

**CITY OF NEW ORLEANS
CHIEF ADMINISTRATIVE OFFICE**

POLICY MEMORANDUM NO. 92

December 23, 1991

TO: All Departments, Boards, Agencies and Commissions

FROM: Leonard D. Simmons, Jr., Chief Administrative Officer

SUBJECT: COMPLIANCE WITH THE PUBLIC RECORDS ACT

I. PURPOSE

This memorandum establishes a policy in conformity with L.S.A.-R.S. 44:1 through 42, known as the Public Records Act. Additionally, guidance for responses to subpoena duces tecum in civil proceedings is provided. Policy Memorandum No. 40, dated February 3, 1977, entitled "Inspection of Public Records" is hereby canceled and replaced by this policy memorandum.

II. OVERVIEW

A. General Procedures and Responsibilities of Custodian.
"Public records", [defined in Section IX (A) below], will be made available to any person 18 years old or older for: a) inspection, b) copying, c) reproduction, or d) obtaining reproduction from the City. When the City is asked to make copies, the fees fixed by Policy Memorandum 36, (or any successor or supplemental memorandum in force), will be charged by the custodian. Fees for reproduction of material not listed in Policy Memorandum 36 will be fixed at the amount it costs the City to reproduce the material requested.

All public records will be available for inspection except those exempt (see Section X below).

The custodian of the records shall make no inquiry as to the reason or purpose for the request and shall extend all reasonable comfort and facility to the requesting person. The custodian shall, however, require that the requesting person sign a log or register each time a verbal request is made or keep a copy of any written correspondence if the request was made in writing. The register shall be maintained by the custodian. (See Section V below.)

Normally a request made in writing is to be treated as though an appearance in person was made as of the date the written request is received. The custodian is to respond within the estimated cost of copying the records sought within three (3) working days of the request.

The custodian is not required to compile information to satisfy the request (i.e. to create a new document so as to answer the request). The custodian is to make all records and files available for the requesting individual to inspect and copy (or to copy those records the requesting individual identifies). Common sense and courtesy are to be used in meeting all requests. If a dispute as to the custodian's duty or ability to comply with a request arises, the attorney-on-duty in the Law Department ("Duty-day attorney") should be contacted immediately and the requesting individual notified if more than three (3) working days is necessary to resolve the issue.

Public records (except those that are exempt) shall be made available for inspection immediately, if possible; if the records are not available or only partially available, this fact shall be immediately made known in writing within three (3) working days to the requesting individual and the records that are available shall be produced by the custodian within not less than three working day from the receipt of the request. For example, production of records that are in use by an auditor can be delayed but records that are being held (but not being audited) are to be produced for inspection at once; if some records are exempt shall be made available.

When a request is for a document that is exempt (see Section X, below) or which the custodian reasonably believes is exempt, this fact shall be immediately conveyed to the requesting individual. After the record's status is determined, the record will be produced or the requesting individual notified that it is exempt. Illustrations of exempt documents would include certain personnel records, tax records or files, certain OMI investigations, and copyright protected records (such as a computer program). Other illustrations would include records that appear private or personal so that they would fall within the privacy exemption and/or would fall within that category of records which an individual would believe private under constitutional law. The Law Department (through the duty-day attorney) and/or any other appropriate department or agency should be contacted by the record custodian if assistance in making this determination is needed. The custodian will notify the requesting individual within three days of the request that this determination is in progress, and thereafter shall again notify the requesting individual of the result.

The custodian should attempt to comply with all requests during normal working hours. If it is determined that necessary city business cannot be done while at the same time complying with the request, and, if the requesting individual will not voluntarily agree to an extension of time, the custodian may authorize overtime to meet the deadline. However, all such

overtime shall be first approved by the Chief Administrative Officer (“CAO”) or his designated representative, and the overtime costs immediately conveyed to the requesting individual, as provided in Section VI below. Overtime costs must be paid by the requesting individual prior to commencement of the overtime.

The custodian is to maintain the vigilance necessary to prevent alteration of any record while it is being inspected. However, technicalities shall not be used to hinder or delay any inspection.

All custodians are advised that civil penalties can be rendered against the custodian, personally, for unreasonable or arbitrary delay or refusal to allow access to records. Penalties can include damages of \$100 per day plus attorney’s fees. (See Section VII (A), below.) Compliance with the protective measures outlined in Section VI, below, will however remove the custodian from the exposure to personal civil liability. Additionally, the custodian should be mindful that violation of the statute may subject him or her to criminal penalties. (See Section VII (B), below.)

