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Nora Culver

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A PROPOSED AMENDMENT TO THE CALIFORNIA PUBLIC RECORDS ACT: BALANCING PRIVACY AND PUBLIC ACCESS

Nora Culver*

I. INTRODUCTION

A popular Government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.¹

The Founding Fathers created a government “of the people, by the people and for the people.”² Secrecy is “antithetical to [such] a democratic system.”³ While secrecy may be antithetical to democracy, the right of privacy is also deeply rooted in this country’s foundations.⁴

The issue of whether public officials’ salaries are subject to disclosure has recently created much confusion within the

* Research Editor, Santa Clara Law Review, Volume 45 J.D. Candidate, Santa Clara University School of Law; B.A. Political Science and Spanish, Wellesley College.

1. Letter from James Madison to W.T. Barry (August 4, 1822), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1816-1826, at 276 (R. Worthington ed., 1884).

2. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript available at the Library of Congress).

3. Cal. State Univ., Fresno Ass’n v. Superior Court, 108 Cal. Rptr. 2d 870, 879 (Cal. Ct. App. 2001) (internal citation omitted) (explaining that the California Public Records Act’s broad definition of “public record” is designed to protect the public’s need to know of the government’s actions).

4. Teamsters Local 856 v. Priceless, LLC, 5 Cal. Rptr. 3d 847, 857-58 (Cal. Ct. App. 2003). See *Griswold v. Conn.*, 381 U.S. 479, 494 (1965) (recognizing that “the right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live”) (Goldberg, J., concurring) (internal citations omitted).

California legal community.⁵ As a public official in local government, should Burlingame, California city clerk Jim Johnson⁶ be required to disclose his \$53,000 a year salary and yearly bonus to anyone who requests this information?

On the one hand, there is a strong presumption in the California Public Records Act (CPRA)⁷ in favor of disclosure and the public's right of access to government records.⁸ The CPRA reflects the democratic ideals on which the United States was founded, including the belief that "open governments are a hallmark of a democratic society, the public should have full access to information concerning the working of the government 'in order to verify accountability.'"⁹ The idea that access to information involving the conduct of the people's business is an important right is almost as old as this country.¹⁰

On the other hand, there is the equally important and constitutionally protected right of privacy, reflected in the CPRA's express limitations on disclosure.¹¹ Given these two competing interests, we arrive at the question of whether the disclosure of city officials' salaries is an invasion of privacy that trumps the CPRA.¹² Further, does the publication of individuals' salaries help the public ensure government ac-

5. *Papers Appeal Suit to High Court*, THE PALO ALTO DAILY NEWS, Dec. 10, 2003, at 5.

6. The name referenced is fictional.

7. CAL. GOV'T CODE § 6250-6270 (West 2004). Public access to government records in California is governed by the California Public Records Act.

8. *See Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 205 Cal. Rptr. 92 (Cal. Ct. App. 1984). *See also* 53 Op. Cal. Att'y. Gen. 140 (1970) (explaining that the Legislature had long attempted to "formulate a workable means of minimizing secrecy in government"); 53 Op. Cal. Att'y. Gen. 143 (1970) (stating that the CPRA was enacted against a "background of legislative impatience with secrecy in government").

9. *Rackauckas v. Superior Court*, 128 Cal. Rptr. 2d 234, 236 (Cal. Ct. App. 2002) (citing *Cal. State Univ., Fresno Ass'n*, 108 Cal. Rptr. 2d at 878). While the court found that section 6254(f) of the CPRA provides a broad exemption from disclosure for investigative files that reflect the thoughts and opinions of an investigation, it also recognized the importance of public access to governmental records. *Id.*

10. *See San Gabriel Tribune v. Superior Court*, 192 Cal. Rptr. 415, 420 (Cal. Ct. App. 1983) (finding the financial data submitted by a waste disposal company when it entered into a contract with a city was a public record and therefore subject to disclosure).

11. *See* GOV'T § 6254.

12. *See Priceless*, 5 Cal. Rptr. 3d at 857. The court in *Priceless* supported the idea that financial affairs (such as salary information) were an aspect "of the personal right to privacy" not compelling enough to be disclosed. *Id.*

countability and shed light on the government's performance of its duties?¹³ Finally, do public officials' salaries actually constitute public records that must be disclosed under the CPRA?¹⁴

*Teamsters Local 856 v. Priceless, LLC*¹⁵ (*Priceless*) addressed the issue of disclosure of public officials' salaries by individual name.¹⁶ The court held that such disclosure was inappropriate, would "uproot constitutional concerns of individual privacy,"¹⁷ and would serve "no valid purpose"¹⁸ in demonstrating the government's performance of its duties.¹⁹ The case surprised the newspapers, who brought the initial *Priceless* suit against the cities, after requesting a disclosure of salaries.²⁰ The case also surprised the legal community because while there is no controlling case law on point, the court analyzed the CPRA in an innovative way, placing more weight on the legislature's interest in privacy rights than existing case law had done.²¹ Prior decisions in California and other states have commonly interpreted state public records acts to heavily favor a broad policy of disclosure.²²

The losing newspapers requested that the California Supreme Court overturn the appellate court's decision, but the request has been denied until the newspapers can produce additional evidence showing there is no privacy interest in-

13. *Id.* at 863.

14. *Id.* at 858-59. The *Priceless* court raised the question of whether "the name of an ordinary public employee, coupled with detailed salary information" would be included within the definition of "employment contract" which the CPRA considers a public record. *Id.*

15. *Id.* at 847.

16. *Id.* at 858-59.

17. *Id.* at 854.

18. *Priceless*, 5 Cal. Rptr. 3d at 863.

19. *Id.* at 854-62.

20. *Papers Appeal Suit to High Court*, *supra* note 5. The lawsuit was brought by The Daily News, a media group which publishes newspapers in various cities throughout the San Francisco Bay Area. *See id.*

21. *Priceless*, 5 Cal. Rptr. 3d at 847.

22. *Id.* at 854. See also the following cases and authorities which support a broad policy of disclosure in interpreting public records acts in various states: *Register Div. of Freedom Newspapers*, 205 Cal. Rptr. 2d at 96; *Houghton v. Franscell*, 870 P.2d 1050 (Wyo. 1994); *Int'l Ass'n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132 (Alaska 1999); *People ex rel. Recktenwald v. Janura*, 376 N.E.2d 22 (Ill. App. Ct. 1978); Interview with Bill McClure, City Attorney of Menlo Park and Partner, Jorgenson, Siegel, McClure & Flegel, LLP, in Menlo Park, Cal. (Jan. 6, 2004) (Bill McClure believes California case law generally favors disclosure over privacy rights.).

volved or that the significance of disclosure outweighs the privacy interest.²³ Until and *if* the court decides to take the case, the publication of individualized public officials' salaries will remain a contentious and uncertain area of law, with strong arguments on either side of the issue.²⁴

This comment will first outline the legal problem this controversy encompasses.²⁵ It will then provide a more thorough background of the pertinent legal issues.²⁶ Finally, it will analyze the facts²⁷ and propose a resolution to the problem: an amendment to the California Public Records Act.²⁸

Proponents of disclosure contend that the CPRA establishes a strong presumption in favor of the public's right to access government records.²⁹ This presumption is supported by substantial case law nationwide where state courts have held that the public has a right to access government records.³⁰ Proponents also maintain that salary information should be disclosed because it is a public record,³¹ and pursuant to CPRA section 6253, public records must be disclosed.³² Further, the proponents contend a salary constitutes a part of an employment contract, which CPRA section 6254.8 lists as a public record,³³ thus making it even more likely that salary information fits within the scope of a public record.

