by this matter, the Commission could (1) leave proposed Section 7924.305 as is, and (2) add the relocation issue to the list of “Minor Clean-Up Issues For Possible Future Legislative Attention” at the end of the Commission’s report. Alternatively, the staff could try to obtain input on the issue from the Director of Pesticide Regulation before the next Commission meeting.

**What is the Commission’s preference?**

G. OTHER CONCERNS ABOUT SPECIFIC ASPECTS  
OF THE PROPOSED RECODIFICATION

The remainder of this memorandum discusses a variety of other issues relating to the tentative recommendation, most of them relatively minor. The discussion tracks the order in which the issues arise in the tentative recommendation.

**Comment to Proposed Section 7920.000**

Among other things, the Comment to proposed Section 7920.000 says:

For guidance on record retention, see, e.g., Gov’t Code §§ 9080 (legislative records), 12220-12237 (State Archives), 14740-14746 (State Records Storage Act), 26201-26202.6 (county records), 34090-34090.8 (city records), 68150-68152 (trial court records). See also Gov’t Code §§ 12270-12279 (State Records Management Act).

Having taken another look at that Comment, the staff thinks it should be revised as follows:

For guidance on record ~~retention~~ management, see, e.g., Gov’t Code §§ 9080 (legislative records), 12220-12237 (State Archives), 14740-14746 (State Records Storage Act), ~~26201-26202.6~~ 26200-26202.6, 26205-26205.8, 26206.7-26206.8 (county records), 34090-34090.8 (city records), 68150-68152 (trial court records). See also Gov’t Code §§ 12270-12279 (State Records Management Act).

**Unless the Commission otherwise directs, the staff will make these revisions in the next draft of the proposed recodification.**

## Proposed Section 7920.005

Proposed Section 7920.005 defines the “CPRA Recodification Act of 2020” as follows:

7920.005. This division recodifies the provisions of former Chapter 3.5 (commencing with Section 6250) of Division 7 of this title. The act that added this division shall be known and may be cited as the “CPRA Recodification Act of 2020.”

It seems likely, however, that the conforming revisions for the proposed recodification will be introduced in a separate bill, not in the same bill as the proposed recodification itself.

To account for that situation, **proposed Section 7920.005 should be revised as follows:**

7920.005. This division recodifies the provisions of former Chapter 3.5 (commencing with Section 6250) of Division 7 of this title. The act that added this division, and the act that consists of conforming revisions to reflect the addition of this division, shall be known and may be cited as the “CPRA Recodification Act of 2020.”

This is important, because the proposed recodification includes the following provision:

7920.100. Nothing in *the CPRA Recodification Act of 2020* is intended to substantively change the law relating to inspection of public records. The act is intended to be entirely nonsubstantive in effect. Every provision of this division and every other provision of this act, including, without limitation, every cross-reference in every provision of the act, shall be interpreted consistent with the nonsubstantive intent of the act.<sup>110</sup>

**Unless the Commission otherwise directs, the staff will make this revision in the next draft of the proposed recodification.<sup>111</sup>**

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110. Emphasis added.

111. The Commission already recognized the need for this revision in its separate tentative recommendation consisting of conforming revisions, which says:

Due to their bulk, the conforming revisions in this tentative recommendation might be introduced as a separate bill, instead of being included in the same bill as the CPRA recodification itself. Regardless of whether they are in a separate bill, the Commission will make sure that they are statutorily defined to be part of the “CPRA Recodification Act of 2020.”

Tentative Recommendation on *California Public Records Act Clean-Up: Conforming Revisions* (July 2019), p. 7 (footnote omitted); see also *id.* at n. 17.

### **Proposed Section 7920.535**

Section 6254.24 defines “public safety official” for purposes of the CPRA. The definition includes “a probation officer *as defined in* Section 830.5 of the Penal Code.”<sup>112</sup>

Penal Code Section 830.5 uses the term “probation officer,” but does not define that term. The Commission pointed this out and sought comment on the matter in a Note accompanying proposed Section 7920.535, which would recodify Section 6254.24.

CNPA “believes that the reference to Penal Code Section 830.5 should be retained in new Section 7920.535(g) in order to avoid making a substantive change to the section.”<sup>113</sup> CNPA suggests, however, that because Penal Code Section 830.5 “does not actually define the term ‘probation officer’ it would be appropriate to modify the cross-reference to instead refer to ‘a probation officer *as that term is used* in Section 830.5 of the Penal Code.”<sup>114</sup>

**Would the Commission like to revise proposed Section 7920.535(g) as CNPA suggests?**

### **Proposed Section 7920.545**

Proposed Section 7920.545 would be a signpost provision in “Chapter 2. Definitions,” alerting readers to two definitions of “trade secret” that are used in the CPRA. It reads:

7920.545. (a) “Trade secret” is defined in subdivision (f) of Section 7924.305.

(b) Subdivision (f) of Section 7924.510 defines “trade secret” for purposes of that section.

**Comment.** Section 7920.545 is new. It is intended to help persons locate the definitions of “trade secret” used in the California Public Records Act.

CNPA “see two problems with this approach.”<sup>115</sup> It explains:

First, the term “trade secret” is used throughout the CPRA but is only sometimes defined with the CPRA itself. For example, existing Section 6254.15 (re-codified in new Section 7927.605) uses the term “trade secret” without defining that term, while existing Section 6254(ad)(5) (recodified in new Section 7929.420) uses the term “trade secret” as defined in the Evidence Code. Because

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112. Section 6254.24(g) (emphasis added).

113. Exhibit p. 9.

114. *Id.* (emphasis in original).

115. Exhibit p. 9.

neither of these sections include a CPRA-specific definition of “trade secret,” they are not referenced in new Section 7920.545’s definition of “trade secret.” This omission could result in a reader incorrectly concluding the two sections referenced in new Section 7920.545 are the only two sections in the CPRA which deal with trade secrets.

Second, subdivision (a) of new Section 7920.545 states that the term “is defined in subdivision (f) of Section 7924.305.” While that statement is technically correct, its inclusion in the general definition portion of the CPRA ... gives the impression that the definition found ... in subdivision (f) of Section 7924.305 is applicable to all uses of the term “trade secret” in the CPRA unless a section-specific definition is provided, which is clearly not correct given that the definition in Section 7924.305 is specific to pesticides while the term “trade secret” is used more generally in other parts of the CPRA.<sup>116</sup>

For those reasons, CNPA recommends that proposed Section 7920.545 be deleted.<sup>117</sup>

The purpose of a signpost provision is to help readers, not to create problems. **Given the concerns that CNPA raises, it seems advisable to delete proposed Section 7920.545 as CNPA suggests.**

### **Proposed Section 7923.110**

Section 6259(b) provides:

(b) If the court finds that the public official’s decision to refuse disclosure is not justified *under Section 6254 or 6255*, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.<sup>118</sup>

Proposed Section 7923.110 would recodify Section 6259(b), with revisions updating the cross-references to Sections 6254 and 6255:

7923.110. (a) If the court finds that the public official’s decision to refuse disclosure is not justified *under Section 7922.000 or any provision listed in Section 7920.505*, the court shall order the public official to make the record public.

