

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

AB 343 (Fong)
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Fiscal: Yes
Urgency: No
AM

SUBJECT

California Public Records Act Ombudsperson

DIGEST

This bill establishes the position of the California Public Records Act Ombudsperson, within the California State Auditor's Office, to review the denial of a state agency to an original request by a member of the public to access records under the provisions of the California Public Records Act (CPRA), as provided.

EXECUTIVE SUMMARY

The CPRA makes all public records of a public agency open to public inspection upon request, unless the records are otherwise exempt from public disclosure, and grants the public the right to obtain a copy of any public record. If a requester believes a public agency improperly denied a request for records under the CPRA, the requester can file a civil suit against the agency in a superior court; however, most members of the public are unable to do so without the assistance of an attorney. Existing law requires a court to provide court costs and reasonable attorney's fees to a requester that prevails in an action against a public agency under the CPRA and requires the public agency to pay those costs and fees. If the court finds that the action was clearly frivolous, the court is required to award those costs and fees to the public agency. This bill seeks to provide an alternative mechanism for members of the public to appeal the denial of a request for records under the CPRA by establishing the position of the Ombudsperson to review such denials for records by state agencies.

The bill is author-sponsored. The bill is supported by various organizations. There is no known opposition. Should this bill pass out of the Committee, it will be heard next in the Senate Governmental Organization Committee.

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 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).)
 - b) 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).)
2. Governs the disclosure of information collected and maintained by public agencies pursuant to the CPRA. (Gov. Code §§ 6250 et seq.)
 - a) States that, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 6250.)
 - 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).)
3. Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 6253.)
 - a) Some records are prohibited from being disclosed and other records are permissively exempted from being disclosed. (See e.g. Gov. Code §§ 6254 & 6254.29.) There are several general categories of documents or information that are permissively exempt from disclosure under the CPRA essentially due to the character of the information. The exempt information can be withheld by the public agency with custody of the information, but it also may be disclosed if it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information.¹ (Gov. Code § 6254.)

¹ *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652 (*hereafter* CBS) ("Two exceptions to the general policy of disclosure are set forth in the [CPRA]. Section 6254 lists 19 categories of disclosure-exempt material. These exemptions are permissive, not mandatory. The [CPRA] endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure.").

- b) Requires a public agency withholding any public record to demonstrate that the record in question is exempt under express provisions of the CPRA or that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code § 6255.)
4. Authorizes any person to institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce the public's right to inspect or to receive a copy of any public record or class of public records under the CPRA. (Gov. Code § 6258.)
- a) The court shall decide the case after examining the record in camera if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties, and any oral argument and additional evidence as the court may allow. (Gov. Code § 6259(a).)
 - b) If the court finds that the public official's decision to refuse disclosure is not justified, the judge will order the public official to make the record public. (Gov. Code § 6259(b).)
 - c) If the judge determines that the public official was justified in refusing to make the record public, the judge will return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. (Gov. Code § 6259(b).)
 - d) Requires the court to award court costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to the CPRA, and requires the costs and fees to be paid by the public agency. Requires the requester to pay the agency's costs and attorney fees if the court finds that the requester's case is clearly frivolous. (Gov. Code § 6259(d).)
5. Recodifies the CPRA in Division 10 of Title 1 (§§ 7920.000 - 7931.000) of the Government Code effective January 1, 2023.

This bill:

- 1) Establishes the position of Ombudsperson, within the California State Auditor's Office.
 - a) The Ombudsperson is to be appointed by the California State Auditor. The appointee must have, at a minimum, expertise in the CPRA and be admitted to practice law in this state for at least five years.
 - b) In the event of a vacancy or if the Ombudsperson is unable to fulfill the duties of the Ombudsperson for a period of 30 days, the State Auditor shall appoint a new Ombudsperson within 30 days.
 - c) The California State Auditor shall provide necessary staff to the Ombudsperson, as provided.

- 2) Requires the Ombudsperson to receive and investigate original requests for review, determine whether the denials of original requests complied with the CPRA, and issue written opinions.
 - a) Requires the Ombudsperson to create a process that allows members of the public to submit a request for review.
 - b) Requires the Ombudsperson to create a process for a person whose information is contained in a record being reviewed to intervene as an interested party to assert their privacy rights or preserve the confidentiality of the information.
 - c) The Ombudsperson is required to maintain a copy of any written opinion issued and to post the opinion on its website.