- B. Subpoena Duces Tecum Request in Civil Suits. Each department or agency custodian is also to respond to any subpoena duces tecum seeking records for any civil legal proceedings. Where appropriate the duty-day attorney in the Law Department is to be contacted concerning any such subpoena. Illustrations of when that office should be contacted are: a voluminous request that would be oppressive or impossible to perform; a request that suggests the City is or may become a litigant in a suit; any other situation which the custodian believes requires review or action by the Law Department.
- C. Promises to Keep Records Confidential. City officials or employees should not make representations to anyone about the City’s ability to maintain the confidentiality of records unless the wording of the representation has been specifically approved by the law department. For example, a City employee should not request confidential or proprietary information from a potential contractor in a manner that implies the City will be able to protect the material from disclosure unless the Law Department has approved the request.

III. RIGHT OF INSPECTION

Any person eighteen or older may inspect, copy, reproduce or obtain a reproduction of any public record. There are some exceptions. The exceptions pertinent to City employees are provided in Section X, below.

IV. COOPERATION – EXEMPT RECORDS

As a matter of law and policy, City officials and employees who are custodians of public records shall afford full cooperation to any legitimate inquiry by an applicant. Legal technicalities shall not be used as an excuse for abrogating the right of public inspection of public records. The custodian shall immediately contact the duty – day attorney in the Law Department whenever there is uncertainty as to whether a record is a public record or not or uncertainty as to whether a public record is exempt from inspection or copying (see Section X, below). The Law Department will immediately respond to the custodian's request.

V. PROCEDURE

- A. All City records that are not exempt from inspection shall be made available for public inspection during normal working hours in a manner which does not prevent the conduct of City business.
- B. The custodian shall make no inquiry of any person seeking a public record, except an inquiry of any person seeking a public record, except an inquiry as to the age and identification of the person.
- C. The right to inspect public records entails the right to make copies. However, the person copying the records shall be required to pay for copying costs. All City departments and agencies should adhere to the provisions of Policy Memorandum Number 36, (or its successor), in assessing fees for copying records and remitting such fees to the Department of Finance. All payment must be made in cash unless other acceptable arrangements are made for payment. Personal checks will not be accepted; however, money orders, certified checks and business checks will be acceptable. If any check is returned NSF, no future checks shall be accepted from that person or business.
- D. Records stored in an unusual manner such as on electronic data processing tapes or microfilm should be made available for review. Usually the reproduction of the tape or microfilm will not be a necessity unless that is the only source of the information. If tape, microfilm or a record retained in another such medium is to be reproduced, the applicant must pay the actual cost of reproduction.
- E. Persons inspecting public records shall be given a work space to read and copy records and shall be provided with reasonable assistance.
- F. Records may not be removed from the office in which they are stored.
- G. Nothing in this policy memorandum shall prohibit providing information to the public by telephone where such is normal and customary. Subpoenas must be honored except where records sought are those set out

in Section X (A) through (K) of this policy memorandum, in which cases the Law Department should be consulted before release of the records.

- H. If any public record applied for is not in the custody or control of the person to whom application is made, the custodian shall promptly certify this fact in writing (and within three (3) working days) and shall explain the absence of the record, its location, and when the record was removed, to the best of the custodian's knowledge.
- I. If the public record applied for is not in use and is immediately available, the record shall be presented to the applicant. If the record is not available because it is in use, the custodian or representative appointed by the custodian to respond to the request shall promptly certify this in writing and shall fix a day or hour for its availability within three (3) working days of the date of application for the record.
- J. Refusal to allow inspection of public records because they are being audited is not permissible unless the records are in active use by the auditor.
- K. If the record applied for is exempt from disclosure under the Public Records Act and is therefore not to be made available, the custodian is to immediately inform the applicant of this fact. This should be done in writing and within three working days of the request. If the applicant objects to the custodian's assertion of the exemption, the custodian shall immediately consult the duty-day attorney in the Law Department.

VI. PROTECTIVE ACTIONS FOR CUSTODIANS

If for any reason the custodian determines that he or she cannot meet the request for inspection for public records (and/or for copying records if that has been requested) during regular office hours and within the three day time limit that is otherwise required, the custodian may certify this to the CAO or the CAO's designated representative, using the memorandum form attached, and, if the use of overtime is approved by the CAO (after consultation with the Law Department), the custodian may then inform the requesting person that he or she must elect either to agree to extend the period of time for the custodian to meet the request or understand that the custodian will produce the records after hours (normally from 5 p.m. to not later than 9 p.m.) and after the overtime cost is paid.

