Draft

STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE ENROLLED BILL ANALYSIS

Date Amended:	**Enrolled**	Bill No:	**AB 822**
Tax:	**Public Records Act**	Author:	**Shelley**
Board Position:		Related Bills:	

BILL SUMMARY:

This bill would establish a new appeals procedure for a state or local agency's denial of a written request for a public record or an agency's failure to respond to such a written request.

ANALYSIS

Current Law

Under current law, personal information may be disclosed pursuant to the Public Records Act, or PRA (commencing with Section 6250 of the Government Code), which provides for public access to any record maintained by a state and local agency, unless there is a statutory exemption that allows or requires the agency to withhold the record. The PRA also requires an agency to determine within 10 days from the receipt of a request for records, whether the request, in whole or part, requests copies of disclosable public records in the possession of the agency. The agency is required to promptly notify the person making the request for public records of its determination. Any determination denying the request for public records, in whole or in part, must be in writing.

A person may seek a court injunction or declarative relief or writ of mandate to enforce his or her right to inspect or to receive a copy of any public record or class of public records. The court is authorized to set the times for responsive pleadings and for hearing on the matter to ensure that a decision is reached expeditiously.

The court is required to award reasonable attorney fees and court costs to a person who prevails in litigation filed under the PRA, and to award reasonable attorney fees and court costs to the public agency if the plaintiff's case is clearly frivolous. There are currently no provisions for any penalty against a public agency for failure to provide records despite a ruling favorable to the person seeking the records.

Proposed Law

This bill would add Sections 6253.3, 6257, and 6259.1 to, and amend Section 6259 of, the Government Code to establish a new appeals procedure for a public agency's denial of a written request or an agency's failure to respond to a written request. Specifically, AB 822 would:

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- Require written requests for inspection or copies of public records be directed to the head of the agency or his or her designee.
- Provide that any public records request that is denied by an agency may be appealed to the Attorney General (AG) within 20 days of the date of denial or in the case of an agency's failure to provide any response to a public records request, within 40 days after the request was delivered or mailed to the agency.
- Require the AG to issue a written decision within 20 working days of the date that the written request and written response or lack of response of the agency is received by the AG. Require the AG to maintain copies of the opinions issued and to publish the opinions annually in a special volume and make them available on the Internet.
- Provide that the AG is immune from any lawsuit or discovery for any action taken as a result of its review of a public agency's action under the PRA.
- Authorize the Superior Court to impose a fine on an agency of not more than $100 per day, but not to exceed $10,000, for each day that access to the public record was delayed, if the court finds that the agency acted in bad faith or with knowledge that the request sought records that were not exempt. This bill would provide that a fine awarded under this section shall be split 50 percent to the plaintiff and 50 percent to the State's General Fund, if the plaintiff first sought review by the AG. The Public Utilities Commission would be exempted from these provisions, as specified.
- Declare legislative intent that public records opinions issued by the AG are given no greater deference than any other opinion of the AG.

As discussed above, this bill provides an appeals procedure that allows the AG to issue a written opinion stating whether the agency's response or lack of response to a public records request complied with the provisions of the Public Records Act. These provisions do not apply to a request for public records made to a state agency by a party to a pending proceeding involving the state agency or an employee of the state agency, or a pending investigation by the state agency, if the AG has provided or is providing legal advice or representation to the state agency with regard to the proceeding or investigation.

This bill would become operative on July 1, 2003.

Background

This bill is almost identical to SB 48 (Sher and Speier) and SB 2027 (Sher) of the 1999-2000 Legislative Session. SB 48 was vetoed by the Governor on October 9, 1999; SB 2027 was vetoed by the Governor on September 29, 2000. Regarding SB 48, the Governor in his veto statement commented that, "SB 48 creates an Attorney General appeals process that will lead to inherent conflicts of interest between the Attorney General and his major clients, the state agencies and departments." The Governor also noted concerns regarding potentially significant compliance costs.

SB 2027 (Sher) attempted to address the AG conflict of interest issue that was present in SB 48. SB 2027 would have allowed a state agency to claim attorney-client privilege,

thus precluding the AG from reviewing the request and providing an opinion, if the AG had previously advised the state agency to deny the request. SB 2027 also explicitly permitted a state agency to employ outside counsel in defense of an action after the AG had rendered an adverse opinion.

Although SB 2027 sought to resolve the conflict of interest issue, the Governor in his veto statement noted that, "While proponents of this bill contend that a weakness of the Public Records Act is the lack of recourse when state agencies refuse to comply, this bill does not address that issue. Instead the bill sets up a bureaucratic reporting mechanism, involving the preparation, posting and mailing of AG opinions on the merits of a state agency's decision to withhold requested information." The Governor also expressed concerns about the likely significant costs in complying with this bill.

COMMENTS:

1. **Sponsor and purpose.** This bill is sponsored by the California Newspaper Publishers Association in an effort to provide a new, quick, and inexpensive way to resolve PRA disputes.
2. **Portions of this bill codify existing Board practices.** The Board already provides denials of public records requests in writing.
3. **This bill adds two provisions that were not contained in SB 2027.** Those two additions are: (1) state agencies hiring outside counsel would be limited to paying the same rate that the AG would charge for legal services for the defense of the same action; and (2) a fine of $100 per day (maximum of $10,000) awarded under Section 6259 would be split 50 percent to the plaintiff and 50 percent to the State's General Fund.

COST ESTIMATE

Although some provisions of this bill would codify existing Board practice, there is a potential unfunded liability cost if a court finds that the Board acted in bad faith or with knowledge that a request sought non-exempted records. Also, a potential unfunded, but unknown, cost could be incurred if the Board is required to employ outside counsel.

REVENUE ESTIMATE

This bill would not impact state revenues.

Analysis prepared by:	Debra A. Waltz	324-1890	09/5/02
Contact:	Margaret S. Shedd	322-2376	

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