

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2962 (Committee on Judiciary)

Version: June 13, 2022

Hearing Date: June 28, 2022

Fiscal: Yes

Urgency: No

AM

SUBJECT

Court records: fees

DIGEST

This bill prohibits the courts from charging the public a fee that exceeds the court's direct costs of duplication for public users of the website to search for, download, or copy public court records. The bill authorizes a court to charge a fee to a commercial user for viewing, searching, duplicating, downloading, or printing public court records in an electronic format, and requires Judicial Council to develop a rule of court establishing statewide commercial user fees or a process for courts to use in developing commercial user fees by January 1, 2024.

EXECUTIVE SUMMARY

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state, as provided by both the California Constitution and statute. It has come to the attention of the author that some courts charge the public to access public court records posted online in an electronic format. This policy acts as an impediment to the public in being able to effectuate this fundamental right. This bill seeks to address this issue by prohibiting the courts from charging the public a fee that exceeds the court's direct costs of duplication for public users of the website to search for, download, or copy public court records, but strikes a balance by allowing courts to charge commercial users fees for accessing those records.

The bill is author sponsored. It is supported by the California News Publishers Association, California Broadcasters Association, Consumer Attorneys of California, First Amendment Coalition, Latino Journalists of California, Media Alliance, Nation Press Photographers Association, Orange County Press Club, and the Radio Television Digital News Directors Association. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the California Constitution, that 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 are required to be open to public scrutiny. (Cal. Const. art. I, § 3 (b)(1).)
 - a) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
- 2) Governs the disclosure of information collected and maintained by public agencies pursuant to the California Public Records Act (CPRA). (Gov. Code §§ 6250 et seq.)
 - a) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 6253.)
 - b) Defines "public records" 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 § 6252(e).)
 - c) Defines "public agency" as any state or local agency. (Gov. Code § 6252(d).)
 - d) Defines "state agency" as every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution. (Gov. Code § 6252(f).)
 - e) Recodifies the CPRA in Division 10 of Title 1 (§§ 7920.000 - 7931.000) of the Government Code effective January 1, 2023.
- 3) Requires that, unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this division that is in an electronic format shall make that information available in an electronic format when requested by any person. (Gov. Code § 6253.9.)
- 4) Requires that the cost of duplication of an electronic record to be limited to the direct cost of producing a copy of a record in an electronic format.
- 5) Provides the requester is required to bear the cost of producing a copy of the record, including the cost to construct a record and the cost of programming and computer services necessary to produce a copy of the record, when either of the following applies:

- a) in order to comply with the CPRA the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals; or
 - b) the request would require data compilation, extraction, or programming to produce the record. (Gov. Code § 6253.9)
- 6) Authorizes trial court records to be e created, maintained, and preserved in any form or forms of communication or representation, including paper, optical, electronic, magnetic, micrographic, or photographic media or other technology pursuant to the rules adopted by the Judicial Council. (Gov. Code § 68150(a).)
- a) Requires the Judicial Council to adopt rules to establish the standards or guidelines for the creation, maintenance, reproduction, or preservation of court records, including records that must be preserved permanently. The standards or guidelines shall reflect industry standards for each medium used, if those standards exist. The standards or guidelines shall ensure that court records are created and maintained in a manner that ensures accuracy and preserves the integrity of the records throughout their maintenance. (*Id.* at (c).)
 - b) Requires these court records to be made reasonably accessible to all members of the public for viewing and duplication as the paper records would have been accessible, unless access is otherwise restricted by law. (*Id.* at (l).)
 - c) Requires reasonable provision to be made for duplicating the records at cost. Cost consist of all costs associated with duplicating the records as determined by the court. (*Ibid.*)
- 7) Provides for courts to charge the following fees related to court records.
- a) Fifty cents per page to cover the cost of preparing copies of any record, proceeding, or paper on file in the clerk's office.
 - b) One dollar per page, in addition to the fee for the certificate, for comparing with the original on file in the office of the clerk of any court, the copy of any paper, record, or proceeding prepared by another and presented for the clerk's certificate.
 - c) Fifteen dollars for each search of records or files conducted by a court employee that requires more than 10 minutes. (Gov. Code § 70627.)
- 8) Defines "court record" as consisting of the following:
- a) all filed papers and documents in the case folder, but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created;
 - b) administrative records filed in an action or proceeding, depositions, transcripts, including preliminary hearing transcripts, and recordings of electronically recorded proceedings filed, lodged, or maintained in connection with the case, unless disposed of earlier in the case pursuant to law; or

- c) other records listed under subdivision (g) of Section 68152. (Gov. Code § 68151(a).)

