

AUXILIARY ORGANIZATIONS ASSOCIATION

*RECORDS ACCESS  
GUIDE*

Published exclusively for member-organizations

January 2012

## RECORDS ACCESS GUIDE

### I. PURPOSE

This *Guide* offers background and a framework for member-organizations in developing access policy and practices for records that are:

- Required by law to be disclosed on some basis;
- Protected to some degree as business information (statutorily exempt from disclosure); or that may be
- Personal information held by organization (subject to third party privacy or proprietary protection).

A record may contain information elements that cross these three categories requiring discerning practices.

Auxiliary organization records **held by the university** are subject to the *California Public Records Act*<sup>1</sup>(CPRA). Certain disclosure exemptions (that is, from disclosure requests) may apply to such records, but requests and exemptions asserted are university matters. Auxiliary organizations should coordinate with the campus CPRA Coordinator and the campus-assigned University Counsel to help assure a consistent approach to records access matters.<sup>2</sup>

**Unlike governmental agencies (including CSU universities) doing the public business under the CPRA<sup>3</sup>, there is no presumption that auxiliary organization written materials are “public records.” Many auxiliary organization transactions involve strictly financial, economic, confidential or proprietary written matter warranting degrees of protection.**

**However, effective January 2012, auxiliary organization records are subject to the *Richard McKee Transparency Act of 2011*.<sup>4</sup> The McKee Act has been portrayed as “updating” the *California Public Records Act (CPRA)* or being parallel to it. More accurately, the McKee Act is a separate statutory framework (in the *Education Code*, not the *Government Code*) with provisions drawn from the CPRA.**

“Personal information” means a record or written matter about a natural person that identifies or describes matters, including but not limited to, his or her name, social security number, physical description, home address, telephone number, education, financial matters, and medical or employment history, readily identifiable to that person. “Proprietary information” includes invention data, trade secrets, business and marketing plans, salary structures, customer/client lists, contracts, computer systems buying group arrangements, security information, and employee special knowledge and skills learned on the job. Auxiliary organizations access positions over proprietary information must be consistent with McKee. **If this proprietary information is also held by the campus, it would be subject to campus access determinations under the CPRA.** It is important to understand the unique role that auxiliary organizations serve, and to appreciate the operational balance required in managing records between the principles of, and statutes concerning public access, corporate integrity, transparency and accountability, while protecting personal information, and protecting and preserving business information (some of it proprietary in nature), while meeting security needs. For this reason, a background narrative seems appropriate.

## II. BACKGROUND

*General.* All AOA member-organizations operate within the California State University (CSU). Each entity is a *nonprofit public benefit corporation* chartered under the California Nonprofit Public Benefit Corporation Law<sup>5</sup> and formed for *public or charitable purposes*. Auxiliary organizations include student body organizations.<sup>6</sup> These corporations are also each designated as *auxiliary organizations*. Clear public policy and authority by the California Legislature for auxiliary organizations to provide critical support functions to CSU campuses and the system.<sup>7</sup> Many of these services would be difficult or inappropriate for a university without auxiliary organization support.

### **A. Corporate Integrity, Accountability and Transparency**

Auxiliary organizations are not considered public (for-profit) companies. They do not file the periodic financial or annual reports, or provide other documents called for under Securities Exchange Commission rules.

While auxiliary organizations are not governmental or public agencies (and, therefore, outside the *California Public Records Act*<sup>8</sup>), they are subject to extensive oversight, and hold to strict accountability and transparency standards, including limited rights of governing directors, organization members, and the public to inspect or otherwise have access to a wide range of information held by the organization.<sup>9</sup>

A nonprofit corporation's integrity must be beyond reproach. Its actions, affairs and activities are intended to serve the public purposes for which it was formed.<sup>10</sup> As a consequence, the law sets high standards for records, reports and related member/director inspection-rights.<sup>11</sup>

Auxiliary organizations functions are strictly limited to those authorized by regulations of the Trustees,<sup>12</sup> and require appropriate operating agreements and facility leases.<sup>13</sup> The agreements/leases are a matter of public record.

Auxiliary organizations are subject to an independent annual financial audit by a certified public accountant, and the results must be published widely and be available to the public upon request.<sup>14</sup>

Federal law exercises considerable oversight over tax-exempt organizations. These laws include a strong public records inspection right. All auxiliary organizations have been determined by the U.S. Internal Revenue Service to be *Internal Revenue Code* Section 501(c)(3), 509(a) tax-exempt public charities.

Each application for tax-exempt status includes detailed organization (activities, purpose, character), governance, and latest financial information (assets, liabilities, receipts and disbursements, income sources/restrictions). The public has the right to inspect these materials, plus the IRS determination letter and any background documents relating to the determination. IRS regulations prescribe specific access procedures and limitations relating to protected information.

Furthermore, the general public has the right to inspect each organization's extensive federal annual tax return (IRS Form 990). The *Pension Protection Act of 2006* extended the inspection/disclosure requirements and penalties to include the IRS Form 990-T, the unrelated business income tax return. Stringent standards limit or prohibit activities that are not related to the exempt purpose of the organizations, and these annual filings are a sharp and comprehensive view into an organization's operational and financial affairs.