- 3) Authorizes a member of the public who believes that a state agency improperly denied an original request for records made by that member of the public to submit a request for review to the Ombudsperson.
 - a) A determination issued by the Ombudsperson does not affect the right of a person to enforce their right to inspect or to receive a copy of any public record by instituting proceedings for injunctive or declarative relief or writ of mandate pursuant to the CPRA. A member of the public is not required to exhaust this administrative remedy prior to filing a legal action in superior court.
 - b) A determination is not to be considered as evidence that a requester's action is clearly frivolous under the CPRA.
 - c) A person may withdraw, by written notice, their request for review under this section if the withdrawal notice is received by the Ombudsperson prior to the issuance of an opinion.
 - d) Provides that if a person institutes proceedings for injunctive or declarative relief or writ of mandate pursuant to the CPRA while a request for review of the same original request is pending, the person is to immediately notify the Ombudsperson and the ombudsperson is required to cease investigation of the request.
 - e) Prohibits the Ombudsperson from considering a request for review of an original request that is or has been subject to a pending or completed action for injunctive or declarative relief or writ of mandate pursuant to the CPRA.

- 4) Requires the Ombudsperson to, within 30 days from receipt of a request for review, determine whether the original request sought copies of disclosable public records that were in the possession of the state agency and whether the agency's denial of the request complied with the CPRA.
 - a) Upon completion of its review, the Ombudsperson must promptly notify the member of the public who submitted the request for review and the state agency of its determination and the reasons therefor.

- b) In unusual circumstances, the 30-day time period to respond may be extended by written notice to the member of the public and the state agency, setting forth the reasons for the extension and the date on which a determination is reasonably expected to be completed.
 - c) The Ombudsperson is required to reassess the circumstances necessitating the extension of the time period every 30 days and, in the event the date on which a determination is reasonably expected to be dispatched changes, notify the requester and the state agency.
- 5) Prohibits the Ombudsperson from requiring a state agency to disclose any records that are prohibited or exempted from disclosure by express provisions of law, including, but not limited to, the CPRA.
- 6) Requires a state agency to provide the Ombudsperson access to all relevant information, documents, and other records upon which the agency relied in denying the original request or that the Ombudsperson requests.
- 7) Requires the Ombudsperson to maintain the privacy and confidentiality of records being reviewed in the same manner as required of the state agency in possession of the record under existing law, and to establish policies and procedures for transferring, receiving, possessing, or reviewing records for review.
- 8) Requires a state agency to provide the public records to the member of the public who submitted the request for review if the Ombudsperson determines that the state agency improperly denied disclosure of the records.
- a) Authorizes a state agency to appeal the determination by the Ombudsperson by filing a petition with the superior court pursuant to existing provisions under the CPRA for injunctive or declarative relief or writ of mandate.
 - b) Requires the court to review the Ombudsperson's decision *de novo*.
 - c) Provides that if the court affirms the decision of the Ombudsperson, the member of the public is entitled to court costs and reasonable attorney fees in the same manner as afforded under the CPRA if the member of the public had instituted a cause of action under the CRPA.
 - d) Authorizes a person whose information is contained in a record being reviewed and that the Ombudsperson required to be disclosed to seek declaratory relief or a writ of mandamus to obtain a judicial ruling to preclude the state agency from improperly disclosing confidential documents or information.
- 9) Requires the Ombudsperson to require any state agency determined to have improperly denied a request for public records to reimburse the Ombudsperson for the costs of investigating, if requested.

