LOS ANGELES

Daily Journal

www.dailyjournal.com

THURSDAY, JUNE 20, 2013

PERSPECTIVE

Will public records trailer make the budget?

By Jeffrey Dintzer and Krista Hernandez

The state Legislature just passed a budget that is being submitted to the governor's office and which he is expected to sign. As part of that legislation, a trailer (AB 76) has been attached that makes critical revisions to the Public Records Act (PRA) requirements. Under normal circumstances, local agencies such as cities are required to comply with the PRA and provide documents and information to requesting parties in a timely fashion. The trailer explicitly states that certain existing PRA "mandates ... shall not apply to a local agency" and makes compliance with certain PRA provisions discretionary for local agencies. Instead, these former *requirements* are described as "best practices" which the local agency can, in its discretion, choose whether or not it wants to follow. A local agency that does not want to follow these best practices is only required to make an oral announcement starting on July 1. Thereafter, the local agency refusing to follow "best practices" need only make such an announcement at its first meeting in January on an annual basis.

Under the current schedule the trailer will become operative on the effective date of the bill. The trailer was prompted by complaints from cities who sought reimbursement from the state for the costs of having to comply with the state's PRA requirements. The Senate Floor Analysis of the bill indicates that some of the former requirements — now purely voluntary "best practices" — were "determined to be state-reimbursable mandates." Given the state's own budget difficulties, the state opted to respond to the cities' concerns by relieving them of critical responsibilities under the PRA. Many local agencies likely will immediately opt out of the PRA requirements to save money having to respond to such requests. It is impossible to believe that cash strapped local agencies will not take immediate advantage of the new opt out provisions, as many such agencies believe that the current regime is onerous and expensive.

When the PRA amendment takes effect, local agencies will no longer be required to:

(1) respond to PRA requests within 10 days of receipt;

(2) provide written notice of an extension of the response time due to "unusual circumstances" which includes the reason for that extension and an estimated date for a response;

(3) "[a]ssist the member of the public" in identifying "records and information that are responsive to the request";

(4) "[d]escribe the information technology and physical location" where "records exist";

(5) "[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought";

(6) make information that "is in an electronic format ... available in an electronic format." Under the trailer, "the local agency may determine the format of electronic data to be provided in response to a request for information";

(7) designate home addresses and telephone numbers of state employees and employees of a school district or county office of education as nonpublic, and not subject to public disclosure except in certain circumstances;

(8) put denial of a request, and the reason for that denial, in writing.

Taken has a whole, this amendment will relieve local agencies of any obligation to be helpful or promptly respond to PRA requests as they will no longer have any obligation to document denials in writing. For those in the business of frequently issuing PRA requests to local agencies, the PRA amendment could immediately close off numerous avenues of investigation, either due to delay, lack of cooperation, and knee-jerk denials. And without a written record as to why a request is denied, it will become very difficult to challenge those denials. In the absence of a written denial providing a reason for that denial, requestors may be left with no choice but to file a lawsuit to challenge that denial. However, the lack of any deadline for a response to the request leaves the requestor in a difficult position in terms of determining when it would be appropriate or timely to bring such a suit. And what happens to those requestors who need the information in a timely fashion? With no timeliness requirement, a requestor is left with little recourse but to wait and hope that the agency chooses to respond in a timely fashion. An increase in litigation over records requests would no doubt increase litigation costs for local agencies. And how will the cash strapped courts deal with a blast of new petitions for relief?

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From a practical standpoint, the PRA amendment will immediately impact a wide variety of parties and businesses. For example, attorneys frequently use PRA requests to obtain information from local agencies in advance of filing a lawsuit in order to gather information to bolster the allegations of an impending complaint or other pleading. In addition, PRA requests are often used during litigation to quickly and efficiently obtain documents that provide additional evidence of past events. Forcing litigation to proceed without the available local agency files may result in an incomplete record of evidence for courts to deal with in deciding the merits of claims.

Of course, PRA requests are not only made by lawyers — real estate companies and their environmental consultants use them to discover the past history of properties that might be bought, sold or developed. Private equity firms use publicly available information to assess the past compliance of target entities. Banks often use the information gathered from local agencies as part of their underwriting process.

News organizations use PRAs to investigate stories. Without the ability to obtain an efficient and fulsome response to a PRA request, journalists' ability to report on our government's activities will be severely hampered. The concern of journalists was documented in a comment letter submitted by the California Newspaper Publishers Association (CNPA) to the governor on June 18. Understandably, the CNPA asserts that "AB 76 will make it easier for public agencies to ignore requests for public documents or provide no reason at all for denying a request for agency records. The notion that an agency can ignore a request or deny a request without providing a reason for doing so is antithetical to long standing democratic principles and an affront to Californians who want to participate in local government." The CNPA also notes that the state has "failed to identify the amount of money that the state will save by the suspension" of the PRA requirements. Coupled with the unknown costs of potential litigation related to denials of requests, it is difficult to know whether the cost savings (if any) would justify the potentially severe impact on the right of citizens to obtain agency records.

The number of entities potentially affected by the trailer could go on and on — nonprofit organizations, small businesses, and certainly not least of all, private citizens. Although certainly California needs a budget, it is critical that the trailer not be included as part of that budget given the unknowns regarding its cost savings, and potential direct and indirect costs. Because the trailer has been slipped into the budget bill without adequate analysis and consideration, it necessarily overlooks the cost to parties seeking to obtain these records as well as the potential hidden costs for local agencies. If agency records are no longer available to the public who will watch to ensure that local bureaucracies do not waste public funds entrusted to them? In any event, the cost of not knowing what our government is doing is just too high. As such, Gov. Jerry Brown must veto AB 76.

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