Date of Hearing: April 25, 2017

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 1479 (Bonta) – As Amended March 21, 2017

As Proposed to be Amended

SUBJECT: PUBLIC RECORDS: CUSTODIAN OF RECORDS: FINES

KEY ISSUE: SHOULD THE CALIFORNIA PUBLIC RECORDS ACT BE AMENDED IN A NUMBER OF WAYS TO IMPROVE PUBLIC ACCESS TO GOVERNMENT RECORDS, INCLUDING BY ADDING A REQUIREMENT FOR AGENCIES TO DESIGNATE A CUSTODIAN OF RECORDS, AND AUTHORIZING A COURT TO IMPOSE A CIVIL PENALTY OF UP TO $5,000 WHEN AN AGENCY DOES NOT ACT IN GOOD FAITH TO COMPLY WITH THE ACT?

SYNOPSIS

The California Public Records Act (PRA or CPRA) was enacted in 1968, codified as Government Code sections 6250 through 6276.48, and enshrined in California's Constitution. The PRA has been amended and strengthened by the voters and the Legislature numerous times since then. Nevertheless, many open government advocates and newspaper organizations that support this bill allege that government agencies have delayed responding to, and even actively obstructed, requests for public documents in a number of recent high-profile investigations of public hazards and corruption. They argue that such incidents demonstrate why the reforms proposed by this bill are necessary. Specifically, they say that the public had a keen interest in the tragic Ghost Ship fire that occurred in Oakland in December of 2016; alleged misconduct by former UC Davis Chancellor Linda Katehi; and the near collapse of the Oroville dam, but when investigative reporters sought documents related to these incidents government agencies delayed complying with their PRA requests, thereby thwarting expeditious investigations and consequently undermining public trust in the competence, ethical standards, and diligence of the government. Supporters of the bill allege that such delays are distressingly commonplace.

In order to facilitate the public in obtaining the public records to which they are entitled and to give the public a point of contact about requests that are denied or delayed, the bill requires that public agencies designate a person or office to act as the agency's custodian of records who is responsible for responding to PRA requests and handling inquiries from the public about denials of requests for public records. In order to encourage compliance with the PRA, the bill allows (but does not require) a court to assess a civil penalty against the agency in an amount not less than one thousand dollars ($1,000), nor more than five thousand dollar ($5,000), if the court finds that the agency did any of the following: (1) improperly withheld a public record that was clearly subject to disclosure; (2) unreasonably delayed providing the contents of a record subject to disclosure in whole or in part; (3) assessed an unreasonable or unauthorized fee upon a requester; or (4) otherwise did not act in good faith to comply with the PRA. Supporters of the bill have provided the Committee with numerous examples of local governments violating existing provisions of the PRA by committing all of these enumerated unlawful acts.

The author will take a number of clarifying amendments in this Committee, specifically to remove the term "punitive damages," and use the term "civil penalty"; limit the circumstances

under which a court can award such a penalty; change the term "supervisor" of records to "custodian" in order to be consistent with existing law; and add appropriate legislative findings that the bill increases the public's access to government records. The bill summary and analysis reflect those amendments. The bill is supported by a number of transparency, civil rights, and open government advocates, as well as dozens of private citizens who sent emails and letters of support to the Committee. The bill is opposed by a coalition of local government organizations and utilities, as well as the Sutter County Board of Supervisors.

SUMMARY: Seeks to increase transparency in the process for requesting access to public records under the California Public Records Act (PRA or CPRA), and to allow a court to assess civil penalties for a government agency's bad faith non-compliance with the PRA. Specifically, **this bill**:

1) Requires that public agencies designate a person or office to act as the agency's custodian to respond to any request made pursuant for a public record and any inquiry from the public about a decision by the agency to deny a request for records.

2) Allows a court, if it finds that an agency or custodian improperly withheld a public record that was clearly subject to disclosure, unreasonably delayed providing the contents of a record subject to disclosure in whole or in part, assessed an unreasonable or unauthorized fee upon a requester, or otherwise did not act in good faith to comply with the Act, to assess a civil penalty against the agency in an amount not less than one thousand dollars ($1,000) nor more than five thousand dollar ($5,000).

