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Association of California



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CONSTRUCTION
EMPLOYERS'
ASSOCIATION

March 26, 2024

The Honorable Sharon Quirk-Silva
California State Assembly
1021 O Street, Suite 4210
Sacramento, CA 95814

**SUBJECT: AB 2439 (QUIRK-SILVA) PUBLIC RECORDS: OWNERS AND DEVELOPERS
OPPOSE – AS INTRODUCED FEBRUARY 13, 2024
SCHEDULED FOR HEARING – APRIL 2, 2024**

Dear Assemblymember Quirk-Silva:

The California Chamber of Commerce and the listed organizations respectfully **OPPOSE AB 2439 (Quirk-Silva)**, because it will expose private companies to harassment and litigation risks, drive up the costs for public works projects, and serve no public purpose. Substantively, **AB 2439** will require private employers who work on public works projects to be treated as if they were public entities for purposes of the Public Records Act (the “PRA”).

Background: The PRA and its Provisions

To analyze the implications of **AB 2439**, some background is necessary. The PRA was passed in 1968 with a focus on accountability and openness for governments vis-à-vis the public.¹ As courts have subsequently noted, the purpose of the PRA was to “increas[e] freedom of information by giving the public access to information in possession of public agencies.”² **AB 2439** would forever change the PRA’s fundamental focus on the public’s access to their government by requiring private companies to comply with all of the PRA’s requirements for all of their private documents related to the project.

Generally speaking, the PRA gives any “person” the right to access any “public records” upon request – but the simplicity of that sentence hides the complexity of compliance.³ However, the requesting “person” need not be an actual person, or even a citizen of California or the United States.⁴ And the “request” need

¹ Gov. Code, § 7920.000 et. seq.

² See *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, 668. (internal quotations omitted)

³ Summary of the Public Records Act taken from “The People’s Business: A Guide to the Public Records Act”, by the League of California Cities. Henceforth, the “Guide.” Available at: https://www.calcities.org/docs/default-source/city-attorneys/the-people's-business.pdf?sfvrsn=f827f33f_3

⁴ *Id.*, p 17.

not be made in writing – it can even be made orally or via phone call.⁵ Furthermore, the request does not even have to clearly describe the records sought, as the PRA provides that covered entities have a duty to help requesting parties in reformulating their request to identify a more specific document or set of documents.⁶ As to what “records” are covered – the PRA views the term broadly, including “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.”⁷ In response to a request, a public entity must meet a tight 10-day timeline to respond with which, if any, records can be disclosed (pursuant to legal limitations discussed below).⁸ Under certain circumstances, an additional 14-days is potentially available for limited purposes.⁹ During this time period, the public entity must locate all the covered records, review all of them for any potential legal or privacy concerns, then prepare them for production to the requesting party. Needless to say, complying with the PRA is a considerable task for many city attorneys’ offices in California.¹⁰ For a single request, the public entity must: (1) review the document request; (2) potentially help the requester re-formulate their request; (3) locate the described documents (which may be held in multiple offices or departments); (4) review all requested documents prior to production for any non-disclosable information (such as social security numbers, attorney client communications, etc.); and (5) and producing documents. And, again, all of this must be done within strict statutory timelines.

In the event that a public entity mistakenly fails to disclose a covered record, a requester can sue the entity and recover attorneys’ fees for their costs in enforcing the PRA, with the burden being on the public entity to justify their decision.¹¹

AB 2439 Will Greatly Expand the Scope of Documents Covered by the PRA.

At present, the PRA is limited to public documents – that is, documents in the hands of the public entity. For a public works contract, this might include: the underlying contract itself, any communications with the contractor about the project, and any wage-related or other verification documents that the public entity is entitled to. These are the documents which the public entity (and potentially state law) require for oversight of the contract. As an example, with these documents, the PRA would allow the public to verify that no emails were exchanged between a council member and a contractor promising favor or illicit benefits. In other words, the PRA allows members of the public to ensure their government is doing its job.

In contrast, **AB 2439** would render a whole new world of private documents that are maintained inside of the contracting company. Internal discussions, emails, estimates of costs, discussions around potential suppliers or subcontractors... all of these documents would now be accessible via a PRA from any person, group, or corporation. We see no policy rationale for such access, and great risks of abuse, as discussed below.

AB 2439 Will Disincentivize Public Contracting for Public Works by Adding Costs and Legal Risks for Private Contractors.

Simply put, **AB 2439** will create a world of risk for private companies considering bidding on a public works project. First, **AB 2439** adds the costs and difficulty of attempting to comply with the PRA – which will

⁵ *Id.*, p 20.

⁶ *Id.*, pp. 21, 24-5.

⁷ *Id.*, p. 12. Notably, the definition of documents itself reflects that the PRA was only meant to apply to public entities.

⁸ *Id.*, pp. 22-23.

⁹ *Id.*

¹⁰ Having personally worked on contract for city attorney’s offices, I can attest to the amount of legwork necessary in identifying the covered documents, reviewing them for legal concerns, redacting them, and preparing them for production. Moreover, the length of the Guide and the role of the League of California Cities to continually revise and republish it shows it is a matter of great consequence to California’s cities.

¹¹ *The Guide*, p 69.

require additional staff and attorney time, as well as potential litigation costs and attorneys' fees – for all contractors bidding on public works contracts.

Second, **AB 2439** creates an entirely new risks related to abuse of the PRA after a contract is awarded. Here, *competing contractors* (or upset unions, citizen groups, or others) could utilize the PRA after a contract was awarded to harass the winning bidder. A simple one-line email could be used to generate 20 or 30 person-hours of work for the contractor, with no fear of retribution. Moreover, beyond mere harassment, the PRA could be used to gather economically profitable information about the winning bidder's business operations, including trade secrets.¹²

These concerns are much more modest presently because they are limited to entities without clear competitors (cities and counties) and the documents in their possession. However, when the PRA is applied to non-public documents, competitive concerns become extremely serious.

In summary: we are concerned that **AB 2439** will not advance the key goals of the PRA (good government and transparency in public actions), but will create considerable new costs and risks for contractors that bid on public works projects. As a result, we expect it to raise costs for public works projects and reduce bids for such projects due to the legal and competitive risks it would create for contractors.

For these reasons, we **OPPOSE AB 2439 (Quirk-Silva)**.

Sincerely,



Robert Moutrie
Senior Policy Advocate
California Chamber of Commerce
on behalf of

American Property Casualty Insurance Association
American Subcontractors Association of California (ASAC)
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Chamber of Commerce
California Financial Services Association (CFSA)
California Manufacturers and Technology Association
Construction Employers' Association (CEA)
Flasher Barricade Association (FBA)
Housing Contractors of California
National Association of Surety Bond Producers
National Federation of independent Business (NFIB)
San Luis Delta Mendota
The Surety & Fidelity Association of America
Western Electrical Contractors Association (WECA)

cc: Legislative Affairs, Office of the Governor

RM:ldl

¹² Notably, the PRA does contain an exception from disclosure for “trade secrets”, but it is not a blanket exception (it may still be released if it serves the “public interest”). In other words, the topic of whether a given document qualifies as a trade secret would be a matter of litigation, and we do not believe that exception would serve to prevent harassing demands. *See* The Guide, pp. 61-62.