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Community Guide to Environmental & Occupational Safety Laws - Part I - Right to Know Laws: How to Obtain Information About Environmental Hazards in Your Community & Workplace

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**COMMUNITY GUIDE TO ENVIRONMENTAL &
OCCUPATIONAL SAFETY LAWS**

**PART I
RIGHT-TO-KNOW LAWS:
HOW TO OBTAIN INFORMATION ABOUT
ENVIRONMENTAL HAZARDS IN YOUR
COMMUNITY & WORKPLACE**

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School of Law**

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PART I

RIGHT-TO-KNOW LAWS

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FORWARD

The Environmental Law and Justice Clinic ("ELJC") and the Women's Employment Rights Clinic ("WERC") of Golden Gate University School of Law developed this community guide to assist you and your community in addressing environmental pollution and occupational safety concerns. It explains several state and federal environmental and workers' safety laws, and provides an overview of several governmental agencies responsible for enforcing these laws. We hope you will find this community guide useful, such as when you want to identify and contact a governmental agency, obtain information about an environmental hazard in your neighborhood or workplace, participate in an environmental decision-making process, or voice your concerns on a particular environmental issue at a public hearing.

There are three parts to this community guide. Part I focuses on those laws concerning access to public information and a community's and worker's right to know. This information will help you obtain information about environmental pollution and possible hazards in your community or workplace. Part II focuses on specific environmental statutes, such as the federal Clean Water Act and Clean Air Act, and will help you understand and address a particular environmental

pollution problem. Part III focuses on employment laws which seek to protect workers and promote workplace safety.

Please let us know if our community guide is useful. We welcome your comments and suggestions on how we can improve this guide. The Environmental Law and Justice Clinic and Women's Employment Rights Clinic wish to acknowledge and thank the Corporation for National Service and United States Environmental Protection Agency for their financial assistance and support.

DISCLAIMER

This community guide is intended as advisory and informational guidance only. It is designed for community groups, public-interest organizations and workers who are interested in right-to-know laws. This information is not intended as legal advice because the law can be interpreted differently depending upon the particular facts of each case.

While we have used our best efforts and taken every precaution in preparing this community guide, we assume no responsibility for any errors and omissions. Furthermore, neither the Environmental Law and Justice Clinic nor the Women's Employment Rights Clinic assume any liability for damages resulting from the use of the information in this guide.

Although the information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement number EQ999101-01-3 to Golden Gate University School of Law, it has not been subjected to the Agency's publications review process and therefore, may not reflect the views of the Agency and no official endorsement should be inferred.

* * *

MISSION STATEMENTS

ENVIRONMENTAL LAW AND JUSTICE CLINIC

The **Environmental Law and Justice Clinic ("ELJC")** of Golden Gate University School of Law was established in the spring of 1994 and provides free legal services and education on environmental justice issues to San Francisco Bay area residents, community groups and public-interest organizations. ELJC assists communities bearing disproportionate environmental burdens, particularly communities of color and low-income neighborhoods. ELJC addresses a range of environmental justice issues by offering a combination of services: legal counseling and representation; community education workshops and guidebooks; and policy and legislative analysis.

ELJC also provides students with opportunities to develop their practical legal skills while serving these communities, by allowing students to perform client interviews, counseling, problem solving, drafting legal documents and by appearing at hearings. Our law students are considered the core of ELJC's staff and participate in all aspects of the cases, while supervised by ELJC's two co-directors, a staff lawyer and a graduate fellow. This enables our Clinic to deliver high-quality, free legal services while allowing law students to become effective environmental advocates.

WOMEN'S EMPLOYMENT RIGHTS CLINIC

The **Women's Employment Rights Clinic ("WERC")**, started in August 1993, is also part of the Golden Gate University School of Law. WERC advises, counsels and represents clients in employment-related matters, particularly low-income clients who often cannot afford legal services when confronting employment problems. WERC is staffed by law students, under direct supervision of WERC attorneys, who are also professors at Golden Gate University School of Law.

WERC clinical students and attorneys counsel clients on employment matters, including issues relating to workplace safety and illness prevention. WERC also handles unemployment insurance appeals, wage and hour claims heard by the State Labor Commissioner, and helps clients file employment discrimination complaints with state or federal discrimination agencies. WERC often advises clients on resolving employment problems informally, without having to file charges or be formally represented by an attorney. When a client is unable to resolve an employment problem on her own, WERC carefully evaluates the case to determine if formal legal representation can be provided.

If you need legal assistance with environmental or employment problems, you may contact ELJC or WERC, respectively, by calling (415) 442-6647.

CHAPTER 1

GENERAL INFORMATION ABOUT LAWS

I. INTRODUCTION

The United States Congress, state legislatures and local governments have adopted numerous laws to protect the environment, workers and public health. Administered and enforced by different government agencies, these laws are developed in a variety of forms and called statutes, acts, ordinances, rules or regulations, depending on what level of government developed them. Also, courts can interpret and apply laws to a particular set of circumstances; court decisions, often called opinions, then become part of the law. Without a doubt, trying to address an environmental pollution problem or understand your rights under numerous laws can be overwhelming.

This chapter covers basic concepts and explains legal terms, principles and research techniques. Chapter 1 begins with general information on where to find a law and explains what a citation is and the difference between two types of laws -- "statutory law" and "case law." Next, we offer some advice to help you understand and interpret what a law really means. Finally, this chapter provides some suggestions on how local residents and workers can effectively make their concerns known and locate legal assistance when necessary.

II. FINDING THE LAW

A. Federal Statutes Adopted by the United States Congress

Federal laws are written and enacted by the United States Congress and referred to as "statutes" or "acts." Some of the more common federal environmental and worker protection statutes include: the Clean Water Act, the Clean Air Act, a toxic site cleanup law called the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), the Endangered Species Act, and the Occupational Safety and Health Act ("OSHA"). Federal statutes adopted by Congress are codified and appear in publications called the *United States Code (U.S.C.)* or the *United States Code Annotated (U.S.C.A.)*. The annotated version is a more comprehensive resource because it contains references to other materials, such as court cases or notes reflecting the statute's history. It also contains the most up-to-date information on the statute itself, such as recent amendments or changes.

A reference to a statute or law is called a "citation." Citations are simply abbreviations written in a standard form to tell you exactly where the law can be found. For example, to find the Endangered Species Act, you would use its citation, which is "16 U.S.C. §§ 1531-1544." This citation tells you that the Endangered Species Act is found in Title 16 of the *United States Code* beginning

at section number 1531 and continuing through section number 1544. The symbol "§" is used to represent section numbers. Since both the U.S.C. and U.S.C.A are organized identically, the same statute can be found using either "16 U.S.C. §§ 1531-1544" or "16 U.S.C.A. §§ 1531-1544."

Sometimes, researching federal laws can be confusing because a new law may have more than one citation. After a legislative bill is enacted by Congress and signed into law by the President, it is identified as a "public law" and assigned a specific number. This creates its first citation. The new law then appears in a publication called *United States Statutes at Large*, which is the official compilation of statutes passed by Congress and executive orders issued by the United States President. When a law appears in this publication, this creates its second citation. When the same new law is subsequently codified and integrated into the numbering system of the U.S.C., this creates its third citation. Consequently, one federal law can have three citations. Fortunately, the *United States Code* contains a table to identify the applicable U.S.C. citation for any corresponding *United States Statutes at Large* citation.

The different citations used for identifying a federal law is illustrated by the following example. In 1972, Congress enacted the Federal Water Pollution Control Act (also known as the "Clean Water Act") to protect our nation's waters.

This law was originally identified as "Public Law 92-500." The first number in the public law citation identifies the session of Congress which passed the bill (in this example, the 92nd Congress). The second number is the identification number assigned to the new law by Congress. Thus, the citation above identifies the Clean Water Act as public law number 500 of the 92nd Congress. The Clean Water Act was then published in the *United States Statutes at Large* and identified by the citation "86 Stat. 816." This means that the Clean Water Act can be found in Volume 86 starting on page number 816 of the *United States Statutes at Large*. The Clean Water Act was then codified and integrated into the *United States Code*. This created another citation for the Clean Water Act, "33 U.S.C. §§ 1251-1387." This citation means that the Clean Water Act may be found in Title 33 of the U.S.C., starting with section number 1251. In effect, the Clean Water Act may be identified by using any of three citations: Public Law 92-500, 86 Stat. 816, and 33 U.S.C. §§ 1251-1387.

B. Federal Rules and Regulations

After a statute is adopted by the United States Congress, it is usually implemented and administered by a government agency. In carrying out the law, a government agency often develops a set of administrative standards and

procedures, which identify how the statute is to be put into effect and enforced.

The standards and procedures developed by government agencies are called rules and regulations. Rules and regulations may state an agency's view of what an existing law requires, or they may set forth additional standards or policies themselves. For example, Congress enacted environmental protection laws such as the Clean Water Act and the Clean Air Act, and then assigned the United States Environmental Protection Agency ("U.S. EPA") responsibility to administer and enforce these laws. The U.S. EPA adopted detailed rules and regulations to implement these statutes. To understand an environmental law, you should read not only the statute, but also the administrative rules and regulations developed by the government agency for that particular statute.

Federal regulations are published in the *Code of Federal Regulations*, or "C.F.R.," which contains all regulations adopted by federal agencies. Currently, there are 50 "Titles" in the C.F.R., organized by different subject areas. For example, you can find the rules and regulations for most major environmental laws in Title 40 of the C.F.R., including U.S. EPA's rules and regulations for air quality, water quality, hazardous waste, solid waste, pesticides and toxic substances.

When researching federal laws, you may find citations to the regulations, such as "40 C.F.R. § 125.1 et seq." This means that these regulations may be found in Title 40 of the *Code of Federal Regulations* at section 125.1. The "et seq." portion is a Latin abbreviation and simply means that the regulations are continued in subsequent sections of the same title. Other titles of the C.F.R. which provide regulations concerning environmental protection and workers' safety requirements include: Title 10 (Energy); Title 29 (Labor); Title 36 (Parks and Forests); Title 43 (Public Lands); and Title 50 (Wildlife and Fisheries).

Federal regulations are revised and updated regularly. To stay informed, it is important to review the most recent edition of the *C.F.R.* Also, proposed and adopted revisions to federal regulations are described in the *Federal Register*, a daily publication. The *Federal Register* is the United States government's official means of notifying the public of federal agency actions and proposed actions, including notices of proposed and new regulations.

In addition, updates of federal regulations are published monthly in the *List of C.F.R. Sections Affected*, a pamphlet which describes any changes made to the regulations during the past month. The back of each volume of the *C.F.R.* also contains a *List of CFR Sections Affected*, which provides a chronological list of changes to the regulations in the volume.

C. State Laws and Regulations

Similar to the federal government, state legislatures and state government agencies develop and administer numerous environmental protection and workers' safety laws and programs. Sometimes, both state and federal laws are in effect; if so, you need to determine how both sets of laws affect your environmental concern and whether more than one government agency is involved with the issue.