3) Makes legislative findings about how this act furthers the public's access to public records: "By requiring local agencies to designate custodians of records responsible for responding to requests and inquiries under the California Public Records Act, this act furthers the public's access to public records."

EXISTING LAW:

1) Provides, in the California Constitution, that "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. 1, sec. 3, subd. (b), par. (1).)

2) Requires, pursuant to the California Constitution, that "A state, court rule, or other authority . . . that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. 1, sec. 3, subd. (b), par. (2).)

3) Provides, under the PRA, that all public agency records are open to public inspection upon request, unless the records are otherwise exempt from public disclosure. (Government Code Section 6250 *et seq*. All further statutory references are to this code, unless otherwise indicated.)

4) Requires, except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any

person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. (Section 6253 (b).)

5) Requires each agency, upon a request for a copy of records, to, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. (Section 6253 (c).)

6) Allows, in unusual circumstances, the time limit prescribed in 5), above, to be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched, but provides that no notice shall specify a date that would result in an extension for more than 14 days and requires the agency, if it determines that the request seeks disclosable public records, to state the estimated date and time when the records will be made available. (*Ibid.*)

7) Defines "unusual circumstances" as the following, but only to the extent reasonably necessary to the proper processing of the particular request:

   a) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
   b) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
   c) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
   d) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. (*Ibid.*)

8) Provides that "Nothing in [the PRA] shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." (Section 6253 (d).)

9) Requires that the notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial. (*Ibid.*)

10) Provides that, if the court finds that the public official's decision to refuse disclosure is not justified, he or she shall order the public official to make the record public and also provides that 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. (Section 6259 (b).)

11) Requires the court to award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section, specifies that the costs and fees shall be paid by the public agency, but also provides that the public official who denied the request does not have personal liability. (Section 6259 (d).)

12) Requires the court, if it finds that the plaintiff's case is clearly frivolous, award court costs and reasonable attorney fees to the public agency. (*Ibid.*)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: The California Public Records Act (PRA or CPRA) was enacted in 1968 (Chapter 1473, Statutes of 1968) and codified as Sections 6250 through 6276.48. Similar to the federal Freedom of Information Act, the PRA requires that the documents and "writings" of a public agency be open and available for public inspection, unless they are exempt from disclosure. (Sections 6250-6270.) The PRA is premised on the principle that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." It defines a "public record" to mean "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." (Section 6252 (e).)

In 2004, the voters of the state approved Proposition 59, which was placed on the ballot by a unanimous vote of both houses of the Legislature. Proposition 59 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. 1, sec. 3, subd. (b), par. (1).) In 2014, voters again approved an initiative, Proposition 42, which further increased public access to government records. It was also placed on the ballot after being unanimously approved by the Legislature in SCA 3 (Leno), Chapter 123. Proposition 42 requires local agencies to comply with the PRA and the Brown Act, and with any subsequent statutory enactment amending either act. Proposition 42 also makes the state's compensation of costs for new or higher levels of service in the PRA discretionary rather than mandatory.

This bill appears to further the long history of legislative efforts to increase and improve the public's access to records of the government, a principle furthered by the state's constitution and clearly popular with the state's voters. According to the author:

> When the Legislature enacted the California Public Records Act, it declared that access to information concerning the conduct of people's business is a fundamental and necessary right of every person in this state. The CRPA is an essential component to open government. This bill ensures that CRPA hold the government accountable to the public. Specifically, this bill will strengthen the power of citizens to gain access to public records in part by increasing the consequences for public entities that unreasonably delay in responding to public records requests.