(b) If the court finds that the public official was justified in refusing to make the record public, the court shall return the record

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116. *Id.*

117. *Id.*

118. Emphasis added.

to the public official without disclosing its content, together with an order supporting the decision refusing disclosure.<sup>119</sup>

The City Attorneys' CPRA Committee "recommends subdivision (a) of section 7923.110 be modified to read, 'If the court finds that the public official's decision to refuse disclosure is not justified *under this Division ...*'"<sup>120</sup> The committee "believes that specific references to sections 7922.000 and 7920.505 may unintentionally limit the applicability of the exemptions an agency may rely on in refusing disclosure."<sup>121</sup>

The City Attorneys' CPRA Committee is essentially suggesting that Section 6259(b) should cross-refer to the entire CPRA, not just Sections 6254 and 6255. That might make sense, but it would not be appropriate for the Commission to propose such a revision in this strictly nonsubstantive study.

Instead, **the Commission should perhaps mention the matter in its report, as an issue that might warrant investigation in the future.** That could be done in the preliminary part and/or the list of "Minor Clean-Up Issues for Possible Future Legislative Attention."

**Is the staff's suggested approach acceptable to the Commission?** If so, the staff will prepare implementing language for the Commission to consider at its next meeting.

### **Proposed Sections 7923.120 and 7923.510**

As previously explained, "Chapter 2. Procedure" of "Part 4. Enforcement" would recodify the substance of Section 6259, which is shown on pages 26-27 of this memorandum. That chapter would be divided into two articles: "Article 1. Petition to Superior Court" and "Article 2. Writ Review."

Among the provisions in "Article 1. Petition to Superior Court" would be proposed Section 7923.120, which provides:

#### **§ 7923.120. Failure to obey order as grounds for contempt**

7923.120. Any person who fails to obey an order of the court *pursuant to this chapter* shall be cited to show cause why that person is not in contempt of court.

**Comment.** Section 7923.120 continues the fifth sentence of former Section 6259(c) without substantive change.

....<sup>122</sup>

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119. Emphasis added.

120. Exhibit p. 2 (emphasis added).

121. *Id.* (emphasis added).

122. Emphasis added.

Among the provisions in “Article 2. Writ Review” would be proposed Section 7923.510, which provides:

**§ 7923.510. Stay of judgment or order**

7923.510. A court shall not grant a stay of a judgment or order entered *pursuant to this chapter* unless the petitioning party demonstrates both of the following:

- (1) Probable success on the merits.
- (2) The petitioning party will otherwise sustain irreparable damage.

**Comment.** Section 7923.510 continues the fourth sentence of former Section 6259(c) without substantive change.

....<sup>123</sup>

*CNPA’s Concern*

CNPA says it “is clear from the context of existing Section 6259(c) that the orders and judgments referred to in that section are those ‘either directing disclosure by a public official or supporting the decision of the public official refusing disclosure’ (see the first sentence of existing Section 6259(c)).”<sup>124</sup> CNPA then points out that proposed Sections 7923.120 and 7923.510 refer instead to an order made pursuant to proposed “Chapter 2. Procedure” of “Part 4. Enforcement.”<sup>125</sup>

CNPA “is concerned that this could be interpreted to refer to *any* order made in an enforcement proceeding, rather than just those orders ‘either directing disclosure by a public official or supporting the decision of the public official refusing disclosure,’ which would appear to be a substantive change to the CPRA.”<sup>126</sup> To address this concern, CNPA suggests that proposed Sections 7923.120 and 7923.510 “should instead refer to ‘a’ or ‘an’ order issued *pursuant to Section 7923.110* (rather than pursuant to all of Chapter 2).”<sup>127</sup>

*Analysis of CNPA’s Concern*

If the Commission decides to reorganize “Part 4. Enforcement” as the City Attorneys’ CPRA Committee suggests (see pages 24-27), CNPA’s concern about proposed Sections 7923.120 and 7923.510 will be moot. If the Commission decides to stick with the organizational scheme used in the tentative recommendation, then it will need to consider that concern.

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123. Emphasis added.

124. Exhibit p. 10.

125. *Id.*

126. *Id.* (emphasis in original).

127. *Id.* (emphasis in original).

To the staff, Section 6259(c) does not seem as clear as CNPA suggests. It provides:

(c) In an action filed on or after January 1, 1991, *an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure*, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of *any order pursuant to this section*, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days. A stay of *an order or judgment* shall not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey *the order of the court* shall be cited to show cause why he or she is not in contempt of court.<sup>128</sup>

As CNPA points out, the first sentence refers to “an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure.” As the Commission can see, however, the second sentence refers to “any order pursuant to this section” (i.e., Section 6259, which corresponds to proposed “Chapter 2. Procedure”). The fourth sentence (corresponding to proposed Section 7923.510) and the fifth sentence (corresponding to proposed Section 7923.120) are more opaque: They refer to “an order or judgment” and “the order of the court,” respectively.

**The concern that CNPA raises could be avoided by preserving the existing language of Section 6259(c).** That could be accomplished by replacing proposed Sections 7923.120, 7923.500, 7923.505, and 7923.510 with the following provision:

**§ 7923.500. Writ review and contempt**

7923.500. (a) An order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.

(b) Upon entry of any order pursuant to this chapter, a party shall, in order to obtain review of the order, file a petition within 20

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128. Emphasis added.

days after service upon the person of a written notice of entry of the order, or within a further time, not exceeding an additional 20 days, as the trial court may for good cause allow.

(c) If the notice is served by mail, the period within which to file the petition shall be increased by five days.

(d) A stay of an order or judgment shall not be granted unless the petitioning party demonstrates that the party will otherwise sustain irreparable damage and probable success on the merits.

(e) Any person who fails to obey the order of the court shall be cited to show cause why that person is not in contempt of court

It would also be necessary to make various conforming changes, such as renaming “Article 2. Writ Review” as “Article 2. Writ Review and Contempt.”

**Would the Commission like to make these changes? Would it prefer to respond to CNPA’s concern in some other way?**

#### **Proposed Section 7923.750**

Section 6254.4.5 includes the word “such,” which is generally disfavored in legislative drafting. The staff overlooked this in preparing proposed Section 7923.750, the provision that would continue the substance of Section 6254.4.5.

That problem could be addressed by revising proposed Section 7923.750(a) as follows:

7923.750. (a) This division does not require disclosure of a video or audio recording that was created during the commission or investigation of the crime of rape, incest, sexual assault, domestic violence, or child abuse that depicts the face, intimate body part, or voice of a victim of the incident depicted in the recording. An agency shall justify withholding ~~such a~~ that type of video or audio recording by demonstrating, pursuant to Section 7922.000 and subdivision (a) of Section 7922.540, that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording.

