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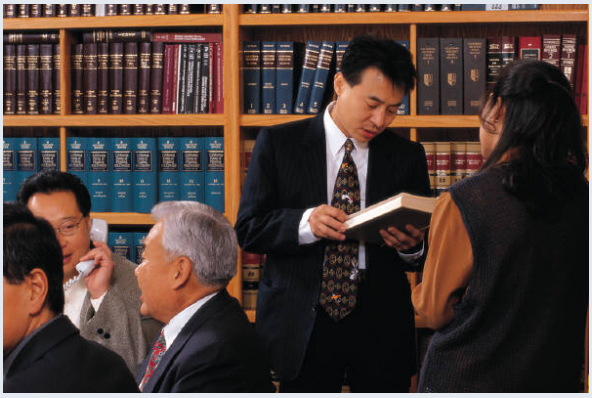
Better late than never I always say. I intended to get this out earlier but I have been extremely busy. I had three lectures last month and that proved to be pretty time consuming. As many of you know, I am a big fan of the California Public Records Act. For some specifics about this law, visit: http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=06001-07000&file=6250-6270

In simplest terms, what this means is if the government creates a document that has been paid for with tax dollars, it is owned by the public. Unfortunately, many municipalities don't agree with this law and as a result, it can lead to problems. With regards to land surveying documents, some cities, counties, and other government agencies feel that their notes and records are their own personal property. For the life of me, I don't understand why these folks have to make things so difficult.

The City of Encinitas, located in San Diego's North County learned their lesson the hard way when a Superior Court judge ordered the city to pay out $56,175 in attorneys' fees to a man who won a state Public Records Act lawsuit against the city. This, after the city spent nearly $25,000 defending its position.



It all began when Encinitas resident Kevin Cummins filed suit against the city in August 2010 after repeatedly asking city officials to release draft versions of a citywide road maintenance report. Cummins argued that the documents would allow residents to decide whether the city was delaying much-needed road repairs due to financial constraints. In response to Cummins' requests, the city stated that the draft reports were not

public records because they were still being “revised.” They informed Cummins that they would eventually release a "final draft" and he would be welcome to have a copy then. It was released in September 2010. Months after Cummins won his case against the city, city officials released two previous draft road documents dated December 2009. Subsequently, a Superior Court judge ordered the city to pay Cummins' attorney fees.

When the decision was made public, the San Diego Union Tribune published a scathing editorial entitled “Encinitas’ foolishness gets proper rebuke.”

> *An unacceptable case of petty government secrecy came to a predictable but sorry conclusion this week in Encinitas. The City Council decided not to challenge a court order requiring that the city pay $56,175 in legal fees to a man who sued the city because it wouldn’t turn over a draft report on road maintenance done by an outside consultant.*
>
> *Kevin Cummins, a local activist, wanted to see the document to determine whether the city’s financial issues were getting in the way of needed road repairs. The city’s lawyers used the tired dodge of saying the draft report was a work product, not an official document covered by the state Public Records Act. Even after losing their first round in court, Encinitas officials chose to appeal, only to be embarrassed again when the California 4th District Court of Appeal declined to review the ruling.*
>
> *Since then, common sense has set in, with a decision not to appeal to the state Supreme Court and now the decision to pay Cummins’ attorney fees. But it should never have come to this in the first place. That we continue to see such petty cover-ups after decades of court rulings affirming California’s open-government laws is beyond frustrating. Encinitas’ leaders owe their residents an apology.*

In spite of this ruling, there are still government employees who refuse to follow the law as it is their opinion that they are not subject to state laws. Lessons like this can be expensive.

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January 1 is always a day of celebration around the world. It is also a day of merriment for members of the state legislature as well as for associates of the legal community. Nationwide, some 40,000 new laws were passed. Alas, there is no more happy hour in Utah, porn stars working in California are required to wear condoms and the Golden State requires that school teachers teach children some form of gay and lesbian history. In Georgia there is a new safety requirement for cities that allow drivers to steer their golf carts off the green and

onto roads. In all, 745 new laws were signed by California's Governor Brown. Some have an impact upon the Land Surveying profession.

One that I am pleased with is the lifting of the small claims filing limit from $7,500 to $10,000. As a small business owner, this welcomed change is a valuable tool to business owners in a difficult economic environment. In 1993, when the economy took a nosedive, I had to file 13 small claims actions in order to get paid for much of the work I had done. Because of the lower limits at that time, I made the business decision to slice some money off the top in order to use small claims as a means of dispute resolution. In other words, if a client owed me $3200 and the small claims limit was $2500, I could sue under the $2500 cap. Admittedly this left some $700 on the table but given the costs of an attorney and the potential downside to judgment collections, this seemed to be a good business decision. The new cap of $10,000 will make swallowing $700 a lot easier. The applicable code revisions are found in the Code of Civil Procedure at the following sections:

> *116.221. In addition to the jurisdiction conferred by Section 116.220, the small claims court has jurisdiction in an action brought by a natural person, if the amount of the demand does not exceed ten thousand dollars ($10,000), except for actions specified in Section 116.224, or otherwise prohibited by subdivision (c) of Section 116.220 or subdivision (a) of Section 116.231.*
>
> *116.222. If the action is to enforce the payment of a debt, the statement of calculation of liability shall separately state the original debt, each payment credited to the debt, each fee and charge added to the debt, each payment credited against those fees and charges, all other debits or charges to the account, and an explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount.*
>
> *116.224. (a) Notwithstanding Section 116.221, the small claims court has jurisdiction in an action brought by a natural person for damages for bodily injuries resulting from an automobile accident if the amount of the demand does not exceed seven thousand five hundred dollars ($7,500).*
> *(b) This section shall apply only if a defendant is covered by an automobile insurance policy that includes a duty to defend.*
> *(c) This section shall remain in effect only until January 1, 2015, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2015, deletes or extends that date.*