Opponents of disclosure assert that the CPRA does not

23. Interview with Larry Anderson, City Attorney of Burlingame, in Burlingame, Cal. (July 9, 2004). See *Priceless*, 5 Cal. Rptr. 3d at 847.

24. Interview with Larry Anderson, City Attorney of Burlingame, in Burlingame, Cal. (Dec. 23, 2003).

25. See discussion *supra* Part I.

26. See discussion *infra* Part II.

27. See discussion *infra* Part IV.

28. See discussion *infra* Part V.

29. See CAL GOV'T CODE § 6250 (West 2004).

30. See *id.* See also *CBS v. Sherman Block*, 725 P.2d 470, 473-76 (Cal. 1986). The following cases also support the public's right of access: *Int'l Ass'n of Fire Fighters*, 973 P.2d 1132; *Janura*, 376 N.E.2d 22; *Penockie v. Michigan Technological Univ.*, 287 N.W.2d 304 (Mich. Ct. App. 1979); *Hastings & Sons Publ'g Co. v. City Treasurer of Lynn*, 375 N.E.2d 299 (Mass. 1978); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999); *Houghton v. Franscell*, 870 P.2d 1050 (Wyo. 1994); *Dobronski v. FCC*, 17 F.3d 275 (9th Cir. 1994); *Tripp v. Dep't of Def.*, 193 F. Supp. 2d 229 (D.D.C. 2002).

31. *Priceless*, 5 Cal. Rptr. 3d at 858-59. California Government Code section 6254.8 states that employment contracts between the state or local agency and a public official is a public record. See GOV'T § 6254.8.

32. GOV'T § 6253.

33. *Id.* § 6254.8 (stating that "[e]very employment contract between a state or local agency and any public official or public employee is a public record").

trump constitutional privacy rights.³⁴ In support of this position, they refer to the legislature's intent in enacting the CPRA, which was to encourage public access, but simultaneously to be "mindful of the right of individuals to privacy."³⁵ The CPRA's right of disclosure, opponents argue, is tempered by the right of privacy.³⁶ Further, the right to privacy is a fundamental constitutional right.³⁷ It is a right that extends to an individual's "personal financial affairs . . . against compulsory public disclosure."³⁸ An employee's right to privacy in his or her employment and financial records is established under California³⁹ and federal law.⁴⁰ Opponents of disclosure also claim that revealing employees' *individual* names linked to their salaries sheds no "light on the city's performance of its duties."⁴¹ Finally, they contend that salary information is not automatically considered part of an employment contract under CPRA section 6254.8,⁴² which states that employment contracts are public records.⁴³

Recognizing the conflicting yet equally prominent interests involved, this comment proposes an amendment to the California Public Records Act that accommodates both public access needs and privacy rights.⁴⁴ The amendment will exempt identified *individual* salary, bonuses, and total compensation from being disclosed.⁴⁵ However, the salary, bonuses, and total compensation corresponding to each governmental

34. *Priceless*, 5 Cal. Rptr. 3d at 854.

35. GOV'T § 6250. See also *Rackauckas*, 1028 Cal. Rptr. 2d at 236.

36. *City of Los Angeles v. Superior Court*, 49 Cal. Rptr. 2d 35, 36 (Cal. Ct. App. 1996). The court recognized this privacy right within the opinion.

37. See *Griswold*, 381 U.S. at 484 (stating that the right to privacy is a fundamental right formed by "specific guarantees in the Bill of Rights" creating "zones of privacy").

38. *Priceless*, 5 Cal. Rptr. 3d at 857 (citing *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225, 231-32 (Cal. 1970)).

39. GOV'T § 6254(c). Section 6254(c) recognizes the right of privacy in one's personnel files. See also *Priceless*, 5 Cal. Rptr. 3d at 857-58; *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225, 233 (Cal. 1970); *San Diego Trolley, Inc. v. Superior Court*, 105 Cal. Rptr. 2d 476, 485 (Cal. Ct. App. 2001).

40. 5 U.S.C. section 552(b)(6) (2000) states that the disclosure of personnel, medical and similar files would constitute an unwarranted invasion of personal privacy. See also *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 319 (1979); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982).

41. *Priceless*, 5 Cal. Rptr. 3d at 863.

42. GOV'T § 6254.8.

43. *Priceless*, 5 Cal. Rptr. 3d at 860-61.

44. See discussion *infra* Part V.

45. See discussion *infra* Part V.

position and *not* linked to identifiable individuals will constitute a public record and be subject to disclosure.⁴⁶

II. BACKGROUND

The conflict between disclosure of public officials' salaries and privacy rights is realized when reviewing the relevant law involved. Two competing interests on public record disclosure are revealed in statutory and case law: "[the] prevention of secrecy in government and the protection of individual privacy."⁴⁷ While the right to know requires public exposure of recorded official action, there is an equally strong, yet narrower, societal interest in privacy.⁴⁸ The CPRA's broad definition of "public record" leaves open the question of whether individual salary information falls within the category of an official public record prompting disclosure.⁴⁹

A. Controlling Statute: The California Public Records Act

The California Public Records Act (CPRA)⁵⁰ governs access to state and local government information.⁵¹ Enacted in 1968, the CPRA was modeled after the federal Freedom of Information Act (FOIA).⁵² Like the FOIA, the CPRA favors disclosure⁵³ by stating that "every person has a right to inspect any public record, except as hereafter provided."⁵⁴ The CPRA's goal is broad disclosure of government information to safeguard government accountability to the public.⁵⁵

46. See discussion *infra* Part V.

47. *Black Panther Party v. Kehoe*, 117 Cal. Rptr. 106, 109 (Cal. Ct. App. 1974). Pursuant to the CPRA, plaintiffs sought judicial enforcement to review written letters of complaint on file at defendant government agency. *Id.* at 107.

48. *Id.*

49. CAL. GOV'T CODE § 6254.8 (West 2004).

50. *Id.* §§ 6250-70.

51. Jonathan H. Anschell, *Obtaining Government Records Under the Public Records Act*, 25 AUG. L.A. LAW. 21 (2002).

52. 5 U.S.C. § 552 (2000). See *Priceless*, 5 Cal. Rptr. 3d at 857, which recognized that the CPRA is modeled upon the FOIA. See also *Cook v. Craig*, 127 Cal. Rptr. 712, 716 (Cal. Ct. App. 1976) which analyzed the CPRA by basing it on the FOIA. The court found the CPRA required disclosure of the rules and regulations of the California Highway Patrol Department governing the investigation and disposition of citizens' complaints of police misconduct. *Id.* at 718.

