

Comment on Item 5

This comment responds to two apparent misconceptions in OFD's response: that agencies can generally refuse to disclose records in response to broad requests, and that agencies can broadly charge fees for disclosure of electronic records. It also suggests a few questions for OFD.

Public agencies can only refuse to answer “unspecific” or “unduly burdensome” requests.

There are two separate issues here: clarity and overbreadth.

First, a requester must make a “specific and focused” request.¹ However, since requesters do not have access to agency files, records “may be described by their content,” and the agency must then “search for records based on criteria set forth in the search request.”²

Second, an agency can refuse to respond to an “unduly burdensome” request. But the catch-all balancing test is the legal justification for such a decision: that “the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.”³ As a result, not every request that seeks a voluminous number of records is overbroad. For instance, despite the vast number of records, a request requiring production of 42,582 emails was not unduly burdensome because the emails were easily identifiable and required little review.⁴

It seems likely that this is the advice that OCA is providing OFD. While OFD may certainly seek clarity from an unfocused request or seek to narrow a request if it believes it would better suit the requester's purposes,⁵ it generally may not refuse to disclose records to a broad request.

Public agencies can only impose limited fees to disclose public records.

To produce a duplicate of paper records, an agency may only charge the “direct costs of duplication, or a statutory fee if applicable.”⁶ This is understood to mean only the cost involved with “running the copy machine” (including “the expense of the person operating it”), not costs associated with “staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information.”⁷

To produce a duplicate of electronic records, an agency may only charge “the direct cost of producing a copy of a record in an electronic format” (e.g., the cost of uploading a file to NextRequest) unless specific circumstances are present.⁸ Only when an electronic record is “one that is produced only at otherwise regularly scheduled intervals,” or when producing the electronic record requires “data compilation, extraction, or programming” may the agency charge more: in those instances, the agency can charge “the cost to construct a record, and the cost of

¹ *Rogers v. Superior Ct.*, 23 Cal. Rptr. 2d 412, 418 (Cal. Ct. App. 1993).

² *California First Amend. Coal. v. Superior Ct.*, 78 Cal. Rptr. 2d 847, 849 (Cal. Ct. App. 1998).

³ *Bertoli v. City of Sebastopol*, 182 Cal. Rptr. 3d 308, 323 (Cal. Ct. App. 2015) (citing the statute now recodified at Cal. Gov't Code § 7922.000).

⁴ *Getz v. Superior Ct.*, 287 Cal. Rptr. 3d 722, 732 (Cal. Ct. App. 2021).

⁵ See, e.g., Cal. Gov't Code § 7922.600(a)(3) (requiring a public agency to “[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought.”).

⁶ Cal. Gov't Code § 7922.530(a).

⁷ *Nat'l Laws. Guild, San Francisco Bay Area Chapter v. City of Hayward*, 464 P.3d 594, 598 (Cal. 2020).

⁸ Cal. Gov't Code § 7922.575(a).

programming and computer services necessary to produce a copy of the record.”⁹ But those circumstances are narrowly construed. “Extraction” does not “cover every process that might be colloquially described as ‘taking information out.’”¹⁰ For instance, it does not “cover time spent searching for responsive records in an e-mail inbox or a computer’s documents folder.”¹¹ Rather, it includes situations like “pulling demographic data for all state agency employees from a human resources database and producing the relevant data in a spreadsheet.”¹² That is why a public agency may only charge the cost of providing requesters with a copy of a file in response to a request for body camera footage—which is usually a de minimis cost—and not the cost of redacting the footage.¹³

To the extent that OFD is suggesting it can broadly charge to produce electronic records, it is mistaken. Moreover, even when agencies have the authority to impose significant fees for “data compilation, extraction, or programming,” they usually do not. This may be for several reasons: (1) such requests usually significantly further the public interest (for instance, requests for demographic data associated with police-citizen interactions); (2) administrative costs associated with collecting fees may be high; and (3) the volume of requests in which the agency can impose such a fee is likely low. Accordingly, allowing city agencies to impose such a fee likely would not significantly impact the volume of requests while at most only discouraging requests that seek disclosure of important data.

Suggested questions for OFD

- What is a general breakdown of the role of requesters? That is, are most requests made by members of the public, journalists, insurance companies, or other individuals/entities?
- Requests associated with fire/ambulance runs as well as code inspection reports appear to generate the largest volume of requests. How long do each of these types of requests take to fulfil? What are the biggest challenges in responding to each type of request? Are there processes that could automate certain steps in responding to any of these types of requests?
- Some public record request responses note that the ransomware attack resulted in a loss of data. Could you expand upon this statement and explain how this has impacted OFD’s disclosure of records?

⁹ Cal. Gov’t Code § 7922.575(b).

¹⁰ *Nat’l Laws. Guild*, 464 P.3d at 606–07.

¹¹ *Id.* at 607.

¹² *Id.* at 606.

¹³ *Id.* at 608.