Finally, effective January 2012, auxiliary organization records are subject to the *McKee Act*. See Schedules A, D and E.

## **B. Protecting Personal Information**

Although not subject to the *California Information Practices Act of 1977*,<sup>15</sup> auxiliary organizations have an affirmative duty under several laws to protect personal information lawfully held from unauthorized use, transfer or release. See Schedule B, *Summary of Major Privacy Laws Related to Personal Information Held or Used by Organization*

Auxiliary organizations should consider policy statements that include an expression of commonly accepted fair information practices principles over personal data<sup>16</sup>:

- **Openness**

There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available for establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

- **Collection Limitation**

There should be limits to the collection of personal data and any such data should be obtain by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

- **Purpose Specification**

The purpose for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

- **Use Limitation**

Personal data should not be disclosed, made available or otherwise used for purposes other than those specified as described above, except with the consent of the data subject or by the authority of law.

- **Data Quality**

Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete, relevant and kept up-to-date.

- **Individual Participation**

An individual should have the right: a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to the individual; b) to have communicated to that individual, data relating to him or her within a reasonable time; at a charge, if any, that is not excessive; in a reasonable manner; and in a form that is readily intelligible to that individual; c) to be given reasons if a request is denied and to be able to challenge such denial; and d) to challenge data relating to him or her and, if the challenge is successful, to have the data erased, rectified, completed or amended.

- **Security Safeguards**

Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.

- **Accountability**

A data controller should be accountable for complying with measures which give effect to the principles stated above.

### **C. Protecting and Preserving Business Information**

Certain business operations necessitate information protection measures. Auxiliary organizations often provide commercial, donor, and research-related services involving “information that derives business or economic value from not being generally known, and is kept confidential through reasonable actions.” The *California Uniform Trade Secrets Act*<sup>17</sup> protects trade secrets (proprietary information) from disclosure and misappropriation. This law broadly defines proprietary information to include financial and economic data, as well as confidential information and intellectual property, and the organization should demonstrate through appropriate policy and practices the scope of such information and the steps taken to protect it from unauthorized use or release. Business information can transect all aspects of an organization’s operations, and some of it may be proprietary, some of it may involve information required by law to be disclosed on some basis, or to be personal and subject to privacy protection. See Schedule C for additional perspective.

As a corollary to satisfying business information protection standards, as well as those described in subsections A and B (whether properly disclosing or withholding information), auxiliary organizations must develop and implement internal security systems over information. The devices, methods, techniques and processes of these systems themselves need to be properly protected. It is therefore important that a records access policy extend to records that document or reveal such systems.

Additionally, recent federal anti-terrorism laws and regulations place additional information disclosure and protection requirements on higher education institutions and exempt organizations over electronic communications and dangerous substances/delivery systems.<sup>18</sup>

### **D. Critical Importance of Records Access Policy and Practices**

Auxiliary organizations have a unique linking-pin relationship with the California State University and a State Legislature charge: provide support functions distinct from those that the CSU (and its campuses) could ordinarily perform as a state agency, and to do so in a viable fashion that demonstrates both a *public benefit* character and private sector acumen. The role and relationship is a demanding one, but one that auxiliary organization governance should give clear expression through appropriate formal policy statements and practices.

No area of auxiliary organization governance and management deserves a policy-voice more than access to records. There is strong public policy in two frequently competing directions: *corporate openness* and the *rights to privacy*. Sandwiched in between is the protection of *business information*.

## **III. RECORDS ACCESS DISPOSITION GUIDANCE**

*Disclosable Information.* State and federal laws require or imply that certain auxiliary organization records shall be published or otherwise accessible by the public, governing directors, organization members, or campus, CSU or other authorized officials. Schedule A lists key corporate record categories, cites authority, and profiles disclosure processes related to them.

*Personal Information Held by Organization.* Schedule B lists, in summary, the major laws protecting personal information when used or held by the organization in the course of doing its business. The use, release or transfer of such information is subject to strict standards, and the policy statement should provide for compliance with these standards.

*Business Information.* The organization should survey for all forms of maintained business information and arrive at a consistent classification of records, set policy, and develop implementing practices. Critical record categories that are those typically considered to be deserving of scrutiny when subject to public disclosure requests. Business information should be identified in an organization's records access policy, together with procedures for their protection and any authorized release (including redaction and segregation). Keep in mind that not all business information is proprietary; some may involve accessible written matters or even personal information. Auxiliary organizations should consider website postings of non-proprietary business information (particularly records and reports required to be accessible to the public). Requests for such information can then be satisfied by providing the web link to the requester as a more effective measure of transparency.

The record categories listed in these schedules are not necessarily mutually exclusive. For example, information in personnel records may be protected from release or use on privacy rights and business information grounds.

#### **IV. POLICY IMPLEMENTATION**

Each AOA member-organization should consider using this *Guide* in developing written records access policy and practices. The objective of an organization's policy should be to balance public records access compliance and essential accountability and transparency standards with the need to protect privacy/proprietary rights and meet security requirements. Once a records access policy is in place, the governing board and management must exercise close and consistent attention to its implementation and periodic review.

