

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Administrative Office of the Courts
Mary M. Roberts, General Counsel, Office of the General Counsel,
415-865-7803, mary.roberts@jud.ca.gov
Curtis L. Child, Director, Office of Governmental Affairs,
916-323-3121, curtis.child@jud.ca.gov

DATE: December 7, 2009

SUBJECT: Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803) (Action Required)

Issue Statement

On July 28, 2009, Governor Arnold Schwarzenegger signed Senate Bill X4 13 (Stats. 2009-10, 4th Ex. Sess., ch. 22, eff. July 28, 2009), which, among other provisions, addresses public access to administrative records of the judicial branch. SBX4 13 added section 68106.2 to the Government Code, clarifying the public's right to access certain administrative records held by the Administrative Office of the Courts (AOC) and the superior courts. SBX4 13 also requires the Judicial Council to adopt rules of court by January 1, 2010, applicable to the judicial branch that "provide public access to nondeliberative or nonadjudicative court records, budget and management information."

Recommendation

On behalf of and with the endorsement of the judicial working group, Administrative Office of the Courts staff recommends that the Judicial Council, effective January 1, 2010:

1. Adopt rules 10.500(a)–(e)(3) and (e)(5)–(j) and 10.501, which provide public access to nondeliberative and nonadjudicative court records, budget and management information relating to the administration of the courts;

2. Adopt a fee structure to be imposed under subdivision (e)(4): Alternative 1, Alternative 2, or some other fee structure to be specified by the council.

If Alternative 2 is adopted, adopt Fee Guidelines in the form of Attachment A to this report, and approve a one-time allocation of \$1.5 million from the Trial Court Trust Fund, subject to available appropriations, to provide a funding source to reimburse trial courts for specified expenses incurred between January 1, 2010, and December 31, 2011, in responding to requests for public access to judicial administrative records under rule 10.500 and as provided in the Fee Guidelines and procedures and guidelines to be issued by the Administrative Office of the Courts.

3. Adopt rule 10.501, which requires the maintenance of certain trial court budget and management information as set forth in current rules 10.802(a) and 10.802(b);
4. Repeal rule 10.802, on maintenance of and public access to budget and management information;
5. Amend rule 10.803, on information access disputes, to reflect the adoption of rules 10.500 and 10.501;
6. Direct the Supreme Court, Courts of Appeal, superior courts, and Administrative Office of the Courts to maintain records regarding requests for public access to judicial administrative records and information, including the time, cost, and type of court resources spent in responding to requests received, and costs recovered, and to provide that information to the Administrative Office of the Courts upon request to enable compilation of branchwide data and presentation to the council of a report analyzing the impact of the rules on court operations statewide;
7. Direct the Administrative Office of the Courts to compile and present to the council by December 31, 2011, branchwide information about the impact of the new rules on public access to judicial administrative records; and
8. Adopt as findings the rationale for recommendation in this report, which demonstrates the impact of the proposed rules on the public's right of access to judicial administrative records and the important public interests protected by these rules and the need for protecting those interests.

Rationale for Recommendation

There currently is no comprehensive statutory scheme regarding public access to administrative records held in the judicial branch. The proposed rules would implement the requirements of SBX4 13 by establishing comprehensive public access provisions applicable to judicial administrative records held by the trial and appellate courts, the Judicial Council, and the AOC. The rules would make clear that the right of access as set forth in the rules applies to “judicial administrative records.” The rules would not apply to records that are “adjudicative,” such as records that are prepared for or filed in or used in court proceedings.

The report discusses the important public interests in access to records and information, the protection of privacy rights, and the effective functioning of an independent judicial branch of state government. The rationale section of the report demonstrates the impact of the proposed rules on important public interests, including the public interests protected by the rules and the need to protect those interests.

To ensure that the proposed rules reflect to the greatest extent possible the views of the judicial branch and interested parties, AOC staff developed the rules with a judicial working group that includes representatives from the Trial Court Presiding Judges Advisory Committee (TCPJAC), Court Executives Advisory Committee (CEAC), Administrative Presiding Justices Advisory Committee (APJs), Court of Appeal clerk/administrators (ACAs), and the California Judges Association. In addition, AOC staff met with the TCPJAC, CEAC, APJs, and ACAs both before and after the proposed rules were circulated for public comment to discuss development of and progress on the proposed rules.

The judicial working group and AOC staff also consulted with legislative staff, labor unions representing trial court employees, and organizations advocating open access to government information, including Californians Aware, the California First Amendment Coalition, and the California Newspaper Publishers Association. The judicial working group held joint meetings with these stakeholders both before and after the rules were circulated for comment to discuss the direction of the proposed rules and the major themes identified in the comments received.

The proposed rules were drafted using the California Public Records Act (CPRA) as a primary guide, in some instances supplemented by the Legislative Open Records Act (LORA) and the federal Freedom of Information Act (FOIA), which was the model for the CPRA. The rules follow the basic principle of the CPRA in establishing a presumption that records reflecting the administrative functions of judicial branch entities are open to the public. Like the CPRA, the rules specify exemptions to that basic tenet in appropriate circumstances, with some CPRA provisions modified as appropriate to address the specific needs and circumstances of the judicial branch.

Comments From Interested Parties

Thirty-five individuals or organizations submitted comments on this proposal. With the exception of the issue of fees, the vast majority of the comments have been addressed. Owing to the volume and content of comments received on the issue of fees from parties both within and outside the judicial branch, the council is presented with two alternative fee structures for consideration.

Attachments

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Administrative Office of the Courts
Mary M. Roberts, General Counsel, Office of the General Counsel,
415-865-7803, mary.roberts@jud.ca.gov
Curtis L. Child, Director, Office of Governmental Affairs,
916-323-3121, curtis.child@jud.ca.gov

DATE: December 7, 2009

SUBJECT: Public Access to Judicial Administrative Records (adopt Cal. Rules of
Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)
(Action Required)

Issue Statement

On July 28, 2009, Governor Arnold Schwarzenegger signed Senate Bill X4 13 (Stats. 2009-10, 4th Ex. Sess., ch. 22, eff. July 28, 2009), which, among other provisions, addresses public access to administrative records of the judicial branch. SBX4 13 added section 68106.2 to the Government Code,¹ clarifying the public's right to access certain administrative records held by the Administrative Office of the Courts (AOC) and the superior courts. SBX4 13 also requires the Judicial Council to adopt rules of court by January 1, 2010, applicable to the judicial branch that "provide public access to nondeliberative or nonadjudicative court records, budget and management information."

Rationale for Recommendation

Background

In California, access to records of the executive and legislative branches is governed by the California Public Records Act (CPRA) and the Legislative Open Records Act (LORA), respectively. The CPRA,² which applies to agencies within the executive branch of state government, generally exempts all agencies provided for under articles IV

¹ All statutory citations are to the California Government Code unless otherwise indicated.

² Gov. Code, § 6250 et seq.

and VI of the California Constitution from its requirements.³ The records of agencies under article IV, which are agencies in the legislative branch, are subject instead to the Legislative Open Records Act.⁴ There is no comprehensive statutory scheme regarding records held in the judicial branch. A limited category of budget and management information held by a superior court, the AOC, or the Judicial Council must be made available upon request under current rule 10.802. Rule 10.802 does not apply to records of the California Courts of Appeal or the Supreme Court.

The proposed rules would implement the requirements of SBX4 13 by establishing comprehensive public access provisions applicable to judicial administrative records held by the trial and appellate courts, the Judicial Council, and the AOC. The rules would make clear that the right of access as set forth in the rules applies to “judicial administrative records.” The rules would not apply to records that are “adjudicative,” such as records that are prepared for or filed in or used in court proceedings.

Process

SBX4 13, effective July 28, 2009, established a brief time frame for the Judicial Council to adopt its rules for public access to judicial administrative records. As noted, the Judicial Council is directed to adopt rules to take effect January 1, 2010.

To ensure that the proposed rules reflect to the extent possible the views of the judicial branch and interested parties, the AOC developed the proposed rules with a judicial working group that includes representatives from the Trial Court Presiding Judges Advisory Committee (TCPJAC), Court Executives Advisory Committee (CEAC), Administrative Presiding Justices Advisory Committee (APJs), Court of Appeal clerk/administrators (ACAs), and the California Judges Association.⁵ In addition, AOC staff met with the TCPJAC, CEAC, APJs, and ACAs both before and after the proposed rules were circulated for public comment to discuss development of and progress on the proposed rules.

The judicial working group and AOC staff also consulted with legislative staff, labor unions representing trial court employees, and organizations advocating open access to government information, including Californians Aware, the California First Amendment Coalition, and the California Newspaper Publishers Association. The judicial working

³ Gov. Code, § 6252(f). The CPRA contains one relevant exception to this exemption, requiring judicial branch entities to allow public inspection of an itemized statement of their total expenditures and disbursement. (Gov. Code, § 6261.)

⁴ Gov. Code, § 9070 et seq.

⁵ The members of the judicial working group are Justice Judith D. McConnell (Court of Appeal, Fourth Appellate District), Ms. Diana Herbert (Court of Appeal, First Appellate District), Judge Mary Ann O’Malley (Superior Court of Contra Costa County), Judge James E. Herman (Superior Court of Santa Barbara County), Judge Clifford L. Klein (Superior Court of Los Angeles County), Judge Kenneth K. So (Superior Court of San Diego County), Mr. Michael D. Planet (Superior Court of Ventura County), and Mr. Michael M. Roddy (Superior Court of San Diego County).

group held joint meetings with these stakeholders both before and after the rules were circulated for comment to discuss the direction of the proposed rules and the major themes identified in the comments received.

Constitutional background

In 2004, voters approved amendments that added section 3(b) to article I of the California Constitution. The Constitution now provides that a statute, court rule, or other authority adopted after November 3, 2004, that limits the right of access to information concerning the conduct of the people's business must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. Const., art. I, § 3 (b)(2).) The amendment states that it does not repeal or nullify exceptions to the right of access to public records or meetings of public bodies that were in effect on November 3, 2004. (Cal. Const., art. I, § 3(b)(2) and (5).) As noted above, the judicial branch is exempted from all but one section of the CPRA. Although there is currently no comprehensive scheme regarding access to records held in the judicial branch, commentators noted that the proposed rules should include findings demonstrating the interest protected by any limitation on access, and the need for that protection.

The proposed rules recognize the important public interest in access to records and information relating to the administration of the judicial branch and expand the public's right of access to judicial administrative records. In addition, the proposed rules include provisions acknowledging the important public interest in protecting the privacy rights of individuals working in or doing business with judicial branch entities and in the effective functioning of an independent judicial branch of state government. This report discusses these various interests. The rationale for recommending adoption of these proposed rules as discussed below demonstrates how specified limitations on the public's right of access to judicial administrative records under the proposed rules would protect a public interest and why protecting that interest is necessary.

Overview of Proposed Rules

The proposed rules were drafted using the CPRA as a primary guide, in some instances supplemented by LORA and the federal Freedom of Information Act (FOIA, applicable to federal executive branch agencies and the model for the CPRA). The rules follow the basic principle of the CPRA in establishing a presumption that records reflecting the administrative functions of judicial branch entities are open to the public. Like the CPRA, the rules specify exemptions to that basic tenet in appropriate circumstances, with some CPRA provisions modified as appropriate to address the specific needs and circumstances of the judicial branch. Rather than summarizing each provision of the rules, this report describes the general premise and the main provisions of the rules. The report also discusses provisions of the rules that are not self-explanatory or that generated comments. Where the proposed rules differ substantively from the provisions of the CPRA with respect to a particular topic, the report also explains the reasons for the difference.

Rule 10.500: Public access to judicial administrative records

Subdivision (a)—Intent

Subdivision (a) sets out the council’s intent to implement section 68106.2(g), added by SBX4 13, which requires the adoption of rules of court that provide “public access to nondeliberative or nonadjudicative court records, budget and management information.” Subdivision (a) also states that the rule clarifies and expands the public’s right of access to the administrative records of the judicial branch. The rule does not affect public access to “adjudicative” records, as discussed below.

Subdivision (b)—Application

Subdivision (b)(1) clarifies that the rule provides access to “judicial administrative records,” which are defined broadly to mean any writings containing information relating to the conduct of the people’s business that are prepared, owned, used, or retained by a judicial branch entity. The definition excludes “adjudicative” records, which are defined to mean writings prepared for or filed or used in a court proceeding, the judicial deliberation process, or the assignment or reassignment of cases and of justices, judges (including temporary and assigned judges), subordinate judicial officers, and of counsel appointed or employed by the court.

As circulated for public comment, subdivision (b)(1) used the term “nonadjudicative records” in describing the records subject to the rule. In response to comments received, subdivision (b)(1) was amended to instead define affirmatively the records to which the rule would apply.

Subdivision (b)(2) states that the rule does not apply to, modify or otherwise affect existing law with respect to public access to adjudicative records. An advisory committee comment is included to explain that public access to adjudicative records remains governed by a large body of case law and that the Judicial Council’s intent is not to affect current law with respect to these records. The comment explains that, in general, current law provides that case records officially reflecting the adjudicative work of the court are open to inspection (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782–83), while other documents prepared in the course of judicial work that are not official case records are not subject to public access. (*Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106.)

Subdivision (b)(5) provides that electronic mail (e-mail) and text messages related to judicial administration sent or received prior to the effective date of the rule will not be subject to disclosure. This provision recognizes the change the rule would make in expectations within the judicial branch regarding public access to e-mails and text messages. The provision also takes into account the excessive burden that would be imposed on judicial branch entities in searching and reviewing an unlimited number of e-mail and text messages as well as the potential for unwitting disclosure of

communications related to a court's adjudicative functions that are not subject to disclosure.

Subdivision (c)—Definitions

Subdivision (c) sets forth the definitions used for interpreting rule 10.500, many of which are based on similar terms in the CPRA. The definition of a “judicial administrative record” draws from the definition of a “public record” under the CPRA and specifically includes electronic communications such as e-mail and text messages. In response to comments received, the definition of “judicial administrative record” has been amended to clarify that it does not include writings of a personal nature that do not relate to the conduct of the people's business. This language in the rule conforms to case law interpretations of the CPRA establishing that the public has the right to access only records that are used “in the conduct of the people's business.” (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.) An advisory committee comment has also been added to clarify that the exclusion of purely personal letters, e-mails, telephone records, and similar records is a codification of CPRA case law.

Subdivision (d)—Construction

Subdivision (d) provides that the terms used in the rule have the same meaning as under the CPRA and LORA and must be interpreted consistently with the interpretation applied to the terms under those acts. Subdivision (d) also provides for the incorporation of CPRA and LORA exemptions and case law in the determination of what record or type of record is not subject to mandatory disclosure. The rule would, therefore, expand the public's right of access to judicial administrative records and reflect existing law governing access to public records under the CPRA.

Subdivision (e)(1)—Public Access

Presumption of Disclosure

Subdivision (e)(1) establishes the basic premise of the rule that all judicial administrative records are subject to inspection or copying unless exempted from disclosure under the rule or by law. If a judicial administrative record contains information that is exempt from disclosure and the exempt portions are reasonably segregable, a judicial branch entity must allow inspection and/or copying of the record after redaction of the portions that are exempt from disclosure.

No requirement to Create a Record or to Compile or Assemble Data in Response to a Request

A judicial branch entity would not be required to create a record or to compile or assemble data in response to a request for judicial administrative records if the judicial branch entity does not already compile or assemble the data in the requested form. However, selecting data loaded from extractable fields in a single database using software already owned or licensed by the judicial branch entity does not constitute the creation of a record or the compilation or assemblage of data. In addition, subdivision

(i)(2), which specifically addresses the availability of information contained in an electronic format, provides that if the judicial branch entity agrees to perform data compilation or extraction to produce a record in response to a request, the requester will bear the cost of producing the record.

The rule varies slightly from the corresponding language of the CPRA. The CPRA allows a subject entity to recover the costs of producing a copy of a record in an electronic format if the request requires data compilation, extraction, or programming to produce the record. But, the CPRA has not been interpreted to require the entity to create or assemble a new record from disparate sources of information. The rule adds a clarification that judicial branch entities are not required under the rule to compile or assemble data in response to a request. Therefore, the rule will codify the current interpretation of the CPRA requirement.

Given the current and foreseeable budget situation and the impact on staffing, requiring a judicial branch entity to engage in extensive data compilation in response to a request, even if the requester pays for the associated costs, is not feasible for many courts that simply do not have the technological capability or staff to provide such services. More important, such a requirement could interfere with a court's ability to carry out its core functions. Subdivisions (e)(1) and (i)(2) of the rule take into consideration the public's interest in preserving the majority of courts' staff and technological resources for their core functions, and represents a reasonable interpretation of the provisions of the CPRA addressing access to electronic records.

Subdivision (e)(2)—Examples of judicial administrative records

Subdivision (e)(2) provides a nonexhaustive list of judicial administrative records that, absent any applicable exemption, would be subject to public disclosure under the rule. Except for some modifications discussed in the Comments From Interested Parties section below, the examples were taken directly from the language of Government Code section 68106.2(a), which provides a list of the types of information that a person has a right to obtain under current rule 10.802.

Subdivision (e)(4)—Costs of duplication, search, and review

The issue of whether and to what extent a judicial branch entity may recover its costs for responding to public access requests generated the most comments. Under the proposed rule as circulated for public comment, a judicial branch entity will be able to recover a fee representing its direct cost of duplication and, in certain circumstances, a fee representing the costs of document search and review. This approach differs from the CPRA, which, as interpreted by case law, does not authorize a subject agency to recover the costs of document search and review. The proposed rule was instead based on FOIA, which allows federal agencies to charge for document search and review if the request is for commercial, as opposed to noncommercial, use. The Invitation to Comment specifically solicited comments and suggestions regarding potential alternatives to

address the courts' critical lack of resources available for meeting the broad new public access mandates.

In addition to the fee structure included in the rules as circulated for public comment, the proposed rules now include an alternative fee structure developed in response to the Invitation to Comment. Regardless of the fee structure selected, however, the rule will expand the public's right of access to judicial administrative records. The imposition of fees under the proposed rules will not limit the right of access itself, and will assist judicial branch entities in recovering their direct costs of complying with the significant new requirements of the proposed rules. The imposition of fees protects broad rights to public access by enabling judicial branch entities to respond effectively to requests, allocates the costs of responding to public access requests, and protects the public's interest by supporting the continued ability of judicial branch entities to deliver their core services.

Alternative 1

The judicial working group recommends the fee structure that was included in the proposed rules as circulated for public comment, with some refinements in response to comments received (Alternative 1). Under Alternative 1, a judicial branch entity would be able to charge a fee representing its "direct costs of duplication," which is identical to the wording in the CPRA and includes items that have been interpreted to be such "direct costs of duplication" under the CPRA (e.g., paper and toner in the case of a hard copy and the expense of compensation of the person operating the copy machine).⁶

Alternative 1 has been amended in response to comments received to clarify that any cost incurred in retrieving the record from a remote storage facility or archive and the cost of mailing the responsive records are included in the definition of "direct costs of duplication."

Alternative 1 adds a component to the fee not included in the CPRA that represents the cost of judicial branch personnel devoted to the search and review effort. The fee would be charged at an amount calculated as the hourly compensation rate (salary plus benefits) for the personnel employed on the task multiplied by the time required. If the request were for commercial use, the judicial branch entity would be able to impose a fee representing compensation of the personnel involved for the entire search and review effort. The definition of "commercial use" as used in the rule is based on the similar term in FOIA and generally does not include requests from the media. The definition of "media" is based on the version of the federal "shield law" that is currently under debate in the Senate. Following the approach that the Senate is anticipated to take, and similar to the approach in the bill passed by the House, the definition of "media" clarifies that

⁶ See *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 148 ["The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it"].

those who do not gain a substantial portion of their income from disseminating information are not considered media.

Under Alternative 1, if the records were requested for a noncommercial use, the judicial branch entity could not impose a fee for search and review time unless the effort exceeded two hours. The fee charged would represent only the personnel cost for the time devoted to the search and review effort in excess of two hours. The provision allowing a judicial branch entity to impose a fee for search and review time spent responding to a request that is not for commercial use would “sunset” after three years and have no effect after December 31, 2012. Thus, as of January 1, 2013, the rule would enable a judicial branch entity to impose a fee representing only its direct costs of duplication and, with respect to requests for commercial use, a fee representing the cost of the total search and review time spent on the response.

Alternative 1 provides that by January 1, 2012, the council will review and evaluate the numbers of requests received, the time necessary to respond, the fees imposed by judicial branch entities for access to records and information, and the costs recovered. The council’s review would consider impact on both the public’s access to records and information and on judicial branch entities’ ability to carry out and fund their core judicial operations.

Alternative 2

Owing to the volume and content of comments received on the issue of fees and, in particular, an emphasis in the comments on the possible “chilling effect” a fee structure substantially different from the CPRA could have on the ability of the public to request records and information, another fee structure is proposed by the AOC. This alternative fee structure would closely follow Alternative 1 but would have two major differences (Alternative 2). Under Alternative 2, a judicial branch entity could impose a fee representing the costs of search and review time only on requests for commercial use. In addition, the fee representing the “direct costs of duplication” would be established in advance by the council as set forth in Attachment A, Fee Guidelines. Alternative 2 allows a judicial branch entity to impose a fee different from the council-established fee pursuant to a specified procedure allowing for public notice, comment, and notice to the council.

To mitigate the impact of proposed rules 10.500 and 10.501 on the operating costs of judicial branch entities if Alternative 2 were selected, the council would approve a one-time allocation of \$1.5 million from the Trial Court Trust Fund, subject to available appropriations, to provide a funding source to reimburse trial courts for certain direct costs of responding to requests for judicial administrative records and information. The funding would be available to reimburse properly documented claims submitted from January 1, 2010, through December 31, 2011, up to the amount of the allocation. Reimbursement, which would occur on a quarterly basis, would be available only for the

actual direct costs of search and review time in excess of two hours expended by judicial branch personnel in response to requests for records for other than commercial use, up to a maximum hourly rate established by the AOC based on the average statewide hourly rate for salary and benefits of a mid-step Legal Process Clerk.

Because no fee would be imposed on search and review time for requests for noncommercial uses, Alternative 2 does not contain a sunset provision. However, like Alternative 1, Alternative 2 includes the same provision directing the council to review and evaluate the impact of the fee structure in two years.

Subdivision (e)(5)—Inspection of records

Subdivision (e)(5) provides that a judicial branch entity must make judicial administrative records in its possession and not exempt from disclosure open to inspection at all times during the office hours of the judicial branch entity if the record is of a nature permitting inspection. Although this provision reflects the language of the CPRA, commentators noted that it could be interpreted to require immediate production of judicial administrative records. Neither subdivision (e)(5) nor the CPRA provision on which it is modeled require the immediate production of records. Subdivision (e)(5) merely provides that a request may be made at any time during the office hours of the judicial branch entity. As discussed below, subdivisions (e)(6) through (e)(8) of the proposed rule govern the actual timeline applicable to both requests for copies and requests for inspection.

Subdivisions (e)(6)–(8)—Time for determination of disclosable records and response

Under subdivision (e)(6), a judicial branch entity will be required to respond to a request for judicial administrative records within 10 calendar days from receipt of the request, by providing a determination regarding whether records will be made available or the reason any records will be withheld. Subdivision (e)(8) allows the time period for this response to be extended in certain specified unusual circumstances, but the extension may not exceed 14 calendar days. Once a judicial branch entity has determined that it has records that are responsive to a request, subdivision (e)(7) requires that the judicial branch entity make the records available “promptly.” As under the CPRA, what constitutes a prompt response to a request depends on the facts of the specific request and what is reasonable under those circumstances.

These provisions reflect the requirements of the CPRA. In so doing, the provisions apply a different response time standard than is now applicable to a narrow category of judicial administrative records that are subject to disclosure under current rule 10.802. Under current rule 10.802(e), a superior court, the AOC, and the Judicial Council are required to make certain budget and management information available to a requester within 10 business days of the request (previous fiscal year information must be provided within 20 business days of the request).

Applying different response times to different types of information, however, would be infeasible for judicial branch entities to administer. In addition, applying the shorter time frame specified in current rule 10.802 to all requests for judicial administrative records would impose an undue burden on judicial branch entities. The rule therefore replaces the time requirements in current rule 10.802 with the new standard applicable to all requests. As with the CPRA, nothing in the rule is intended to preclude judicial branch entities from producing records as soon as they are available.

Subdivision (9)—Reasonable efforts

Subdivision (e)(9) requires that a judicial branch entity provide a requester with reasonable assistance in making a focused and effective request. Subdivision (e)(9) also lists the different ways by which a judicial branch may assist a requester. The requirements of subdivision (e)(9) will be considered satisfied if the judicial branch entity makes reasonable efforts to assist the requester and will be considered not applicable if the judicial branch entity makes the requested records available or determines that the requested records are exempt from disclosure.

Subdivision (f)—Exemptions

The general premise of the CPRA is that all public records are disclosable unless specifically exempt. The specific exemptions of the CPRA reflect instances when a competing public policy consideration, such as public security or the right to privacy, outweighs the right to access public documents. Section 6255(a), the “catch-all” exemption of the CPRA, provides that a record may be exempt even if it does not come within one of the stated exemptions when “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.”

Subdivision (f) incorporates the same exemptions specified in the CPRA where applicable (e.g., personnel, medical, or similar files) and include an identical “catch-all” exemption. To ensure that the same interpretations of exemptions under the CPRA are applied to judicial administrative records under the rule, the rule provides that records are not subject to public access under the rule if the same type of record is not subject to public access under the CPRA. The rule also modifies existing CPRA exemptions and includes additional ones where appropriate to address the specific needs of the judicial branch.

The following summarizes the exemptions included in the rule that would differ substantively from the provisions of the CPRA and exemptions that have been refined in response to comments received, and explains the reasoning behind the exemptions.

Subdivision (f)(1)—Exemption for preliminary writings

Subdivision (f)(1) provides an exemption for “[p]reliminary writings, including drafts, notes, working papers, and inter-judicial branch entity or intra-judicial branch entity

memoranda, that are not retained by the judicial branch entity in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” This language differs from the language of subdivision (f)(1) as it was circulated for public comment, which did not include the condition that preliminary writings must also not be retained in the ordinary course of business to qualify for the exemption.

Subdivision (f)(1) has been amended in response to commentary that the exclusion of this condition was unwarranted and could potentially raise interpretation difficulties. The exemption now in the rule would match the CPRA exactly. This change would not substantively change the determination of whether a record is discloseable under the rule.

Subdivision (f)(3)—Exemption for personnel, medical or similar files

Subdivision (f)(3) provides an exemption very similar to that included in the CPRA for certain personal information, including personnel files and other types of records the disclosure of which would constitute an unwarranted invasion of personal privacy. The rule would add to the CPRA formulation a specific exemption for the direct contact information of justices, judges, subordinate judicial officers, and their staff attorneys. This addition was added to reflect the special characteristics of communications among judicial branch personnel and is intended to ensure that ex parte communications are avoided.

Subdivision (f)(6)—Exemption for security plans and procedures

Subdivision (f)(6) provides an exemption for records if disclosure of the record would compromise the safety or security of judicial branch personnel or the courts themselves. This includes in a single exemption various provisions that are found in separate sections under the CPRA, altered as appropriate to reflect the business of the judicial branch. The rule makes clear that court security plans and surveys, and security investigations, procedures, and assessments of judicial branch entities are all exempt from disclosure.

Subdivision (f)(7)—Exemption for records relating to complaints or investigations of judicial officers

Subdivision (f)(7) exempts from disclosure “[r]ecords related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office.”

Although subordinate judicial officers are employees, records regarding these judicial officers are also included in this exemption.⁷ This approach differs from CPRA case law, which establishes that records of complaints and investigations of public officials can

⁷ Certain personnel privacy protections may also apply to subordinate judicial officers as employees.

become public records if the public interest in disclosing the record outweighs the privacy interest of the public official.⁸

The judicial process is inherently adversarial. As the adjudicators of disputes, judicial officers often are targets for allegations of misconduct, many of which arise out of litigants' dissatisfaction with the results of the court proceedings in their cases. Subordinate judicial officers, who are often assigned to high-volume court calendars, with significant numbers of self-represented litigants, may be subject to a disproportionate number of complaints.

The conduct of judicial officers is subject to the Code of Judicial Ethics and Code of Civil Procedure sections 170 et seq. These provisions address the circumstances under which a judicial officer is disqualified from presiding over a particular matter. In addition, the Code of Judicial Ethics sets forth general "rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns." (Cal. Const., art. VI, § 18(m).) The Commission on Judicial Performance (CJP) is the constitutional entity created to consider and adjudicate complaints against judicial officers. (Cal. Const., art. VI, §§ 8, 18.) Upon a petition, the Supreme Court may review a determination of the CJP. (Id., § 18(d).)

Proceedings of the CJP are confidential until it institutes formal proceedings, at which time all subsequent papers and proceedings are open to the public. (Art. VI, §18(i).) In addition to judges and justices, the CJP has discretionary jurisdiction over subordinate judicial officers. (Id., §18.1.) The California Rules of Court set forth the authority and duties of a trial court presiding judge, including oversight of judicial officers. (Cal. Rules of Court, Rule 10.603(c)(4).) Such oversight includes notice to the CJP, if appropriate, of specified conduct, and the requirement to create procedures for resolving complaints arising out of the conduct of subordinate judicial officers consistent with Rule 10.703. Rule 10.703 sets forth express procedures to be used in instances in which conduct by a subordinate judicial officer would be referred to the CJP if a judge had engaged in it, and requires that local procedures be adopted if the alleged conduct would not be within the CJP's jurisdiction. Subdivision (e) of the rule specifies that proceedings concerning a subordinate judicial officer "be conducted in a manner that is as confidential as is reasonably possible." If a formal investigation results in a finding of discipline for conduct that would otherwise be within the jurisdiction of the CJP, the presiding judge must forward to the CJP information about the action.

Policy considerations underlying the provisions outlined above, which include maintaining the independence of the judiciary and protecting the judiciary's duty to administer justice in fair and impartial manner, also apply to information concerning complaints against judges and subordinate judicial officers before the CJP institutes

⁸ *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.

formal proceedings. Confidentiality with respect to complaints against judges and judicial officers is important because these complaints are sometimes made without merit. Individuals with complaints, or with knowledge that complaints have been made, may use the information to manipulate judicial assignments or create a misleading public perception that the assigned judicial officer is not impartial. In addition, confidentiality helps encourage individuals with complaints to come forward so that the complaint may be properly addressed. (See, e.g., *City Council of Santa Monica v. Superior Court* (1962) 204 Cal.App.2d 68, 76.) Keeping confidential investigations of complaints ensures that individuals will feel comfortable filing complaints and that judges and the public are not diverted by unsubstantiated complaints, and also protects against the manipulation of judicial assignments.

In response to comments received, subdivision (f)(7) was amended to include records related to evaluations, complaints, and investigations of current judicial officers, and of applicants and candidates for judicial office. The exemption would support the principles underlying the confidentiality of CJP proceedings and proceedings under rule 10.703, which apply whether the judicial officer is an elected judicial officer or a subordinate judicial officer.

