CA|RR|D Californians Advocating Responsible Rail Design

July 26, 2011

Via email

Dear Board Member,

We have made multiple requests to the California High Speed Rail Authority under the California Public Records Act ("Act") that have not been fulfilled, in clear violation of state law. We would like immediate access to the information we have requested. In addition, in accordance with California Government Code 6253.4, the Authority should adopt regulations stating the procedures to be followed making its records available and make such procedures publicly available.

The Public Records Act

The Public Records Act was originally enacted by the California legislature to assure the public of access to information of how their business is being conducted. In 2004, Proposition 59 was approved by 83% of the electorate, enshrining in the California constitution transparency as a constitutional duty owed to the people, to whom officials are accountable.

The law is very straightforward. Agencies are to respond within 10 calendar days to requests. At the time of the response, there are only 3 possibilities. (1) The records are produced; (2) the agency needs up to 2 additional weeks because the records are offsite or a key person is not available; or (3) the records are not produceable because of one of the few, narrow exemptions to the Act (generally regarding privacy).

In addition, agencies are to help the public frame their request to find documents that provide the information they are seeking and even oral requests are to be honored.

Increasing difficulty receiving information

Our group's mission specifically includes ensuring that all aspects of the high speed rail project are conducted with transparency. The California High Speed Rail program is the largest infrastructure project contemplated in the state's history. The Authority operates with significant discretion in how large sums of public money are spent and in how the project shapes our state. We are very frustrated with the challenges of getting the Authority to release information that we believe is in the public interest and we understand that other members of the public have had similar experiences. This is simply unacceptable conduct for an agency, even one with a limited number of staff members.

The Authority has attempted to withhold documents by labeling them as "draft." In a number of cases, the Authority has tried to claim that if it does not officially accept a document provided by a consultant that it is a draft and exempt from disclosure. It is well established in case law that the "draft" exemption is very narrow and such labeling is irrelevant to disclosure status.[1]

[1] Draft documents are only exempt if they meet all three tests: (1) the document is a preliminary draft, note, or memorandum;(2) the agency establishes that the plan is not retained in the ordinary course of business; and(3) the public interest in withholding the plan clearly outweighs the public interest in disclosure. Even if a document meets all three requirements, factual information in otherwise exempt drafts is not exempt from disclosure. Avoiding public confusion or misperception as a rationale for withholding government documents was rejected by the California

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Ridership peer review panel

We will use one particular incident to illustrate our interactions with the Authority regarding public records requests.

We have a long-standing interest in the ridership model for the project. The model underpins almost every aspect of the project and our analysis revealed not only significant problems with methodology, but also issues with process. Significant aspects of the model differed substantially from the published documentation, a fact only brought to light by a public records request made by our group.

Our analysis led to review of the model by the University of California Institute of Transportation Studies. Their concerns led Authority CEO Roelof van Ark to convene a special ridership peer review panel that would report directly to him. As Mr. van Ark noted at a recent board meeting, it is crucial for the Authority to have "defensible" ridership forecasts.

Mr. van Ark has noted the existence of such a panel in public comments, although no details of its workings have been disseminated since discussions last year with the legislature regarding its formation. Through public records requests, we received an internal memo regarding the group's formation, the presentation Mr. van Ark made at its initial meeting in January and a copy of the contracts with each member covering the first meeting.

The internal memo noted that while there would be a final report, "on-going communications about model development and application" were vitally important to the functioning of the group.

Indeed, the contracts specified that the panel was to provide both notes and a report within 15 days from the initial meeting held in January 2011. The 5 members of the panel were to be paid up to a total of $187,800 for their work related to this initial meeting.

We made an initial request for the meeting notes and report on March 22 and were told that no such documents existed.

Our understanding is that the peer review panel did submit the deliverables in their contract by April 21st. The Authority has not answered basic questions about the process nor made these available to us or to the public. We have made numerous follow up requests for the documents and for the correspondence with Frank Koppelman, the chair of the peer review committee. These have been made via email and in person at meetings in Sacramento and Bakersfield. Below is a timeline of the correspondence between CARRD and the Authority (CHSRA) on this topic.

Supreme Court long before the enactment of the California Public Records Act. The high court in Coldwell v. Board of Public Works, 187 Cal. 510, 520 (1921) concluded that if draft versions of government records "were writings of public interest, disclosure could not be impeded with the claim that they were preliminary in nature, 'tentative and...liable to error or alteration...' ".

"If preliminary materials are not customarily discarded or have not in fact been discarded as is customary they must be disclosed." – California Court of Appeal in Citizens for a Better Environment v. Department of Food & Agriculture, 171 Cal. App. 3d (3d Dist. 1985).

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Timeline

March 22 CARRD: Initial request

March 24 CHSRA (Rachel Wall): Nothing available

April 6 CARRD: Request again

April 8: CHSRA (Jeff Barker): Nothing available

April 8 CARRD: Request for correspondence with Frank Koppelman

April 21 CARRD: Followup on April 8th request, extending time period to April 21st

April 21 CHSRA (Jeff Barker): We are moving, will be next week

April 25 CARRD (in person and email): We would like anything that has been submitted by peer review

April 25 CHSRA (Jeff Barker): There is nothing

April 28 CHSRA (Jeff Barker): Move is complete, will give status end of next week

May 11 CARRD: Where are the documents?

May 11 CHSRA (Jeff Barker): Request seems easy; end of next week

June 1 CARRD: Where are the documents?

June 7 CHSRA (Jeff Barker): Coming at the end of the week

June 20 CARRD: Where are the documents?

June 21 CHSRA (Jeff Barker): I am getting some help. Will let you know if more than a couple of days

June 30 CARRD: Where are the documents? We offered previously to help implement a tracking system. Let's talk!

July 14 CARRD (at board meeting): Where are the documents?

July 14 CHSRA (Jeff Barker): There are no documents; we are busy; any documents are drafts; you just want to make us look bad on your website

July 26 Nothing received to date

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We are requesting the board's assistance in making public the relevant documents, as well as establishing policies and procedures to be followed for all future public records requests.

Thank you very much.

Regards,

Elizabeth Alexis

Co-founder, CARRD