53. GOV'T § 6250.

54. *Id.* § 6253. See the following sources which recognize the CPRA's goal of broad disclosure: *City of Los Angeles*, 49 Cal. Rptr. 2d at 36; Anschell, *supra* note 51, at 21.

55. GOV'T § 6250.

However, the CPRA does contain limitations⁵⁶ and a catchall provision.⁵⁷ The catchall provision allows an agency to withhold records if the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.⁵⁸

The legislature adopted the CPRA with the right of privacy in mind, but simultaneously declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."⁵⁹ While encouraging disclosure by providing some specifics as to what must be disclosed, the CPRA also attempts to define what should not be disclosed.⁶⁰ Section 6253 states that every person has the right to inspect any public record subject to defined limitations.⁶¹

The CPRA defines a public record to be "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."⁶² An employment contract between a state or local agency and a public employee is considered a public record.⁶³ A more detailed definition of employment contract is not included.⁶⁴

The broad definition of a public record is designed to protect the public's right to be informed concerning the actions of

56. See California Government Code section 6254 for those materials which do not need to be disclosed. For example, they include preliminary notes retained by the public agency in the ordinary course of business; records pertaining to pending litigation to which the public agency is a party; personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy; records of complaints to or investigations conducted by the Attorney General or Department of Justice; library circulation records kept to identify the borrower of items; and, statements of personal worth or personal financial data required by a licensing agency; etc. *Id.*

57. Anschell, *supra* note 51, at 21.

58. *Id.*

59. GOV'T § 6250.

60. See California Government Code section 6254 for records defined as exempt from disclosure.

61. GOVT. § 6253. See section 6254 for the defined limitations referred to in section 6253.

62. *Id.* § 6252.

63. *Id.* § 6254.8. Section 6254.8 excludes an employment contract from being exempted from disclosure under the provisions of section 6245. However, the section states that an employment record is a public record but provides no further definition for an employment record. *See id.*

64. *See id.* § 6254.8.

the government.⁶⁵ However, such a broad definition has given the California courts the opportunity to interpret and determine what constitutes a public record. As part of this process, courts have deliberated about which right prevails: the right of disclosure or the right of privacy.⁶⁶

B. Current Controlling Law: Teamsters v. Priceless

*Teamsters v. Priceless*⁶⁷ recently brought the issue of salary disclosure to the forefront.⁶⁸ The opinion illustrates the court's ongoing struggle to interpret an unclear statutory framework where the right to privacy and the public's right to know about the workings of government come together.⁶⁹

The Daily News, a media group which publishes newspapers in various cities throughout the San Francisco Bay Area, had requested from numerous Bay Area cities the names, titles, and W-2 forms⁷⁰ of all city employees in the preceding year.⁷¹ The request defined wages as "all compensation paid to these employees during the year, including regular hours, overtime, bonuses, etc."⁷²

Some cities refused to release this information, and unions representing public employees⁷³ sought a permanent injunction to prevent the release.⁷⁴ The Daily News filed an opposition to the request for the injunction, stating that pursuant to the CPRA, the information requested was of a public record nature, not exempt from disclosure, and did not infringe on any privacy interest.⁷⁵

The court acknowledged that the CPRA favors disclosure, but chose to weigh more heavily the legislature's express recognition of individual privacy interests,⁷⁶ concluding that

65. Cal. State Univ., Fresno Ass'n v. Superior Court, 108 Cal. Rptr. 2d 870, 879 (Cal. Ct. App. 2001).

66. *Papers Appeal Suit to High Court*, *supra* note 5.

67. *Priceless*, 5 Cal. Rptr. 3d at 847.

68. *Id.*

69. *Black Panther Party*, 117 Cal. Rptr. at 110 n.5.

70. W-2 forms are tax forms which request information on wages earned.

71. *Priceless*, 5 Cal. Rptr. 3d at 850.

72. *Id.*

73. These unions included the Teamster Local 856, the Services Employees International Union Local 715, and the Association of Federal, State, County, and Municipal Employees Locals 829 and 2190. *Id.* at 847.

74. *Id.* at 850-51.

75. *Id.* at 851.

76. California Government Code section 6250 states that "in enacting this

“public employees do have a legally protected right of privacy in their personnel files”⁷⁷ The court applied the Fourth Amendment’s zone of privacy protection to hold that public officials’ financial affairs should be protected against compulsory disclosure.⁷⁸

The court also balanced the public interest in nondisclosure of individuals’ names against the public interest in disclosure of the information.⁷⁹ It held that an individual’s name does not have to be linked to such salary information pursuant to the CPRA section 6254.8 because disclosure of individual names serves no valid purpose and will not provide any additional insight on governmental conduct and performance.⁸⁰

While the *Priceless* ruling provides California with the most recent decision on the subject, its interpretation of the CPRA and definition of a public record are debatable and inconsistent with other appellate court decisions.⁸¹ Even if the California Supreme Court does not grant certiorari to hear the case, other California courts may rule contrarily by choosing to interpret the CPRA’s intent and past case law differently.⁸²

C. The Pro-Disclosure Argument

1. The CPRA establishes a strong presumption in favor of the public’s right of access.

Proponents of publication of officials’ salaries point to the CPRA’s strong policy favoring disclosure.⁸³ The legislature

chapter, the Legislature [is] mindful of the right of individuals to privacy.” CAL GOV’T CODE § 6250 (West 2004).

77. *Priceless*, 5 Cal. Rptr. 3d at 855.

78. The U.S. CONST. amend. IV states that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” The Supreme Court has stated that the right to privacy is a fundamental right formed by “specific guarantees in the Bill of Rights” creating “zones of privacy.” See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) for recognition of this privacy right. See also *Priceless*, 5 Cal. Rptr. 3d at 847.

79. *Priceless*, 5 Cal. Rptr. 3d at 861.

80. *Id.* at 861-63.

81. *Papers Appeal Suit to High Court*, *supra* note 5.

82. Interview with Bill McClure, *supra* note 22.

83. See *Lorig v. Medical Board*, 92 Cal. Rptr. 2d 862 (Cal. Ct. App. 2000) and *California State University, Fresno Ass’n*, 108 Cal. Rptr. 2d 870, which

expressly stated that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."⁸⁴ The lawmakers further articulated their intent for broad disclosure underlying the CPRA by stating that every person has the right to inspect public records subject only to the express limitations contained elsewhere in the CPRA.⁸⁵

The CPRA's specific exemptions⁸⁶ have been described as "islands of privacy upon the broad seas of enforced disclosure."⁸⁷ The exemptions include records pertaining to litigation, personnel, medical or similar files, preliminary drafts, notes or intra-agency communications and public employee information of an intimate nature.⁸⁸ Salary information is *not* included in this list.⁸⁹ Moreover, California has complied with the federal courts' policy of narrowly construing the disclosure exemptions.⁹⁰ This can lead to the conclusion that because salary was not included in this list, it cannot be exempted.

2. Those refusing to publish salary information have a very difficult burden of proving that their interest in maintaining secrecy outweighs the public's right of access.

In addition to the express exemptions,⁹¹ the CPRA includes a catchall provision that allows the public agency to withhold its records from inspection when the public interest

support the strong policy of disclosure reflected in the CPRA. *See also* Anschell, *supra* note 51, at 21.