**Unless the Commission otherwise directs, the staff will make this revision in the next draft of the proposed recodification.**

#### **Proposed Section 7926.410**

Section 6254.18 is a lengthy section on confidentiality and disclosure of public records relating to a reproductive healthy services facility. In the tentative recommendation, its substance would be divided into a number of different

provisions, which would comprise an article entitled “Reproductive Health Services Facility.” Within that article, proposed Section 7926.410 would continue the substance of Section 6254.18(c).

The City Attorneys’ CPRA Committee recommends that proposed Section 7926.410 be revised “to make clear that it relates to employment records of a reproductive healthcare clinic.”<sup>129</sup> The committee explains:

In ... section 6254.18(c), it is clear from the context that the section relates directly to privacy protections for people associated with a reproductive healthcare clinic. As a stand-alone section, it is ambiguous.<sup>130</sup>

The committee’s suggestion makes sense. **It could be implemented as follows:**

7926.410. (a) Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to obtain access to employment history information of a reproductive health services facility pursuant to Part 4 (commencing with Section 7923.000).

(b) If the court finds, based on the facts of a particular case, that the public interest served by disclosure of employment history information of a reproductive health services facility clearly outweighs the public interest served by not disclosing the information, the court shall order the officer or person charged with withholding the information to disclose employment history information or show cause why that officer or person should not do so pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4.

**Unless the Commission otherwise directs, the staff will make this revision in the next draft of the proposed recodification.**

**“Chapter 7. Library Records” (Proposed Sections 7927.100 and 7927.105; Existing Sections 6254(j) and 6267)**

Section 6254(j) relates to library records. It provides:

6254. Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:

....

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for

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129. Exhibit p. 3.

130. Emphasis added.

reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

Section 6267 is a longer provision, which also concerns confidentiality of library records, but only “of a library that is in whole or in part supported by public funds.”<sup>131</sup> It provides:

6267. All patron use records of any library which is in whole or in part supported by public funds shall remain confidential and shall not be disclosed by a public agency, or private actor that maintains or stores patron use records on behalf of a public agency, to any person, local agency, or state agency except as follows:

(a) By a person acting within the scope of his or her duties within the administration of the library.

(b) By a person authorized, in writing, by the individual to whom the records pertain, to inspect the records.

(c) By order of the appropriate superior court.

As used in this section, the term “patron use records” includes the following:

(1) Any written or electronic record, that is used to identify the patron, including, but not limited to, a patron’s name, address, telephone number, or e-mail address, that a library patron provides in order to become eligible to borrow or use books and other materials.

(2) Any written record or electronic transaction that identifies a patron’s borrowing information or use of library information resources, including, but not limited to, database search records, borrowing records, class records, and any other personally identifiable uses of library resources information requests, or inquiries.

This section shall not apply to statistical reports of patron use nor to records of fines collected by the library.

In the tentative recommendation, proposed Section 7927.100 would continue the substance of Section 6254(j). Proposed Section 7927.105 would continue the substance of Section 6267. Together, proposed Sections 7927.100 and 7927.105 would comprise a chapter entitled “Library Records.”

The City Attorneys’ CPRA Committee says that “[b]y placing the sections together, they appear to be redundant.”<sup>132</sup> The committee recommends that the Commission “merge the two sections.”<sup>133</sup> The committee further advises that

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131. Section 6267(c).

132. Exhibit p. 3.

133. *Id.*

“[b]ecause Section 7927.105 is the more comprehensive section, 7927.100 is unnecessary.”<sup>134</sup>

The staff is not as confident about the degree of overlap between the two provisions in question. For example, Section 6254(j) (corresponding to proposed Section 7927.100) might apply to a circulation record of a *private* library if that record is for some reason “retained by” a public agency,<sup>135</sup> while Section 6267 would not seem to apply to such a record. Section 6254(j) also refers to “library and museum materials made or acquired and presented solely for reference or exhibition purposes,”<sup>136</sup> while Section 6267 lacks such language. It is possible that Section 6254(j) is meant to refer to “[l]ibrary circulation records kept for the purpose of identifying the borrower of ... library and museum materials made or acquired and presented solely for reference or exhibition purposes,” but that construction seems strained and less than obvious.

Instead of trying to sort out how the two library-related provisions interrelate in the context of this study, the staff recommends **adding that project to the Commission’s list of “Minor Clean-Up Issues for Possible Future Legislative Attention.”**

In addition, **it may be prudent to revise proposed Section 7927.100 to more closely track the language of Section 6254(j).** The version in the tentative recommendation reads:

**§ 7927.100. Library circulation records and library and museum materials**

7927.100. (a) Except as provided in Sections 7924.510, 7924.700, and 7927.605, this division does not require disclosure of any of the following:

(1) Library circulation records kept for the purpose of identifying the borrower of items available in libraries.

(2) Library and museum materials made or acquired and presented solely for reference or exhibition purposes.

(b) The exemption in this section does not apply to records of fines imposed on the borrowers.

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134. *Id.*

135. See Section 6252(e), defining “public records” to include “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.” (Emphasis added.)

136. For cases referring to that part of Section 6254(j), see *Vallejo v. California Hwy. Patrol*, 89 Cal. App. 3d 781, 785, 152 Cal. Rptr. 846 (1979); *Cook v. Craig*, 55 Cal. App. 3d 773, 782, 127 Cal. Rptr. 712 (1976).

That version would seem to preclude the possible construction mentioned above. To leave open that possibility, **the Commission could replace the version in the tentative recommendation with the following new version:**

**§ 7927.100. Library circulation records and related matters**

7927.100. (a) Except as provided in Sections 7924.510, 7924.700, and 7929.610, this division does not require the disclosure of library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes.

(b) The exemption in this section does not apply to records of fines imposed on the borrowers.

**Would the Commission like to take the steps recommended above?**

**Leadline for Proposed Section 7927.605**

Proposed 7927.605 would recodify the substance of Section 6254.15 as follows:

7927.605. (a) Nothing in this division requires the disclosure of records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.

(b) Except as provided in subdivision (c), incentives offered by a state or a local government agency, if any, shall be disclosed upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first.

(c) Before publicly disclosing a record that describes state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California, the agency shall delete information that is exempt pursuant to this section.

Pursuant to the Commission's usual practice, this proposed new provision is preceded by a short, descriptive leadline, which says: "§ 7929.605. Records relating to siting of private company."