The exemption will not limit or restrict the public's existing right of access to judicial administrative records. The public's interest in the effective functioning of the judicial branch will be protected by this exemption.

Subdivision (f)(10)—Exemption for “trade secrets” and “confidential commercial and financial information”

Trade secrets

Subdivision (f)(10)(A) of the rule would exempt from mandatory disclosure those records containing trade secrets, using the definition of trade secrets set out in section 3426.1 of the Civil Code.

Commentators pointed out that this specific exemption, which has no CPRA counterpart, is unnecessary because trade secrets are already exempted from disclosure by subdivision (f)(5) of rule 10.500 (exempting records that are exempted or prohibited from disclosure under state or federal law, including provisions of the California Evidence Code relating to privilege) and Evidence Code section 1060 (providing a privilege for trade secrets). These commentators also objected to the definition of “trade secret” in the proposed rule, arguing that the definition should instead conform to the definition set forth in Civil Code section 3426.1.

Having a specific exemption for trade secrets not only ensures that such information is not subject to mandatory disclosure but is necessary to clarify the controlling definition of “trade secret.” For the purposes of Evidence Code section 1060, the definition of the term is set forth in Civil Code section 3426.1. However, for purposes of disclosing

records under the CPRA, the applicable definition of “trade secrets” is the common law definition used prior to the adoption of the Uniform Trade Secrets Act. (See Cal. Civ. Code, §3246.7) The version of the rule that circulated for public comment included the common law, pre-Uniform Trade Secrets Act definition of a trade secret.

Given the imprecise nature and infrequent use of the common law, pre-Uniform Trade Secrets Act definition of a trade secret, subdivision (f)(10)(a) has been amended to adopt the definition set forth in Civil Code §3426.1.

Confidential Commercial and Financial Information

Subdivision (f)(10)(C) exempts from mandatory disclosure records containing confidential commercial or financial information. This specific exemption, which does not have a CPRA counterpart, addresses financial and other confidential documents that are submitted by vendors during either the solicitation process or as part of their contractual relationship with a judicial branch entity and that do not rise to the level of trade secrets. Absent the exemption bidders might be disinclined to submit bids for judicial branch entity projects, interfering with effective competitive bidding and the ability to secure favorable pricing for goods and services.

Commentators suggested that this exemption is unnecessary, as confidential commercial and financial information would be exempt from mandatory disclosure under the rule by way of subdivision (f)(5) of rule 10.500 and Evidence Code section 1040 (providing a privilege for “official information”). However, the commentators’ reliance on Evidence Code section 1040 alone may be misplaced. Evidence Code Section 1040 provides a privilege from disclosing “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made” where the disclosure of such information would be against the public interest. The language referring to official disclosure and the time in which the privilege is claimed is largely inapplicable to the context of the commercial transactions of judicial branch entities. In addition, the privilege presumes a legal basis for the assurance of confidentiality. Subdivision (f)(10) sets forth that legal basis.

Under the CPRA, much confidential commercial or financial information submitted as part of a solicitation process is exempt from disclosure by way of the California Public Contract Code (See Public Contract Code §10165 regarding questionnaires and financial statements submitted by bidders for public works contracts). Because the Public Contract Code does not apply to the judicial branch, a judicial branch entity cannot rely on subdivision (f)(5) of this rule to exempt this category of information. Including in rule 10.500 a specific exemption for this category of information ensures that the information is not subject to mandatory disclosure. Rather than relying on a generic “weighing of the public interests” standard used for the “catch-all” exemption, subdivision (f)(10)(C) provides more specific guidance. To conform the language of the exemption more closely to its intent, subdivision (f)(10)(C) was amended so that it applies to only

confidential commercial and financial information submitted in response to a judicial branch entity's solicitation for goods or services or in the course of a judicial branch entity's contractual relationship with a commercial entity.

Subdivision (f)(11)—Deliberative process exemption

During the discussions among legislative staff, representatives of court employee labor groups and representatives of the judicial branch that led to SBX4 13, the parties agreed that the legislatively mandated rule of court would not require the disclosure of records that would reveal the “deliberative process” of a judicial branch entity. Discussions regarding this issue centered on case law that establishes the deliberative process exemption from the CPRA's disclosure requirement, with the understanding that these records would also not be subject to disclosure under the rule. As a result, Government Code section 68106.2 specifically directs that the rule of court address access to “nondeliberative” records. Accordingly, the rule specifically exempts from mandatory disclosure records the disclosure of which would reveal the “deliberative process” of a judicial branch entity.

In response to comments received, the exemption was clarified to ensure that it preserves a presumption in favor of disclosure, and that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has also been added to clarify that the application of the exemption is intended to reflect existing case law on “deliberative process” under the CPRA. Subdivision (f)(11) reflects the intent of the directing statute (see Gov. Code, § 68106.2(g)) and is consistent with law applicable to and practice in the other two branches of government.

The addition of a specific exemption for records that would reveal an entity's deliberative process will not limit or restrict the public's existing right of access to judicial administrative records. The public's interest in the effective functioning of the judicial branch will be protected by this exemption.

Subdivision (g)—Treatment of computer software and copyrighted materials

Subdivision (g) excludes “computer software” from the definition of “judicial administrative records,” and therefore from mandatory disclosure under the rule. The language used in the subdivision is similar but not identical to that used in its CPRA counterpart. Under the CPRA, “computer software,” which if developed by a state or local agency is not itself a public record, includes “computer mapping systems, computer programs, and computer graphics systems.” (Gov. Code., § 6254.9 (a), (b).) Subdivision (g), in addition, includes in the definition software “used by a judicial branch entity for the storage or manipulation of data.” Including this language in “computer software” excludes this software from the definition of “judicial administrative record.” Subdivision (g) also includes a provision that a judicial branch entity is not required to duplicate records under rule 10.500 in violation of any copyright.

Government Code section 6254.9 was interpreted by the Court of Appeal for the Fourth District in February of this year in *County of Santa Clara v. Superior Court* ((2009) 170 Cal.App.4th 1301.) The court determined that the definition of “computer software” used in the CPRA did not include a geographic information system “basemap.” As such, the county was required to disclose its basemap to a requester under the CPRA. In addition, the court found that the County was not entitled to impose end-user restrictions on the basemap disclosed, because the language of section 6254.9 does not expressly authorize an agency to withhold public records because of copyright interests.

In response to comments received, members of the judicial working group consulted with information technology staff within the judicial branch, and discussed the comments provided and the above case with commentators from outside the judicial branch. As revised, the rule includes more portions of the provisions of section 6254.9. To address specific concerns raised within the branch that the term “computer software” under the CPRA can be misinterpreted, and because it is generally understood that a “computer program” includes the codes that make up the program, subdivision (g) explicitly includes programming code within the definition of “computer software.”

Subdivision (i)—Availability in electronic format

Subdivision (i) requires a judicial branch entity to produce a judicial administrative record in the electronic format requested if the record already exists in that format or if the entity has previously produced the requested record in that format for its own use or to share the record with other agencies, and the disclosure would not compromise the security of the record or the computer software used to store the record. This subdivision corresponds closely to its CPRA counterpart, section 6253.9. The rule also would add that the requested format must be standard or customary for the type of information requested and be commercially available.

Subdivision (i) is intended to work in tandem with subdivision (e)(1), which provides that “selecting data from extractable fields in a single database” does not constitute “creating” a record or compiling or assembling data, which, as noted above, is not required by proposed rule 10.500. Thus, a judicial branch entity would be required to select data from a single data source using software that it already owns or licenses in response to a request, assuming other requirements of rule 10.500 are satisfied. The two subdivisions work together to both ensure public access to judicial administrative records that are increasingly held in computerized data management systems, and to protect the public’s interest in the integrity of the data and of the computer system in which it is held.

Under subdivision (i), the judicial branch entity is required to transmit the judicial administrative record requested in a format that is accessible to the requester, but is not required to transmit the data in exactly the same form in which it is held by the entity. Thus, the entity would not be required to produce the requested data as the data exists within the entity’s computerized document management system. To protect the public

interest in the integrity of judicial branch computer systems, many of which are also interlinked with computer systems of justice partners, subdivision (i) does not require the entity to include with the data any computer programming used by the entity to store and manipulate the data.

The following example illustrates how subdivision (i) would be applied in practice. A requester seeks a particular superior court's budgets for the previous three years in a format compatible with Microsoft Excel. Assuming other requirements of this rule are met, the court selects these data for the requester if the information sought is available from a single database. The court is required to provide the record in a format compatible with Excel only if the court had previously produced such a record in Excel for its own use or to share with other entities. The court, however, is not required to produce the data in a format that is not standard and is not available to the general public, such as a customized database proprietary to the requester.

If the request requires the compilation or extraction of records and therefore constitutes "creating" a record under the rule, or if the request seeks a record that is usually produced on a different schedule, the judicial branch entity may choose to grant or deny the request. If the judicial branch entity agrees to produce the record in response to the request, the requester will be charged the costs of producing the record, including the costs of any required computer programming.

Subdivision (j)—Dispute resolution

Current rule 10.803 provides an expedited process by which disputes regarding access to AOC and superior court budget and management information may be heard in the superior court by a justice of the Court of Appeal. Government Code section 71675(b), the statutory authority for the hearing process set forth in current rule 10.803, limits the availability of that process to disputes with the Judicial Council, the AOC, and the superior courts regarding records that are required to be maintained under rule 10.803. For disputes under current rule 10.803, attorney fees may be granted to prevailing plaintiffs through California's private attorney general statute, Code of Civil Procedure section 1021.5.

In response to comments received, subdivision (j) was amended so that the hearing process established in current rule 10.803 will continue to apply to all disputes currently subject to rule 10.803. All other disputes under proposed rule 10.500 will be subject to the process in subdivisions (j)(2) through (j)(6), which is equivalent to the CPRA's dispute resolution process provision that provides for injunctive or declaratory relief or writ of mandate in any court of competent jurisdiction. Because a claimant may have disputes that are both eligible and ineligible for the hearing process in current rule 10.803, the rule will also provide that a claimant may "opt out" of the expedited hearing and appeal procedure of current rule 10.803 and proceed under subdivisions (j)(2) through (j)(6) instead. Subdivision (j) will also provide, like the CPRA, that a prevailing

party is entitled to recover reasonable costs and attorney fees. If the judicial branch entity is the prevailing party, it may recover its attorney fees and costs only if the claim is determined to be clearly frivolous.

Rule 10.501—Maintenance of budget and management information requirement

Rule 10.500 will replace most of the content of current rule 10.802 regarding public access to a limited category of budget and management information. To avoid potential confusion, rule 10.802 will be repealed in its entirety.

Current rule 10.802, however, also contains requirements that the superior courts and the AOC maintain the specified categories of budget and management information. This maintenance requirement, with some clarifications acknowledging the new rules, will be moved into new rule 10.501 and thus survive the repeal of rule 10.802. The maintenance requirements of new rule 10.501 are not intended to apply to any records other than those delineated in current rule 10.802.

Alternatives Actions Considered

The language of SBX4 13 requires the council to adopt rules of court that provide public access to certain records of the judicial branch to take effect January 1, 2010. Therefore, no alternatives to adopting the rules were considered. The rationale and comment sections of the report discuss the alternatives considered with respect to individual provisions of the rules.

Comments From Interested Parties

This proposal was circulated for public comment for four weeks (from October 1 through October 29, 2009). In addition, specific input was also sought on this proposal from appellate presiding justices, appellate court clerk/administrators, trial court presiding judges, court executive officers, legislative staff, labor unions representing trial court employees, newspaper organizations, and organizations advocating open access to government information.

Thirty-five individuals or organizations submitted comments on this proposal. Ten commentators agreed with the proposal, 18 commentators agreed with the proposal if modified, 5 commentators did not agree with the proposal, and 3 commentators did not indicate their position on the proposal as a whole, but provided comments on specific aspects of the proposal. A chart containing the full text of the comments received and the AOC's and judicial working group's responses to the comments is attached beginning on page 55.

Comments received on the proposed rules can be grouped into major themes, each of which is discussed below.

1. *Breadth of the rule*

As circulated for public comment, subdivision (b)(1) of rule 10.500 used the term “nonadjudicative records” in describing the subject of the rule. Many judicial branch commentators questioned the term “nonadjudicative records” and the broad definition of “judicial administrative record.” Because a majority of records held by a judicial branch entity are “adjudicative,” commentators offered, the rules should cover only a smaller portion of judicial branch records. Other judicial branch commentators noted that the language of SBX4 13 listing the types of records that are subject to mandatory access should be interpreted as delineating the types of records intended to be covered by the rule. Commentators therefore urge that the rule should not define “judicial administrative record” more broadly than necessary to cover those types of records.

As discussed in the overview of subdivision (b) of rule 10.500, subdivision (b)(1) was amended to state affirmatively that the rule applies to judicial administrative records and not to nonadjudicative records. Furthermore the listing of specific records and types of records under section 68106.2 was not intended to be the exclusive list of records available under the rule to be drafted. Rather, the statute was intended only as interim provision while the judicial branch adopted a broader rule on public access to judicial administrative records.

2. *Specific examples of judicial administrative records*

Executed Contracts

Commentators from outside the judicial branch objected to the term “executed contracts,” arguing that the term “executed” means that copies of contracts that have not been fully performed by the parties would not be subject to public disclosure, contrary to the requirements of the CPRA and the intended spirit of rule 10.500. To clarify, as used in rule 10.500, the term “executed contract” means contracts that have been signed by all parties intended to be bound by the contracts’ terms and conditions. This term does not refer to contracts that have been fully performed.

Salary and Benefit Information

Commentators from outside the judicial branch objected to the description “actual and budgeted employee salary and benefit information, by position classification” arguing that the description of this information implied that individual employee salary and benefit information would not be subject to public access, which is contrary to the requirements of the CPRA and case law interpreting that section as reflected in the Supreme Court’s opinion in *Int’l Fed. of Professional & Technical Engineers v. Superior Court* ((2007) 42 Cal.4th 319). To clarify that individual employee salary and benefit information would be subject to public access, subdivision (e)(2) was amended to delete the reference to “position classification.”

Final Audits

Commentators from outside the judicial branch objected to the term “final audits,” arguing that the inclusion of this term would allow a judicial branch entity to withhold finished, but not “final” audit reports or to edit out the negative findings of a complete audit prior to disclosure. These comments indicate a lack of understanding of the audit process as it is conducted within the judicial branch. As used by the AOC Finance Division, which performs audit services for the trial and appellate courts, the term “final audit report” refers to a document that has gone through the entire audit process. Both the investigative aspect of the audit, and the analysis and resulting findings, must be completed for an audit to be considered “final.” Accordingly, no action was taken in response to these comments.

3. *Electronic communications*

The inclusion of electronic mail (e-mail) in the definition of records subject to disclosure under the rule generated the largest volume of comment from judicial branch commentators. The primary concerns among judicial officers were the unintended disclosure of e-mail related to the adjudicative functions of a court and unnecessary disclosure of personal correspondence unrelated to judicial duties that would implicate privacy and security concerns. Currently, very few courts have policies in place regarding segregation or retention of e-mail. In general, comments received indicate that although judicial officers frequently use e-mail to discuss case-related issues, e-mail and text messaging have so far been treated informally throughout the branch.

The comments offered several suggestions regarding the treatment of e-mail, including exempting from disclosure all e-mail between judicial officers “in the normal course of business,” exempting from disclosure personal e-mails, exempting from disclosure all e-mail not related to specific categories of judicial administrative records and making the disclosure requirement vis-à-vis e-mails and text messages apply prospectively.

As discussed in the overview of subdivision (b) of rule 10.500, a provision making the disclosure requirement of e-mails and text messages apply prospectively was added. Subdivision (c) of rule 10.500 was also amended to clarify that the definition of a judicial administrative record does not include writings of a personal nature.

4. *Fees*

Judicial branch commentators suggested that fees should cover all of the responding entity’s direct and indirect costs, including staff time, and that all requesters should pay for search and review time regardless of the purpose of the request. Other commentators urged that the rule should follow the CPRA and allow judicial branch entities to charge a fee that represents only the direct cost of duplication. CPRA case law establishes that the direct cost of duplication includes only the cost of supplies, such as paper and toner, and

potentially the cost of compensation of the person making the copies.⁹ Some commentators suggested that if FOIA were to be used as a model, the rule should also include provisions like those in FOIA that allow educational institutions, noncommercial scientific institutions, and representatives of the media to pay only the direct duplication costs after 100 pages, which fees may also be waived “if the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹⁰ As discussed in the Rationale for Recommendation section, two alternatives are proposed for consideration.

5. *Specific exemptions from disclosure*

(f)(1)–Preliminary Writings

Commentators from outside the judicial branch objected to the fact that the language of this exemption did not exactly track the language of its CPRA counterpart, section 6254(a). Specifically, these commentators noted as missing the condition that the preliminary writings, etc. be the sort “that are not retained by the public agency in the ordinary course of business.” As discussed in the overview of subdivision (f) of rule 10.500, subdivision (f)(1) was amended to track its CPRA counterpart exactly.

Subdivision (f)(7)–Exemption for Records Relating to Complaints or Investigations of Judicial Officers

Commentators from outside the judicial branch suggested that complaints and investigations regarding subordinate judicial officers should not be exempt because subordinate judicial officers are employees. These commentators point to case law under the CPRA establishing that public employees do not have a right to privacy with respect to disclosure of complaints against them when the complaints are “well-founded.”¹¹ Commentators within the judicial branch noted that the principles underlying the confidentiality of records related to complaints and investigations regarding judicial officers also apply to records related to evaluations of applicants or candidates for judicial office.

As discussed in the overview of subdivision (f) of rule 10.500, subdivision (f)(7) was amended to apply the exemption to evaluations of applicants or candidates for judicial office. Also as discussed in the overview, no action was taken in response to the comments to change the treatment of records regarding complaints and investigations of subordinate judicial officers.

⁹ *North Cty. Parents, supra*, 23 Cal.App.4th at 148.

¹⁰ 5 U.S.C. §552(a)(4)(iii).

¹¹ *BRV, supra*, 143 Cal.App.4th at 742.

(f)(10)(A)–Trade Secrets

As discussed in the overview of subdivision (f) of rule 10.500, commentators from outside the judicial branch objected to the trade secrets exemption as unnecessary and incorporating the wrong definition of trade secret. As discussed in the overview of subdivision (f) of rule 10.500, subdivision (f)(10) was amended to adopt the definition of trade secret set forth in Civil Code section 3426.1.

(f)(10)(C)–Confidential Commercial and Financial Information

As discussed in the overview of subdivision (f) of rule 10.500, commentators from outside the judicial branch objected to the confidential commercial and financial information exemption as unnecessary. These commentators also objected to the definition of “confidential information” as too vague. As discussed in the overview of subdivision (f) of rule 10.500, subdivision (f)(10)(C) was amended to conform more closely to its intent, i.e., to apply only to confidential commercial and financial information submitted in response to a judicial branch entity’s solicitation for goods or services or in the course of a judicial branch entity’s contractual relationship with a commercial entity. The definition of “confidential commercial and financial information” was also simplified to reflect the limited scope of the exemption.

(f)(11)–Deliberative Process

Because the CPRA does not provide a specific exemption for records that reflect the deliberative process engaged in by judicial branch entities or personnel, commentators from outside the judicial branch suggested that the rule similarly not incorporate a specific “deliberative process” exemption. These commentators also suggested that if the rule were to include a deliberative process exemption, it make clear that the presumption should be in favor of disclosure and that the exemption be applied upon the specific facts, in a case-by-case analysis.

As discussed in the overview of subdivision (f) of rule 10.500, subdivision (f)(11) was amended to clarify that it preserves a presumption in favor of disclosure, and that the exemption be applied on the specific facts, in a case-by-case analysis. An advisory committee comment clarifying that the application of the exemption is intended to reflect existing case law on “deliberative process” under the CPRA has also been added.

6. *Records Regarding Communications Pertaining to Judicial Ethics*

Commentators within the judicial branch wanted clarification on the rules’ impact on records regarding communications pertaining to judicial ethics. Records of a judicial officer regarding judicial ethics inquiries may be exempt from disclosure under the rules. To the extent that a record relating to judicial ethics pertains to a particular case, the record would be considered an adjudicative record and thus not subject to the disclosure requirements of the rules. To the extent that a record is considered a judicial administrative record, and depending on the specific facts, the record may be exempt from mandatory disclosure under any one or all of the following subdivisions:

subdivision (f)(3) (personal privacy exemption), subdivision (f)(7) (evaluations, complaints, and investigations of judicial officers exemption), and subdivision (f)(12) (catch-all exemption). In addition, the proposed rules would have no effect on rule 9.80 and its provisions regarding the confidentiality of communications to and from the Supreme Court Committee on Judicial Ethics Opinions.

7. *Treatment of computer software*

Judicial branch commentators expressed concern that the definition of “computer software” was not broad enough to cover the variety of computer databases, systems, and programs currently under development within the branch. Particular concerns were raised that the rule not be subject to an interpretation that would require the mandatory disclosure of source code used in programs such as case management systems. Many commentators noted that major security concerns would be presented if judicial branch entities were to be required to disclose programming code or other information that would allow requesters to access the judicial branch’s computer systems directly. This is a particularly acute concern because case management systems contain confidential juvenile records, domestic violence victim information, and other confidential information. Additionally, if individuals could get access to source code, they could compromise the integrity of the system and alter case or participant information that may be available in no place other than the electronic case management system and may be critical to a judge’s decision-making.

Commentators from outside the judicial branch suggested that the rule be drafted identically to the CPRA and noted that the relevant CPRA section was interpreted by the Court of Appeal recently in *County of Santa Clara v. Superior Court* ((2009) 170 Cal.App.4th 1301). The commentators noted that the county was required under the decision to make source data available under the CPRA, and that source code should be treated identically. The drafters of the rule do not interpret the *Santa Clara* case as requiring such disclosure.

As discussed in the overview of subdivision (g) of rule 10.500, the subdivision was amended to incorporate the CPRA’s definition of “computer software” and make explicit that a judicial branch entity is not required to disclose records under the rule in violation of copyright.

8. *Dispute resolution*

Commentators from outside the judicial branch suggested that all disputes under the rule should be subject to the expedited hearing process that is in place under current rule 10.803. Other commentators noted that the appeal process described in subdivision (j)(5) of proposed rule 10.500 contradicts the appeal process already available under current rule 10.803(d), and suggested that all disputes under the rule should also be subject to this appeal process.

As discussed in the overview of subdivision (j) of rule 10.500, subdivision (j) was amended so that the hearing process established in current rule 10.803 will continue to apply to all disputes currently subject to rule 10.803. An “opt-out” provision was also added to allow a claimant with disputes that are both eligible and ineligible for the hearing process in rule 10.803 to proceed under subdivision (j)(2) instead.

Implementation Requirements and Costs

The adoption of these rules will create substantial new workload for courts and the AOC. Court and AOC staff will need to undergo training to understand and implement their responsibilities under the rules. The AOC is preparing training materials and programs to assist judicial branch entities in implementing their responsibilities under the rules.

Court and AOC staff will also have to devote a significant amount of time to respond to requests under the time conditions required by the rules. The main obstacle to implementing the recommendation is the current and foreseeable budget situation and its impact on staffing. AOC staff anticipates that the costs of complying with the rules will be a sustained annual cost.

Recommendation

On behalf of and with the endorsement of the judicial working group, Administrative Office of the Courts staff recommends that the Judicial Council, effective January 1, 2010:

1. Adopt rules 10.500(a)–(e)(3) and (e)(5)–(j) and 10.501, which provide public access to nondeliberative and nonadjudicative court records, budget and management information relating to the administration of the courts;
2. Adopt a fee structure to be imposed under subdivision (e)(4): Alternative 1, Alternative 2, or some other fee structure to be specified by the council.

If Alternative 2 is adopted, adopt Fee Guidelines in the form of Attachment A to this report, and approve a one-time allocation of \$1.5 million from the Trial Court Trust Fund, subject to available appropriations, to provide a funding source to reimburse trial courts for specified expenses incurred between January 1, 2010, and December 31, 2011, in responding to requests for public access to judicial administrative records under rule 10.500 and as provided in the Fee Guidelines and procedures and guidelines to be issued by the Administrative Office of the Courts.

3. Adopt rule 10.501, which requires the maintenance of certain trial court budget and management information as set forth in current rules 10.802(a) and 10.802(b);

4. Repeal rule 10.802, on maintenance of and public access to budget and management information;
5. Amend rule 10.803, on information access disputes, to reflect the adoption of rules 10.500 and 10.501; and
6. Direct the Supreme Court, Courts of Appeal, superior courts, and Administrative Office of the Courts to maintain records regarding requests for public access to judicial administrative records and information, including the time, cost, and type of court resources spent in responding to requests received, and costs recovered, and to provide that information to the Administrative Office of the Courts upon request to enable compilation of branchwide data and presentation to the council of a report analyzing the impact of the rules on court operations statewide;
7. Direct the Administrative Office of the Courts to compile and present to the council by December 31, 2011, branchwide information about the impact of the new rules on public access to judicial administrative records.
8. Adopt as findings the rationale for recommendation in this report, which demonstrates the impact of the proposed rules on the public's right of access to judicial administrative records and the important public interests protected by these rules and the need for protecting those interests.

The text of rules 10.500 and 10.501 and amended rule 10.803 is attached at pages 30-52.

Attachments

Rules 10.500 and 10.501 of the Cal. Rules of Court are adopted, rule 10.802 is repealed, and rule 10.803 is amended, effective January 1, 2010, to read:

1 TITLE 10. JUDICIAL ADMINISTRATION RULES

2
3 Division 3. Judicial Administration Rules Applicable to All Courts

4
5 **Rule 10.500. Public access to judicial administrative records**

6
7 **(a) Intent**

- 8
9 (1) The Judicial Council intends by this rule to implement Government
10 Code section 68106.2(g), added by Senate Bill X4 13 (Stats. 2009-10,
11 4th Ex. Sess. ch. 22), which requires adoption of rules of court that
12 provide public access to nondeliberative and nonadjudicative court
13 records, budget and management information.
14
15 (2) This rule clarifies and expands the public's right of access to judicial
16 administrative records and must be broadly construed to further the
17 public's right of access.
18

19 **(b) Application**

- 20
21 (1) This rule applies to public access to judicial administrative records,
22 including records of budget and management information relating to
23 the administration of the courts.
24
25 (2) This rule does not apply to, modify or otherwise affect existing law
26 regarding public access to adjudicative records.
27
28 (3) This rule does not restrict the rights to disclosure of information
29 otherwise granted by law to a recognized employee organization.
30
31 (4) This rule does not affect the rights of litigants, including parties to
32 administrative proceedings, under the laws of discovery of this state,
33 nor does it limit or impair any rights of discovery in a criminal case.
34
35 (5) This rule does not apply to electronic mail and text messages sent or
36 received before the effective date of this rule.
37

38 **(c) Definitions**

39
40 As used in this rule:
41

1 (1) “Adjudicative record” means any writing prepared for or filed or used
2 in a court proceeding, the judicial deliberation process, or the
3 assignment or reassignment of cases and of justices, judges (including
4 temporary and assigned judges), and subordinate judicial officers, or of
5 counsel appointed or employed by the court.

6
7 (2) “Judicial administrative record” means any writing containing
8 information relating to the conduct of the people’s business that is
9 prepared, owned, used, or retained by a judicial branch entity regardless
10 of the writing’s physical form or characteristics, except an adjudicative
11 record. The term “judicial administrative record” does not include
12 records of a personal nature that are not used in or do not relate to the
13 people’s business, such as personal notes, memoranda, electronic mail,
14 calendar entries, and records of Internet use.

15
16 (3) “Judicial branch entity” means the Supreme Court, each Court of
17 Appeal, each superior court, the Judicial Council, and the
18 Administrative Office of the Courts.

19
20 (4) “Judicial branch personnel” means justices, judges (including
21 temporary and assigned judges), subordinate judicial officers, members
22 of the Judicial Council and its advisory bodies, and directors, officers,
23 employees, volunteers, and agents of a judicial branch entity.

24
25 (5) “Person” means any natural person, corporation, partnership, limited
26 liability company, firm, or association.

27
28 (6) “Writing” means any handwriting, typewriting, printing,
29 photographing, photocopying, electronic mail, fax, and every other
30 means of recording on any tangible thing any form of communication
31 or representation, including letters, words, pictures, sounds, symbols, or
32 combinations, regardless of the manner in which the record has been
33 stored.

34
35 **(d) Construction of rule**

36
37 (1) Unless otherwise indicated, the terms used in this rule have the same
38 meaning as under the Legislative Open Records Act (Gov. Code, §
39 9070 et seq.) and the California Public Records Act (Gov. Code, §
40 6250 et seq.) and must be interpreted consistently with the
41 interpretation applied to the terms under those acts.

42
43 (2) This rule does not require the disclosure of a record if the record is

1 exempt from disclosure under this rule or is the type of record that
2 would not be subject to disclosure under the Legislative Open Records
3 Act or the California Public Records Act.
4

5 **(e) Public access**

6
7 **(1) Access**

8
9 **(A) A judicial branch entity must allow inspection and copying of**
10 **judicial administrative records unless the records are exempt from**
11 **disclosure under this rule or by law.**

12
13 **(B) Nothing in this rule requires a judicial branch entity to create any**
14 **record or to compile or assemble data in response to a request for**
15 **judicial administrative records if the judicial branch entity does**
16 **not compile or assemble the data in the requested form for its own**
17 **use or for provision to other agencies. For purposes of this rule,**
18 **selecting data from extractable fields in a single database using**
19 **software already owned or licensed by the judicial branch entity**
20 **does not constitute creating a record or compiling or assembling**
21 **data.**

22
23 **(C) If a judicial administrative record contains information that is**
24 **exempt from disclosure and the exempt portions are reasonably**
25 **segregable, a judicial branch entity must allow inspection and**
26 **copying of the record after deletion of the portions that are**
27 **exempt from disclosure. A judicial branch entity is not required to**
28 **allow inspection or copying of the portion of a writing that is a**
29 **judicial administrative record unless that portion is reasonably**
30 **segregable from the portion that constitutes an adjudicative**
31 **record.**

32
33 **(D) If requested, a superior court must provide a copy of the certified**
34 **judicial administrative record if the judicial administrative record**
35 **requested has previously been certified by the superior court.**

36
37 **(2) Examples**

38
39 **Judicial administrative records subject to inspection and copying unless**
40 **exempt from disclosure under subdivision (f) include, but are not**
41 **limited to, the following:**
42

- 1 (A) Budget information submitted to the Administrative Office of the
 2 Courts after enactment of the annual Budget Act;
- 3 (B) Any other budget and expenditure document pertaining to the
 4 administrative operation of the courts, including quarterly
 5 financial statements and statements of revenue, expenditure, and
 6 reserves;
- 7
- 8 (C) Actual and budgeted employee salary and benefit information;
 9
- 10 (D) Copies of executed contracts with outside vendors and payment
 11 information and policies concerning goods and services provided
 12 by outside vendors without an executed contract;
- 13
- 14 (E) Final audit reports; and
- 15
- 16 (F) Employment contracts between judicial branch entities and their
 17 employees.