84. CAL. GOV'T CODE § 6250 (West 2004).

85. *Id.* § 6253.

86. *See* GOV'T § 6254 (listing the exemptions); Anschell, *supra* note 51.

87. *Black Panther Party*, 117 Cal. Rptr. at 110.

88. GOV'T § 6254; *City of Los Angeles*, 49 Cal. Rptr. 2d at 39-40.

89. GOV'T § 6254.

90. *Braun v. City of Taft*, 201 Cal. Rptr. 654, 659 (Cal. Ct. App. 1984). The court found that two letters and a personnel card relating to the employment of a city firefighter were public records. The documents were not exempt from disclosure under section 6254, which exempts personnel, medical, or similar files. It also found that the firefighter's right to privacy did not outweigh the public's right to know. The court recognized that the CPRA is modeled after the federal Freedom of Information Act and "[s]ince the acts are so similar, California courts have used federal law to construe the California act." Further, "[b]oth the federal and California courts have construed the statutory exemptions narrowly in order to accomplish the general policy of disclosure." *Id.* at 659.

91. GOV'T § 6254.

served by not disclosing the record plainly outweighs the interest served by disclosure of the record.⁹²

The presumption is in favor of access, and the burden is on the party refusing disclosure to justify its refusal.⁹³ To overcome the presumption in favor of the public's right of access, the party must demonstrate either an unwarranted invasion of privacy or that secrecy clearly outweighs the right of access.⁹⁴ The burden placed on the party to prove its right of privacy is a heavy one.⁹⁵

On the issue of salary disclosure, it is difficult for the cities who are refusing to submit salary information to meet this burden. The California Court of Appeals, on several occasions, has supported the belief that public employees do not have a legally protected privacy interest in keeping their compensation secret,⁹⁶ and salary secrecy does not outweigh the right of access.⁹⁷

In *San Diego Union v. City Council*,⁹⁸ the court held that salaries and other compensation terms constitute municipal budgetary matters of significant public interest.⁹⁹ The court found that with an increasing demand on public funds, secrecy cannot be overlooked in budgetary determinations, including the implementation of salaries.¹⁰⁰ Similarly, in *Braun v. City of Taft*,¹⁰¹ the court found that the disclosure of a sal-

92. *Id.* § 6255. Section 6255 includes a catchall provision which states that "[t]he agency shall justify withholding any record by demonstrating that . . . the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." *Id.* See also Anschell, *supra* note 51, at 21.

93. See *San Gabriel Tribune v. Superior Court*, 192 Cal. Rptr. 415, 420-21 (Cal. Ct. App. 1983).

94. *Hill v. NCAA*, 865 P.2d 633, 653 (Cal. 1994). The California Supreme Court found the NCAA could continue its athletic drug testing program of students. The court reasoned the testing affected privacy interests but plaintiffs had a diminished expectation of privacy because they participated in athletic activities that required physical examinations. Also, plaintiffs had advanced notice of the testing and the opportunity to consent to the program. *Id.*

95. *San Gabriel Tribune*, 192 Cal. Rptr. at 421, 426.

96. *Braun*, 201 Cal. Rptr. at 662; see also *San Gabriel Tribune*, 192 Cal. Rptr. at 426; *San Diego Union v. City Council of San Diego*, 196 Cal. Rptr. 45, 49 (Cal. Ct. App. 1983).

97. *San Diego Union*, 196 Cal. Rptr. at 49.

98. *Id.* at 45.

99. *Id.* at 49.

100. *Id.*

101. *Braun*, 201 Cal. Rptr. at 659. In *Braun*, the court found that two letters and a personnel card relating to the employment of a city firefighter were public

ary card was not an unfounded invasion of privacy and stated that when one accepts public employment, "the very fact that he is engaged in the public's business strips him of some anonymity."¹⁰²

In addition, the Attorney General of California has opined that one's salary, bonuses and performance awards in particular, are a matter of public record.¹⁰³ He has also stated that the benefit from *nondisclosure* of a performance award based on the executive manager's annual salary is insignificant in comparison with the substantial public need *for disclosure*.¹⁰⁴

3. *The government's promises of confidentiality and the employees' resulting expectations cannot create an expectation of privacy.*

The government's mere assurance of confidentiality of records to its employees does not transform such public records into private records.¹⁰⁵ The California Court of Appeals stated that "assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public."¹⁰⁶ It has also reasoned that an employee's expectation of privacy does not trump the public's right of access.¹⁰⁷

4. *Salary information constitutes a "public record" that must be disclosed pursuant to the CPRA.*

Section 6254.8 of the CPRA states that "every employment contract between a state and local agency and any public official or public employee is a public record" that is not subject to the CPRA's exemptions and must be disclosed.¹⁰⁸ The CPRA does not further define the elements of an em-

records. *Id.*

102. *Id.* at 662.

103. 68 Op. Cal. Att'y. Gen. 73 (1985). The Attorney General stated that records specifying the amount of the bonus should be disclosed. Further, "any interest in not disclosing the amount of and reasons for a performance award pales in comparison with the substantial need for disclosure." *Id.* at 5.

104. *Id.*

105. See *San Gabriel Tribune*, 192 Cal. Rptr. at 422.

106. *Id.* at 423.

107. Register Div. of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 92, 102 (Cal. Ct. App. 1984).

108. CAL. GOV'T CODE § 6254.8.

ployment contract.¹⁰⁹ In *Priceless*,¹¹⁰ however, many of the cities from which the Daily News requested salary information assumed the position that the compensation earned by individual employees *was* a public record and provided a list of their employees' total compensation as it appeared on their W-2 forms.¹¹¹ These cities interpreted the definition of a public record to include salaries.¹¹²

The question of whether an employment contract includes an individual public employee's name accompanied by detailed salary information has never been discussed in any cited authority.¹¹³ *Priceless* also avoided this issue because California public employment is governed by statute and not by contract.¹¹⁴ The court was able to reason that section 6254.8 did not pertain to California public employees and did not "mandate that an individual's name must be linked to salary information."¹¹⁵ Interestingly, many cities including Menlo Park, Palo Alto and Redwood City independently assumed public records included salaries.¹¹⁶ Thus, there is a strong presumption that future courts will also find salary information to be part of an employment contract.¹¹⁷

5. Decisional law throughout the country recognizes that citizens have a right to know what their governments pay public employees.

Other state and federal jurisdictions have generally rejected the notion that the salaries and names of public employees require privacy protection.¹¹⁸ For instance, the Illinois Court of Appeals stated that compensation and salaries are a

109. *Id.*

110. *See Priceless*, 5 Cal. Rptr. 3d at 847.

111. Interview with Bill McClure, *supra* note 22.

112. *Id.*

113. *Priceless*, 5 Cal. Rptr. 3d at 860-61.

114. *Id.*

115. *Id.* at 861.