In the event that overtime is chosen by the applicant, the custodian shall immediately advise the applicant as to the estimated hours of overtime that will be required, and the cost of this overtime. The said sum must be paid in cash and in advance before the inspection committee, unless other acceptable arrangements for payment are made (see Section V (C), above). The custodian shall prepare a warrant and cause the money to be deposited to the City's general fund account,

noting that it is for reimbursement for overtime of the City employee concerned in his matter.

The custodian shall fully justify and explain the need for authorizing overtime and certify that the custodian's office cannot perform the necessary work during regular and normal hours. Overtime may not be charged to file, separate or organize the records of the custodian for the custodian's or the City's benefit but it may be charged if such activities are necessary solely because of the need to produce the records for inspection outside of normal hours.

VII. SANCTIONS

- A. Civil Penalties. If a person seeking to inspect or to receive a copy of a public record prevails in a suit for a writ of mandamus, injunctive, or declaratory relief to obtain a document pursuant to the Public Records Act, he shall be awarded reasonable attorney's fees and other costs of litigation. If such person prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion thereof.

If the court finds that the custodian arbitrarily or capriciously withheld the requested record or unreasonably or arbitrarily failed to respond to the request, it may award the requesting person any actual damages proven to have resulted from the actions of the custodian except as hereinafter provided. In addition, if the court finds that the custodian unreasonably or arbitrarily failed to respond to the request, it may award the requesting person civil penalties not to exceed one hundred dollars per day, exclusive of Saturdays, Sundays, and legal public holidays, for each day the records were not available for inspection.

The custodian shall be personally liable for the payment of any such damages, and shall be liable in person's attorney's fees and other costs of litigation, except where the custodian has withheld or denied production of the requested record or records on advice of the City Attorney or other legal counsel representing the City. In the event the custodian retains private legal counsel for his defense or for bringing suit against the requesting person in connection with the request for records, the court may award attorney's fees to the custodian.

- B. Criminal Penalties. In addition to civil penalties, any person having custody or control of a public record, who violates any of the provisions of the Public Records Act, or any person not having such custody or control who by any conspiracy, understanding or cooperation with any other person hinders or attempts to hinder the inspection of any public record declared by the Public Records Act to be subject to inspection, shall upon first conviction be fined not less than one hundred dollars, and not more than one thousand dollars, or shall be imprisoned for not less than one

month, nor more than six months. Upon any subsequent conviction he shall be fined not less than two hundred fifty dollars, and not more than two thousand dollars, or imprisoned for not less than two months, nor more than six months, or both.

VIII. PRESERVATION OF RECORDS

- A. Unless a special provision of law requires expungement of a particular record, all persons and public bodies having custody or control of any public record (other than conveyance, probate, mortgage, or other permanent records required by existing law to be kept for all time) shall exercise diligence and care in preserving the public records for at least three years from the date on which the public record was made, or from the date on which a particular program or project was completed or closed out. However, in all instances in which a formal retention schedule has been ordered by the State Archivist or by Chapter 34 of the City code, such public records shall be preserved and maintained for any additional period required by the said schedule or Code. Any questions about retention beyond the three year minimum set out in the City Code should be addressed to the Division of Archives, Records Management, and History, in the Office of the Louisiana Secretary of State and/or the City Archives Department of the New Orleans Public Library. Also see City Attorney Opinion No. 91-82 (Request No. 88-6-6) for additional guidance concerning the retention of certain municipal and police related records. A copy of this opinion may be requested from the Law Department.

Discretion and common sense should be used when determining whether a public record should be maintained longer than the minimum retention period, and in determining the length of time it should be maintained beyond the three year period. [Nothing in this policy memorandum is to be interpreted as prohibiting a department or agency from maintaining its records for longer than 3 years if appropriate or required]. Public records should not be destroyed in cases where the records may be involved in actual or potential litigation.

- B. All existing records or records hereafter accumulated by the various services of the city, state or its subdivisions which participate in federal programs or receive federal grants may be destroyed after three years from the date on which the records were made (or the particular program or project was closed out), unless a retention schedule prescribed by the state archivist or guidelines for the operative federal or state program (or grant) or the City Code requires longer retention periods for the records in question. However, such records shall not be destroyed in any case where litigation with reference thereto is pending or might arise, or until the appropriate city, state or federal audits have been conducted.

No records of the City shall be destroyed unless the custodian has determined, in consultation with the New Orleans Public Library, that the records are unsuitable for transfer to the City Archives, pursuant to Chapter 34 of the City Code.