Recent examples of government agencies withholding records in violation of the PRA and contrary to the public interest. Supporters of this bill cite a number of recent examples of incidents where government agencies have delayed responding to, and even actively obstructed, the efforts of news organizations to investigate public hazards, as evidence that the reforms proposed by this bill and designed to encourage compliance with the PRA are necessary. The California Newspaper Publishers Association (CNPA), for example, cites the tragic Ghost Ship fire that occurred in Oakland in December of 2016 as an example of how a local government delayed the release of public records in order to obstruct a newspaper's investigation into Oakland's enforcement of fire and safety codes. According to CNPA, the *East Bay Times* had to threaten suing the city in order to obtain records after repeated requests for city records were ignored or delayed:

> In a letter dated December 16, the City of Oakland promised to release records to the newspaper related to the incident. By February 2, 2017, the City had failed to produce the records responsive to the newspaper's request. The newspaper sent a lawyer's letter to the City, citing its protracted delay in responding to the request: "Given the gravity of this tragedy and the overwhelming public importance of access to records enabling the public to understand why it happened and to start to find solutions to prevent such occurrences in the future, the City's evident desire to control the message and delay the public's right of access during this critical time to the public's discourse on the matter is inexcusable." The newspaper threatened to sue if the records were not released. As a result, more than 600 pages of records were promptly released.

Likewise, when former UC Davis Chancellor Linda Katehi came under criticism after a nearly month-long sit-in outside her office; reports about her service on for-profit corporate boards (including a textbook manufacturer doing business with the university); nepotism allegations; and the pepper-spraying by campus police of student activists that attracted national and even international attention, reporters from the Sacramento Bee requested records about Katehi from UC Davis. According to the Bee, a "primary university tactic" for dealing with the public relations crisis "appears to be limiting release of public documents, salaries and calendars involving Katehi and others."

> Seven requests for documents filed with UC Davis and the University of California president's office by The Sacramento Bee remained largely unanswered for weeks as controversy has built over Katehi's participation on outside corporate boards.
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> . . . At 4:31 p.m. Thursday, hours after The Bee asked for comment on the delays, UC Davis officials emailed some of the materials being sought and said searches for others still are underway.
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> The university's responses to public records requests note that "there is no requirement for a public agency to actually supply the records within 10 days of receiving a request, unless the records are readily available. (Lambert, Diana and Stanton, Sam, "Is UC Davis delaying access to public records during student protest?", Sacramento Bee, April 6, 2016; Available at http://www.sacbee.com/news/local/education/article70635942.html#storylink=cpy.)

More recently, reporters have sought records relating to construction of the Oroville Dam. According to an editorial in the San Francisco Chronicle, "Since the dam's crumbling spillways forced hundreds of thousands to evacuate downstream areas amid heavy winter rains, the Department of Water Resources has become increasingly reluctant to release information about the structure's weaknesses and planned repairs. Even as the state prepared to spend $275 million in public funds to repair the nation's tallest dam, officials cited security concerns and antiterrorism regulations to keep contract, inspection and other records from reporters and the public." ("Spill the Oroville Dam Records," Editor, San Francisco Chronicle, April 19, 2017; Available at: http://www.sfchronicle.com/opinion/editorials/article/Spill-the-Oroville-Dam-records-11084994.php.)

In all of these cases, the public had a keen interest in the subject matter of the investigations—about the alleged failure of public officials to either protect the safety of the public from deadly risks (such as living in a fire trap or near a dam at risk of failure) or to protect public funds being wasted and mismanaged—and had continuing concerns about whether those risks were being

addressed and corrected, or, if not, would continue unabated. Unfortunately, these types of delays--which undermine public trust in the competence, ethical standards, and diligence of the government--are common, according to the First Amendment Coalition, which supports the bill. It cites a study conducted in San Diego as proof of the need for reforms to the PRA, such as those proposed by this bill:

> The problem of agency delay is widespread. As detailed in a March 19, 2016 article in the San Diego Union-Tribune ("Fees, delays, can slow flow of records"), that newspaper collected logs of all CPRA requests from 107 local agencies between January 2015 and March 2016. The logs resulted in a database of more than 11,000 requests. Of those requests, more than 25 percent showed that public agencies missed the CPRA-mandated timelines for disclosure and response. At least one agency took an average of 66 days to respond to requests -- more than six times longer than the 10-day requirement under the CPRA. These findings are in accord with FAC's experience and, we believe, highlight a serious problem.