116. Interview with Bill McClure, *supra* note 22.

117. *Id.*

118. *See Dobronski v. FCC*, 17 F.3d 275 (9th Cir. 1994); *Tripp v. Dep't. of Def.*, 193 F. Supp. 2d 229 (D.D.C. 2002); *People ex rel. Recktenwald v. Janura*, 376 N.E.2d 22 (Ill. Ct. App. 1978); *Int'l Ass'n of Firefighters v. Municipality of Anchorage*, 973 P.2d 1132 (Alaska 1999); *Hastings & Sons Publ'g Co. v. City Treasurer of Lynn*, 375 N.E.2d 299 (Mass. 1978); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999); *Penokie v. Mich. Technological Univ.*, 287 N.W.2d 304 (Mich. Ct. App. 1979).

use of public funds and the disclosure of personal financial information does not violate those employees' right to privacy.¹¹⁹ The Alaska Supreme Court reasoned that the amount public employees are paid affects the public, holding that "municipal employees do not have a legitimate expectation of privacy in their names and salaries" and disclosure of their names and salaries does not violate their constitutional right to privacy.¹²⁰

Similarly, Iowa's Supreme Court held that compensation records were not "personal or intimate" in nature and a matter of justifiable concern to the public.¹²¹ Both Michigan's Court of Appeals and the Massachusetts Supreme Court have agreed with Iowa's Supreme Court holding.¹²² Massachusetts reasoned that the names and salaries of municipal employees were not the kind of facts that the legislature wanted to exclude from mandatory disclosure.¹²³

The federal courts have also recognized that individual names and salary information belongs in the public domain.¹²⁴

D. The Anti-Disclosure Argument

1. The CPRA cannot be read to trump the constitutional privacy rights of public employees.

Opponents of the disclosure of public officials' salaries point to the concern the legislature expressed for privacy rights when drafting the CPRA.¹²⁵ While the CPRA does favor public record disclosure it does not attempt to destroy the constitutional concerns for individual privacy.¹²⁶ In passing the CPRA, the legislature was cognizant of a public employee's individual right to privacy when declaring public ac-

119. *Janura*, 376 N.E.2d at 24-25.

120. *Int'l Ass'n of Firefighters*, 973 P.2d at 1136.

121. *Clymer*, 601 N.W.2d at 42.

122. *Hastings*, 375 N.E.2d at 299; *Penokie*, 287 N.W.2d at 304.

123. *Hastings*, 375 N.E.2d at 304. The court found municipal payroll records were public records. *Id.*

124. See *International Ass'n of Firefighters*, 973 P.2d 1132 and *Hastings*, 375 N.E.2d at 304, which interpreted the federal Freedom of Information Act to permit disclosure of individual names and salary information. "The names and salaries of municipal employees, including disbursements to policemen for off-duty work details, are not the kind of private facts that the Legislature intended to exempt from mandatory disclosure." *Hastings*, 375 N.E.2d at 304.

125. *Priceless*, 5 Cal. Rptr. 3d at 854.

126. *Id.*

cess to government records a "fundamental and necessary right."¹²⁷

Although the legislature focused on disclosure, it nevertheless recognized the significance of privacy interests.¹²⁸ The right to privacy is explicitly stated in the California Constitution which declares "inalienable" the right of all people to privacy.¹²⁹

California law also supports the right to privacy with respect to employment and financial records.¹³⁰ Courts have recognized that citizens whose names appear in government records do not "surrender their constitutional right to privacy."¹³¹ For instance, *San Diego Trolley v. Superior Court*¹³² recognized that the defendant's personnel records and employment history were within the boundaries of protection provided by the state and federal constitutions.¹³³ *Harding Lawson Associates v. Superior Court*¹³⁴ noted that California courts have generally concluded that the public interest in preserving confidential information, which arguably includes salary information, outweighs an individual's interest in acquiring the confidential information.¹³⁵

In particular, *Priceless*¹³⁶ expressed concern with compulsory disclosure of one's personal financial affairs.¹³⁷ The court saw this as residing in the realm of the Fourth Amendment¹³⁸ protected privacy.¹³⁹ Additionally, it viewed disclosure of financial data as an open invitation for identity theft, thus distinguishing its prior statement in *Braun v. City of Taft*¹⁴⁰ which stated that social security, credit union numbers, and

127. CAL. GOV'T CODE § 6250 (West 2004).

128. *Priceless*, 5 Cal. Rptr. 3d at 854.

129. *Id.*; CAL. CONST. art. I, § 1 (amended 1972). The right to privacy is also guaranteed in the United States Constitution. U.S. CONST. amend. IV.

130. *See Priceless*, 5 Cal. Rptr. 3d at 857; *see also* Hill v. NCAA, 865 P.2d 633, 654 (Cal. 1994); *San Diego Trolley, Inc. v. Superior Court*, 105 Cal. Rptr. 2d 476, 485 (Cal. Ct. App. 2001); *Harding Lawson Assocs. v. Superior Court*, 12 Cal. Rptr. 2d 538, 539-40 (Cal. Ct. App. 1992).

131. *Priceless*, 5 Cal. Rptr. 3d at 854; *see also Hill*, 865 P.2d at 648.

132. 105 Cal. Rptr. 2d 476 (Cal. Ct. App. 2001).

133. *Id.* at 485.

134. 12 Cal. Rptr. 2d at 538.

135. *Id.* at 539.

136. *Priceless*, 5 Cal. Rptr. 3d at 847.

137. *Id.* at 857.

138. U.S. CONST. amend. IV.

139. *Id.*

140. *Braun*, 201 Cal. Rptr. 654.

birth dates were of little interest to the public.¹⁴¹

2. *Public employees do not waive their constitutional right to privacy by virtue of their employment at a public agency.*

The California Supreme Court has held that the mere status of being a government employee should not force a citizen to forfeit his or her fundamental right to privacy.¹⁴² The court reflected a legitimate concern for the public servant's rights, wishing to eliminate any significant differences between public and private employees, and further ensuring that public employment did not diminish one's constitutional right to privacy.¹⁴³ The court reasoned that public employees are not "second class citizens within the ken of the Constitution."¹⁴⁴

The court reiterated this motion in *City of Carmel-By-the-Sea v. Young*.¹⁴⁵ It stated that "where fundamental personal liberties are involved, they may not be abridged by the States" simply upon showing that the regulatory statute has a rational state purpose.¹⁴⁶ Instead, the state must indicate a compelling state interest to overcome the desire to protect public servants from differential treatment and undue personal invasions.¹⁴⁷

3. *Named individual salary disclosure will not shed any new light on the government's performance of its duties that unnamed disclosure will not serve. Thus, the public interest in disclosure does not outweigh the employee's privacy rights.*

The balancing test in CPRA section 6255¹⁴⁸ weighs the public interest served by not disclosing the record against the public interest served by disclosing the record.¹⁴⁹ The test re-

141. *Priceless*, 5 Cal. Rptr. 3d at 855.

142. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 669 (Cal. 1986) (finding that involuntary polygraph examinations intruded upon government employees' constitutionally protected privacy rights).

143. *Id.*

144. *Id.*

145. *City of City of Carmel-By-The-Sea v. Young*, 466 P.2d 225 (Cal. 1970).

146. *Id.* at 232.

147. *Id.*

148. *See supra* pp. 132-34.

