



**Policy Type:** Board

**Category:** Administrative Practices

**Policy Name:** Policy Relating to Confidentiality of Documents - Board Policy  
3.25

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## **3.25 POLICY RELATING TO CONFIDENTIALITY OF DOCUMENTS (Adopted 3-9-99; Amended 1-26-21)**

### **3.25.1 Introduction**

The purpose of this policy is to help identify which County documents are confidential, and to specify how those documents should be handled to ensure that they remain confidential. Generally, unless subject to statutory privileges or protections, County records are not confidential;<sup>1</sup> they are public documents, as required by the Public Records Act (the "Act"), California Government Code § 6250 et seq. The Act states that access to public information is a fundamental right and requires government agencies to either disclose requested information or justify their refusal to do so by citing a specific enumerated exception to the Act, which courts have narrowly construed. Public records are defined 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." Government Code § 6252(d). The courts have further declared that "this definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed." *San Gabriel Tribune v. Superior Court* 143 Cal. App. 3d 762, 774 (1983).



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Footnote 1: This does not include, for example, privileged legal documents or records relating to County clients, patients, inmates, or employees that are subject to statutory confidentiality requirements and/or the constitutional right to privacy.

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### **3.25.2 Policy**

Santa Clara County is committed to ensuring that the public shall have access to information concerning the conduct of the people's business, as is their right under the Act. The law does, however, provide that certain documents may not or should not be publicly disclosed, in order to protect the privacy of individuals and/or the best interests of the County. To ensure that such confidential County documents remain confidential, County officers and staff shall employ the following actions to maintain the confidentiality of documents exempt from the requirements of the Public Records Act:

- A. Confidential documents and communications shall be labeled as such.
- B. Confidential documents should be maintained in separate files or kept in some other manner designed to ensure their confidentiality is maintained.
- C. County departments shall establish policies to limit access to confidential documents and the information therein to those properly having access to such documents.
- D. Each member of the Board of Supervisors may designate any person(s) on the Supervisor's staff who is/are authorized to have



access to confidential documents and information, in accordance with Section 3.25.4, below.

- E. Confidential documents shall be shredded before they are discarded.
- F. Confidential emails shall not be forwarded or otherwise shared with unauthorized persons.
- G. If unauthorized persons do gain access to privileged materials, immediate steps shall be taken to obtain their destruction or return.
- H. County employees with access to confidential documents shall be informed about this policy by their supervisors and provided a copy of it.

### **3.25.3 Confidential Documents – Definitions and Discussion**

For the purposes of this policy, “confidential documents” are those County records exempt from disclosure under the Public Records Act, documents received during or related to closed sessions of the Board, and any other documents protected from disclosure by law.

#### **A. Records exempt from the Public Records Act**

The Public Records Act exempts particular records from disclosure. The exemptions listed below are broadly applicable to the County’s business. This is not an exhaustive list, however. Many specific exemptions and confidentiality laws apply to different aspects of the County’s work. County employees should receive training on exemptions and confidentiality laws applicable to their area of work, and County Counsel should be consulted about any questions



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regarding the applicability of the Public Records Act to a particular document.

### 1. Preliminary Drafts, Notes, or Inter-agency Memoranda

Preliminary drafts, notes or inter-agency memoranda are exempt from disclosure if they are not retained by the agency in the ordinary course of business and if the public interest in nondisclosure outweighs the interest in disclosure. See Government Code Section 6254(a). Courts have construed this narrowly, placing the burden upon the government agency to prove that such records are both ordinarily not retained and that there is an overriding public interest in nondisclosure. See *Citizens for a Better Environment v. Dept. of Food & Agriculture*, (1985) 171 Cal. App.3d 704, 715 (holding that memoranda normally retained and consisting of factual material or severable factual material along with deliberative material may be disclosed without doing violence to the public interest in withholding such records.)

### 2. Records Prepared for Pending Litigation

Records pertaining to pending litigation, until the litigation is finally adjudicated or settled, are exempt from disclosure. See Government Code § 6254(b). A document is protected from disclosure only if it was specifically prepared for use in litigation; documents that are at issue in a litigation, but that were not prepared for the litigation and are not otherwise exempt, are not shielded by this provision. See *City of Hemet v. Superior Court*, 37 Cal. App. 4th, 1411, 1420 (1995) (holding that because public interest in the activities of a public agency are highest when the agency is being sued, the litigation exemption should



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be narrowly construed). This exemption may apply more broadly than attorney-client privilege and attorney work product doctrine, to exempt, for example, confidential correspondence between opposing counsel and parties during the pendency of the litigation. *See Bd. of Trustees of California State U. v. Super. Ct.*, 132 Cal. App. 4th 889, 900 (2005).