This bill:

- 1) Requires a court to make information that constitutes a public court record available to a person for inspection and copying at a courthouse during hours when the courthouse is open to the public, unless otherwise prohibited by law. Authorizes a court to charge a fee for copying court records pursuant to existing law.
- 2) Prohibits a court that makes public court records available in an electronic format by means of an internet website maintained by the court, or a third party on behalf of the court, from charging a fee that exceeds the court's direct costs of duplication for users of the website to search for, download, or copy public court records.
- 3) Provides these provisions do not require a court to either:
 - a) create, post, or reconstruct a record in an electronic format; or
 - b) release an electronic record if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.
- 4) Authorizes a court, notwithstanding 2) above, charge a fee to a commercial user for viewing, searching, duplicating, downloading, or printing public court records in an electronic format.
- 5) Requires the Judicial Council, by January 1, 2024, to develop a rule of court establishing statewide commercial user fees or a process for courts to use in developing commercial user fees.
- 6) Defines certain terms for these purposes.
 - a) "Commercial user" means a person or entity, or any person acting on behalf of an entity, that has viewed, downloaded, or printed at least 100 individual electronic court records during a 12-month period. Entities formally organized as nonprofit corporations, including, but not limited to, nonprofit organizations providing legal services to the persons whose records are obtained, are not commercial users.
 - b) "Court record" has the same meaning as in subdivision (a) of Section 68151.
 - c) "Direct costs of duplication" means the actual cost of producing a copy of a record in an electronic format and does not include any ancillary costs, including, but not limited to, the cost of personnel time or database development or maintenance.

- d) "Public court record" means a court record that is not sealed by court order, made exempt from remote public access under the California Rules of Court, or otherwise confidential by law.

COMMENTS

1. Stated need for the bill

The author writes:

AB 2962 ensures that the public will be able to access public court records that are posted on a court's website in an electronic format, and download and copy them, without paying fees to do so. Some courts charge a fee to access to their public court records that are posted online. Under the California Public Records Act (CPRA), public agencies are prohibited from charging the public more than the "direct cost of producing a copy of a record in an electronic format." Although the CPRA does not explicitly apply to the judicial branch, courts are required to comply with the *spirit* of the CPRA by not creating obstacles to the public obtaining access to court records. Furthermore, the California Constitution affirms that, "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."

Public agencies cannot charge for their costs of building or maintaining their databases and websites, even though such costs can be substantial. Courts should not charge for those costs, either. Courts should request additional funds from the Legislature for the creation, maintenance, and management of their electronic systems, if needed. AB 2962 merely ensures that the public will have the same free access to public *court* records posted online that they now have to other public records.

2. Public access to court records posted online

- a. *Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state*

Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Cod § 6250; 7921.000.) In 2004, the right of public access was enshrined in the California Constitution (*hereafter* Constitution) with the passage of Proposition 59 (Nov. 3, 2004, statewide gen. elec.),¹ which amended the Constitution to specifically protect the right of the public to access

¹ Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).

and obtain government records: “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.” (Cal. Const., art. I, sec. 3 (b)(1).) The Constitution mandates that statutes, court rule, or other authority are to be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. (*Ibid.*) Additionally, it requires a statute that limits the public’s right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (*Ibid.*) Under the CPRA, a public record is defined as any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 6252(e).) A “state agency” is defined as every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.² (Gov. Code § 6252(f)(1); 7920.540.³) The CPRA therefore specifically exempts its provisions from applying to the courts.

Even though the CPRA does not specifically apply to court records, the California Supreme Court has held that there is a common law right of access to court records in which there is a legitimate public interest, if not outweighed by strong countervailing reasons, and further noted that “the general principles regarding public access to the records of public entities established in the statutes and [applicable] case law [...] continue to apply in the context of court records.” (*Sander v. State Bar of California*, (2013) 58 Cal.4th 300, 318-323.) The court has found that the Constitutional provisions related to the people having the right of access to information regarding the people’s business and the mandate that limitation on access be narrowly construed also applies to court records. In *Savaglio v. Wal-Mart Stores, Inc.*, the court stated: “With the passage of Proposition 59 effective November 3, 2004, the people’s right of access to information in public settings now has state constitutional stature, grounding the presumption of openness in civil court proceedings with state constitutional roots.” ((2007) 149 Cal. App. 4th 588, 597.) In *Sander v. State Bar of California*, the California Supreme Court recognized that Article I, § 3 of the California Constitution applies to records of the judicial branch and applied the narrow construction rule to certain State Bar records at issue in that case. (*Sander v. State Bar of California*, *supra* at 312-313.)

² The CPRA does specifically provide that an itemized statement of the total expenditures and disbursement of any agency provided for in Article VI of the California Constitution shall be open for inspection. (Gov. Code § 6261.)