- 10) Authorizes the Ombudsperson to provide written information, guidance, and advice to both public agencies and members of the public regarding the CPRA, including by posting such information, guidance, and advice on its internet website.
- 11) Provides that an opinion of the Ombudsperson is not to be considered binding precedent, but may be considered persuasive by public agencies and the courts.
- 12) Requires the Ombudsperson, on or before January 1, 2024, and every year thereafter, to provide a report to the Legislature on all of the following;
 - a) the activities of the Ombudsperson in the prior year;
 - b) the number of requests for review that were submitted in the prior calendar year and the number of determinations made that a state agency improperly denied a request for public records;
 - c) any proposals, both legislative and administrative, that would allow the Ombudsperson to function more independently and provide more transparency to the records of public agencies; and
 - d) the amounts of reimbursements sought and obtained from state agencies for the cost of investigating requests for review conducted by the Ombudsperson; and
 - e) in the report due on or before January 1, 2026 an assessment of whether local agencies should be subject to the same review process.
- 13) Defines the following terms for these purposes:
 - a) "California Public Records Act" means the CPRA ((Division 10 (commencing with Section 7920.000) of Title 1).
 - b) "Local agency" has the same meaning as defined in Section 7920.510 of the Government Code.
 - c) "Member of the public" has the same meaning as defined in Section 7920.515 of the Government Code.
 - d) "Ombudsperson" means the CPRA Ombudsperson created pursuant to this bill.
 - e) "Original request" means a request for records retained by a state agency made by a member of the public pursuant to the CPRA.
 - f) "Public agency" has the same meaning as defined in Section 7920.525 of the Government Code.
 - g) "State agency" has the same meaning as defined in Section 7920.540 of the Government Code.
 - h) "Request for review" means a request for the ombudsperson to review a denial by a state agency of an original request.
 - i) "Unusual circumstances" has the same meaning as defined in subdivision (c) of Section 7922.535 of the Government Code.

COMMENTS

1. Stated need for the bill

The author writes:

The intent of the California Public Records Act (CPRA) is to make government transparent and accountable to the public they serve. State agencies should not be able to skirt the CPRA (CPRA) by denying public records requests by simply citing irrelevant CPRA exemptions. Transparency in government is a cornerstone of democracy. This bill seeks to end this abuse by establishing a CPRA ombudsperson to referee whether the CPRA request is legitimate

2. Public right of access under the CPRA

a) Public access is a fundamental right

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.) In 2004, the right of public access was enshrined in the California Constitution with the passage of Proposition 59 (Nov. 3, 2004, statewide general election),² which amended the California Constitution to specifically protect the right of the public to access and obtain government records: "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." (Cal. Const., art. I, sec. 3 (b)(1).) In 2014, voters approved Proposition 42 (Jun. 3, 2014, statewide direct primary election)³ to further increase public access to government records by requiring local agencies to comply with the CPRA and the Ralph M. Brown Act⁴, and with any subsequent statutory enactment amending either act, as provided. (Cal. Const., art. I, sec. 3 (b)(7).)

Under the CPRA, public records are open to inspection at all times during the office hours of a public agency for inspection by the public, unless exempted. (Gov. Cod § 6253(a).) 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).) The CPRA allows a public agency 10 days or, in specified "unusual circumstances," within 14 days of the 10-day period to disclose the requested public record, and authorizes the agency

² Prop. 59 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 1 (Burton, Ch. 1, Stats. 2004).)

³ Prop. 42 was placed on the ballot by a unanimous vote of both houses of the Legislature. (SCA 3 (Leno, Ch. 123, Stats. 2013).)

⁴ The Ralph M. Brown Act is the open meetings laws that apply to local agencies. (Gov. Code §§ 59450 et. seq.)

to charge a fee for its “direct costs of duplication” to the record. (Gov. Code § 6253(b)-(c).)

b) Enforcement of rights under the CPRA is a judicial function

The CPRA was enacted to balance the privacy rights of individuals⁵ and the right of the people to know about the conduct of public business.⁶ (Gov. Code § 6250.) Certain records and information are prohibited from being disclosed under the CPRA, while other records are permissively exempt from disclosure. A record prohibited from disclosure is generally done expressly.⁷ A permissive exemption provides an agency discretion regarding whether or not to disclose specified records, and courts construe these permissive exemptions narrowly.⁸ A majority of litigation under the CPRA deals with the issue of whether or not a record was properly held within the permissive exemptions under the CPRA, specifically Section 6254 of the Government Code.