In addition to the examples of delayed compliance with the PRA, above, supporters of this bill have many examples of local governments violating the PRA by committing all of the acts that would justify imposition of the civil penalty under this bill. The bill authorizes a court to impose a "civil penalty" upon a government agency that has done any of the following: (1) improperly withheld a public record that was clearly subject to disclosure; (2) unreasonably delayed providing the contents of a record subject to disclosure in whole or in part; (3) assessed an unreasonable or unauthorized fee upon a requester; or (4) otherwise did not act in good faith to comply with the PRA. Unfortunately, supporters of this bill have many examples of local governments doing these things:

(1) Examples where a local government improperly withheld a public record that was clearly subject to disclosure. CNPA provided the Committee with several letters written by counties, in response to PRA requests, in which the counties refused to provide employee names and salary information, which the CA Supreme Court has said is clearly disclosable information. (See (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319.)

(2) Examples where a local government unreasonably delayed providing the contents of a record subject to disclosure in whole or in part. In the example of a Ghost Ship fire provided by the CNPA, above, the *East Bay Times* made repeated requests to a city for records regarding fire and building safety standard enforcement, originally in mid-December of 2016 and again in early February of 2017. During that approximate six-month period, the city did not provide the reporter with a single document. The city eventually turned over 600 pages of records to the newspaper, but only after receiving multiple requests, including a threat of litigation. As explained more fully, below, a months-long delay by a government agency before providing a single document is not consistent with the California Supreme Court's holding in *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427. Such conduct is clearly inconsistent with the expectations of the Legislature—made clear from the very specific timelines and limited exceptions to those timelines provided in the PRA—for disclosures to be made "expeditiously."

(3) Examples where a local government assessed an unreasonable or unauthorized fee upon a requester. CNPA provided the Committee with several letters from local governments that assessed what were clearly unreasonable and unauthorized fees upon requesters of public

records. For example, one county stated that the requester—the Calaveras Enterprise, a small local newspaper with limited funds--was responsible for a more than $1,500 charge for the time of a public employee "for compilation, review, electronic extraction, redaction and transmission" of registration forms in order to redact confidential information from otherwise public records and make them available to the requester. Such charges are clearly unauthorized by the PRA, according to numerous appellate court decisions, including *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 148, which held that the " 'Direct cost' [authorized under the PRA] does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted."

(4) Examples where a local government otherwise did not act in good faith to comply with the PRA. This catch-all provision would authorize a court to award the civil penalty authorized by the bill based upon conduct that does not meet the criteria of any of the three types of violations of the PRA, above. While it is difficult to imagine a scenario in which a government agency could violate the PRA *without* committing any of the three specific violations, above, it is theoretically possible. One example is arguably the factual scenario discussed in *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306. In that case, open government advocates sought e-mails pertaining to official city business, including but not limited to any emails sent to or from City Attorney Goldsmith's personal e-mail account. When the city received the request, four city attorneys reviewed it and concluded that it sought only e-mails stored and maintained in Goldsmith's private e-mail account and not e-mails saved to City's e-mail account, which was clearly an incorrect interpretation of the plain wording of the request. Although the city attorneys conceded they were aware private e-mails stored on city servers that were public records, the city did not search for the e-mails and promptly denied that aspect of the request. The city did not search for and disclose the e-mails until *after* the requester filed a lawsuit. (*Id.*, at p. 1322.) The catch-all provided by the bill could be helpful because in a case like this where there was an honest, but unreasonable, misunderstanding of the PRA request, but no delay in responding to the request and no unauthorized fee assessed, or in another case where the agency acts in bad faith, but the conduct does not meet the criteria of one the three types of violations of the PRA, above.