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If you have ever been deposed, and you have not been retained as an expert witness, it can be a very frustrating experience, particularly if you have been deposed as a "percipient witness." Many people are not familiar with the difference and for the practicing land surveyor, such ignorance can be costly. So as to better explain the difference between the two roles, a brief definition is provided. A percipient witness is an individual who saw, observed, or who heard something that is of importance to the

court or the case. An old friend of mine, a brilliant litigator explains the difference. A percipient witness is best described in the context of an accident. In this case, a woman falls down and breaks her arm. The percipient witness, i.e. the person who observed the accident is entitled to testify as to what he or she saw. "The woman fell down the stairs and she broke her arm. I could see the bones sticking out of her arm." This person witnessed the accident; he/she is a percipient witness.

The expert witness, a trained orthopedic surgeon would have a very different explanation even though he/she may not have to have seen the accident. The surgeon could explain with great certainty, using complex medical terms, the nature of the break, the precise location, the extent of injuries, prescribed treatment, and length of recovery. She might call it a "distal radius fracture" even though she did not see the accident. In a legal setting the cause of the accident might be more important than the result. After all, the real issue is usually liability.

In land surveying, an expert land surveyor would describe the methodology employed in performing the survey and his/her testimony would include the type of instrumentation used, the means of measurement, the rotation, adjustment, basis of bearings, grid/ground deviations, etc.

In many cases, the performing – on the ground surveyor – may be the one whose work has been challenged. In these cases, it is not uncommon for such a surveyor to have his/her work defended by another surveyor, oftentimes one who has been retained by an insurance company.

Under California law, each side is limited to designating one expert for a particular role or opinion. You cannot have two surveyors testifying as experts for one side, providing the same testimony. The plaintiff gets one expert and the defendant gets one.

Scene from the Railroad Museum in Sacramento

In a situation like this, many attorneys will issue a subpoena to the original surveyor compelling his/her testimony as a percipient witness, all the while, fully intending to elicit or compel an expert like opinion in the hopes of using that testimony against that side's own expert. In addition, the levels of legal standing for an expert versus a percipient are compromised. Whether or not the so-called percipient surveyor elects to testify or answer any

questions poses a potential dilemma for the surveyor. Notwithstanding the implications of testimony, is not the initial surveyor's time valuable? Moreover, what if the other side ties the surveyor up for hours and hours eliciting what amounts to cheap testimony. As a percipient witness, one is entitled to a witness fee of $35.00 a day and a travel reimbursement of $0.20 a mile. Conversely, a competent land surveying expert is entitled to a fee of three to four hundreds of dollars an hour or more. What then of the percipient surveyor's opinions?

Fortunately, the state legislature was aware of these abuses by unscrupulous member of the legal profession and in response, they adopted some very nice legislation. These provisions, wherein a percipient land surveyor, called to testify in this scenario is entitled to charge conventional expert fees. More specifically, relief is found under the California Code of Civil Procedure at 2034.430. (a) (3) wherein very select professions are granted this relief, i.e. An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding.

What this means is if you are deposed in connection with your work with the original project design or survey, you are entitled to expert witness compensation. Instead of being paid $36.80 for your testimony, you could be paid $3200.00 for your time and aggravation. You will notice that architects and professional engineers are also granted this same right. And when you think about it, this is only natural as these three professionals are oftentimes called into court to testify about certain things and in many instances, the background information, so vitally important to any case, is the very same information that has been developed by the practicing professional. In addition to the obvious benefits to the professionals, the entire community and litigants are benefitted through this process. Otherwise and without the cooperation of the professionals, days and hours could be expended reconstructing the history of a project. This is another good piece of legislation.

The applicable code provisions are set forth below:

> *CALIFORNIA CODE OF CIVIL PROCEDURE RELATING TO EXPERT WITNESSES - SECTION 2034.410-2034.470*
>
> *2034.410. On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Chapters 9 (commencing with Section 2025.010), 10 (commencing with Section 2026.010), and 11 (commencing with Section 2028.010) apply to a deposition of a listed trial expert witness except as provided in this article.*
>
> *2034.420. The deposition of any expert described in subdivision (b) of Section 2034.210 shall be taken at a place that is within 75 miles of the courthouse where the action is pending. On motion for a protective order by the party designating*

an expert witness, and on a showing of exceptional hardship, the court may order that the deposition be taken at a more distant place from the courthouse.

2034.430. (a) Except as provided in subdivision (f), this section applies to an expert witness, other than a party or an employee of a party, who is any of the following:

(1) An expert described in subdivision (b) of Section 2034.210.

(2) A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words or symbols are.

(3) An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding.

(b) A party desiring to depose an expert witness described in subdivision (a) shall pay the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition.

(c) If any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel.

(d) Notwithstanding subdivision (c), the hourly or daily fee charged to the tardy counsel shall not exceed the fee charged to the party who retained the expert, except where the expert donated services to a charitable or other nonprofit organization.