The CPRA grants the public the right to institute proceedings in superior court for injunctive or declaratory relief or writ of mandate to enforce their rights to inspect or receive a copy of any public record. (Gov. Code § 6258.) This has been the exclusive remedy a member of the public to adjudicate the denial of records by an agency under the CPRA since its inception. This provision only applies to members of the public and not a public agency.⁹ For most members of the public, enforcing one’s right under the CPRA would require the assistance of an attorney in filing a cause of action in superior court. Cognizant of this, the CPRA provides that if a member of the public prevails in the cause of action alleging that a public agency improperly withheld a public record under the CPRA and the court finds that the record is disclosable, the court is required to award court costs and reasonable attorney’s fees to the member of the public to be paid for by the public agency. (Gov. Code § 6259(d).) This provision helps alleviate the cost of hiring an attorney for members of the public to enforce their rights and creates a deterrent to public agencies denying access to disclosable public records, lest they be on the hook for costs and fees. A public agency can only get costs and fees paid if the court finds that the requester’s case is clearly frivolous. (*Ibid.*) Either party may appeal the

⁵ Article I, Section 1 of the California Constitution provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” (emphasis added)

⁶ *N.Y. Times v. Superior Court* (1990) 218 Cal. App. 3d 1579, at 1584.

⁷ See e.g. § 8592.45 of the Government Code: “any public records relating to any communication made pursuant to, or in furtherance of the purposes of, subdivision (c) of Section 8592.40 are confidential and shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1).” (emphasis added)

⁸ E.g. § 6254 of the Government Code. See *N.Y. Times supra* at 1585: (“Specific exemptions from this general requirement of disclosure are listed in [S]ection 6254 [of the Government Code] and are construed narrowly to ensure maximum disclosure of the conduct of governmental operations.”).

⁹ *Filarsky v. Superior Court*, 28 Cal. 4th 419, at 426 (finding that the “plain language of this provision [Gov. Code § 6258] contemplates a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records, and not by the public agency from which disclosure is sought.”)

decision of the superior court by petition to the appellate court for the issuance of an extraordinary writ, as specified. (*Id.* at subd. (c).) A person who is potentially affected by the disclosure of the records in question in the proceeding may intervene as a real party in interest in order to assert their rights that the records should not be disclosed.¹⁰ This right of intervention is especially important when the records seeking to be disclosed are of a sensitive nature and allows members of the public to assert their right to privacy, as guaranteed under the California Constitution.

The decision of whether or not a record is disclosable under the CPRA is a judicial decision, and one that requires the delicate balancing of two fundamental constitutional rights, public access and the privacy of individuals:

The California Constitution guarantees both the individual's right of and the public's "right of access to information concerning the public's business" including 'the writings of public officials and agencies' [...] In the CPRA the Legislature has sought to reconcile these two fundamental, but sometimes conflicting, conditional rights. While 'mindful of the right of individuals to privacy' the Legislature has declared 'access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.' Thus, the CPRA generally provides 'every person has a right to inspect any public record ... 'except with respect to public records exempt from disclosure by express provisions of law ... in turn, lists 29 categories of documents exempt from the requirement of public disclosure, many of which are designed to protect individual privacy, including, '[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.'¹¹ Section 6255, subdivision (a), also permits a public agency to withhold other records if it can demonstrate '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.' These statutory exemptions from mandatory disclosure under the CPRA must be narrowly construed. Moreover, the exemptions from disclosure provided by Section 6254 [of the Government Code] are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure. Indeed, the penultimate sentence of Section 6254 [of the Government Code] provides, 'Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.'¹² (footnotes and citations omitted)

¹⁰ See *Int. Federation of Prof. & Tech. Engineers v. Superior Court* (2007) Cal. 4th 319.

¹¹ The 29 categories refer to the permissive exemptions in Section 6254 of the Government Code (see Gov. Code § 6254(c).).