Often, states receive approval from the federal government to implement a federal environmental statute and will do so as part of, or in conjunction with, the state's environmental protection program. For example, in California, the Air Quality Management Districts are responsible for implementing the state's air quality laws, as well as many of the requirements of the federal Clean Air Act.

In California, as in all states, a proposed law (often referred to as a "bill" or "measure") is usually introduced by a member of the state legislature, in the state Assembly or state Senate. That bill is assigned a number and may be referred to as Assembly Bill ("A.B.") or Senate Bill ("S.B.") with its assigned number (example: AB 1234 or SB 1234). Alternatively, in California, a measure can be introduced by voter initiative and, if adopted at an election, the bill becomes law.

Similar to federal laws, California state laws are identified by citations. Citations for California laws indicate the year of the legislative session during which the law was enacted and include an official chapter number. For example, using the hypothetical Assembly Bill No. 1234 (A.B. 1234), if it was enacted by the 1994 California Legislature and assigned a chapter number 5678, then it would have the following citation: "Stats. 1994, c. 5678 (A.B. 1234)."

After a bill is adopted by the voters by referendum or by the state legislature, it is codified and published in two publications called *West's Annotated California Codes* and *Deering's California Codes*. The California Codes are organized by subject areas. Many key California environmental laws may be found in Division 20 of the Health and Safety Code. For example, the California laws regulating hazardous waste facilities are found in Health and Safety Code, Division 20, Chapter 6.5; the Safe Drinking Water and Toxic Enforcement Act of 1986, also known as "Prop. 65," which regulates chemicals causing cancer or reproductive toxicity, may be found in Health and Safety Code, Division 20, Chapter 6.6. Other codes also provide environmental protection laws. An important environmental law, the California Environmental Quality Act, or "CEQA," is found in the California Public Resources Code, Division 13.

Similar to federal laws, state statutes are implemented by different state governmental agencies, which often develop administrative rules and regulations for each of the laws. California environmental and occupational safety regulations can be found in the *California Code of Regulations ("C.C.R. ")*, under numerous "titles," including Title 8 (California Occupational Safety and Health regulations); Title 17 (air quality); Title 19 (emergency releases); Title 22 (toxics); and Title 23 (water quality). Title 26 of the C.C.R. contains a compilation of all California toxic regulations.

D. Local Laws and Ordinances

Local governments also adopt their own municipal laws and ordinances to regulate activities affecting the environmental and public health. For example, a local government's zoning ordinances or nuisance laws may limit or restrict certain types of land uses or industrial activities because of their environmental impacts. These laws can usually be found in your local law library or local public library. Generally, a public library will carry only the local ordinances adopted by that particular county or city. If you are unable to find a particular local ordinance or to ensure that you have researched all the applicable local laws, contact your local city attorney's office for information on local municipal codes.

E. Laws Developed By Courts

A final source of environmental laws is the decisions by courts. Courts interpret the laws adopted by Congress, state legislatures and local governments when applied to a particular set of circumstances. When it is unclear what a law really means or there is disagreement over what a law means, the courts may determine what the legislature intended. The rulings of the courts, known as "case law," have the same force of law as statutes or regulations.

Different courts have authority or "jurisdiction" over different laws. Depending upon which court has jurisdiction over a law in question or the parties in the lawsuit, a case may be brought before a state or federal court. Generally, cases involving federal laws enacted by Congress, such as the Clean Water Act and Clean Air Act, are brought before federal courts.

Federal courts have three levels. In most situations, first is the trial court level consisting of federal district courts. This court is usually the first forum to hear a case when a complaint is filed. Second is the appellate level, involving federal circuit courts. After a decision is made by a district court and an appeal is filed by one of the parties, the case is then heard in the federal circuit court. The last level is the United States Supreme Court, where a case may be heard upon

appeal from the federal appellate court. Cases may also be heard at the U.S. Supreme Court which are appealed from a state's highest court.

Federal court decisions are published in three different reports, depending upon which court decided the case. Cases heard at the trial level are found in the *Federal Supplement*. Cases heard in federal appellate court are found in the *Federal Reporter*. The United States is divided into nine circuits, with several states comprising one circuit. The ninth circuit includes California, Oregon, Hawaii and Washington. Therefore, any case citation with "(9th Cir. 1989)" means that the case was heard in the ninth circuit court of the federal appellate system during 1989. Finally, cases heard in the U.S. Supreme Court are found in the *United States Reports* or the *Supreme Court Reporter*.

Citations to all these publications are organized by volume number and page number. For example, in *Chevron U.S.A., Inc. v. Aguiland*, the citation "496 F. Supp. 1038" indicates that this case can be found in Volume 496 of the *Federal Supplement* on page 1038.

Unlike the federal system, in which some district court decisions are published, California trial court cases are not published. Only state appellate cases and state Supreme Court cases are published for public review, and are found in the *California Appellate Report* and the *California Report*. These cases are

organized by volume number, series number and page number. For example, a citation to "45 Cal. App. 3d 1458" means that a case can be found in volume 45 of the third series of the California Appellate Report on page 1458.

In addition to the legal publications discussed above, there are computer-based legal research systems, called Lexis and Westlaw, which can be helpful to locate laws and court decisions. Both Lexis and Westlaw are comprehensive and up-to-date, and provide copies of all federal and state statutes, regulations and published court decisions. Local law libraries in urban centers often maintain one or both of these computerized research systems for the public's use and charge only a small fee.

III. INTERPRETING A LAW

After deciding which particular law deals with your concerns, understanding and interpreting the law is next. Environmental statutes can be particularly complex and difficult to understand. Often it will be difficult to know exactly what the law is saying even after reading it. Legal guidelines and law practice books can help explain what a particular law means and can usually be found in your local law library or public library. Another good source for

interpreting the law is the published decision issued by the courts, called "case law." As discussed, the courts are often called on to interpret a particular law.

Finally, when reading any law or statute you should realize the importance of the verbs describing activities or requirements. The use of "must," "shall," "should" or "may" indicates very different levels of action a government agency or corporation can or is required to take.

"Must" or **"shall"** means the action described is mandatory. The party has no discretion or choice and must follow the requirement as stated; failure to perform is a violation and actionable in court.

"Should" indicates that the activity described is advisory. The party is advised to follow the particular guideline, but could choose not to, if compelling considerations indicate otherwise.

"May" indicates a permissive element. In other words, the requirement is only a suggestion and performing it is fully within the party's discretion.

It is important to consider these distinctions. Whenever a law (ordinance, statute or court case) indicates that an action is one that a government agency "may"--or even "should"--do, there is a great deal of discretion available to the agency. As a result, legal action against an agency for its failure to take a

particular discretionary action is unlikely to be successful. Courts are generally reluctant to enforce discretionary duties against the agency.

IV. SUGGESTIONS FOR EFFECTIVE PUBLIC PARTICIPATION

Factors which critically influence the effectiveness of public involvement include:

Timely involvement - Often community and neighborhood groups either do not get notice, or do not get it early enough, so a proposed project or the issuance of a permit may go unchallenged or be challenged too late. It is important to voice your concerns in a timely manner. For example, subject to certain exceptions, the National Environmental Policy Act ("NEPA") is a federal law requiring the preparation of environmental impact statements for certain types of federal agency actions which may have a potential significant impact on the environment and provides opportunities for public comments. Similarly, there are numerous state laws, such as the California Environmental Quality Act ("CEQA"), that also require the preparation of environmental impact reports for projects that may have a potentially significant impact and provide opportunities for public comments.¹ If comments on a project are submitted to a reviewing government agency after the

¹ For a detailed discussion on NEPA and CEQA, see Part II of this community guide.

formal public comment period has ended, the agency usually is not required to respond to these comments. Keeping informed of agency actions is important for individuals and groups wanting to influence local, state and federal environmental policy and actions.

Strength through numbers - Local residents and workers who want to effectively voice their concerns on a particular issue should consider organizing support for their position. The benefits of showing a strong and unified stance cannot be overstated. When many people share a common concern regarding overlooked or under-analyzed problems, this can galvanize a local agency to action. Unity could be demonstrated by many letters from separate individuals, petitions signed by many residents, or by appearances and comments at public hearings. The best approach is to use all methods of contacting and persuading local decision-makers.

Documented and timely public comment - As noted, if challenges to projects are not made in a timely fashion during the formal public comment periods provided by various environmental statutes, such as NEPA and CEQA, the objections or concerns may not be raised later in court. Although some opportunities exist for challenging projects on grounds not raised during the

public comment periods, such opportunities are rare. It is important to document your position with as much specific supporting evidence as possible.

V. FINDING AN ATTORNEY :

When a court challenge to agency actions is contemplated, an attorney's assistance may be necessary early in the process to ensure compliance with all procedural steps. Following these steps could be critical to ensure that the opportunity for judicial review is not lost. For example, before a case is litigated, a complaint meeting very specific requirements must be filed with the proper court.

A complaint (also a "pleading") is a legal document which initiates a civil lawsuit. In general, the complaint identifies both parties (the plaintiff and defendant), the claims alleging the violations committed by the defendant, and the relief the plaintiff seeks. The federal and California court systems require "notice pleading" which requires that the complaint contain sufficient facts to give the other party notice of the claims they will be defending against. Copies of sample complaints are available in form books that you can find in your local law library.

Before you consider filing a lawsuit, it may be helpful to consult with an attorney. Unfortunately, finding affordable legal assistance can be difficult. Here are some suggestions.

1) Contact the State Bar of California attorney referral service or the local city or county bar association for names of attorneys familiar with your type of problem (the State Bar telephone number in San Francisco is 415-561-8200 and in Los Angeles is 213-765-1000).

2) Consult public-interest environmental organizations and community organizations for names of attorneys with whom they have worked and can recommend.

3) Consult law schools for attorney referrals. Some law schools also have established legal clinics which provide legal assistance at low or no cost to workers, community groups and non-profit organizations. These clinics are usually staffed by students working under the supervision of experienced attorneys.

CHAPTER 2

COMMUNITY RIGHT-TO-KNOW LAWS

I. INTRODUCTION

To aid you and your community group find and use information about hazardous chemicals, this chapter describes the main community "right-to-know" laws. This chapter explains the various types of available information, and describes the sources of information and how to use it.

Thus far, results from the public's use of such information are promising. Public relations concerns stemming from disclosure about toxic emissions have encouraged companies to significantly reduce emissions and prevent pollution. Many companies have switched to "clean" manufacturing processes and actually reduce their operating costs in the process. Community groups can play an important role in promoting cleaner industrial processes and the community right-to-know laws help give them the tools to do so.

Under federal and state community right-to-know laws, specific reporting documents prepared by businesses that handle hazardous chemicals must be routed to designated public agencies. In California, these documents end up locally at an "administering agency," typically a fire department or county health department. The "administering agency" is the local office responsible for making

community right-to-know information publicly available. Such information must then be made available to the general public during normal working hours, and agencies must publicize notice in local newspapers about the availability of information.