(e) A daily fee shall only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forgo all business that the expert would otherwise have conducted that day but for the request that the expert be available all day for the scheduled deposition.

(f) In a worker's compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay the fee under this section.

2034.440. The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

2034.450. (a) The party taking the deposition of an expert witness shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition.

(b) The expert's fee shall be delivered to the attorney for the party designating the expert.

(c) If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert.

2034.460. (a) The service of a proper deposition notice accompanied by the tender of the expert witness fee described in Section 2034.430 is effective to require the party employing or retaining the expert to produce the expert for the deposition.

(b) If the party noticing the deposition fails to tender the expert's fee under Section 2034.430, the expert shall not be deposed at that time unless the parties stipulate otherwise.

2034.470. (a) If a party desiring to take the deposition of an expert witness under this article deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. Notice of this motion shall also be given to the expert.

(b) A motion under subdivision (a) shall be accompanied by a meet and confer declaration under Section 2016.040. In any attempt at an informal resolution under Section 2016.040, either the party or the expert shall provide the other with all of the following:

(1) Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.

(2) The total number of times the presently demanded fee has ever been charged and received by that expert.

(3) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(c) In addition to any other facts or evidence, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall be based on, proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.

(d) In an action filed after January 1, 1994, the expert or the party designating the expert shall also provide, and the court's determination as to the reasonableness of the fee shall also be based on, both of the following:

(1) The total number of times the presently demanded fee has ever been charged and received by that expert.

(2) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(e) The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination.

(f) Upon a determination that the fee demanded by that expert is unreasonable, and based upon the evidence and factors considered, the court shall set the fee of the expert providing testimony.

(g) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

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As mentioned above, I have been busy on the lecture circuit. On Friday evening, January 28 my wife and I attended the dinner and award ceremonies at the 51st Annual Geomatics Conference at Fresno State University. The highlight of the evening is the awarding of scholarships. It is simply amazing how much money is handed out. It is also very uplifting. One of the presenters is my good friend Rob McMillan of CALTRANS. Rob is a tireless advocate for the fine staff of professional land surveyors at CALTRANS as well as a devoted member of the California Land Surveyors

Association. I would be remiss if I failed to include a picture of Rob handing out a scholarship.

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Last but not least, while in Sacramento, we toured the California State Railroad Museum in Old Sacramento. One of the first things you are greeted by is an impressive depiction of a crew of railroad surveyors chaining across the rugged mountainside. There is also a wonderful collection of old time surveying equipment donated by one of my dear friends, the late Bud Uzes. If you look closely, you can see Bud in the exhibit.

Good luck in the New Year - *Michael J. Pallamary, PLS*

California Public Records Act

GOVT. CODE §§ 6250 - 6276.48

THE BASICS

The Public Records Act is designed to give the public access to information in possession of public agencies: "public records are open to inspection at all times during the office hours of the…agency and every person has a right to inspect any public record, except as . . . provided, [and to receive] an exact copy" of an identifiable record unless impracticable. (§ 6253). Specific exceptions to disclosure are listed in sections 6253.2, 6253.5, 6253.6, 6254, 6254.1-6254.22, 6255, 6267, 6268, 6276.02-6276.48; to ensure maximum access, they are read narrowly. The agency always bears the burden of justifying nondisclosure, and "any reasonably segregable portion . . . shall be available for inspection…after deletion of the portions which are exempt." (§ 6253(a))

WHO'S COVERED

- **All state and local agencies**, including: (1) any officer, bureau, or department.; (2) any "board, commission or agency" created by the agency (including advisory boards); and (3) nonprofit entities that are legislative bodies of a local agency. (§ 6252(a),(b)). Many state and regional agencies are required to have written public record policies. A list appears in § 6253.4.

WHO'S NOT COVERED

- Courts (except itemized statements of total expenditures and disbursement).(§§ 6252(a), 6261)
- The Legislature. (§ 6252) *See* Legislative Open Records Act, Govt. Code §§ 9070-9080.
- Private non-profit corporations and entities.
- Federal agencies. *See* Federal Freedom Of Information Act, 5 U.S.C. § 552.

ACCESS TIP ☞ Look to access laws (*e.g.* Legislative Open Records Act, IRS rules, court cases) that permit inspection and copying of records of agencies not subject to the Public Records Act. Many local jurisdictions also have "Sunshine" laws that grant greater rights of access to records.

WHAT'S COVERED

- "Records" include all communications related to public business "regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper,…, magnetic or other media." (§ 6252(e)) Electronic records are included, but software may be exempt. (§§ 6253.9(a),(g), 6254.9 (a),(d))

WHAT MUST HAPPEN

- **Access is immediate** and allowed at all times during business hours. (§ 6253(a)) Staff need not disrupt operations to allow immediate access, but a decision whether to grant access must be prompt. An agency may not adopt rules that limit the hours records are open for viewing and inspection. (§§ 6253(d); 6253.4(b))
- **The agency must provide assistance** by helping to identify records and information relevant to the request and suggesting ways to overcome any practical basis for denying access. (§ 6253.1)
- **An agency has 10 days to decide if copies will be provided**. In "unusual" cases (request is "voluminous," seeks records held off-site, OR requires consultation with other agencies), the agency may, upon written notice to the requesters, give itself an additional 14 days to respond. (§ 6253(c)) These time periods may not be used solely to delay access to the records. (§ 6253(d))
- **The agency may never make records available only in electronic form**. (§ 6253.9(e))
- **Access is always free**. Fees for "inspection" or "processing" are prohibited. (§ 6253)
- **Copy costs are limited to "statutory fees"** set by the Legislature (not by local ordinance) or the "direct cost of duplication", usually 10 to 25 cents per page. Charges for search, review or deletion are not allowed. (§ 6253(b); North County Parents v. D.O.E., 23 Cal.App.4th 144 (1994)) If a request for electronic records either (1) is for a record normally issued only periodically, or (2) requires data compilation, extraction, or programming, copying costs may include the cost of the programming. (§ 6253.9(a),(b))
- **The agency must justify the withholding of any record** by demonstrating that the record is exempt or that the public interest in confidentiality outweighs the public interest in disclosure. (§ 6255)