IX. DEFINITIONS

- A. “Public records” are defined as all books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, if the record has been used, is in use, or was or is prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by under the authority of any ordinance, regulation, mandate, or order of any public body, or concerning the receipt or payment of any money received or paid by or under the authority of the constitutions or the laws of this state or by or under the authority of any ordinance, regulation mandate, or order of any public body. Thus, as a general rule, all print or electronic documents, including drafts or incomplete documents in progress and including photostatic copies, handwritten notes, et cetera, are public records.

For example, a handwritten incomplete draft of a letter from a department head to a City contractor regarding his contract, which the department head has brought to his home to work on, is a public record; the same head’s personal gasoline credit card statement, which he has carried to his office in order to mail payment at lunch time, is not. However, the same statement would become a public record if it contained evidence of

reimbursable City travel expenses for which the head was seeking reimbursement.

- B. “Custodian” means the public official or head of any public body having custody or control of a public record or a representative specifically authorized by her or him to respond to requests to inspect public records. Public body means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, or any other instrumentality of parish or municipal government, including a public or quasi-public non-profit corporation designated as an entity to perform a governmental or proprietary function (e.g., the French Market

Corporation). The appointing authority of a department, board, agency or commission of the government of the City of New Orleans will be considered the custodian for purposes of compliance with this policy memorandum and the Public Records Act.

Although the custodian may authorize a representative to respond to requests to inspect public records, the custodian may not delegate the responsibility for maintaining the public records. Requests made to employees not specifically authorized to respond to requests shall be referred to such a person and the requesting individual appropriately notified.

The custodian shall ensure that records are not altered, removed or destroyed.

- C. “Requesting Individual” and “applicant” are defined as the person who is making the request to inspect, copy reproduce or obtain a reproduction of a public record.

X. EXCEPTIONS

The following types of records are exempt from disclosure under the Public Records Act and need not be made available for public inspection:

- A. Exception For Tax Returns and Tax Files.
Tax returns and the files or the information contained in any tax return or file (See LSA-R.S. 47:1508.)
- B. Exception For Records Of Prosecutive, Investigative, and Law Enforcement Agencies.
1. Certain records, or the information contained therein, held by the office of the district attorney, the sheriffs, the police department, investigators, public health investigators, correctional agencies, and intelligence agencies of the City. The exempt records are:
 - a. Records pertaining to pending criminal litigation or any criminal litigation which can be reasonably anticipated, until such litigation has been finally adjudicated or otherwise settled; or,
 - b. Records containing the identity of a confidential source of information or records which tend to reveal the identity of a confidential source of information; or,

- c. Records containing security procedures, investigative training information or aids, investigative techniques, investigative technical equipment or instructions on the use thereof, or internal security information; or,
- d. Records containing the identity of a subject of a public health disease investigation or records which would tend to reveal the identity of such a subject.
- e. i) Records of the arrest of a person, other than the report of the officer or officers investigating a complaint, until a final judgment of conviction or the acceptance of a plea of guilty by a court of competent jurisdiction. **However, the initial report of the officer or officers investigating a complaint** (but not any follow up or subsequent report or investigation), **records of the booking of a person as provided in the Louisiana Code of Criminal Procedure, Article 228, records of the issuance of a summons or citation, and records of the filing of a bill of information shall be public record.**
 - ii) The initial report shall set forth:
 - (a) A narrative description of the alleged offense.
 - (b) The name and identification of each person charged with or arrested for the alleged offense.
 - (c) The time and date of the alleged offense.
 - (d) The location of the alleged offense.
 - (e) The property involved.
 - (f) The vehicles involved.
 - (g) The names of investigating officers.
 - iii) The Public Records Act does not require the disclosure of information which would reveal undercover or intelligence operations.
- f. Records containing the identity of an undercover police officer and records which would tend to reveal the identity of an undercover police officer; or

- g. Records concerning status offenders as defined in the Code of Juvenile Procedure.
 2. The Public Records Act does not prevent any and all prosecutive, investigative, and law enforcement agencies and communications districts from having among themselves a free flow of information for the purpose of achieving coordinated and effective criminal justice.
 3. The exempt records relative to confidential sources [(b) and (f), above] are to be released on a court order on grounds of due process or constitutional law. Additionally, they may be released with the written consent of the chief officer of the agency or department where the record is located. The Law Department should be consulted before release of these records. The requesting person should be notified in writing within three (3) working days either that the records are exempt or that an examination of them is being made to determine if they are exempt.
- C. Exception For Records of Old Age Assistance, Aid To The Blind, Or Aid To Dependent Children
- The names of any person or any other information from the records, papers or files of the City concerning persons applying for or receiving old age assistance, aid to the blind, or aid to dependent children, shall not be made available for public inspection.
- D. Hospital Records
1. The charts, records, reports, documents and other memoranda prepared by physicians, surgeons, psychiatrists, nurses and employees in hospitals, adult or juvenile correctional institutions, public mental health centers and public schools for the mentally deficient to record or indicate the past or present condition, sickness or disease, physical or mental of the patients treated in the hospital shall not be made available for public inspection except when the Law Department indicates the law provides otherwise. (See (2) below.)
 2. However, certain legal “exceptions to the exception” provide that the foregoing records (as well as records and proceeding of any hospital committee, medical organization committee or extended care facility committee) may be released. The Law Department should be consulted before the release of these records.
- E. Exception For Certain Personnel Records