Schedule D is template Records Access Policy statement. Schedule E is a template for Records Access Compliance Procedures. Organizations should consult closely with appropriate counsel and advisors in the development of policy and practices.

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Schedule A: *Disclosable Information*

Schedule B: *Summary of Major Privacy Laws Related to Personal Information Held or Used by Organization*

Schedule C: *Business Information*

Schedule D: *Records Access Policy* (template only)

Schedule E: *Records Access Compliance Procedures* (template only)

Endnotes:

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<sup>1</sup> *Cal Govt Code* §§ 6250-6276.48.

<sup>2</sup> The CSU *Records Access Manual* is a useful reference tool for requests involving documents subject to the CPRA. See: [http://www.calstate.edu/gc/Docs/Records\\_Access\\_Manual.doc](http://www.calstate.edu/gc/Docs/Records_Access_Manual.doc).

- <sup>3</sup> *Ibid* §6252(e).
- <sup>4</sup> *Cal Ed Code* § 89913 *et seq.*
- <sup>5</sup> *Cal Corp Code* §§5110 *et seq.*
- <sup>6</sup> *Cal Ed Code* §89300 *et seq.*
- <sup>7</sup> *Ibid* §89900 *et seq.* and CSU Board of Trustees policy, *Cal Code of Regs*, Title 5, at §42401 *et seq.*
- <sup>8</sup> See “Fresno Bee” case, 90 Cal. App. 4<sup>th</sup> 810 and 108 Cal. Rptr. 2d 870 (2001).
- <sup>9</sup> *Cal Ed Code* §§ 89006, 89900, 89904, 89904.5, 89905, 89906-09, 89913 *et seq.*, 89920-27; and *Cal Code of Regs*, Title 5 §§ 42402, 42403-04, 42408, 42502 and 42659.
- <sup>10</sup> *Cal Corp Code* § 5231(a).
- <sup>11</sup> *Ibid* § 6320 *et seq.*
- <sup>12</sup> *Cal Code of Regs*, Title 5, § 42500.
- <sup>13</sup> *Ibid* at §42501. Operating agreements and support service leases are accessible under the CPRA.
- <sup>14</sup> *Cal Ed Code* §89900(a); *Cal Code of Regs*, Title 5, §42408.
- <sup>15</sup> *Cal Civil Code* §1798 *et seq.* applies to most “public agencies,” as defined (not auxiliary organizations).
- <sup>16</sup> Organisation for Economic Cooperation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (available at <http://www.oecd.org>).
- <sup>17</sup> *Cal Civil Code* §§3426-3426.11.
- <sup>18</sup> See: *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits & Grantmakers Need to Know*, Day, Berry & Howard Foundation, Inc., 2004.

**SCHEDULE A**  
**Disclosable Records**

<i>Key Corporate Records</i>	<i>Authority</i>	<i>Access Requirements</i>	<i>Procedure Highlights</i>	<i>Notes</i>
<b>1. Federal: IRS Form 1023 Application for Recognition of Exemption (§ 501(c)(3) &amp; Related Documents</b>	IRC § 6104(e); Treas Regs §301.6104(d)-1(b)(3); Rev Proc 2008-2, Int Rev Bull 258	Copy of completed form + supporting materials available by organization for inspection by requester during regular business hours	Provide within 30 days of written requests; immediately if request in person; employee may be present during inspection; copy/ mailing charges must be reasonable	Donor names & addresses need not be disclosed
<b>2. Federal: IRS Form 990 Return of Organization Exempt from Income Tax</b>	IRC § 6104(d)	Copy of filed form + supporting documents for past 3 years available by organization for inspection by requester during regular business hours.	Provide within 30 days of written requests; immediately if request in person; employee may be present during inspection; copy/ mailing charges must be reasonable	Donor names & addresses need not be disclosed
<b>3. Federal: IRS Form 990-T Exempt Organization Business Income Tax Return</b>	IRC §6104(d)(1)	Copy of filed form + supporting documents for past 3 years available by organization for inspection by requester during regular business hours.	Provide within 30 days of written requests; immediately if request in person; employee may be present during inspection; copy/ mailing charges must be reasonable	Certain information on form (supporting docs) need not be disclosed (ie trade secrets).
<b>4. Articles of Incorporation &amp; Bylaws</b>	Cal Corp Code §5160	Available for directors & members* at all reasonable times during office hours.  (*Student body organizations have members; other auxiliary organizations do not)		Subject also to public inspection rights for Federal Forms 1023 & 990 (see 1 & 2 above)