¹² *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal. App 4th 1250, at 1261.

c) Writ prohibiting disclosure of records under the CPRA

Existing law provides for what are sometimes referred to as reverse-CPRA actions. This type of action allows a person to seek a writ from the court prohibiting a public agency from releasing information that is prohibited from being disclosed under existing law.¹³ The court has found that:

[...] although the CPRA provides a specific statutory procedure for the resolution of disputes between the party seeking disclosure and the public agency, no comparable procedure exists for an interested third party to obtain a judicial ruling precluding a public agency from improperly disclosing confidential documents. If the public agency elects to disclose records in response to a CPRA request, absent an independent action for declaratory relief or traditional mandamus, no judicial forum will exist in which a party adversely affected by the disclosure can challenge the lawfulness of the agency's action [...] the Legislature has not specified any special procedures to resolve the issue. A petition for writ of mandate is the appropriate procedure to present the issue to the court.¹⁴

3. Reintroduction of AB 289 (Fong, 2019)

This bill is a reintroduction of AB 289 (Fong, 2019), which failed to pass this Committee. The analysis for AB 289 highlighted several issues with the proposed language, including, among others:

- the experience and qualifications the Ombudsperson should possess;
- the precedent, if any, the determination of the Ombudsperson should have;
- ability of a state agency to appeal the determination of the Ombudsperson to the superior court;
- standard of review a court should use to review the Ombudsperson's determination if a state agency is authorized to appeal their determination; and
- placement of the Ombudsperson in the State Auditor's Office and potential conflict;
- the rights of an interested party in the records at issue to intervene;
- two-tier system of enforcing one's rights under the CPRA; and
- treatment of records that fall within a permissive exemption under the CPRA.

This bill, as recently amended, addresses many of the concerns raised in the analysis for AB 289 by:

- specifying the Ombudsperson must have, at a minimum, expertise in the CPRA and be admitted to practice law in this state for at least five years;

¹³ *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) Cal. App. 4th 1250, at 1267.

¹⁴ *Id.* at 1267.

- providing that an opinion of the Ombudsperson is not to be considered binding precedent, but may be considered persuasive by public agencies;
- authorizing a state agency to appeal the decision of the Ombudsperson, and providing that a court reviewing a decision of the Ombudsperson should do so *de novo*;
- requiring the Ombudsperson to create a process for a person whose information is contained in a record being reviewed to intervene as an interested party to assert their privacy rights or preserve the confidentiality of the information; and
- prohibiting the Ombudsperson from requiring a state agency to disclose any records that are prohibited or exempted from disclosure by express provisions of law, including, but not limited to, the CPRA.

4. CPRA Ombudsperson

- a. Establishes an alternative forum for members of the public to contest a state agency's denial of a request for records under the CPRA*

This bill establishes an alternative forum for members of the public to contest a state agency's denial of a request for records under the CPRA by creating the position of the Ombudsperson to review denials of a request to review records by a state agency. The essential policy question posed by the bill is should a single individual be given the power to decide what records are disclosable under the CPRA when this determination has been exclusively a judicial function, especially when taking into account the need to carefully balance two fundamental constitutional rights – privacy and public access – when making these determinations.

The bill allows a member of the public who believes they were improperly denied disclosure of a public record to submit a request for review to the Ombudsperson. The Ombudsperson would be required to investigate the claim within 30 days from receipt, or longer in “unusual circumstances,”¹⁵ and requires the Ombudsperson to issue a written decision regarding whether or not the requested records were improperly withheld under the CPRA. The bill requires a state agency to provide the Ombudsperson access to all relevant information, documents, and other records upon

¹⁵“Unusual circumstances” means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

which the agency relied in denying the original request or that the Ombudsperson requests to assist in review of the agency's determination. As recently amended, the bill provides enhanced protections for privacy and confidentiality by requiring the Ombudsperson to maintain the privacy and confidentiality of records being reviewed in the same manner as required of the state agency in possession of the record under existing law, and to establish policies and procedures for transferring, receiving, possessing, or reviewing records for review.

b. Amendments to the bill allow a state agency to appeal decision of Ombudsperson

If the Ombudsperson determines that the state agency improperly withheld records under the CPRA, the state agency is required to release those records. As recently amended, the bill authorizes a state agency to appeal the Ombudsperson's determination to a court in the same manner as existing law authorizes a member of the public to institute a review of a denial for a public record in superior court. The bill requires the court to review the Ombudsperson's decision *de novo*. The bill specifies that, if the court affirms the decision of the Ombudsperson, the member of the public who initiated the original request for review by the Ombudsperson is entitled to court costs and reasonable attorney fees in the same manner as afforded under the CPRA if the member of the public had instituted a cause of action under the CRPA.