ACCESS TIP ☞ Always ask for both copies and access; after inspection you can reduce the copy request (and associated costs) to the materials you need.

REQUESTING PUBLIC RECORDS

- Plan your request; know what exemptions may apply.
- Ask informally before invoking the law. If necessary, use this guide to state your rights under the Act.
- Don't ask the agency to create a record or list.
- A written request is not required, but may help if your request is complex, or you anticipate trouble.
- Put date limits on any search.
- If the agency claims the records don't exist, ask what files were searched; offer any search clues you can.
- Limit pre-authorized costs (or ask for a cost waiver), and pay only copying charges.
- Demand a written response within 10 days.

IF YOUR REQUEST IS DENIED

- Keep a log of to whom you speak and the stated reason for the denial.
- Employ the following six-step DENIAL strategy:
  D = Discretionary: Exemptions are permissive, never mandatory. Ask the agency if it will waive the exemption and release the record.
  E = Explanation: Insist that the agency explain in a written denial why the exemption applies to the requested record.
  N = Narrow Application: The Act favors access. Exemptions must be narrowly construed.
  I = Isolate: Request the release of any non-exempt portions of the record.
  A = Appeal: State your rights, using this guide, and ask to speak to a higher agency official.
  L = Lawsuit: File suit to enforce your rights. If you win, the agency must pay your costs and legal fees. (§ 6259(d)); Belth v. Garamendi 232 Cal.App.3d 896 (1991).
- Write a news story or Letter to the Editor about the denial.
- Consult your supervisor or lawyer, or contact one of the groups listed on this brochure.

WHAT'S NOT COVERED

- Employees' private papers, unless they "relat[e] to the conduct of the public's business [and are] prepared, owned, used, or retained by the agency." (§ 6252(e))
- Computer software "developed by a state or local agency ... includ[ing] computer mapping systems, computer programs, and computer graphic systems." (§§ 6254.9(a),(b))
- Records not yet in existence: The PRA covers only records that already exist, and an agency cannot be required to create a record, list, or compilation. "Rolling requests" for future-generated records are not permitted.

RECORDS EXEMPT FROM DISCLOSURE

The Act exempts certain records from disclosure in whole or in part. This does not mean they are not public records or that disclosure is prohibited. An agency may withhold the records, but can allow greater access if it wishes. (§ 6253(e)). However, "selective" or "favored" access is prohibited; once it is disclosed to one requester, the record is public for all. (§ 6254.5) Many categories of records are exempt, some by the Act itself, (§§ 6254(a)-(z)) and some by other laws (§§ 6275-6276.48). These include:

- **Attorney-Client discussions** are confidential, even if the agency is the client, but the agency (not the lawyer) may waive secrecy. (§§ 6254(k), 6254.25, 6276.04)
- Appointment calendars and applications, phone records, and other records which impair the **deliberative process** by revealing the thought process of government decision-makers may be withheld only if "the public interest served by not making the record[s] public clearly outweighs the public interest served by disclosure of the record[s]." (§ 6255; Times Mirror v. Superior Ct., 53 Cal.3d 1325 (1991); CFAC v. Superior Ct., 67 Cal.App.4th 159 (1998); Rogers v. Superior Ct., 19 Cal.App.4th 469 (1993)) If the interest in secrecy does not clearly outweigh the interest in disclosure, the records must be disclosed, "whatever the incidental impact on the deliberative process." (Times Mirror v. Superior Ct.) The agency must explain, not merely state, why the public interest does not favor disclosure.
- **Preliminary drafts, notes and memos** may be withheld only if: (1) they are "not retained...in the ordinary course of business" and (2) "the public interest in withholding clearly outweighs the public interest in disclosure." Drafts are not exempted if: (1) staff normally keep copies; or (2) the report or document is final even if a decision is not. (§ 6254(a)) Where a draft contains both facts and recommendations, only the latter may be withheld. The facts must be disclosed. (CBE v. CDFA., 171 Cal.App.3d 704 (1985))
- **Home Addresses** in DMV, voter registration, gun license, public housing, local agency utility and public employee records are exempt, as are addresses of certain crime victims. (§§ 6254(f),(u), 6254.1, 6254.3, 6254.4, 6254.16, 6254.21)
- **Records concerning agency litigation** are exempt, but only until the claim is resolved or settled. The complaint, claim, or records filed in court, records that pre-date the suit (e.g., reports about projects that eventually end in litigation), and settlement records are public. (§§ 6254(b), 6254.25; Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893 (1984))
- **Personnel, medical and similar files** are exempt only if disclosure would reveal intimate, private details. (§ 6254(c)) Employment contracts are not exempt. (§ 6254.8)
- **Police Incident reports, rap sheets and arrest records** are exempt (Penal Code §§ 11075, 11105, 11105.1), but information in the "police blotter" (time and circumstances of calls to police; name and details of arrests, warrants, charges, hearing dates, etc.) must be disclosed unless disclosure would endanger an investigation or the life of an investigator. Investigative files may be withheld, even after an investigation is over. (Gov. Code § 6254(f); Williams v. Superior Ct., 5 Cal. 4th 337 (1993); County of L.A. v. Superior Ct., 18 Cal. App. 4th 588 (1994). Identifying data in police personnel files and misconduct complaints are exempt, but disclosure may be obtained using special procedures under Evidence Code section 1043.
- **Financial data** submitted for licenses, certificates, or permits, or given in confidence to agencies that oversee insurance, securities, or banking firms; **tax**, **welfare**, and **family/adoption/birth** records are all exempt. (§§ 6254(d),(k),(l), 6276)

