

## APPENDIX A

PUBLIC RECORDS ACT EXEMPTIONS - It is the Department's policy to be open and cooperative with the public regarding access to Department records and to disclose information in accordance with the Public Records Act. There are, however, several categories of documents which are exempt from disclosure under the Public Records Act. Most of these exemptions are listed in Government Code §6254. It is important that the Department staff review records for exempt material before the records are disclosed to the requestor because the Department in most cases is deemed to have waived any applicable exemption when it discloses documents which would otherwise be exempt to members of the public. Government Code §6254.5. The Office of Legal Counsel should be consulted if Department staff are uncertain of the exempt status of a particular record. The principal exemptions Department staff are likely to encounter are discussed below:

1. EXEMPTIONS INCORPORATED INTO THE PUBLIC RECORDS ACT - Government Code §6254(k) exempts "records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including but not limited to, provisions of the Evidence Code related to privilege." Many well known privileges apply to the Public Records Act under this provision. These include:
  - a. ATTORNEY-CLIENT PRIVILEGE
    1. The purpose of the attorney-client privilege is to protect communications between the client and his or her attorney. This privilege is found in Evidence Code §954.
    2. A public entity, like the Department, is a "client" which can protect communications with its attorneys from disclosure. Because the Department acts through its employees, communications between Department employees and its lawyers (both DTSC's Office of Legal Counsel and the Attorney General's Office) which are intended to be communicated in confidence are privileged. Both verbal and written communications are included within the privilege.
    3. It is important to remember that an attorney-client communication can lose its privileged character if the privilege is waived. Waiver can occur in the following instances:

(a) failure to claim the privilege in a timely fashion in a legal proceeding;

(b) making confidential statements in the known presence of unnecessary third parties;

(c) voluntary disclosure of the communication to a third party.

b. ATTORNEY WORK PRODUCT PRIVILEGE

1. The attorney's work product doctrine is a privilege developed by case law to protect an attorney from having to disclose his or her work to third parties. Work protected includes:

(a) Information which an attorney secures from a witness while acting for the Department in anticipation of litigation;

(b) Memoranda, briefs, communications and other writings prepared by attorneys in representing the Department;

(c) Materials compiled, prepared or analyzed by Department staff under the direction of an attorney in anticipation of litigation;

(d) Writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

c. TRADE SECRETS

1. Trade secrets are protected from disclosure under Health and Safety Code §§25173, 25358.2 and Evidence Code §1060. Trade secrets as defined by the Health and Safety Code includes, but is not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which 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, and which gives its user an opportunity to obtain a business advantage over competitors.

who do not know or use it.

2. It is the obligation of the person furnishing information to the Department to inform the Department if the information contains a trade secret. Health and Safety Code §25358.2(d).

3. RECORDS OBTAINED THROUGH FACILITY INSPECTION - When the Department receives a request to review records, including, but not limited to, documents, photographs, and sampling results that have all been gathered pursuant to Health and Safety Code §§ 25185(a) [as amended by Stats. 1994, ch. 1160 (S.B. 1747)], 25185.5(d) and 25358.1(e), the Department is required to notify the facility from which the records were obtained of the request for the purpose of allowing the facility to assert a claim of trade secrets, if applicable, and allowing the facility to assert a claim that the records reveal facility security, if applicable. Upon request, the Department will submit a copy of the record to the facility for its review. Health and Safety Code §§ 25185(d) [as amended by Stats. 1994, ch. 1160 (S.B. 1747)], and 25358.1(f). Because the Department is required to respond to the public records request within ten days of receipt of the request by the Department unless "unusual circumstances" exist, it is important that the facility be notified by the Department of the request to view the records immediately after the records request is received. Department staff should notify the facility in writing by certified mail, return receipt requested, that if it claims a trade secret for any record, that this claim must be asserted by a date which is no more than ten days from the date that the Department received the public records request. (See Attachment 7 for a model letter that may be sent to the facility.)