Auxiliary Organizations Association  
**Records Access Guide**

**SCHEDULE A**  
**Disclosable Records**

<b>5. Audited Financial Statements*</b>	Cal Ed Code §89900(a); Cal Code of Regs §42408	Published & disseminated widely as feasible & available to public upon request	Publish report or notice of report availability in campus newspaper	Send copy to Chancellor's Office
<i>*Many organizations also publish annual reports</i>	Gov't Code §§ 12583 & 12586(e)	Organizations w/ \$2M revenue	Must be available for inspection by AG	
<b>6. Board &amp; Committee Meeting Schedule &amp; Agendas</b>	Cal Ed Code §§89921-27	One week meeting notice to individual requester or media	Board sets annual regular meeting schedule (date, time & location)	Common practice includes posting & local publishing of meeting notices
<b>7. Student Body Organizations Legislative Body Meeting Notice &amp; Agendas</b>	Cal Ed Code §89305.5-.7	Minimum 72 hour advance meeting notice posted with brief on agenda items	Body sets annual meeting schedule (date, time & location)	
		Copy of meeting agenda packet provided to requester		
<b>8. Corporate Policy Statements</b>	Cal Corp Code §5160	Available for directors & members* at all reasonable times during office hours.	Modern practice: make documents widely available to public on Internet	Subject also to public inspection rights for Federal Forms 1023 & 990 (see 1 above)
<b>9. Operating Agreements &amp; Support Service Leases</b>	Cal Gov't Code §6252(e)	Documents are considered matter of public record	Provide copy of requested document or refer requester to university contracts officer	
<b>10. Externally-sponsored Project/Program Proposals, Agreements &amp; Records</b>	Cal Gov't Code §6252(e)	Documents reviewed and/or held university employees are considered a public record	Certain project/program records may be withheld for privacy or proprietary rights reasons under CPRA exemptions	Projects/programs with "public funding" are typically open to public disclosure.

Auxiliary Organizations Association  
**Records Access Guide**

**SCHEDULE A**  
**Disclosable Records**

<b>11. Environmental Impact Reports &amp; Negative Declarations</b>	Cal Code of Regs §15800 et seq.	Public notice required of document availability	Release only when authorized by Board or designee
<b>12. State: Form CT-1 Charitable Trust Registration</b>	Cal Gov't Code §12583	Information is considered a public record	Provide most recent copy or refer requester to DOJ Website
<b>Form RRF-1 Annual Registration/Renewal Report</b>	Cal Gov't Code §12586-7		
<b>13. State: Form SI-100 Biennial Statement Domestic Corporation</b>	Cal Corps Code §6210(a)-(b)	Information is considered a public record	Provide most recent copy or refer requester to Sec of State Website
<b>14. Major Donor Report (quarterly, if organization donated &gt; \$10k for ballot measure campaigns)</b>	Cal Code of Regs §81002(a)	Information is considered a public record	Provide most recent copy or refer requester to CFPPC Website
	Cal Code of Regs §42403(c)(1)		
<b>15. Licenses &amp; Permits issued by regulating agencies</b>	Various (example: ABC License – Ca Bus & Prof Code §24046)	Typically required to be posted in conspicuous place at site of business Refer requester to licensing agency	Display for public inspection if stipulated in permit/license terms
<b>16. Any information, instrument copies, reports, books memoranda, papers, documents of title, or other corporate records</b>	Cal Gov't Code §§12584, 12588	Open to inspection by AG's Registry of Charitable Trusts	State Audit records of auxiliary organizations are subject to CPRA exemptions under. See Cal Gov't Code §6276 et seq. & §§10525, 10527 & 10527.1
	Cal Corps Code §5250		
	Cal Code of Regs §42404(b)	Open to Board of Trustees & Department of Finance	
<b>Right to inspect &amp; make copies</b>	Cal Corps Code §6334	Governing Board members	At any reasonable time
			Right balance against competing rights

Auxiliary Organizations Association  
**Records Access Guide**

**SCHEDULE A**  
**Disclosable Records**

<b>17. Limited information relating to Board elections, membership lists.</b>	Cal Corps Code §5523	Board nominee materials to members for election purposes	Provide members w/ nominee materials (cost borne by nominee) or nominee access to membership list	Applies to organizations w/ at least 500 members
<b>Limited access to corporate records</b>	Cal Corps Code §6310-38	Upon written request if reasonably related to member-requestors membership interests	Detailed procedures apply	Right must be balanced with other rights
<b>18. Employment Records</b>	Cal Labor Code §§432 & 1198.5	Employees & former employees have limited right to inspect their personnel records.		
<b>Payroll Records</b>	Cal Labor Code §226	Right to inspect or copy		

Auxiliary Organizations Association  
**Records Access Policy Development Guide**

**SCHEDULE B**  
**Summary of Major Privacy Laws Related to**  
**Personal Information Used or Held by Organization**

**California** (Cal. Const., Art. I, §§1 & 3)

**Employee Personnel Files**, confidential preemployment information – Labor Code section 1198.5

[Computer Misuse and Abuse: Criminal Sanctions - Penal Code section 502](#). In general, this section makes it a crime to knowingly access and, without permission, use, misuse, abuse, damage, contaminate, disrupt or destroy a computer, computer system, computer network, computer service, computer data or computer program. Depending on the particular violation, this section can support a variety of fines and imprisonment in criminal actions as well as remedies recoverable in civil actions.

Credit Card or Check Payment - Civil Code sections [1725](#) and [1747.08](#). Any person accepting a check in payment for most goods or services at retail is prohibited from recording a purchaser's credit card number or requiring that a credit card be shown as a condition of accepting the check ([Section 1725](#)). Any person accepting a credit card in payment for most goods or services is prohibited from writing the cardholder's personal information on forms associated with the transaction ([Section 1747.08](#)).