A POCKET GUIDE TO

THE CALIFORNIA PUBLIC RECORDS ACT

A SERVICE OF:

THE FIRST AMENDMENT PROJECT
SOCIETY OF PROFESSIONAL JOURNALISTS (Nor. Cal.)

HOW TO USE THIS GUIDE

This pocket guide is intended to be a quick reference and provide general information to journalists and citizens. It addresses some common public records problems, but does not substitute for research or consultation with a lawyer on detailed questions. This guide current as of December 3, 2003.

FOR MORE INFORMATION OR HELP:

FIRST AMENDMENT PROJECT.....510/208-7744
www.thefirstamendment.org

California First Amendment Coalition…….....415/460-5060
www.cfac.org

Funding provided by the Sigma Delta Chi Foundation of the Society of Professional Journalists

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 05-1004
of	:	February 28, 2006
BILL LOCKYER Attorney General	:	
GREGORY L. GONOT Deputy Attorney General	:	

THE HONORABLE SHEILA JAMES KUEHL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Are interim grading documents, including geology reports, compaction reports, and soils reports, submitted by a property owner to a city's building department in conjunction with an application for a building permit subject to public inspection and copying under the California Public Records Act at the time the documents are first received by the building department?

CONCLUSION

Interim grading documents, including geology reports, compaction reports, and soils reports, submitted by a property owner to a city's building department in conjunction with an application for a building permit are subject to public inspection and copying under the California Public Records Act at the time the documents are first received by the building department.

ANALYSIS

We are informed that a city commonly requires property owners in hillside areas to submit interim grading documents, including geology reports, compaction reports, and soils reports, when applying for building permits from the city's building department. These reports are prepared by civil engineers and are reviewed by the building department's professional staff in determining whether to issue the permits requested. These reports are preliminary in nature in the sense that they do not become "final" until approved by the city's staff. (See Bus. & Prof. Code, § 6735.) Grading and construction activity may proceed only on the basis of final, approved documents.

The question presented for resolution is whether these interim grading documents are subject to inspection and copying by members of the public at the time the documents are first submitted to the city's building department. We conclude that the documents must be made available for inspection and copying from the time they first come into the custody of the building department.

The California Public Records Act (Gov. Code, §§ 6250-6276.48; "Act")[1] generally requires state and local agencies, including cities,[2] to allow members of the public to inspect records in their custody and obtain copies thereof (§§ 6250, 6252, 6253). The Act "was passed for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies' [Citation]. Maximum disclosure of the conduct of governmental operations was to be promoted by the Act. [Citation.]" (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651; see also *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370; *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125.)

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[1] All references hereafter to the Government Code are by section number only.

[2] A city is a "local agency" by definition under section 6252, subdivision (b).

"Public records" are defined to include "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." (§ 6252, subd. (e).) A "writing" is further defined to include "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation. . . ." (§ 6252, subd. (g).)

The Act specifies that "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. . . ." (§ 6253, subd. (a).) Of particular relevance to our discussion here are the requirements of section 6253, subdivision (b):

> "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."

Thus, when a request is made for a copy of any identifiable public record, a state or local agency must promptly provide an exact copy, unless impracticable to do so, upon payment of a fee that covers the direct cost of duplication or a statutory fee if applicable. In short, "all public records are subject to disclosure unless the Legislature has expressly provided to the contrary." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 346; 86 Ops.Cal.Atty.Gen. 132, 133 (2003).)

The grading documents in question, although prepared and submitted by private property owners, are reviewed by the city in determining whether a building permit should be issued. They are writings that (1) relate to the conduct of the public's business and (2) are "used" by the city's building department. (See *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1006-1007.) As such, unless some exemption applies, they must be made promptly available for inspection and copying by members of the public. (See 88 Ops.Cal.Atty.Gen.153 (2005) [parcel boundary map data maintained in an electronic format by a county assessor subject to public inspection and copying under the Act]; 86 Ops.Cal.Atty.Gen. 132, *supra* [arrested person's mug shot is a writing and a public record subject to inspection and copying]; 78 Ops.Cal.Atty.Gen. 104 (1995) [names, addresses, and telephone numbers of persons who have filed noise complaints concerning operation of a city airport are subject to disclosure under the Act unless exception applies].)

For reasons of privacy, safety, and efficient governmental operations, the Legislature has provided for exemptions from disclosure in limited situations. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1064.) These statutory exemptions are to be construed narrowly (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 773; see Cal. Const., art. I, § 3, subd. (b)(2); 88 Ops.Cal.Atty.Gen., *supra*, at pp. 157-159), and the burden is on the public agency to show that the records are exempt from disclosure (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476).