4. It is the obligation of the person claiming the trade secret to substantiate the claim. Where a claim of trade secret has been made for a record which does not appear to contain trade secrets, Department staff must consult with the Office of Legal Counsel for a determination of whether or not the

record should be disclosed to the requestor. If a determination is made to disclose the record, the person claiming the trade secret will be notified that the Department will disclose the record to the requestor on a specified date.

d. OFFICIAL INFORMATION

1. This privilege applies to information acquired in confidence by a public employee in the course of his or her duty and which is not open or officially disclosed to the public prior to the time the claim of privilege is made. Evidence Code §1040.

2. The Department as a public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information if the privilege is claimed by a person authorized by the public entity to do so, and:

(a) Disclosure is forbidden by a federal or state statute, or

(b) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. No privilege may be claimed if any person authorized to do so has consented to disclosure of the information in the proceeding.

3. The Office of Legal Counsel should be consulted where records are believed to be exempt under this provision.

e. IDENTITY OF INFORMER

1. A public entity under Evidence Code §1041 has a privilege to refuse to disclose the identity of an informer (a person who has furnished information in confidence regarding a violation of law) if:

(a) the privilege is claimed by a person authorized by the public entity to do so;

(b) disclosure is forbidden by an act of Congress or a statute of this state, or

(c) disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his or her identity that outweighs the necessity for disclosure in the interest of justice;

(d) the information is furnished in confidence by the informer to a law enforcement officer, a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or any person for the purpose of transmittal to a law enforcement officer or representative of an administrative agency.

2. Names of informants are also prohibited from disclosure under 22 CCR §66272.20(c) unless the names have been publicly disclosed as part of a judicial proceeding.

2. DRAFT DOCUMENTS - Preliminary drafts, notes or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business may be withheld, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure (Government Code §6254(a)).

This is a two-prong test. First, the documents must be of the type which are not normally retained as set forth in the Department's records retention policy. Second, even if the documents are preliminary drafts and they are not normally retained, the Department must demonstrate that the public interest is better served by not releasing them.

Examples of the public interest which is served by not releasing such records includes preserving the Department's ability to engage in free internal debate and to engage in negotiations without fear of premature disclosure.

Electronic mail notes, for example, are exempt from disclosure under this provision if the two-prong test is satisfied. If the electronic mail notes do not

satisfy the two-prong test, the notes may still be exempt under another exemption such as the deliberative process privilege (Appendix A, paragraph 6.b.) or the attorney client privilege (Appendix A, paragraph 1.a.).

3. PRIVATE AND CONFIDENTIAL RECORDS

- a. These records can be defined as records that contain medical, personnel, or financial information or any information the disclosure of which would constitute an unwarranted invasion of personal privacy. (Government Code §6254(c).)

Personal privacy is defined as the right of an individual to control the use of data, when it may be used and where it may be transferred as well as protection against improper use or unwarranted collection. The right to privacy is guaranteed to an individual by both the California and United States Constitutions.

- b. When a request is made seeking private and confidential records, it should first be determined whether release of the records would violate any law or regulation that makes the record confidential. Where disclosure would violate a law, public record requests should be denied in writing stating the reason or reasons for the denial.
- c. When a request is for private and confidential records and there is no specific statutory prohibition, the Department must weigh the public interests served by disclosing the record against those served by nondisclosure. If the determination is that the public interest served by disclosure is stronger, the records will be released. If the determination is clearly otherwise, the person making the request should be notified in writing that the request is denied along with a statement of the basis for the denial. The Office of Legal Counsel should be consulted in making the determinations discussed above and is available to assist in drafting any refusal to disclose.

- d. The home address and home telephone number of state employees are not public records and should not be disclosed to the public except as authorized under Government Code §6254.3.