The PRA already requires agencies to act in a diligent and prompt manner to respond to, and comply with, requests for public records. The PRA requires a government agency, within 10 days of receiving a request, to make a preliminary determination whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and to *promptly* notify the person making the request of its determination. (Section 6253 (c).) It provides additional time to an agency to make this determination, but only in "unusual circumstances" and then requires the agency to provide written notice to the person who made the request, setting forth the reasons for the extension and the date on which a determination is expected to be made. (*Ibid.*) It specifies that the notice of extension must not extend the date by more than 14 days and requires the agency, if it determines that the request seeks disclosable public records, to state the estimated date and time when the records will be made available. (*Ibid.*) The PRA defines "unusual circumstances" (that necessitate an extension of time for the agency to make its initial determination) by listing specific reasons that justify a delay:

a) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
b) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

c) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
d) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. (*Ibid.*)

Finally, the PRA provides that "Nothing in [the PRA] shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." (Section 6253 (d).)

The fact that the PRA is so specific and so prescriptive indicates the intent of the Legislature (and the voters who have repeatedly approved strengthening the PRA) to ensure that agencies are diligent in complying with PRA requests. As discussed above, the California Supreme Court confirmed this interpretation of the law in *Filarsky v. Superior Court, supra,* 28 Cal.4th, at p. 427, writing that these procedures "reflect a clear legislative intent that the determination of the obligation to disclose records requested from a public agency be made expeditiously."

Designation of a custodian of records is consistent with statutory requirements and case law. The bill requires a public agency to designate a person or office to act as the agency's custodian of records to respond to any request made pursuant to the PRA for a public record and to respond to any inquiry from the public about a decision by the agency to deny a request for records. This provision is not only consistent with the terminology in CPRA—which repeatedly uses the term "custodian"—but is also consistent with what appellate courts have said should be the practice of government agencies. Once an agency receives a PRA request, it "has the duty to respond to requests for disclosure of the information in public records, including assisting the requester in formulating reasonable requests, because of the City's superior knowledge about the contents of its records. The City's duty requires it to communicate the scope of the information requested to the custodians of its records[.]" (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.) Therefore, this provision in the bill appears to merely clarify existing law.

Authorization of civil penalty for unreasonable or bad faith conduct is consistent with case law and the public interest. The bill allows (but does not require) a court to assess a civil penalty against the agency in an amount not less than one thousand dollars ($1,000) nor more than five thousand dollar ($5,000) under specific circumstances. The bill allows a court to do so if it finds that an agency or custodian committed one of a number of specific acts in violation of the PRA, or—as a catch-all—"otherwise did not act in good faith to comply with the Act."

According to Californians Aware, which supports the bill, this civil penalty is appropriate, not only to serve as a disincentive for local agencies to delay and obstruct compliance with legitimate PRA requests, but also as a way to compensate members of the public for the significant inconvenience "in terms of a plaintiff's diverted time, attention and energy for weeks or months, [that] are not recouped by an award of attorney's fees" when the plaintiff is forced to file a lawsuit in order to obtain the documents to which, under existing law, they clearly are entitled.

On the other hand, the coalition of local governments ("opposition coalition") objects to any additional penalty being authorized in the law. Writing in opposition to a prior version of the bill, which authorized "punitive damages" for a number of grounds which no longer justify the award of even a civil penalty under the bill (including that the agency "*improperly* withheld a

public record from a member of the public *without justification*, failed to furnish a properly requested record or a portion thereof *in a timely manner*"), the coalition states the following:

> It is our contention that adding the additional punitive damages award provision—which could be as high as $5,000 per violation will lead to a litany of satellite litigation given the grounds for punitive damages are so vast. Under this measure damages can be awarded on every type of violation, no matter how significant, no matter if a denial was made in good faith, etc. In addition, viewed more broadly, the idea of punitive damages becoming a fixture in legislation against public entities is a troublesome precedent. Local agencies already potentially face significant liability exposure each time a request is denied due to the potential award of attorneys' fees.

As proposed to be amended, the bill no longer authorizes "punitive damages" to be awarded, which appears to be an appropriate change, considering that current law only authorizes punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civil Code Section 3294 (a).) Instead, the bill authorizes (but does not require) a court to impose a "civil penalty" on a government agency that has improperly withheld a public record from a member of the public and one of the following conditions apply:

1) The record was clearly subject to public disclosure.
2) The agency unreasonably delayed providing the contents of a record subject to disclosure in whole or in part.
3) The agency assessed an unreasonable or unauthorized fee upon a requester.
4) The agency otherwise did not act in good faith to comply with the PRA.