149. CAL. GOV'T CODE § 6250 (West 2004); *Priceless*, 5 Cal. Rptr. 3d at 861.

quires looking at the extent to which disclosure of the requested information will "shed light on the public agency's performance of its duty."¹⁵⁰ Both California and federal case law have refused to allow publication of individual information when no government purpose is served.¹⁵¹

In *Priceless*, the court recognized that there was no evidence demonstrating that mass disclosure of salaries of named employees would shed light on a city's performance of its duties.¹⁵² Instead, a release of salaries by position, title, base salary, overtime, and bonuses absent the release of names would serve the appropriate purpose without invading personal privacy.¹⁵³

In *City of Carmel-By-The-Sea v. Young*,¹⁵⁴ the California Supreme Court invoked a three-part test to determine when a fundamental liberty¹⁵⁵ is threatened.¹⁵⁶ One of the prongs states that there must be no less subversive alternatives.¹⁵⁷ With respect to public employees' right to privacy, federal cases have found there to be a less subversive alternative by not attaching specific names to salaries¹⁵⁸ because this would just as successfully accomplish the goal of furthering the public's understanding of government expenditures.¹⁵⁹

4. *CPRA section 6254.8 does not automatically render salary information a public record, which would then open it to disclosure.*

Section 6254.8 states that every employment contract between a state or local agency and a public official constitutes

150. *Priceless*, 5 Cal. Rptr. 3d at 861.

151. *Id.* at 862; *U.S. Dep't. of Justice v. Reporters Comm.*, 489 U.S. 749, 766 n.18 (1989); *Campbell v. U.S. Civil Serv. Comm'n.*, 539 F.2d 58, 62 (10th Cir. 1976).

152. *Priceless*, 5 Cal. Rptr. 3d 847, 863.

153. *Id.*

154. *City of Carmel-By-The-Sea*, 466 P.2d 225.

155. *See supra* notes 37-38 and accompanying text.

156. The three prongs of the test are: (1) that the political restraints rationally relate to the enhancement of the public service; (2) that the benefits which the public gains by the restraint outweigh the resulting impairment of constitutional rights; and, (3) that no alternatives less subversive of constitutional rights are available. *Id.* at 232.

157. *Id.*

158. *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Priceless*, 5 Cal. Rptr. 3d at 863.

159. *Hopkins*, 929 F.2d at 88; *Priceless*, 5 Cal. Rptr. 3d at 863.

a public record.¹⁶⁰ The CPRA gives no further indication as to what such an employment contract encompasses. Burlingame City Attorney Larry Anderson believes this definition does not imply that every document reflecting or disclosing employment terms should be construed as part of the employment contract.¹⁶¹

If every document reflecting or disclosing employment terms constituted an employment contract then virtually any document in a personnel file could be considered part of the employment contract. This would render numerous documents subject to disclosure notwithstanding public employees' privacy rights.¹⁶² In light of the above, opponents contend it is questionable whether a salary classification should be deemed a public record when the CPRA does not unequivocally define it as part of the employment contract.¹⁶³

III. IDENTIFICATION OF THE PROBLEM

The conflicts between case law and the legislative intent regarding disclosure of public employees' salaries give rise to two important questions. First, does salary information constitute a public record?¹⁶⁴ Second, can a court-created privacy exception (i.e. one that is not listed among the CPRA's exemptions) trump the public's right of access to governmental records?¹⁶⁵

It will be fascinating to see whether the California legal community can arrive at a consensus as to how to define public officials' salaries as public or private records and how the privacy interests of individuals can be reconciled with the public's need for access to this information. Resolution of this conflict is essential to end the present confusion and dispute among California city attorneys, judges, unions, and employees.¹⁶⁶ The following analysis attempts to resolve this prob-

160. CAL. GOV'T CODE § 6254.8 (West 2004).

161. Interview with Larry Anderson, *supra* note 22.

162. *Id.*

163. *Id.*

164. See discussion *infra* Part IV.A.

165. See *Priceless*, 5 Cal. Rptr. 3d at 854, for the court-created privacy exception the *Priceless* court uses to trump the right of disclosure. It states "[t]he CPRA is weighted in favor of disclosure of public records, but it does not attempt to uproot constitutional concerns of individual privacy . . . the Legislature expressly recognized the importance of individual privacy interests."

166. When the *Daily News* asked Bay Area cities to disclose salary informa-

lem by examining the two issues listed above and, subsequently, proposing an amendment to the CPRA.

IV. ANALYSIS

A. Is Salary Information a Public Record?

The CPRA is characterized by its exemptions because it contains more exemptions to disclosure than required disclosures.¹⁶⁷ These exemptions include records pertaining to litigation, personnel, medical or similar files, preliminary drafts and public employee information of a very personal nature.¹⁶⁸ California courts have indicated that personnel files do not include salary information.¹⁶⁹ Public employee salary information, therefore, is not considered an exemption under the CPRA's personnel file exemption.¹⁷⁰

Arguably, salary information does not fit into one of the CPRA's exemptions from disclosure. It appears to fall within the definition of public record and, thus, requires disclosure under the CPRA.¹⁷¹ The Act defines "public records" to include any writing comprised of information relating to the conduct of the public's business performed by a state or local agency.¹⁷² City governments use a portion of resident tax revenues for the compensation of city employees.¹⁷³ Therefore,

tion, Menlo Park willingly submitted the information believing it to be a public record while cities just miles away—Burlingame, Foster City, San Carlos and Belmont—refused to release the information believing it to be an invasion of privacy. A majority of California city attorneys, as reflected via the state-wide California city attorney email list, believe salary information is public information. See *Priceless*, 5 Cal. Rptr. 3d at 850; see also Interview with Bill McClure, *supra* note 22.

167. TERRY FRANCKE, *THE CALIFORNIA JOURNALIST'S LEGAL NOTEBOOK, HOW TO KEEP OPEN MEETINGS OPEN AND PUBLIC MEETINGS PUBLIC* 87, 106 (California First Amendment Coalition ed., 1998).

168. CAL. GOV'T CODE § 6254.8 (West 2004); *City of Los Angeles v. Superior Court*, 49 Cal. Rptr. 2d 35, 40 (Cal. Ct. App. 1996).

169. *San Diego Trolley, Inc. v. Superior Court*, 105 Cal. Rptr. 2d 476, 485 (Cal. Ct. App. 2001); *Harding Lawson Assocs. v. Superior Court*, 12 Cal. Rptr. 2d 538, 539 (Cal. Ct. App. 1992).

170. *San Diego Trolley, Inc.*, 105 Cal. Rptr. 2d at 485; *Harding Lawson Assocs.*, 12 Cal. Rptr. 2d at 539.