4. RECORDS PERTAINING TO PENDING LITIGATION - Records pertaining to pending litigation to which the public agency is a party, or to claims made under the California Tort Claims Act, are exempt until the pending litigation or claim has been finally adjudicated or otherwise settled. (Government Code §6254(b).)

- a. Time Limitation - This section is time-limited. It is the position of the Department that this exemption applies once there is a decision to proceed with litigation. This exemption ends when the matter is concluded. Even though a record has lost its exempt status under this exemption because the case has been resolved, that record may still be exempt under another exemption. As an example, records such as a Statement of Facts lose their exempt status under Government Code §6254 (b) when the litigation is concluded. However, the Statement of Facts remains exempt from disclosure under several other exemptions contained in the Public Records Act.

5. COMPLAINTS AND INVESTIGATIONS.

- a. The Public Records Act also exempts from disclosure records relating to investigations in licensing or law enforcement. This is a broad exemption which includes all investigatory files or security files compiled by any state agency or local agency for correctional, law enforcement, or licensing purposes. Government Code section 6254(f). Records do not come under this exemption unless there is a "concrete prospect of enforcement." Records which qualify for this exemption remain exempt even after the investigation has concluded. Williams v. Superior Court (1993) 5 Cal. 4th 337. Not every record related to an investigation is exempt. For example, a ~~Field Report~~ of <sup>Summary</sup> Violations and a Report of Violations may be disclosed to the public after the Report has been sent to the facility. Inspection reports, including photographs, sampling

results, etc., are required to be provided to the operator of the facility which has been inspected within 65 days of the date of the inspection. Health and Safety Code § 25185(c) (2) (A) [as amended by Stats. 1994, ch. 1160 (S.B. 1747)]. These records are also subject to disclosure to the general public once the records have been sent to the facility unless the records are trade secrets or are otherwise privileged or exempt. (For a discussion of the application of trade secrets to inspection records see "Trade Secrets" beginning at Page A-2). An administrative "Enforcement Order" also becomes a document disclosable to the public after it has been finalized and served on the facility involved. (Government Code §6254 (f).)

6. CORRESPONDENCE OF AND TO THE GOVERNOR - Government Code §6254 (1) exempts correspondence of and to the Governor or employees of the Governor's office. This exemption also includes records which are in the custody or maintained by the Governor's legal affairs secretary. An example of records included within this exemption are bill analyses, enrolled bill reports and decision memos for the Governor.

7. THE "PUBLIC INTEREST" AND "DELIBERATIVE PROCESS" EXEMPTIONS

- a. PUBLIC INTEREST PRIVILEGE - Government Code §6255 provides that a government agency may still withhold a record from disclosure under the Public Records Act even if it is not exempt under the express provisions of the Act if on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.
- b. DELIBERATIVE PROCESS PRIVILEGE - The deliberative process privilege protects an agency's internal working papers consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy making processes. The purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Time Mirror Company v. Superior Court (1991) 53 Cal. 3d 1325. Records which fall within

the deliberative process privilege must be both predecisional and deliberative. "Predecisional" means that the records must have been generated before a decision or policy was consummated. "Deliberative" means that the records are part of the decision-making process. Factual matters may be protected under this privilege if the disclosure of the facts would disclose the nature of the deliberation. An example of records which fall within this privilege are daily, weekly and monthly appointment calendars and schedules maintained by the Governor. The Court in Times Mirror Company held that the Governor's appointment calendars and schedules were exempt from disclosure because revealing the identity of persons with whom the Governor had met and consulted would reveal the substance or direction of the Governor's judgment and mental processes thereby intruding into the deliberative process. Electronic Mail notes, for example, which are generated prior to an agency decision and which reflect the agency's decision-making process may qualify for the deliberative process privilege.

8. MISCELLANEOUS EXEMPTIONS - There are many other exemptions which are specifically identified in the Public Records Act. These exemptions are set forth in Appendix D. Department staff should consult with the Office of Legal Counsel to identify other exemptions which may apply to a particular record.