In addition to federal community right-to-know laws, several California laws established reporting requirements for hazardous chemicals that are unique to this state.² California companies must file reports regarding their business plan, contingency plan, preparedness and prevention plan, risk management prevention program, asbestos information, and underground storage tank information.

II. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act ("EPCRTKA"),³ a federal law which requires disclosure of the presence and release of hazardous chemicals. The main purposes of EPCRTKA are to identify facilities in communities that contain substantial amounts of

² For a detailed discussion on OSHA requirements and workers' right-to-know, see Chapter 5 of Part I of this community guide.

³ EPCRTKA was first enacted as Title III of the 1986 Superfund Amendments and Reauthorization Act and is found at 42 U.S.C.A. §§ 11001-11050. The federal Occupational Safety and Health Act ("OSHA") requires disclosure to workers of hazardous chemical exposures. See Chapter 5 of Part I of this guide.

hazardous materials, to develop emergency plans to help local communities respond to accidental releases of hazardous chemicals, and to inform the public about routine releases to the environment of these chemicals.

The emergency planning and right-to-know information required by this law helps individuals and community groups prepare for and prevent chemical accidents. Such accidents seem to occur frequently in the form of factory explosions, train derailments or truck crashes.

A study by environmental groups found that over 400 chemical accidents involving deaths, injuries or evacuations occurred in California in the five years between 1988 and 1992. For example, in 1991, a train accident in northern California released 13,000 gallons of the lethal chemical metam-sodium into the Sacramento River, destroying plants and fish along the 45-mile stretch from Dunsmuir to Lake Shasta. In 1993, 3,200 residents of the San Francisco Bay Area sought hospital care after a thick fog of sulfuric acid escaped from a General Chemical Corporation rail yard in Richmond, California.

The tragic chemical accident in Bhopal, India, at the Union Carbide plant, is in part responsible for the passage of the EPCRTKA requirements. In 1984, over 3,000 people died there when an accidental release of methyl isocyanate clouded

the air. Had residents and local authorities been more informed about the plant's activities, hundreds of lives could have been saved.

A. EPCRTKA Requirements: Facilities Must Submit Emergency Planning and Right-to-Know Information

Under EPCRTKA, owners and operators of facilities handling toxic chemicals are required to submit certain types of information, which fall into two major categories: (1) emergency planning and notification information; and (2) right-to-know information which identifies the types and amounts of toxic chemicals handled or used. Following is a list of the different types of information in each of these categories.

1. Emergency Planning and Notification Information

- a. Notice of the presence of extremely hazardous substances if used in certain "threshold" quantities (42 U.S.C. § 11002);
- b. Emergency planning information, to enable local governments to develop emergency response plans (42 U.S.C. § 11003);
- c. Emergency Release Follow-up Reports (42 U.S.C. § 11004);

2. Right-to-Know Information

- a. Material Safety Data Sheets (42 U.S.C. § 11021);
- b. Emergency and hazardous chemical inventory forms (42 U.S.C. § 11022); and
- c. Toxic chemical release inventories (42 U.S.C. § 11023).

The first category of information relating to emergency planning and notification aids state and local officials in planning for and responding to emergency releases of chemicals and is discussed in the following subsection. The purpose of the second category of information is to give communities and workers information about toxic chemicals they may be exposed to. These are discussed in turn below.

B. Emergency Planning and Notification Information

As noted, EPCRTKA's emergency planning and notification requirements are comprised of three types of right-to-know information: (1) notification forms; (2) emergency response plans; and (3) emergency release notification and follow-up reports. This emergency planning and notification information describes the types and quantities of chemicals used or stored at given locations as well as safety measures to be taken in the event of an accident. Under EPCRTKA, the public can review emergency planning information prepared by facilities handling toxic chemicals and collected by local government agencies.

1. Notification Forms

Section 302 of EPCRTKA provides a notification requirement, which applies to facilities storing or using a "threshold planning quantity" of "extremely hazardous substances," including chemicals such as fluorine, nitric oxide and

phosphoric acid. The U.S. EPA has identified nearly 400 extremely hazardous chemicals, listed at 40 C.F.R. Part 355, Appendix A. Each particular chemical has its own minimum threshold planning quantity. A company with less than the "threshold planning quantity" does not have to comply with this reporting requirement.

2. Emergency Response Plans

EPCRTKA's requirements pertaining to emergency response plans are implemented in California by the state Office of Emergency Services and the local "administering agencies."⁴ Administering agencies are required to develop "area plans" for emergency responses to hazardous materials releases. In addition, businesses handling a hazardous material equal to or greater than 500 pounds, or a total volume of 55 gallons, or 200 cubic feet of compressed gas, are required to develop and implement a "business plan" for emergency response to a release or threatened release of a hazardous material. Business plans identify the inventory of chemicals a facility stores or uses; they provide local and state emergency planning authorities with an inventory of all the hazardous substances used by the facility. Business plans are also required to contain information regarding evacuation plans, notification to the administering agency and local emergency

⁴ The Business and Area Plan requirements are provided in the California Health and Safety Code §§ 25500-25520.

rescue personnel, and the procedures to mitigate the harm caused by a release.

Business plans must be filed annually or whenever a new MSDS is prepared and are available for public review at the administering agency.

Furthermore, under California state law, some companies are required to prepare Risk Management and Prevention Programs ("RMPPs"), which are made available for the public's review.⁵ RMPPs identify precautionary measures to minimize the accidental risks of releases of acutely hazardous materials. They also must present a "worst case" analysis of dangers from chemical accidents, and a three-year history of accidents at the company. RMPPs are required only for a select group of companies, based on statutory criteria and if requested by the local administering agency, at its discretion.

3. Emergency Release Notification and Follow-Up Reports

Under Section 304 of EPCRTKA, if a facility releases an extremely hazardous substance, the owner or operator of the facility is required to provide notice of the release to local emergency response personnel and submit an emergency release follow-up report. The notice must identify the name of the chemical released, the amount of chemical released, time of release, duration of release, environmental media affected and any associated health risks. Any

⁵ See the Hazardous Materials Management provisions of the California Health & Safety Code, Division 20, Chapter 6.95, §§ 25531-25541.

accident must be reported immediately by telephone, radio or in person to the community emergency authorities. The owner or operator of the facility must also file a written report with local and state agencies within 30 days after an accident.

B. Right-To-Know Information

EPCRTKA's right-to-know information consists of three types: (1) material safety data sheets; (2) hazardous chemical inventory forms; and (3) toxic release inventory information forms. Following is a brief description of each type.

1. Material Safety Data Sheets

Material safety data sheets ("MSDSs") must be prepared by manufacturers for products containing hazardous substances and provided by employers to workers exposed to these chemicals, pursuant to the federal Occupational Safety and Health Act ("OSHA")⁶ and, in California, a state law called the Hazardous Substance Information and Training Act ("HSITA")⁷. MSDSs reveal critical information on toxic chemicals at the workplace and are important because these substances are sometimes unwittingly carried into the home and spread to others.

⁶ OSHA is found in 29 U.S.C.A. §§ 651 et seq.

⁷ HSITA is found in the California Labor Code §§ 6360 et seq. For a detailed discussion of what MSDSs contain and how employees can obtain copies of them, see Chapter 5 of Part I of this community guide.

Occasionally, unexplained health hazards may be traced to chemicals in the workplace.

As part of EPCRTKA's right-to-know requirements, a facility which is required to prepare or have MSDSs for toxic chemicals in amounts above a certain threshold must submit a copy of the MSDSs or a list of such chemicals to local and state emergency planning authorities.⁸ This way, the general public and local emergency personnel can know what specific chemicals are handled by particular facilities. Tracking MSDSs down may be difficult because EPCRTKA doesn't require companies to submit copies of MSDSs to local emergency planning agencies. Rather, companies must keep the MSDSs on file and may submit only a list of chemicals for which they have MSDSs. Your community group may review these lists, but for a copy of the MSDS, you must make a written request to your local administering agency, specifying the company location and the particular chemicals for which MSDSs are requested. It is not necessary to explain why the MSDS is being requested. The agency will then request the

⁸ Employers are required to prepare an MSDS for the use of any "hazardous substance" or "extremely hazardous substance" to which employees are exposed. There are potentially some 50,000 chemicals on the EPA's list of hazardous substances. See 29 C.F.R. § 1910.1200(c) and 40 C.F.R. Part 355, Appendix A. However, U.S. EPA has somewhat limited the availability of the forms to the general public by establishing minimum threshold quantities. That is, of all the MSDS forms that a company has on file, for the most part, only those pertaining to chemicals present in quantities of over 10,000 pounds (for hazardous substances) or 500 pounds (for extremely hazardous substances) must be included on the list to the local agency.

MSDS from the company and make it available for the requesting party. An easier route may be to get the data sheets directly from a company employee or the manufacturer directly. OSHA mandates that MSDS forms be available to employees on request. (See Chapter 5 following).

2. Hazardous Chemical Inventory Forms

Along with MSDSs, certain facilities are required to prepare and submit to local agencies hazardous chemical inventory forms, one of the most commonly required reporting forms.⁹ In California, EPCRTKA's inventory requirement is satisfied when a company files a "business plan."¹⁰

In addition to these federal EPCRTKA reporting requirements, California also has an additional reporting requirement for businesses that use threshold quantities of any "extremely hazardous substances" listed in the federal regulations.¹¹ These businesses must file what is called an "Acutely Hazardous Materials Registration Form" with the administering agency.¹² This form

⁹ See 42 U.S.C. § 11022.

¹⁰ See California Health and Safety Code §§ 25500 *et seq.* and Part I of this community guide, Chapter 2, Section II.B.2 (p.23), regarding business plans.

¹¹ See 40 C.F.R. Part 355, Appendix A.

¹² See California Health & Safety Code § 25533(a).

describes the company's processes and equipment used in handling the hazardous materials.

3. Toxic Release Inventory Forms

Certain facilities are required to complete a toxic chemical release form ("TRI"), which describes the types and quantities of toxics released into the environment and is intended to provide information to federal, state, local governments and the public, including residents of communities surrounding the facilities. TRI forms are available to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers and those conducting research and data-gathering efforts; to aid in developing appropriate regulations, guidelines, and standards; and other similar purposes. TRI forms are the most widely known and used reports of all EPCRTKA information.¹³

Companies and manufacturers can satisfy this right-to-know requirement by filing an EPA-produced form, called "Form R," which must be submitted annually on July 1st by all owners and operators of facilities meeting the following criteria:

(1) the company has 10 or more full-time employees that are in Standard Industrial Classification Codes 20 through 39, which refers to the major

¹³ See 42 U.S.C. § 11023.

manufacturing sectors of the country; and (2) the company manufactures, processes or otherwise uses any of U.S. EPA-identified toxic chemicals in excess of certain specified threshold amounts.¹⁴ The minimum threshold quantities for this reporting requirement are 25,000 pounds per year for companies that manufacture the chemical and 10,000 pounds per year for companies that "otherwise use" the chemical. For purposes of this law, manufacture means to produce, prepare, import or compound a toxic chemical. Companies must also file Form R if more than these minimum quantities are "released" into the environment. Release is defined as "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing . . . including the abandonment or discarding of barrels, containers and other closed recepticals."

