



March 14, 2022

The Honorable Shirley N. Weber  
California Secretary of State  
500 11th Street  
Sacramento, CA 95814  
Secretary.weber@sos.ca.gov

**RE: SOS Must Respect Public Records Act, Encourage Accountability**

Dear Ms. Weber,

Government transparency is no laughing matter, yet your website features cartoons encouraging government employees to *destroy public records*.

We presume these statements and images predate your Administration. However, you must immediately remove the web content, which makes a mockery of the California Constitution's guarantee that the "writings of public officials and agencies shall be open to public scrutiny." (Cal. Const. art. I, § 3(b)(1).) Both the state Constitution and the landmark Public Records Act reflect the principle that government transparency is essential in a democracy.

In the course of researching the Department of Insurance's recently rescinded policy to automatically delete emails after 180 days, we discovered statements and cartoons on the Secretary of State's website encouraging state agencies to destroy records *in order to avoid liability under the Public Records Act*. For example, on page 69 of the Records Management Handbook ("Handbook") posted on the agency website<sup>1</sup>, the following message appears:

#### **Avoid Litigation**



According to the Public Records Act (PRA) "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"<sup>3</sup> to the person who requested them. Any records, regardless of format, that are not exempt according to the law must be provided when a PRA request is made. When State

entities retain records past their retention period, they potentially create liabilities if those records become the subject of a PRA request.

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<sup>1</sup> <https://archives.cdn.sos.ca.gov/calrim/handbook/2018-12-records-management-manual.pdf>.

Thankfully, Commissioner Lara reversed course on the Department of Insurance's ill-conceived email deletion policy, and recently Assembly Member Marc Levine introduced a bill to require all state records to be preserved for a minimum of two years. However, the inappropriate statements and images on your website undermine this important progress toward government accountability.

In addition to removing these statements, we ask that you also demonstrate your commitment to accountability by supporting Mr. Levine's bill, AB 2370. Currently there is no minimum records retention period that applies to state agencies. As a result, records that otherwise must be produced under the California Constitution and the Public Records Act may be deleted or destroyed before the public even has a chance to request and review them. Clear, minimal standards for the retention of records are essential to ensure the public's access to them. AB 2370 would simply apply to state agencies the same minimum two-year retention period for public records that is already in place for California counties and cities.

The first step is for your agency to overhaul its statements about record retention to reflect the seriousness of the issue and to model appropriate agency conduct.

Currently the SOS's Handbook encourages destruction of records, while acknowledging an agency staff's "reluctance" to do so. In fact, your Handbook explicitly states that destruction of records will help agencies avoid liability under the Public Records Act or "any kind of legal action." For example, on page 62, the Handbook states:



While there may be some reluctance to destroy records, this is an important part of the Records Management Program. If no records are ever destroyed, State entities would be drowning in obsolete records that are no longer useful to conduct business. Also, State entities are liable for all records they retain in the event of a Public Records Act request or any kind of legal action.

Moreover, automatic email deletion policies that rely on individual staffers to individually archive each email record to avoid permanent deletion—such as the Department of Insurance's recently rescinded 180-day email deletion policy—are highly problematic. As acknowledged on page 39 of your Handbook, individual agency staff would be left to determine which records are "obsolete" and subject to destruction "with proper authorization and in accordance with the law," and which records are "of historical importance [and should be] transferred to the State Archives for preservation." At minimum such policies could lead to inadvertent deletion, and at worst be subject to abuse by leaving it to individuals, who may have

an interest in shielding emails from public disclosure, to affirmatively act to archive messages within a relatively short period of time. Yet on page 49 of the Handbook, your agency currently promotes an “annual purge day” for all records.

It may be a good idea for the RMC to promote an annual purge day or week where staff are encouraged to dispose of expired records according to the Retention Schedule. Highlighting the proper destruction of records helps



As noted by Department of Insurance staff who contacted Consumer Watchdog with grave concerns about the timing and implementation of the Department’s email deletion program, such regular automatic purging of emails is inappropriate. Many records that ultimately prove to be essential for agency enforcement efforts may not appear to be important until years after they are initially received. Without a minimum records retention requirement as proposed by AB 2370, your agency’s calls for “purging” emails and other records on a regular basis is a gift to unscrupulous business seeking to avoid appropriate oversight.

Furthermore, your agency should revise and update the online resources meant to assist agencies with crafting proper records retention programs as we encountered many broken weblinks and outdated sources of information while investigating these matters. For example, the records retention schedule form, referred to as “STD. 73,” currently refers signers to nonexistent State Administrative Manual sections. The Records Management and Appraisal Program main webpage, among others, contains broken weblinks to STD. 71 and the STD. 73 “Cover Page.”<sup>2</sup> Additionally, the Administrative Records guidelines are stated to be “current as of June 29, 1999.”<sup>3</sup>

These are not trivial matters. As noted by the California Supreme Court in underscoring the importance of the Public Records Act, “individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.” (*C.B.S., Inc. v. Block* (1986) 42 Cal.3d 646, 651).

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<sup>2</sup> Records Management and Appraisal (RMA) Program, <https://www.sos.ca.gov/archives/records-management-and-appraisal>.

<sup>3</sup> Recommended General Retention Schedule for Administrative and/or Common Use Records Series for Statewide Use, <https://archives.cdn.sos.ca.gov/calrim/guidelines/calrim-guidelines-admin-common-retention-rev.pdf>.

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We look forward to your removal of the statements and cartoons encouraging ad hoc deletion of public records, corrections to the other deficiencies noted above, and your support for AB 2370.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jerry Ellner', written in a cursive style.

Jerry Ellner  
Litigation Director

A handwritten signature in black ink, appearing to read 'Ryan Mellino', written in a cursive style.

Ryan Mellino  
Law Fellow