[Credit/Debit Card Number Truncation - California Civil Code section 1747.09](#). No more than the last five digits of a credit card or debit card number may be printed on the customer copy of electronically printed receipts.\*

[Destruction of Customer Records - California Civil Code sections 1798.80 - 1798.81 and 1798.84](#). This requires businesses to shred, erase or otherwise modify the personal information in records under their control.\*

[Eavesdropping or Skimming RFID – Civil Code section 1798.79 and following](#). This law makes it a misdemeanor to intentionally remotely read or attempt to read another person's identification document that uses radio frequency identification (RFID), without the person's knowledge or consent. It also makes it a misdemeanor to reveal the operational system keys used in a contactless identification document. Both crimes are punishable by a jail term of up to one year and/or a fine of up to \$1,500.

[Information-Sharing Disclosure, "Shine the Light" - Civil Code sections 1798.83-1798.84](#). This law lets consumers learn how their personal information is shared by companies for marketing purposes and encourages businesses to let their customers opt-out of such information sharing. In response to a customer request, a business must provide either: 1) a list of the categories of personal information disclosed to other companies for their marketing purposes during the preceding calendar year, with the names and addresses of those companies, OR 2) a privacy statement giving the customer a cost-free opportunity to opt-out of such information sharing. Financial services companies subject to the California Financial Information Privacy Act are exempted from this law. See the Office of Privacy Protection's [Recommended Practices](#) in relation to this law.

**SCHEDULE C**  
**Summary of Major Privacy Laws Relating to**  
**Personal Information Used or Held by Organization**

**Marketing to State University Alumni** - Education Code sections [89090-89090.5](#) & [92630](#). This law authorizes the alumni associations of the California State University, the University of California, and Hastings College of Law to provide the names, addresses, and e-mail addresses of alumni to certain businesses ("affinity partners") for marketing purposes, provided the associations give alumni an opportunity to opt-out of having their information shared and provided the alumni have not, while students at those institutions, opted-out of information sharing.

**Physical & Constructive Invasions of Privacy - Civil Code section 1708.8**. This law defines physical invasion of privacy in terms of trespassing in order to capture an image, sound recording or other impression in certain circumstances. It also defines constructive invasion of privacy as attempting to capture such an impression under circumstances in which the plaintiff had a reasonable expectation of privacy.

**Security Breach Notice** - Civil Code sections [1798.29](#), [1798.82](#), and [1798.84](#). This law requires a business or a State agency that maintains unencrypted computerized data that includes personal information, as defined, to notify any California resident whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The type of information that triggers the notice requirement is an individual's name plus one or more of the following: Social Security number, driver's license or California Identification Card number, financial account numbers, medical information or health insurance information. The law's intention is to give affected individuals the opportunity to take steps to protect themselves from identity theft. See the Office of Privacy Protection's [Recommended Practices](#) in relation to this law.

**Security of Personal Information - Civil Code section 1798.81.5**. This law requires specified businesses to use safeguards to ensure the security of Californians' personal information (defined as name plus SSN, driver's license/state ID, financial account number) and to contractually require third parties to do the same. It does not apply to businesses that are subject to certain other information security laws.

**Social Security Number Confidentiality - Civil Code sections 1798.85-1798.86, 1785.11.1, and 1785.11.6**. This law restricts businesses and state and local agencies from publicly posting or displaying Social Security numbers. It also bans embedding SSNs on a card or document using a bar code, chip, magnetic strip or other technology, in place of removing the number as required by law. The law takes effect gradually, from 2002 through 2007. See the Office of Privacy Protection's [Recommended Practices](#) in relation to this law.

Auxiliary Organizations Association  
**Records Access Policy Development Guide**

**SCHEDULE C**  
**Summary of Major Privacy Laws Relating to  
Personal Information Used or Held by Organization**

[Social Security Number Truncation on Pay Stubs – Labor Code section 226](#). This law requires employers to print no more than the last four digits of an employee's SSN, or to use an employee ID number other than the SSN, on employee pay stubs or itemized statements. Employers must comply by January 1, 2008.

[Online Privacy Protection Act of 2003 - Business and Professions Code sections 22575-22579](#). This law requires operators of commercial web sites or online services that collect personal information on California residents through a web site to conspicuously post a privacy policy on the site and to comply with its policy. The privacy policy must, among other things, identify the categories of personally identifiable information collected about site visitors and the categories of third parties with whom the operator may share the information. An operator is in violation for failure to post a policy within 30 days of being notified of noncompliance, or if the operator either knowingly and willfully or negligently and materially fails to comply with the provisions of its policy. This law takes effect July 1, 2004.

\* The practical effect of this California law may be limited by the federal government's enactment of the 2003 amendments to the [Fair Credit Reporting Act](#).

## **Federal**

**Electronic Communications Privacy Act of 1986** - 18 U.S. Code sections [2510-2522](#), [2701-2711](#), [3121](#), [1367](#). This law amends the federal wiretap law to cover specific types of electronic communications, such as e-mail, radio-paging devices, cell phones, private communications carriers, and computer transmissions. It also extends the ban on interception to the communications of wire or electronic communication services and sets restrictions on access to stored wire and electronic communications and transaction records.