An unfortunate limitation of the TRI program is that many facilities either fail to meet the three criteria listed above or are otherwise exempted from reporting. Facilities which are exempt include sewage treatment plants, power

¹⁴ The list of all chemicals for which an EPA Form R is required can be found in 40 Code of Federal Regulations Part 372. The list currently contains about 650 chemicals, selected because either they cause acute health effects, chronic health effects (cancer, birth defects, neurological disorders) or the chemicals are known as "persistent chemicals", which means they tend not to breakdown into smaller forms, or they bioaccumulate, which means the chemicals tend to become increasingly concentrated in plant and animal tissue. Benzene, chlordane and mercury are familiar chemicals for which TRI's must be filed. Environmental groups are currently lobbying the EPA to make the list longer; however, there is legislation being considered by Congress that might force the removal of some chemicals from the list.

plants, solid and hazardous waste incinerators, industrial mining sites, photographic processing operations, storage facilities, federal facilities and dry-cleaning businesses.

Information on Form R reports are grouped into five categories: facility identification, substance identifications, environmental release of chemicals, waste treatment and off-site waste transfer. In addition, under the Federal Pollution Prevention Act of 1990,¹⁵ facilities must now also report their projected hazardous chemical usage for future years, the percentage change expected for future years, the percentage change over past years, source reduction practices and recycling activities.

III. MAKING A REQUEST FOR CHEMICAL INFORMATION

Information about hazardous chemicals may be accessed either directly through those offices charged with making the information available or via electronic databases. Each has its advantages and special uses, yet both methods should be considered as potential sources. In either case, because the reports filed by companies may use chemical abbreviations, deciphering which chemicals companies are actually reporting may be tricky. U.S. EPA publishes *Common*

¹⁵ 42 U.S.C. §§ 13101 *et seq.*

Synonyms for Chemicals listed under Section 313 of EPCRA, a valuable reference tool available from U.S. EPA and in the library of U.S. EPA's regional offices. It cross-references Chemical Abstract Service registry numbers (which are often used as shorthand for chemical names) with TRI chemical names and common chemical names.

A. Government Agencies

Several agencies are involved in hazardous chemical reporting requirements. Companies must submit annual TRI reports directly to both the U.S. EPA and the California Environmental Protection Agency ("Cal-EPA"). U.S. EPA publishes an extensive, accessible summary each year of releases reported by all facilities nationwide (previously entitled *Toxics in The Community*, the most recent version is called *1993 Toxics Release Inventory: Public Data Release*). There is also a 1-800 Community Right-to-Know Information Hotline at the U.S. EPA offices (1-800-535-0202) and a user- support group.

In addition, EPCRTKA requires that each state has a State Emergency Response Commission ("SERC"). California's commission is called the Chemical Emergency Planning and Response Commission ("CEPRC"). California is further divided into six regional districts, each with a Local Emergency Planning Committee ("LEPC") office. The California Office of Emergency Services

("OES") is the primary state agency responsible for coordinating several right-to-know programs.

Most requests for information by community groups begin at the "administering agency," which is responsible for making right-to-know and emergency planning information publicly available. For the address of the administering agency for your area, contact either the CEPRC or LEPC in your region. Most often, the office will be a county health department or fire department. There are about 127 such departments throughout California's 58 counties and 69 city/municipalities.

Local fire departments and libraries also must keep certain types of right-to-know information on file, all of which the public has a right to review. At least one library in each county must make EPCRTKA's TRI reports available to the public. Fire departments are required to have copies of emergency planning information.

In addition to the many federal and state reporting requirements, some communities have local ordinances with hazardous substance reporting requirements. Administering agencies may also be of assistance in obtaining information required by local city, county or regional ordinances.

B. Electronic Databases

In addition to reviewing EPCRTKA information at an administering agency, TRI data is also available electronically. To facilitate access to the on-line TRI database, a group called "OMB Watch" began an on-line telecommunications link to the data. This system, RTK NET, has over 1,000 participants, many of whom work for environmental and public-interest groups. Anyone can sign-up for an RTK NET account by calling OMB Watch and requesting an application.

RTK NET requires that the user have a computer, a modem and an open telephone line. Getting an account is easy - there is no charge for RTK NET use, except for long-distance telephone charges to connect with RTK NET, and RTK NET will waive the long-distance charges for some low-income groups. An RTK NET account offers the most recent information and RTK NET-staff provide training and technical assistance. Further, RTK NET includes many additional databases which may be interlinked with TRI data. Parts of the 1990 Census, New Jersey Fact Sheets (health effects for each chemical), the Superfund National Priorities List and other databases are on-line, and the service is continually being expanded. Some groups have used census tract data to show correlations between pollution and socio-economic factors, such as ethnicity or income-level.

Apart from RTK NET, TRI is also available on-line through the National Library of Medicine's TOXNET. EPA regional libraries and many college and university libraries also provide access to this system. Both of these options, however, require some training. Before using the system, certain documents such as the *National Library of Medicine's TRI Database Guide to Direct Searching* or the *Quick Reference Guide to TCRI on the TOXNET System* may be helpful. These booklets may be available where the system is accessible or from the EPA's Office of Pollution Prevention and Toxics ("OPPT"), which is directly responsible for making TRI information available. Through this office a Toxic Release Inventory User Support group ("TRI-US") was established in 1990 to facilitate access to TRI data nationwide.

TRI information may also be obtained from CD-ROMs or personal computer diskettes supplied by the state. These may be ordered from TRI-US, which will also copy and return information for free upon receiving a blank disk. Contact TRI-US directly, at 202-260-1351, to obtain the most useful information for your particular needs.

IV. USING RIGHT-TO-KNOW INFORMATION

In 1993 alone, 23,321 manufacturers filed almost 80,000 Toxic Release Inventory reports. According to the National Resources Defense Council, these reports have done more to reduce toxic air emissions than 20 years of the Clean Air Act's regulatory program. The *New York Times* reported that EPCRTKA use has "galvanized small citizen groups."

Community groups most frequently use EPCRTKA information to pressure facilities for change, to educate the public and for lobbying efforts. In addition, groups and individuals can use EPCRTKA to learn about suspected industrial polluters, to discover possible personal health risks or dangers to the environment, to help prevent chemical accidents and to help prevent local siting of proposed facilities.

Though many problems and limitations exist with the right-to-know laws, there have been many success stories in the few years since data reporting began.

A. Discovering Personal Health Risks or Dangers to the Environment

In 1989, a community environmental group in Texas was formed when a homemaker talking with neighbors began to count the number of people "right around here who were sick with tumors." According to her, it became clear "We had to find out what was going on." After much research and hard work, the

group filed a lawsuit that resulted in the closure of two nearby toxic waste incinerators.

Similarly, if you or members of your group notice unusual health problems, such as lung, skin or eye irritations, nose and throat irritations, respiratory problems, or even birth defects, miscarriages or cancers, these effects can be checked and compared with known effects of local chemical pollutants. Other known health effects of chemical pollutants include loss of hearing, eyesight or smell, dizziness, nausea and fatigue.

Appendix A, taken from U.S. EPA's annual EPCRTKA report for 1990, *Toxics in the Community*, contains a list of known health effects of the twenty-five most commonly released pollutants for 1988, many still being emitted in large quantities. As noted, use of the on-line TRI database also provides access to resources such as the New Jersey Health Fact Sheets, which detail potential dangers for each chemical.

Right-to-know information also can help explain damage to the local environment, which in some cases, may be traced to chemicals being released from local facilities. Damage to trees, fish or wildlife may provide signs of pollution problems that could become focal points to create pressure for industry change.

B. Planning For or Preventing Chemical Emergencies

In the face of public pressure, companies may be willing to either phase out the use of certain chemicals or take extra precautionary measures. An example occurred in Washington, D.C., when members of Congress found out that an accident involving chlorine stored in tank cars for a local water treatment plant could result in clouds of highly poisonous chlorine gas directly over the Capitol building. Ultimately, plant managers installed guard rails to reduce the chance of a collision involving these tanks.

Learning about what types of hazardous chemicals being stored or used in your community is the first step to planning for an emergency. This can be accomplished by reviewing the emergency planning information currently on file at the local administering agency. Reviewing the company's past record of accidental spills or releases at the administering agency can be informative. This information can be found in the emergency release follow-up reports. Learn more about the company's performance by investigating other locations, by contacting agencies at the state or local level at that location. If the company has a history of accidents, lobbying for change can be even more persuasive.

Residents and community groups can also assist government planning efforts by educating the community about possible dangers from a facility.

Further, groups can help prepare emergency plans themselves through participating and commenting on such plans during public review opportunities. Essentially, emergency plans identify facilities and transportation routes, probable affected areas, and methods and procedures for responding to a release. In California, these plans are revised annually. The LEPC for each area is responsible for up-dating the plans; public participation is invited. One LEPC in northern California holds monthly meetings to review proposed changes. Check with the LEPC or your local administering agency to find out how often and when emergency plans are revised, and how to participate.

C. Promoting Change

EPCRTKA emergency planning and right-to-know requirements have promoted a reduction in air pollution and companies' generation of toxic wastes. By requiring companies to identify and report their use of hazardous chemicals, EPCRTKA encourages them to develop and adopt "cleaner" manufacturing operations.

For example, AT&T redesigned a circuit board cleaning process to eliminate chlorinated fluorocarbon ("CFC") usage and now saves \$ 3 million annually over the cost of the previous process. Polaroid has developed a mercury-free battery which is recyclable. Reynolds Metals saved \$ 30 million in pollution-

reduction equipment costs by replacing a solvent-based ink with one that is water-based. In Silicon Valley, one group identified IBM as a major source of CFCs. Using an extensive public information campaign, the group was successful in encouraging IBM to voluntarily reduce its use of CFCs. Similarly, Monsanto pledged to reduce air emissions voluntarily by 90 percent, after a 1987 report revealed that the company emitted over 374 million pounds of toxic substances in one year.

Many groups have found that having information about the amount of pollution produced by a company may be used for negotiations. To avoid negative publicity, many companies are "motivated" to work with community residents in developing "good neighbor" agreements to reduce pollution.

Additionally, many citizen groups have used hazardous chemical information to prepare their own reports for public distribution. These reports may range from one-page flyers or booklets, to in-depth reports about chemicals in the community.

EPCRTKA can also be used to challenge the siting of new polluting facilities. One successful campaign in Kettleman City, California, used right-to-know information to help prevent the planned construction of a hazardous incinerator. Residents argued that pollutants from pre-existing sources had caused

significant health dangers. Similarly, residents of the Bayview-Hunter's Point area in San Francisco are currently using right-to-know information to help challenge the siting of a proposed power plant in their neighborhood. Researching the locations of existing sources of pollution and their chemical releases in your area can help your group prevent the installation of new, environmentally harmful facilities. In addition, you can check records of the new facility's owner/operator at other locations to make sure that it is reliably representing the true risks of the proposed facility.