18

19 (3) Procedure for requesting records

20

21 A judicial branch entity must make available on its public Web site or
 22 otherwise publicize the procedure to be followed to request a copy of or
 23 to inspect a judicial administrative record. At a minimum, the
 24 procedure must include the address to which requests are to be
 25 addressed, to whom requests are to be directed, and the office hours of
 26 the judicial branch entity.

27

28

29 Alternative 1- Costs of duplication, search, and review¹

30

31 (4) Costs of duplication, search, and review

32

33 (A) A judicial branch entity, on request, must provide a copy of a
 34 judicial administrative record not exempt from disclosure if the
 35 record is of a nature permitting copying, subject to payment of the
 36 fee specified in this rule or other applicable statutory fee. A
 37 judicial branch entity may require advance payment of any fee.

38

¹ Alternative 1 and the immediately following Alternative 2 each set forth a complete subdivision (e)(4). The alternative subdivision (e)(4) that is not adopted will be deleted in its entirety from the published version of the rule. Alternative 1 is endorsed by the judicial working group. Alternative 2 is proposed by the Administrative Office of the Courts.

1 (B) A judicial branch entity may impose on all requests a fee
2 reasonably calculated to cover the judicial branch entity's direct
3 costs of duplication of a record or of production of a record in an
4 electronic format under subdivision (i). The fee includes:

5
6 (i) A charge per page, per copy, or otherwise, representing the
7 direct costs of equipment, supplies, and staff time required
8 to duplicate or produce the requested record; and

9
10 (ii) Any other direct costs of duplication or production,
11 including, but not limited to, the costs incurred by a judicial
12 branch entity in retrieving the record from a remote storage
13 facility or archive and the costs of mailing responsive
14 records.

15
16 (C) In the case of requests for records for commercial use, a judicial
17 branch entity may impose, in addition to the fee in (B), a fee
18 reasonably calculated to cover the actual costs of staff search and
19 review time, based on an hourly rate for salary and benefits of
20 each employee involved.

21
22 (D) In the case of requests for records other than commercial use, if
23 the total staff search and review time exceeds two hours, a
24 judicial branch entity may impose, in addition to the fee in (B), a
25 fee reasonably calculated to cover the actual costs of staff search
26 and review time in excess of two hours, based on an hourly rate
27 for salary and benefits of each employee involved. This paragraph
28 will remain in effect until December 31, 2012.

29
30 (E) For purposes of this rule:

31
32 (i) "Commercial use" means a request for a use or purpose that
33 furtheres the commercial, trade, or profit interests of the
34 requester or the person on whose behalf the request is being
35 made. A request from a representative of the news media
36 that supports its news-dissemination function is not a
37 request for a commercial use.

38
39 (ii) "Representative of the news media" means a person who
40 regularly gathers, prepares, collects, photographs, records,
41 writes, edits, reports, or publishes news or information that
42 concerns local, national, or international events or other
43 matters of public interest for dissemination to the public for

1 a substantial portion of the person’s livelihood or for
2 substantial financial gain.

3
4 (iii) “Search and review time” means actual time spent
5 identifying and locating judicial administrative records,
6 including material within documents, responsive to a
7 request; determining whether any portions are exempt from
8 disclosure; and performing all tasks necessary to prepare the
9 records for disclosure, including redacting portions exempt
10 from disclosure. “Search and review time” does not include
11 time spent resolving general legal or policy issues regarding
12 the applicability of particular exemptions.

13
14 (F) By January 1, 2012, the Judicial Council will review and evaluate
15 the numbers of requests received, the time necessary to respond,
16 and the fees imposed by judicial branch entities for access to
17 records and information. The Judicial Council’s review will
18 consider the impact of this rule on both the public’s access to
19 records and information and on judicial branch entities’ ability to
20 carry out and fund core judicial operations.

21
22
23 Alternative 2— Costs of duplication, search, and review

24
25 (4) Costs of duplication, search, and review

26
27 (A) A judicial branch entity, on request, must provide a copy of a
28 judicial administrative record not exempt from disclosure if the
29 record is of a nature permitting copying, subject to payment of the
30 fee specified in this rule or other applicable statutory fee. A
31 judicial branch entity may require advance payment of any fee.

32
33 (B) A judicial branch entity may impose on all requests a fee
34 reasonably calculated to cover the judicial branch entity’s direct
35 costs of duplication of a record or of production of a record in an
36 electronic format under subdivision (i). The fee includes:

37
38 (i) A charge per page, per copy, or otherwise, as established
39 and published by the Judicial Council, or as established by
40 the judicial branch entity following a notice and comment
41 procedure specified by the Judicial Council, representing the
42 direct costs of equipment, supplies, and staff time required
43 to duplicate or produce the requested record; and

1
2 (ii) Any other direct costs of duplication or production,
3 including, but not limited to, the costs incurred by a judicial
4 branch entity in retrieving the record from a remote storage
5 facility or archive and the costs of mailing responsive
6 records.

7
8 (C) In the case of requests for records for commercial use, a judicial
9 branch entity may impose, in addition to the fee in (B), a fee
10 reasonably calculated to cover the actual costs of staff search and
11 review time, based on an hourly rate for salary and benefits of
12 each employee involved.

13
14 (D) For purposes of this rule:

15
16 (i) “Commercial use” means a request for a use or purpose that
17 furtheres the commercial, trade, or profit interests of the
18 requester or the person on whose behalf the request is being
19 made. A request from a representative of the news media
20 that supports its news-dissemination function is not a
21 request for a commercial use.

22
23 (ii) “Representative of the news media” means a person who
24 regularly gathers, prepares, collects, photographs, records,
25 writes, edits, reports, or publishes news or information that
26 concerns local, national, or international events or other
27 matters of public interest for dissemination to the public for
28 a substantial portion of the person's livelihood or for
29 substantial financial gain.

30
31 (iii) “Search and review time” means actual time spent
32 identifying and locating judicial administrative records,
33 including material within documents, responsive to a
34 request; determining whether any portions are exempt from
35 disclosure; and performing all tasks necessary to prepare the
36 records for disclosure, including redacting portions exempt
37 from disclosure. “Search and review time” does not include
38 time spent resolving general legal or policy issues regarding
39 the applicability of particular exemptions.

40
41 (E) By January 1, 2012, the Judicial Council will review and evaluate
42 the numbers of requests received, the time necessary to respond,
43 and the fees imposed by judicial branch entities for access to

1 records and information. The Judicial Council’s review will
2 consider the impact of this rule on both the public’s access to
3 records and information and on judicial branch entities’ ability to
4 carry out and fund core judicial operations.
5

6
7 (5) *Inspection*

8 A judicial branch entity must make judicial administrative records in its
9 possession and not exempt from disclosure open to inspection at all
10 times during the office hours of the judicial branch entity provided that
11 the record is of a nature permitting inspection.
12

13
14 (6) *Time for determination of disclosable records*

15
16 A judicial branch entity, on a request that reasonably describes an
17 identifiable record or records, must determine, within 10 calendar days
18 from receipt of the request, whether the request, in whole or in part,
19 seeks disclosable judicial administrative records in its possession and
20 must promptly notify the requesting party of the determination and the
21 reasons for the determination.
22

23 (7) *Response*

24
25 If a judicial branch entity determines that a request seeks disclosable
26 judicial administrative records, the judicial branch entity must make the
27 disclosable judicial administrative records available promptly. The
28 judicial branch entity must include with the notice of the determination
29 the estimated date and time when the records will be made available. If
30 the judicial branch entity determines that the request, in whole or in
31 part, seeks nondisclosable judicial administrative records, it must
32 convey its determination in writing, include a contact name and
33 telephone number to which inquiries may be directed, and state the
34 express provision of this rule justifying the withholding of the records
35 not disclosed.
36

37 (8) *Extension of time for determination of disclosable records*

38
39 In unusual circumstances, to the extent reasonably necessary to the
40 proper processing of the particular request, a judicial branch entity may
41 extend the time limit prescribed for its determination under (e)(6) by no
42 more than 14 calendar days by written notice to the requesting party,
43 stating the reasons for the extension and the date on which the judicial

1 branch entity expects to make a determination. As used in this section,
2 “unusual circumstances” means the following:

3
4 (A) The need to search for and collect the requested records from
5 multiple locations or facilities that are separate from the office
6 processing the request;

7
8 (B) The need to search for, collect, and appropriately examine a
9 voluminous amount of records that are included in a single
10 request; or

11
12 (C) The need for consultation, which must be conducted with all
13 practicable speed, with another judicial branch entity or other
14 governmental agency having substantial subject matter interest in
15 the determination of the request, or with two or more components
16 of the judicial branch entity having substantial subject matter
17 interest in the determination of the request.

18
19 (9) Reasonable efforts

20
21 (A) On receipt of a request to inspect or obtain a copy of a judicial
22 administrative record, a judicial branch entity, in order to assist
23 the requester in making a focused and effective request that
24 reasonably describes an identifiable judicial administrative record,
25 must do all of the following to the extent reasonable under the
26 circumstances:

27
28 (i) Assist the requester in identifying records and information
29 responsive to the request or to the purpose of the request, if
30 stated;

31
32 (ii) Describe the information technology and physical location
33 in which the records exist; and

34
35 (iii) Provide suggestions for overcoming any practical basis for
36 denying inspection or copying of the records or information
37 sought.

38
39 (B) The requirements of (A) will be deemed to have been satisfied if
40 the judicial branch entity is unable to identify the requested
41 information after making a reasonable effort to elicit additional
42 clarifying information from the requester that helps identify the
43 record or records.

1
2 (C) The requirements of (A) do not apply to a request for judicial
3 administrative records if the judicial branch entity makes the
4 requested records available or determines that the requested
5 records are exempt from disclosure under this rule.

6
7 (10) *No obstruction or delay*

8
9 Nothing in this rule may be construed to permit a judicial branch entity
10 to delay or obstruct the inspection or copying of judicial administrative
11 records that are not exempt from disclosure.

12
13 (11) *Greater access permitted*

14
15 Except as otherwise prohibited by law, a judicial branch entity may
16 adopt requirements for itself that allow for faster, more efficient, or
17 greater access to judicial administrative records than prescribed by the
18 requirements of this rule.

19
20 (12) *Control of records*

21
22 A judicial branch entity must not sell, exchange, furnish, or otherwise
23 provide a judicial administrative record subject to disclosure under this
24 rule to a private entity in a manner that prevents a judicial branch entity
25 from providing the record directly under this rule. A judicial branch
26 entity must not allow a private entity to control the disclosure of
27 information that is otherwise subject to disclosure under this rule.

28
29 **(f) Exemptions**

30
31 Nothing in this rule requires the disclosure of judicial administrative records
32 that are any of the following:

33
34 (1) Preliminary writings, including drafts, notes, working papers, and
35 inter-judicial branch entity or intra-judicial branch entity memoranda,
36 that are not retained by the judicial branch entity in the ordinary course
37 of business, if the public interest in withholding those records clearly
38 outweighs the public interest in disclosure;

39
40 (2) Records pertaining to pending or anticipated claims or litigation to
41 which a judicial branch entity is a party or judicial branch personnel are
42 parties, until the pending litigation or claim has been finally adjudicated
43 or otherwise resolved;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

- (3) Personnel, medical, or similar files, or other personal information whose disclosure would constitute an unwarranted invasion of personal privacy, including, but not limited to, records revealing home addresses, home telephone numbers, cellular telephone numbers, private electronic mail addresses, and social security numbers of judicial branch personnel and work electronic mail addresses and work telephone numbers of justices, judges (including temporary and assigned judges), subordinate judicial officers, and their staff attorneys;
- (4) Test questions, scoring keys, and other examination data used to develop, administer, and score examinations for employment, certification, or qualification;
- (5) Records whose disclosure is exempted or prohibited under state or federal law, including provisions of the California Evidence Code relating to privilege, or by court order in any court proceeding;
- (6) Records whose disclosure would compromise the security of a judicial branch entity or the safety of judicial branch personnel, including but not limited to, court security plans, and security surveys, investigations, procedures, and assessments;
- (7) Records related to evaluations of, complaints regarding, or investigations of justices, judges (including temporary and assigned judges), subordinate judicial officers, and applicants or candidates for judicial office;
- (8) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the judicial branch entity related to the acquisition of property or to prospective public supply and construction contracts, until all of the property has been acquired or the relevant contracts have been executed. This provision does not affect the law of eminent domain;
- (9) Records related to activities governed by Government Code sections 71600 et seq. and 71800 et seq. that reveal deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy or that provide instruction, advice, or training to employees who are not represented by employee organizations under those sections. Nothing in this subdivision limits the disclosure duties of a judicial branch entity with

1 respect to any other records relating to the activities governed by the
2 employee relations acts referred to in this subdivision;
3

4 (10) Records that contain trade secrets or privileged or confidential
5 commercial and financial information submitted in response to a
6 judicial branch entity’s solicitation for goods or services or in the
7 course of a judicial branch entity’s contractual relationship with a
8 commercial entity. For purposes of this rule:
9

10 (A) “Trade secret” means information, including a formula, pattern,
11 compilation, program, device, method, technique, or process, that:
12

13 (i) Derives independent economic value, actual or potential,
14 from not being generally known to the public or to other
15 persons who can obtain economic value from its disclosure
16 or use; and
17

18 (ii) Is the subject of efforts that are reasonable under the
19 circumstances to maintain its secrecy;
20

21 (B) “Privileged information” means material that falls within
22 recognized constitutional, statutory, or common law privileges;
23

24 (C) “Confidential commercial and financial information” means
25 information whose disclosure would:
26

27 (i) Impair the judicial branch entity’s ability to obtain necessary
28 information in the future; or
29

30 (ii) Cause substantial harm to the competitive position of the
31 person from whom the information was obtained.
32

33 (11) Records whose disclosure would disclose the judicial branch entity’s or
34 judicial branch personnel’s decision-making process, provided that, on
35 the facts of the specific request for records, the public interest served by
36 nondisclosure clearly outweighs the public interest served by disclosure
37 of the record; or
38

39 (12) If, on the facts of the specific request for records, the public interest
40 served by nondisclosure of the record clearly outweighs the public
41 interest served by disclosure of the record.
42

1 **(g) Computer software; copyrighted materials**

2
3 (1) Computer software developed by a judicial branch entity or used by a
4 judicial branch entity for the storage or manipulation of data is not a
5 judicial administrative record under this rule. For purposes of this rule
6 “computer software” includes computer mapping systems, computer
7 graphic systems, and computer programs, including the source, object,
8 and other code in a computer program.

9
10 (2) This rule does not limit a judicial branch entity’s ability to sell, lease, or
11 license computer software for commercial or noncommercial use.

12
13 (3) This rule does not create an implied warranty on the part of any judicial
14 branch entity for errors, omissions, or other defects in any computer
15 software.

16
17 (4) This rule does not limit any copyright protection. A judicial branch
18 entity is not required to duplicate records under this rule in violation of
19 any copyright.

20
21 (5) Nothing in this subdivision is intended to affect the judicial
22 administrative record status of information merely because the
23 information is stored in a computer. Judicial administrative records
24 stored in a computer will be disclosed as required in this rule.

25
26 **(h) Waiver of exemptions**

27
28 (1) Disclosure of a judicial administrative record that is exempt from
29 disclosure under this rule or provision of law by a judicial branch entity
30 or judicial branch personnel acting within the scope of their office or
31 employment constitutes a waiver of the exemptions applicable to that
32 particular record.

33
34 (2) This subdivision does not apply to disclosures:

35
36 (A) Made through discovery proceedings;

37
38 (B) Made through other legal proceedings or as otherwise required by
39 law;

40
41 (C) Made to another judicial branch entity or judicial branch
42 personnel for the purposes of judicial branch administration;
43

1 (D) Within the scope of a statute that limits disclosure of specified
2 writings to certain purposes; or

3
4 (E) Made to any governmental agency or to another judicial branch
5 entity or judicial branch personnel if the material will be treated
6 confidentially.

7
8 (i) **Availability in electronic format**

9
10 (1) A judicial branch entity that has information that constitutes an
11 identifiable judicial administrative record not exempt from disclosure
12 under this rule and that is in an electronic format must, on request,
13 produce that information in the electronic format requested, provided
14 that:

15
16 (A) No law prohibits disclosure;

17
18 (B) The record already exists in the requested electronic format, or the
19 judicial branch entity has previously produced the judicial
20 administrative record in the requested format for its own use or
21 for provision to other agencies;

22
23 (C) The requested electronic format is customary or standard for
24 records of a similar type and is commercially available to private
25 entity requesters; and

26
27 (D) The disclosure does not jeopardize or compromise the security or
28 integrity of the original record or the computer software on which
29 the original record is maintained.

30
31 (2) In addition to other fees imposed under this rule, the requester will bear
32 the direct cost of producing a record if:

33
34 (A) In order to comply with (1), the judicial branch entity would be
35 required to produce a record and the record is one that is produced
36 only at otherwise regularly scheduled intervals or;

37
38 (B) Producing the requested record would require data compilation or
39 extraction or any associated programming that the judicial branch
40 entity is not required to perform under this rule but has agreed to
41 perform in response to the request.
42

1 (3) Nothing in this subdivision shall be construed to require a judicial
2 branch entity to reconstruct a record in an electronic format if the
3 judicial branch entity no longer has the record available in an electronic
4 format.

5
6 **(j) Public access disputes**

7
8 (1) Unless the petitioner elects to proceed under (2) below, disputes and
9 appeals of decisions with respect to disputes with the Judicial Council,
10 Administrative Office of the Courts, or a superior court regarding
11 access to budget and management information required to be
12 maintained under rule 10.501 are subject to the process described in
13 rule 10.803.

14
15 (2) Any person may institute proceedings for injunctive or declarative
16 relief or writ of mandate in any court of competent jurisdiction to
17 enforce his or her right to inspect or to receive a copy of any judicial
18 administrative record under this rule.

19
20 (3) Whenever it is made to appear by verified petition that a judicial
21 administrative record is being improperly withheld from disclosure, the
22 court with jurisdiction will order the judicial branch entity to disclose
23 the records or show cause why it should not do so. The court will
24 decide the case after examining the record (in camera if appropriate),
25 papers filed by the parties, and any oral argument and additional
26 evidence as the court may allow.

27
28 (4) If the court finds that the judicial branch entity's decision to refuse
29 disclosure is not justified under this rule, the court will order the
30 judicial branch entity to make the record public. If the court finds that
31 the judicial branch entity's decision was justified, the court will issue
32 an order supporting the decision.

33
34 (5) An order of the court, either directing disclosure or supporting the
35 decision of the judicial branch entity refusing disclosure, is not a final
36 judgment or order within the meaning of Code of Civil Procedure
37 section 904.1 from which an appeal may be taken, but will be
38 immediately reviewable by petition to the appellate court for the
39 issuance of an extraordinary writ. Upon entry of an order under this
40 subdivision, a party must, in order to obtain review of the order, file a
41 petition within 20 days after service of a written notice of entry of the
42 order or within such further time not exceeding an additional 20 days as
43 the court may for good cause allow. If the notice is served by mail, the

1 period within which to file the petition will be extended by 5 days. A
2 stay of an order or judgment will not be granted unless the petitioning
3 party demonstrates it will otherwise sustain irreparable damage and
4 probable success on the merits. Any person who fails to obey the order
5 of the court will be cited to show cause why that is not in contempt of
6 court.

7
8 (6) The court will award court costs and reasonable attorney fees to the
9 plaintiff should the plaintiff prevail in litigation filed under this
10 subdivision. The costs and fees will be paid by the judicial branch
11 entity and will not become a personal liability of any individual. If the
12 court finds that the plaintiff’s case is clearly frivolous, it will award
13 court costs and reasonable attorney fees to the judicial branch entity.

14
15
16 Advisory Committee Comment

17
18 **Subdivision (a).** By establishing a public access rule applicable to all judicial administrative
19 records, the proposed rule would expand public access to these records. The Judicial Council
20 recognizes the important public interest in access to records and information relating to the
21 administration of the judicial branch. The Judicial Council also recognizes the importance of the
22 privacy rights of individuals working in or doing business with judicial branch entities and the
23 public’s interest in an effective and independent judicial branch of state government. The report
24 on this rule includes the Judicial Council’s findings on the impact of this rule on these interests,
25 and how these interests are protected by the rule.

26
27 **Subdivisions (b)(1) and (b)(2).** This rule does not apply to adjudicative records, and is not
28 intended to modify existing law regarding public access to adjudicative records. California case
29 law has established that, in general, subject to specific statutory exceptions, case records that
30 accurately and officially reflect the work of the court are public records open to inspection.
31 (Estate of Hearst (1977) 67 Cal.App.3d 777, 782–83.) However, documents prepared in the
32 course of adjudicative work and not regarded as official case records, such as preliminary drafts,
33 personal notes, and rough records of proceedings, are not subject to public access because the
34 perceived harm to the judicial process by requiring this material to be available to the public is
35 greater than the benefit the public might derive from its disclosure. (Copley Press, Inc. v.
36 Superior Court (1992) 6 Cal.App.4th 106.)

37
38 **Subdivision (c)(2).** The application of this rule is intended to reflect existing case law under the
39 California Public Records Act that exempts from the definition of “public record” certain types of
40 personal records and information. The concept was first discussed in the California Assembly and
41 establishes that if personal correspondence and information are “unrelated to the conduct of the
42 people’s business” they are therefore not public records. (San Gabriel Tribune v. Superior Court
43 (1983) 143 Cal.App.3d 762, 774, citing Assembly Committee on Statewide Information Policy
44 California Public Records Act of 1968, section B, page 9, Appendix to Assembly Journal (1970
45 Reg. Sess.)) Case law has further established that only records necessary or convenient to the
46 discharge of official duty, or kept as necessary or convenient to the discharge of official duty, are
47 public records for the purposes of the California Public Records Act and its predecessors. (Braun

1 v. City of Taft (1984) 154 Cal.App.3d 332; City Council of Santa Monica v. Superior Court
2 (1962) 204 Cal.App.2d 68.)

3
4 **Subdivision (e)(4).** The fees charged by a judicial branch entity under this rule are intended to
5 allow the entity to recover an amount not to exceed the reasonable costs of responding to a
6 request for records or information. In accordance with existing practice within the judicial branch
7 and the other branches of government, the Judicial Council intends agencies and entities of the
8 executive and legislative branches of the California state government to receive records or
9 information requested from judicial branch entities for the agency’s or entity’s use free of charge.
10 This subdivision is intended to provide, however, that requesters of records or information for the
11 purpose of furthering the requester’s commercial interests will be charged for costs incurred by
12 the judicial branch entity in responding to the request, and that such costs will not be a charge
13 against the budget of the judicial branch of the state General Fund.

14
15 **Subdivision (f)(3).** In addition to the types of records and information exempt from disclosure
16 under the corresponding provision of the California Public Records Act, Government Code
17 section 6254(c), this provision includes a further nonexclusive list of specific information that is
18 exempt under this rule. The rule does not attempt to list each category of information that is
19 specific to judicial branch entities and that may also be exempt under this rule. For example,
20 although they are not specifically listed, this provision exempts from disclosure records
21 maintained by any court or court-appointed counsel administrator for the purpose of evaluating
22 attorneys seeking or being considered for appointment to cases.

23
24 **Subdivision (f)(10).** The definition of “trade secret” restates the definition in Civil Code section
25 3426.1.

26
27 **Subdivision (f)(11).** This subdivision is intended to reflect California law on the subject of the
28 “deliberative process” exemption under the California Public Records Act, which is currently
29 stated in the Supreme Court’s decision in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d
30 1325 and the later Court of Appeal decisions *California First Amendment Coalition v. Superior*
31 *Court* (1998) 67 Cal.App.4th 159 and *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136.

32
33 **Subdivision (j)(1).** Under current rule 10.803 a petitioner may file a writ in a superior court
34 regarding a dispute with a superior court or the Administrative Office of the Courts with respect
35 to disclosure of records and information required to be maintained under current rule 10.802. The
36 writ petition must be heard on an expedited basis and includes a right to an appeal. The statutory
37 authority for the hearing process set forth in current rule 10.803, Government Code section
38 71675(b), does not extend this procedure to other disputes with respect to public access. The rule
39 provides that petitioners with a dispute with any other judicial branch entity, or with respect to
40 records that are not required to be maintained under rule 10.802, may follow the procedure set
41 forth in (j)(2) through (j)(6), which is equivalent to the dispute resolution procedure of the
42 California Public Records Act. A petitioner eligible for the dispute resolution process set out in
43 current rule 10.803 may also elect to proceed with his or her dispute under the procedure set forth
44 in (j)(2) through (j)(6).

1 **Rule 10.501. Maintenance of budget and management information**

2
3 **(a) Maintenance of information by the superior court**

4
5 Each superior court must maintain for a period of three years from the close
6 of the fiscal year to which the following relate:

- 7
8 (1) Official documents of the superior court pertaining to the approved
9 superior court budget allocation adopted by the Judicial Council and
10 actual final year-end superior court revenue and expenditure reports as
11 required in budget procedures issued by the Administrative Office of
12 the Courts to be maintained or reported to the council, including budget
13 allocation, revenue, and expenditure reports;
14
15 (2) Records or other factual management information on matters that are
16 within the scope of representation as defined in Government Code
17 section 71634 unless distribution is otherwise precluded by law; and
18
19 (3) Records or other factual management information on other matters
20 referred to in Government Code section 71634 unless distribution is
21 otherwise precluded by law.

22
23 **(b) Maintenance of information by the Administrative Office of the Courts**

24
25 The Administrative Office of the Courts must maintain for a period of three
26 years from the close of the fiscal year to which the following relate:

- 27
28 (1) Official approved budget allocations for each superior court;
29
30 (2) Actual final year-end superior court revenue and expenditure reports
31 required by budget procedures issued by the Administrative Office of
32 the Courts to be maintained or reported to the council that are received
33 from the courts, including budget revenues and expenditures for each
34 superior court;
35
36 (3) Budget priorities as adopted by the council; and
37
38 (4) Documents concerning superior court budgets considered or adopted by
39 the council at council business meetings on court budgets.
40

1 ~~Rule 10.802. Maintenance of and public access to budget and management~~
2 ~~information~~

3
4 ~~(a) Maintenance of information by the superior court~~

5
6 ~~Each superior court must maintain for a period of three years from the close~~
7 ~~of the fiscal year to which the following relate:~~

8
9 ~~(1) Official documents of the superior court pertaining to the approved~~
10 ~~superior court budget allocation adopted by the Judicial Council and~~
11 ~~actual final year end superior court revenue and expenditure reports as~~
12 ~~required in budget procedures issued by the Administrative Office of~~
13 ~~the Courts to be maintained or reported to the council, including budget~~
14 ~~allocation, revenue, and expenditure reports;~~

15
16 ~~(2) Records or other factual management information on matters that are~~
17 ~~within the scope of representation as defined in Government Code~~
18 ~~section 71634 unless distribution is otherwise precluded by law; and~~

19
20 ~~(3) Records or other factual management information on other matters~~
21 ~~referred to in Government Code section 71634 unless distribution is~~
22 ~~otherwise precluded by law.~~

23
24 ~~(b) Maintenance of information by the Administrative Office of the Courts~~

25
26 ~~The Administrative Office of the Courts must maintain for a period of three~~
27 ~~years from the close of the fiscal year to which the following relate:~~

28
29 ~~(1) Official approved budget allocations for each superior court;~~

30
31 ~~(2) Actual final year end superior court revenue and expenditure reports~~
32 ~~required by budget procedures issued by the Administrative Office of~~
33 ~~the Courts to be maintained or reported to the council that are received~~
34 ~~from the courts including budget revenues and expenditures for each~~
35 ~~superior court;~~

36
37 ~~(3) Budget priorities as adopted by the council; and~~

38
39 ~~(4) Documents concerning superior court budgets considered or adopted by~~
40 ~~the council at council business meetings on court budgets.~~

1 ~~(c) Legislative priorities or mandates~~

2
3 ~~The information maintained under (a) and (b) must indicate, to the extent~~
4 ~~known, the legislative requirements the funding is intended to address, if~~
5 ~~any, and any itemization of the funding allocation by purpose, program or~~
6 ~~function, and item of expense.~~

7
8 ~~(d) Public access~~

9
10 ~~(1) Each superior court must, on written request, make available to the~~
11 ~~requesting person those documents required to be maintained under (a).~~

12
13 ~~(2) The Administrative Office of the Courts must, on written request, make~~
14 ~~available to the requesting person those documents required to be~~
15 ~~maintained under (b).~~

16
17 ~~(e) Time for response~~

18
19 ~~Information requested under this rule must be made available within 10~~
20 ~~business days of receipt of the written request for information relating to the~~
21 ~~current or immediate previous fiscal year. Information relating to other fiscal~~
22 ~~years must be made available within 20 business days of receipt of the~~
23 ~~written request for information. If the information requested is not within the~~
24 ~~scope of this rule, the Administrative Office of the Courts or the superior~~
25 ~~court must so inform the requesting party within 10 business days of receipt~~
26 ~~of the written request.~~

27
28 ~~(f) Costs~~

29
30 ~~The Administrative Office of the Courts and the superior court may charge a~~
31 ~~reasonable fee to cover any cost of copying any document provided under~~
32 ~~this rule. The amount of the fee must not exceed the direct cost of~~
33 ~~duplication. A recognized employee organization and a superior court may~~
34 ~~provide for a different amount in their memorandum of understanding.~~

35
36 ~~(g) Preparation of reports not required~~

37
38 ~~This rule does not require the Judicial Council, the Administrative Office of~~
39 ~~the Courts, or any superior court to prepare any budgetary, revenue, or~~
40 ~~expense report or documentation that is not otherwise expressly required to~~
41 ~~be prepared by this rule or any other provision of law or rule of court.~~

1 ~~(h) Effect on other rules~~

2
3 ~~This rule is not intended to repeal, amend, or modify the application of any~~
4 ~~rule adopted by the council before the effective date of this rule. To the~~
5 ~~extent that any other rule is contrary to the provisions of this rule, this rule~~
6 ~~applies.~~

7
8 ~~(i) Public Records Act~~

9
10 ~~The information required to be provided by (a) and (b) of this rule must be~~
11 ~~interpreted consistently with the requirement that the same information be~~
12 ~~provided under the Public Records Act (beginning with Government Code~~
13 ~~section 6250), and the terms have the same meaning as under that act. This~~
14 ~~rule does not require the disclosure of information that would not be subject~~
15 ~~to disclosure under that act.~~

16
17 ~~(j) Internal memoranda~~

18
19 ~~Nothing in this rule requires disclosure of internal memoranda unless~~
20 ~~otherwise required by law.~~

21
22 ~~(k) Rights of exclusive bargaining agent~~

23
24 ~~Nothing in this rule is intended to restrict the rights to disclosure of~~
25 ~~information otherwise granted by law to a recognized employee~~
26 ~~organization.~~

27
28 ~~(l) Informational sessions~~

29
30 ~~The Administrative Office of the Courts will provide informational sessions~~
31 ~~and materials on superior court budgets for the general public and designated~~
32 ~~employee representatives. The information will include the following areas,~~
33 ~~among others:~~

34
35 ~~(1) Description and timing of the budget development process, including~~
36 ~~decisions made at each phase of the cycle, and how budget priorities~~
37 ~~are determined;~~

38
39 ~~(2) Availability of budget information, including the type of information~~
40 ~~available, when it is available, and how it can be obtained; and~~

41
42 ~~(3) The authority of a superior court to reallocate funds between budget~~
43 ~~program components.~~

1
2 **Rule 10.803. Information access disputes—writ petitions (Gov. Code,**
3 **§ 71675)**

4
5 **(a) Availability**

6
7 This rule applies to petitions filed under rule 10.500(j)(1) and Government
8 Code section 71675(b).
9

10 **(b) Assignment of Court of Appeal justice to hear the petition**

11
12 (1) The petition must state the following on the first page, below the case
13 number, in the statement of the character of the proceeding (see rule
14 2.111(6)):

15
16 “Writ petition filed under rule 10.500(j)(1) and Government Code
17 section 71675—Assignment of Court of Appeal justice required.”
18

19 (2) When the petition is filed, the clerk of the court must immediately
20 request of the ~~Judicial Assignments Unit of the Administrative Office~~
21 ~~of the Courts-Chief Justice~~ the assignment of a hearing judge from the
22 panel established under (e).
23

24 (3) If an assignment is made, the judge assigned to hear the petition in the
25 superior court must be a justice from a Court of Appeal for a district
26 other than the district for that superior court.
27

28 **(c) Superior court hearing**

29
30 (1) The superior court must hear and decide the petition on an expedited
31 basis and must give the petition priority over other matters to the extent
32 permitted by law and the rules of court.
33

34 (2) The petition must be heard by a judge assigned by the Chief Justice
35 from the panel of hearing judges established under (e).
36

37 **(d) Appeal**

38
39 An appeal of the superior court decision must be heard and decided on an
40 expedited basis in the Court of Appeal for the district in which the petition
41 was heard and must be given priority over other matters to the extent
42 permitted by law and the rules of court. The notice of appeal must state the

1 following on the first page, below the case number, in the statement of the
2 character of the proceeding (see rule 2.111(6)):

3
4 “Notice of Appeal on Writ Petition filed under rule 10.500(j)(1) and
5 Government Code section 71675—Expedited Processing Requested.”

