March 11, 2022

Via Email & Position Letter Portal

Assembly Member Mark Stone
Chair of the Judiciary Committee
State Capitol, Room 3146
Sacramento, CA 94249
Assemblymember.Stone@assembly.ca.gov

RE: AB 2370 (Levine) – SUPPORT

Dear Assembly Member Stone,

California's landmark Public Records Act reflects the principle that government transparency is essential in a democracy. The California Constitution guarantees the public's right-to-know and right to access public records, and therefore, "the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const. art. I, § 3 (b)(1).) Yet, there is no minimum retention period for such records that applies to state agencies. As a result, records may be deleted or destroyed that otherwise must be produced under the California Constitution and the Public Records Act. 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.[1] The Public Records Act already covers any "writing . . . regardless of physical form," including e-mail (Gov. Code §§ 6252(e), (g)), and the California Supreme Court has also expressly held that e-mail is subject to the Public Records Act. (*City of San Jose v. Super. Ct.* (2017) 2 Cal.5th 608.) Under AB 2370, any record—whether electronic or in paper form—that meets the definition of "public record" under the Public Records Act must be retained by state agencies for a minimum of two years.[2]

[1] Current law—Government Code sections 26202 and 34090—prohibits cities and counties from destroying public records that are less than two years old.
[2] "'Public records' includes any writing containing information *relating to the conduct of the public's business* prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code 6252(e), emphasis added.)

The full significance of certain public records, particularly those critical to enforcement actions in response to public complaints, may not be immediately apparent. While many records should be retained for far longer than two years, AB 2370 provides a critical baseline to ensuring that public records are preserved and retained for a sufficient period such that the public, journalists, and policymakers have an opportunity to request them, and agency staff may continue to access them as part of their public duties. Without AB 2370, agencies may delete records before the public even has a chance to request and review them, while also depriving agency staff of critical documentary evidence.

Current law leaves it to state agencies to determine how long various records should be retained under "retention schedules" filed with the Secretary of State. (*See* Gov. Code §§ 12270-12279.) For example, under the Department of Insurance's current records retention schedule for the Office of the Commissioner and Executive Office, attached as Exhibit A, "Department records, scheduling, invitations, schedules, deadlines, [and] contracts" are destroyed after 90 days. Destroying records after 90 days—for example, meeting records with lobbyists and other individuals that have matters pending before the agency—is the antithesis of the government transparency that the Public Records Act is meant to provide.

Email has become one of the primary means by which public servants conduct their work and communicate with one another. Yet, just this year the Department of Insurance adopted an email "Retention Policy" that would have automatically deleted agency email after 180 days unless individual staff manually archived each email, according to an agency FAQ provided to Consumer Watchdog by concerned Department employees.

The policy, which was pulled back in the wake of media attention and concerns raised by Consumer Watchdog, was developed following statewide news coverage of a pay-to-play scandal involving Applied Underwriters ("Applied"), the workers' compensation insurer that directed cloaked campaign donations to Insurance Commissioner Lara's 2022 re-election campaign. The policy could have jeopardized emails relevant to Consumer Watchdog's on-going Public Records Act litigation seeking records of meetings and communications with Applied. A similar policy proposed in the future to delete emails less than two years old that meet the definition of a "public record" would not be possible under AB 2370.

Failure to retain public records is a problem that reaches beyond the Department of Insurance. For example, CalPERS began automatically deleting email older that 60 days in 2011 after a different government scandal. In 2016, CalTRANS's 120-day auto delete email policy was determined to constitute spoilation of evidence. The California Environmental Protection Agency currently considers emails transmitting "informal information" to be "transitory," which must

be deleted after 90 days. The Medical Board destroys "physician licensing files . . . . not necessary to establish qualifications for licensure" upon the time the physician's license is issued. The DMV destroys records regarding a driver's failure to establish insurance coverage following an accident after just 30 days. The Department of Forestry destroys records regarding hazardous material (Hazmat) property upon expiration of the relevant contract regardless of the time period, and records of fire safety inspections after one year. At the other end of the spectrum, agencies like the Department of Managed Health Care have established 2-5 year minimum retention policies by regulation. (Cal. Code Regs. Tit 28, § 1009.)