Many citizen groups also use right-to-know information to gather evidence for presentation to local officials, state legislatures or other political groups. In Louisiana, EPCRTKA information is credited with stimulating passage of a new, stringent air toxics law. This strategy might also work to promote the passage of local ordinances requiring mandatory reduction in toxic chemicals.

Finally, EPCRTKA has been used by citizen groups to help enforce existing environmental laws. The information disclosed can be compared with permits to determine if the company complies with other laws like the Clean Air Act, Clean Water Act or the Resource Conservation and Recovery Act. For example, it may be discovered via EPCRTKA information that a particular chemical used by the company must also be reported on other documents such as permit monitoring

reports. A review of the company's monitoring report for the same chemical may reveal a violation of the Clean Water Act or the Clean Air Act if the company released that chemical in amounts which exceed the water or air permit limitations.

Groups may conduct additional research to find out if particular companies are complying with EPCRTKA itself. EPCRTKA allows citizens to file a lawsuit against companies that fail to file required reports. To find out about potential violations, cross-check reported information with discharge reports or emission permits filed under other laws.

IV. CONCLUSION

In conclusion, EPCRTKA and the state right-to-know laws serve a vital function. Sometimes called regulation-by-information, right-to-know laws provide knowledge to those who can profit most from its use -- community members themselves.

CHAPTER 3

THE FREEDOM OF INFORMATION ACT

"The more the American people know about their government, the better they will be governed. Openness in government is essential to accountability."

-President Clinton

I. INTRODUCTION

From the time the United States was created, one feature of our democracy is that the public should know about the activities of our government. The Freedom of Information Act ("FOIA") furthers the public's right to information in the government's possession. Under FOIA, each federal agency has a duty to provide records held by that agency unless the agency can show that the records fit into one of several narrow exemptions. Although most environmental problems are very complex, FOIA is a simple way to obtain federal records that contain important environmental information. FOIA can be very useful when gathering information on environmental issues and can assist the environmental activist in preparing lawsuits, influencing the political process, informing the public, organizing community groups or just becoming better acquainted with particular environmental issues.

In the simplest scenario, an individual or community group writes a letter to the government agency requesting specific information. Usually, the writer will either receive the information in the mail or a letter notifying him or her when to come into the office to inspect and copy the records. There is no requirement that the individual be a United States citizen, nor is it necessary to reveal the reason for wanting the records.

A wide variety of information is available under FOIA. Almost any document relating to environmental matters held by the federal government can be obtained. For example, an individual or community organization can learn what records the government has on nuclear radiation or acid rain, what federal agencies consider to be the greatest environmental hazards to the public, federal emergency response procedures during oil spills, the amount of money the government has spent on cleaning up environmental hazards and accidents, statistics the government uses to generate environmental laws, and about past governmental actions against polluters. Often, a FOIA request for environmental information will be sent to the U.S. Environmental Protection Agency ("U.S. EPA"), the federal agency that handles most environmental issues. For this reason, we offer examples of how the EPA handles different issues that arise under FOIA.

II. BACKGROUND

FOIA was initially passed by Congress in 1966. Prior to passage of FOIA, there was a limited public right to government records under the Administrative Procedures Act ("APA") of 1946. The APA gave the public limited access to certain government records, provided the requester could show a proper reason to examine the records. FOIA changed all that. Under FOIA, it doesn't matter what the reason is for requesting the documents. Today, all government records are presumed to be accessible to the public, unless the agency can show that the records are somehow privileged information.

The public's right to government records was further expanded in 1974 when FOIA was amended to speed up the process. Backlogs, or delays in providing records, was further addressed by the Clinton Administration in October 1993 via a presidential order. In this order, President Clinton wrote that because FOIA is an essential part of our government system, agency backlogs should be reduced as much as possible. He further explained: "The statute was enacted based on the fundamental principle that an informed citizenry is essential to the democratic process. . . .The American people are the federal government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner."

Attorney General Janet Reno issued a memo to federal agencies on October 4, 1993, stating that the Justice Department would defend agency refusals of FOIA requests in court only when disclosure would be harmful to specific government interests. These approaches are more favorable toward disclosure than the previous government policies and it is easier for the public to obtain government records through the Freedom of Information Act.

III. HOW FOIA WORKS

Knowing specific sections of the Act is useful, so that they can be referenced specifically when communicating with government officials. FOIA can be found in Chapter 5 of the *United States Code*, section 552.¹⁶ It requires federal agencies to promptly make available to any person, records that are reasonably described in the request.¹⁷ FOIA also requires federal agencies to decide whether to provide the documents within 10 business days of receipt of the request.¹⁸ The statute further states that fees may be charged, but these fees may

¹⁶ 5 U.S.C. § 552.

¹⁷ 5 U.S.C. § 552(a)(3).

¹⁸ 5 U.S.C. § 552(a)(6)(A).

be partially or completely waived if it is determined that disclosure of the records will be in the public interest.¹⁹

FOIA applies to federal agencies. Many states have laws that apply to their state agency records, like California's Public Records Act.²⁰ An "agency" is any executive department of the federal government and includes branches of the military. FOIA does not apply to elected officials, such as the President or Congress, because they are not "agencies." Likewise, FOIA does not apply to federal courts.

FOIA requires federal agencies to provide information in two ways. First, agencies must make available descriptions of the organization, general policy statements, rules and decisions of the agency. This information must be published (usually in the *Federal Register*) or be made available for inspection upon request. Second, agencies must provide records upon request by the public. All printed or typed documents, maps, photographs, computer disks, or similar items in the agency's possession that are requested must be released unless they fall under one of nine fairly narrow exceptions to the Act.

¹⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

²⁰ See Chapter 4 of Part I of this community guide, regarding the California Public Records Act.

IV. MAKING A FOIA REQUEST

The first step in requesting information is determining the information you want, which depends, of course, on your particular needs and plans. In the case of environmental information, it is helpful to do preliminary research before submitting the request, so your requests are narrowly and specifically focused. Because FOIA only requires an agency to provide records that are already in existence, the Act does not require the agency to put together records or conduct research for you.

Once you decide what to seek, make the request as clear and concise as possible. The information requested must be reasonably described in the request so agency staff can locate your documents easily. It is best to know the exact title of the document you are seeking. For example, a request for "information on oil spills" made to the U.S. Coast Guard was rejected because there is too much information on the subject in the Coast Guard's files. The request would have been more successful if it had been limited to a list of specific documents, or to oil spills during a particular time period, or to spills in a particular body of water. Also, avoid the language used in the statutory exemptions described in the section "FOIA Exemptions," provided in this chapter. If the request uses words or phrases

that appear in the exemptions, it will be easier for an agency officer to deny your request. (A sample FOIA request is included at the end of this chapter.)

Next, decide to which agencies to submit your request. The best place to start if you are unsure of the agency is the *United States Government Manual*, found in most public libraries, which provides names, addresses and general functions of every federal agency. In addition, the *Code of Federal Regulations* ("*CFR*"), also found in most major public libraries, has similar information and often will have the addresses of FOIA officers for specific agencies.

It is a good idea to submit the same request to several agencies. A request denied by one agency will sometimes be honored by others. More often, several agencies will provide different records on the same subject, resulting in a fuller picture than records from any single agency. The worst that can happen is that some requests will be denied. For example, when submitting a FOIA request for records pertaining to federal oil spill contingency plans (a plan of action the federal government would take for a large oil spill off of the California Coast), we sent requests to regional and national offices of five federal agencies -- ten requests in all. Information resulted from every request, showing that oil spill prevention and cleanup is addressed in some form or other by at least ten federal

agencies. (Please note that this may have been unusual and just as often no information is forthcoming.)

Federal agencies with information of environmental concerns include, but are not limited to, the U.S. EPA, Department of Energy, Federal Emergency Management Agency, Department of the Interior, U.S. Coast Guard, Department of Commerce, Department of State, Department of Agriculture, Department of Health and Human Services, Department of Justice, Department of Transportation, Nuclear Regulatory Commission, Department of Defense and various Armed Services.

After the request has been formulated and you have determined the appropriate agencies for your request, you should do two important things before actually writing a formal request. First, contact one of the U.S. Government Bookstores, which sells government information in book form, located in many large cities. They may already have the information you need.

Second, and more important, call the FOIA officer at the proper agency and make an informal request over the phone. The telephone number of the agency can be found by looking in the government section of the yellow pages, by dialing the telephone directory, or by looking in a government telephone directory in a public library. Very often such a telephone request will be successful, thus saving

the time and the effort of a formal request. Many FOIA officers will be more than happy to help a caller. Even if the officer tells the requester that a formal request will be necessary, it will often be the same officer who reads that request when it comes into the office, and he or she may be helpful by suggesting specific documents which may contain the information that you want. Sometimes, a phone call can establish a friendly relationship which can only help in getting the information you want.

A. The Formal FOIA Request

Each federal agency has its own rules for the form that FOIA requests should take. These rules can usually be found in the Federal Register. Here is a general guideline of what a FOIA request should include. At a minimum, it should include: 1) the name of the FOIA officer; 2) a statement that a request is being made under the Freedom of Information Act; 3) a citation of the statute;²¹ 4) a clear description of the kinds of records that are being sought; and 5) your phone number and address.

You should also state if the request is being made in the public interest, for example, on behalf of a non-profit organization. This can be accomplished by writing one or two sentences to show how the requested information will help

²¹ 5 U.S.C. § 552.

further the interests of the public or society. This may partially or totally waive any fees that might be charged for providing the information. A sample FOIA request letter that can be used by environmental activists is included at the end of this chapter.

About a week after sending the request letter, you should make a follow-up phone call to the FOIA officer. By doing this, the requester can clarify the request if necessary and check on the status of the request.

B. The 10-Day Rule

Section 6 of the Act requires that the agency must determine whether or not to provide the records within ten working days of receipt of the request, unless "exceptional circumstances" exist. This rule means that the agency must act upon the request within 10 days. FOIA does not require the agency to actually deliver the documents to you within this time. Instead FOIA requires the agency to make a decision about how the request will be handled and to notify you if the request will be honored or rejected. Along with this notification, the agency will assign a case number to the request.

This "10-day rule" is often violated by the agencies. Some agencies are notorious for their slow response to FOIA requests: the average response time for the FBI was 340 days in 1992. Many agencies have a backlog of FOIA requests

due to the large volume of the public's requests. In the case of a delay, there is little the requester can do other than regularly call the FOIA officer. This is another reason why it is a good idea to send out requests to many agencies.

Some FOIA offices work much faster than others, because either the backlog of requests is not as great or the office is better managed. U.S. EPA receives more than 40,000 FOIA requests every year. Of these, U.S. EPA responds to about half after the expiration of the 10-day limit. However, U.S. EPA was able to respond to most requests in fewer than 30 days.