6
7 **(e) Panel of hearing judges**

8
9 The panel of judges who may hear the petitions in the superior court must
10 consist of Court of Appeal justices selected by the Chief Justice as follows:

- 11
12 (1) The panel must include at least one justice from each district of the
13 Court of Appeal.
14
15 (2) Each justice assigned to hear a petition under (c)(2) must have received
16 training on hearing the petitions as specified by the Chief Justice.

Rule 10.500. Public access to judicial administrative records
Fee Guidelines

- (a) For purposes of rule 10.500(e)(4), the direct costs of equipment, supplies, and staff time required to duplicate or produce the requested record are established as follows:
 - (i) Paper duplication of any record on 8½-by-11-inch or 8½-by-14-inch paper, including transfer of a record in electronic format to paper of these sizes if required for the response—10 cents per page; and
 - (ii) Production of a record in electronic format, or paper duplication of any record on paper sizes other than as listed in (i)—actual direct costs incurred by the judicial branch entity.
- (b) In lieu of the costs established in (a), a judicial branch entity may establish its own direct costs of equipment, supplies, and staff time required to duplicate or produce the requested record under rule 10.500 if it determines that a different amount represents its direct costs for these items and then posts the proposed fee for these costs for public comment for a minimum of four weeks. On completion of the notice and comment period, the costs established by the judicial branch entity under this procedure will be effective following notice to the Judicial Council of the costs established.
- (c) A trial court may request reimbursement from funding provided by the Administrative Office of the Courts to assist in mitigating the impact of rules 10.500 and 10.501 on the operating costs of judicial branch entities as follows:
 - (i) The Administrative Office of the Courts will reimburse trial courts for the actual direct costs, calculated on an hourly basis, of search and review time of personnel in excess of two hours that is spent on requests for records for other than commercial use, up to a maximum hourly rate established by the Administrative Office of the Courts based on the average statewide hourly rate for salary and benefits of a mid-step Legal Process Clerk.
 - (ii) The Administrative Office of the Courts will make reimbursement under these Fee Guidelines up to the aggregate total amount of \$1,500,000 and will reimburse trial courts on a quarterly basis for

claims submitted by trial courts within the previous fiscal quarter, provided the claims are properly substantiated.

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|--|-----------------|---|-----------------|
| 1. | Alliance of California Judges Bakersfield, California | AM | <p>We are the executive board members of a new organization of California judges. On September 11, 2009, a group met in San Diego (coincident with the annual conference of the California Judges Association) and formed a new state-wide, voluntary judges' association called the Alliance of California Judges (ACJ). The membership of this group is growing. The organization's primary focus is to provide an additional voice for judges at this time of crisis for our court system. We exist now primarily to promote county trial court autonomy, local participation in court budgeting decisions, the rescission of court closures, and public transparency in the area of court financing and administration.</p> <p>The 58 county court system in California is mandated by law. The independence of the judiciary, the integrity of common law process, and the legitimate rule of law, depend upon a vital, diverse judiciary, in which each constitutional superior court judge is empowered with independent decision-making authority, and administratively supported in that decision-making process by fully funded local court sessions.</p> <p>The primacy of the county court system has been pressured over the last ten years by the perceived need for central state funding of the courts, and state ownership of facilities, which has now been legally mandated. This financial issue has lead to the evolution of centralized</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>management of the system by the administrative arm of the California Judicial Council, the Administrative Office of the Courts (AOC), which has seen incredible growth in size, power, and influence since 1998. As the AOC has grown, there has been a growing concern among judges that the AOC, as an organization, has perceived its role as one of control of the county court system, rather than its envisioned role of assistance to county court management (management which is legally vested in each county superior court).</p> <p>California now faces a catastrophic public services funding crisis, due particularly to structural dysfunction in revenue procurement versus demand. For the first time, this budget failure has resulted in a legislative mandate for court closures, requested by the Judicial Council, the AOC, and approved by the Legislature. The budget prospects show no signs of improving, and are actually projected to substantially worsen over the next few years, since the 2009-2010 budget “solutions” involved many “one-time only” corrections. Judges are deeply worried that the Judicial Branch cannot and should not be treated simply as some sort of executive agency of the state, but must be respected as a fully independent third arm of government. As other institutions fail, the demands upon the courts correspondingly increase. Shutting off court access in a time of crisis fundamentally threatens the rule of law upon which a just</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>society depends.</p> <p>There is a substantial sentiment among the judges of this state that the AOC has addressed the current budget crisis by acting to preserve itself as an institution for management and control of the courts, rather than prioritizing the county court operations it was designed to serve. This worry has been fueled by the AOC's preservation of an overwhelmingly expensive information system that many believe has not been effectively vetted, the AOC's maintenance of undisclosed millions in court facility funds, and the AOC's continued hiring of employees when county courts have been forced into layoffs, furloughs, and hiring freezes. The estimated cost of the information system (CCMS) has grown over \$500 million within the last 30 days, according to the AOC's own figures. This conduct has the appearance to many of maintaining functions that enhance AOC management, rather than devoting all possible resources to trial court funding. There is concern that the AOC is preferring central management and control, computers, bricks, and mortar over people and judicial access.</p> <p>Latent worries and suspicions have now erupted into media demands for audit and accountability of the AOC, and demands from the other branches of government for disclosure. There is a grave danger in this atmosphere, because essential separation of powers demands that the Judiciary itself respond, rather than abdicating</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>to Executive or Legislative scrutiny.</p> <p>The ACJ supports the proposed rule changes for Public Access to Judicial Administrative Records to the extent that they ensure full public disclosure of all financial information of the judiciary, and information regarding judiciary budgeting and expenditures, and to the extent it requires disclosure of attendant administrative information related to judiciary finances and administration. We ask that there be no “deliberative process” exception applied to financial or administrative functions. The ACJ strongly opposes any rule of disclosure that would open judicial decision-making to public disclosure in any cases and controversies, or private judicial communications.</p> <p>As to any audits, we hope that full public disclosure of current financial information will lessen the immediate need and the demand for such measures. It is obvious that the state financial crisis is not a one-year event, and that we must rescind court closures and ensure continued operations as much as possible from existing funds and revenue sources outside of the state General Fund. Hope for an increased share of general fund revenues is likely illusory. It seems clear that keeping our courts open will require the very painful choice of obtaining legislative permission to further apply capital reserve trust funds set aside for facilities and information systems, as well as the administrative operational funds otherwise</p> | <p>The inclusion of a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel reflects the language and intent of the directing statute and is consistent with current practice in the other two branches of government. The rule does not alter the law regarding access to adjudicative records.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|--|-----------------|---|--|
| | | | <p>applied to those programs, and divert such funding to local operations. The total existing amount of these funds is not immediately apparent in the AOC's public documents.</p> <p>In this regard, we request that the Judicial Council and the AOC advise us, and immediately make public, the total amount of all reserve or trust funds currently held for these purposes (identifying each specific fund), and to make public the currently expected revenue amounts and revenue sources for these purposes through the 2013-2014 fiscal year. In this way meaningful debate may be had in the public eye as to how public dollars may best be spent upon our court system in the current crisis.</p> | |
| 2. | <p>Appellate Defenders, Inc. California Appellate Projects Response by Elaine A. Alexander, Executive Director Appellate Defenders, Inc. San Diego, California</p> | AM | <p>The California appellate projects [fn1] recommend that rule 10.500 on public access to judicial administrative records make clear that records maintained by an appellate court and/or an appellate project within the meaning of rule 8.300(d) of the California Rules of Court, evaluating the qualifications and performance of individual attorneys being considered for appointment on appeal, are exempt from disclosure. We are concerned that forced disclosure of such evaluations, or the threat of litigation over the matter, could hamper the ability of the courts to obtain candid and accurate assessments of attorneys, discourage attorneys from seeking or accepting court appointments, and put attorneys' professional reputations at risk. While these arguments may</p> | <p>Rule 10.500(c)(1) has been amended to add the assignment or reassignment of court-appointed counsel to the definition of an adjudicative record, which the rules do not cover. Writings related to the evaluation of court-appointed counsel are exempt from mandatory disclosure by (f)(3) (personal privacy exemption) and (f)(12) (catch-all exemption). An advisory committee comment on (f)(3) addresses evaluations of court-appointed counsel.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>well apply to similar records maintained for appointments at the <i>trial</i> level, we are not sufficiently familiar with the diversity of systems at that level to offer informed comments, although we suggest the working group investigate the matter.</p> <p><i>Background</i> The appellate projects are nonprofit corporations operating under contract with the Administrative Office of the Courts to administer the system of appointed counsel on appeal in the various districts of the Court of Appeal and also, in somewhat different structure, in the California Supreme Court. Among other responsibilities, the Court of First District Appellate Project; California Appellate Project, Los Angeles (Second District); Central California Appellate Program (Third and Fifth Districts), Appellate Defenders, Inc. (Fourth District); Sixth District Appellate Program; California Appellate Project, San Francisco (Supreme Court). Appeal projects develop and maintain panels of attorneys available to accept appointments in their respective courts. Their staff attorneys evaluate the qualifications of those who apply to the panel and on an ongoing basis assess the performance, as reflected in work product, of each attorney in each case under their programs. The Court of Appeal projects use these evaluations in a number of ways: to determine what kinds of cases – from simple to highly complex or sensitive – an attorney is qualified to handle and whether the</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>panel attorney needs assistance from a staff attorney in doing so; to offer cases to attorneys accordingly and recommend the appointment to the court; to provide assistance to the attorney as needed; and to recommend compensation to the Administrative Office of the Courts. For Court of Appeal appointed cases granted review, the Court of Appeal projects use them also to recommend an appointed attorney to the Supreme Court and to provide assistance to those attorneys.</p> <p>The Court of Appeal projects, in addition, provide the California Appellate Project, San Francisco (CAP-SF) with their assessment of attorneys seeking appointment to automatic appeals and habeas corpus proceedings. CAP-SF compiles, summarizes, and communicates this information, with its own information on counsel’s performance on previous death penalty cases and its own recommendation and analysis, to the Supreme Court’s Automatic Appeals Monitor. It also uses this information in assisting appointed counsel.</p> <p>Except for assistance to panel attorneys in the handling of their cases, the functions discussed above – evaluating counsel, determining their qualifications for particular cases, and recommending compensation – are inherently <i>court</i> functions, as specified by rule 8.300 of the California Rules of Court, which requires appellate courts to adopt procedures for evaluating, classifying, and matching counsel</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>and cases. That rule also authorizes the courts to contract with an experienced administrator for this purpose. The projects have had such contracts since their creation in the mid-1980's.</p> <p><i>Discussion</i> Assessments of attorneys' qualifications and performance are essential to performing the duties mandated by rule 8.300, which implements the United States Constitution's guarantee of effective assistance of counsel on appeal. The projects use their assessments of panel attorneys and panel applicants to make appointment recommendations to the courts. These assessments need to be accurate, thorough, and candid in order to promote the efficient functioning of the courts and guard against constitutionally defective representation that could interfere with the judicial process, undermine the quality of decisions, or necessitate duplicative proceedings. These are matters of high public importance.</p> <p>If the projects had to make individual panel attorney evaluations public, their comments would inevitably become more guarded, less candid, and thus far diminished in value to the courts. The court in <i>California First Amendment Coalition v. Superior Court</i> (1998) 67 Cal.App.4th 159, 172 (<i>Coalition</i>), observed:</p> <p>“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>concern for appearances . . . to the detriment of the decisionmaking process.”</p> <p>(Quoting <i>United States v. Nixon</i> (1974) 418 U.S. 683, 705; see also <i>Rackauckas v. Superior Court</i> (2002) 104 Cal.App.4th 169, 177.)</p> <p>The <i>Coalition</i> case held the Governor was not obligated to reveal information about persons who had applied to him for a county supervisorial vacancy he was authorized to fill. The petitioner conceded that the Governor’s staff <i>evaluations and recommendations</i> were not open to disclosure, but argued that revealing the applications for the position would serve the public interest. The court responded:</p> <p>“The answer to th[is] argument[] is not that [it] lack[s] substance, but pragmatism. The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it.”</p> <p>(<i>California First Amendment Coalition v. Superior Court, supra</i>, 67 Cal.App.4th 67 at p. 172, quoting <i>Times Mirror Co. v. Superior Court</i> (1991) 53 Cal.3d 1325, 1345; see also <i>Wilson v. Superior Court</i> (1996) 51 Cal.App.4th 1136.)</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>The same points apply in the projects' situation. They, and derivatively the courts, cannot make appropriate decisions on appointment of attorneys if the only information they can rely on has been diluted to be suitable for public consumption. Project evaluations are intended to inform decisions on appointments, not hurt attorneys' reputations or ability to practice law. Project attorneys know that the fact an attorney has sometimes performed (or is likely to perform) less than satisfactorily in particular appellate cases does not mean he or she is an incompetent lawyer. They are aware, however, that a lay audience, not cognizant of the special skills appellate work requires, may draw that conclusion from a less than favorable assessment. If their assessments were subject to public disclosure, they would be motivated to "pull their punches," offering bland generalities when pointed criticisms would be more appropriate. That would serve the interests of neither the clients, the courts, nor the public.</p> <p>Assuming project attorneys would be totally candid even if their assessments were subject to disclosure, the risk of public embarrassment and consequent professional injury, not to mention the invasion of individual privacy, from disclosure of evaluations could substantially discourage applications to the panel and acceptance of case offers in both Court of Appeal and Supreme Court cases. In death penalty cases, it could exacerbate the difficulties</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>the Supreme Court has experienced in recruiting qualified attorneys.</p> <p>We agree there is a legitimate public interest in knowing who is appointed to cases, under what criteria, and by what processes. But that information is available without disclosure of attorney evaluations. The names of attorneys appointed to cases are available on request in person or by phone, in the many publishing services reporting on court decisions, and through the court’s online docket. [fn2] The processes of evaluating cases and attorneys and the criteria used are spelled out in considerable detail on the court website [fn3] and on the project websites. [fn4] Background information on individual attorneys is available on the State Bar website, on request from the Bar, and from numerous other sources.</p> <p>It is true rule 10.500 as drafted already exempts from disclosure “personal information the disclosure of which would constitute an unwarranted invasion of personal privacy” (subd. (f)(3)) and “[r]ecords the disclosure of which would expose a judicial branch entity’s or judicial branch personnel’s decision-making process so as to discourage candid discussion within the entity or the judicial branch and thereby undermine the entity’s ability to perform its function” (subd. (f)(11)). However, these exemptions are stated in highly general terms, and it may not be clear that they are applicable to the appellate projects and their</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>assessments.</p> <p>We believe it would be beneficial to have a specific exemption for attorney evaluations maintained by the courts or court-appointed administrators such as the appellate projects. This could be accomplished in the text of the rule or in an Advisory Committee comment, explicitly providing that the rule is not intended to require disclosure of evaluations of individual attorneys. Such provisions would forestall requests for disclosure and the threat of potential litigation, both of which would consume judicial resources and distract from the core functions the courts and projects must perform. The appendix offers examples of potential wording for both the rule text for subdivision (f)(3) (attorney privacy) and a comment (deliberative processes exemption).</p> <p>The appellate projects appreciate this opportunity to comment on the proposed rule. We thank the working group for its efforts.</p> <p style="text-align: center;">— APPENDIX — POSSIBLE LANGUAGE FOR EXEMPTION FOR ATTORNEY RECORDS Rule 10.500</p> <p>(f) Exemptions Nothing in this rule requires the disclosure of judicial administrative records that are any of the following:</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>* * *</p> <p>(3) Personnel, medical, or similar files, or other personal information the disclosure of which would constitute an unwarranted invasion of personal privacy, including but not limited to records revealing home addresses, home telephone numbers, cellular telephone numbers, private e-mail addresses, and social security numbers of judicial branch personnel <u>and court-appointed counsel</u>; and work e-mail addresses and work telephone numbers of justices, judges, subordinate judicial officers, and their staff attorneys;</p> <p>* * *</p> <p><u>Advisory Committee Comment</u> <u>This rule is not intended to require disclosure of records maintained by any court or court-appointed counsel administrator for the purpose of evaluating attorneys seeking or being considered for appointment to cases.</u></p> <p>fn1- First District Appellate Project; California Appellate Project, Los Angeles (Second District); Central California Appellate Program (Third and Fifth Districts), Appellate Defenders, Inc. (Fourth District); Sixth District Appellate Program; California Appellate Project, San Francisco (Supreme Court). fn2- http://appellatecases.courtinfo.ca.gov/ n3- http://www.courtinfo.ca.gov/reference/documents/cac.pdf fn4- http://members.calbar.ca.gov/search/member.aspx.</p> | |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|--|-----------------|---|---|
| 3. | Hon. James Ardaiz Presiding Justice Court of Appeal, Fifth Appellate District Fresno, California | AM | Ms. Kieliger, attached is a proposal regarding a modification of the proposed rule regarding access to records. I asked Justice Dennis Cornell to review the proposed rule and expressed my concern that it created the potential for demand for personal e-mail communications that had no relationship to budget or fiscal matters. I do not believe that such communications should be treated as public documents and I do not believe there should be a presumption or mandatory access regarding such documents. In my view the difficulty with all of this is that it assumes that internet communication is effectively the same as written communication. I disagree with that perspective. In the past much business of a personal nature was done over the telephone. No one would argue that such conversations were somehow public simply because a government telephone was used. I recognize that there are restrictions on such conversations as they pertain to specific types of government business (i.e., meetings of more than two officials, etc., as constituting a public meeting, for example) but, in general, people now do through e-mail what they used to do over the telephone or by walking down the hall. Nobody would argue that such conversations should be monitored or memorialized for purposes of public access. The ambiguity created regarding personal e-mail communications is significant in consequence. I believe the proposal made by Justice Cornell after reviewing the proposed rule will go a long way toward addressing this concern and is completely consistent with the | <p>Rule 10.500(c)(2) has been amended to clarify that a “judicial administrative record” does not include writings of a personal nature that do not relate to the conduct of the people’s business. An advisory committee comment has been added to clarify that the exclusion of personal writings from the definition of a “judicial administrative record” is a codification of California Public Records Act (CPRA) case law.</p> <p>To ameliorate the burden of searching and reviewing an unworkable number of electronic mail and text messages and prevent the potential unintended disclosure of communications related to a court’s adjudicative functions that are not subject to disclosure, a provision has been added to rule 10.500(b) to make the disclosure requirements apply prospectively to electronic-mail and text messages.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>express purposes of the statute. Therefore, I am submitting this within the comment time and it is my intention to ask the Administrative Presiding Justices to endorse this proposal or to utilize it as a basis for addressing the concerns many of us share regarding the current proposed rule.</p> <p>Proposed Rules 10.500 and 10.501</p> <ol style="list-style-type: none">1. The clear goal of the new legislation, and those that support it, is to have access to those records described in Rule 10.500 subdivision (e) (2). There is no indication that anyone is seeking our personal communications.2. The access provided extends to computer generated and/or stored information, specifically including email.3. A review of the existing statutes and rules, and the cases interpreting them, shows that these new rules are not “new” at all. They are attempting to put in one place the current requirements of statutes, CPRA, FOIA, and rules.4. Where possible, the rules slant toward non-disclosure. For example, there is a broad definition of exempt categories such as “adjudicative” and “deliberative.” | <ol style="list-style-type: none">1. The intent of the rules is set forth in rule 10.500(a). The goal of the legislation and the rules is broader than indicated by the commentator. The rules provide public access to “judicial administrative records,” which are defined in Rule 10.500(c)(1) and which include, but are not limited to the records listed in rule 10.500(e)(2).2. This is a correct interpretation of the rules.3. As explained more fully in the report, the rules draw from concepts and guidelines currently found in the CPRA, the federal Freedom of Information Act, the Legislative Open Records Act (LORA), and the California Rules of Court.4. As explained more fully in the report, rule 10.500 presumes that all “judicial administrative records,” as defined, are subject to public access absent a specific exemption. The rule does not apply to “adjudicative records.” The rule includes |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|--|----------|---|--|
| | | | <p>5. There is no duty to compile records or lists. There is a duty to help the requestor focus the request.</p> <p>6. There is no “maintenance” requirement for the Court of Appeal or Supreme Court, only the AOC and the Superior Courts. Also, there is no dispute resolution process for the Court of Appeal or Supreme Court.</p> <p>7. If a record contains both exempt and non-exempt material, and the exempt portion is not segregable, the entire record is not discoverable.</p> <p>8. The exemptions are specified in Rule 10.500 subdivision (f). There are 12 listed. I propose that we suggest that an additional exemption be added as follows:</p> <p>(13) Records of personal communications not related to items set forth in subdivision (e) (2) (A) through (F).</p> | <p>a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel.</p> <p>5. This is a correct interpretation of the rules.</p> <p>6. Rule 10.501 requires the Administrative Office of the Courts and the superior courts to maintain certain information. These requirements do not apply to the Courts of Appeal or the Supreme Court. A dispute resolution process for disputes with the Courts of Appeal or the Supreme Court is set forth in rule 10.500(j)(2) - (6).</p> <p>7. This is a correct interpretation of the rules.</p> <p>8. Rule 10.500(c)(2) has been amended to clarify that a “judicial administrative record” does not include writings of a personal nature that do not relate to the “conduct of the people’s business.” An advisory committee comment has been added to clarify that the exclusion of personal writings from the definition of a “judicial administrative record” is a codification of CPRA case law.</p> |
| 4. | Hon. Barry Baskin Judge Superior Court of Contra Costa | AM | Exemptions should be made for emails sent between judicial officers in the normal course of duties. In this way confidential collaborative | The proposed rule has been amended to clarify that certain records will not be subject to |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|--------------------------------|-----------------|---|--|
| | County Martinez, California | | <p>efforts in decision making, on ethical issues and on exchanging views on problem litigants or cases will be excluded from public scrutiny.</p> <p>Without this clear exemption the quality of the judicial work product and judicial integrity will be compromised.</p> <p>Unless clear language is included in the proposed rule, it can now be interpreted to encompass what should be private and exempt.</p> | <p>disclosure under the rule. Writings related to adjudicative functions are not subject to disclosure due to the exclusion of adjudicative records from the rule (see rule 10.500(b)(1) - (2) and (c)(1) - (2)).</p> <p>Writings that reveal the deliberative process of a judicial branch entity or judicial branch personnel are not subject to disclosure due to the exemption rule 10.500(f)(11). Other writings are not subject to disclosure if the disclosure of the writing would not be in the public interest (see rule 10.500(f)(12)).</p> <p>Records of a judicial officer regarding judicial ethics inquiries may be exempt from disclosure under the rules. To the extent that a record relating to judicial ethics pertains to a particular case, the record would be considered an adjudicative record and thus not subject to the disclosure requirements of the rules. To the extent that a record is considered a judicial administrative record, and depending on the specific facts, the record may be exempt from mandatory disclosure under any one or all of the following subdivisions: subdivision (f)(3) (personal privacy exemption), subdivision (f)(7) (evaluations, complaints, and investigations of judicial officers exemption), and subdivision (f)(12) (catch-all exemption). In addition, the proposed rules would have no effect on rule 9.80 and its provisions regarding the confidentiality of communications to and from the Supreme Court Committee on Judicial Ethics Opinions.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|---|-----------------|---|--|
| 5. | Steven Bradley ¹ El Cajon, California | A | I strongly believe in transparency. Transparency prevents corruption, demonstrates accountability, and creates a two-way communication between government and the people. The courts act like it is true that they are not part of the government, when in fact they are--and they should be part of a more stringent accountability process than any other part of government, because they are supposed to be impartial arbiters. They can only fulfill this function properly if citizens can believe in them, and the citizens will only believe in them if they truly act without partiality. Transparency doesn't insure this, but it subjects the courts to outside review, which they desperately need. | No response required. |
| 6. | California Judges Association Jordan Posamentier Legislative Counsel San Francisco, California | NI | In response to the Judicial Council's request for public comment on its proposed rule pertaining to public access of court administrative records, our membership is concerned that the rule may subject their personal emails and internet searches to disclosure. Of particular concern are online communications pertaining to judicial ethics and to responses to criticisms, e.g., communications between the bench officer and CJA's Judicial Ethics Committee or Response to Criticism Committee. Those communications are highly sensitive. | Rule 10.500(c)(2) has been amended to clarify that a "judicial administrative record" does not include writings of a personal nature that do not relate to the conduct of the people's business. An advisory committee comment has been added to clarify that the exclusion of personal writings from the definition of a "judicial administrative record" is a codification of CPRA case law. To ameliorate the burden of searching and reviewing an unworkable number of electronic mail and text messages and prevent the potential unintended disclosure of communications related to a court's adjudicative functions that are not subject to disclosure, a provision has been added to rule 10.500(b) to apply the disclosure |

¹ This comment was submitted for another proposal, but may have been done so erroneously and is therefore included here.