³ Section when recodification becomes operative Jan. 1, 2023.

⁴ See also *City of San Jose v. Superior Court*, (2017) 2 Cal.5th 608, 617; *American Civil Liberties Union Foundation of Southern California v. Superior Court*, (2017) 3 Cal.5th 1032, 1036-37.

- b. Some courts charge the public to access public court records posted online in an electronic format*

Some courts in the state charge the public to access to their public court records which are posted online in an electronic format. The JCC states the reason is to cover costs associated with the creation, maintenance, and management of their electronic systems that allow for public access to those electronic records. According to the Judicial Council, in 2021 almost \$30 million dollars was collected by various courts in fees for providing access to electronic records online. The exact number of courts that do this is unclear, as the Judicial Council is unable to provide details about how common the practice is. This issues was encountered first hand by staff of the Assembly Judiciary Committee, sponsor of the bill, when they were searching for Sacramento County court records related to that Committee’s work. Staff was unable to even search for the records they were trying to obtain without paying an initial fee. Under the CPRA, public agencies are prohibited from charging the public more than the “direct cost of producing a copy of a record in an electronic format,” and generally cannot charge for the staff costs of searching for records, redacting nonpublic information, or monitoring the public viewing of records, even though such costs can be substantial. (Gov. Code Sec. 6253.9; 7922.575.⁵)

3. This bill prohibits the court from charging the public for access to court records posted online, but allows courts to charge commercial users for access to these records

The author argues that in light of the fundamental right to access governmental records enshrined in the Constitution, long standing common law principles, and policy of the CPRA to limit public agencies ability to charge the public for access to records, courts should not be charging the public for costs over and above the direct costs to the courts of access and duplication of records – i.e. costs associated with the creation, maintenance, and management of their electronic systems. The bill prohibits the courts from charging the public a fee that exceeds the court’s direct costs of duplication for public users of the website to search for, download, or copy public court records. The bill strikes a balance by authorizing courts to charge commercial users fees for viewing, searching, duplicating, downloading, or printing public court records in an electronic format. The bill requires Judicial Council to develop a rule of court establishing statewide commercial user fees or a process for courts to use in developing commercial user fees by January 1, 2024. A “commercial user” is defined as a person or entity, or any person acting on behalf of an entity, that has viewed, downloaded, or printed at least 100 individual electronic court records during a 12-month period. Entities formally organized as nonprofit corporations, including, but not limited to, nonprofit organizations providing legal services to the persons whose records are obtained, are not considered commercial users.

⁵ Section when recodification becomes operative Jan. 1, 2023.

This policy is in line with recent changes in the federal courts. Amid debate in Congress regarding whether the federal courts should be forced to allow the public free access to online docket searches in the federal court's electronic records system PACER, the Judicial Conference of the United States approved a plan in March 2022 to make PACER searches free for non-commercial users in any future overhauls of the system.⁶

The Judicial Council has raised some concerns regarding the provisions of the bill including the potential fiscal impact of its provisions and challenges in implementing the bill's provisions from an IT perspective. They claim it would be extremely difficult for court systems to be able to distinguish between a public user and commercial user and note that, unlike the federal system the California courts do not operate on one single system but 58 individual different systems. They also raised concerns that some of the provisions were duplicative of existing provisions, unclear, or could lead to confusion.

4. Proposed amendments

In response to some of the concerns raised by the Judicial Council and feedback from other stakeholders, the author has proposed several amendments to the bill that:

- extend the date upon which the Judicial Council is to develop a rule of court establishing statewide commercial user fees or a process for courts to use in developing user fees by one year to January 1, 2025;
- remove provisions that are duplicative of existing law;
- clarify, consistent with California Rule of Court 2.503, that a court is required to provide remote access to all public court records about civil cases that are maintained by the court in electronic format unless it is not feasible for the court to make the records available remotely due to lack of resources or technical capacity or if they are the types of records specifically listed in the California Rules of Court as records for which remote access is not to be granted; and
- provide that a commercial user does not include an attorney or law firm that obtains a record about a client or a person who attest that the records are needed for a scholarly, journalistic, political, or government use.

The specific amendments are:⁷

68511.3. (a) Unless otherwise prohibited by law, a court shall make ~~information that constitutes a public court record~~ *public court records that are maintained in an electronic*

⁶ Nate Raymond, *Fed judiciary says yes to free PACER searches. Here are the details so far*, Reuters (May 31, 2022), available at <https://www.reuters.com/legal/government/fed-judiciary-says-yes-free-pacer-searches-here-are-details-so-far-2022-05-31/>.