Backlog of FOIA requests is an unfortunate reality existing since FOIA was passed in 1966. While Congress has amended the Act to encourage disclosure, it has not allocated new funds for the agencies to comply with FOIA in a timely manner. If the agency's FOIA officer contacts you for a clarification of your request, the agency will usually consider the 10-day rule in effect after that clarification. Within 10 days (probably more), you should receive the agency's answer whether or not to provide the records. Your next step depends upon whether the request is approved or denied.

C. Fees

Upon approval of your FOIA request, the records may be provided in one of two ways. The agency may notify you that the records can be inspected at the agency, or the agency may send you copies after charging fees for its search and copy costs.

The agency may only charge fees to cover its own costs in providing the documents, and nothing more. There are three categories of fees under FOIA: copying costs, costs for searching for documents, and costs for reviewing records to determine if they should be turned over.

There are three categories of FOIA requesters: the first includes commercial-use requesters, including those seeking government records for commercial use and profit. Requesters falling into this category must pay full fees for all three kinds of agency costs: copying, searching and reviewing. The second category of requesters includes the news media and educational or noncommercial scientific institutions. This category pays no search fees and are entitled to receive up 100 pages of copying free per request. However, educational institutions and news media representatives are required to pay 15 cents per copy after the first 100 pages.

The third category of requester is pretty much everybody else who does not fall into the other categories. This includes citizen groups, private individuals, environmental groups, community organizations and any other group. These requesters are entitled up to two hours of search time and 100 pages of copies at no charge.

In other words, unless the records are for some business profit, you can expect to pay nothing for the first two hours of search time and the first 100 pages of copies. Noncommercial requesters must pay between 15 and 25 cents per page after the first 100 pages, and between \$ 8 and \$ 20 per hour for search costs. You may want your FOIA request to include a request that the FOIA officer call you if the search will exceed two hours or more than 100 pages.

Even if a fee applies to a FOIA request, the fee may be waived if the FOIA officer is convinced that the request is in the public interest, not for commercial gain. This is another reason to emphasize the public interest in the initial FOIA request. This may be done by stating in the request letter that the request is being made to obtain documents that will be used as part of an effort to fight pollution and improve the health of children.

V. FOIA EXEMPTIONS

Section 552(b) lists the kinds of documents and records not required to be disclosed under FOIA. There are nine categories of exempt records: classified documents, internal personnel rules, information made exempt by other laws, confidential business information, internal government communications, information which might invade personal privacy, law-enforcement records, data from financial institutions and geological information.

As explained, an agency that receives a request must release the information unless the agency can show that a specific statutory exemption applies. It is important to note that if it is possible for the agency to delete part of the document so that an exemption does not apply (by marking out the sensitive information, for example), the agency must do so and provide the edited document. It is important to understand how the exemptions work and which exclusions may apply to your request. As an example of how often requests are denied, in 1992 the U.S. EPA received more than 41,000 FOIA requests, and denied 1,210 of them, invoking one or more FOIA exemptions.

A. Individual Exemptions

Exemption 1 -- Classified Documents

An agency does not have to disclose records designated as classified in the interests of national defense or foreign policy. Courts which have reviewed requests denied under this exemption have shown great deference to agency decisions based on this exemption and almost always uphold these denials. This is because the courts and Congress feel that the military (or the CIA, or whichever agency has classified the documents) is in the best position to decide which records should be labeled classified. If your request is denied for this reason, an appeal will most likely be fruitless. Thus, a request for documents on the environmental impacts stemming from certain military operations is likely to be denied if the documents contain information affecting national security or foreign policy. On other hand, you should be able to obtain information pertaining to polluting activities of the military that does not implicate national security or foreign policy.

Exemption 2 -- Internal Personnel Rules and Practices

An agency does not have to provide records which deal solely with the agency's internal personnel rules and practices. Typically, these documents deal with matters of no public interest. This exemption exists because allowing

someone access to this information might aid him or her in breaking the law or getting around agency regulations. Examples of internal personnel rules and practices include: the agency's policies regarding lunch hours, statements of policy as to sick leave, vacation or parking facilities.

Exemption 3 -- Information Exempt Under Other Laws

If another federal law specifically prohibits certain records from public disclosure, the agency which receives such a request is not bound to release these records. One example is a tax return, which is exempt from public disclosure under the Tax Code. Therefore, a request to the Internal Revenue Service for another person's tax information will be denied under this exemption. For this reason, a request for tax returns to show that a polluter profited from breaking environmental laws will be denied.

Exemption 4 -- Confidential Business Information

The government collects thousands, perhaps millions, of records about businesses, which do not have to be disclosed under FOIA if the records fall into two categories. The first is trade secrets, such as the recipe for Coca-Cola, or the special sauce in a Big Mac, or possibly information about the quantity of hazardous chemicals a company uses as ingredients in its manufacturing process. The policy behind this exemption is that disclosure of such records would harm

the competitive advantage of the entity which provided the information, and would also make it difficult for the government to obtain such information in the future. Although such information often must be disclosed to the government, it is exempt from public disclosure through FOIA.

The second category is information that contains commercial or financial information obtained from a person, and is confidential or privileged. This exemption applies to information that is provided by a third party, other than a government agency, such as a partnership, individual or corporation. Information that an agency created on its own cannot normally be withheld under exemption four. Again, the policy behind this exemption is that disclosure of such information would harm the competitive advantage of the entity which provided the information, and would also make it difficult for the government to obtain such information in the future.

Exemption 5 -- Internal Government Communications

An agency does not have to release records that deal solely with communications between agencies about agency decision-making and policies. The reason for this exemption is that Congress wanted to promote frank discussions between agencies and agency members. For example, a request for U.S. EPA's internal documents used to develop a priority list for the cleanup of

"Superfund" hazardous waste sites would probably be denied under this exemption. However, purely factual information used in the decision-making process must be disclosed. In other words, the facts used in creating the priority list would have to be released, such as U.S. EPA's data about the chemicals present at a hazardous waste site and their degree of toxicity. This internal government communications exemption is the one most often cited by U.S. EPA.

Exemption 6 -- Personal Privacy

This exemption protects people from the disclosure of personnel, medical and similar records which, if released, would clearly be an unwarranted invasion of personal privacy. Simply because a record contains personal information, however, does not mean that the record must be withheld. The exemption requires the agency to balance the individual's privacy interest with the public's right to know the information. If the balance comes out evenly, the agency is required to disclose those records.

An example of this exemption is the case in which a newspaper sent a request to NASA for the transcripts and tape recordings of the crew discussions during the final minutes of the Space Shuttle Challenger before it exploded. The U.S. Supreme Court upheld the agency decision to disclose the printed transcripts but not the tape recordings. The court held that such a disclosure would violate

the privacy interests of the families of the crew members who were killed, and that the public's interest in the tapes was not great because of the availability of the printed transcripts.

Exemption 7 -- Law Enforcement

This exemption was designed so the law enforcement process can operate without interference. Therefore, a request may be denied about a polluter if the same information is currently being used by the government in a law-enforcement action against the company. This exemption is relevant with the increasing number of federal and state enforcement actions against environmental polluters.

Exemption 7 has six subcategories of exemptions:

7(A) -- records that, if disclosed, could reasonably be expected to interfere with an ongoing law-enforcement proceeding. Although this exemption allows agencies involved in law enforcement to withhold information from the public, some agencies have determined that certain information about polluters should be made public despite law-enforcement proceedings. For example, U.S. EPA has stated that it will make public records about businesses in violation of hazardous waste laws, so long as the disclosure does not, however, interfere with an ongoing investigation. This does not require the EPA to disclose information in every instance. Therefore, information collected pursuant to the Comprehensive

Environmental Recovery and Cleanup Liability Act (CERCLA), a federal hazardous waste cleanup law, will probably be turned over to individuals making requests under FOIA, so long as the release of the documents does not interfere with any ongoing enforcement actions.

7(B) -- records that, if disclosed, would deprive a person of the right to a fair trial.

7(C) -- records in law enforcement files that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. Although the language of this exemption is similar to exemption 6, this is a tougher exemption to overcome.

7(D) -- records that, if released, could reasonably be expected to reveal the identity of a confidential source.

7(E) -- records that, if released, would reveal law enforcement procedures and techniques, and would risk that someone receiving such information could use it to circumvent the law.

7(F) -- records that, if released, could reasonably be expected to endanger the life or safety of an individual.

Exemption 8 -- Financial Institutions

Federal agencies do not have to disclose records prepared by or for an agency that supervises banks or other financial institutions.

Exemption 9 -- Geological Information

Though rarely used, federal agencies are not bound to release geological information, geological data or maps about wells. This exemption exists largely to protect oil companies which have spent millions of dollars in exploration, from having to simply hand over their findings to potential competitors. While this exemption may seem at first irrelevant, it may be important in a search for environmental information about groundwater toxicity or other underground pollution issues. The agency may deny the request under this exemption.

B. Agency Guidelines for Exemptions

Though an agency denies a FOIA request, the agency must still state (with few exceptions) that they have the documents being sought and the kind of records they have. The agency must also disclose clearly which exemption is being invoked. In some cases, a court may order the agency claiming an exemption to provide a detailed list of the documents that are being withheld and the exact reason why each is being withheld. This is known as a "Vaughn Index". A Vaughn Index can be helpful because it discloses the types of documents held by

the agency. In addition, the requester can use the Vaughn Index to argue that FOIA exemptions have been inappropriately applied.

In rare instances, the agency is not required to confirm the existence of a requested document. This may apply to some ongoing law enforcement effort and counterintelligence records. It is important to remember that these exemptions are "discretionary," which means that the agency can decide not to invoke a particular exemption to the documents being sought. Some agencies have developed policies to effectively ignore some FOIA exemptions. For example, U.S. EPA's policy is to encourage disclosure of records which are exempt under exemption numbers 2, 5, 7(A), 7(B), 7(E), and 7(F) unless disclosure would cause significant harm to the agency. On the other hand, U.S. EPA, as a matter policy, will not release records that fall under exemptions 1, 3, 4, 6, 7(C), 7(D), 8 or 9 unless there is some exceptional circumstance or a federal court order requiring them to do so. If your request is denied, it may be worth calling the FOIA officer and trying to get the document released anyway. Explaining your situation personally may shed new light on the review process and result in a reversal of the earlier denial.

VI. THE APPEAL PROCESS

If a FOIA request is denied, the agency must state the reasons for the denial and your right to appeal the decision. You can appeal any decision by the agency, including the charging of fees or a partial release of records, by writing an appeal letter to the head of the agency. This is an administrative appeal, which does not involve the courts. The appeal letter should include the case number assigned to the request, a copy of the original request and the agency's letter denying the request. Although you are not required to state the reasons why you are appealing, it may be advantageous to include any facts or arguments which support why the appeal should be granted. (A sample appeal letter is included at the end of this chapter.)

The appeal should be mailed as soon as possible after the request has been denied. The agency is required to answer an appeal within 20 business days. If the agency takes more than 20 days to answer your appeal, you may proceed as if your appeal has been denied. If the appeal is denied, you have the right to appeal the denial in a federal court. At this stage, because the courts are involved, you may want to seek advice from an attorney. If a court determines that the information request should have been approved or that the requesting party

"substantially prevailed" in the case, the agency will have to pay the requester's court costs as well as provide the information.

