Date of Hearing: April 19, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Jesse Gabriel, Chair
AB 2370 (Levine) – As Amended March 23, 2022

SUBJECT: Public records: state agency retention

SUMMARY: This bill would provide that, unless a longer retention period is required by statute or regulation, or established by the Secretary of State pursuant to the State Records Management Act, a state agency, for purposes of the California Public Records Act, is required to retain and preserve for at least two years every public record, as defined, regardless of physical form or characteristics.

EXISTING LAW:

1) Provides that the people have the right of access to information concerning the conduct of the people's business and, therefore, the writings of public officials and agencies shall be open to public scrutiny. The California Constitution also provides that a statute shall be broadly construed if it furthers the people's right of access and narrowly construed if it limits that right of access. (Cal. Const., art. 1, Sec. 3.)

2) Provides that, among other rights, all people have an inalienable right to pursue and obtain privacy. (Cal. Const., art. 1, Sec. 1.)

3) Provides, under the California Public Records Act (CPRA), that public records of state and local agencies are open to inspection, unless exempt. (Gov. Code. Sec. 6250 *et seq*.) The CPRA provides that it shall not be construed to require disclosure of personnel, medical, or similar files, "the disclosure of which would constitute an unwarranted invasion or personal privacy." (Gov. Code. Sec. 6254(c).) Records of investigations conducted by any state or local police agency or investigatory files of those agencies are also exempt from disclosure. (Gov. Code. Sec. 6254(f).)

4) Provides that public records may be exempt from disclosure by express provisions of state or federal law. (Gov. Code. Sec. 6254(k).) Existing law provides that an agency shall justify withholding any record by demonstrating that it is exempt from disclosure under express provisions of law, as specified, 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. (Gov. Code Sec. 6255.)

5) Defines "public records" for CPRA purposes to include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics; and defines a "writing" to include any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. (Gov. Code. Sec. 6252 (e) and (g).)

6) Directs California's Secretary of State to establish and administer a records management program that applies efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of State records. (Gov. Code. Secs. 12270-12279.)

7) Under existing case law, provides that the intent of the CPRA is to hold government accountable while still protecting individual privacy. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169; *California State University, Fresno Association v. Superior Court* (2001) 90 Cal.App.4th 810.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Purpose of this bill**: seeks to ensure meaningful access to public records by clarifying that public agencies must retain records relating to the public's business for at least two years, in the same manner that they are required to retain paper records. This bill is author-sponsored.

2) **Author's statement**: According to the author:

> The bill harmonizes the Public Records Act ("PRA") with the various records retention statutes currently on the books, by placing a two-year minimum retention requirement for emails within the PRA itself. This helps address the current gap between the purpose of the PRA (giving citizens a right of access to information concerning the conduct of the people's business) and its practical application (the right to access information concerning the conduct of the people's business is illusory if public records are deleted or destroyed).

3) **California law balances transparency of public agencies and protection of individual privacy**: The State of California simultaneously grants the public a right to access records collected and maintained by public agencies, and an individual's constitutional right to privacy. In circumstances where these two principles are in conflict, the Legislature has approved limited exceptions, seeking to strike an appropriate balance. There are 30 general categories of documents or information that are exempt from disclosure, essentially due to the character of the information, and unless it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information, the exempt information may be withheld by the public agency with custody of the information. (Gov. Code Sec. 6254 et seq.) For example, while employee records fall within the scope of the CPRA and are therefore subject to disclosure, in order to protect the individual employee's right to privacy, existing law provides that the home addresses and private telephone numbers of employees "shall not be deemed to be public records and shall not be open to public inspection[.]"(Gov. Code Sec. 6254.3.)

   This bill would create minimum retention requirements for state agencies by requiring them to retain all public records for at least two years. Public records are defined in existing law and in this bill as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code Sec. 7920.530.) Staff notes that the existing exemptions in the CPRA (e.g, exemptions including those to protect individuals privacy and the balancing test requiring an agency to consider the public's interest in non-disclosure of a

requested record noted above) are not affected by this bill and would apply to state agency records required to be retained for at least two years pursuant to this measure.

