

MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

ACCESSIBILITY OF RECORDS POLICY

ADOPTED: December 12, 2007

AMENDED: November 3, 2010

AMENDED: December 14, 2011

I. PURPOSE

The Board of Retirement ("Board") of the Marin County Employees' Retirement Association ("MCERA") adopts this policy to establish guidelines and procedures for making determinations concerning the disclosure of information in MCERA's files, records or other information when responding to requests made under the Public Records Act ("PRA").

The Board recognizes that it has an obligation to balance its members' right to privacy with the public's right to information regarding public business. There are no "bright line" standards available to the Board for knowing how that balance should tip in each instance. Nevertheless, the Board has determined that it would be useful to establish guidelines for MCERA to follow when a request is made under the PRA, and to publish those guidelines for the benefit of its members and their beneficiaries, and the public at large.

All staff should be familiar with these guidelines so that the process of responding to requests is efficient, consistent and compliant with the applicable laws. In many circumstances, these guidelines will enable staff to respond to requests without the need for substantial analysis or the assistance of legal counsel. However, given the complexities of the law, situations will likely arise where a simple application of the general guidelines will not provide a definitive answer. When such a situation arises, the Retirement Administrator should refer any questions to legal counsel.

II. GENERAL PRINCIPLES

A request to inspect MCERA records may be made by a telephone call, an in-person oral request, a written request, a subpoena or a court order. The person making a request for records may be a member, a beneficiary, an employee organization, a government agency or member of the press or general public. Staff should always be aware that a request, no matter how informal it may appear, must be analyzed under the principles outlined in this Policy (or analyzed by legal counsel in more complicated situations). The general principles of the policy may be summarized as follows:

1. Confidentiality of an individual member's records must be protected unless those records relate to the conduct of the public's business, or unless the member has authorized the disclosure in writing.

2. An individual (member or beneficiary) generally must be permitted access to his or her own records.

3. The public -- i.e, any person, for any reason -- has a right to inspect records that relate to MCERA's operation that are neither confidential nor protected from disclosure by the applicable laws.

4. Generally, MCERA must respond to any request for information within 10 calendar days of receipt of the request. The response need not contain the actual requested information or production of the sought records, but must (at a minimum) provide a response as to whether MCERA will produce the requested records or provide a basis for rejecting the request. If MCERA is unable to formulate a response within 10 calendar days, it may extend the time for a response by as much as 14 calendar days, but may only do so with good cause.

5. Subpoenas or court orders requiring the production of records and/or information should be referred to legal counsel immediately upon receipt.

6. Even if a request seeks disclosable records, under California case law, a request may be objectionable if it is unreasonably burdensome. Additionally, the PRA only requires MCERA to disclose its existing records; it does not require MCERA to conduct studies, reorganize information or summarize data for the requesting party. Thus, when confronted with a request that will substantially disrupt MCERA's operations, the Retirement Administrator should consult legal counsel.¹

7. When a request is made for information regarding an individual member that appears to be of a personal or private nature, MCERA should seek the advice of legal counsel.

III. APPLICABLE LAW

A. Public Records Act (PRA)

The PRA generally requires MCERA to disclose "public records" unless the particular information is exempt from disclosure. Under the PRA and interpreting case law, "public records" include information in virtually any format "relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency." Although certain exemptions allow MCERA to withhold some records, case law is clear that the policy in California generally favors disclosure.

The PRA sets forth an extensive list of records that are exempt from required disclosure.² Many of the statutory exemptions are inapplicable to MCERA and others may be

¹ Although MCERA does not have to conduct studies, reorganize information or summarize data, it may have to invest substantial energy sifting through existing data. The amount of time or energy spent sifting through MCERA's existing data is not, alone, a valid ground for withholding records or information.

² According to California case law, the listed exemptions permit MCERA to withhold records; they do not prohibit disclosure. In other words, these exemptions provide MCERA with discretion to disclose certain records and information. However, due to (a) the possibly sensitive nature of the records covered by the exemptions and (b) the fact that disclosure may constitute a waiver of future rights to withhold information, MCERA is encouraged to consult legal counsel before disclosing any records that fall under an exemption.

applicable only in rare instances. The following exemptions are the most important exemptions for MCERA:

1. Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.
2. Records pertaining to pending litigation to which the public agency is a party until the litigation or claim has been finally adjudicated or otherwise settled.
3. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
4. Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
5. Additionally, Government Code Section 6255 provides a “catch all” provision whereby MCERA can justify withholding *any* record by demonstrating that “on the facts of the particular case the public interest served by not disclosing the record *clearly* outweighs the public interest served by disclosure of the record.”³

B. Member Records

Government Code section 31532 provides as follows: “Sworn statements and individual records of members shall be confidential and shall not be disclosed to anyone except insofar as may be necessary for the administration of this chapter [the ’37 Act] or upon order of a court of competent jurisdiction, or upon written authorization by the member.”