Automatic purging of email at periods of less than two years is particularly inappropriate for public-facing agencies. Email archives provide a critically important record for government regulators and lawyers to bring enforcement actions against bad actors, including by providing crucial documentary evidence. Consumer complaints that span many years, for example, are a primary catalyst for enforcement actions agencies carry out against illegal and dangerous practices. At minimum such email deletion policies could lead to inadvertent deletion of important public records, 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.

Any costs associated with this bill are likely to be both generally minimal and wholly justified in light of the overriding importance of public access to records. Thanks to technological advances, large amounts of data can be stored at relatively low cost. For example, Google offers unlimited email and file storage for $12 per person per month,[3] while Dropbox offers unlimited storage for $20 per person per month.[4] Furthermore, few agencies are likely to require unlimited storage, as one terabyte of storage is enough to hold 6.5 million emails or PDFs.[5] Costs associated with hiring additional personnel to review and search for public records in response to Public Records Act requests are wholly justified—state agencies have both a statutory and constitutional duty to provide the public access to records. Additional personnel should also lead to improved responses to Public Records Act requests, further enhancing and supporting the people's right to access public records.

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.) And as the Court of Appeal noted, "[p]ublic disclosure is

[3] G Suite Business Edition, https://support.google.com/a/answer/6034782?hl=en
[4] Choose the right Dropbox for you, https://www.dropbox.com/plans
[5] How much is 1 TB of storage?, https://experience.dropbox.com/resources/how-much-is-1tb

a critical weapon in the fight against government corruption. Whether there is a real impropriety or merely the appearance of an impropriety, the public has a right to know the particulars." (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 515.)

Retaining public records for a minimum of two years is a modest, but essential, step to protecting the public interest.

Sincerely,

Jerry Fl[illegible]
Litigation Director

Ryan Mellino
Law Fellow

cc: Alison Merrilees, Chief Counsel, Assembly Judiciary Committee

EXHIBIT A

STATE OF CALIFORNIA – SECRETARY OF STATE

RECORDS RETENTION SCHEDULE

STD.73 (REV. 2/2015)

STATE RECORDS PROGRAM

(1) DEPARTMENT*	(2) AGENCY BILLING CODE	IMS CODE	(3)
Department of Insurance	98501		PAGE 1 OF 2 PAGES

(4) DIVISION / BRANCH / SECTION	(5) ADDRESS
Office of the Commissioner/Executive Office	300 Capitol Mall, 17th Floor, Sacramento, CA 95814

CHECK THE APPROPRIATE BOX

(6) ☐ New schedule of records that have never been scheduled. *[Complete boxes (9)–(12)]*

(7) ☒ Revising a previous schedule. *[Complete boxes (9)–(16)] (A new approval number will be assigned.)*

(8) ☐ Amending some pages of a previous schedule. *[Complete boxes (13) - (16)] (The original approval number will remain in effect.)*

	(9) SCHEDULE NUMBER	(10) SCHEDULE DATE	(11) NUMBER OF PAGES	(12) CUBIC FEET *(Total Schedule)*
NEW SCHEDULE INFORMATION (If applicable)	COM7	6/12/18	2	
PREVIOUS SCHEDULE INFORMATION (If applicable)	(13) SCHEDULE NUMBER COM5	(14) APPROVAL NUMBER 2012-105	(15) APPROVAL DATE(S) 6/20/18	(16) PAGE NUMBER(S) REVISED