The City Attorneys' CPRA Committee writes:

The title of section 7927.605 has changed from "Information relating to retention, location, or expansion of corporate facility with the state; redaction" to "Records relating to siting of private

company.” The Committee is concerned that the new title is misleading, as it excludes the reference to corporate financial records and proprietary information. The Committee recommends that the CLRC reinstate the former title.<sup>137</sup>

As previously explained, the leadlines in Commission publications are not law, nor are the similar descriptors that other publishers of California statutory materials include in their publications. The one that the City Attorneys’ CPRA Committee mentions (“Information relating to retention, location, or expansion of corporate facility with the state; redaction”) is in *West’s Annotated California Codes*. It was prepared by Thomson Reuters, not by the Legislature.

The Commission tries hard to ensure that each leadline in its reports accurately reflects the content of the corresponding statutory provision. In this instance, the staff thought that the phrase “*Records relating to siting of private company*”<sup>138</sup> would be broad enough to encompass “*corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.*”<sup>139</sup>

Given the concerns raised by the City Attorneys’ CPRA Committee, however, **perhaps the leadline for proposed Section 7929.605 should be revised to track the statutory language more closely.** For example, it could be changed to:

§ 7929.605. Corporate financial records, corporate proprietary information, and information relating to in-state siting furnished to agency to facilitate such siting

**Would the Commission like to revise the leadline as shown above? Would it like to revise it in some other manner?**

#### **Comment to Proposed Section 7927.700**

Proposed Section 7927.700 would continue the substance of Section 6254(c), which refers broadly to “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” A Note in the tentative recommendation points out that there are also a variety of other, more specific, legal protections for medical, personnel, and similarly private records. Some such protections are mentioned in the Comment to proposed

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137. Exhibit p. 4.

138. Emphasis added.

139. Emphasis added.

Section 7927.700: the Health Insurance Portability and Accountability Act (“HIPPA”), the Public Safety Officers Procedural Bill of Rights Act (“POBAR”), Penal Code Sections 832.5, 832.7, and 832.8, and various provisions within the CPRA. The Note solicits suggestions on whether the Comment should mention any other legal protections.

CNPA says that in its experience, “agencies often rely on existing Section 6254(c) as a basis to withhold records that are, in fact, subject to disclosure.”<sup>140</sup> For that reason, and “consistent with Article I, Section 3 of the California Constitution”<sup>141</sup> (which says a statute “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access”<sup>142</sup>), “CNPA believes it is important for the Commission to not only reference *exemptions* to disclosure, but also cases that *mandate* disclosure notwithstanding existing Section 6254(c).”<sup>143</sup> CNPA provides three examples of cases to include in the Comment.<sup>144</sup>

CNPA’s suggestion seems reasonable. **It could be implemented by revising the Comment to proposed Section 7927.700 along the following lines:**

**Comment.** Section 7927.700 continues former Section 6254(c) without substantive change.

In addition to this section, many other laws protect personal privacy to one degree or another. See, e.g., Health Insurance Portability and Accountability Act (“HIPPA”), Pub. Law 104-191, 110 Stat. 1936 (1996); Public Safety Officers Procedural Bill of Rights Act (“POBAR,” codified at Sections 3300-3312); Penal Code §§ 832.5, 832.7, 832.8.

For a case that requires disclosure of certain salary information despite a claim of privacy, see International Federation of Professional & Technical Engineers, Local 21 v. Superior Court, 42 Cal. 4th 319, 165 P.3d 488, 64 Cal. Rptr. 3d 693 (2007); see also Bakersfield City School Dist. v. Superior Court, 118 Cal. App. 4th 1041, 13 Cal. Rptr. 3d 517 (2004) (requiring disclosure of certain disciplinary records); BRV, Inc. v. Superior Court, 143 Cal. App. 4th 742, 49 Cal. Rptr. 3d 519 (2006) (requiring disclosure of investigator’s report on alleged misconduct of superintendent, with redactions).

For provisions of the California Public Records Act ....

**Would the Commission like to make these revisions?**

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140. Exhibit p. 12.

141. *Id.*

142. Cal. Const. art. I, § 3(b)(2).

143. Exhibit p. 12 (emphasis in original).

144. Exhibit p. 12 (emphasis in original).

## Proposed Section 7928.720

Section 6261 applies to judicial branch agencies. It provides:

6261. *Notwithstanding Section 6252*, an itemized statement of the total expenditures and disbursement of any agency provided for in Article VI of the California Constitution shall be open for inspection.<sup>145</sup>

The cross-referenced provision, Section 6252, defines the terms “local agency,” “member of the public,” “person,” “public agency,” “public records,” “state agency,” and “writing.”

Proposed Section 7928.720 would continue the substance of Section 6261, as follows:

7928.720. *Notwithstanding Section 7920.540*, an itemized statement of the total expenditures and disbursements of any agency provided for in Article VI of the California Constitution shall be open for inspection.<sup>146</sup>

The cross-referenced provision, proposed Section 7920.540 would continue Section 6252’s definition of “state agency,” which says:

(f)(1) “State agency” means every state office, officer, department, division, bureau, board, and commission or other state body or agency, *except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.*

(2) Notwithstanding paragraph (1) or any other law, “state agency” shall also mean the State Bar of California, as described in Section 6001 of the Business and Professions Code.<sup>147</sup>

The other definitions in Section 6252 would be recodified elsewhere. They do not seem relevant to the substance of proposed Section 7928.720, so the staff did not include cross-references to them.

The City Attorneys’ CPRA Committee recommends, however, that “section 7928.720 begin with, “Notwithstanding any other provision of law ...,” rather than with “Notwithstanding Section 7920.540 ....”<sup>148</sup> The committee does not explain the basis for this suggestion.

**The staff would appreciate further explanation.** We would understand a suggestion to cross-refer to all of the provisions that would recodify Section 6252 (though we do not think that is necessary). We do not understand, however, why

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145. Emphasis added.

146. Emphasis added.

147. Emphasis added.

148. Exhibit p. 4.

“Notwithstanding any other provision of law” would be equivalent to “Notwithstanding Section 6252.”

**The Commission should consider any further information it receives on this point, and then decide whether to adjust the cross-reference in some manner or leave it as is.**

#### **Proposed Section 7929.420**

Section 6254(ad)(5)(A) cross-refers to Section 6276.44, which is part of the CPRA index:

6254. Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:

....  
(ad) The following records of the State Compensation Insurance Fund:

....  
(5)(A) Records that are trade secrets pursuant to *Section 6276.44*, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including, without limitation  
....<sup>149</sup>

Proposed Section 7929.420(a) would continue the substance of Section 6254(ad)(5)(A).

In reviewing the tentative recommendation after its release, the staff realized that we inadvertently failed to update the cross-reference to Section 6276.44 in drafting proposed Section 7929.420(a). **That could be fixed by replacing the cross-reference to Section 6276.44 with a cross-reference to proposed Section 7030.205, which would recodify Section 6276.44.**

However, the cross-reference to Section 6276.44 is also problematic for another reason. It implies that Section 6276.44 defines “trade secret,” but that is not the case. Section 6276.44 is part of the CPRA index, which is just a tool to assist CPRA users, not substantive law. Rather than defining “trade secret,” the section simply lists CPRA exemptions alphabetically from “taxpayer information” to “trust companies,” including several exemptions that relate to trade secrets.