The following items in the personnel records of a public employee shall be kept confidential.

1. The home telephone number of a public employee where such employee has chosen to have a private or unlisted home telephone number because of the nature of his or her occupation with a public body.
2. The home telephone number of a public employee where such employee has requested that the number be confidential.
3. The home address of a public employee where such employee has requested that the address be confidential.
4. Evaluations.
5. Records which would fall within an individual's right of privacy under Louisiana Constitution Article I. The custodian should consult the employee and the Law Department before disclosing any record which the custodian believes contains information which a reasonable person might expect to be treated as within the zone of privacy. Unless this determination is made within three (3) days (and the records produced or denied accordingly) the custodian shall notify the requesting individual within three (3) days of the request that this review is in progress, and thereafter shall notify the requesting person of the result.

F. Registration And Other Records Of Libraries

1. Records of public libraries indicating which of its documents or other materials regardless of format, have been loaned to or used by an identifiable individual or group of individuals may not be disclosed except to a parent or custodian of a minor child seeking access to that child's records, to persons acting within the scope of their duties in the administration of the library, to persons authorized in writing by the individual or group of individuals to inspect such records, or by order of a court of law.
2. Records of any such library which are maintained for purposes of registration or for determining eligibility for the use of library services may not be disclosed except as provided in Subsection F (1), above.
3. This library exemption does not prohibit or hinder any library or any business office operating jointly with a library from collecting overdue books, documents, films, or other items and/or materials owned or otherwise belonging to such library nor does it prohibit or hinder any such

library or business office from collecting fines on such overdue books, documents, films, or other items and/or materials.

G. Attorney Files

Claims or pending claim files in the custody or control of the Office of Risk Management or similar records in the custody of an agency of a municipality or parish (such as the Law or Finance Department), including those of the attorney representing the municipality.

H. Records of Violations of Municipal Ordinance

Certain records of municipal or parish ordinance convictions ordered expunged and criminal court records where there was a nolle prosequi, acquittal or dismissal of any offense (misdemeanor or felony) are to be destroyed; however, felony arrests records shall be destroyed only upon order of the district court. Some such records may be retained for investigative purposes only. The Law Department should be consulted as to the specific ramifications of this exemption (R.S. 44:9)

I. Attorney Work Products

The Public Records Act does not apply to writings, records or other accounts that reflect the mental impressions, conclusions, opinions or theories of an attorney or an expert, obtained or prepared in anticipation of litigation or in preparation for trial (Section 2 of Acts of 1978, No. 686). Additionally, this exemption also normally applies to City employees, agents, surety, or indemnitor involved in such litigation (LSA. C.C.P. Article 1424). The Law Department shall be contacted immediately by the record custodian if a request is received which the custodian reasonably believes falls within this exemption. The custodian shall provide a written response within three working days to the requesting person.

J. Employer Drug Testing

All information, interviews, reports, statements, memoranda, or test results received by the employer through its drug testing program are confidential communication and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings except in a proceeding related to an action under R.S. 23:160(10) in a claim for unemployment compensation proceeding, hearing, or civil litigation where drug use by the tested employee is relevant.

K. Other Exempt Records

Certain other records are exempt. These include public health investigations (R.S. 40:3.1); Energy information Administration of the U.S. Department of Energy records; records of the fitness of a dentist, dental hygienist, veterinarian, and/or chiropractor to hold a license to practice said profession; records of deep water or shallow draft port commission of the state; information or records of the Departments of Health and Hospitals (R.S. 40:2104 (B)). Questions concerning the specifics of these exemptions should be directed to the Law Department.

XI. INQUIRIES

- A. Any questions concerning the intent of this memorandum should be addressed to the Chief Administrative Office.
- B. Specific questions concerning the Public Records Act should be referred to the attorney-on-duty in the Law Department.

Leonard D. Simmons, Jr.
Chief Administrative Officer

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