Section 6254 is the primary exemption statute, specifying a diverse assortment of categories of public records that a state or local agency may in its discretion keep confidential. (§ 6254, subds. (a)-(cc).) Other special exemptions exist. (See, e.g., §§ 6254.1, 6254.3, 6254.4 6454.20, 6254.22, 6254.25.) Finally, the Act contains a "catchall" exemption that permits a public agency to withhold a requested public record when "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." (§ 6255, subd. (a); see, e.g., 84 Ops.Cal.Atty.Gen. 55, 56-60 (2001); 81 Ops.Cal.Atty.Gen. 383, 386-388 (1998).)

Only a few of these statutory exemptions merit discussion here. Subdivision (a) of section 6254 provides an exemption for "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure." We reject the application of this exemption to interim grading documents for several reasons. First, these documents are retained "in the ordinary course of business," as they are carefully reviewed by the department's professional staff and remain on file until the approval process is completed. Indeed, we are informed that these reports are retained by the department for a five-year period. Second, this exemption is inapplicable to factual materials that are prepared by private parties. Instead, this exemption is intended to protect *deliberative* writings prepared by a *public agency*. (See *Citizens for A Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 713.) Finally, as discussed below, the public interest in withholding these documents would not clearly outweigh the public interest in disclosure. (See *id.* at pp. 714-716.)[3]

Subdivision (k) of section 6254 allows exemption from disclosure for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Records

[3] For the same reason, the importance of public disclosure of interim grading documents would render inapplicable the "catchall" exemption of section 6255.

or information not required to be disclosed pursuant to this exemption include, but are not limited to, records or information identified in the statutes listed in sections 6276.02 through 6276.48. (§ 6276.) If certain information in the interim grading documents were subject to the protection of one of the specified statutes, the documents would be subject to review to determine whether some portion of them should be withheld. However, we have not been informed of the presence of any such information in these documents.

Another exemption that may at first appear applicable is found in section 6254, subdivision (e), which exempts "[g]eological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person." Here, however, even if this exemption were otherwise applicable,[4] the reports in question are not "obtained in confidence." (See *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 211-212; *National Resources Def. v. U. S. Dept. of Defense* (C.D. Cal. 2005) 388 F.Supp.2d 1086, 1107-1108.) Rather, their importance as public records is demonstrated by the statutory scheme relating to the sale of subdivided lands. Business and Professions Code section 11010 states:

> "(a) Except as otherwise provided pursuant to subdivision (c) or elsewhere in this chapter [concerning subdivided lands], any person who intends to offer subdivided lands within this state for sale or lease shall file with the Department of Real Estate an application for a public report consisting of a notice of intention and a completed questionnaire on a form prepared by the department.
>
> "(b) The notice of intention shall contain the following information about the subdivided lands and the proposed offering:
>
> ". . . . . .
>
> "(14) A true statement, if applicable, referencing any soils or geologic report or soils and geologic reports that have been prepared specifically for the subdivision.
>
> ". . . . . ."

[4] We need not define the term "utility systems development" for purposes of this opinion or decide whether the phrase "relating to utility systems development" modifies the phrase "[g]eological and geophysical data."

This statutorily mandated inclusion referencing the reports at issue serves to promote timely public access in considering whether a proposed building project may impact surrounding properties.[5]

No other statutory exemption warrants analysis.[6] We thus conclude that interim grading documents, including geology reports, compaction reports, and soils reports, submitted by a property owner to a city's building department in conjunction with an application for a building permit are subject to public inspection and copying under the Act at the time the documents are first received by the building department.

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[5] We note that the Act "does not allow limitations on access to a public record based upon the purposes for which the record is being requested, if the record is otherwise subject to disclosure." (§ 6257.5; see *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1417-1418; *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77, 82-83.)

[6] A special exemption exists for corporate proprietary information, including trade secrets. (§ 6254.15.) We have not been informed that such information would be contained in interim grading documents.

Belth v. Garamendi(1991) 232 Cal.App.3d 896 , 283 Cal.Rptr. 829

[No. A051541. First Dist., Div. Five. July 25, 1991.]

JOSEPH M. BELTH, Plaintiff and Appellant, v. JOHN GARAMENDI, as Insurance Commissioner, etc., Defendant and Respondent.

(Superior Court of the City and County of San Francisco, No. 923654, Ira A. Brown, Jr., Judge.)

(Opinion by King, J., with Low, P. J., and Haning, J., concurring.)

COUNSEL

Robert C. Fellmeth and Carl K. Oshiro for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Timothy G. Laddish, Assistant Attorney General and Richard F. Finn, Deputy Attorneys General, for Defendant and Respondent.

OPINION

KING, J.

In this case we hold that Government Code section 6259, subdivision (d), mandates an award of court costs and reasonable attorney fees to a plaintiff who prevails in litigation filed under the California's Public Records Act. We further hold that the plaintiff has prevailed within the meaning of the statute when he or she files an action which results in defendant releasing a copy of a previously withheld document.

Joseph M. Belth appeals from an order denying his request for statutory attorney fees in connection with Public Records Act litigation against then- Insurance Commissioner Roxani M. Gillespie (Commissioner).