Despite the fact that the bill only authorizes the additional civil penalty to be imposed and only authorized it under limited circumstances (where there has been a violation of the PRA), the opposition coalition objects to the term "unreasonable":

> The bill also appears to authorize a requestor to sue a public agency if the agency has "assessed an unreasonable fee upon a requester." However, the term "unreasonable" is not expressly defined in this measure, thereby creating uncertainty for agencies and increasing their exposure to litigation. Agencies are expressly authorized to charge certain fees, and there are existing avenues to challenge improper fees that have more exacting standards under current law.

Although the term "unreasonable" is not defined in the bill, as the opposition coalition states, the failure to define the term does not also "thereby creat[e] uncertainty for agencies and increasing their exposure to litigation," as it also alleges. In fact, the term "unreasonable" is repeatedly used in existing statutory (in 51 different sections of the Government Code alone) and case law. Courts are familiar with interpreting what it means, including in the context of the PRA. In fact, one appellate court held that reasonableness is the standard for determining whether an agency has complied with the PRA, in conducting a diligent search for records or assisting a requester to formulate a request that will be successful, for example: "We are mindful of the press of business of public agencies, particularly in these difficult fiscal times, and do not hold the City to an impossible standard, merely a reasonable one." (*Community Youth Athletic Center v. City of National City, sura,* 220 Cal.App.4th, at p. 1428.)

The opposition coalition also seems to take the untenable position that although additional penalties are not authorized by the PRA under existing law, the Legislature cannot amend the PRA to authorize new remedies or penalties. It writes the following in opposition to the bill:

> In *County* of *Santa Clara v. Superior Court (Naymark) (2009) 171 Cal.App.4th 119,* the court found that Government Code sections 6258 and 6259 are narrow in terms of the types of lawsuits that are permitted under those sections. Under current law, lawsuits cannot be brought under Government Code sections 6258 or 6259 to challenge other alleged deficiencies in CPRA compliance—such as the production of a request that has already occurred but was late.
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> However, this bill makes amends Government Code section 6259 to authorize the court to assess damages if a court finds a violation of the CPRA because the agency "*failed to furnish a properly requested record or a portion thereof in a timely manner, assessed an unreasonable fee upon a requester, or otherwise did not act in good faith to comply with this chapter.*" But those causes of actions are not permitted under Government Code section 6259, per the courts determination in *Naymark*. The result is that this measure creates a situation whereby there is a remedy provided for a cause of action that is not available. This is untenable.

Despite the opposition coalition's argument that the bill would authorize a new theory of liability, the bill does not, in fact, do so. The bill merely adds an additional remedy—to be imposed on a discretionary basis when certain specific criteria are satisfied--to Section 6259, which the opposition coalition acknowledges to be the section of the PRA which provides remedies for violations of the PRA. The *County* of *Santa Clara v. Superior Court (Naymark)* case cited by the opposition coalition, does not limit the theories under which a plaintiff may seek to enforce his or her rights to obtain public records pursuant to the PRA. In fact, it stands for a contrary proposition. In that case, the plaintiffs alleged that a number of cities in the Bay Area had adopted policies for the release of public records that were contrary to the PRA and a number of other state laws. They argued that "the expenditure of money to implement and enforce these illegal policies and practices 'constitutes an illegal expenditure of public funds within the meaning of Code of Civil Procedure section 526a' [an action by a taxpayer "to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state]." (*County of Santa Clara v. Superior Court, supra,* 171 Cal.App.4th, at p. 124.) The appellate court held that neither the PRA nor California Supreme Court precedent precluded the taxpayers from making such an argument and proceeding with their action in order to enforce the PRA:

> The CPRA was enacted to further "the fundamental right of every person in this state to have prompt access to information in the possession of public agencies." [Citation omitted.] As the California Supreme Court recognized in *Filarsky*, the CPRA provides the exclusive remedy for resolving whether a public entity has erroneously refused to disclose a particular record or class of records. Nowhere in the CPRA is there any language that explicitly or implicitly restricts, permits, or precludes any type of legal action "concerning" public records other than whether a particular record or class of records must be disclosed. The CPRA's judicial remedy is limited to a requestor's action to determine whether a particular record or class of records must be disclosed. The purpose of the CPRA is furthered, not obstructed, by citizen suits under Code of Civil Procedure section 526a to enforce the CPRA's provisions. (*Id.*, at p. 130.)