(17) FUNCTIONAL STATEMENT

Update

PART I – AGENCY STATEMENTS

As the program manager (or person authorized to sign for the program manager) directly responsible for the records listed on this records retention schedule, I certify that all records listed are necessary and that each retention period is correct. ***For revisions, all items on the previous schedule are included or accounted for on the recapitulation. Vital records identified by this schedule are protected. If protection is not currently provided but plans are underway, the details of such plans are shown in Column 48, Remarks.***

(18) SIGNATURE - MANAGER RESPONSIBLE FOR THE RECORDS	(19) TITLE	NAME - *(Printed or Typed)*	(20) PHONE NUMBER	(21) DATE SIGNED
Roberta Potter	Executive Office Operations Manager	Roberta Potter	(916) 492-3622	6/12/18

In accordance with Government Code 12274, approval of this Records Retention Schedule by the Secretary of State is hereby requested. Retention periods shown have been established in accordance with the criteria set forth by Section 1667 of the State Administrative Manual.

(22) SIGNATURE - RECORDS MANAGEMENT ANALYST	(23) CLASSIFICATION	(24) NAME - *(Printed or Typed)*	(25) PHONE NUMBER	(26) DATE SIGNED
	AGPA	Jose Regalado	(916) 492-3452	6/20/18

PART II A – SECRETARY OF STATE APPROVAL *(Per Government Code Section 12272)*

(27) SIGNATURE - CalRIM CONSULTANT	NAME - *(Printed or Typed)*	(28) APPROVAL NUMBER	(29) APPROVAL DATE	(30) EXPIRATION DATE
Ramona Gutierrez-Scholz	Ramona Gutiérrez-Scholz	2018-121	7/24/2018	7/24/2023

PART II B – ARCHIVAL SELECTION *(Per Government Code Section 12223)*

THE ATTACHED RECORDS RETENTION SCHEDULE:

(31) ☐ Contains no material subject to further review by the California State Archives

(32) ☒ Contains material subject to archival review. Items stamped "NOTIFY ARCHIVES" may not be destroyed without clearance by the California State Archives. *(Per Section 1671 of the State Administrative Manual.)*

(33) SIGNATURE - CHIEF OF ARCHIVES OR DESIGNATED REPRESENTATIVE	NAME - *(Printed or Typed)*	(34) DATE SIGNED
Michael J McNeil	MICHAEL J MCNEIL	08/02/2018

FOR ARCHIVES' STAMP

CALIFORNIA STATE ARCHIVES

**Department refers to any Agency, Department, Board, Commision, Office or Other*

STATE OF CALIFORNIA - SECRETARY OF STATE

STATE RECORDS PROGRAM

RECORDS RETENTION SCHEDULE

STD. 73 (REV. 2/2015)

(35) APPROVAL NUMBER 2018-121											(36) Page 2 of 2 Pages
ITEM #	CUBIC FEET*	CA. STATE ARCHIVES USE ONLY	TITLE AND DESCRIPTION OF RECORDS *(Double spaces between items)*	MEDIA	VITAL	RETENTION				PRA & IPA	REMARKS
						OFFICE	DEPT.	SRC	TOTAL		
(37)	(38)	(39)	(40)	(41)	(42)	(43)	(44)	(45)	(46)	(47)	(48)
1		NOTIFY ARCHIVES	Commissioner Correspondence-(Dept.Chron/Issues by Date Order)	E		Active			Active		Active until incumbent leaves office
2		NOTIFY ARCHIVES	Department Correspondence (Staff Assignments by Alpha Order)	E		Active			Active		Active until incumbent leaves office
3		NOTIFY ARCHIVES	Administrative Correspondence-Commissioner's Office (miscellaneous, budget, exec staff meetings)	E		Active			Active		Active until incumbent leaves office
4		NOTIFY ARCHIVES	Chron (Commissioner Correspondence Responses)	E		Active			Active		Active until incumbent leaves office
5			Department records, scheduling, invitations, schedules, deadlines, contracts	E		90 days			90 days		