[Family Educational Rights and Privacy Act of 1974 \(FERPA\) - 20 U.S. Code section 1232g](#). This law puts limits on disclosure of educational records maintained by agencies and institutions that receive federal funding.

[Computer Fraud and Abuse Act of 1984 - 18 U.S. Code section 1030](#). This law makes unauthorized access to "protected computers" illegal. Protected computers include U.S. government computers, computers used in interstate commerce and computers used by financial institutions. It also prohibits trafficking in computer passwords and damaging a protected computer.

## **SCHEDULE C**

### Business Information

Auxiliary organizations must operate as a business.<sup>1</sup> A business must set policy and use an information protection program to two reasons:

- Information as a resource can be expensive, often sensitive, and sometimes even perishable. Business information can be critical to a competitive posture, and may ultimately determine the viability of the organization. Without a records access policy and program, there is the profound risk of loss of information integrity, availability, confidentiality, authenticity, and utility.
- Business information often represents a substantial investment.

The value of information involving business operations and product/service strategy plans and reports, which include technical, financial and operational data, is probably equal to the value of the organization, less the value of its physical assets. Some business information may be claimed as *proprietary* or *trade secret*. In general, such information is that which has some *commercial value* and is *closely held*. All auxiliary organizations hold and use much business information that is publicly known or available. The breadth of such information is common for nonprofit, public benefit corporations, and serves to promote accountability and transparency in keeping with the organization's mission and corporate/exempt status. On the other hand, some business information is not publicly available but may have little no inherent commercial value – yet warrant close scrutiny when subject to a public records request.

It is important to discern proper categories in the development of policy and access practices, and to consistently apply those categories when using, withholding, or disclosing business information held by the organization.

The categories below are concerned broadly with business information needing protection, and specifically with information that the organization owns and has classified as *confidential* or claimed as *proprietary* (protected by law, including trade secrets and intellectual property records).

## **SCHEDULE C**

### Business Information

#### *Information Classified as Confidential*

The confidentiality of specified business information classifications should be limited in nature, and not used to circumvent disclosure laws or corporate principles of accountability and transparency. Typical to this records category are internal reports, memoranda, or correspondence relating to proposed or recommended business actions or operations, certain accounting transactions, operational or strategic plans, personnel matters, (salaries/benefits, disciplinary issues), investment, expense, income data details, and customer/sponsor/donor lists.

Such records or component information therein, may overlap with the personal information and proprietary information categories.

#### *Proprietary Information*

Information that is closely held within the organization, that is, controlled and not generally known, even within the organization, and has commercial value, that is, it contributes in a substantial manner to the entity's viability. If an organization asserts certain business information is a trade secret, it must have established and be able to demonstrate the practice of protecting that information. Merely holding a piece of business information a secret does not make it commercially valuable. Invention records and even copyrighted materials may be trade secrets.

#### *Proper Classification of Protected Business Information*

In order to assure that business information is properly protected, the organization must engage in a structured effort that *classifies* all such records. The process includes defining classifications, setting protection procedures for each classification, and training those involved in processing records in the protection procedures.

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<sup>i</sup> See *Cal Ed Code* §§ 89904, 89904.5, 89904.6.

## RECORDS ACCESS POLICY

[Auxiliary Organization Template]

I. Purpose and Scope. This statement establishes policy over public access to and the protection of records held by the [organization name]. Records held include those prepared, used, owned or maintained by this organization. Such records held by [University name] are subject to the *California Public Records Act*. This policy shall be interpreted consistent applicable law, and CSU or University policy.

### II. References.

- A. *The Richard McKee Transparency Act of 2011* (the Act), California Education Code, at Section 89913 *et seq*.
- B. *California Public Records Act 2004* (CPRA), California Government Code Section 6250 *et seq*, particularly Section 6254 and 6255.
- C. *U.S. Internal Revenue Code* Sections 6033(a)(1) and 6033(b); *Reg. § 1.6033-2 et seq*.
- D. *California Constitution*, Article I, Sections 1 and 3(b)(1)(2) & (3).

### III. Definitions.

A. *Disclosable Information* means any “identifiable writing” held by the organization available to the public upon request to inspect or copy. The Act refers to such information as “public records.”

B. *Fiduciary Interests* of the organization include matters that bear significantly upon its financial or operational security or stability, and therefore deserving of close scrutiny when the subject to a records access request pursuant to the Act.

C. *Identifiable writing* means 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, including, but not limited to, letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

### IV. Policy Provisions.

A. General. This organization promotes and assists the University by providing essential and integrated activities in a transparent and accountable manner. It is fully recognized that the organization’s clients, customers, members, sponsors, donors, as well as the public, deserve

access to pertinent information about the conduct of the organization. Such access shall be balanced with the need to protect both individual information privacy rights to personal information, including those of employees, donors and volunteers, as well the fiduciary interests of the organization.

B. Disclosable Information. To the maximum extent feasible, this organization shall post and maintain an accessible Internet Website containing a comprehensive range of information, including governance, financial, and other reports and documents of public value and interest.