171. GOV'T § 6253.

172. *Id.* § 6252. This section defines a public record as "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." *Id.*

173. Interview with Larry Anderson, *supra* note 24.

the determination of employee salaries relates directly to the "conduct of the public's business" and thus would constitute a public record.¹⁷⁴

An equally compelling argument is supported by CPRA section 6254, which states that every employment contract is a public record and is accessible without qualification or limitation.¹⁷⁵ However, "employment contract" is not specifically defined. Agencies that attempt to avoid disclosing salary information claim that an employment contract only applies to those employees who have personalized, written employment contracts with their employers.¹⁷⁶ Thus, generic form employment agreements would not constitute a public record.¹⁷⁷

Case law indicates that salaries and other compensation terms are of substantial public interest because the public's tax dollars go to public employee salaries and should fit under the employment contract definition.¹⁷⁸ Also, the State Attorney General has suggested on two occasions¹⁷⁹ that specific compensation of individual employees should be a public record.¹⁸⁰ Furthermore, the Attorney General has expressed his belief that exact compensation and bonuses, and not merely the pay range, are matters of public record.¹⁸¹

The fact that several California appellate courts, the state's Attorney General, and a majority of city attorneys have indicated that salaries are public records and are part of an employment contract supports the notion that the legislature also intended for salaries and bonuses to be disclosed.¹⁸² In order to attain the CPRA's goal of disclosure, salary information should be made publicly available.¹⁸³ What better way

174. *Id.*

175. GOV'T § 6254; FRANCKE, *supra* note 167, at 111.

176. FRANCKE, *supra* note 167, at 111.

177. *Id.*

178. *Braun v. City of Taft*, 201 Cal. Rptr. 654, 662 (Cal. Ct. App. 1984); *San Diego Union v. City Council of San Diego*, 196 Cal. Rptr. 45, 49-50 (Cal. Ct. App. 1983).

179. See 68 Op. Cal. Att'y. Gen. 73 (1985) for the Attorney General's published opinion. See also FRANCKE, *supra* note 167, at 112 (referencing the Attorney General's unpublished letter in which he concludes that exact compensation of employees is a matter of public record).

180. FRANCKE, *supra* note 167, at 112.

181. *Id.*; 68 Op. Cal. Att'y. Gen. 73 (1985).

182. See *Braun*, 201 Cal. Rptr. at 662; *San Diego Union*, 196 Cal. Rptr. at 49-50. See also FRANCKE, *supra* note 167, at 112; Interview with Bill McClure, *supra* note 22.

183. See *supra* part II.C(1).

to provide the public with insight into governmental spending of tax revenue than to disclose budgetary determinations with respect to salary compensation?

B. Even if salaries are public records, can a court-created privacy exception trump the right of public access to such records?

Even if salaries are deemed public records, the CPRA has a catchall exemption that allows a public agency to withhold its records from inspection when “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”¹⁸⁴ *Priceless* created a privacy exemption not listed in the CPRA by recognizing a privacy invasion in disclosing individuals’ names that outweighed the public interest in disclosure.¹⁸⁵ Although the *Braun*¹⁸⁶ and *San Diego Union*¹⁸⁷ courts and the Attorney General¹⁸⁸ have opined that secrecy of compensation does not outweigh public access, there is an equally strong argument that individual salaries are private information and should be kept private.

For example, in 1984, when *Braun* was decided, the court reasoned that few people would have an interest in the plaintiff’s social security or credit union numbers.¹⁸⁹ Today, the threat of identity theft is serious, widespread, and continues to increase.¹⁹⁰ In 2002, seven million Americans were victims of identity theft.¹⁹¹ Social security numbers, bank account numbers, and other identifying financial data, such as salaries, constitute information that could be readily used in stealing one’s identity.¹⁹² Identity theft victims are frequently forced to spend a significant amount of time and financial resources to rectify the disaster that “thieves have made of their

184. CAL. GOV’T CODE § 6255 (West 2004); Anschell, *supra* note 51, at 21.

185. *Priceless*, 5 Cal. Rptr. 3d at 856-58.

186. *Braun*, 201 Cal. Rptr. at 662.

187. *San Diego Union*, 196 Cal. Rptr. at 49.

188. 68 Op. Cal. Att’y. Gen. 73 (1985).

189. *Braun*, 201 Cal. Rptr. at 660.

190. Identity Theft Resource Center, *available at* <http://www.idtheftcenter.org/index.shtml> (last viewed Sept. 17, 2004).

191. *Id.*

192. The Federal Trade Commission: Your National Resource for Identity Theft, *available at* <http://www.consumer.gov/idtheft/> (last viewed Sept. 17, 2004).

good name and credit record.”¹⁹³ The victims may also lose job opportunities, be refused loans, education, house or cars, or be arrested for crimes they didn’t commit.¹⁹⁴

In addition, publication of salary information can result in humiliation and harassment. More importantly, however, in today’s era of identity crime, it can lead to more serious financial ramifications.¹⁹⁵ *Braun*, *San Diego Union*, and the Attorney General’s opinion date back to the 1980s, before identity theft became a serious and widespread problem.¹⁹⁶ It is important to consider the nature of contemporary society in addition to examining pertinent court decisions from twenty years ago. If courts were to require publication of individually identifiable salary information, it could open the floodgates for disclosure of a long list of personal documents, such as e-mails, disciplinary records, medical leave reports, and complaints.¹⁹⁷ *Hopkins*¹⁹⁸ expressed this fear, stating that if disclosure of personal information such as payroll records were compelled, “we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA (Freedom of Information Act) privacy exemptions.”¹⁹⁹

A potential consequence may be the impact on recruitment of skilled professionals for government positions.²⁰⁰ Few would want to become government employees for fear of being exposed to public scrutiny.²⁰¹ Thus, the quality of the government employees could be jeopardized.²⁰² The California Supreme Court found that such invasions of privacy would create a “chilling or discouraging effect” upon the seeking or holding of public office.²⁰³

However, the right of disclosure must also be considered in order to bring to light the competing interests involved, but also to emphasize the need for a solution. The right of citizens to inquire into their state expenditures cannot be ig-

193. *Id.*

194. *Id.*

195. *Id.*

196. *Braun*, 201 Cal. Rptr. at 661-62; *San Diego Union*, 196 Cal. Rptr. at 49-50; 68 Op. Cal. Att’y. Gen. 73.

197. *Hopkins v. HUD*, 929 F.2d 81 (2d Cir. 1991).

198. *Id.*

199. *Id.* at 88.

200. *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225, 232-33 (1970).

201. *Id.*

202. *Id.*

203. *Id.*

nored.²⁰⁴ Thus, we must consider whether compensation is truly a private issue. It does not concern family, sex, or marriage. Salary publication does not disclose how employees *spend* their salaries, it is only about what they *receive*.²⁰⁵ In most cities, the mayor's, city attorney's, judges' and city planners' salaries are public knowledge, frequently available on the city's Internet Web site.²⁰⁶ What distinguishes the undisclosed salaries of other city employees, such as city clerks, firefighters and librarians from those of the mayor, attorney and planner, whose salaries must be disclosed pursuant to the terms of their employment contracts?²⁰⁷

Furthermore, one cannot ignore the common view reflected in case law nationwide, that government employees' salaries should be public.²⁰⁸ While privacy is a fundamental right, so is the right to know how the government conducts its financial affairs.²⁰⁹ The government must be held accountable for its actions, including the compensation it determines for its employees; otherwise, the public will become distrustful of its government.²¹⁰

In conclusion, there are equally compelling interests on both sides of the matter. The following hypothetical illustrates this situation. City clerk number one, Jim Johnson,

204. See *supra* note 1 and accompanying text. The United States was founded on the principle that citizens would be informed of the workings of government.