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>While these materials do not appear to be subject to disclosure under the rule’s definitions of “administrative records,” they are also not expressly contained in the list of exemptions. CJA therefore requests clarification that judicial officers’ personal emails, searches, and especially their communications pertaining to judicial ethics and responses to criticisms are expressly exempt from disclosure under the rule.</p> | <p>requirements apply prospectively to electronic - mail and text messages.</p> <p>The proposed rule has been amended to clarify that certain records will not be subject to disclosure under the rule. Writings related to adjudicative functions are not subject to disclosure because of the exclusion of adjudicative records from the rule (see rule 10.500(b)(1) - (2) and (c)(1) - (2)). Writings that reveal the deliberative process of a judicial branch entity or judicial branch personnel are not subject to disclosure because of the exemption in rule 10.500(f)(11). Other writings are not subject to disclosure if the disclosure of the writing would be not in the public interest (see rule 10.500(f)(12)).</p> <p>Rule 10.500(f)(7) has been amended to add to the exemption records related to evaluations, complaints, and investigations of current judicial officers and of potential judicial officers and candidates for such positions. A complete discussion of this exemption is included in the Judicial Council report. In brief, the exemption reflects the underlying principles that result in the confidentiality of Commission on Judicial Performance proceedings and proceedings under rule 10.703.</p> <p>Records of a judicial officer regarding judicial ethics inquiries may be exempt from disclosure under the rules. To the extent that a record relating to judicial ethics pertains to a particular case, the record would be considered an adjudicative record</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|---|-----------------|---|---|
| | | | | <p>and thus not subject to the disclosure requirements of the rules. To the extent that a record is considered a judicial administrative record, and depending on the specific facts, the record may be exempt from mandatory disclosure under any one or all of the following subdivisions: subdivision (f)(3) (personal privacy exemption), subdivision (f)(7) (evaluations, complaints, and investigations of judicial officers exemption), and subdivision (f)(12) (catch-all exemption). In addition, the proposed rules would have no effect on rule 9.80 and its provisions regarding the confidentiality of communications to and from the Supreme Court Committee on Judicial Ethics Opinions.</p> |
| 7. | <p>California Newspaper Publishers Association The Associated Press, Bay Area News Group (publisher of the San Jose Mercury News, Contra Costa Times, Oakland Tribune, and eight other Bay Area daily newspapers) Belo Corporation (publisher of the Press-Enterprise) First Amendment Coalition, Freedom Communications, Inc. (publisher of the Orange County Register) Gannett Company (publisher of USA Today, Visalia Times-Delta, Tulare Advance-Register, El Sol, and Salinas Californian) Los Angeles Times Communications LLP (publisher of The Los Angeles Times and Times Community News</p> | AM | <p>On behalf of the California Newspaper Publishers Association (“CNPA”), The Associated Press, Bay Area News Group (publisher of the San Jose Mercury News, Contra Costa Times, Oakland Tribune, and eight other Bay Area daily newspapers), Belo Corporation (publisher of the Press-Enterprise), First Amendment Coalition, Freedom Communications, Inc. (publisher of the Orange County Register), Gannett Company (publisher of USA Today, Visalia Times-Delta, Tulare Advance-Register, El Sol, and Salinas Californian), Los Angeles Times Communications LLP (publisher of The Los Angeles Times and Times Community News Newspapers), McClatchy Newspapers, Inc. (publisher of the Sacramento Bee, Fresno Bee, and Modesto Bee), the New York Times Company (publisher of the New York Times</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| Commentator | Position | Comment | Response |
|---|----------|--|----------|
| <p>Newspapers) McClatchy Newspapers, Inc. (publisher of the Sacramento Bee, Fresno Bee, and Modesto Bee) New York Times Company (publisher of the New York Times and the Santa Rosa Press-Democrat) The Reporters Committee for Freedom of the Press (“Media Representatives”) Response by Kelli L. Sager Davis Wright Tremaine LLP Los Angeles, California</p> | | <p>and the Santa Rosa Press-Democrat), and The Reporters Committee for Freedom of the Press (“Media Representatives”), we respectfully submit the following comments regarding Proposed Rule of Court 10.500 et seq.</p> <p>I. Introduction</p> <p>The Media Representatives appreciate the opportunity to provide meaningful feedback regarding these proposed rules concerning the public’s access to judicial administrative records. The Judicial Council should be applauded for its stated intent to adopt rules that are intended to clarify and expand the public’s access rights. As drafted, however, some of the proposed rules do not satisfy the Judicial Council’s commendable goal of promoting and expanding public access to the judiciary, and appear inconsistent with the newly-adopted provision of California’s Government Code that required the adoption of new rules. Cal. Gov. Code, § 68106.2.</p> <p>As a preliminary matter, it is important that the rules recognize — just as the Invitation to Comment recognized — the constitutional and statutory underpinnings of the public’s right of access to judicial administrative records. In addition to the federal and statutory provisions noted in the Invitation to Comment, the public’s rights of access were reinforced by the adoption of Article 1, § 3(b) of the California Constitution, which imposes a requirement that any restriction on the public’s rights of access</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>be based on “findings demonstrating the interest protected by the limitation and the need for protecting that interest,” and be “narrowly construed” so as not to unduly impair the public’s rights. <u>Id.</u> As a broad principle, the proposed rules, which currently make no mention of these important constitutional access rights, should reflect and embody the requirements set forth in Article 1, § 3(b) of the state Constitution.</p> <p>Furthermore, although the proposed rules are offered as a means of ensuring (and even broadening) public access to important information about the state’s judiciary, as currently drafted, the proposed rules instead would create broader exemptions from disclosure than currently exist under the leading California and federal access laws, including the California Public Records Act (“CPRA”) and the federal Freedom of Information Act (“FOIA”). For example, as discussed in more detail below, the proposed rule exemptions for records reflecting the “deliberative process,” trade secrets and “confidential” information, and computer source data are extremely broad, and would have the effect of greatly diminishing, if not entirely eliminating, public access to any records that are deemed to be within these categories. The proposed rules also provide for greater secrecy with respect to the salaries and job classifications of public employees, complaints about alleged misconduct, and similar records that California</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>courts have deemed to be accessible as to non-judicial government employees.</p> <p>Finally, the Judicial Council’s proposal to charge “search” and “review” fees to virtually all requesters would have the effect of severely curtailing public access, since many requesters simply cannot afford to pay fees. Our clients are fully aware of the State’s budget crisis, which no doubt has influenced this part of the proposed rules; nevertheless, the fee proposal is a drastic departure from both the CPRA and FOIA, and is not supported by the constitutional findings of need required by the California Constitution. [fn1]</p> <p>We are confident that with relatively minor changes, the proposed rules can meet the Judicial Council’s goal of enhancing the public’s right of access to judicial administrative records, while taking into account any countervailing interests. [fn2]</p> <p>II. Proposed Rule of Court 10.500 et seq. Should Reflect Both The Statutory and Constitutional Bases For The Public’s Right Of Access To Judicial Administrative Records.</p> <p>As currently drafted, Rule of Court 10.500 <u>et seq.</u> recite the specific legislative impetus for the adoption of new rules of court, but without recognizing the important pre-existing constitutional right of access to public records,</p> | <p>Rule 10.500(a)(2) provides that the rule clarifies and expands the public’s right of access to judicial administrative records and must be broadly construed to further the public’s right of access. An advisory committee comment on Rule</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>including the judiciary’s records, contained in Article 1, § 3(b) of the California Constitution. In 2004, 83 percent of California voters approved Proposition 59, amending the state Constitution to recognize the public’s right of access to government information. Article I, § 3(b) of the Constitution now affirms that “[the people have the right of access to information concerning the conduct of the people’s business,” and guarantees that “the writings of public officials and agencies shall be open to public scrutiny.” As amended, the Constitution mandates that “[a] statute, court rule, or other authority ... shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” <u>Id.</u> The Constitution also requires that “[a] statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.” <u>Id.</u> See also <u>Savaglio v. Wal-Mart Stores, Inc.</u> (2007) 149 Cal.App.4th 588, 597 (“[w]ith the passage of Proposition 59 effective November 3, 2004, the people’s light of access to information in public settings has state constitutional stature”); <u>BRV, Inc. v. Superior Court</u> (2006) 143 Cal.App.4th 742, 750 (noting that Proposition 59 “enshrined in our state Constitution the public’s right to access records of public agencies”).</p> | <p>10.500(a) addresses the Judicial Council’s recognition of the public interest in access to records and information and other important public interests affected by the proposed rules. The Judicial Council report addresses this issue in more detail.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>Rule of Court 10.500 <u>et seq.</u> should expressly recognize these important constitutional principles. Although the current version of Rule of Court 10.500(a) properly acknowledges that the new rules “must be broadly construed to further the public’s right of access,” it does not reference the constitutional origins of this principle—namely, article I, section 3(b) of the California Constitution. Even the drafter’s notes to Rule 10.500(a) do not mention the constitutional access rights conferred by the Sunshine Amendment. The rules should be revised to make explicit that they have been adopted not only with reference to a specific statute passed by the California Legislature, but also to give effect to the right of access in article I, section 3(b) of the state Constitution, which requires the presumption of public access, broadly construed, and the narrow construction of exemptions to public access. [fn3]</p> <p>Similarly, the preamble should include language that makes clear that any limitation on the public’s right of access requires “findings demonstrating the interest protected by the limitation and the need for protecting that interest.” <u>See</u> Cal. Const. Art. I, § 3(b). This language is consistent with the requirement set forth in article I, section 3(b), and should be made explicit to remove any doubt that the new rules must be interpreted and applied in a manner consistent with this constitutional requirement. [fn4]</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>III. The Proposed Rules Include Expanded Exemptions That Are Inconsistent With The California Public Records Act And Previously Recognized Rights of Access.</p> <p>In several instances, as indicated above, the proposed rules would either create or expand exemptions to the public’s right of access, in contravention of the express legislative purpose behind Government Code section 68106.2 and the statutory and constitutional authorities on which it relied. These sections of the proposed rules should be revised in accordance with existing law.</p> <p><i>A. The <u>Per Se</u> Deliberative Process Privilege Exemption In Proposed Rule of Court 10.500(f)(11)–(12) Unduly Restricts The Public’s Right Of Access.</i></p> <p>California’s Evidence Code does not recognize a “privilege” for information that falls within the category of so-called deliberative process information, nor is it expressly recognized as an exemption under the CPRA. Instead, to the extent a limitation on the public’s right of access to public records to protect an agency’s “deliberative process” has been recognized, it has derived from the “catch-all” exemption in the CPRA, Gov. Code, § 6255. That provision states, in pertinent part, that “[t]he agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that <u>on the</u></p> | <p>The inclusion of a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel reflects the language and intent of the directing statute and is consistent with current practice in the other two branches of government.</p> <p>Rule 10.500(f)(11) has been amended to ensure that it preserves a presumption in favor of disclosure, and that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has been added to clarify that the application of the exemption is intended to reflect existing case law on the “deliberative process” exemption under the</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--------------|
| | | | <p><u>facts of the particular case</u> the public interest served by not disclosing the record clearly outweighs the public interest.” (Emphasis added.) Proposed Rule of Court 10.500(f)(11) appears to go beyond this language, eliminating the express reference to a case-by-case factual analysis as required by the CPRA’s catch-all exemption. It also suggests, perhaps unintentionally, a presumption as to the outcome of a balancing analysis by suggesting that the disclosure of such records “would expose a judicial branch entity’s or judicial branch personnel’s decision-making process so as to discourage candid discussion within the entity or the judicial branch and thereby undermine the entity’s ability to perform its function” Although the proposed rule still requires disclosure if “the public interest served by disclosure of the record clearly outweighs the public’s interest in withholding the record,” the change in language from the CPRA’s provisions is confusing, at best, and is likely to convey a change in the underlying analysis that may not be intended, but certainly is not warranted in light of the Legislature’s and public’s express directives for a “narrow construction” of any exemption to the public’s right of access. <u>See, e.g.</u>, Cal. Const. art. 1, § 3(b).</p> <p>Indeed, when the public voted decisively to adopt Proposition 59 in 2004, the “Argument in Favor of Proposition 59” accompanying ballots specifically noted that passage of Proposition 59 would “allow the public to see and understand</p> | <p>CPRA.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>the deliberative process through which decisions are made.” After the measure passed and became part of the California Constitution, Governor Schwarzenegger immediately released portions of his official calendars that he previously had withheld from public view, based on the deliberative process privilege. Noting that “the guarantees described in Proposition 59 and the Public Records Act [] must be respected and implemented,” the Governor’s Office also prohibited state agencies from invoking Section 6255—the CPRA exemption where the Courts had recognized the deliberative process privilege without executive approval. These pronouncements were important, because the leading decision upholding a denial of public access based on the deliberative process privilege involved the refusal of a prior governor to release his calendars to the public. <u>Times Mirror Co. v. Superior Court</u> (1991) 53 Cal.3d 1325. Although the few courts that have addressed this issue since the passage of Proposition 59 have found that a deliberative process protection still exists [fn5], the new constitutional right of access nonetheless should be recognized as requiring, at a minimum, that “a government entity demonstrate to a somewhat greater extent than under [pre-Proposition 59] law why information requested by the public should be kept private.” Leg. Analyst’s Summary of Prop. 59.</p> <p>Instead of requiring judicial entities to make a</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>more stringent showing to assert the catch-all exemption, however, Proposed Rule of Court 10.500(f)(11) appears to dramatically enlarge the parameters of the deliberative process privilege, in violation of the public’s constitutional rights. For example, in addition to eliminating the express language requiring a case-by-case analysis before documents can be withheld under the CPRA’s catch-all exemption, the proposed rule appears to reverse the CPRA’s assignment of the burden to the public agency [fn6], and instead requires the public to show an interest in disclosure that “clearly outweighs” the government interest in withholding the records. Such burden shifting not only violates the constitutional principle that rules that restrict the public’s right of access to records must receive a narrow construction, it also is impermissible because it was made without the requisite findings of need required by article I, section 3(b) of the California Constitution. These Media Representatives urge the Judicial Council to reject the current version of Proposed Rule of Court 10.500(f)(11) and instead address this interest by mirroring the “catch-all” provision of the CPRA (as currently included in Proposed Rule of Court 10.500(f)(12).</p> <p><i>B. The Trade Secrets And Confidential Commercial And Financial Information Exemption in Proposed Rule of Court 10.500(f)(10) Is Overly Broad.</i></p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>Because the Proposed Rules do not include adjudicatory records, it is unclear what justification exists for adding exemptions for “trade secrets” and “confidential commercial and financial information” — areas that would seem unlikely to have any application to records of a government entity, like the California courts. Assuming, however, that there is a need for some explicit protection in these areas, as opposed to the manner in which the CPRA deals with other privileges and confidential information, it certainly should not extend beyond the protections that already are defined by California law.</p> <p>For example, California has a statutory definition of “trade secrets,” which inexplicably is not mirrored by Proposed Rule of Court 10.500(f)(10)(A). Under California Civil Code section 3426.1(d), a trade secret is defined as follows:</p> <p style="padding-left: 40px;">“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:</p> <p style="padding-left: 40px;">(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and</p> | <p>To have the rule conform more closely to its intent, the exemption in (f)(10) was amended so that it applies only to confidential commercial and financial information submitted in response to a judicial branch entity’s solicitation for goods or services or in the course of the entity’s contractual relationship with a commercial entity. The definition of “confidential information” is taken from case law interpreting the same exemption under the federal Freedom of Information Act. The exemption is intended to protect financial documents that do not rise to the level of trade secrets to encourage competitive bidding and favorable pricing for goods and services.</p> <p>Under the CPRA a significant amount of confidential commercial or financial information submitted as part of a solicitation process is exempt from disclosure under the California Public Contract Code. Because the Public Contract Code does not apply to the judicial branch, this information would not be exempt from disclosure under (f)(5). A specific exemption will ensure uniform treatment of this category of information.</p> <p>Rule 10.500(f)(10) includes a specific exemption for trade secrets to ensure that such information is not inadvertently subject to disclosure and to clarify the controlling definition of trade secret. Evidence Code section 1060 provides a privilege for trade secrets and, in general, the definition of a “trade secret” for purposes of this privilege is set</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [fn7]</p> <p>Neither of these clauses appears in the proposed rule exemption, yet both are important limitations on the circumstances where trade secret protections may be applied. For example, Civil Code section 3426.1(d)(1) codifies the fundamental tenet that a trade secret must “give[] its user an opportunity to obtain a business advantage over competitors who do not know or use it.” <u>Uribe v. Howie</u> (1971) 19 Cal.App.3d 194, 207 (emphasis added). Civil Code section 3426.1(d)(2) gives effect to the principle that “public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret.” <u>In re Providian Credit Card Cases</u> (2002) 96 Cal.App.4th 292, 305–306. By omitting this critical language in favor of a much broader definition of trade secrets [fn8], Proposed Rule of Court 10.500(f)(10) appears to provide a greater exemption for information deemed to be “trade secrets” than is afforded by other California access laws. The proposed rules do not include any findings that a broader definition is needed to further an interest in secrecy, as required by the California Constitution, nor would such an expansive interpretation make sense in the context of these rules. Consequently, the Media Representatives urge the Judicial Council to either eliminate this provision entirely, or if some specific exemption</p> | <p>forth in Civil Code section 3426.1. But, for purposes of disclosing records under the CPRA, Civil Code section 3426.7 requires the use of the common law, pre -Uniform Trade Secrets Act definition of a trade secret. Given the imprecise nature of this common law definition, rule 10.500(f)(10)(a) has been amended to adopt the more precise definition used in Civil Code section 3426.1, as recommended by the commentator.</p> <p>The privilege set forth in Evidence Code section 1040 is largely inapplicable to the context of the commercial transactions of judicial branch entities. In addition, however, there must be a legal basis for the assurance of confidentiality. Rule 10.500(f)(10) sets forth that legal basis.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>is to be included for trade secrets, to use the definition of trade secrets codified in existing California law.</p> <p><i>C. The Computer Software Exemption In Proposed Rule of Court 10.500(g) Is Directly Contrary to Prevailing Case Law Finding That Computer Source Data Is A Public Record.</i></p> <p>The definition of computer software that is exempt from public disclosure in the Proposed Rule of Court 10.500(g) includes the following language: “source code developed by a judicial branch entity or used by a judicial branch entity for the storage and manipulation of data is not a judicial administrative record.” While the Drafter’s Notes claim that this language “corresponds to Government Code section 6254.9,” that is inaccurate; the above-cited language in the proposed rules actually <u>contradicts</u> language that appears in the CPRA, and is inconsistent with case law interpreting the CPRA’s source code provisions.</p> <p>Government Code section 6254.9(b) defines computer software as encompassing only “computer mapping systems, computer programs, and computer graphic systems” (not “source code”), and Government Code section 6254.9(d) explicitly states that “[n]othing in this section is intended to affect the public record status of information merely because it is stored in a computer. Public records shall be disclosed</p> | <p>Subdivision (g) was amended to include in the definition of “computer software” software that is developed by and used by a judicial branch entity for the storage or manipulation of data, and the coding included in that programming. Subdivision (g) was also amended to include a provision that a judicial branch entity is not required to duplicate records under rule 10.500 in violation of any copyright. The language is intended to follow current practice in the executive branch and to prevent misinterpretation of the terms used.</p> <p>The committee disagrees with the commentator’s interpretation of the rule. We believe that the language of (e)(1) represents a clarification and reasonable interpretation of the provisions of the CPRA addressing access to electronic records.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>as required by this chapter.” In <u>County of Santa Clara v. Superior Court</u> (2009) 170 Cal.App.4th 1301, plaintiff California First Amendment Coalition and media amici prevailed on a writ petition that sought to compel Santa Clara County to provide its Geographic Information Systems (“GIS”) basemap data pursuant to the CPRA. The court found that the GIS basemap data at issue did not qualify as “computer software” under the CPRA definition because it consisted of source data, and not a computer mapping system, computer program, or computer graphic system. <u>Id.</u> at p. 1332. Accordingly, the Court of Appeal rejected the County’s assertion of an exemption under the CPRA, and held that it had to make available the GIS basemap data to the requesters. <u>Id.</u> at pp. 1335–1336.</p> <p>In contrast, Proposed Rule of Court 10.500(g) includes “source code” language, in what appears to be a thinly-disguised effort to overturn prevailing case law on the issue of access to source data maintained by public agencies. This departure from the CPRA and the case law is not justified by any findings of need, nor is it a narrowly constructed exemption as required by the California Constitution. For these reasons, the source code language in the proposed rule should be deleted, and the language of the computer software exemption should be amended to conform to the language in the CPRA. [fn9]</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p><i>D. The Proposal To Charge Fees To Almost All Requesters Is Contrary To The CPRA and The FOIA, and Contravenes The Policy Behind The New Rules.</i></p> <p>The Invitation to Comment on the Proposed Rules states that the draft is intended to “reflect the judicial branch’s recognition of and support for the public’s right of access to information about its activities.” The preamble to the Proposed Rules echoes this sentiment, stating that Rule 10.500 “clarifies and expands the public’s right of access to judicial administrative records, and must be broadly construed to further the public’s right of access.” [Proposed] Rule 10.500(a) (emphasis added). Yet in perhaps the most significant departure from these principles, the Proposed Rules would impose a new cost structure for individuals and entities who take advantage of their rights — something that the CPRA does not permit, and that even the federal Freedom of Information Act (“FOIA”) allows only with explicit exemptions for many requesters.</p> <p>This drastic change was not accidental. Indeed, although the Proposed Rules in most respects purportedly were designed to mirror the CPRA, the drafters expressly note that FOIA was used instead “as a reference” for crafting a rule on fees because “[c]urrently, the case law interpreting the CPRA does not authorize a state agency to recover the costs of document search and review.” Yet Proposed Rule of Court</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>10.500(e)(4) goes even further than FOIA, by omitting key fee waiver provisions of FOIA that exempt many non-commercial and news media requesters from having to pay fees. For example, FOIA includes a “public interest” fee waiver provision that “is to be liberally construed in favor of waivers for non-commercial requesters.” <u>Federal Cure v. Lappin</u> (D.D.C. 2009) 602 F.Supp.2d 197, 201. Under the “public interest” fee waiver provision, waiver of search, review, and duplication fees is warranted where disclosure of the requested records “is likely to contribute significantly to public understanding of the operation or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § (a)(4)(A)(iii). Additionally, FOIA limits the fees that may be charged to “representative[s] of the news media.” 5 U.S.C. § (a)(4)(A)(ii)(II). Under the “news media” exception in FOIA, federal agencies may charge news media fees only for the costs of duplicating the requested records, but not for “search” and “review” done by the agencies. The “news media” exception, too, must be broadly construed, according to the prevailing case law. <u>See, e.g., National Security Archive v. Dep’t of Defense</u> (D.C. Cir. 1989) 880 F.2d 1381, 1386 (“[i]t is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.... In fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>'representative of the news media.'"). (Emphasis in original.) Neither of these fee waiver provisions appear in Proposed Rule of Court 10.500(e)(4), which requires every requester to pay unspecified fees for any time spent by the judicial entity beyond a narrow two-hour window for searching and reviewing for requested records.</p> <p>By imposing a cost structure on the public's rights of access, particularly one that goes beyond mere copying costs to include "search" and "review" time, the Proposed Rules will deter many potential requesters who simply cannot afford to pay for "time" spent by government officials (who already are paid by taxpayers for their efforts). This not only is counter to the Legislature's (and this body's) expressly stated purposes, it is contrary to the requirements of article I, section 3(b) of the California Constitution, which mandates a showing of "need" before restrictions on the public's rights of access can be allowed.</p> <p>In short, to impose significant costs on individuals or entities who seek to vindicate their rights of public access to their public records — based on the speculative concern that the new rules will result in a "flooding" of courts with requests — is contrary to the policy behind Government Code section 68106.2 and violates the California Constitution. These Media Representatives urge the council to reconsider the fee provisions contained in the</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>Proposed Rules, and follow the example set by the CPRA, which does not allow public agencies to charge for time spent performing their public functions under the law. At minimum, any fee structure should reflect FOIA’s broad public interest and news media fee waiver exemptions, which ensure that the public’s right of access is not truncated by oppressive fee requirements.</p> <p>IV. Other Recommended Changes To The Proposed Rules:</p> <p>While attempting not to repeat the more detailed comments provided by Californians Aware and others, Media Representatives urge the Judicial Council to consider the following changes to the Proposed Rules:</p> <ul style="list-style-type: none"> • The definition of “judicial branch entity” in Proposed Rule of Court 10.500(c)(3) is incomplete. The Commission on Judicial Performance, Commission on Judicial Appointments, and, most importantly, the California State Bar Association are all judicial branch entities, according to Article VI of the California Constitution, yet they are excluded from the definition in the proposed rules. The omission of the State Bar from this definition is especially notable, in light of the fact that the State Bar is currently facing several lawsuits related to public access to its records. | <p>The proposed rules are intended to apply to the Supreme Court, the Courts of Appeal, the superior courts, the Judicial Council, and the Administrative Office of the Courts, consistent with the statutory direction. The proposed rule is not intended to apply to all entities provided for in article VI of the California Constitution. The Judicial Council’s powers and responsibilities, which are set forth in article VI, section 6 of the California Constitution, include adopting rules for court administration, practice and procedure and performing other functions prescribed by statute. Article VI, section 6 does not provide the Judicial Council with rule-making authority over the Commission on Judicial Performance, Commission on Judicial Appointments, or the State Bar of California.</p> <p>The list of judicial administrative records set forth in Rule 10.500(e)(2) is taken from Government Code section 68106.2 and is illustrative, not</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| Commentator | Position | Comment | Response |
|-------------|----------|--|---|