It would not be appropriate to try to fix this problem in the context of this strictly nonsubstantive study; the correct solution is not obvious. Instead, **the**

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149. Emphasis added.

**Commission could include the issue on its list of “Minor Clean-Up Issues for Possible Future Legislative Attention.”**

**Unless the Commission otherwise directs, the staff will handle the cross-reference to Section 6276.44 as described above.**

#### H. NEW LEGISLATION

There were many bills relating to the CPRA in the legislative session that just ended. A number of them died, but others have been enacted and some are awaiting action by the Governor. **The staff will incorporate any newly enacted legislation in the next draft of the proposed recodification.**

#### NEXT STEPS

The Commission is fortunate to have received thoughtful and well-grounded comments from both CNPA and the City Attorneys’ CPRA Committee, which will considerably improve the proposed CPRA recodification. Their assistance is invaluable and greatly appreciated. **Further comments from them or other knowledgeable sources are always welcome as the Commission finalizes its recommendation.**

After the Commission resolves the issues discussed in this memorandum and any other issues that surface at or before the upcoming meeting, the staff will revise the proposed recodification to reflect the Commission’s decisions. **Ideally, the staff will be able to prepare a draft of a final recommendation, for the Commission to consider and perhaps approve in November, in time for introduction of the proposed legislation in 2020.**

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel



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August 23, 2019

**VIA EMAIL**

Barbara Gaal & Steve Cohen  
California Law Review Commission  
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Re: California Law Revision Commission Study of California Public Records Act

Dear Ms. Gaal and Mr. Cohen:

I write on behalf of the California Public Records Act ("CPRA" or "Act") Committee ("Committee") of the City Attorneys' Department of the League of California Cities, an association of 478 California cities united in promoting the general welfare of cities and their citizens, regarding the California Law Revision Commission's ("CLRC") study of the CPRA.

As you are aware, members of this Committee are experienced attorneys from public agencies and law firms specializing in municipal law. The Committee drafted and published a comprehensive guide to the CPRA, "The People's Business," which is widely used by public agencies throughout California. In addition, the Committee members routinely update the public records sections of the Municipal Law Handbook, provide input and assistance on appellate cases involving CPRA issues, review and comment on legislation related to the CPRA, and participate in trainings and seminars about the CPRA for City Attorneys, City Clerks, Police Departments, and other public agency personnel.

The Committee appreciates the opportunity to comment on the CLRC's Tentative Recommendation. We respectfully offer the following comments.

**I. Overarching Comments**

**Statements of Legislative Intent**

The Committee appreciates that the tentative recommendation includes sections 7920.110, 7920.115, and 7920.120 and comments accompanying amended sections, which emphasize that the changes made by the CLRC are not intended to be substantive.

## **Consistency**

The Committee believes the tentative recommendation should be reviewed with an eye towards ensuring consistency. For example, some statutory provisions use the term “yearend,” while others use “year-end.” Similarly, some statutory provisions refer to “records,” while others refer to a “record.” Using consistent terminology will assist courts and practitioners in interpreting and applying the Act.

### **“Except as provided in Sections 7924.510, 7924.700, and 7927.605”**

The phrase, “Except as provided in Sections 7924.510, 7924.700, and 7927.605,” has been included in several provisions throughout the tentative recommendation. However, the Committee believes that the reference to 7927.605 should be to 7929.610. Therefore, the Committee recommends that the CLRC make a universal change to the reference.

## **II. Specific Comments**

### **§ 7922.575. Cost of duplication**

Subdivision (b)(1) of section 7922.575 inaccurately refers to Section 7922.520, which does not exist. Because this section is meant to continue former sections 6253.9(a)(2) and 6253.9(b) without substantive changes, the committee believes the reference should be to section 7922.570, and recommends that the CLRC change the reference.

## **Part 4. Enforcement**

The Committee believes that Part 4 unnecessarily separates concepts that are currently consolidated under former sections 6258 and 6259. Although the Committee understands the CLRC’s intent in making the table of contents clear, by breaking up previously consolidated sections, the tentative recommendation makes it more difficult for public records requesters to understand their rights, as requesters will need to read multiple sections in order to understand the enforcement process. Therefore, the Committee recommends that the CLRC revise the Act to consolidate sections 7923.000 and 7923.005, and sections 7923.100-7923.510.

### **§ 7923.110. Decision and order**

The Committee recommends subdivision (a) of section 7923.110 be modified to read, “If the court finds that the public official’s decision to refuse disclosure is not justified under this Division...” The Committee believes that specific references to sections 7922.000 and 7920.505 may unintentionally limit the applicability of the exemptions an agency may rely on in refusing disclosure.

## **Government Code § 6254(f)**

The tentative recommendation breaks up section 6254(f) into sections 7923.600-7923.625. The Committee strongly believes that doing so will result in substantive changes to existing law. There is extensive case law regarding the interpretation of 6254(f) in its current form with analysis that turns on specific words used in particular contexts. By breaking 6254(f) apart into separate sections and changing the context, CLRC risks undermining judicial interpretations of 6254(f).

For example, in *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, the California Supreme Court held that Government Code section 6254(f)(2) “required the disclosure of information derived from the records while, in most cases, preserving the exemption for the records themselves.” *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072. In reaching this conclusion, the Court analyzed subdivision (2) in the context of section 6254(f) as a whole, comparing its component parts. If the components of section 6254(f) were contained in separate subsections, the court may not have reached the same conclusion.

### **§ 7924.305. Data submitted and designated as trade secret**

The Committee recommends that subdivision (a) of section 7924.305, which relates to information submitted to the Director of Pesticide Regulation that could potentially constitute trade secrets, be recodified elsewhere. The Committee believes Chapter 2 of Division 7 of the Food and Agriculture Code (Pesticides) may be an appropriate place for the subdivision to be codified.

### **§ 7924.700. Emergency information**

The Committee agrees with the proposed revision and rationale for recodifying subdivision (c) of section 7924.700 in a separate section entitled “Record relating to housing or building violation.”

### **§ 7926.410. Proceeding for access to employment history information**

The Committee recommends that section 7926.410 be amended to make clear that it relates to employment records of a reproductive healthcare clinic. In former section 6254.18(c), it is clear from the context that the section relates directly to privacy protections for people associated with a reproductive healthcare clinic. As a stand-alone section, it is ambiguous.

### **§ 7927.100. Library circulation records and library and museum materials; § 7927.105. Patron use records of library supported by public funds**

Sections 7927.100 and 7927.105 mirror former sections 6254(j) and 6267. By placing the sections together, they appear to be redundant. Because Section 7927.105 is the more

comprehensive section, 7927.100 is unnecessary. Therefore, the Committee recommends that the CLRC merge the two sections.