205. 82 Op. Cal. Att'y. Gen. 159 (1999).

206. Interview with Bill McClure, *supra* note 22.

207. For example, in Menlo Park, the City Manager and City Attorney's salaries are public because most city managers and city attorneys nationwide have employment contracts with the cities and their salaries must be approved by the city council pursuant to state government codes, and are public knowledge. Most of the non-exempt positions (non-managerial positions like librarian, firefighter, etc.) do not need their salaries approved by the city council and these salaries are not public information. See *id.*

208. See *San Diego Union*, 196 Cal. Rptr. at 49; *San Gabriel Tribune*, 192 Cal. Rptr. at 426; *Braun*, 201 Cal. Rptr. at 658. The following cases from other states also reflect the idea that salary information should be disclosed: *Dobronski v. FCC*, 17 F.3d 275 (9th Cir. 1994); *Tripp v. Dep't. of Def.*, 193 F. Supp. 2d 229 (D.D.C. 2002); *People ex rel. Recktenwald v. Janura*, 376 N.E.2d 22 (Ill. Ct. App. 1978); *Int'l Ass'n of Firefighters v. Municipality of Anchorage*, 973 P.2d 1132 (Alaska 1999); *Hastings & Sons Publ'g Co. v. City Treasurer of Lynn*, 375 N.E.2d 299 (Mass. 1978); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999); *Penokie v. Mich. Technological Univ.*, 287 N.W.2d 304 (Mich. Ct. App. 1979).

209. See *San Diego Union*, 196 Cal. Rptr. at 49; *San Gabriel Tribune*, 192 Cal. Rptr. at 426; *Braun*, 201 Cal. Rptr. at 658.

210. Interview with Bill McClure, *supra* note 22.

who works in *City F*, does not want his yearly salary plus bonuses published in the local newspaper. He is embarrassed at the thought that his neighbors, friends, and co-workers will be privy to the fact that he makes fifty thousand dollars per year more than city clerk number two, Sharon Clark. In addition, he understandably feels uneasy knowing that his name, compensation, and place of residence will be made available to the general public, including identity thieves looking for their next victim.

On the other hand, consider Sue and Tim Jackson, residents and taxpayers of *City F* for thirty years. The mayor of *City F* has hired his sister's daughter as his aide, and she is receiving unwarranted bonuses and raises as a result of the family relationship. The Jacksons have a right to know if their tax dollars are being spent for inappropriate purposes. The improper raise and bonuses should become public knowledge to deter governmental corruption and to promote democratic ideals.

The question of how to reconcile the publication of records reflecting important governmental decision-making with the equally significant right to privacy leads us to a proposal calling for an amendment to the CPRA.

V. PROPOSAL

A. Is there a less subversive alternative that would provide the public access to important governmental information about employee salaries without intruding so severely upon individuals' privacy rights?

Priceless, in rejecting the mass disclosure of employees' names and salaries as serving a public interest, suggested that the "release of salaries, broken down by position, title, base salary, overtime and bonus competition" would serve the appropriate public purpose.²¹¹ The disclosure of salary rate, bonuses and positions without employee names would illustrate the compensation employees make at certain levels and how public money is being spent.²¹² There would be no need to provide individual employees' names.²¹³

211. *Priceless*, 5 Cal. Rptr. 3d at 863.

212. *Id.*

213. *Id.*

The San Mateo County Superior Court, in its initial ruling in *Priceless* prior to the newspapers' appeal to a higher court, prohibited the disclosure of compensation of individually identifiable employees.²¹⁴ But it did not preclude the disclosure of earnings information about each position, classification, and actual earned wages.²¹⁵ Burlingame City Attorney Larry Anderson and Menlo Park City Attorney Bill McClure both agree that the *Priceless* proposal²¹⁶ would serve the needed purpose.²¹⁷ The proposal would publicize the position and salary without correlating them to individual names.

Striking a balance between competing interests, these authorities have recognized that while the publication of personal financial information invades privacy rights, the need to disclose various portions of salary information is necessary to shed light on governmental functions.²¹⁸

This comment proposes two new amendments to the California Public Records Act. The first amendment would be included under CPRA section 6254: Exemption of particular records.

AMENDMENT TO Section 6254:

The individual salary, bonuses, and total compensation of each identifiable public official (not already ordered disclosed by California law) shall not constitute a public record.

The second amendment would be included under section 6253: Public records open to inspection.

AMENDMENT TO Section 6253:

The salary, bonuses, and total compensation corresponding to each government position within a state or local agency shall constitute a public record.

The following example illustrates the application of the amendment.

214. *Teamsters Local 856 v. City of Atherton*, No. CIV 429950, 2003 WL 23681646 (Cal. App. Dep't Super. Ct., April 2, 2003) (order granting preliminary injunction).

215. *Priceless*, 5 Cal. Rptr. 3d at 847.

216. *Id.* at 865.

217. Interview with Bill McClure, *supra* note 22; Interview with Larry Anderson, *supra* note 24.

218. Interview with Bill McClure, *supra* note 22; Interview with Larry Anderson, *supra* note 24.

EXAMPLE

Position	Salary	Bonuses	Overtime
City Clerk #1	\$50,000	\$2,000	\$4,300
City Clerk #2	\$73,000	\$5,000	\$7,100
Librarian #1	\$31,000	\$1,000	\$3,000
Librarian #2	\$23,000	\$3,000	\$4,200
Librarian #3	\$35,000	\$2,500	\$2,100

VI. CONCLUSION

The proposed amendments above reflect the opinions of seasoned California judges and city attorneys who have become all too familiar with the battle between privacy and public access. Such interests have existed since this nation's conception.²¹⁹

The California legal battle over publication of public officials' salaries has brought these two competing interests to the forefront.²²⁰ This comment's approach of balancing both has explored two valuable and similarly important concerns, as well as highlighting their relevance and current livelihood in our democratic society.²²¹

While the CPRA favors disclosure and promotes public awareness of government performance, it also aims to protect privacy rights.²²² As seen above, case law, city attorneys, and legal scholars all disagree over which interest trumps which.²²³ Some believe that public employees' salaries are truly public records, whose publication is essential in demonstrating how the government spends its funds.²²⁴ Others point to the privacy invasion and identity theft threats posed by publication of such information.²²⁵ This comment has offered an equitable solution that may serve and appease both sides and integrate both of these competing interests in a fair and efficient manner. Through the publication of salaries, titles, and bonuses without individualized names, the public

219. See *San Gabriel Tribune*, 192 Cal. Rptr. at 420-21 (discussing the concept of access to information as a fundamental right and not foreign to jurisprudence). See *supra* Part I.

220. See *supra* Parts II-II.B.

221. See *supra* Parts II.C-III.

222. FRANCKE, *supra* note 167, at 87.

223. See *supra* Parts II.C-III.

224. See *supra* Part II.C.

225. See *supra* Part II.D.

will “arm” themselves with knowledge²²⁶ without compelling “unwarranted invasion[s] of personal privacy.”²²⁷

226. *San Gabriel Tribune*, 192 Cal. Rptr. at 420.

227. *Priceless*, 5 Cal. Rptr. 3d at 854.