| | | <ul style="list-style-type: none"> <li data-bbox="848 321 1373 1390">• Proposed Rule of Court 10.500(e)(2)(B)–(C) appears to provide public access to employee salary and benefit information only “by position classification” and any changes in salaried positions only “by classification.” If this is an attempt to keep individual court employees’ salary and bonus information confidential, it is yet another significant departure from existing CPRA law, which recognizes that individual compensation information for executive branch and local government employees is public information that must be disclosed. See <u>Int’l Fed. Of Professional & Technical Engineers v. Superior Court</u> (2007) 42 Cal.4th 319, 331; <u>Commission on Peace Officer Standards & Training v. Superior Court</u> (2007) 42 Cal.4th 278, 294, 296–298. This proposed change does not include any constitutionally required findings demonstrating a need to treat individual salary information for these individuals differently than for other government employees, nor is it narrowly tailored to address any special concerns that may exist. Accordingly, Proposed Rule of Court 10.500(e)(2)(B)–(C) should be revised to acknowledge the public’s right of access to records reflecting the individual compensation information of these public judicial employees. <li data-bbox="848 1425 1293 1455">• Proposed Rule of Court 10.500(f)(1) | <p data-bbox="1394 321 1995 548">exhaustive. Subdivision (e)(2) has been amended to list individual employee salary information as an example of a judicial administrative record that would be subject to inspection and copying, consistent with the Supreme Court’s opinion in <i>Int’l Fed. of Professional & Technical Engineers v. Superior Court</i> (2007) 42 Cal.4th 319.</p> <p data-bbox="1394 1360 1995 1455">Rule 10.500(f)(1) has been amended to provide an exemption for “[p]reliminary writings, including drafts, notes, working papers, and inter-judicial</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>exempts “[p]reliminary writings, including drafts, notes, working papers and inter-judicial branch entity or intra-judicial branch entity memoranda, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” This proposed rule excludes the following emphasized language from the comparable exemption in the CPRA (Gov. Code, § 254(a)): “[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business” Under the CPRA, if the public agency customarily retains the preliminary materials, they must be disclosed. <u>See Citizens For A Better Environment v. Dep’t of Food & Agric.</u> (1985) 171 Cal.App.3d 704, 714. The proposed rules do not contain any findings of need for this more expansive view of the preliminary drafts exemption, nor is any need apparent; consequently, the Proposed Rules should be revised to track the language in the CPRA.</p> <ul style="list-style-type: none"> Proposed Rule of Court 10.500(f)(7) exempts all records related to complaints regarding or investigations of justices, judges, and subordinate judicial officers. Although complaints against judges, which are processed and adjudicated by the Commission on Judicial Performance, | <p>branch entity or intra-judicial branch entity memoranda, that are not retained by the judicial branch entity in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” This language is identical to the corresponding section of the CPRA, Government Code section 6254(a).</p> <p>A complete discussion of this issue is included in the Judicial Council report. In brief, (f)(7) reflects the underlying principles that result in the confidentiality of Commission on Judicial Performance proceedings and proceedings under rule 10.703.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>are kept confidential until formal proceedings begin (see Cal. Const. art. XVIII, § J), there is no support in California law for allowing complaints against subordinate judicial officers to be kept secret. To the contrary, courts consistently have held in connection with other government employees that as long as the complaints against regular employees are “well founded,” the records reflecting the complaints must be disclosed. <u>Bakersfield City School Dist. v. Superior Court</u> (2004) 118 Cal.App.4th 1041, 1044, 1046. In the case of high-level employees, even unreliable charges against the high-level employee must be revealed. See <u>BRV. Inc. v. Superior Court</u> (2006) 143 Cal.App.4th at p. 759. The proposed rules offer no findings for why subordinate judicial officers should be permitted to conceal complaints against them, or otherwise justify this departure from California law.</p> <ul style="list-style-type: none"> • Proposed Rule of Court 10.500(b) states that “[t]his rule applies to public access to nondeliberative and nonadjudicative court records, budget, and management information relating to the administration of the courts. The nebulous term “nondeliberative” should be deleted from this rule, for the reasons stated above. • Proposed Rule of Court 10.500(c)(2) | <p>\</p> <p>Rule 10.500(b)(1) has been amended to clarify that the rule applies to “judicial administrative records” as opposed to “nonadjudicative” and “nondeliberative” records.</p> <p>The phrase “relating to the conduct of the people’s</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>should broadly define judicial administrative records as including “any non-adjudicative writing containing information that is prepared, owned, used, or retained by a judicial branch entity regardless of the writing’s physical form or characteristics.” The phrase “relating to the conduct of the people’s business” should be eliminated from the definition, because it would have the consequence of permitting judicial agencies to argue, as some public agencies have attempted to argue, that requested records do not “relate to the conduct of the people’s business” and are “personal,” even though they are judicial administrative records.</p> <ul style="list-style-type: none"> • In several places, the proposed rules discuss “executed contracts” or “final audit[s].” <u>See, e.g.</u>, Proposed Rules of Court 10.500(f)(8), 10.500(c)(2)(E). This language appears to be unduly restrictive. The proposed rules already contain limitations on the revealing of certain preliminary drafts materials (which should be amended, for the reasons stated above), but no explanation is given why a formed but not executed contract should be concealed from the public. Nor do the proposed rules articulate why an audit that was finished, but to which a judicial branch entity objected, should remain exempt from public inspection. | <p>business” in (e)(2) is identical to the corresponding language in the CPRA’s definition of “public record,” Government Code section 6252(e).</p> <p>Rule 10.500(c)(1) has been amended to add the assignment or reassignment of court-appointed counsel to the definition of an adjudicative record, which the rules do not cover. Writings related to the evaluation of court-appointed counsel are exempt from mandatory disclosure by (f)(3) (personal privacy exemption) and (f)(12) (catch-all exemption). An advisory committee comment on (f)(3) addresses evaluations of court-appointed counsel.</p> <p>As used in rule 10.500, the term “executed contract” means a contract that has been signed by all parties intended to be bound by its terms and conditions. This term does not refer to contracts that have been fully performed.</p> <p>As used by the AOC Finance Division, which performs audit services for the trial and appellate courts, the term “final audit report” refers to a document that has gone through the entire audit process. Both the investigative aspect of the audit and the analysis and resulting findings must be completed for an audit to be considered “final.” Accordingly, no action was taken in response to these comments.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>V. Conclusion</p> <p>The proposed rules provide a good starting point for clarifying and expanding the public’s right of access to judicial administrative records. If modified to address the concerns raised in this letter and in the comments submitted by other parties, the rules eventually adopted can provide a model of transparency and openness in government. If we may provide you with additional information, please do not hesitate to call me at 213-633-6821.</p> <p>Davis Wright Tremaine LLP</p> <p>fn1 - In this section of the proposed Rules, as well as in other areas, there are distinctions drawn between what are deemed to be requests for “commercial” use and those for “non-commercial” use. Although news organizations may operate as for-profit entities, courts have made very clear that this does not equate with a “commercial” use that lessens their rights to obtain and disseminate information to the public. The inclusion of the word “commercial” in proposed rules is therefore of significant concern, particularly since it appears without definition or explanation. We would urge the Council to revise the rules to remove the suggestion that a different standard, or even more onerous charges, may be applied to journalistic or other enterprises that do not operate as non-profit entities.</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>fn2 - This letter is not intended to be exhaustive, and takes into account the thoughtful comments provided by other interested parties, including Californians Aware.</p> <p>fn3 - For the same reason, proposed Rule 10.500(b)(2), while making clear that the rule does not “modify” the law concerning public access to adjudicative records, should make clear that the rule does not intend to limit in any way the rights that exist under the First Amendment to the United States Constitution, California Constitution, and the common law.</p> <p>fn4 - Although important to avoid ambiguity and unnecessary disputes over the application of the Rules, this would not change their impact, since the constitutional requirements must be applied to their interpretation. See, e.g., <i>McClung v. Employment Development Dep’t</i>, 34 Cal. 4th 467, 477 (2004) (“[a]n established rule of statutory construction requires [the Court] to construe statutes to avoid constitutional infirmities”) (citations, internal quotes omitted); accord <i>NBC Subsidiary (KNBC-TV), Inc. v. Superior Court</i>, 20 Cal. 4th 1178, 1216 (1999); <i>People v. Superior Court (Romero)</i>, 13 Cal. 4th 497, 509 (1996).</p> <p>fn5 - See, e.g., <i>Sutter’s Place v. Superior Court</i>, 161 Cal. App. 4th 1370 (2008).</p> <p>fn6 - Under Section 6255 of the CPRA, the public agency bears the burden of</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>demonstrating that the government interest in nondisclosure “clearly outweighs” the public interest served by disclosure.</p> <p>fn7 - The definition of trade secrets in the Civil Code and an identical portion of the penal Code (Section 499c) applies to the CPRA through Government Code § 6254(k), which exempts information that is privileged under the Evidence Code, including Evidence Code § 1061. That section of the Evidence Code states that the definition of trade secrets is that found in the above-cited Civil Code and Penal Code provisions.</p> <p>fn8 – The drafters of the proposed rule appear to have borrowed a definition of trade secrets from a CPRA section exempting certain specific air pollution data that merited trade secret protection. See Gov’t Code § 6254.7. Using the well-recognized statutory definitions in the Civil Code and Penal Code, which already have been interpreted and applied in a variety of contexts, is far preferable to creating new avenues for disputes by using language that was intended for one specific purpose.</p> <p>fn9 – In a related point, Proposed Rule 10.500(e)(1), which states that judicial entities are not required to “create a record or list, compile or assemble data” that would not otherwise be created, listed, compiled or assembled” then goes on to suggest that even where data is “compiled,” it need not be</p> | |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|----|---|-----------------|--|-----------------------|
| | | | produced. This contravenes the Court of Appeal's holding in <i>CBS Broadcasting Inc. v. Superior Court</i> , 91 Cal. App. 4th 892, 909 (2001), which held that the Department of Social Services was required under the CPRA to compile a list of individuals who had been granted criminal conviction exemption to work on licensed day care facilities – a matter of undisputable public importance. With judicial records increasingly being maintained in electronic storage, and outside vendors being considered to maintain those records, adopting a different rule for judicial entities would be a significant impediment to the public's right of access. At minimum, the convoluted language in this second sentence should be eliminated, so that there is no confusion about the obligations of judicial entities to make available records that already are compiled or created by the entity or its designees. | |
| 8. | Robert Collins | N | I agree with Marcy's (Ganz) stmt. I would like add another input of restricting the courts from collecting attorneys fees. The public should have the right, but the gov't from the public is punishing them for trying. | No response required. |
| 9. | Council of California County Law Librarians Lawrence R. Meyer President San Bernardino, California | AM | The Council of California County Law Librarians (CCCLL) has reviewed the proposed California Rules of Court, rule 10.500 and submits our comments to the drafted provisions on Public Access to Judicial Administrative Records. | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>CCCLL recommends clarification in the proposed Rule 10.500(e)(1) that the county law libraries will continue to receive reports and information related to their own operation at no cost:</p> <p>Nothing in this rule requires a judicial branch entity to create a record ... if the judicial branch entity does not list, compile, or assemble the data in the requested form for its own use <i>or for provision to other agencies</i>. Extracting or compiling data loaded from extractable fields in a single database using software already owned or licensed by the judicial branch entity <i>does not constitute the creating of a record</i> or the compilation or assemblage of data.</p> <p>[Italics added]</p> <p>Since the enactment of the Uniform Civil Fees and Standard Fee Schedule Act of 2005, the Administrative Office of the Courts has collected the county law libraries' portion of the filing fees and distributed the funds back to each library. The monthly fee distribution to the libraries includes county and statewide fee reports including types of filings, number of filings, and amounts remitted. The reports are required for the county law libraries' governance and operations, and are used for future planning. CCCLL recommends the Rule be clarified so those programs whose portion of</p> | <p>The provision of reports included in the monthly filing fee distribution to the county law libraries will not be affected by rule 10.500.</p> <p>No response required.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|--|---|
| | | | <p>the filing fee is collected by the courts will continue to receive its reports at no charge.</p> <p>Regarding the Proposal's Rule 10.500(e)(4) discussing cost recovery, CCCLL agrees and supports the position that utilizing the judicial branch's existing technology and software will minimize any costs. It will provide the least expensive and most efficient means to capture data that may be disclosed to the public.</p> <p>The Council of California County Law Librarians respectfully submits these comments encouraging the Judicial Council's support of our concerns. Thank you for the opportunity to respond.</p> | |
| 10. | <p>Consumer Attorneys of California Paloma V. Pérez Associate Legislative Counsel Sacramento, California</p> | AM | <p>Consumer Attorneys of California (CAOC) has reviewed the proposed rules governing public access to judicial administrative records. Please accept the following comments on behalf of the organization.</p> <p>We applaud the efforts of the Judicial Council to ensure the public has access to important information regarding the state judiciary branch. However, we are of the belief that Proposed Rule 10.500, particularly subdivision (e)(4), is a deviation from the intent of the proposed rules, which is intended to clarify and expand the public's right of access to judicial administrative records. Proposed Rule 10.500(e)(4) allows a the judicial branch to impose a charge for "document search and review." Although the</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|--------------------|-----------------|---|-----------------|
| | | | <p>rule does not impose a fee on non-commercial information requests for the first two hours of search and review, we are concerned this will effectively hinder a person’s ability to request information from the courts.</p> <p>California has historically supported public access to information. Article 1, §3(b) of the California Constitution guarantees that statutes, court rules, or any other authority to be “broadly construed” in a manner that furthers the public’s access to information. Furthermore, the California Public Records Act (CPRA), prohibits a state agency from charging a citizen for a document search or review fee when making a public record request. We believe that the judicial system should follow the same sentiment and should be only able to charge the direct duplication costs. By charging members of the public a fee that is more than the cost of duplication, many people will be denied access to information.</p> <p>Judicial Council has cited court closures and lack of resources as the reason for allowing courts the discretion to impose such fees. We are extremely sympathetic to the court’s current setbacks in light of state's financial crisis. The disturbing reality is that these setbacks constrain a person’s access to the courts. This problem will be elevated if persons are charged more than the direct duplication cost for this vital information.</p> | |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|-----------------|
| | | | In essence, while we believe the intentions of the proposed rules are excellent, they have the potential to hinder public access to information if costs are too high. Please do not hesitate to call me if you would like to discuss the issue further. | |
| 11. | Courthouse News Service Response by Rachel Matteo-Boehm Holme Roberts & Owen LLP Pasadena, California | AM | <p>As explained more fully below, Courthouse News agrees with the statement, on page 3 of the Invitation to Comment, that “[l]ike the legislative and executive branches, the judicial branch receives and expends public resources. How courts manage these resources are matters that should be open to public view subject to appropriate exemptions.” Given this policy goal, it would seem that the Proposed Rules should correlate closely to the California Public Records Act (“CPRA”), and impose access restrictions above and beyond those existing as part of the CPRA only in those cases where access should be further restricted due to the special characteristics and role of the judicial branch. Yet the Proposed Rules go well beyond this in several respects:</p> <ul style="list-style-type: none"> • The Proposed Rules contain disclosure exemptions not found in the CPRA that appear to be motivated not by any unique characteristics of the judiciary, but rather a simple desire for more secrecy than is offered by the CPRA. As explained more fully below, Courthouse News is particularly concerned about the deliberative process exemption found at Proposed Rule | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>10.500(f)(11) and the exemption for “confidential commercial and financial information” at Proposed Rule 10.500(f)(10).</p> <ul style="list-style-type: none">• The Proposed Rules would permit court officials to charge as-yet undetermined fees for time needed to search for and review documents responsive to requests, and for copies provided to those requesting records for commercial use, even though the CPRA does not allow such fees. While a lack of resources is given as the justification given for these fees, the Judiciary is no different from the legislative and executive branches in this respect, and imposing search and review fees for judicial administrative records together with special copying fees for records sought for commercial use would undermine the goal of openness in the administrative affairs of the judiciary that these Proposed Rules are intended to advance. In addition, the proposed fees would impose a particular burden on the press, a frequent and appropriate requestor of records about the government, which is struggling with industry-wide financial challenges of its own.• The Proposed Rules would impose limitations on obtaining records in an electronic format that do not exist in the CPRA and that would unduly restrict the press and public’s ability to access administrative records in an age where | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>records are increasingly being held in an electronic form - sometimes exclusively so. As with other aspects of these Proposed Rules, there does not appear to be any special reason why there should be less access to electronic judicial administrative records than what is currently required for executive and administrative agency records maintained in electronic form.</p> <p><u>About Courthouse News Service</u> Based in Pasadena, California, Courthouse News Service is a legal news service for lawyers and the news media that covers courts across the nation. Founded in 1990, Courthouse News is similar to other news wire services, such as the Associated Press, except that it focuses on civil lawsuits, from the date of filing through the appellate level. The majority of Courthouse News’ nearly 2,500 subscribers are lawyers and law firms; however, its subscribers also include prominent media organizations such as the <i>Los Angeles Times</i>, the <i>San Jose Mercury News</i>, <i>The Dallas Morning News</i>, <i>The Houston Chronicle</i>, <i>The Boston Globe</i>, <i>Forbes</i>, and FOX. Courthouse News’ web site (www.courthousenews.com) which features news reports and commentary about civil cases and appeals, receives an average of 10,000 unique daily visitors.</p> <p><u>Exemption For “Confidential Commercial And Financial Information”</u> Subdivision (f)(10) of Proposed Rule 10.500</p> | <p>Rule 10.500(f)(10) includes a specific exemption for trade secrets to ensure that such information is not inadvertently subject to disclosure, and to</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>would add an exemption for “[r]ecords containing trade secrets or privileged or confidential commercial and financial information.” Such an exemption is not included in the CPRA, and for good reason. Among other things, the portion of the exemption relating to “confidential commercial and financial information” would likely be used to block from public disclosure a variety of documents that shed light on the government’s use of public funds. In the case of judicial administrative records, such an exemption could be used to prevent the release of documents pertaining to the courts’ dealings with third party vendors, such as vendor contracts. It might also be used to make documents pertaining to competitive bid processes off-limits in perpetuity.</p> <p>Although the CPRA does not provide a specific exemption for trade secrets or commercial or financial information of a proprietary nature, it does contain other provisions that could be used, in appropriate cases, to address these interests. Among these is Evidence Code § 1060, which creates a qualified privilege for trade secrets through Government Code § 6254(k) (exemption for records the disclosure of which is exempted or prohibited pursuant to state or federal law). <i>See San Gabriel Tribune v. Superior Court</i>, 143 Cal. App. 3d 762,775-76 (1983); <i>Uribe v. Howie</i>, 19 Cal. App. 3d 194,206-14 (1971). Evidence Code § 1060 would also be incorporated into the Proposed Rules for disclosure of judicial administrative</p> | <p>clarify the controlling definition of “trade secret.” Evidence Code section 1060 provides a privilege for trade secrets, and, in general, the definition of a trade secret for purposes of this privilege is set forth in Civil Code section 3426.1. But, for purposes of disclosing records under the CPRA, Civil Code section 3426.7 requires the use of the common law, pre - Uniform Trade Secrets Act definition of a trade secret. Given the imprecise nature of this common law definition, Rule 10.500(f)(10)(a) has been amended to adopt the more precise definition used in Civil Code section 3426.1.</p> <p>To have the rule conform more closely to its intent, the exemption in (f)(10) was amended so that it applies only to confidential commercial and financial information submitted in response to a judicial branch entity’s solicitation for goods or services or in the course of the entity’s contractual relationship with a commercial entity. The definition of “confidential information” is taken from case law interpreting the same exemption under the federal Freedom of Information Act. The exemption is intended to protect financial documents that do not rise to the level of trade secrets to encourage competitive bidding and favorable pricing for goods and services.</p> <p>Under the CPRA a significant amount of confidential commercial or financial information submitted as part of a solicitation process is exempt from disclosure under the California Public Contract Code. Because the Public</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>records by virtue of Proposed Rule 10.500(f)(5), which performs the same function as Government Code § 6254(k).</p> <p>The catch-all exemption, found in both the CPRA at Government Code § 6255 and Proposed Rule 10.500(f)(12), also provides protection in appropriate cases, such as where disclosure of commercial or financial information <i>during</i> a competitive bid process would create significant harm to either a private party bidder or the government itself. <i>See Michaelis, Montanari & Johnson v. Superior Court</i>, 38 Cal. 4th 1065 (2006).</p> <p>In light of these other protections, which the legislature has deemed sufficient to protect trade secrets and confidential commercial information in legislative and executive branch documents, there is no inherent reason why there should be a heightened rule of confidentiality in the case of judicial administrative records. Courthouse News has observed that courts are increasingly outsourcing important functions pursuant to commercial arrangements with third parties that involve considerable sums of money. Given this environment, it is particularly important that the judiciary’s use of taxpayer funds be open to public view. Proposed Rule 10.500(f)(10) should therefore be eliminated to ensure that court expenditures of taxpayer funds are subject to the same public scrutiny as the other branches of California’s government.</p> | <p>Contract Code does not apply to the judicial branch, this information would not be exempt from disclosure under subdivision (f)(5). A specific exemption will ensure uniform treatment of this category of information.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p><u>Deliberative Process Exemption</u> While the Invitation to Comment suggests that the deliberative process exemption at Subdivision (f)(11) of Proposed Rule 10.500 simply tracks the deliberative process exemption recognized by prior court decisions for the purposes of the CPRA, Proposed 10.500(f)(11) would in fact pose a far greater barrier to access.</p> <p>The CPRA does not contain a deliberative process exemption per se. However, courts have found such an exemption to exist through application of the catch-all provision at Government Code § 6255 (which, as noted above, would also be incorporated into the Proposed Rules through Proposed Rule 10.500(f)(12). <i>See, e.g., Times Mirror Co. v. Superior Court</i>, 53 Cal. 3d 1325 (1991); <i>California First Amendment Coalition v. Superior Court</i>, 67 Cal. App. 4th 159 (1998). Under Government Code § 6255, and under Proposed Rule 10.500(f)(12), records may be withheld if, “on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure of the record.” In other words, the presumption is one of disclosure.</p> <p>Proposed Rule 10.500(f)(11) would take that presumption and flip it on its head, creating an additional exemption that would apply to any records exposing the judiciary’s administrative “decision-making process ... unless the public</p> | <p>The inclusion of a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel reflects the language and intent of the directing statute and is consistent with current practice in the other two branches of government.</p> <p>Rule 10.500(f)(11) has been amended to ensure that it preserves a presumption in favor of disclosure and to state that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has been added to clarify that the application of the exemption is intended to mirror existing case law on the “deliberative process” exemption under the CPRA.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>interest served by disclosure clearly outweighs the public's interest in withholding the record.” In other words, the presumption would be one of <i>nondisclosure</i>. While Courthouse News certainly understands the need for deliberative confidentiality in the case of adjudicative records, there does not appear to be any inherent reason why the judiciary would have a special need for deliberative confidentiality in the case of non-adjudicative, administrative records that goes above and beyond what the courts have previously said applies in the case of administrative and executive agencies. [fn1]</p> <p>Because the presumption of nondisclosure would be so hard to overcome, the practical effect of Proposed Rule 10.500(f)(11) would be that any records even arguably exposing the judiciary’s “decision-making process” as to administrative matters would be effectively off-limits to the public. As with the proposed exemption for trade secrets and confidential financial information, the proposed deliberative process exemption would be ripe for abuse and create a gaping hole so large as to nearly eviscerate the policy of public access that motivated the Proposed Rules in the first place by effectively preventing public oversight of judicial administrative matters.</p> <p>Courthouse News recognizes that Government Code 68106.2(g) provides that the Proposed Rules should provide access to “nondeliberative” records, but respectfully</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>suggests that this directive is sufficiently addressed by the catch-all exemption in Proposed Rule 10.500(f)(12) and the prior case law creating a deliberative process privilege based on this exemption. There is no need to create what would be, in effect, a super-deliberative process exemption. Courthouse News thus urges the Judicial Council to eliminate subdivision (f)(11) of Proposed Rule 10.500.</p> <p><u>Fees For Document Duplication; Search And Review Time</u> Under the CPRA, no fees may be charged to those simply requesting to review records, and except in certain specified cases involving electronic records, the fees for a copy of a record are limited to the direct costs of duplication. Government Code §§ 6253, 6253.9. The CPRA’s fee structure makes no distinction between requests for commercial and noncommercial uses of records—every requestor is charged the same fee. Subdivision (e)(4) of Proposed Rule 10.500, which would allow courts to charge whatever fees they deemed “reasonable” for searching for and reviewing administrative records, and would similarly allow courts to impose whatever fees they determined to be “reasonable” for copies of records “requested for commercial use,” represents a significant and troubling departure from that framework.[fn2]</p> <p>In the analogous situation of press access to</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>criminal trials, the Court of Appeal has observed:</p> <p>It would be a dangerous and totally unacceptable precedent to hold that alternatives to a jury trial within an area where prejudicial publicity has circulated need not be pursued before the press is excluded, based on a <i>cost factor</i>. ... when balancing the interest of minimizing the expense in the impaneling of an impartial jury against the interests of preserving rights of public access and a free press, it is quite apparent there is no contest. ...the cost to the criminal justice system to provide a fair trial is the price we pay for an open society, and a free press with access to criminal proceedings.</p> <p><i>Tribune Newspapers West, Inc. v. Superior Court</i>, 172 Cal. App. 3d 443, 458-59 (1985)</p> <p>The same principles hold true with respect to public access to judicial administrative records. While Courthouse News appreciates the judiciary’s budgetary challenges, it respectfully asserts that court budgets should not be balanced on the backs of those who seek access to administrative judicial records, either to perform an oversight function or simply to better understand and/or further disseminate information about the judiciary's administrative</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>operations—activities at the heart of our democratic system of government. Not only are judicial administrative records already paid for in the first instance by taxpayer dollars, but the fees contemplated by Proposed Rule 10.500(e)(4) would discourage the public and press from requesting to see such records, resulting in less oversight of the judicial branch. This is true even for records sought for “commercial” purposes. To the extent the judiciary believes it needs extra funding to pay for the disclosure mandate, Courthouse News respectfully believes that such funding should come from sources other than the requestors themselves, as is the case with legislative and executive branch records.</p> <p>Courthouse News is particularly concerned about the impact that search and review fees would have on the news media. As the U.S. Supreme Court has recognized, the media function as “surrogates for the public,” which today acquires information about court proceedings “chiefly through the print and electronic media.” <i>Richmond Newspapers, Inc. v. Virginia</i>, 448 U.S. 555,572 (1980). As part of its role in monitoring the activities of the government, news agencies are frequent requestors of government records, and any fees for accessing those records make it harder for the media to perform this oversight function. This is especially true given the current dire financial state of the media industry.</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p><u>Electronic Records</u> As a final matter, Courthouse News respectfully disagrees with the limitations contained in the Proposed Rules for access to judicial administrative records maintained in an electronic format. We live in an increasingly electronic age, from which paper records may soon disappear. Yet Proposed Rule 10.500(e)(1) contain limitations that would likely bar the public and the press from reviewing certain types of electronic records once again, limitations that are not found in the CPRA.</p> <p>While Courthouse News recognizes that the Proposed Rules attempt to address this concern by providing that court officials may be required to “extract[] or compil[e] data loaded from extractable fields in a single database using software already owned or licensed by the judicial branch entity,” Proposed Rule 10.5000(e)(1), in an environment of rapidly-changing computer technology, this language is not sufficient to cover all the situations in which electronic data should be “compiled” or “assembled” so that the public and press may perform their oversight role over the judiciary’s administrative functions. As with the other provisions of the Proposed Rules addressed in these comments, there is no inherent reason why the special role of the judiciary should warrant a departure from the CPRA’s approach to electronic records, and Courthouse News respectfully urges the Judicial Council to bring</p> | <p>As explained more fully in the Judicial Council report, the committee believes that the language of (e)(1) represents a clarification and reasonable interpretation of the provisions of the CPRA addressing access to electronic records.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>the Proposed Rules in line with the CPRA so that requestors continue to have an adequate ability to review the judiciary’s administrative records as technology develops.</p> <p>Courthouse News appreciates the opportunity to comment on these Proposed Rules. If you have any questions, or would like to discuss any of Courthouse News’ comments further, please do not hesitate to contact our offices.</p> <p>fn1- Proposed Rule 10.500(f)(11) is particularly problematic in light of Article 1, § 3 of the California Constitution, as amended by passage of Proposition 59 in 2004. That provision states: “The people have a right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and writings of public officials and agencies shall be open to public scrutiny.” The ballot argument in support of Proposition 59 states that “[i]t will allow the public to see and understand the deliberative process through which decisions are made.” Thus, Proposition 59 was clearly intended to preclude the use of the “deliberative process” privilege.</p> <p>fn2- The question of what constitutes a “commercial use” is not addressed in the Proposed Rules. And unlike the federal FOIA, which limits the fee that may be charged for copies of records requested by members of the news media, the Proposed Rules contain no special provisions for the news media.</p> | |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|---|---|
| 12. | Children's Rights Initiative for Sharing Parents Equally (CRISPE) Marcy Ganz | N | <p>I submit my comments regarding proposed CRC 10.500. I reject your proposed rule.</p> <p>1. I disagree with charging fees for time on document searches. CPRA does not charge search fees. You have seemed to pick and choose what would be most difficult to openly give records which is subverting the legislatures intent.</p> <p>Recommend: No Charge for records or search time because it will discourage the taxpayers right to know.</p> <p>2. I disagree with your exclusions to information. Your argument that judge become targets is flawed. Judges have unlimited immunity and are not liable even if it is proven they willfully did not follow the law or act capriciously. Withholding information that can improve the courts or hiding decisions by court decision makers makes it difficult for the public to grasp what you are doing and why you need funding to operate you monolithic operations.</p> <p>Recommend: Unrestricted access to records, the public has a right to know. Make your records easily available on line so people don't have to make as many query to locate records. Such as: Statement 700 forms, Oath of Office, audits, budgets, contracts, minutes of meetings so to be open with the public how taxpayers money is being spent.</p> | <p>1. Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> <p>2. A complete discussion of this exemption, (f)(7), is included in the Judicial Council report. In brief, (f)(7) reflects the underlying principles that result in the confidentiality of Commission on Judicial Performance proceedings and proceedings under rule 10.703.</p> <p>3. The process used to solicit public input for these rules follows the process established by the judicial branch to invite comment from the public. In addition to conferring with members within the judicial branch, the judicial working group and AOC staff consulted with legislative staff; representatives of labor unions representing trial</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|--|--|
| | | | <p>3. The writers of proposed draft failed to properly solicitate input from the public or hold hearings on this important change. Posting this on a website and not notifying interested stakeholders and member of various organizations is improper and erodes confidence on how judicial council conducts business with the public.</p> <p>Recommend: Interim rule until rule can be properly review by a working group including stakeholders outside of the judicial branch.</p> <p>Please feel free to contact me and I will be interested in speaking with you in further details.</p> | court employees; and representatives of organizations advocating open access to government information, including Californians Aware, the California First Amendment Coalition, and the California Newspaper Publishers Association. |
| 13. | Darlene ² Silverhill, Alabama | A | Make records of the court available to the public to stop organized crime. | No response required. |
| 14. | Greg Fite Castro Valley, California | A | I am a county law librarian and have served the public in Alameda County for over twenty years. I strongly favor open public access to court records, with the exception of confidential records. We are asked all the time how records might be obtained, and I hate to send people to the Court Clerk's office if we can pull up the record on-site. Thank you for this wonderful proposal that will continue the long-term enhancement of public access to court records and documents. | No response required. |