In support of this bill, the California News Publishers Association, First Amendment Coalition, and CalAware write:

> A clear statutory minimum standard for the retention and preservation of public records, especially electronic mail, is necessary in an era in which many agencies routinely communicate on important issues concerning the conduct of the people's business and automatically purge these email communications. In their eagerness to purge these records from their servers, agencies dispose of records that provide the public with insights into the development of public policy, illuminate controversial decisions, or potentially hide evidence of corruption and self-dealing. Such records are critical to the public's ability to hold its government to account.
>
> This problem is not limited to electronic mail. As recently reported, the chief administrative officer of a state agency testified that she routinely shredded scoring worksheets that she no longer considered "relevant," even though they were central to a contract bidding dispute.
>
> Existing law leaves it to state agencies to determine how long various records should be retained under "retention schedules" filed with the Secretary of State. (*See* Gov. Code §§ 12270-12279.) For example, under the Department of Insurance's current records retention schedule for the Office of the Commissioner and Executive Office "Department records, scheduling, invitations, schedules, deadlines, [and] contracts" are destroyed after 90 days. Destroying records after 90 days, before the press or public may be aware of important issues these records could shed light on, is the antithesis of the government transparency that the Public Records Act is meant to provide.
>
> AB 2370 would require state agencies to retain public records, including electronic documents, for a minimum time critical to public accountability and provide clear guidance to agencies, journalists, and members of the public as to what the appropriate standards are for the custodians of this information.

4) **Narrower than prior legislation**: This bill is very similar to both AB 1184 (Gloria, 2019) and AB 2093 (Gloria, 2020), which addressed record retention by *all* public agencies, not just state agencies. Specifically, AB 1184 would have required a public agency (state and local) to retain and preserve for at least two years every public record, as defined, transmitted by electronic mail unless a longer retention period is required by statute or regulation or established by the Secretary of State, as specified. AB 1184 was vetoed by Governor Newsom, who argued in his veto message that the burden of record retention and management would outweigh any benefit of added transparency.

   AB 2093, nearly identical to AB 1184, died in the Assembly Appropriations Committee. Both of those bills had significant opposition from local governments. AB 2370, instead applies only to state agencies and enjoys no opposition at the time of this writing.

Consumer Watchdog writes in support, "The Public Records Act already covers any "writing . . . regardless of physical form," including e-mail (Gov. Code §§ 6252(e), (g)), and the California Supreme Court has also expressly held that e-mail is subject to the Public Records Act. (City of San Jose v. Super. Ct. (2017) 2 Cal.5th 608.) Under AB 2370, any record—whether electronic or in paper form—that meets the definition of "public record" under the Public Records Act must be retained by state agencies for a minimum of two years."

5) **Prior legislation**: AB 2093 (Gloria, 2020) was virtually identical to AB 1184. It died in the Assembly Appropriations Committee.

   AB 1184 (Gloria, 2019) would have required a public agency to retain and preserve for at least two years every public record, as defined, that is transmitted by email. AB 1184 was vetoed by Governor Newsom who argued that the "bill does not strike the appropriate balance between the benefits of greater transparency through the public's access to public records, and the burdens of a dramatic increase in records-retention requirements, including associated personnel and data-management costs to taxpayer."

6) **Double referral**: This bill was double referred to the Assembly Judiciary Committee where it was heard on March 22, 2022 and passed out 9 to 0.

REGISTERED SUPPORT / OPPOSITION:

Support

California News Publishers Association
Californians Aware: the Center for Public Forum Rights
Consumer Watchdog
First Amendment Coalition
Oakland Privacy

Opposition

None on file

Analysis Prepared by: Nichole Rocha / P. & C.P. / (916) 319-2200