**§ 7927.605. Records relating to siting of private company**

The title of section 7927.605 has changed from “Information relating to retention, location, or expansion of corporate facility within the state; redaction” to “Records relating to siting of private company.” The Committee is concerned that the new title is misleading, as it excludes the reference to corporate financial records and proprietary information. The Committee recommends that the CLRC reinstate the former title.

**§ 7928.720. Itemized statement of total expenditures and disbursements of judicial branch agency**

The Committee recommends that section 7928.720 begin with, “Notwithstanding any other provision of law...,” rather than with “Notwithstanding Section 7920.540,....”

**III. Conclusion**

The Committee remains committed to offering as much professional assistance as you might need or want for this important project. We appreciate the generous opportunities you have given us to participate in this project. Should you have any questions or comments, please feel free to contact the Committee. If it would be helpful, Committee members are able to meet with CLRC staff at your convenience to discuss any of our proposed recommendations.

Sincerely,



JOLIE HOUSTON  
Chair, California Public Records Act  
Committee  
League of California Cities  
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# CALIFORNIA NEWS PUBLISHERS ASSOCIATION CNPA Services, Inc.

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August 26, 2019

California Law Review Commission  
c/o UC Davis School of Law  
Davis, CA 95616  
[bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov)

**RE: Tentative Recommendation on California Public Records Act Clean-Up**

Dear California Law Review Commission:

The California News Publishers Association (CNPA) represents the interests of newspapers in California, in legislative, regulatory, and judicial processes. More than 400 newspapers, including all of the major daily newspapers published in this state, are CNPA members.

As the voice of the newspaper industry in California, CNPA respectfully requests the Commission to consider its concerns with respect to Commission's tentative recommendation on the California Public Records Act Clean-Up.

As a preliminary matter, CNPA commends the Commission for its thorough and diligent work on this project. While CNPA does have concerns about the tentative recommendation, it recognizes and appreciates the tremendous effort made by the Commission in carrying out the task assigned to it by the Legislature.

## **I. General Comment**

As CNPA understands it, the underlying motivation of the Legislature in directing the Commission to study the California Public Records Act (CPRA) and prepare recommended legislation was to make the CPRA easier for the public to understand. Unfortunately, in CNPA's opinion, the tentative recommendation does not accomplish this objective. If the tentative recommendation were to be adopted, the CPRA would continue to be a long, complex, and often-times difficult to understand law.

To be clear, CNPA believes this result is dictated by the substance, rather than the form, of the CPRA, and no amount of non-substantive revision will meaningfully address the difficulty the public has in understanding the law. While CNPA recognizes that the Commission's mandate was to make only non-substantive changes, CNPA believes it is appropriate for the Commission to, at a minimum, include a discussion in its final recommendation of whether the benefits to the

public of a non-substantive revision justify the burden the reorganization will place on practitioners and publishing companies.

## **II. Delayed Operative Date**

The tentative recommendation includes a recommendation that the operative date of the proposed legislation be delayed by six months (to July 1, 2021). CNPA agrees that, if the legislation is adopted, a delayed operative date will be necessary. However, CNPA believes that the operative date should be delayed for at least one year (to January 1, 2022). This will allow both practitioners and groups that publish guides for the public on the CPRA – such as CNPA – a more suitable amount of time to adjust to the revisions and to update publications.

## **III. Structure of the Proposed Law**

The tentative recommendation calls for “Disclosure and Exemptions Generally” and “Procedures” to be divided into two different Parts of new Division 10. CNPA isn’t aware of any reason why these provisions should be divided into two different Parts as they include provisions that relate to baseline rules regarding requests for and disclosure of any public record.

For example, Part 2 (Disclosure and Exemptions Generally) includes new Section 7922.000, which recodifies existing Section 6255(a)’s requirement that an agency justify the withholding of any record either by reference to a specific exemption or by showing that the specified balance test is met. But, other generally applicable rules of disclosure, such as new Sections 7922.535 and 7922.600, which recodify parts of existing Sections 6253 and 6253.1 respectively – the requirements related to an agency’s duty to respond within a specific timeframe and to assist a requester in identifying responsive records – are included in Part 3 (Procedures).

Separating provisions that relate to the general rules governing requests and disclosure into two different Parts is unnecessary and makes it more difficult for members of the public to find key provisions of the CPRA. CNPA believes that Parts 2 and 3 should be merged into one Part, entitled “Disclosure and Exemptions Generally.”

In the event the two Parts are kept separate, CNPA believes that Part 3 should, at a minimum, be renamed to give a better indication as to its actual content. The term “Procedures” is misleading because Part 3 actually includes important substantive rights of requesters, such as the right to be charged no more than the actual cost of duplication for a copy of a public record (Section 7922.530) and the right to receive information in an electronic format (Section 7922.570).

Moreover, there is little meaningful difference between procedural and substantive rights in the context of the CPRA as violation of a procedural rule can often result in a harm that is substantive in nature. For example, an undue delay in disclosing records, in violation of new Section 7922.500 (existing Section 6253(d)), can have the same substantive effect as not providing the records at all if the requester was seeking the records for a time-sensitive matter (such as a newspaper seeking records for a news story).

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#### **IV. Handling of Existing Section 6254 Provisions**

##### **a. New Section 7920.505**

The tentative recommendation handles the difficult task of breaking up the provisions of existing Section 6254, which is regularly referenced in other provisions of the CPRA, into different sections without making substantive change by creating new Section 7920.505. New Section 7920.505 is essentially an index of the various code sections that have been re-numbered. Provisions of the CPRA that currently reference Section 6254 generally will now instead refer to Section 7920.505.

CNPA understands the simplicity of this approach, and recognizes that if Section 6254 is to be broken up without making substantive change there is probably no other feasible means of accomplishing the task. However, CNPA is concerned that because Section 7920.505 will include only those provisions that were part of Section 6254 at the time of the CPRA Recodification Act of 2020's adoption it means that new exemptions created in the future, that otherwise would have been included in Section 6254, are left in limbo. This could result in an increase in cross-references to other Sections in future legislation, which is contrary to directive given to the Commission in ACR 148 (Chau).

To remedy this issue, CNPA believes that the Commission should include a signpost in the comment to Section 7920.505 that the Legislature may wish to consider adding a new subdivision to Section 7920.505 in the future to list new CPRA exemptions, so that Section 7920.505 can continue to serve as a convenient cross-reference for CPRA exemptions generally. Alternatively, it may be appropriate to consider whether the Legislature needs to make minor substantive changes to the CPRA, and other laws that reference Section 6254, to instead make a more general reference to records exempt from disclosure pursuant to the CPRA.