In 2011, three California District Courts of Appeal published decisions interpreting Section 31532 in the context of requests for records under the PRA. See *Sonoma County Employees’ Retirement Association v. Superior Court* (2011) 198 Cal.App.4th 986; *San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1241, *Sacramento County Employees’ Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440 (collectively, the “CPRA cases”).

The CPRA cases affirm the MCERA Board’s interpretation of Government Code section 31532, as of 2007, as it pertains to the confidentiality of member records. That interpretation, expanded upon to incorporate guidance from the CPRA cases, is as follows:

³ Generally, California law favors disclosure, and if a court disagrees with MCERA’s determination, MCERA may be liable for the requesting parties’ attorney fees and costs associated with obtaining disclosure. Thus, the “catch all” provision should be used sparingly, and only with the benefit of legal counsel.

The gross amount of any benefit or any refund of an MCERA contribution due to a member or beneficiary, as well as a member's retirement benefit tier(s), plan sponsor former employer(s), and total accrued service credit amount are not confidential and may be released upon request to MCERA.

All otherwise nonpublic data filed by, or on behalf of, any member or beneficiary with the Board is confidential, and no individual record shall be divulged by any official or employee having access to it to any person other than the member to whom the information relates or his or her authorized representative or the county or participating agency by which he or she is employed. The information shall be used by the Board for the sole purpose of carrying into effect the provisions of this part. Any information that is requested for retirement purposes by any such public agency shall be treated as confidential by the agency.

Except as provided above, no member's, beneficiary's or annuitant's address(es), telephone number(s), date of birth or age, social security number, names of relatives, beneficiary and option selections, reports of information on medical or psychological status or condition, or other personal information shall be released.

For purposes of this section, "authorized representative" includes the spouse, registered domestic partner, individual with a power of attorney providing proper general authorization, or beneficiary of a member when no contrary appointment has been made and when, in the opinion of the Board, the member is prevented from appointing an authorized representative because of mental or physical incapacity or death.

C. Alternative Investment Records

The following records of alternative investment vehicles (private equity funds, venture funds, hedge funds, or absolute return funds) are exempt from public disclosure under Section 6254.26 of the PRA, unless the information already have been publicly released by the keeper of the information:

- (1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle;
- (2) Quarterly and annual financial statements of alternative investment vehicles;
- (3) Meeting materials of alternative investment vehicles;
- (4) Records, containing information regarding the portfolio positions in which alternative investment funds invest;
- (5) Capital call and distribution notices; and

- (6) Alternative investment agreements and all related documents.

The following information contained in records described above regarding alternative investment vehicles must be disclosed in response to a PRA request:

- (1) The name, address and vintage year of each alternative investment vehicle.
- (2) The dollar amount of the commitment made to each alternative investment vehicle made to each alternative investment vehicle by the public investment fund since inception.
- (3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.
- (4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.
- (5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.
- (6) The net internal rate of return of each alternative investment vehicle since inception.
- (7) The investment multiple of each alternative investment vehicle since inception.
- (8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, but the public investment fund to each alternative investment vehicle.
- (9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year-end basis.

IV. PROCEDURE FOR RESPONDING TO PUBLIC RECORDS REQUESTS

A. Initial Review

Upon receiving a request for records, MCERA must first determine whether the request seeks disclosable "public records."⁴ To make this determination, MCERA should proceed as follows:

⁴ It is important to remember that a request may be partially acceptable and partially objectionable. MCERA should disclose all records that are properly sought, even if the person making the request has sought other records that need not be disclosed.

1. Determine if the records are prepared, owned, used, or retained by MCERA.

2. If the records are prepared, owned, used, or retained by MCERA, then determine if the requested records relate to the conduct of the public's business.

3. Determine if the requested records fit under one of the exemptions discussed above (e.g., preliminary drafts, records related to litigation or personnel files, alternative investment materials).

4. Always consider whether there is a good public policy reason to withhold the records. If so, the request should be referred to legal counsel for a case-by-case determination.