Furthermore, the Legislature clearly has the authority to amend the PRA in a manner that improves or expands the right of the public to obtain government records. Although the California Constitution requires that a "state . . . rule. . . that *limits* the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest" (Cal. Const., art. 1, sec. 3, subd. (b), par. (2) [emphasis added], no such requirement applies to a measure that *expands* public access to government records, as this bill does. In fact, the Legislative findings that were recently added to the bill provide that "By requiring local agencies to designate custodians of records responsible for responding to requests and inquiries under the California Public Records Act, this act *furthers* the public's access to public records."

OTHER ARGUMENTS IN SUPPORT: The First Amendment Coalition writes the following in support of AB 1479:

> We routinely see complaints about the failure of government agencies to comply with the timelines set forth under the CPRA for responding to requests for public records. Indeed, this is one of the most frequent complaints we receive. It is clear beyond doubt that government agencies across California routinely ignore the timelines set forth under the CPRA. . . Delay is particularly problematic for news reporters and others who need information promptly and, for such requesters, a delay in response is effectively a denial. . . .However, under present law, there are no specific penalties for exceeding these mandatory time frames. The result is that government agencies routinely take far longer than required to even respond to a request, and in some instances delay for many, many months in providing records. . . AB 1479 provides much needed incentives to curtail such improper delays.

The California Newspaper Publishers Association supports AB 1479 because, among other things, it will "create greater incentives for public agencies to comply with their duties under the California Public Records Act (CPRA)."

> Delay and other barriers to access in the production of records are commonplace. These unlawful acts which limit the public's constitutional right to access government records come in many forms, typically, an agency's failure to comply with the CPRA's stated deadlines, and attempts to charge exorbitant, unlawful fees which deter a requester from actually obtaining records. Even CNPA's members, who are some of the most sophisticated public records requesters, are given the runaround by agencies that want to withhold access without issuing an outright denial to a request.

The Committee also received dozens of email messages and letters from private citizens in support of the bill, expressing frustration with government offices that do not promptly comply with requests for PRA requests by the public. For example, David Soares, of Santa Cruz, writes as follows:

> I have become aware in recent years that state and public agencies are less open in how they conduct the public's business, and less responsive to requests by citizens and the media to requests for information under the Public Records Act. This is an alarming development and a threat to our democratic form of government. . . . The penalty provisions of AB 1479 will go a long way to assuring that public officials take seriously their duty to do the public's business in public. The great U.S. Supreme Court Justice Louis Brandeis once wrote that, "Sunlight is said to be the best of disinfectants, electric

light the most efficient policeman." Cronyism and corruption are on the rise with the new administration in Washington. Never before has it been so important for Californians to lead the way in resisting that tendency in our society, in order to preserve our great democracy.

OTHER ARGUMENTS IN OPPOSITION: The Sutter County Board of Supervisors writes that, "While the bill appears to be a worthy attempt to get public agencies to be responsive to records requests, there are already enough incentives for local public agencies to comply with the law, including existing court costs and negative publicity if they don't. . . .Local government bodies already take the California Public Records Act seriously because it is the law, failure to do so can cost agencies unlimited legal fees and the publicity surrounding he failure to respond to public records request can undermine public confidence in the agency."

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union- California
Californians Aware
California Newspaper Publishers Association
First Amendment Coalition
Think Computer Foundation
Naked Capitalism
Numerous private individuals

Opposition

Association of California Healthcare Districts
Board of Supervisors, County of Sutter
California Municipal Utilities Association
California State Association of Counties
California Special Districts Association
League of California Cities
Urban Counties of California

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