² This comment was submitted for another proposal, but may have been done so erroneously and is therefore included here.

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|--|
| 15. | Hon. Paul Hearle Associate Justice Court of Appeal, First Appellate District, Division Two San Francisco, California | AM | <ol style="list-style-type: none"> 1. Subsection (f)(10) defines “trade secret,” “privileged information,” and “confidential information,” but not the fourth and final term used in the introductory sentence, i.e., “financial information.” I suggest that this term be specifically defined and that the definition include anything personal to judicial branch personnel, i.e., communications to or from them regarding personal financial matters (i.e., written or e-mail communications from or to banks, investment advisors, mutual funds, insurance companies, etc., etc.); 2. Many judicial officers are sent numerous forms or e-mails requesting evaluations of candidates for judicial appointment. For example, many judges get almost a dozen JNE forms a month asking for their evaluation of candidates for judicial office. Both incoming and outgoing matters such as these, both written and e-mails, should be made exempt under revisions or expansions of subsections (f)(1), (3)(7) or (10)—or possibly a new subsection. | <p>This exemption is intended to protect proprietary commercial and financial records that do not rise to the level of a trade secret and that may be disclosed to a judicial branch entity during the solicitation process or in the normal course of a judicial branch entity’s contractual relationship with a commercial entity. Rule 10.500(f)(10) has been amended to reflect that intent. Writings reflecting personal finances are exempt from mandatory disclosure by Rule 10.500(f)(3) (personal privacy exemption). Also, writings reflecting personal communications are expressly excluded from the definition of “judicial administrative record (see Rule 10.500(c)(6))... Rule 10.500(f)(7) has been amended to exempt from mandatory disclosure records related to evaluations of applicants or candidates for judicial office.</p> |
| 16. | Samantha Klein Court Training Coordinator Superior Court of Marin County | AM | <ul style="list-style-type: none"> • In Trial Court Financial Procedures and Policies AOC Fin 12.01: Record Retention, it states “As shown in the following table, the AOC has established a five-year (current year plus four) retention period as the standard for retention of a wide range of court financial documents. The trial | <p>The possible inconsistency between the two provisions has been forwarded to the Finance Division of the Administrative Office of the Courts, the division responsible for the Trial Court Financial Policies and Procedures Manual, for reconciliation of the two provisions.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|---|-----------------|
| | | | <p>court should comply with this standard in the absence of a specific retention period required by statute or the AOC.” http://www.courtinfo.ca.gov/reference/tcftp/documents/6ed/1201.pdf pg 4</p> <ul style="list-style-type: none"> • In the proposed Rule of Court 10.501(a)(1) it is stated that: Official documents of the superior court pertaining to the approved superior court budget allocation adopted by the Judicial Council and actual final year-end superior court revenue and expenditure reports as required in budget procedures issued by the Administrative Office of the Courts to be maintained or reported to the council, including budget allocation, revenue, and expenditure reports” http://www.courtinfo.ca.gov/invitationstoccomment/documents/sp09-07.pdf p 27 <p>The final sentence of the latter statement probably allows the new rule to trump the old one, but consistency is always nice so I thought I'd bring it your attention before final adoption.</p> | |
| 17. | Laborers' International Union of North America Local 777 Liberty Rieter Sanchez Legislative Advocate Los Angeles, California | AM | <p>On behalf of Laborers' International Union of North America Local 777 below please find comments in response to proposed Rules of Court 10.500 and 10.501, proposed repeal of Rule of Court 10.802 and proposed amendments to Rule of Court 10.803.</p> <p>The stated intent of the new proposed Rule 10.500 is to “expand the public’s right of access</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>to judicial administrative records” (proposed Rule 10.500 (a)). As currently written, several provisions of the proposed Rule 10.500, and the elimination of existing Rule of Court 10.802 would effectively limit access to information rather than expand access. Further, the proposed rules “draw from the California Public Records Act...and the Legislative Open Records Act...[t]o some extent, the proposed rules also draw from the federal Freedom of Information Act” (SPO9-07 p.2), culminating in a potentially ineffective mishmash in lieu of an important public access rule. We believe that the adoption of the proposed rules, in conjunction with repeal of the existing rule, would result in failure to meet not only the stated purpose of the new rules, but also the spirit and intent of SB 4X 13 (Chapter 22, Statutes 2009), the statute which requires promulgation of the rules. Accordingly, we believe that the proposed rule should more closely mirror the California Public Records Act, and that existing Rule of Court 10.802 should not be repealed.</p> <p>Our specific concerns are as follows:</p> <p><u>COSTS</u></p> <p>We believe that 10.500(e)(4) imposes costs which are too onerous on information requesters. The both the CPRA (see Government Code section 6253(b) and the current rule of court 10.802(f) provide that costs</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>are not to exceed direct cost of duplication, yet the proposed rule establishes costs in accordance with existing Government Code section 70627(a) which is 50 cents per page. This provision would result in substantial increases to the costs currently associated with copying documents requested under the existing Rule, rendering many information requests cost prohibitive. Accordingly, subparagraph (e)(4) should be replaced with the existing language of subparagraph 10.802(f), which provides for reasonable fees to cover direct costs.</p> <p><u>TIMELINE</u></p> <p>Under existing 10.802(e) the time by which the court or the AOC must make requested information available to the requesting party is within 10 business days of the receipt of the request for current or immediately prior fiscal year information, and within 20 business days of the receipt of the request for prior years information. The new proposed Rule 10.500(e)(6) instead requires that a determination must be made within 10 calendar days from receipt of the request as to whether the information requested is disclosable, and then (e)(7) requires that such disclosable information be made available to the requesting party “promptly.” Neither the requesting party nor the court or the AOC benefits when specific timelines are not expressly provided, and “promptly” does not constitute a specific timeline. Accordingly, the proposed Rule should</p> | <p>The timeline provisions set forth in Rule 10.500(e)(6) - (8) reflect the requirements of the CPRA. In so doing, the provisions would apply a different response time standard to some categories of judicial administrative records that are subject to disclosure under current rule 10.802. Under current rule 10.802(e), a superior court, the AOC, and the Judicial Council are required to make certain budget and management information available to a requester within 10 business days of the request (previous fiscal year information must be provided within 20 business days of the request).</p> <p>Applying different response times to different types of information, however, would be infeasible for judicial branch entities to administer. In addition, applying the shorter time frame provided in current rule 10.802 to all requests for judicial administrative records would</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>be amended to incorporate the timeline provided in existing Rule 10.802 (e). Further, in order to ensure that the timelines do not result in delay, the following should be added from the CPRA (Sec 6253(d)): “Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records.”</p> <p><u>LIMITATIONS</u></p> <p>Proposed Rule 10.500 (b)(1) specifies that the rule “applies to public access to non-deliberative or non-adjudicative court records, budget and management information relating to the administration of the courts.” We believe that deliberative records, if they are to be exempted from disclosure, should be specifically defined. Further, such definition should be included under the “exemptions” portion of the rule. Failure to define “deliberative records” will give rise to an overly broad interpretation of the term which may be misused to prevent distribution of documents which are not truly part of the “deliberative or adjudicative record.”</p> <p>Proposed Rule 10.500 (d) regarding construction of the rule ends with the following: “This rule does not require the disclosure of a record if the type of record would not be subject to disclosure under those acts.” (Those acts being CPRA and LORA.) It would appear that this sentence is intended to act as an additional,</p> | <p>impose an undue burden on judicial branch entities. The rule would replace the time requirements in current rule 10.802 with the new standard applicable to all requests. As with the CPRA, nothing in the rule would be intended to preclude judicial branch entities from producing records as soon as they are available.</p> <p>Rule 10.500(b)(1) has been amended to clarify that the rule applies to “judicial administrative records” as opposed to “nonadjudicative” and “nondeliberative” records.</p> <p>The intent of the referenced sentence is to incorporate the recognized exemptions set forth in the CPRA and LORA and case law interpreting those acts.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|--|--|
| | | | <p>undefined exemption from the rule. Such an undefined and ambiguous exemption will give rise to an overly broad interpretation which may be misused to prevent distribution of documents to which the public has a right.</p> <p>Subsections (f)(11) and (f)(12) of proposed rule 10.500 fail to require demonstration on the part of the court or AOC that the public interest served by nondisclosure clearly outweighs the public interest served by disclosure, and instead would allow the court or AOC to withhold information without such demonstration. These subparagraphs should be revised to require such demonstration in accordance with the standard outlined in existing Government Code section 6255(a).</p> <p>Thank you for the opportunity to provide comments in response to the proposed rules on behalf of Laborers' International Union of North America Local 777. Please do not hesitate to contact me at (916) 213-1440 or at sanchezadvocacy@gmail.com with any questions or concerns.</p> | <p>Rule 10.500(f)(11) has been amended to ensure that it preserves a presumption in favor of disclosure and to state that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has been added to clarify that the application of the exemption is intended to mirror existing case law on the "deliberative process" exemption under the CPRA. The language and interpretation of this subdivision reflect the intent of the directing statute (see Gov. Code, § 68106.2(g)) and are consistent with current practice in the other two branches of government.</p> |
| 18. | Hon. Ruston G. Maino Superior Court of San Diego County Vista, California | A | The AOC and the Judicial Council as well as local courts must be liberal in providing financial information to the public. If we are not liberal, the Legislature will probably pass a law allowing public access which will be far broader than this rule of court. | No response required. |
| 19. | Kathy McAnany | AM | The public should have access to Judicial | No response required. |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|--|-----------------|
| | Los Angeles, California | | Administrative records. This way they can be held accountable for any wrong doing. They should be held accountable like everyone else. If everyone else is expected to follow the law, then those in law themselves should be subjected to the same scrutiny. They cannot expect the public to follow the law when they themselves are not. If we really have a just legal system in this country, then public records should not be a problem. | |
| 20. | Hon. Judith McConnell, Hon. Manuel A. Ramirez, Hon. David G. Sills, Response by Hon. Judith McConnell, Administrative Presiding Justice Court of Appeal, Fourth Appellate District San Diego, California | AM | I strongly support transparency in government and access to governmental information, but also believe the new rules must recognize the substantial differences between how the judicial branch operates, and how the legislative and executive branches of government operate. The judicial branch has a unique constitutional role, which requires it to apply the law impartially to the facts as established by the parties to a case and precludes judges, justices and court staff from discussing, or receiving outside information about, pending matters. I offer the following comments: <u>I. DEFINED TERMS</u> Because proposed rule 10.500 provides the basis for public access to court records, close scrutiny of its definitional terms is critical to ensuring that the scope of required disclosures is appropriate. As currently drafted, rule 10.500(c) defines “judicial administrative record” as “any writing containing information relating to the conduct or the people’s business that is | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>prepared, owned, used, or retained by a judicial branch entity ... , except an adjudicative record.” (Rule 10.500(c)(2).) In turn, an “adjudicative record” is defined as “any writing prepared for or filed or used in a court proceeding or the judicial deliberative process.” (Rule 10.500(c)(1).)</p> <p>The current definition of “adjudicative record” is rather vague and in light of the rule’s stated intent that its provisions are to be broadly construed in favor of a public right of access (rule 10.500(a)), may lead to unnecessary disputes and/or required disclosures of materials that are outside the scope of what is required by Government Code section 68106.2. To address this concern, the current definition needs to be broadened to expressly include materials that reveal deliberative processes, impressions, evaluations and strategies relating to cases that are, or have been, before the courts. (In this regard, the Judicial Council may wish to consider incorporating into this definition matters referred to in the proposed Advisory Committee Comment to proposed rule 10.500.) In addition, the definition should be made expressly applicable to any writings that contain information about case assignment or reassignments, so as to protect currently confidential information relating to case weighting or grading (in those courts that use such a measure to balance case assignments among judges or justices) or the identity of staff assignment to assist to drafting orders or</p> | <p>The definition of “adjudicative record” in subdivision (c)(1) has been amended in response to this and similar comments to incorporate the materials stated in this comment. The rule now includes writings prepared for or used in the assignment or reassignment of cases and justices, judges (including temporary and assigned judges), subordinate judicial officers, or of counsel appointed or employed by the court. Also, an advisory committee comment specifically states that the rule does not apply to adjudicative records and does not modify or otherwise affect existing law with respect to public access to adjudicative records.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>decisions relating to a particular case.</p> <p><u>II. PUBLIC ACCESS</u> Proposed rule 10.500(e)(3) sets forth the procedure for requesting records, leaving it to each judicial branch entity to establish and publish the steps to be followed in requesting administrative records. It provides in part that “[a]t a minimum, the procedure must include the address to which requests are to be addressed ...,” which implies but does not unequivocally state that requests must be submitted by a written or electronic document. Because keeping written records of requests is going to be critical once the access rules are implemented, the proposed rule should be amended to make this implicit requirement explicit.</p> <p>Proposed rule 10.500(e)(4) permits a court to impose a fee reasonably calculated to cover its direct costs of producing records subject to disclosure. The public may not realize that this could include significant costs for retrieving documents from off-site storage, so it might be advisable to specifically refer to this type of cost in the rule.</p> <p>Proposed rule 10.500(e)(6) generally requires a judicial branch entity to determine whether a request seeks disclosable materials within 10 calendar days from its receipt of the request. Proposed rule 10.500(e)(8) provides that in unusual circumstances, that time may be</p> | <p>The rule does not require or allow a judicial branch entity to require that a request be submitted in writing. This is consistent with provisions in the CPRA. A judicial branch entity may, however, encourage that the request be in writing, transcribe an oral request, or seek clarification from a requester.</p> <p>Rule 10.500(e)(4) has been amended to clarify that a judicial branch entity may charge a requester for this cost.</p> <p>The Administrative Office of the Courts, Office of the General Counsel will continue to assist the courts in responding to public access requests. In addition, the Administrative Office of the Courts is preparing educational materials and programs to address the implementation of the rule.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|--|---|
| | | | <p>extended by 14 additional calendar days if the requested records are in multiple or offsite locations, the request seeks voluminous records or there is a need to consult with another judicial branch entity or governmental agency having a substantial interest in the determination. I do not have a problem with these general provisions but wonder whether the Judicial Council intends for the Office of the General Counsel to assist the courts in making these types of determinations or complying with the rules that are ultimately adopted and implemented.</p> <p><u>III. EXEMPTIONS</u> In addition to broadening the definition of an “adjudicative record,” I also suggest that Rule 10.500(f) be amended to include exemptions from disclosure information that would expose courts to possible identity theft. Similarly the courts should not be required to disclose technological information that would render them vulnerable to computer hackers.</p> | <p>Records that would expose an individual to identity theft are exempt from mandatory disclosure by Rule 10.500(f)(3) and (f)(12).</p> |
| 21. | Nancy Huntington Beach, California | A | I demand Public Access to Judicial Administrative Records. | No response required. |
| 22. | No More Family InJustice Greg Smart Founder San Diego, California | A | The people demand access to Judicial Administrative Records | No response required. |
| 23. | Hon. Kathleen E. O’Leary Associate Justice | AM | Comment on proposed Cal. Rules of Court, rules 10.500 and 10.501. | Commentator provides a suggestion that the overall definition of what is accessible under the |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| Commentator | Position | Comment | Response |
|---|----------|---|---|
| <p>Court of Appeal, Fourth Appellate District, Division Three Santa Ana, California</p> | | <p>There can be no dispute as to the public’s right to access information regarding the judicial branch’s fiscal management and expenditure of Public funds. Accordingly, my criticism of the currently proposed rules is not as to the principles underlying the rules, but rather certain portions of the verbiage in the rules. The primary goal of Government Code section 68106.2 was to clarify the public’s right to access certain administrative records within the judicial branch. The statute directs the Judicial Council to adopt rules to allow for public access consistent with the statute. The rules as proposed provide a mechanism for the public to exercise its right to access judicial branch records, but the identification of what records are subject to disclosure is anything but a model of clarity.</p> <p>Proposed Rule 10.500 rule draws closely from the statutes that govern our sister branches of government. While this initially seems like a good idea, in practice it is problematic. Unlike our sister branches, the majority of information maintained within our branch is adjudicative, and accordingly not subject to disclosure. A rule that acknowledges this reality and concentrates on the body of information available for review would be more efficient and would better serve the public. A clear and concise rule would best allow lay persons the opportunity to focus on and obtain relevant judicial branch information in a timely manner.</p> | <p>rules be written differently. The rules are modeled after the CPRA, and to a lesser extent, LORA and FOIA, which all have as a general premise the presumption that all records covered by the act are public unless otherwise exempted. The directing statute requires that the rules apply to a category of records broader than budget related matters. Because there is a the vast amount of records that, while not adjudicative, do not fit into the definition of a record “containing information relating to the development and administration of judicial branch budgets or containing administrative information relating to the fiscal management of the judicial branch,” it would be impossible and impractical to list every type of record that would be disclosable. The exemptions to mandatory disclosure were written to address those instances in which the disclosure of a record would not be in the public’s interest. Any record that does not fit into any of the specific exemptions provided by rule 10.500 may still be exempt from mandatory disclosure under (f)(12) (catch all exemption).</p> <p>Rule 10.500(b)(1) has been amended to clarify that the rule applies to “judicial administrative records” as opposed to “nonadjudicative” and “non deliberative” records.</p> <p>Rule 10.500(b)(2) has been amended to state that the rule does not “apply to. modify or otherwise affect existing law regarding adjudicative records of the judicial branch” An advisory committee comment has been added to explain that public</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>I disagree with the proposed definitions of “judicial administrative record” and “judicial branch personnel.” I also recommend the rule be modified to provide guidance as to how specific a requesting party must describe the information sought and what efforts constitute a good faith response to a request.</p> <p>Rule 10.500 (c)(2), as proposed, defines “judicial administrative record” as “any writing containing information relating to the conduct of the people’s business that is prepared, owned, used, or retained by a judicial branch entity regardless of the writing’s physical form or characteristics, except an adjudicative record.” This definition seems to identify a universe of judicial documents. A subsequent section of the rule, section (f), then attempts to narrow the universe through the use of a variety of exemptions.</p> <p>This “process of elimination” approach to identify the information subject to the rule seems to be extremely inefficient and unnecessarily costly. From a cost benefit analysis this approach doesn’t pass muster. It would place a tremendous burden on the judicial branch without any guarantee it would produce sufficient beneficial results for the public to justify the effort.</p> <p>The proposed definition of “judicial administrative record” is so broad that it would</p> | <p>access to adjudicative records would remain governed by a large body of case law, and that the Judicial Council’s intent is not to affect current law with respect to these records. The comment also explains that in general current law provides that case records officially reflecting the judicial work of the court are open to inspection (<i>Estate of Hearst</i> (1977) 67 Cal.App.3d 777, 782-83), while other documents prepared in the course of judicial work that are not official case records are not subject to public access. (<i>Copley Press, Inc. v. Superior Court</i> (1992) 6 Cal.App.4th 106.)</p> <p>Writings that reveal the deliberative process are exempt from disclosure because of the deliberative process exemption (see Rule 10.500(f)(11)). Other writings are not subject to disclosure if the disclosure of the writing would not be in the public interest (see Rule 10.500(f)(12)).</p> <p>Rule 10.500(c)(2) has been amended to clarify that a “judicial administrative record” does not include writings of a personal nature that do not relate to the conduct of the people’s business. An advisory committee comment has been added to clarify that the exclusion of personal writings from the definition of a “judicial administrative record” is a codification of CPRA case law.</p> <p>Rule 10.500(f)(7) has been amended to add to the exemption records related to evaluations, complaints, and investigations of current judicial officers, and of potential judicial officers and</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>require a judicial officer to first consider the totality of nonadjudicative information and then go through the excruciating process of considering each piece of information in light of the exemptions. Should information generated in connection with bench or bar education programs or community outreach efforts be disclosed? Are recommendation letters written in support of a judge seeking elevation exempt? This type of nonadjudicative information doesn't seem to fit neatly into an exemption, but is this really what the legislature meant when it says "<i>nondeliberative</i> or <i>nonadjudicative</i> court records, budget and management information?" Efforts to resolve ambiguities such as these would be both costly and time consuming, and result in litigation in some instances.</p> <p>At a time when the judicial branch is forced to operate under such severe fiscal constraints that we must close our courts one day a month, shouldn't we adopt a rule that provides for a simpler and more economical process to provide the public the access it deserves?</p> <p>I would propose the rule define a "judicial administrative record" as "any writing containing information relating to the development and administration of judicial branch budgets or containing administrative information relating to the fiscal management of the judicial branch that is prepared, owned, used, or retained by a judicial branch entity regardless of the writing's physical form or</p> | <p>candidates for such positions. As used in rule 10.500, the term "judicial branch personnel" sets forth the scope of certain exemptions (see (f)(3), (f)(6) and (f)(11)) and the instances when a judicial branch entity has waived its right to withhold the disclosure of a particular judicial administrative record (see Rule 10.500(h)). The rule does not require an individual to respond to a records request because that individual falls within the definition of "judicial branch personnel."</p> <p>Rule 10.500(e)(6) requires that a request "reasonably describe an identifiable record or records." Under the CPRA, a request need not identify an exact record. But, it should be specific and focused (see <i>Rogers v. Superior Court</i>) (1993) 19 Cal.App. 469). The AOC will continue to provide assistance with requests for public access to records and information. The AOC is also preparing training materials and programs.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>characteristics, except an adjudicative record.”</p> <p>Another troublesome definition is “judicial branch personnel.” “Judicial branch personnel,” as proposed in Rule 10.500 (c)(4), includes “justices, judges (including temporary and assigned judges), subordinate judicial officers, members of the Judicial Council and its advisory bodies, and directors, officers, employees, volunteers, and agents of a judicial branch entity.” Although it is reasonable to require the judicial branch to require its judicial officers, employees, and agents to review information within their control and provide access to information available under the rule, it is unrealistic to assume the judicial branch could require all Judicial Council members and all members of council advisory committees and volunteers to respond to access requests. The task of simply identifying all the possible persons who fall within these various groups would be an exhausting endeavor.</p> <p>And under what authority could the judicial branch require a public member of an advisory committee or task force, or a volunteer, to search and review records in response to an access request? Who would underwrite the cost involved in such an effort? Section (3) of Rule 10.500, as proposed, attempts to explain the procedure for requesting records. Noticeably missing is any indication of the degree of detail that must be included within a request. Would it be permissible for a person to request “all</p> | |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|--|--|
| | | | <p>nonadjudicative information within the possession or under the control of the X Superior Court?” With such a general request, a conscientious respondent could spend an inordinate amount of time searching volumes of general information and could feel compelled to produce an excessive amount of documents at great cost to the judicial branch. Such a huge response may not be in the best interest of the requesting party. It could be so unmanageable it would defeat the goal of providing meaningful access.</p> <p>I support a rule that provides for easy public access to nonadjudicative judicial branch information that does not unnecessarily drain the limited resources of the branch during these most difficult times. Thank you for your consideration.</p> | |
| 24. | <p>Donald Parks President/CEO Applied Technology, Inc. Davis, California</p> | NI | <p>Applied Technology, Inc. is a subject matter expert in public accessibility information technology (IT) public entity compliance requirements. With respect to the shift from the use of paper to electronic forms of information by the California courts, we recommend that:</p> <ol style="list-style-type: none"> 1. There the Administrative Office of the California Court be responsible and tasked to establish a system that is maintained in place to assure the maintenance of the “accessible features” of California court information; | <p>The Invitation to Comment was provided to the commentator directly in the requested format. The remainder of the comment is not directly relevant to the proposed rules. No response necessary.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|-----------------|
| | | | 2. Language be included that references and/or incorporate the requirements of Federal and State public accessibility laws intended to assure the access to, use and benefit of, public information, services, programs, activities and facilities (the Internet included) by persons with communication limitations “in the most integrated setting” and manner that is as timely and as “equally effective as is afforded to others.” | |
| 25. | Reed Elsevier Teresa L. Jennings Senior Director | N | On behalf of Reed Elsevier and its division LexisNexis, I wanted to take the time to register our comments on the California Court rules on proposed Public Access to Judicial Administrative Records. We believe that the precedent of the California Public Records Act (CPRA) and case law would not comport with some of these changes. We also believe other changes being contemplated would be vague and could thereby impede access to records. As such, we do not agree with these proposed changes. By way of background, LexisNexis is recognized as a leading provider of authoritative legal, public records, and business information. LexisNexis plays a vital role in supporting government, law enforcement and business customers who use our information services for important uses including: detecting and preventing identity theft and fraud, locating suspects, finding missing children and preventing and investigating criminal and terrorist activities. | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>In this instance, we are concerned that the distinction being made between commercial and non-commercial uses of records for the determination of fees ultimately could have a chilling impact upon the ability of entities to receive these records. We note that in Rule 10.500, the proposed court rules referenced the federal Freedom of Information Act (5 USC §552) to determine its fee schedules. In doing so, the courts would set a rate of fees depending on whether the use of the underlying record is a commercial or a non-commercial use. However, in California, both the California code and the case law interpreting the code do not make a distinction between the types of use in determining access.</p> <p>The California Public Records Act (CPRA) does not include fee structures that are contingent on the use of the record. Case law interpreting the CPRA bolsters that position. Under case law, we see that there is a history of making no limitations on access to a public record based on the purposes for which the record is being requested. The CPRA consistently has been interpreted by case law to explain that “[t]he motive of the particular requestor of public records is irrelevant; the question instead is whether the disclosure serves the public interest. The California Public Records Act, Gov. Code, § 6250 et seq., does not differentiate among those who seek access to public information.” In fact, the CPRA, upon which the California Courts relies in drafting</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|---|
| | | | <p>certain portions of its rule, was drafted to codify the holding in case law which states that “[w]hat is material is the public interest in disclosure, not the private interest of a requesting party; section 6255 does not take into consideration the requesting party’s profit motives or needs.”</p> <p>We would be concerned if the specific use is now an element that could prevent the record from becoming available. The court notes in its drafting comments that the fee structure is being contemplated to make up for costs that it considers to be unfunded mandates. If the fees being charged, particularly to commercial users, are increased to meet budget cuts, we could foresee that these fees could become an unreasonable burden for certain classes of users and could make the records unavailable based on the type of use. This distinction has been rejected by California case law.</p> | |
| 26. | Samuel Ross Little Egg Harbor, New Jersey | A | <p>Many of the records that are released claim to be dismissed, but show no reason or evidence as to why... Without proper investigation and transparency of these issues, public trust will be further eroded. Not passing such a law can be seen as if one feels judges should not be held to any ethics or standards within their profession. Please help gain back public trust and hold judges accountable for their actions by making these records public.....</p> | <p>The definition of “adjudicative record” in (c)(1) has been amended in response to this and similar comments to incorporate the materials stated in this comment. The rule now includes writings prepared for or used in the assignment or reassignment of cases and justices, judges (including temporary and assigned judges), subordinate judicial officers, or of counsel appointed or employed by the court. Also, an advisory committee comment specifically states that the rule does not apply to adjudicative records and does not modify or otherwise affect existing law with respect to public access to adjudicative</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|--|--|
| | | | | records. |
| 27. | Linda Marie Sacks ³ | A | All courts must make their records transparent, accessible and subject to public review. I support this and it should be mandatory at every courthouse, in each state, all over the United States of America. | No response required. |
| 28. | SEIU California State Council Response by Jonathan Weissglass Altshuler Berzon LLP San Francisco, California | N | <p>I am writing on behalf of the SEIU California State Council to provide comments on Proposed Rule 10.500, which concerns public access to judicial records. The Council appreciates the work that went into the Proposed Rule and the changes that have been made in response to previous comments from the Council and other interested parties, but has significant concerns about the current draft as set forth below.</p> <p>The primary concern we have with the proposal is its overall approach. Our conception of how to address public access to judicial branch records is to start with the California Public Records Act and make a very few modifications to reflect the small number of special problems posed by applying that template to the judiciary. What the draft does instead is take various provisions from the Public Records Act, the Legislative Open Records Act, and the federal Freedom of Information Act, often changing the language from the original in large and small</p> | <p>The rules follow the basic principle of the CPRA in establishing a presumption that records reflecting the administrative functions of judicial branch entities are open to the public. Like the CPRA, the rules specify exemptions to that basic tenet in appropriate circumstances, with some CPRA provisions modified as appropriate to address the specific needs and circumstances of the judicial branch.</p> |

³ This comment was submitted for another proposal, but may have been done so erroneously and is therefore included here.

