

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2370 (Levine)
Version: March 23, 2022
Hearing Date: June 14, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

Public records: state agency retention

DIGEST

This bill requires a state agency to retain and preserve for at least two years every public record regardless of physical form or characteristics, unless a longer retention period is required by statute, regulation, or established by the Secretary of State pursuant to the State Records Management Act.

EXECUTIVE SUMMARY

Public access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. The California Public Records Act (CPRA) makes all public records in the possession of a public agency open to public inspection upon request, unless the records are otherwise exempt from public disclosure. A public record is any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. This bill specifies that a state agency is required to retain and preserve for at least two years every public record regardless of physical form or characteristics, unless a longer retention period is required by statute, regulation, or established by the Secretary of State pursuant to the State Records Management Act.

The bill is author-sponsored. The bill is supported by various news organizations and advocates for government transparency. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and,

therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. Const. art. I, § 3 (b)(1).)

- 2) Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 6250 et seq.)
 - a) Defines “public records” as any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 6252(e).)
 - b) Defines “public agency” as any state or local agency. (Gov. Code § 6252(d).)
- 3) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 6253.)
- 4) Recodifies the CPRA in Division 10 of Title 1 (§§ 7920.000 - 7931.000) of the Government Code effective January 1, 2023.
- 5) Requires the Secretary of State to establish and administer a records management program that applies efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of state records. (Gov. Code §§ 12270-12279.)

This bill requires a state agency to retain and preserve for at least two years every public record regardless of physical form or characteristics, unless a longer retention period is required by statute, regulation, or established by the Secretary of State pursuant to the State Records Management Act.

COMMENTS

1. Stated need for the bill

The author writes:

While the California Constitution guarantees the public’s right to access public records, there is no minimum retention period for state agencies to hold those records. AB 2370 harmonizes the California Public Records Act (CPRA) with the various records retention requirements under current law by requiring state agencies to retain records regarding public business for at least two years.

2. Requires state agencies to retain any public record for at least two years

a. *CPRA*

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Cod § 6250.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide gen. elec.),¹ which amended the California Constitution to specifically protect the right of the public to access and obtain government records: "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, sec. 3 (b)(1).)

Under the CPRA, public records in the possession of a public agency are open to inspection by the public at all times during the office hours of the agency, unless the records are prohibited or exempted from disclosure. (Gov. Cod § 6253(a).) The CPRA allows a public agency 10 days or, in specified "unusual circumstances," within 14 days of the ten-day period to disclose the requested public record, and authorizes the agency to charge a fee for its "direct costs of duplication" to the record. (Gov. Code § 6253(b)-(c).)

A public record is defined as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 6252(e).) A public record can include an email if the email contains information relating to the conduct of the public's business:

[T]o qualify as a public record under [the] CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618-619.)

The CPRA was recodified in Division 10 of Title 1 (§§ 7920.000 - 7931.000) of the Government Code by AB 473 (Chau, Ch. 614, Stats. 2021, and the recodification will become operative January 1, 2023.

b. *Record retention*

The CPRA only requires the disclosure or public records in the possession of the agency, but does not specify how long public records are to be kept by a public agency.

¹ Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).

There are several provisions of law that deal with the retention of records by public agencies; however, most of them pertain to local governments or entities.² There are a few statutes that deal with record retention of state agencies.

The Information Practices Act requires state agencies to “retain the accounting [of a disclosure] . . .for at least three years after the disclosure for which the accounting is made, or until the record is destroyed, whichever is shorter.” (Civ. Code § 1798.27.) However, it specifically states that it does not require “retention of the original documents for a three-year period, providing that the agency can otherwise comply with the requirements of this section.” (*Id.*) The State Records Management Act requires the Secretary of State to establish and administer a records management program that includes, among other things, management methods regarding disposal of state records. (Gov. Code §§ 12270-12279.) The State Records Management Act specifies that a record is not to be destroyed or disposed of “unless it is determined by the Secretary of State that the record has no further administrative, legal, or fiscal value and the Secretary of State has determined that the record is appropriate for preservation in the State Archives.” (Gov. Code § 12275.) Each agency is required to establish and maintain a records retention schedule that details the public records the agency will keep, how the records will be managed, and how the agency will legally dispose of non-permanent records. (Gov. Code § 12274.)

This bill would specifically provide a minimum length of time that state agencies are required to keep public records by requiring state agencies to retain and preserve for at least two years every public record regardless of physical form or characteristics, unless a longer retention period is required by statute, regulation, or established by the Secretary of State pursuant to the State Records Management Act.

c. Similar to AB 1184 (Gloria, 2019) and AB 2093 (Gloria, 2020)

This bill is somewhat similar to AB 1184 (Gloria, 2019) and AB 2093 (Gloria, 2020). Those bills required a public agency as defined under the CPRA, which includes local agencies, to maintain every public record that is transmitted by electronic mail for two years unless a longer retention period is required by statute or regulation, or established by the Secretary of State pursuant to the State Records Management Act. These bills had significant opposition from local governments. AB 2093 (Gloria, 2020) was held in the Assembly Appropriations Committee. AB 1184 (Gloria, 2019) passed this Committee by a vote of 7 to 1, but was ultimately vetoed by Governor Newsom who wrote:

[...] This bill does not strike the appropriate balance between the benefits of greater transparency through the public's access to public records, and the

² See Gov. Code §§ 12236, 26201, 26202, 26202.1, 26202.5, 26202.6, 34090, 34090.5, 34090.6, 59020, 59021, 59022, 59023, 59024, 59025, 59026, 59027; Edc. Code §§ 35253-35254.

burdens of a dramatic increase in records-retention requirements, including associated personnel and data-management costs to taxpayer. [...]

This bill is different than AB 1184 and AB 2093 in one fundamental way – it only applies to state agencies. The Committee has received no opposition to this bill.

3. Statements in support

Supporters of the bill include the California Newspaper Publishers Association, Californians Aware: The Center for Public Forum Rights, Consumer Watchdog, First Amendment Coalition, and Oakland Privacy.

The California News Publishers Association, the First Amendment Coalition, and Californians Aware write in support:

A clear statutory minimum standard for the retention and preservation of public records, especially electronic mail, is necessary in an era in which many agencies routinely communicate on important issues concerning the conduct of the people's business and automatically purge these email communications. In their eagerness to purge these records from their servers, agencies dispose of records that provide the public with insights into the development of public policy, illuminate controversial decisions, or potentially hide evidence of corruption and self-dealing. Such records are critical to the public's ability to hold its government to account.

This problem is not limited to electronic mail. [As recently reported](#), the chief administrative officer of a state agency testified that she routinely shredded scoring worksheets that she no longer considered "relevant," even though they were central to a contract bidding dispute.

The Consumer Watchdog writes in support:

The full significance of certain public records, particularly those critical to enforcement actions in response to public complaints, may not be immediately apparent. While many records should be retained for far longer than two years, AB 2370 provides a critical baseline to ensuring that public records are preserved and retained for a sufficient period such that the public, journalists, and policymakers have an opportunity to request them, and agency staff may continue to access them as part of their public duties. Without AB 2370, agencies may delete records before the public even has a chance to request and review them, while also depriving agency staff of critical documentary evidence.

SUPPORT

California News Publishers Association
Californians Aware: the Center for Public Forum Rights
Consumer Watchdog
First Amendment Coalition
Oakland Privacy

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: *See 2)c* above.

PRIOR VOTES:

Assembly Floor (Ayes 73, Noes 0)
Assembly Appropriations Committee (Ayes 16, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)