Upon request, a record that reasonably describes disclosable information held by the organization shall be promptly made available within a reasonable for inspection, or to obtain a copy upon payment of a fee covering the direct cost of duplication. Any reasonable segregable portion of a record shall be disclosed after redacting those portions exempt from disclosure by law.

Such information is subject to Act request, response and disclosure requirements set forth in the written compliance guide.

C. Disclosure Exemptions. Certain records retained by the organization are exempt from disclosure:

1. Pending claims and litigation;
2. Attorney records;
3. Personnel, medical or similar records;
4. Preliminary notes, drafts & memoranda;
5. Investigative records & intelligence information;
6. Identity of donors, prospective donors, or volunteers;
7. Personal financial information, estate planning information, and gift planning information of donors, prospective donors, or volunteers;
8. Donor private trusts or annuities under organization administration;
9. Organization fundraising plans, fundraising research, and solicitation strategies (not otherwise statutorily protected);
10. Trade secret information;
11. Identity of students and alumni; or
12. Information within the *deliberative process privilege*.

The above exemption categories are subject to statutory exceptions, limitations or qualifications, set out in the compliance guide. Disclosure exemptions must be claimed as a basis for withholding requested records. In certain circumstances, the disclosure of a record otherwise claimed as exempt constitutes a waiver of exemption.

D. Other Provisions. Organization contracts entered into on or after January 1, 2012 shall contain provisions consistent with the Act. The organization shall not delay or obstruct the inspection or copying of its public records, and shall assist persons in making focused and effective public record requests.

V. Policy Implementation. This policy shall be implemented by management through a written compliance guide developed in coordination with the University, and consistent with applicable law. Management shall file periodic reports with the Board of Directors on: request trends and developments; relevant administrative matters; and any policy revision recommendations.

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## SCHEDULE E

(Name of Auxiliary Organization)

### Records Access Compliance Procedures

[Template Only]

A. Purpose and Background. These procedures implement the organization's *Records Access Policy* and shall be administered consistent with Education Code Section 89913 *et seq.*

The *Records Access Policy* requires management to establish written procedures through which requests for public records held by the organization shall be received, processed and disclosed or exempted from disclosure.

The term *public records* includes any held disclosable information relating to the conduct of the organization available to the public upon request for inspection or to copy, that are *identifiable writings* statutorily defined as "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 symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

These procedures do not apply to records subject to a request under the *California Public Records Act, Government Code* Section 6250 *et seq.*

#### B. Public Records Requests

1. *Form and Focus of Request*. A records request may be informal or formal (in writing), and may seek to inspect and/or to copy the records sought. A records request should reasonably describe an identifiable record, and assigned staff shall assist the requester in making the request focused and effective -- one that reasonably describes an identifiable record or records.

2. *Availability of Records*. Public records shall be available for inspection or to copy at all times during the organization's office hours through the process described below.

3. *Records Disclosure*. The organization shall make the requested public record promptly available to person making the request within a reasonable time.

## SCHEDULE E

4. *Fee for Copy of Requested Records.* A request for a copy of disclosable information requires payment of the established fee covering only the direct cost of duplication.

5. *Written Requests.* In response to a written public records request, the organization shall determine, within ten (10) calendar days of receiving the request, whether the request, in whole or in part, seeks disclosable information held by the organization. The requester shall be notified in writing without delay of the determination and the reasons explaining the determination. If requested disclosable information is found, the notice shall include an estimated date and time when the requested public records will be available to the requester. In unusual circumstances, reasonably necessary to the proper processing of a particular request, this time limited may be extended as set forth below.

C. Time Extension for Initial Response to Request. There may be a need to:

1. Search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

2. Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request;

3. Consult with another entity having a substantial interest in the determination of the request, or among two or more components of the entity having a substantial subject matter interest in the records requested; or to

4. Compile data, to write programming language or a computer program, or to construct a computer report to extract data.

In such unusual circumstances, the ten (10) day notification may be extended for up to an additional fourteen (14) days by a written notice from the [title of chief executive officer] or a designee, to the requester stating the reasons for the extension and the date (but not beyond the maximum extension period) a determination on the request is expected to be sent.

D. Disclosing Records in Electronic Format

1. *General.* An organization public record in electronic format shall, upon request, make that record available in the electronic format in which it is held, unless otherwise prohibited by law. A copy of such records shall be provided in the in the electronic format requested if that format is used by the organization to make copies for its own use or for others.

## SCHEDULE E

2. *Copy Cost Recovery.* The cost of reproducing a requested public record in electronic format used by the organization shall be limited to the direct cost of copying the record.

However, a requester shall bear the cost of producing a copy of a public record, including the cost of record construction, and the cost of programming and computer services necessary to produce a copy of such a record if either of the following applies:

- a). The record is only produced in electronic format by the organization at otherwise regularly scheduled intervals; or
- b). The request would require data compilation, extraction, or programming to produce the record.

3. *Records Also Available in Electronic Format.* If a public record is requested in a non-electronic format, and that record is also available in an electronic format, the requester may be informed that the record sought is available in electronic format.