##### **b. Cross References to Existing Sections 6254.7 and 6254.13**

Existing Section 6254 includes the following clause that applies to all exemptions provided for therein: "Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records". The Commission handled the cross reference to Sections 6254.7 and 6254.13, which mandate the disclosure of specified types of records in specific situations, by cross referencing the re-codifications of 6254.7 and 6254.13 at the beginning of each re-codified provisions of Section 6254. Specifically, the clause inserted to the re-codified Section 6254 provisions reads: "Except as provided in Sections 7924.510, 7924.700, and 7927.605". CNPA sees two problems with this approach.

First, the cross reference to new Section 7927.605 is erroneous. Section 7927.605 re-codifies Section 6254.15, not Section 6254.13. Section 6254.13 is re-codified in new Section 7929.610. If the approach of including the cross reference in each re-codified provision of Section 6254 is continued, the clause must be corrected to reference Section 7929.610 instead of Section 7927.605.

Second, the recurring cross references to the re-codifications of Sections 6254.7 and 6254.13 runs counter to the direction given in ACR 148 (Chau) to avoid unnecessary cross references and eliminate duplicative provisions. It may be appropriate for the Commission to consider whether including “notwithstanding” language in Sections 7924.510, 7924.700, and 7929.610 is a more efficient approach than including “except as provided” language in every re-codification of Section 6254’s provisions. To the extent this would be considered a substantive change, CNPA believes it is appropriate for the Commission to flag the issue for consideration by the Legislature.

## V. Comments on Specific Provisions

### a. Section 7920.500 – Definition of “Elected or Appointed Official”

Section 7920.500, found in Article 3, Chapter 2, of Part 1 appears to include an error. It references Article 3 (commencing with Section 7928.200) of Chapter 5. The lack of reference to a Part gives the impression that 7928.200 is included in the same Part as Section 7920.500, when in fact it is found in Part 5. In addition, Section 7928.200 commences Article 3 of *Chapter 14*, not Chapter 5. Section 7920.500 should be corrected to reference Article 3 (commencing with Section 7928.200) of Chapter 14 of Part 5.

### b. Section 7920.510 – Definition of “Local Agency”

The comment to Section 7920.510 requested comment on the correction of the reference to “subdivisions (c) *and* (d) of Section 54952” in Section 6252(a) to instead reference “subdivisions (c) *or* (d) of Section 54952” in new Section 7920.510.

CNPA agrees with the Commission that the Legislature did not intend to require an entity to satisfy the requirements of both subdivisions to qualify as a “local agency,” and that the correction currently reflected in new Section 7920.510 should remain.

### c. Section 7920.535 – Definition of “Public Safety Official”

The comment to new Section 7920.535 requested comment on the correction of the reference to “Sections 1808.2 *and* 1808.6 of the Vehicle Code” in Section 6254.24(b) to instead reference “Section 1808.2 *or* 1808.6 of the Vehicle Code” in new Section 7920.535.

CNPA agrees with the Commission that the Legislature did not intend to require a person to be listed in both of the Vehicle Code provisions to qualify as a “public safety official” within the meaning of Section 6254.24, and that the correction currently reflected in new Section 7920.535(b) should remain.

The comment to new Section 7920.535 also requested comment on the correction of the reference to an employee “who supervises inmates in a city police department, a county sheriff’s office, the Department of the California Highway Patrol, federal, state, or a local detention facility, *and* a local juvenile hall, camp, ranch, or home...” in Section 6254.24(g) to instead reference an employee “who supervises inmates in a city police department, a county sheriff’s

office, the Department of the California Highway Patrol, federal, state, or a local detention facility, *or* a local juvenile hall, camp, ranch, or home...” in new Section 7920.535.

CNPA agrees with the Commission that the Legislature did not intend to require a “public safety official” to only include an employee who supervises inmates in one of the enumerated facilities for adults *and* in one of the enumerated facilities for juveniles, and that the correction currently reflected in new Section 7920.535(g) should remain.

In addition to the above corrections, the comment to new Section 7920.535 also requested comment on whether the phrase “a probation officer as defined in Section 830.5 of the Penal Code,” which is currently included in Section 6254.24(g), should be retained in new Section 7920.535(g) given that Penal Code Section 830.5 uses, but does not actually define, the term “probation officer.” CNPA believes that the reference to Penal Code Section 830.5 should be retained in new Section 7920.535(g) in order to avoid making a substantive change to the section. However, given that Penal Code Section 830.5 does not actually define the term “probation officer” it would be appropriate to modify the cross-reference to instead refer to “a probation officer *as that term is used* Section 830.5 of the Penal Code.”

d. Section 7920.545 – Definition of “Trade Secret”

New Section 7920.545 proposes to add a signpost in the definition portion of the CPRA for the term “trade secret.” New Section 7920.545 would state that “‘Trade secret’ is defined in subdivision (f) of Section 7924.305” and would also refer to subdivision (f) of Section 7924.510, which defines the term for the purposes of that section. CNPA sees two problems with this approach.

First, the term “trade secret” is used throughout the CPRA but is only sometimes defined within the CPRA itself. For example, existing Section 6254.15 (re-codified in new Section 7927.605) uses the term “trade secret” without defining that term, while existing Section 6254(ad)(5) (re-codified in new Section 7929.420) uses the term “trade secret” as defined in the Evidence Code. Because neither of these sections include a CPRA-specific definition of “trade secret,” they are not referenced in new Section 7920.545’s definition of “trade secret.” This omission could result in a reader incorrectly concluding the two sections referenced in new Section 7920.545 are the only two sections in the CPRA which deal with trade secrets.

Second, subdivision (a) of new Section 7920.545 states that the term “is defined in subdivision (f) of Section 7924.305.” While that statement is technically correct, its inclusion in the general definition portion of the CPRA it gives the impression that the definition found in in subdivision (f) of Section 7924.305 is applicable to all uses of the term “trade secret” in the CPRA unless a section-specific definition is provided, which is clearly not correct given that the definition in Section 7924.305 is specific to pesticides while the term “trade secret” is used more generally in other parts of the CPRA.

For these reasons, CNPA recommends that new Section 7920.545 be deleted.

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e. Section 7921.700 – Inspection of Records by District Attorney

The comment to new Section 7921.700 requested comment on whether the content of existing Section 6262, which is an exception for requests made by district attorneys to the “law enforcement” exemption found in existing Section 6254(f), should be included Part 2, Chapter 2, Article 3 “Disclosure to District Attorney and Related Matters” rather than in Part 3, Chapter 1 “Crimes, Weapons, and Law Enforcement.”

CNPA does not have a position on which Part the exception for requests made by district attorneys to the “law enforcement” exemption found in existing Section 6254(f) should be located in, as CNPA believes either location would be appropriate. Given that the exception is not for use by the general public, CNPA does not believe locating the exception in one location or the other will make a discernable difference.

f. Section 7922.210 – Truncation of SSNs

The comment to new Section 7922.210 (which re-codifies existing Section 6254.28) requested comment on a revision to replace the term “official record” with “official filing” and the term “public record” with “public filing,” given that those are the terms used in Commercial Code Section 9526.5 which is cross referenced in new Section 7922.210.