Belth is a professor of insurance at Indiana University School of Business and editor of The Insurance Forum, a monthly industry periodical. On April **[232 Cal.App.3d 899]** 13, 1990, under the California Public Records Act (Gov. Code, § 6250 et seq.), Belth requested from the Department of Insurance (Department) copies of seven sets of documents regarding Executive Life Insurance Company. On April 19, the Department denied his request, stating that as to item 1, "the Insurance Commissioner has determined that these documents are confidential and, therefore, not open to public inspection, in accordance with California Insurance Code Section 1215.7," and with regard to items 2 through 7, "we deem these documents to be confidential, pursuant to Government Code Section 6254 and Insurance Code Section 12919, since they were received as part of information collected during a special examination by the Department on Executive Life Insurance Company."

On September 10, Belth petitioned for a writ of mandate compelling the commissioner to provide him with the information in item 1 of his original request, i.e., "all documents reflecting her approval of the $45 million repayment by Executive Life Insurance Company to its parent First Executive Corporation," as well as reasonable attorney fees and costs. (Gov. Code, § 6259.) After the trial court issued an alternative writ, the Commissioner filed a return in which she averred that "the subject documents have been provided to petitioner ... because Executive Life Insurance Company consented to the waiver of the[ir] statutory confidentiality," opposed Belth's attorney fee request, and asked that the Department be awarded attorney fees on the grounds that Belth's request was "clearly frivolous." (Gov. Code, § 6259.) After a hearing, the trial court issued an order denying both attorney fee requests.

Subdivision (d) of Government Code section 6295 provides, "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." Belth maintains he prevailed in this litigation by obtaining the requested documents. The Commissioner responds that the threshold question is whether the statutory provision is mandatory or discretionary.

A.

[1] " 'Shall' is mandatory and 'may' is permissive." (Gov. Code, § 14.) "Ordinary deference to the Legislature entails that when in a statute it uses a term which it has defined as a word of art the term be given its legislatively defined meaning by the courts. Such, however, is not always the case in the use of the word 'shall.' " (Governing Board v. Felt (1976) 55 Cal.App.3d 156, 161 [127 Cal.Rptr. 381].) "The use of the word 'shall' does not in every instance require that the language be construed as mandatory. Whether the word 'shall' occurring in a code section is to be construed to be mandatory or directory depends upon the intention of the Legislature." (People v. **[232 Cal.App.3d 900]** Superior Court (1970) 3 Cal.App.3d 476, 485-486 [83 Cal.Rptr. 771].) "The definition of 'shall' as mandatory in the pertinent provision of the [Government] Code itself requires that absent some indication that the statutory definition was not intended, it must be applied." (Governing Board v. Felt, supra, 55 Cal.App.3d at p. 163, citation omitted.)

[2] There is no such indication in this case. On the contrary, all the evidence suggests the Legislature intended subdivision (d) to be mandatory. The attorney fee provision was added to section 6259 in 1975 as part of Assembly Bill No. 23. (Stats. 1975, ch. 1246, § 9, p. 3212.) The Legislative Counsel's Digest of Assembly Bill No. 23 (2 Stats. 1975 (Reg. Sess.) Summary Dig., p. 345) states, "In addition, this bill would, with respect to both the Legislative Open Records Act and the Public Records Act, require the award of court costs and reasonable attorneys' fees to a plaintiff who prevails in the action, and to the public agency when the court finds that the plaintiff's case is clearly frivolous." As the Supreme Court noted in People v. Superior Court (Douglass) (1979) 24 Cal.3d 428, 434 [155 Cal.Rptr. 704, 595 P.2d 139], it is reasonable to presume the Legislature amended this section with the intent and meaning expressed in the Legislative Counsel's Digest. Furthermore, the Department of Finance Enrolled Bill Report (see Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 219 [185 Cal.Rptr. 270, 649 P.2d 912] [Dept. of Finance Enrolled Bill Rep. as source of legislative history])

similarly states that Assembly Bill No. 23 "[r]equires the superior court to award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in the litigation."

Accordingly, in San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 781-782 [192 Cal.Rptr. 415], the court issued a writ of mandate directing an award of costs and reasonable attorney fees, "[s]ince Government Code section 6259 mandates an award of costs and fees to a prevailing plaintiff in litigation pursuant to the Public Records Act (§ 6250 et seq.)."fn. 1 The Commissioner's reliance on Braun v. City of Taft (1984) 154 Cal.App.3d 332 [201 Cal.Rptr. 654], is misplaced as the issue of whether the attorney fee provision is mandatory or discretionary did not arise in that case. Rather, the court held plaintiff's action was "not the type of litigation envisioned in section 6259." (Id. at p. 349.) It is abundantly clear that, where applicable, section 6259, subdivision (d), is mandatory. **[232 Cal.App.3d 901]**

B.