VII. CONCLUSION

Although the Freedom of Information Act allows unprecedented access to federal government records, problems persist with the law; the most significant is the time certain agencies take to process requests. At this point, each FOIA request is answered in a "first come, first serve" fashion. Despite the 10-day rule, many requests take more than a year to answer. Thus, it is a good idea to plan well ahead when determining your information needs. If there is an urgent need for the information, such as to prepare for a trial or a hearing, you should always call the FOIA officer to help speed up the process.

A more technical problem is refusal by some agencies to regard electronic databases stored on computer disk or via a communications network, such as the Internet, as records which can be released. However, FOIA makes no distinction between records maintained in computers and those in hardcopy. Therefore, FOIA applies to computer-stored records just as it does to any other documents. To encourage the release of computerized information, U.S. EPA has begun a database called the Emergency Response Notification System ("ERNS") with

information about the release of toxic substances, which is accessible to the public. This system is very new, so environmental activists who are proficient in computers should contact U.S. EPA and learn how to access ERNS data.²²

Here are suggestions when using the Freedom of Information Act to acquire environmental information:

1. Get organized before making the request. Do some research on the subject you are interested in. Environmental problems are usually very complicated.
2. Look in the Government Directory or the Phone Book to get ideas of which agencies to contact.
3. Make telephone calls to the FOIA officers before you send a request. This could save you a lot of time and we hope will save you the hassle of a formal request. Always be polite, even if the officer is not helpful.
4. Send your request to all the agencies you think may have the information you need. Many agencies have offices in Washington, D.C., as well as local offices in your area. Send the request to both offices.
5. When you send a formal request letter, include as much information as possible about the subject. Include relevant newspaper or magazine articles about the subject so that the FOIA officer can better understand your request.
6. Write "FREEDOM OF INFORMATION ACT REQUEST" clearly on the front of the envelope and letter.

²² See Chapter 2 of Part I of this community guide, concerning the federal Emergency Planning and Community-Right-to-Know Act and on-line information about chemicals hazards.

7. Always state that your request is in the public interest. Emphasize that the information you are seeking on environmental problems can help these problems get cleaned up, which is good for the environment and for the people and animals that depend on the environment.
8. Make follow-up telephone calls to the FOIA officers who received your request. Start calling about a week after sending your request.
9. Keep good records of your phone calls, letters sent and received, and a log of the information disclosed to you. A good paper trail is essential to a successful administrative or judicial appeal.
10. If your request is rejected, be sure to have the reason explained to you. If the explanation doesn't sound valid, send an appeal letter. If you still make no progress, politely remind the agency officer that you have a right to sue in court if the denial is wrongful. Actually taking the case to court is a last resort, and can be a long and costly process. In some situations, it may be better to give up and try a different approach to get the information you need.

SAMPLE FOIA REQUEST LETTER

Date

Freedom of Information Act Officer
Name of Agency
Address of Agency
City, State, Zip Code

FREEDOM OF INFORMATION ACT REQUEST

Dear FOIA Officer:

This is a request for records under the Freedom of Information Act.

I request that a copy of the following documents (or documents containing the following information) be provided to me.

[remember, keep the request as simple and specific as possible.]

To help to determine my status for fees, you should know that I am --

[Here, insert a description of the requester and purpose of the request. Some sample descriptions are provided below:]

a representative of the news media affiliated with _____, and the request is made for news gathering and not for commercial use.

affiliated with an educational or noncommercial scientific institution, and this request is made for a proper purpose and not for commercial use.

an individual seeking information for personal use and not for commercial use.

I request a waiver of all fees for this request. Disclosure of the information requested by me is in the public interest because it is likely to contribute to public understanding of

[Here, insert a suitable explanation of the reasons behind your FOIA request. Be sure to explain how important it is to disclose environmental information to the public.]

[OPTIONAL] I am willing to pay fees for this request up to a maximum of \$ _____. If you estimate that fees will exceed this limit, please inform me first.

Thank you.

Sincerely,
Your name, full address,
area code & telephone number.

SAMPLE FOIA APPEAL LETTER

Date

Freedom of Information Act Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code

Freedom of Information Act Appeal

Dear _____:

This is an appeal under the Freedom of Information Act.

On (date), I requested records under the Freedom of Information Act. My request was assigned the following identification number: _____. On (date), I received a negative response to my FOIA request in a letter signed by _____. I appeal the denial of my request.

[Here state the reasons for your appeal. Remind the review officer that release of records under FOIA is discretionary and that the policy of the President, the Congress and the Attorney General of the United States favor disclosure.]

Thank you.

Sincerely,
Your name, address,
area code & telephone number.

CHAPTER 4

THE CALIFORNIA PUBLIC RECORDS ACT

I. INTRODUCTION

Imagine a business is moving in next door. You want to find out more about it, its other operations and its impact on your community. Being able to review various documents about the business can indicate how it is likely to behave. Furthermore, the information can be used to protest the location of the business next door. Fortunately, there is a relatively easy way to gather this information. The California Public Records Act ("PRA") was enacted by the state Legislature to increase the flow of information to the public. Under the PRA, passed in 1968, the people of California are guaranteed access to information about the conduct of business or government. The PRA can be found in the California Government Code beginning at section 6250.

The PRA can be especially useful when trying to determine if a new business will be good to the environment you live in. For example, businesses have many reporting requirements with local and state agencies; as a result, these agencies have important information about a business' operations and practices. The PRA allows the public to review business permits, application information,

inspection records, complaints from neighbors and enforcement activities by the government. These documents can show whether or not a particular business will be a good environmental neighbor. For an existing business, a review of documents from local agencies can determine whether the company is complying with the law. Further, these documents can show whether government is carrying out its required duties, such as making sure any environmental violations are corrected. Sometimes figuring out what the information means can be difficult, but we hope this chapter helps you know what to look for.

The PRA sets out specific rules for obtaining information in possession of the state, local and county agencies in California. Similar to the Freedom of Information Act which governs access to information held by federal agencies,²³ the PRA provides that every person has a right to inspect or receive a copy of public records. Records may be requested for any reason; a person does not have to justify the request. The only permissible fees are direct copying costs or a reasonable statutory fee. Moreover, it may be possible to have all fees waived. The PRA also recognizes individual privacy. For the public to gain access to private information held by government agencies, agencies must balance the right to privacy against a person's right to gain access to information. The general

²³ See Chapter 3 of Part I of this community guide, concerning the Freedom of Information Act.

policy of the Act, however, strongly favors disclosure of information, and agencies can only withhold information by using specific exceptions in the PRA itself.

II. WHAT ARE PUBLIC RECORDS?

Public records are written documents (or "writings") containing information relating to the conduct of business and government agencies that are either prepared, owned, used or retained by any state or local agency. A "writing" is defined in the statute to include any record that is handwritten, typewritten, printed, photocopied, photographed or otherwise recorded. Because this definition is so broad, a writing can mean letters, words, pictures, sounds or symbols, or a combination thereof, as well as all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums and other documents. In other words, just about any method of recording information qualifies as a writing.

Just because a state or local agency has documents, however, does not make them public. If the record is made by a public officer as part of his or her official duties for the purpose of getting the information to the public or to document an

official transaction, it becomes a "public record." Moreover, a document generated in the course of an official's daily activity is a public record.

In the environmental context, public records include company reports (which must be submitted if the company generates pollution), complaints about the company, government inspection records, government citations, forms filed to obtain a permit, and the permits themselves. These documents can be difficult to read, but they are worth obtaining since they usually contain valuable information about a company's environmental record and compliance with the law.

For example, for an oil company like Chevron to operate a refinery in California, it must obtain several different permits. Because an oil refinery generates hazardous wastes and releases pollutants into the air, Chevron would have to obtain a hazardous waste permit under the California Hazardous Waste Control Act from the California Department of Toxic Substances Control, and an air quality permit under the State and Federal Clean Air Acts from the relevant local air district, such as the Bay Area Air Quality Management District ("Air Quality District").

These permits are critical when trying to research the environmental impacts of businesses in your community. They specify the conditions under which the business must operate, such as providing the limitations on hazardous

waste treatment, storage and disposal, and conditions and limits on air emissions.

The permits will also state what periodic reports Chevron must make to the agencies. Those reports are public records also. A person can compare the reports to the permit limits and, if limits are violated, may be able to sue the business for violating its permits.²⁴

Further, under the California laws governing emergency responses to hazardous chemical releases, all businesses that handle "acutely hazardous material" at any time must supply an inventory of those materials to the county, city or fire district implementing the law.²⁵ "Acutely hazardous material" is defined as chemicals and substances listed under federal law. Under the California and federal emergency planning and community right-to-know laws, businesses also must provide government agencies with information about hazardous materials stored, treated or disposed of at their facilities, as well as prepare a plan of action if the worst-case scenario, a toxic spill, occurs. All these materials are public records to which the public has access.

²⁴ Part III of this community guide provides a discussion of citizen suits to enforce air and water pollution laws.

²⁵ See discussion regarding business plans in Chapter 2 of Part I of this community guide, and California Health and Safety Code §§ 25500 *et seq.*

III. HOW DO I MAKE A PUBLIC RECORDS ACT REQUEST?

When requesting information, try and make your request as specific as possible. If you have the name of a particular document, it is best to state the name of the document in your request. If you are gathering information to establish a pattern of conduct, it is helpful to know the location where the business operates. The following example illustrates how you might conduct an environmental investigation.

Imagine being a Berkeley resident in a neighborhood where an auto body paint shop is located. The odors coming from the site are awful and, many times, overpowering. You have noticed that you have developed a chronic cough, that neighbors have other respiratory problems and, over the years, some have died of lung cancer. The neighborhood is concerned about the health impacts of air emissions from the shop. Now, you want to gather information about the facility.

The first task is to determine what agencies would have information on the paint shop. Because you are concerned about toxic substances that the auto paint industry uses, you could begin by calling the city department dealing with hazardous materials. The odor coming from the emissions stack indicates you should also contact the local air district. These agencies will have suggestions of other agencies with relevant information.

In this particular example, you can begin by calling the Berkeley Toxics Management Program. You should explain to the person answering the phone your concerns about the auto shop in the neighborhood. You will be informed that each local business is assigned to an inspector. The staff person will ask for the address of the business to determine which inspector is responsible for the auto paint shop. Once connected to the inspector, he or she will give you general information about the auto shop's compliance with their rules. This information will tell you about the specific laws Berkeley follows in regulating the auto paint shop and what the laws require. Next, you should ask for copies of the file. Usually, you will be told that you must fill out a form before copies can be mailed to you. The form can be mailed to you. On it you must provide your name, address, name of the organization you represent, the address of the business you are interested in, and what documents you specifically want to see. If your request is granted and you go in to view the file, there should be a Toxic Compliance Plan, as required by the City of Berkeley. The Toxic Compliance Plan lists the products used, the chemicals in those products, and how much hazardous waste is generated, treated and/or disposed at the business location. Documents that list this type of information are worth copying. Documents that

show violations of the facility and citations given by the agency are also helpful. They can help you establish a pattern of conduct.