CNPA believes that the revision is appropriate to be consistent with the cross referenced provision of the Commercial Code.

g. Sections 7923.120 and 7923.510 – Enforcement of Court Orders

New Sections 7923.120 and 7923.510 both relate to the enforcement of the CPRA. New Section 7923.120 re-codifies the fifth sentence of existing Section 6259(c), which requires a court to issue an order to show cause when a public agency disobeys an order directing disclosure of a public record. New Section 7923.510 re-codifies the fourth sentence of existing Section 6259(c), which limits the court’s ability to stay an order directing disclosure of a public record by an agency unless specified conditions are met.

It is clear from the context of existing Section 6259(c) that the orders and judgments referred to in that section are those “either directing disclosure by a public official or supporting the decision of the public official refusing disclosure” (see first sentence of existing Section 6259(c)). However, new Sections 7923.120 and 7923.510 refer an order made pursuant to new Chapter 2 of Part 4 (Enforcement). CNPA is concerned that this could be interpreted to refer to *any* order made in an enforcement proceeding, rather than just those orders “either directing disclosure by a public official or supporting the decision of the public official refusing disclosure,” which would appear to be a substantive change to the CPRA.

To remedy this issue, new Sections 7923.120 and 7923.510 should instead refer to “a” or “an” order issued *pursuant to Section 7923.110* (rather than pursuant to all of Chapter 2).

In addition to the above, there appears to be a technical error in the comment to new Section 7923.120. The second sentence of the comment states that “Subdivision (c) continues former Section 6259(e) without substantive change.” However, new Section 7923.120 does not include a subdivision (c). The sentence appears to apply to the comment to new Section 7923.115, and should be deleted from the comment to new Section 7923.120.

h. Section 7926.615 – Disclosure of Information Relating to Complaints and Requests for Assistance

Subdivision (a) of new Section 7926.615 re-codifies existing Section 6254(f)(2)(A). While CNPA agrees that the re-codification is non-substantive, it finds the structure of subdivision (a) confusing, and recommends the following revision:

(a) *(1)* Notwithstanding any other provision of this article, a state or local law enforcement agency shall make public, subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto, *including, to* ~~except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation. To~~ the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, ~~this includes all of the following:~~

- (1) The time, date, and location of occurrence.
- (2) The time and date of the report.
- (3) The name and age of the victim.
- (4) The factual circumstances surrounding the crime or incident.
- (5) A general description of any injuries, property, or weapons involved.

*(2) Paragraph (1) does not require disclosure of a particular item of information to the extent that disclosure would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation.*

This revision more closely tracks the existing language of existing Section 6254(f)(2)(A), and CNPA believes it would be easier for a member of the public to understand.

i. Section 7924.305 – Pesticide Data Designated as Trade Secret

The comment to new Section 7924.305, which re-codifies existing Section 6254.2, requested comment on whether the second sentence of existing Section 6254.2(b) should be re-codified outside of the CPRA given that it relates to a notice requirement for proposed pesticide registration rather than public records.

CNPA does not have a position on whether the sentence should be re-codified outside of the CPRA.

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j. Section 7924.700 – Record relating to Housing or Building code Violation

The comment to new Section 7924.700, which re-codifies existing Section 6254.7(c), requested comment on whether this provision should instead be in Article 2 (Pollution) with the rest of the substance of existing Section 6254.7.

CNPA does not have a position on whether the sentence should be re-codified in Article 2 (Pollution) with the rest of the substance of existing Section 6254.7.

k. Section 7927.205 – Memorandum of Legal Counsel Relating to Pending Litigation

The comment to new Section 7927.205, which re-codifies existing Section 6254.25, requested comment on whether the Commission should include in the final recommendation a technical amendment of Section 11126 (part of the Bagley-Keene Act) to correct erroneous numbering in that section.

CNPA has reviewed the Commission’s discussion of and proposed revisions to Section 11126 in CLRC Staff Memorandum 2017-50, pp. 11-16, and believes that these revisions are appropriate.

l. Section 7927.700 – Personnel, Medical, and Similarly Private Files

The comment to new Section 7927.700, which re-codifies existing Section 6254(c), requested comment on which legal protections for medical, personnel, and similarly private records should be mentioned in the comment to new Section 7927.700. In its current form, the comment mentions HIPPA, POBAR, and Penal Code Sections 832.5, 832.7, and 832.8.

In CNPA’s experience, agencies often rely on existing Section 6254(c) as a basis to withhold records that are, in fact, subject to disclosure. In light of this, and consistent with Article I, Section 3 of the California Constitution, CNPA believes it is important for the Commission to not only reference *exemptions* to disclosure, but also cases that *mandate* disclosure notwithstanding existing Section 6254(c). Examples of cases that could be included are:

- *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041 (2004)
- *International Federation of Professional Engineers v. Superior Court*, 42 Cal. 4th 319 (2007)
- *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 759 (2006)

m. Section 7928.200 – Online Posting of Election or Appoint Officials’ Information

The comment to new Section 7928.200 appears to contain a drafting error. Currently, the first two sentences of the comment read: “Subdivision (a) of Section 7928.200 continues former Section 6254.21(e) without substantive change. Subdivision (b) continues former Section 6254.21(g) without substantive change.”

These two references appear to have been reversed. Subdivision (a) of new Section 7928.200 actually re-codifies existing Section 6254.21(g), while subdivision (b) of new Section 7928.200 re-codifies existing Section 6254.21(e).

n. Part 6, Chapter 2 – Index of Other Exemptions

The comment to new Part 6, Chapter 2, which re-codifies existing Sections 6276.01-6276.48 – the alphabetical list of exemptions from disclosure located throughout the codes – requested comment on whether another format be more user-friendly.

CNPA believes that, at least for the time, the index should be left in alphabetical order to avoid creating further confusion for practitioners familiar with the CPRA in its existing form. CNPA is not aware of many members of the general public that regularly utilize the index to the CPRA and thus not does believe that reorganizing the index by topic, or otherwise, would be of great utility.

In addition to the above, various comments throughout Chapter 2 seek comment on the Commission's revisions to cross-references that are out-of-date due to the amendment or repeal of the cross referenced law. CNPA believes that the Commission's revisions to account for the changes in the cross referenced codes are appropriate and make the index of more use because they increase accuracy.

**VI. Conclusion**

CNPA appreciates the Commission's consideration of its comments, which CNPA believes will make the final recommendation clearer, and thus, more effective.

Sincerely,



Whitney L. Prout  
CNPA Staff Attorney

cc: Paulette Brown-Hinds, CNPA President, Publisher, *Black Voice News*, Riverside  
Jeff Glasser, CNPA Governmental Affairs Committee Chairman, Senior Vice President and General Counsel, *Los Angeles Times*  
Thomas W. Newton, CNPA Executive Director  
James W. Ewert, CNPA General Counsel