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|--------------------|-----------------|---|---|
| | | | <p>ways, and combine those provisions with a good deal of new language from the drafters. This, it seems to us, is a poor way to proceed. The Public Records Act is a known quantity. In terms of ease of use by the public, and ease of interpretation by the courts in litigation, it makes sense to use the standard language from the Public Records Act that applies to almost every other agency in California. Otherwise, the public has to learn a new process, and the courts will be called upon to interpret a rule based on case law arising from three different statutes. Moreover, because the proposed rule makes a number of wording changes to the original provisions, it will often be unclear whether the changes are substantive or not and how the changes should affect the interpretation of the provisions. These problems could be avoided by simply starting with the Public Records Act as a template and making those few changes necessary due to the special nature of the judiciary.</p> <p>We also have concerns about some of the particular language in the draft. In general, we urge the drafters of the rule to follow the language of the Public Records Act precisely rather than make minor changes. We provide some examples of this below as well as make other comments.</p> <p>Proposed Rule 10.500(d). We believe that the rule should be construed consistently with the Public Records Act, and should not mention the</p> | <p>The rules are based primarily on the CPRA and, to a lesser extent, LORA and FOIA. Where the language is the same or similar to the CPRA,</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>Legislative Open Records Act (or the Freedom of Information Act, which is currently not mentioned in subsection (d)). Otherwise, it will be confusing to decide which act’s terms should govern any particular interpretation.</p> <p>Proposed Rule 10.500(e)(4). The hallmark of the Public Records Act is public access. To the extent this imposes a cost on government agencies, that is the price of good government. The Public Records Act provides for direct duplication costs, but does not permit, as the rule would allow, charging for document searches, document review, or duplication for “commercial use”; nor does the Act allow wiggle room for “a fee reasonably calculated” to cover direct costs. The courts should follow the Public Records Act on this critical issue, and absorb the costs like every other agency – all of which are facing the same fiscal issues. If the justification is that the judiciary is facing start-up costs of implementing public access for the first time, which exceed the ongoing costs facing every other state agency, there should be some quantification of the figures and a request for funding before taking the proposed route. We are not convinced that the start-up costs of this rule are significant. Moreover, if that is the justification as opposed to the ongoing costs that should be the same as every other state agency, then any additional charges to cover start-up costs should be ended after a year rather than ongoing. The judiciary’s budget should not be balanced forever by imposing costs on</p> | <p>which is based on FOIA, an interpretation should refer to case law interpreting the CPRA (and FOIA, if the CPRA language at issue is based on FOIA), Where the language is the same or similar to LORA, an interpretation should refer to case law interpreting LORA.</p> <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>journalists and others seeking to keep government accountable.</p> <p>Proposed Rule 10.500(e)(7). Public Records Act §6253(d) provides that if a request is denied, the notification “shall set forth the names and titles or positions of each person responsible for the denial.” That provision is absent from the draft rule, and should be included. Just as with any agency, the public has a right to know who is making the decisions to deny public access. There is no reason particular to the judiciary to keep those names secret.</p> <p>Proposed Rule 10.500(f)(10). The draft rule goes well beyond the Public Records Act in its wording of exemptions for “trade secrets or privileged or confidential commercial and financial information.” There is no reason to broaden the exemptions that apply to every other California agency. Just because the Freedom of Information Act has certain exemptions does not justify importing those exemptions here. The rule should use the exact language of the Public Records Act. It is not the place of the Judicial Council to second-guess the Legislature’s determination of the scope of the exemptions in California.</p> <p>Proposed Rule 10.500(f)(11). This exemption supposedly incorporates what the drafters refer to as the “deliberative process exemption.” There is no such language in the Public Records Act; rather, the provision is taken from case</p> | <p>The administrative head of each judicial branch entity is identified on all official letterhead and is ultimately responsible for all administrative decisions made by that entity. The omission of the language referenced in the comment is not a substantive one.</p> <p>Rule 10.500(f)(10) includes a specific exemption for trade secrets to ensure that such information is not inadvertently subject to disclosure and to clarify the controlling definition of “trade secret.”</p> <p>To have the rule conform more closely to its intent, the exemption in (f)(10) was amended so that it applies only to confidential commercial and financial information submitted in response to a judicial branch entity’s solicitation for goods or services or in the course of the entity’s contractual relationship with a commercial entity.</p> <p>Under the CPR, a significant amount of confidential commercial or financial information submitted as part of a solicitation process is exempt from disclosure under the California Public Contract Code. Because the Public Contract Code does not apply to the judicial branch, this information would not be exempt</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>law. To the extent courts interpret the Public Records Act to include this or other exemptions, then those exemptions will also apply to the rule as Proposed Rule 10.500(d) already provides that the rule must be interpreted consistently with the Public Records Act. But it is improper to go further and attempt to codify case law in language that is not in the Public Records Act. This effectively freezes the law. Again, the Legislature has determined the exemptions that apply to government agencies. There is nothing special about the judiciary that requires or supports the proposed language.</p> <p>Proposed Rule 10.500(h). The draft rule provides that with certain exceptions, disclosure of a record waives any exemptions. One of the exceptions should be deleted. Proposed Rule 10.500(h)(2)(C) adds an exception for disclosures made within the judicial branch for purposes of judicial administration. This is far too broad. Proposed Rule 10.500(h)(2)(E) already provides for an exception for such disclosures “if the material will be treated confidentially.” In light of this provision, there is no need for the broad exception for any disclosure. The exception is properly limited to confidential disclosures.</p> | <p>from disclosure under (f)(5). A specific exemption will ensure uniform treatment of this category of information.</p> <p>Rule 10.500(f)(11) has been amended to ensure that it preserves a presumption in favor of disclosure and to state that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has been added to clarify that the application of the exemption is intended to mirror existing case law on the “deliberative process” exemption under the CPRA.</p> <p>The inclusion of a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel reflects the language and intent of the directing statute and is consistent with current practice in the other two branches of government.</p> <p>Judicial branch entities exchange vast amounts of information with each other on a daily basis for the purposes of judicial administration. It would be impractical to require that each exchange have a condition that the information be treated confidentially.</p> <p>Rule 10.500(j)(1) has been amended so that the hearing process established in current rule 10.803 will continue to apply to all disputes to which it currently applies. All other disputes under proposed rule 10.500 would be subject to the process in (j)(2), which is the same dispute</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|---|--|
| | | | <p>Proposed Rule 10.500(j). The proposed rule has two flaws with respect to court proceedings. First, Proposed Rule 10.500(j)(1) incorporates the entirety of the procedure for review of disputes with a Superior Court from Rule 10.803. But Rule 10.803(d) has provisions for appeal that are contrary to Proposed Rule 10.500(j)(5) and should not be incorporated. Second, Proposed Rule 10.500(j)(2) does not include a provision for expedited proceeding, which would mean that disputes governing the Superior Courts would be expedited under Rule 10.803(c)(1), but all other disputes would not. Both types of disputes should be expedited.</p> | <p>resolution process set forth in the CPRA. Given to the possibility that a claimant may have disputes that are both eligible and ineligible for the hearing process in rule 10.803, the rule would also provide that a claimant may “opt out” of the expedited hearing and appeal procedure of rule 10.803 and proceed under (j)(2) instead.</p> |
| 29. | <p>Society of Professional Journalists, San Diego Professional Chapter Joe Guerin President San Diego, California</p> | AM | <p>We are writing on behalf of the Society of Professional Journalists San Diego Professional Chapter to comment on the proposed rule changes regarding Public Access to Judicial Administrative Records.</p> <p>We commend California’s judicial branch for proposing rules that bring remarkable transparency to our state court system, guaranteeing access to the administrative records of the court and applying the presumptions of openness, access procedures and enforcement processes set forth in the California Public Records Act (CPRA). These presumptions of openness, which have applied to California’s executive branch and local government agencies for the past 41 years, are so important that they were added to the</p> | <p>Rule 10.500(a)(2) provides that the rule clarifies</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|--------------------|-----------------|--|---|
| | | | <p>California Constitution by amendment to Article I, section (3) when more than 83 percent of the voters in the November 2004 election passed Proposition 59, which states:</p> <p>The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.</p> <p>We appreciate the comprehensive approach to transparency evident in the proposed rules, and we urge the Judicial Council to adopt the rules after making the constitutionally required findings regarding any limitations that are set forth in the rules. To the extent that the Judicial Council cannot find an “interest protected by the limitation and the need for protecting that interest,” any limitations on access should be removed from the proposed rules.</p> <p>In this regard, we adopt the recommendations set forth by Californians Aware on October 16, 2009, as set forth below, and we agree with the proposed changes if modified.</p> | <p>and expands the public’s right of access to judicial administrative records and must be broadly construed to further the public’s right of access. An advisory committee comment on subdivision (a) addresses the Judicial Council’s recognition of the public interest in access to records and information and other important public interests impacted by the proposed rules. The Judicial Council report addresses this issue in more detail.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>There are a number of instances in the proposed rules where the right of access to records is limited by exemptions that are either significantly broader than those in the CPRA or that have no parallel in that law or how it has been interpreted, or that contain words or phrases creating significant ambiguity as to what effect they would have, or that create cost burdens unknown to the CPRA.</p> <p>In the following summary of issues to be addressed, the actual language of the proposed rule is highlighted, and any italics have been added for emphasis.</p> <p>Compensation: Proposed Rule 10.500 (e) (2) states:</p> <p>Judicial administrative records subject to inspection and copying unless exempt from disclosure under subdivision (f) include . . . Actual and budgeted employee salary and benefit information, by position classification, consisting of the number of employees and compensation by classification, and any document, whether prepared periodically or for a special purpose, that shows any changes in salaried positions by classification . . .</p> <p>The California Supreme Court has ruled that the actual compensation of California executive branch and local government employees is, under the CPRA, public information. If this language means that identifiable court</p> | <p>The list of judicial administrative records set forth in Rule 10.500(e)(2) is taken from Government Code section 68106.2 and is illustrative, not exhaustive. Subdivision (e)(2) has been amended to list individual employee salary information as an example of a judicial administrative record that</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| Commentator | Position | Comment | Response |
|-------------|----------|---|---|
| | | <p>employees’ compensation and raises or bonuses are to be confidential, this would be the first major departure from CPRA policy and a likely source of controversy. Judges’ salaries have never been secret, but their actual compensation, generously supplemented as it is by Los Angeles County, for example, may or may not be determinable under this provision. Meanwhile tens of thousands of other judicial branch employees may likewise have their actual pay shielded.</p> <p>Contracts: Proposed Rule 10.500 (e) (2) states:</p> <p>Judicial administrative records subject to inspection and copying unless exempt from disclosure under subdivision (f) include . . . Copies of executed contracts with outside vendors and payment information and policies concerning goods and services provided by outside vendors without an executed contract . . .</p> <p>“Executed” would normally mean fully performed. Is the intent here to release contracts only after performance, and not proposed contracts or those in mid-course of performance?</p> <p>Audits: Proposed Rule 10.500 (e) (2) states:</p> <p>Judicial administrative records subject to inspection and copying unless exempt from disclosure under subdivision (f) include . . . Final audit reports . . .</p> | <p>would be subject to inspection and copying, consistent with the Supreme Court’s opinion in <i>Int’l Fed. of Professional & Technical Engineers v. Superior Court</i> (2007) 42 Cal.4th 319.</p> <p>As used in rule 10.500, the term “executed contract” means a contract that has been signed by all parties intended to be bound by its terms and conditions. This term does not refer to contracts that have been fully performed.</p> <p>As used by the AOC Finance Division, which performs audit services for the trial and appellate courts, the term “final audit report” refers to a document that has completed the entire audit process. Both the investigative aspect of the audit and the analysis and resulting findings must be completed for an audit to be considered “final.” Accordingly, no action was taken in response to</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>Why “final?” Is the intent to give courts or the Administrative Office of the Court the opportunity to negotiate with or pressure the auditor to tone down awkward findings or conclusions before a report is “accepted?”</p> <p>Drafts and Memos: Proposed Rule 10.500 (f) (1) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . Preliminary writings, including drafts, notes, working papers, and inter-judicial branch entity or intra-judicial branch entity memoranda, if the public interest in withholding those records clearly outweighs the public interest in disclosure . . .</p> <p>The comparable exemption in the California Public Records Act (Government Code Section 6254 (a)) is decidedly tighter, applicable only to “(p)reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” The single appellate decision interpreting this section concluded: “The second condition of section 6254, subdivision (a) is that the records be documents which are not retained by the Department in the ordinary course of business. If preliminary materials are not customarily discarded or have</p> | <p>these comments.</p> <p>Rule 10.500(f)(1) has been amended to provide an exemption for “[p]reliminary writings, including drafts, notes, working papers, and inter-judicial branch entity or intra-judicial branch entity memoranda, that are not retained by the judicial branch entity in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” This language is identical to the corresponding section of the CPRA, Government Code section 6254(a).</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>not in fact been discarded as is customary they must be disclosed. (§ 6254, subd. (a).) Thus, the agency controls the availability of a forum for expression of controversial views on policy matters by its policy and custom concerning retention of preliminary materials.” Citizens for A Better Environment v. Department of Food and Agriculture, 171 Cal. App. 3d 704, 714 (1985). But under this rule, every “preliminary” document in the administrative files of the judicial branch would be subject to withholding in the public interest, as decided by the courts.</p> <p>Personal Privacy: Proposed Rule 10.500 (f) (3) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . Personnel, medical, or similar files, or other personal information the disclosure of which would constitute an unwarranted invasion of personal privacy, including but not limited to records revealing home addresses, home telephone numbers, cellular telephone numbers, private e-mail addresses, and social security numbers of judicial branch personnel; and work e-mail addresses and work telephone numbers of justices, judges, subordinate judicial officers, and their staff attorneys . . .</p> <p>The comparable exemption in the California Public Records Act (Government Code Section 6254 (c)) applies simply to “(p)ersonnel, medical, or similar files, the disclosure of which</p> | <p>The commentator correctly states the rationale for excluding from public access contact information for those involved in the adjudication of cases.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>would constitute an unwarranted invasion of personal privacy.” This rule’s emphasis on withholding home contact information for judges is understandable, as well as all employees’ Social Security numbers. A number of statutes already make such information confidential and therefore exempt from disclosure under the CPRA. The drafters of this rule believe that work contact information for those involved in the adjudication of cases also needs confidentiality to prevent improper ex parte contacts – behind the scenes lobbying – by the parties. That is a consideration not arising under the California Public Records Act, but whether it should be addressed under the rubric of “personal privacy” is doubtful.</p> <p>Other Confidentiality Rules: Proposed Rule 10.500 (f) (5) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . Records the disclosure of which is exempted or prohibited under state or federal law, including provisions of the California Evidence Code relating to privilege, <i>or by court order in any court proceeding ...</i></p> <p>The comparable exemption in the California Public Records Act (Government Code Section 6254 (k)) applies to “(r)ecords, 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</p> | <p>The additional language applies to instances when the issue of disclosure properly comes before a court. This provision does not allow a court to circumvent applicable rules of procedure and effectively veto the release of its own records.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>privilege.” The italicized phrase in the proposed exemption is unclear unless it purports to make court information summarily exempt from disclosure by court order. That effect would obviously undermine these rules entirely by giving any court a veto over release of its own records, with no need to justify the secrecy.</p> <p>Complaints and Discipline: Proposed Rule 10.500 (f) (7) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . Records related to complaints regarding or investigations of justices, judges (including temporary and assigned judges), and subordinate judicial officers . . .</p> <p>There is no comparable exemption in the California Public Records Act. Complaints against judges are processed and adjudicated by the Commission on Judicial Performance, which is not subject to these proposed rules and which is required to keep raw complaints confidential until formal proceedings commence. California Constitution Article 18, section (j). As for “subordinate judicial officers” generally – not dealt with by the Commission – courts interpreting the CPRA have held that ordinary (non law enforcement) employees have no privacy rights preventing the release of complaints against them that appear “well founded,” including but not limited to those that have prompted a confirming investigation and</p> | <p>A complete discussion of this exemption is included in the Judicial Council report. In brief, subdivision (f)(7) reflects the underlying principles that result in the confidentiality of Commission on Judicial Performance proceedings and proceedings under rule 10.703.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>discipline. American Federation of State, County and Municipal Employees v. Regents of the University of California, 80 Cal.App.3d 913 (1978), Bakersfield City School District v. Superior Court (Bakersfield Californian), 118 Cal.App.4th 1041 (2004).</p> <p>Appraisals and Estimates: Proposed Rule 10.500 (f) (8) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the judicial branch entity relative to the acquisition of property or to prospective public supply and construction contracts, until all of the property has been acquired or the relevant contracts have been executed. This provision does not affect the law of eminent domain;</p> <p>The comparable exemption in the California Public Records Act (Government Code Section 6254 (h)) applies to “the contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.” Use of the term “executed” in the proposed rule suggests a longer delay, namely, no disclosure</p> | <p>As used in (f)(8), the term “executed contract” refers to a contract that has been signed by all parties intended to be bound by its terms and conditions.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>until the contract has been performed, rather than until the contract has been formed – the “agreement obtained.” The reason for this difference is unclear.</p> <p>Business Information: Proposed Rule 10.500 (f) (10) states:</p> <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . Records containing trade secrets or privileged or confidential commercial and financial information. For purposes of this rule:</p> <p>(A) “Trade secret” means any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information that is not patented, that is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value, and that gives its user an opportunity to obtain a business advantage over competitors that do not know or use it;</p> <p>(B) “Privileged information” refers to material that falls within recognized constitutional, statutory, or common law privileges;</p> <p>(C) “Confidential information” means:</p> <p>(i) For information involuntarily submitted to the judicial branch entity, information the disclosure of which would (1) impair the judicial branch entity’s ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was</p> | <p>Rule 10.500(f)(10) includes a specific exemption for trade secrets to ensure that such information is not inadvertently subject to disclosure and to clarify the controlling definition of “trade secret.” Evidence Code section 1060 provides a privilege for trade secrets and, in general, the definition of a trade secret for purposes of this privilege is set forth in Civil Code section 3426.1. But, for purposes of disclosing records under the CPRA, Civil Code section 3426.7 requires the use of the common law, pre - Uniform Trade Secrets Act definition of a trade secret. Given the imprecise nature of this common law definition, rule 10.500(f)(10)(a) has been amended to adopt the more precise definition used in Civil Code section 3426.1.</p> <p>To have the rule conform more closely to its intent, the exemption in (f)(10) was amended so that it applies only to confidential commercial and financial information submitted in response to a judicial branch entity’s solicitation for goods or services or in the course of the entity’s contractual relationship with a commercial entity. The definition of “confidential information” is taken from case law interpreting the same exemption under the federal Freedom of Information Act. The exemption is intended to protect financial documents that do not rise to the level of trade</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>obtained; (ii) For information voluntarily submitted to the judicial branch entity, the kind of information that would customarily not be released to the public by the person from whom it was obtained;</p> <p>There is no express general exemption for either trade secrets or proprietary information in the California Public Records Act. Government Code Section 6254 (k) exempts information that is privileged under the Evidence Code, which has the following sections:</p> <p>1060. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.</p> <p>1061. (a) For purposes of this section . . . (1) "Trade secret" means "trade secret," as defined in subdivision (d) of Section 3426.1 of the Civil Code, or paragraph (9) of subdivision (a) of Section 499c of the Penal Code.</p> <p>The Civil and Penal Code provisions identically define "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that: "derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and is the subject of</p> | <p>secrets to encourage competitive bidding and favorable pricing for goods and services.</p> <p>Under the CPRA a significant amount of confidential commercial or financial information submitted as part of a solicitation process is exempt from disclosure under the California Public Contract Code. Because the Public Contract Code does not apply to the judicial branch, this information would not be exempt from disclosure under (f)(5). A specific exemption will ensure uniform treatment of this category of information.</p> <p>The privilege set forth in Evidence Code section 1040 is largely inapplicable to the context of the commercial transactions of judicial branch entities. In addition, however, there must be a legal basis for the assurance of confidentiality. Rule 10.500(f)(10) sets forth that legal basis.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>efforts that are reasonable under the circumstances to maintain its secrecy.” Thus, the proposed rule embodies a looser definition of what is a trade secret, lacking the italicized criterion. As for “confidential information,” this category refers to information that is not privileged, but whose release would somehow make it harder for the judicial entity to get similar information in the future (despite its being involuntarily submitted, i.e. compelled by law) or would cause the commercial submitter “substantial harm,” or even information that the voluntary submitter would not normally release to the public, i.e. virtually any information not issued in a press release.</p> <p>Moreover, the vague and overbroad categories of “confidential information” should not be necessary as an exemption in this rule. There is a legal privilege – again, acting as a CPRA exemption under Government Code Section 6254 (k) – in Evidence Code Section 1040, which states:</p> <p>(a) As used in this section, “official information” means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.</p> <p>(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>by the public entity to do so and: (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.</p> <p>This privilege for official information acquired in confidence has been repeatedly interpreted by the courts as requiring essentially the same balancing of interests as under the CPRA’s Government Code Section 6255. In other words, what this proposed rule means by “confidential information” that is per se protected could be withheld under the official information privilege only if the court concluded that the public interest in nondisclosure outweighed the public interest in disclosure. It is not clear why the judicial branch needs such a level of secrecy – one that finds no parallel in the CPRA.</p> <p>Management Decision Documentation: Proposed Rule 10.500 (f) (11) and (12) state:</p> | <p>The inclusion of a specific exemption for records that reflect the deliberative process of a judicial branch entity or judicial branch personnel reflects the language and intent of the directing statute and</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|--|
| | | | <p>Nothing in this rule requires the disclosure of judicial administrative records that are . . . (11) Records the disclosure of which would expose a judicial branch entity’s or judicial branch personnel’s decision-making process so as to discourage candid discussion within the entity or the judicial branch and thereby undermine the entity’s ability to perform its function, unless the public interest served by disclosure of the record clearly outweighs the public’s interest in withholding the record; or</p> <p>(12) If on the facts of the specific request for records the public interest served by withholding the record clearly outweighs the public interest served by disclosure of the record.</p> <p>These two exemptions find their parallel in court interpretations of the CPRA’s Government Code Section 6255, which states: “The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or 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.” In other words, even where an agency cannot point to any exemption from disclosure in the CPRA, it may withhold certain information if, given the realities of the situation, the public interest in not releasing the information “clearly” overrides the public interest in having it be known.</p> | <p>is consistent with current practice in the other two branches of government.</p> <p>Rule 10.500(f)(11) has been amended to ensure that it preserves a presumption in favor of disclosure and to state that the exemption must be applied on the specific facts, in a case-by-case analysis. An advisory committee comment has been added to clarify that the application of the exemption is intended to mirror existing case law on the “deliberative process” exemption under the CPRA.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|----------|
| | | | <p>This “catch-all” or wild card exemption, as invoked in reported appellate cases to date, has been successful in justifying withholding of information seven times, partially successful twice, and unsuccessful 14 times. In one of the successful instances, the California Supreme Court held that the public’s interest in effective decision-making by government officials outweighed its interest in understanding the influences brought to bear on such decision-making. In particular, the court concluded that a disclosure of who had met with a governor (as reflected in his appointment calendar) over a five-year period would endanger the quality of the governor’s decisions by deterring people from seeking to meet with him in the future and thus reducing the quantity or quality, or both, of the information and advice he relied on. Preserving the governor’s diverse mix of advisory input, in short, was held to be more important than public awareness of where that input came from.</p> <p>This decision, in <i>Times Mirror Co. v. Superior Court</i> (State of California), 53 Cal.3d 1325 (1991), has been followed in three lower appellate cases since, and its frequently-called deliberative process “privilege” – not one recognized in the Evidence Code – is increasingly seized on by public agencies for withholding all kinds of communications and other documents from disclosure under the CPRA – down to memos and e-mails among</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|---|
| | | | <p>city staff members. It is safe to say that if Section 6255 is a wild card for secrecy in the CPRA, the deliberative process rationale is the wildest play of that card – so far, a sure trump. These rules could get the benefit of its effects under (12) above alone. Why (11) is necessary as a codification of a particular case (Times Mirror Co.) decided under the rule in (12) is unclear, unless to give the courts the most express and emphatic authority for avoiding public scrutiny of the sources, influences and factors contributing to decisions on how the judicial branch is run.</p> <p>Chargeable Copying Fee: Proposed Rule 10.500 (b) (4) (A) states:</p> <p>A judicial branch entity, on request, must provide a copy of a judicial administrative record not exempt from disclosure if the record is of a nature permitting copying, subject to payment of the fee specified in this rule or other applicable statutory fee:</p> <p>(i) A judicial branch entity may impose a fee reasonably calculated to cover the judicial branch entity’s direct costs of producing a paper or hard copy of any record;</p> <p>(ii) A judicial branch entity may impose a fee reasonably calculated to cover the judicial branch entity’s direct costs of creating a record or producing an electronic copy of a record as specified in subdivision (i); and (iii) A judicial branch entity may require advance payment of any fee.</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>So far, the cost rules closely parallel those in the CPRA, which states in Government Code Section 6253 (b): “Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.”</p> <p>Chargeable Processing Fees: Proposed Rule 10.500 (b) (4) (B-D) state:</p> <p>(B) When records are requested for other than commercial use, a judicial branch entity may impose a reasonable standard charge for document search and review, provided that no charge may be imposed for the first two hours of search and review time.</p> <p>(C) When records are requested for commercial use, a judicial branch entity may impose a reasonable standard charge for document search, review, and duplication.</p> <p>(D) A superior court must provide a copy of the certified judicial administrative record if the judicial administrative record requested has been certified by the superior court.</p> <p>Section (D) addresses certification requirements</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|---|---|
| | | | <p>unique to the judicial branch. Sections (B) and (C) are fundamental departures from the CPRA model in their requirements for payment for search and review (not just copying) and a higher fee for not only search and review but also copying if the records are requested for commercial use. After Californians Aware, journalism and court labor groups and legislative representatives universally and strongly objected to an initial proposal to charge for search and review, the two-hour free pass was added to this version (for non-commercial requesters, that is), but this approach is likely to continue to be controversial.</p> <p>Once again, we appreciate the Judicial Council’s effort to bring transparency to the administrative workings of the California court system, and we urge the Council to adopt the proposed rules as modified to parallel, where they currently do not, the California Public Records Act.</p> | |
| 30. | Wm. Kevin Stinson. Assistant Clerk Administrator Court of Appeal, Fourth Appellate District, Division Three Santa Ana, California | NI | <p>Thank you for the opportunity to comment of the Judicial Council's proposed revisions to the California Rules of court which will allow public access to information on the administration of the courts.</p> <p>Under Public access (e) (1) lines 33-40.</p> <p>It seems contradictory that the first sentence provides an exemption to the court from having to create a record, etc. or data that is not used</p> | <p>Rule 10.500(e)(1) has been amended to clarify what is required to be produced with respect to records available in an electronic format.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--------------------------------------|-----------------|--|---|
| | | | <p>internally or reported to other agencies on a regular basis - but then reverses by saying that gathering data from extractable fields in a single database using software already owned or licensed by the court (ACCMS applies on all counts) does not constitute the creating of a record</p> <p>Additionally - perhaps the establishment of an Ombudsman in the AOC Public Information office can sort through the requests to determine validity and proper scope according to the standards in the rule. This would ensure consistency in the application of the rule across the judiciary as opposed individual districts, divisions or trial courts interpreting the rule locally.</p> | <p>This comment has been forwarded to the appropriate division within the Administrative Office of the Courts for action, if necessary. The Administrative Office of the Courts will continue to provide assistance, and is also preparing training materials and programs.</p> |
| 31. | Superior Court of Los Angeles County | AM | <p>The second paragraph of Rule 10.500(a) should be modified to read: "This rule clarifies the public's right of access to judicial administrative records." Leaving in the reference to expanding rights, and requiring broad construction invites litigation and unintended consequences, and is inconsistent with subdivision (d), Construction of rule, which reads: "Unless otherwise indicated, the terms used in this rule have the same meaning as under the Legislative Open Records Act (beginning with Gov. Code, § 9070) and the California Public Records Act (beginning with Gov. Code, § 6250) and must be interpreted consistently with the interpretation applied to the terms under those acts. This rule does not require the disclosure of</p> | <p>Rule 10.500(a)(2) provides that the rule clarifies and expands the public's right of access to judicial administrative records and must be broadly construed to further the public's right of access. An advisory committee comment on subdivision (a) addresses the Judicial Council's recognition of the public interest in access to records and information and other important public interests affected by the proposed rule. The Judicial Council report explains the treatment of this comment in more detail.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|---|-----------------|--|--|
| | | | <p>a record if the type of record would not be subject to disclosure under those acts.”</p> <p>The procedures set forth in Rule 10.500(e), subdivisions 5, 6, 7, 8, 9, and 10, will impose expensive, time intensive responsibilities upon staff; and may require a court to dedicate at least one person to this effort. Accordingly, fees imposed should include indirect costs, as well.</p> <p>Juror records continue to be exempted from disclosure and do not fall within the definition. Such records are not specifically mentioned in the proposed rule. However, it is assumed they are not included since Govt. Code 6276.28 lists them as not subject to the California Public Records Act. As such, juror records would fall under the proposed rule’s exemption (f) (5).</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> <p>The committee notes that Government Code section 6276.28 refers to source lists as provided under section 197 of the Code of Civil Procedure. “Juror records” includes a variety of records and information. It is anticipated that in a response to a particular request, a judicial branch entity will determine whether the records requested are “judicial administrative records” for purposes of the rule, or “adjudicative records” and therefore not subject to the rule.</p> |
| 32. | Superior Court of Marin County Kim Turner Executive Officer | A | <p>1. It appears that Rule 10.500 is silent as to the form of a request for information. May the public make requests for information verbally, as well as in writing? And may the public use email, fax, phone messages, and other “casual” forms of communication to make such requests? If the rule does not address the manner and format of a request for information, may the local court develop its own policies to require, for example, that requests for information be made only in writing via US mail or hand-delivery? I am concerned that casual forms of</p> | <p>1. The rule does not require or allow a judicial branch entity to require that a request be submitted in writing. This is consistent with provisions in the CPRA. A judicial branch entity may, however, encourage that the request be submitted in writing, transcribe an oral request, or seek clarification from a requester.</p> |

SP09-07**Public Access to Judicial Administrative Records** (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|--|
| | | | <p>communication (verbal, email, fax, phone messages, etc.) may not be acknowledged immediately and/or will not provide reliable tracking information as to when the requests were actually received by the court. I would like to see the local courts retain discretion as to the manner in which requests for information will be accepted by the court, especially in light of the ten-day response requirement. Of course, if this is permitted, local courts should be required to specify these procedures on their websites, along with other record request procedures already required in the new rule.</p> <p>2. In section 10.500(e)(4)(B) and (C), the rule describes reasonable costs that the court may charge for research of judicial administrative records. The rule makes it permissible for courts to charge reasonable costs to “commercial” requestors immediately, while other requestors are granted two hours of research at no cost. I did not see a definition of “commercial” in the rule and would like clarification as to whether this term would include media requests, including requests from bloggers, and requests from other organizations or individuals that use information obtained from the court to advance political, advocacy or lobbying interests.</p> | <p>2. Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> |
| 33. | Superior Court of Riverside County Sherri R. Carter | AM | On behalf of the Riverside Superior Court, I offer the following comments to proposed <i>Cal.</i> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|--------------------|-----------------|--|-----------------|
| | Executive Officer | | <p><i>Rules Ct</i>, Rules, 10.500, 10.501 (new), 10.802 (repeal), and 10.803 (amendment).</p> <p>General Counsel correctly acknowledges that the adoption of rules will create a substantial new workload for judicial branch staff. Moreover, this unfunded mandate will require the courts to absorb costs associated with implementing the legislation during this time of substantial economic hardship. The Riverside Superior Court recognizes that the proposed rules attempt to provide a minimum degree of cost reimbursement. However, the proposed methodology of capturing limited costs is wholly insufficient in light of the increased workload likely to result from the expected onslaught of future requests.</p> <p>At the heart of the problem is how best to charge for the duplication, search, review and production of paper or electronic records. For example, in reviewing the language from proposed rule 10.500(e)(1), it appears that the trial courts have an obligation to “extract” data within defined databases at no charge regardless of the resources required to prepare the necessary query and report parameters. This proposed rule provides:</p> <p><i>Extracting or compiling data loaded from extractable fields in a single database using software already owned or licensed by the judicial branch entity does not constitute the creating of a record or the compilation or</i></p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p><i>assemblage of data. (Ibid.)</i> (Emphasis added.)</p> <p>This language is very troublesome as the costs attendant to writing the appropriate data queries and reports may be enormous in many instances.</p> <p>The issue of whether courts must provide the information at no cost becomes more unclear when referring to the language of proposed rule 10.500(i)(2), which states:</p> <p><i>. . .if the court agrees to perform data compilation to produce a record in response to a request, the requestor will bear the cost of producing a copy of the record, including the cost to construct a record and to produce a copy of the record. (Ibid.)</i> (Emphasis added.)</p> <p>How to assess costs and fees is further complicated when reviewing the language of proposed rule 10.500(e)(4)(A)(ii), which indicates:</p> <p><i>. . . A judicial branch entity may impose a fee reasonably calculated to cover the judicial branch entity's direct costs of creating a record or producing an electronic copy of a record. . . (Ibid.)</i> (Emphasis added.)</p> <p>The Riverside Superior Court had two recent</p> | <p>Subdivisions (e)(1) and (i)(2) have been amended to clarify what is required to be produced with respect to records available in an electronic format and at what charge to the requesting party.</p> <p>Without knowing more about the request, we are unable to determine the application of the rule to the referenced requests. The Administrative Office of the Courts, Office of the General Counsel will continue to assist the courts in responding to public access requests. In addition, the Administrative Office of the Courts is preparing training materials and programs.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|--|----------|
| | | | <p>public requests for an employee vacancy report. Such a report is not available from the state trial court automated human resources system (PHOENIX); therefore, the court ran three separate PHOENIX reports, manually compared the reports to ensure accuracy, and manually prepared a final vacancy report. With over 1,100 employees, many hours were required to complete the final report even though it was initially extracted from a single database. The requester was not charged for the final report because I had requested the same report for budgeting purposes. However, if the final report had not been prepared for my use, would the court have been required to produce such a time consuming report at no cost because it was extracted from a single database although no existing report or query was available?</p> <p>The Riverside Superior Court also had a recent request for a list and copies of all contracts entered between the court and any third party or agency. All original contracts are maintained in hard files and stored at the court's records center in a specific location. However, there is not one list of all of the contracts entered into by the court. Rather, each contract is maintained in a separate file and accounted for separately by the financial and legal departments. To provide such a list and copies, the court charged the requestor an hourly rate to obtain and redact copies, and to prepare a final list.</p> | |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|--|
| | | | <p>These examples illustrate the difficulties the trial courts will encounter in having to determine whether information maintained in some form or fashion by the court must or may be produced, and whether and how much should be charged.</p> <p>Compliance with the legislation and proposed rules will substantially interfere with the legislatively mandated core functions of the trial courts. Moreover, there has been little consideration as to the projected costs to the trial courts of strict compliance with the legislation. For these reasons, the issue of how to charge for duplication, search, review and electronic extraction should be clarified in the proposed rules, and I offer the following suggestions:</p> <ol style="list-style-type: none"> 1. Delete the language in proposed Rule 10.500(e)(1) that could require the courts to create queries and reports at no charge if the information is being extracted from a single database, and rely on proposed Rule 10.500(e)(4)(A)(ii). This would make it clear that if a report or query does not already exist, the court may charge to produce such an electronic record. Alternatively, clarify this section to indicate that extracting or compiling data does not constitute the creation of a record if it comes from a single database and a report or query already exists. 2. Delete the free two hours of search and | <p>Rule 10.500(e)(1) has been amended to clarify what is required to be produced with respect to records available in an electronic format..</p> <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|------------------------------------|-----------------|---|--|
| | | | <p>review time included in proposed Rule 10.500(e)(B). In this austere budget climate, requests for public information should not be provided free of charge at the expense of other critical and mandated services. The unintended consequence will be that abuses will result when there are no fees required for requests. Thank you for allowing the opportunity to provide comments to the proposed rules. In these troubled economic times, the policy implications and interests sought to be protected by such legislation requires a very delicate balance. I am optimistic that the Judicial Council will strike a balance with the Legislature that will promote accessibility to non-judicial records without diminishing the level of service required to perform the core mission of the court.</p> | <p>description of the alternatives is included in the Judicial Council report. Because of the volume and content of comments received on the issue of fees, and in particular an emphasis in the comments on the possible “chilling effect” a fee structure substantially different from the CPRA could have on requests for records and information, neither of the alternatives eliminates the free two hours of search and review time.</p> |
| 34. | Superior Court of San Diego County | A | 1) Rule 10.500(b)(2) should be amended to | 1. An advisory committee comment has been |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|---------------------------------------|----------|--|--|
| | Michael M. Roddy Executive Officer | | <p>indicate that the rule also does not modify existing law regarding public access to “deliberative” records as follows: “This rule does not modify existing law regarding public access to <u>deliberative and adjudicative records.</u>”</p> <p>2) Our court has concerns about the language of Rule 10.500(e)(2)(D) and whether it is intended to require the court to provide payment information for every court expenditure no matter how small. This could be extremely burdensome on the court and its limited resources.</p> <p>3) Rule 10.500(e)(2)(F) should be amended to indicate that personal information of employees must be redacted from any records produced as follows: “Employment contracts between judicial branch entities and their employees (<u>with personal information redacted in accordance with (f)(3) below.</u>)”</p> <p>4) Our court is concerned about the software/technology infrastructure costs that may be required to be incurred by the court to comply with the new rules. Section (E) should be added to Rule 10.500(e)(4) to state the following:</p> <p>(E) <u>Nothing in this rule shall require a judicial branch entity to purchase or otherwise acquire search software.</u></p> | <p>added to clarify that (f)(11)(the deliberative process exemption) is intended to reflect with California law on the subject of the “deliberative process” exemption under the CPRA.</p> <p>2. Rule 10.500(e)(6) requires that a request “reasonably describe an identifiable record or records.” Neither this rule nor case law interpreting the CPRA requires that a record be created in response to a request.</p> <p>3. Personal information of employees is protected by (f)(3) (personal privacy exemption).</p> <p>4. Rule 10.500(e)(1) has been amended to clarify what is required to be produced with respect to records available in an electronic format. Nothing in the rules or case law interpreting the CPRA requires an entity to acquire search software.</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| Commentator | Position | Comment | Response |
|-------------|----------|--|--|
| | | <p>5) Rule 10.500(f)(1) should be amended to include “communications” as follows:</p> <p>Preliminary writings, including drafts, notes, working papers, <u>communications</u>, and inter-judicial branch entity or intra-judicial branch entity memoranda <u>and communications</u>, if the public interest in withholding those records clearly outweighs the public interest in disclosure;</p> <p>6) Rule 10.500(f)(2) should be amended to include records concerning employee discipline as follows: “Records pertaining to pending or anticipated claims, <u>employee discipline</u>, or litigation to which a judicial branch entity...”</p> <p>7) Rule 10.500(f)(5) should be amended to prevent disclosure of documents that would constitute attorney work product. It should read as follows: “Records the disclosure of which is exempted or prohibited under state or federal law, including provisions of the California Evidence Code relating to privilege, <u>the California Code of Civil Procedure (2018.030—attorney work product)</u>, or by court order in any court proceeding;”</p> <p>8) Rule 10.500(f)(9) should be modified to clarify what disclosure duties the</p> | <p>5. Rule 10.500(f)(1) was written to reflect the language and intent of Government Code section 6254(a), which does not include the term “communications.” Also, the definition of “writing” (see rule 10.500(c)(6)) includes any form of communication.</p> <p>6. Records pertaining to employee discipline are exempt from mandatory disclosure by (f)(3) (personal privacy exemption) and (f)(12) (catch-all exemption).</p> <p>7. Documents that would constitute attorney work product are protected by (f)(5) (incorporation of other statutory exemptions) and (f)(12) (catch-all exemption).</p> <p>8. Rule 10.500(f)(9) was written to reflect the language and intent of Government Code section</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|-----|--|-----------------|---|--|
| | | | <p>subdivision is referring to in the last sentence. As drafted, the sentence leaves the limitation wide open to many interpretations, which could result in litigation related to what is meant by “any other records relating to the activities governed by the employee relations acts referred to in this subdivision.”</p> <p>9) Rule 10.500(h) should be amended to clarify that the court is not waiving any privilege through an inadvertent disclosure of material done pursuant to a request for information. Section (h) should be amended to read: “Disclosure of a judicial administrative record... constitutes a waiver of the exemptions applicable to that particular record, <u>except as to an inadvertent disclosure of privileged material.</u>”</p> | <p>6254(p). An existing body of case law interprets this provision.</p> <p>9. Protection against mandatory disclosures of records that have been inadvertently disclosed previously is covered under (f)(12) (catch-all exemption).</p> |
| 35. | Superior Court of Yolo County James B. Perry Executive Officer | AM | <p>Section (e)(4) Costs: (A) (i) and (ii): It would be helpful to include a definition of direct cost to clarify whether staff time to produce the paper, hard copy or electronic copy is considered a direct cost. It is recommended that the definition of direct cost includes staff time and supplies.</p> <p>Section (e)(4) Costs: (B): A definition and example of commercial use vs non-commercial use would be helpful to avoid confusion.</p> <p>Section (e)(5) Inspection: As written, it is not clear that this section cannot be interpreted to require the immediate production of records.</p> | <p>Two alternative fee structures are proposed for Judicial Council consideration. A complete description of the alternatives is included in the Judicial Council report.</p> <p>Rule 10.500(e)(4) has been amended to include a definition of “commercial use.”</p> <p>The suggestion is appreciated, but no additional modifications have been made to rule 10.500(e)(5). This issue is discussed in the</p> |

SP09-07

Public Access to Judicial Administrative Records (adopt Cal. Rules of Court, rules 10.500 and 10.501; repeal rule 10.802; and amend rule 10.803)

All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Response |
|--|-------------|----------|---|---|
| | | | <p>Discussion on page 9 of the Invitation to Comment states that this section “merely provides that any request may be made at any time during the office hours of the judicial branch entity.” If so, it should say that directly. This section of the Rule should be re-written to clearly state that the request may be made during the entity’s office hours and the request will be considered and a response made as determined in section (6) and (7).</p> <p>Section (e)(7) Response: The ...entity must make the ...records available promptly. Promptly is too vague a term and the rule should give a more specific time frame. Section (6) allows for 10 calendar days for determination of disclosable records and it is suggested that the response time be the same.</p> <p>Section (e)(9) Reasonable efforts (A) (i): It should NOT be the court’s responsibility to assist the requester in identifying records and information responsive to their request or to the purpose of their request. The court should not be obligated to help the requester frame their request.</p> | <p>Judicial Council report.</p> <p>Rule 10.500(e)(7) is consistent with provisions in the CPRA. As under the CPRA, what constitutes a prompt response depends on the nature of the request and the surrounding circumstances.</p> <p>Rule 10.500(e)(9) is consistent with provisions in the CPRA.</p> |