5. Determine whether the requested records will reveal information that is included in a member or beneficiary's file. If so, refer to the Board's statement as to confidentiality under Part III(B), entitled "Member Records," above.

6. Determine whether otherwise disclosable records need to be reorganized or redacted such that confidential information is not included in the disclosed material.

7. If, for any reason, MCERA believes that certain records should not be disclosed, or questions whether certain records should be disclosed, legal counsel should be consulted.

B. Preparing the Response Letter

Under normal circumstances, within 10 calendar days⁵ after receipt of the request, MCERA must notify -- in writing -- the person making the request whether some or all of the records will be disclosed. The response letter should also contain the following:

1. If any records will not be disclosed, MCERA must explain why those records are being withheld. If some of the requested records will be disclosed while others will not, it is important that MCERA clearly delineate which records will be disclosed (and which will not) and explain the reasons for the distinctions.

⁵ Under "unusual circumstances," if MCERA cannot reasonably make a determination within 10 days, the Retirement Administrator "or his or her designee" should, within the 10 days, send a letter to the person making the request explaining when a response is expected (but in no case more than 24 days after the initial request) and setting forth the reason(s) for the extension. Extensions should not be used simply to postpone the response, but rather should only be used when "unusual circumstances" exist. "Unusual circumstances" includes: (1) the need to search for and collect the requested records from other locations; (2) the need to search for, "sift through" and examine voluminous records; (3) the need for consultation with another agency or department; or (4) the need to compile data, to write programming language or a computer program, or to construct a computer report to extract more limited data that MCERA seeks to provide in response to a PRA request.

2. If some or all of the requested records will be disclosed, MCERA must state the estimated date and time when the records will be made available. In general, MCERA should provide the relevant information or make the records available at the earliest practicable date. Unless special circumstances exist, MCERA should endeavor to produce the information or records within 10 days after the response letter is sent (i.e., within 20 days after the original request).

3. If some or all of the requested records will not be disclosed, because “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record,” (pursuant to Govt. Code Section 6255) MCERA must set forth the names and titles or positions of each person responsible for the denial.

4. If the requested records relate to a particular member or beneficiary who is identified *by first and last name*, but the records are not confidential (and, thus, may be disclosed), a copy of the responses and notices described above should be sent to such individual member(s). The response letter should also notify the member or beneficiary that the records will be disclosed in 10 days unless the member/beneficiary obtains a court order preventing such disclosure, and provides that order to MCERA’s Retirement Administrator. *In these cases, the records should not be made available until at least 10 days after the date that the response letter is sent.* This will allow the member/beneficiary a fair opportunity to seek a court order preventing the production of the records. If such records are requested as to the entire MCERA membership, or as to a portion of the membership, including beneficiaries, without reference to the individuals’ names, then such notice will not be provided for the reasons set forth in the CPRA cases.

C. Producing the Records

The logistics of providing the requested records should be worked out on a case-by-case basis in cooperation with the person making the request. If practicable, the information should be communicated by letter. If, however, the request seeks review of specific records, or if the requested information is too voluminous for inclusion in a letter, MCERA should send copies of the relevant records to the person making the request. If the production requires substantial copying, MCERA should not release the copies until the requesting party pays MCERA for copying at the rate of \$.25 per page. If the requested information is particularly voluminous (or the person requesting the information does not want to pay for copy charges) arrangements should be made so that he or she can view the records at MCERA’s offices.

V. MISCELLANEOUS

A. Availability Of This Policy

A copy of this policy statement shall be available in a visible location of the MCERA office, shall be made available to any member of the public upon request, and shall be made available on MCERA’s website.

B. Responsible Individual

For consistency and efficiency, the Retirement Administrator shall be the responsible individual for requests under the PRA. Staff shall promptly refer all requests to the Retirement Administrator, or his or her designee(s).

C. Record Keeping

A separate file shall be maintained for all documents relating to requests for records under the PRA. All communications relating to requests for records under the PRA shall either be in writing or memorialized by a writing that is appropriately filed.

IV. POLICY REVIEW

The Board shall review this Accessibility of Records Policy at least every three years to assure its efficacy and relevance. The Board may amend this policy, from time to time, by majority vote of the Board.

V. RETIREMENT ADMINISTRATOR'S CERTIFICATE

I, Jeff Wickman, the duly appointed Retirement Administrator of the Marin County Employees' Retirement Association, hereby certify the amendment of this Policy on this ____ day of December, 2011.

Retirement Administrator