### 3. Personnel, Medical, or Similar Records

The Public Records Act exempts from disclosure medical records, personnel records, and similar records if their disclosure would constitute an unwarranted invasion of privacy. Government Code § 6254(c).

Employers have a duty to protect the privacy rights employees have in certain personnel records and other personal information. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975); see also *Braun v. City of Taft*, 154 Cal. App. 3d 332, 344-45 (1984) (a council member was allowed access to records pertaining to appointment of transit administrator; irrelevant personal items could be taken out before being made public). In some instances, however, personnel records must be disclosed, and County Counsel should be consulted to determine whether a particular record is subject to disclosure. *See* Penal Code § 832.7(b) (requiring disclosure of certain peace officer personnel records).

In addition, individuals served or employed by the County have constitutional and statutory rights to the privacy of their medical information as well as other personal information. *See*, e.g., Cal. Const. art. I, § 1 (state constitutional right to privacy); Civil Code § 56 et seq. (Confidentiality of Medical Information



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Act). Unlawful disclosure of protected personal information can result in monetary and criminal penalties. Because state and federal privacy laws are frequently updated and amended, staff should consult County Counsel regarding the confidentiality requirements applicable to specific types of employee and client records.

#### 4. Client/Patient Records Exempt from Disclosure under State or Federal Law

In addition to the exemption for personnel and medical records, the Public Records Act exempts records the disclosure of which is exempted or prohibited by state or federal law. Government Code § 6254(k). This exemption applies to a wide range of records containing personal information of individuals served by the County. For example, medical and mental health records, juvenile records, criminal offender record information, public benefits information, and financial records, among others, may be exempt and barred from disclosure under this provision and relevant state or federal laws. As noted above, unlawful disclosure of protected personal information can result in monetary and criminal penalties. Because state and federal privacy laws are frequently updated and amended, staff should consult County Counsel regarding the confidentiality requirements applicable to specific types of employee and client records.

#### 5. Taxpayer Information

Information required from any taxpayer in connection with the collection of local taxes may not be disclosed if the information was received in confidence and disclosure would result in an



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unfair competitive disadvantage to the person who supplied the information. Government Code § 6254(i).

### 6. Attorney-Client Privilege and Attorney Work Product

In addition to the exemption for records prepared for pending litigation, the Public Records Act exempts from disclosure certain privileged legal documents and communications, regardless of whether litigation is pending. Government Code § 6254(k). This exemption applies to County records subject to the attorney-client privilege and/or the attorney work product doctrine. Evidence Code § 952; Code of Civil Procedure § 2018.030. Documents subject to the attorney-client privilege include memoranda from and correspondence (including email) with a County Counsel attorney and/or outside counsel for the purpose of providing confidential legal advice or consultation. Records subject to the attorney work product doctrine include documents prepared by an attorney, or others working with the attorney, in investigating, researching, analyzing, or assessing legal matters, including but not limited to any document that reflects an attorney's impressions, conclusions, opinions, or legal research or theories.

Attorney-client privileged documents and attorney work product are confidential and exempt from disclosure. However, these legal protections may be waived and confidentiality potentially forfeited if (1) the Board of Supervisors (or, in the case of work product, the County Counsel) affirmatively acts to waive attorney-client privilege or work product protection, or (2) protected information is shared with unauthorized persons or otherwise not maintained as confidential. Because the attorney-client privilege is between the County and County



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Counsel, in most cases only the Board of Supervisors can voluntarily waive the privilege. All County staff must ensure that attorney-client privileged records and attorney work product remain confidential.

To preserve confidentiality, attorney-client privileged information and attorney work product should be shared only with County staff who reasonably need the information to accomplish the purpose for which legal advice was sought. In addition, all staff who receive attorney-client privileged information or attorney work product should take measures to maintain its confidentiality and should properly label and secure privileged documents. Staff should not discuss attorney-client privileged information or attorney work product in a public place or with unauthorized persons, leave privileged information where it can be seen by others, or forward emails containing attorney-client privileged information or attorney work product to unauthorized persons or to staff who do not have a need to know. It is the responsibility of each County employee or official with access to attorney-client privileged documents and/or attorney work product to take appropriate steps to maintain confidentiality.