⁷ The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

~~format available to a person the public, in either electronic or paper form, for inspection and copying at a courthouse during hours when the courthouse is open to the public. A court may charge a fee for copying public court records pursuant to Section 70627.~~

(b) (1) Except as provided in paragraph (2), a court shall provide remote access to all public court records about civil cases, including registers of actions as defined in Section 69845, calendars, and indexes, that are maintained by the court in an electronic format. A court may provide the public with remote access to the records by means that include, but are not limited to, an internet website maintained by the court, or a third party on behalf of the court.

(2) A court is not required to provide remote access to the records described in paragraph (1) in either of the following circumstances:

(A) It is not reasonably feasible for the court to make the records available by remote means because the court lacks either the resources or the technical capacity to do so.

(B) The record is about one of the types of civil cases listed in the California Rules of Court as a type of civil case to which a court may not provide remote access.

~~(b) (c) Except as provided in subdivision (e), (d), a court that makes public court records available in an electronic format by means of an internet website maintained by the court, or a third party on behalf of the court, provides the public with remote access to the records described in paragraph (1) of subdivision (b), shall not charge a fee that exceeds the court's direct costs of duplication for users of the website to search for, download, or copy public court records.~~

~~(c) Nothing in this section shall be construed to require a court to do either of the following:~~

~~(1) Create, post, or reconstruct a record in an electronic format.~~

~~(2) Release an electronic record if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.~~

~~(d) Nothing in this section shall be construed to permit public access to court records that have been sealed by court order or that are confidential by law.~~

~~(e) (d) Notwithstanding subdivision (b), (c), a court may charge a fee to a commercial user for viewing, searching, duplicating, downloading, or printing public court~~

records in an electronic format. The Judicial Council shall, by January 1, ~~2024~~, 2025, develop a rule of court establishing statewide commercial user fees or a process for courts to use in developing commercial user fees.

~~(f)~~ (e) As used in this section:

(1)(A) "Commercial user" means a person or entity, or any person acting on behalf of an entity, that has viewed, downloaded, or printed at least 100 individual electronic court records during a 12-month ~~period. Entites period for commercial purposes.~~

(B) None of the following shall be considered to be a "commercial user":

(i) An entity formally organized as a nonprofit ~~corporations, corporation, including, but not limited to, a nonprofit organizations organization~~ providing legal services to the persons whose records are ~~obtained, are not commercial users.~~ obtained.

(ii) An attorney or law firm that obtains a record about a client.

(iii) A person who attests that the records are needed for a scholarly, journalistic, political, or government use.

(2) "Court record" has the same meaning as in subdivision (a) of Section 68151.

~~(3) "Direct costs of duplication" means the actual cost of producing a copy of a record in an electronic format and does not include any ancillary costs, including, but not limited to, the cost of personnel time or database development or maintenance.~~

~~(4)~~ (3) "Public court record" means a court record that is not sealed by court order, made exempt from remote public access under the California Rules of Court, or otherwise confidential by law.

5. Statements in support

A coalition of six organizations representing the news industry write in support:

Unfortunately, a number of courts in the state charge the public to access public court records that are posted online in an electronic format, charging fees to search for, download and copy records. They do so, according to the JCC, in order to cover their costs associated with the creation, maintenance, and management of their electronic systems that allow for public access to those electronic records. [...] These fees create the type of "obstacle" that the courts themselves have disapproved. [...]

AB 2962 places reasonable limits on the access to sensitive and personal information within court records. It does not authorize public access to court records that have been sealed by court order or that are confidential by law. Finally, in addition to defining relevant terms, AB 2962 ensures that public court records maintained in an electronic format are available for inspection and copying at a courthouse during hours when the courthouse is open to the public.

The Consumer Attorneys of California write in support:

AB 2962 provides that when a court makes public court records available in an electronic format by means of an internet website maintained by the court, or a third party on behalf of the court, the court shall not charge a fee to copy the records exceeding the court's direct cost of duplication. However, AB 2962 allows courts to charge fees to a "commercial user" of court records – an entity that profits from the use or sale of court records – to view, search for, duplicate, download, or print court records. Proposed amendments to AB 2962 wisely clarify that a person who obtains records while representing their clients is not a "commercial user." Our members face many court fees that mount up and they should not be charged a fee for records involving their own cases.

SUPPORT

California News Publishers Association
California Broadcasters Association
Consumer Attorneys of California
First Amendment Coalition
Latino Journalists of California
Media Alliance
Nation Press Photographers Association
Orange County Press Club,
Radio Television Digital News Directors Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

PRIOR VOTES:

As this bill was recently gutted and amended, all prior votes are irrelevant.