[3a] Whether subdivision (d) is applicable here depends on what it means to "prevail in litigation." While no reported case has construed the phrase in this context, many courts have interpreted similar language in Code of Civil Procedure section 1021.5.fn. 2

"Case law takes a pragmatic approach in defining 'prevailing' or 'successful' party within the meaning of section 1021.5." (Sagaser v. McCarthy (1986) 176 Cal.App.3d 288, 314 [221 Cal.Rptr. 746].) "In order to justify a fee award, there must be a causal connection between the lawsuit and the relief obtained." (Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal.App.3d 836, 844 [216 Cal.Rptr. 649].) "However, a plaintiff need not achieve a favorable final judgment in order to be a successful party. A defendant's voluntary action induced by plaintiff's lawsuit will still support an attorneys' fee award on the rationale that the lawsuit spurred defendant to act or was a catalyst speeding defendant's response." (Californians for Responsible Toxics Management v. Kizer (1989) 211 Cal.App.3d 961, 967 [259 Cal.Rptr. 599], citations omitted.) "The critical fact is the impact of the action, not the manner of its resolution." (Folsom v. Butte County Assn. of Governments (1982) 32 Cal.3d 668, 685 [186 Cal.Rptr. 589, 652 P.2d 437].) "A plaintiff should not be denied attorney's fees because resolution in the plaintiff's favor was reached by settlement, through the defendant's voluntary cessation of the unlawful practice or because the lawsuit was resolved on a preliminary issue obviating the adjudication of other issues." (California Common Cause v. Duffy (1987) 200 Cal.App.3d 730, 742 [246 Cal.Rptr. 285], citations omitted.) "If plaintiff's lawsuit 'induced' defendant's response or was 'material factor' or 'contributed in a significant way' to the result achieved then plaintiff has shown the necessary causal connection." (Californians for Responsible Toxics Management v. Kizer, supra, 211 Cal.App.3d at p. 967, citations omitted.) A plaintiff is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior (California Common **[232 Cal.App.3d 902]** Cause v. Duffy, supra, 200 Cal.App.3d at p. 741), or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result (Wallace v. Consumers Cooperative of Berkeley, Inc., supra, 170 Cal.App.3d at pp. 845- 846). " 'The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and

(b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.' " (Folsom v. Butte County Assn. of Governments, supra, 32 Cal.3d at p. 685, fn. 31, citation omitted.)

[4] In this case, the Commissioner initially refused Belth's request for documents she claimed were confidential. After he filed a writ petition, she obtained Executive Life's consent to disclosure of the documents and released them to Belth. It is undisputed that she took this initiative in response to, and in hopes of resolving this litigation.

Nevertheless the Commissioner insists Belth did not "prevail in litigation" because the documents were produced by virtue of Executive Life's consent to their disclosure rather than by a judicial determination they were not confidential, or by a change in her position on that issue. She cites no authority for requiring Belth to prove he would have prevailed on the merits. A successful party under section 1021.5, one whose lawsuit resulted in the relief he sought, must show at most that his claim was not frivolous, unreasonable or groundless. (Wallace v. Consumers Cooperative of Berkeley, Inc., supra, 170 Cal.App.3d at p. 844.) The trial court necessarily concluded Belth's claim was not frivolous in denying the Commissioner's attorney fee request.fn. 3

As to her second point, while the Commissioner may not have changed her legal position on the issue of confidentiality, she did change her position on Belth's request by turning over documents she had previously withheld. She accomplished this by seeking and obtaining Executive Life's consent to disclosure which, apparently, she had neglected to do before Belth filed suit. She warns that if attorney fees are awarded on this basis, "no agency, once a public records action had been commenced, would ever turn over documents absent a court order." (Italics in original.) That is one way to look at it. Another is that awarding fees in a case like this will encourage public agencies to consider seeking consent for disclosure of possibly confidential records before refusing requests for access. This would further the Public Records Act's objective of increasing freedom of information. (Los Angeles Police Dept. v. Superior Court (1977) 65 Cal.App.3d 661, 668 [135 Cal.Rptr. 575].) **[232 Cal.App.3d 903]**

Contrary to the Commissioner's assertion, this case differs factually from Braun v. City of Taft, supra, 154 Cal.App.3d 332, where attorney fees were denied because "plaintiff received the documents through another avenue." There plaintiff had been given access to personnel records in his capacity as a member of the city council before his request for copies of the documents was refused. Thus, "he was in no way injured or hampered in his attempts to publicize" a perceived irregularity in the appointment of a transit administrator. (Id. at pp. 338, 349.) The cases might be considered "not that different" if Belth had been given access to the documents by Executive Life before the Insurance Commissioner refused his request for copies, thus enabling him to publicize perceived irregularities in Department of Insurance regulation of Executive Life. This, of course, is not what happened.

The matter is remanded with directions to vacate the order and enter an order awarding Belth costs and reasonable attorney fees in the writ proceeding and on appeal.

Low, P. J., and Haning, J., concurred.

FN 1. Noting that the Tribune had sought attorney fees under Government Code section 54960.5 (the Brown Act), the court said, "In addition, costs and reasonable attorney fees may be awarded pursuant to section 625913 ...." (143 Cal.App.3d at p. 781, fn. omitted.) Contrary to the Commissioner's suggestion, in this context "may" indicates discretion in the choice of applicable statute not in making the award, as shown by the italicization of "shall" in footnote 13's quotation of section 6259's attorney fee provision.

FN 2. Code of Civil Procedure section 1021.5, provides that under three specified circumstances, a court may award attorney fees to a successful party in an action resulting in the enforcement of an important right affecting the public interest. It is a codification of the common law private attorney general doctrine which "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 933 [154 Cal.Rptr. 503, 593 P.2d 200].) Similarly, "Section 6259 was enacted to carry out the purposes of the California Public Records Act. Through the device of awarding attorney fees, citizens can enforce its salutary objectives." (Braun v. City of Taft, supra, 154 Cal.App.3d at p. 349.)

FN 3. "If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency." (Gov. Code, § 6259, subd. (d).)