### 7. Law Enforcement Records

The Public Records Act contains a number of exemptions for law enforcement records. Government Code § 6254(f), (k). Generally, investigative files and records are exempt from disclosure. However, the Act requires disclosure of certain information regarding arrests, complaints and requests for assistance, and video or audio recordings related to critical incidents, and it requires certain additional disclosures to



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victims and insurance carriers. Government Code § 6254(f). In addition, certain law enforcement personnel records and information may be subject to disclosure. See *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 64 (2014) (names of police officers involved in on-duty shootings subject to disclosure, absent safety concerns); Penal Code § 832.7(b) (requiring disclosure of certain peace officer personnel records).

### B. Closed Session Documents/Information

Documents received during, or in relation to, closed sessions of the Board of Supervisors are confidential. Closed session meetings of the Board are authorized under specified circumstances by the provisions of the Brown Act, Government Code § 54950 et seq.

#### 1. Divulging Information to Members of the Public

The purpose of a closed session meeting is to prevent disclosure of the matters discussed to the general public. The Brown Act authorizes closed session meetings in a narrow range of sensitive contexts including, for example, to allow the Board to instruct its negotiators or attorneys on specified matters relating to litigation and real estate transactions, and in certain instances where confidential personnel or labor relations information is involved. The California Attorney General has stated "it would be improper for information received during a closed session to be publicly disclosed without authorization of the governing body as a whole." 76 Cal. Op. Atty. Gen. 289, 290 (1993); 51 Cal. Op. Atty. Gen. 203, 206 (1968); 44 Cal. Op. Atty. Gen. 147, 149 (1964). Accordingly, no member of the Board or staff member authorized to attend closed session should disclose information received during or in connection with the



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closed session meeting, unless authorized by the Board as a whole or required by law.

### 2. Divulging Information to Staff

The only persons who may be present in closed sessions of the Board are those actually necessary to advise or take direction from the Board, in light of the specifically permitted purpose of a particular closed session discussion. The Board may determine which individuals should attend a closed session, consistent with the Brown Act. Other County staff, and the staff of the Supervisors, are not authorized to be present in closed session. The Board as a whole may make the determination that it is appropriate for business reasons to permit disclosure of information from closed session to specified staff members, as they could do in relation to the general public.

### C. Other Documents Protected from Disclosure by Law

Numerous state and federal laws impose confidentiality restrictions on records held by the County. These confidentiality laws are incorporated in the Public Records Act through Government Code section 6254(k), which exempts from disclosure any record that cannot be disclosed, or is exempt from disclosure, pursuant to state or federal law.

### **3.25.4 Designation of Staff Authorized to Receive Confidential Information**

In adopting this Policy, the Board of Supervisors has determined that in order to perform the official duties of Board members, it may be necessary for specified staff of Board members to have limited access



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to confidential documents and information provided to the Board member. The Board hereby finds that given the nature and volume of significant issues coming before the Board, and the extent of background information necessary for each Board member to review in order to fulfill the duties of the Board of Supervisors, each Board member may appropriately allow his or her Chief of Staff access to confidential material directed to that Board member, so that the Chief of Staff may assist the Board member.

Any Board member who determines that any other member or members of his or her staff must have access to confidential documents in order to allow that Board member to adequately perform the duties of his or her office may authorize such access verbally or in writing. Such authorization automatically terminates when the staff member terminates employment with the Board member, and may be terminated at any time by the Board member. Persons so designated should have access to confidential information only to the extent reasonably necessary to achieve the purpose of the confidential communications to the Board member. It is the policy of the Board that no person other than the Board member should have access to confidential materials that relate to personnel issues concerning individuals who are appointees of the Board.

### **Related Policies**

None.

### **Related Forms and Information**

None.



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### History

Date	Changes Made
1/26/2021	Policy Amended. <a href="#">View legislative file.</a>
1/24/2014	Policy Uploaded. (John Myers)
3/9/1999	Policy Adopted. <a href="#">View legislative file.</a>