

THE ABC'S OF PRIVACY & PUBLIC RECORDS

- Two Competing Interests: Privacy and Access to Public Records
 - California Public Records Act (access to public records)
 - California Constitution (privacy)
 - Information Practices Act (privacy)

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

- The IPA codifies the right to privacy guaranteed in the California Constitution (Article I, Section 1)
- Three Major Concerns in the IPA:
 - **Collection**. What information can an agency legitimately collect on individuals (and how?)
 - **Disclosure**. What information can be disclosed to 3rd parties ***without*** the consent of the individual to whom the record pertains?
 - **Access**. What rights does an individual have to see personal information maintained by an agency that pertains to that individual?
- Definitions
 - "Personal Information": Any information that is maintained by an agency that identifies or describes an individual. Basically, if there is a name or other personal identifier connected with information then that is personal information.

How the IPA Deals with its Three Basic Concerns:

- Collection
 - “Relevant and necessary”. Each agency shall maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency.
 - Collect information directly from the individual whenever possible, and maintain a record of the source of information
 - Must provide notice to individual when collecting information about individual [§1798.17] Cumbersome administrative requirements, must include purpose of request, whether it is mandatory to provide the information, any disclosures that will be made, etc.
- Disclosure to Third Parties Without Consent of Individual
 - No disclosure of personal information **unless** specific statutory basis for disclosure (22 listed exemptions)
 - Key disclosure categories
 - To the individual to whom information pertains
 - With the consent of the individual
 - To guardian or conservator of the individual
 - To those officers, employees, attorneys, agents, or volunteers of the agency, **if disclosure is:**
 - Necessary and relevant in the ordinary course of the performance of official duties; and

- Is related to the purpose for which the information was acquired.
 - To person or agency where transfer is necessary for transferee agency to perform constitutional or statutory duties. E.g. EEOC, DFEH.
 - To government entities when required by state or federal law
 - Pursuant to the Public Records Act (!)
 - Where compelling circumstances exist which affect health or safety of individual
 - To any person pursuant to a subpoena, court order, or other compulsory process (but must attempt to notify the individual)
 - Pursuant to a search warrant
 - To law enforcement or regulatory agency when required for an investigation
 - Several others relating to various agencies
- Access by the Individual
 - Broad access rights to records containing personal information, with very limited exceptions
 - Inspection within 30 days of request (60 days if archived). Copies within 15 days of inspection. Can charge \$0.10/page for duplication if copies are requested (but not for collecting, compiling, or redacting the records)

- Right to amend record if inaccurate, or insert statement in the record if amendment denied
- Limited categories where can deny inspection by individual
 - Criminal investigations exemptions
 - Maintained for purpose of an investigation of individual's fitness for licensure or public employment, or of a grievance or complaint. But only to not compromise investigation. Once investigation is over, then must disclose
 - Pertains to physical or psychological condition of the individual if disclosure would be harmful to the individual. [But must disclose to health care professional who will make that decision.]
 - Attorney-client privileged material
 - Academic Peer Review (identity of confidential reviewers)
 - Personal information (about others) intertwined in the record should be redacted
 - Identities of Confidential sources of information (people promised confidentiality when writing letters of reference, etc.) can be protected

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

- The Legislative intent says that: "access to information concerning the conduct of the people's business is a *fundamental and*

necessary right of every person in this state."

- Proposition 59, passed November, 2004. Created Constitutional right of access to public meetings and public records. PRA rules still apply.
- ***Presumption*** favoring disclosure of public record: If a record is a public record, then the public has a right of access to that record.
- Statutory ***exemptions*** allowing for non-disclosure must be read narrowly.
- WHAT IS A "PUBLIC RECORD" ?
 - ***Public Record:*** " 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."

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

Writing: "Handwriting, typewriting, printing, Photostatting, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents."

Note: This is a broad definition that includes any form in which information can be retained. This definitely includes e-mail.

- "Disclosure" or "Inspection"

- In statute: Public records are open to inspection at all times during the office hours of the state agency. Statute allows 10 days to respond to a request, then the records can be compiled in a reasonable amount of time.
- Important: Agency does not have to **CREATE** records. Statutes require access and disclosure of existing records.
- So the PRA requires that we: ***MUST DISCLOSE PUBLIC RECORDS, UNLESS A SPECIFIC EXEMPTION APPLIES***
- EXEMPTIONS FROM DISCLOSURE
 - Specifically Listed Exemptions:
 - ***Preliminary drafts, notes, or memoranda*** not retained in ordinary course of business.
 - Records relating to ***“pending litigation”***. But pending litigation narrowly defined by courts. Must be specifically prepared for litigation in which the university is a party.
 - ***Personal, medical, or similar files*** where the disclosure would constitute an ***“unwarranted invasion of privacy”***.
 - Exemptions based on prohibitions of disclosure under federal or state law, including provisions in Evidence Code relating to privilege.
 - Includes doctor-patient and attorney-client privileges.

- Includes "Official Information" Privilege (Evidence Code 1040)
 - "Official information" is "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made"
 - Balancing required: Public interest in non-disclosure vs. public interest in disclosure.
- "Catch-all" Exemption: Public Interest in Non-Disclosure
 - Applies where: "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."
 - Balance the public interest in disclosure against the public interest (not the University's interest) in withholding.
 - Courts do not like to allow the use of the public interest exemption, read it very narrowly.
 - Includes the "Deliberative Process" Privilege, for deliberations leading up to a decision, where the deliberations must be candid.
 - Includes "burdensomeness." In some cases, a request might be so burdensome, and the public interest in the material so small, that the balancing test might allow us to refuse to comply. This is very unusual, in most cases, we have to comply even though it is burdensome.

OTHER RELATED LAWS AND POLICIES

Resources include: Academic Senate Office, Office of the General Counsel, Campus Counsel, Campus Information Practices Coordinator

- Academic Personnel Records - Academic Personnel Manual (APM) Section 160 (based very closely on the IPA)
<http://www.ucop.edu/acadadv/acadpers/apm/apm-160.pdf>
- Student records – Federal Education Rights and Privacy Act (Generally provides even greater privacy protection than IPA)
<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc130.html>
- Medical records - Confidentiality of Medical Information Act (CMIA, California Civil Code section 56)
- Medical records – Health Insurance Portability and Accountability Act (HIPAA) (federal law)
<http://www.universityofcalifornia.edu/hipaa/welcome.html>
- Electronic Communications (E-Mail, Internet) - UC Electronic Communications Policy
<http://www.ucop.edu/ucophome/policies/ec/html/>
- Federal Freedom of Information Act (FOIA) – Generally does not apply to the University, but the California Public Records Act is modeled on FOIA. If someone makes a request to the University under FOIA, it is treated as a request under the Public Records Act
- Federal Privacy Act (Social Security Number Coverage)
- California law governing Social Security Numbers (Civil Code 1798.85)

- Business and Finance Bulletin RMP-8
<http://www.ucop.edu/ucophome/policies/bfb/rmp8toc.html>
- Security Breach Notification
<http://www.ucop.edu/irc/itsec/campusplans.html>
- Disposition Schedule (systemwide): On the web at:
<http://www.ucop.edu/recordsretention/>