4. *Limitations on Electronic Records Availability.* The organization is not required to reconstruct a record in an electronic format if the public record sought is no longer available in such a format. The organization is not permitted to make a requested public record only available in electronic format. The release of a requested public record in electronic format is not required if it would either jeopardize or compromise the security or integrity of the original record, or of any proprietary software with which it is maintained; or would result in public access to organization records otherwise restricted by law.

E. Request Evaluation. Upon receiving a request for public records, the organization shall engage in a coordinated and rigorous evaluation to verify that the records sought are: (1) an identifiable writing; 2) maintained by the organization; 3) disclosable in whole (or in part requiring redaction and determination notice); 4) held in a format consistent with the request; and 5) available for request response within statutory limits (or requiring time extension).

*[Add addition provisions relating to detail request processing, including the role of the campus records request coordinator/single-point-of-contact in the handling of organization records requests.]*

F. Redaction Required. Any redaction required to records sought by the requester shall be under taken by assigned staff separate from staff locating the requested records. Contemporary redaction techniques shall be employed. See *Redaction Guide*.

G. Response Including Disclosure Denial Determination. A response to a written public records request that includes a disclosure denial, in whole or in part, shall be in writing, setting forth the basis for denial, and signed by the organization's official (with typed name and title) responsible for the determination.

H. Disclosure Exemptions

## SCHEDULE E

1. *General.* To justify withholding a requested record, or portions thereof, the organization shall demonstrate in writing to the requester that the information is exempt by law, or that, on the facts of the particular request, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of that information. Reference: *Records Access Guide* relating to personal and business information subject to protection.

The purpose for which a record is requested is not a basis for withholding a record otherwise subject to disclosure.

Contracts entered into between the organization and another party after January 1, 2012 containing a provision preventing disclosable information from being provided in response to a records request for such information shall not be a basis for a disclosure denial determination. Note: such nondisclosure contract provisions are void and unenforceable.

### 2. *Specific Disclosure Exemptions*

- a). Information that would disclose the identity of a donor, prospective donor, or volunteer.
- b). Personal financial information, estate planning information and gift planning information of a donor, prospective donor, or volunteer.
- c). Personal information related to a donor's private trusts or a donor's private annuities administered by the organization.
- d). Information relating to fundraising plans, fundraising research, and solicitation strategies to the extent that these activities are not otherwise statutorily protected. References: *Education Code* Section 99040, *Evidence Code* Section 1060, *Government Code* Section 6254(k).
- e). The identity of students or alumni protected under federal law applicable to the CSU. Note: see exemption exclusion below.
- f). Information, including a formula, pattern, compilation, program, device, method, technique, or process constituting trade secrets, defined by *Civil Code* Section 3426.1, that does both of the following:
  - 1). Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its value from its disclosure or use; and
  - 2). Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

## SCHEDULE E

g). Information exempt under *Government Code* Section 6254 (documents prepared in connection with filed litigation) or Section 6255 (“deliberative process privilege” using the *public interest balancing test*, See Section X(1) *General* above).

3. *Exemption Exclusions*. The above exemptions shall not apply to records containing any of the following information:

a). The identity of students or alumni who are organization employees [or governing board members of student body organizations].

b). The amount and date of a donation.

c). Any donor-designated use or purpose of a donation.

d). Any other donor-imposed restrictions on the use of a donation.

e). The identity of a donor who, in any fiscal year, makes a gift or gifts, in a *quid pro quo* arrangement, where either the value of the benefit to the donor received is in excess of \$2,500, or the benefit would be impermissible under state or federal law. Note: the above monetary threshold shall be adjusted each January to reflect the percentage change in the CPI, rounding to the nearest \$1,000.

f). Self-dealing transactions (defined under *Corporations Code* Sections 5233 and 5236).

g). Instances in which a volunteer or donor is awarded, with 5 years of the service or gift date, a contract with the organization or the University that was not subject to competitive bidding.

4. *Waiver of Exemptions*. When the organization (including a member, agent, volunteer, or officer acting within the scope of assigned duties or affiliation) discloses held information pursuant to a records request that is otherwise exempt from disclosure, the disclosure constitutes an exemption waiver from future requests for the disclosed information, except as provided below.

5. *Exemption Waiver Exceptions*. The following are not subject to the Exemption Waiver:

a). Disclosures made to a donor or prospective about that donor’s donation or prospective donation to the organization.

b). Disclosures made to a volunteer or prospective volunteer about that volunteer’s services to the organization.

c). Disclosures made through other legal proceedings or as otherwise required by law.

## SCHEDULE E

d). Disclosures within the scope of a disclosure required by law that limits disclosure of specified writings to certain purposes.

e). Disclosures described in *Education Code* Section 89916(a) to an auditor conducting an audit.

f). Disclosures described in *Education Code* Section 89916(a) to a bank or similar financial institution in the course of ordinary financial transactions, or in response to a request from the bank or other financial institution relating to the ordinary delivery of financial services.

I. Requester Remedies. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any record or class of records maintained by the organization under the *McKee Act*. Reference: *Education Code* Sections 89917 and 89917.5.

Adopted: [Date]

Name and Signature of Authorized Officer/Manager