c. Addressing issue of reverse-CPRA actions

In order to preserve the right of individuals to assert their rights in their private and confidential information, the bill does two things. First, it requires the Ombudsperson to create a process for a person whose information is contained in a record being reviewed to intervene as an interested party to assert their privacy rights or preserve the confidentiality of the information. Second, the bill explicitly authorizes such a person to seek declaratory relief or a writ of mandamus to preclude the state agency from improperly releasing a record pursuant to a decision of the Ombudsperson.

5. Potential issues that still remain

a. Placement in the State Auditor's Office

The placement of the Ombudsperson in the California State Auditor's Office could be problematic for several reasons. The State Auditor is subject to the CPRA, so there is the potential that the Ombudsperson would have to review a decision by the State Auditor's Office to deny disclosure of a public record, which could lead to a conflict of interest as the Ombudsperson is appointed by the State Auditor. However, this conflict would likely exist no matter what state agency the Ombudsperson is placed in short of being established as an independent office.

Under existing law, the State Auditor's Office is exempt from the requirements of the Administrative Procedures Act (APA) in regards to issuing regulations. (Gov. Code § 8546(g).) That provision authorizes, but does not require the State Auditor to adopt regulations pursuant to the APA, and specifically exempts the regulations from review by the Office of Administrative Law. (*Ibid.*) (Gov. Code § 8546(g).) The APA requires very specific procedures to be met when promulgating regulations and allows for public comment and input when an agency is making regulations. (Gov. Code §§ 11340 et. seq.) The procedures and policies developed by the Ombudsperson would not be subject to the APA under existing law, as the Ombudsperson is placed within the State Auditor's Office. The author may wish to clarify whether the Ombudsperson is subject to the provisions of the APA.

b. Two-tier system for enforcing a person's rights under the CPRA

As the bill only applies to state agencies, the bill potentially creates a two-tier system for enforcing a person's right to access under the CPRA. This bill requires the Ombudsperson to submit annual report to the Legislature detailing the activities of the Ombudsperson in the prior year. This report is to include, among other things, the number of requests for review that were submitted in the prior calendar year and the number of determinations made that a state agency improperly denied a request for public records. Additionally, the bill includes a provision to sunset these provisions on January 1, 2026. The required reports should provide data and information for the Legislature to assess the activities of the Ombudsperson and efficacy of these provisions in assisting the public in asserting their rights to access public information. Additionally, the sunset date it will allow the Legislature to revisit the issue of whether or not local agencies should be subject to these same provisions.

6. Statements in support

Oakland privacy writes in support:

Assembly Bill 343 hits the right balance by not depriving records seekers of their legal right under the law, but providing an additional resource for encouraging compliance. As frequent filers of public records act requests, with more than a few that go unanswered, we are aware of the delicate balancing act required to balance the taking on of legal expenses, and we have better access to public interest legal resources than many others. [...]

We are aware that AB 343 has long been stalled by this committee, with concerns raised regarding the power of a sole officer to rule on records requests. We would respond by stating that the ombudsman service proposed by the bill does not replace or cause the relinquishment of any legal right to sue, that the office only acts when asked by the requester of records, and that most PRA lawsuits are also decided by a sole officer, in those cases, an officer of the court. It is hoped that this

office would be staffed with individuals committed to governmental transparency and freedom of information and we encourage the administration, if the bill moves forward, to consult with stakeholders, including groups that frequently file PRA requests, regarding the initial appointee credentials and experience.

SUPPORT

Biz-Feed, the Central Valley Business Federation
Cal Voices
California News Publishers Association
Greater Bakersfield Chamber of Commerce
Howard Jarvis Taxpayer Association
Oakland Privacy

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: AB 289 (Fong, 2019) was substantially similar to this bill. AB 289 failed to pass this Committee.

PRIOR VOTES:

Assembly Floor (Ayes 79, Noes 0)
Assembly Appropriations Committee (Ayes 16, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)
Assembly Accountability and Administrative Review Committee (Ayes 7, Noes 0)