During the discussion with the City inspector, you may learn that the Air Quality District also regulates the auto paint shop. You should also call that agency and speak to the inspector responsible for monitoring the paint shop. That inspector will tell you about complaints and violations at the shop. Again, you should ask to look at the file, also called the compliance file. It will be necessary to make an appointment to review it. The compliance file will show the violations and citations the Air Quality District may have issued against the paint shop. In the Bay Area Air Quality District's files, compliance files are on microfiche, and you can make up to \$5 worth of copies free. You will not be able to see the actual names of complainants, since, for reasons of confidentiality, these names will be removed from any documents you see. Removing names from complaints is a typical agency practice to protect the privacy of the complainants.

To view the permit file that the Air Quality District maintains, you must submit a formal PRA request to the Air Pollution Control Officer ("APCO"). The Bay Area Air Quality District's ("BAAQMD") address is 939 Ellis Street, San Francisco, CA 94109. Because a business permit is generally viewed as a public document, your request should be granted. However, you are not entitled to view

any material categorized as "trade secret" material. (See discussion following).

Thus, before you can actually see the file, BAAQMD is required to give the business ten days to review the file and mark "trade secret" documents accordingly. These documents will then be removed from the file before you see it. If there are no "trade secret" documents, you will be granted permission to review the entire file.

In the file you will find the permit and conditions, application forms and Material Safety Data Sheets. These documents explain what limits the facility must meet and the various products it uses. Compare these documents with those received from other agencies, such as the Berkeley Toxics Management Program. Any discrepancies will provide you with real clues as to how well the business has complied with environmental regulations.

This simplified example illustrates possible steps in making a request to view records, as well as the types of documents to look for. It is also important to note that it is never too late to seek information. It is always easier to stop pollution before it happens, but you may move into a neighborhood 20 years after a polluter starts polluting and still benefit greatly from obtaining data.

IV. DOES IT COST TO GET COPIES OF PUBLIC DOCUMENTS?

By statute, state government agencies can only charge fees directly related to their copying costs or fees expressly authorized by law. Direct costs of duplication run between \$.25 to \$1 per page. Statutory fees are allowed if they are close to the direct cost of duplication and the agency provides you with copies.

An agency policy of charging an hourly fee *to examine* records is illegal. Such charges are not based on direct copying costs and are not considered reasonable statutory fees. If you encounter this practice or any other fee arrangement that you feel is illegal, you should challenge the fee.

The First Amendment Project in Oakland (510/ 208-7744) deals specifically with free speech issues and the public's right to certain information. You can also challenge an examination fee yourself, using arguments based on the PRA. Begin by stating that the Legislature declared that "access to information concerning the conduct of people's business is a fundamental and necessary right of every person in the state."²⁶ Next state that the PRA only allows agencies to charge fees to cover "the direct costs of duplication or a statutory fee, not for inspections."²⁷ That means that a fee cannot be charged for merely inspecting documents, only a fee

²⁶ Cal. Gov't Code § 6250.

²⁷ Cal. Gov't Code § 6257.

that corresponds to the "direct costs of duplication." "Direct costs of duplication" include equipment and personnel costs incurred as a direct result of making copies. Indirect costs, such as rent, utilities, staff time for monitoring inspection, insurance, locating the documents, removing them from the file, replacing them in the file or postage expenses are not recoverable. End by stating that the fee charged by the agency is in direct violation of the PRA. If you are unsuccessful in your efforts, you should have the First Amendment Project follow up on your behalf.

In some circumstances, copying fees may be waived. A recent amendment to the PRA allows agencies greater flexibility in adopting procedures for examining public records. This amendment was recently interpreted by a court to grant agencies the power to waive or reduce fees. However, the court did not state the legal criteria or circumstances for when a fee waiver is allowed.

Given the newness of this amendment and lack of implementing criteria, you will have to provide a good reason for requesting a fee waiver. Stating that the information is being used to educate the public and not for private gain would be a good place to start. If appropriate, it would also be helpful to state that your group is a non-profit organization, or a local neighborhood group that does not

have any source of funding. For example, a request for a fee waiver might begin like this:

"Our group of neighbors is organized around dealing with environmental problems in the neighborhood. We do not have a source of funding, and plan to use the information to educate ourselves and the public about those problems, not for economic gain. Given these circumstances, please waive any fees for the information requested."

You could also include in your request a simple statement that you are seeking the documents for yourself and your neighbors on an issue of important public concern.

There is no guarantee that fees will be waived. It may be necessary to develop some long-term strategies, such as lobbying your state Assembly person or Senator, to make the fee-waiver language more explicit, or to encourage agencies to write a fee-waiver policy into their own regulations.

Perhaps most important to nonprofit community groups, you can avoid copying fees altogether if you view the records personally at a government office rather than having them mailed to you. As noted, fees are not allowed for merely *examining* records. There is an important, additional benefit to inspecting the documents personally apart from controlling copying costs; this also gives you more control over the information you receive. When you visit an agency, you will most likely get to view the entire file. Sometimes there are even drawers full

of files. Because you can search through all the documents, you may come across information that you had not considered asking about. In other words, you may discover additional relevant documents and information.

V. WHAT RESPONSE WILL I RECEIVE TO MY REQUEST AND HOW LONG WILL IT TAKE TO GET THE DOCUMENTS?

Similar to FOIA, once the agency receives your request, it has 10 days in which to respond in one of three ways. (You may state you have an urgent need to view the documents, but the agency has no obligation to respond any faster.)

First, the agency may provide you with the documents you requested, or allow you to come in and view the documents.

Second, the agency may respond that it needs more time to respond to your request. If an agency seeks more time, it must inform you in writing its reasons for the extension and also state when the agency's decision will be made. The PRA allows the agency more than 10 days to respond only if there are "unusual circumstances," which prevents it from responding sooner. The agency cannot delay access arbitrarily; being too busy is not a legitimate reason for an extension.

Circumstances considered "unusual" include: (1) the need to search for and collect records from field facilities or other separate facilities of the office; (2) the need to search for, collect and examine numerous documents; and (3) the need for

consultation with another agency having an interest in the request. In any event, the extension cannot be more than 10 working days.

Finally, the response may state that your request is denied because the documents fall into an exception.

VI. WHAT ARE THE REASONS AN AGENCY CAN GIVE FOR REFUSING TO DISCLOSE RECORDS?

Similar to FOIA, the PRA contains a long list of records that are exempted from public disclosure. It is easiest to simply list the exceptions that apply most often in the environmental context and provide brief descriptions where necessary.

In general, when information falls into one of these exceptions, the agency will notify you that you cannot have access to the information.

Public records excepted from public access include:

1. Preliminary drafts, notes, or internal agency memos, which are not related to the ordinary business of the agency. This includes information that the agency keeps that is not a part of the final draft. Final agency documents and the facts upon which they are based, however, must be released. This exception can be overcome if there is a strong public interest in allowing access to the records.
2. Records about lawsuits where the agency is the plaintiff or defendant.
3. Personnel, medical, or similar files that are considered an invasion of personal privacy.

4. Most documents relating to law enforcement proceedings by agencies as well as information on the person or business prosecuted.

This exception has been broadly construed, so that it is very difficult to obtain police information.

5. Information required from a taxpayer received in confidence, which if disclosed would result in an unfair competitive advantage.
6. Privileged information, such as information which is the result of an attorney-client relationship or physician-patient relationship. There are other records which are privileged and these can be found in the California Evidence Code.
7. Correspondence to and from the Governor or employees of the Governor's office.
8. Records in the custody of or maintained by the Legislative Counsel.
9. Statements of personal worth or personal financial data required by a licensing agency.
10. Records of state agencies which reveal how an agency makes its decisions, such as evaluations, opinions, recommendations, meeting minutes, research, procedure manuals, theories, or strategy.
11. Trade secrets. A trade secret is a formula, pattern, device, or compilation of information that is used in a business and that can give that business a competitive advantage over competitors who do not know or use that information themselves. A matter that is generally known to the public or to the relevant industry will not meet the definition of a "trade secret."

This exception is quite significant in the environmental context, since companies designate substantial amounts of environmental information they supply to government agencies as trade secrets. Still, even when information is designated as a trade secret, you may still have access to the non-secret information if it is possible to blank out or remove the secret information from the copy you receive.

Also, if the same information has been previously disclosed to a member of the public by the agency, the agency has waived its right to deny the public access to that information. Likewise, information is not a trade secret if it has been previously disclosed by *another* agency. (Thus, if a company states to one agency that certain information is a "trade secret," but does not say the same thing to another agency, the information cannot fall into the "trade secrets" exception.)

VII. CAN I KEEP MY PRA REQUEST SECRET?

Say you have a bad relationship with the neighboring business and there is a nasty dispute. Will your request remain a secret? Once you have received permission to view documents, you can go in and physically view documents anytime; the business owner will not know unless someone at the agency mentions it. However, your request will not be confidential if the agency determines that it is required to notify the owner of your request and allow him or her time to go over the file and take out trade secret information.

While a bad relationship between you and the owner may give the polluter a reason for not wanting you to see the documents, the owner is not permitted to label every document "trade secret" to prevent someone from viewing the documents. Only if the records fit into an exception can your right to view them be denied. Even then, you may challenge the rejection of your request. Thus, your right to view public records is not affected by whether or not a polluter wants

the public to have access to information; it depends upon whether the information falls into an exception.

VIII. HOW CAN I APPEAL A DENIAL OF MY REQUEST?

Even if your request is denied, you may still gain access to the information by appealing the decision. Because the policy of the PRA favors disclosure, the information must fit precisely into one of the statutory exceptions. You may informally appeal the denial by writing a letter, or you may file a lawsuit in court.

An informal letter appeal should be similar in form to the letter suggested for requesting a fee waiver. You should state the reasons why the decision is wrong based on the PRA's policy favoring disclosure and explain why the information does not fall into any exception. This letter lets the agency know that you are serious about obtaining the information and are prepared to file a lawsuit. In a borderline case, an appeal letter may very well persuade the agency to release the information without going to court.

If the informal appeal process does not work in your favor, you will have to file a lawsuit in which a judge will determine whether the state agency is justified in withholding the information under one of the exceptions. You should not be shy about doing this, since the public is the only enforcer of the PRA. In addition,

if you win, the judge can make the offending agency pay your reasonable attorney's fees and court costs. (On the other hand, if you lose and the judge finds that your lawsuit was "clearly frivolous and totally lacking in merit," you may have to pay all the agency's costs. A lawsuit is frivolous and totally lacking in merit if the lawsuit has no legal basis and is filed only to get back at the agency for refusing a request or merely to harass the agency.)

In conclusion, the PRA is a critical tool that allows the public to get information about businesses that pollute their communities. You, as a member of the public, have a right to this information. Just ask.

CHAPTER 5

WORKERS' RIGHT TO KNOW

I. INTRODUCTION

You have the right to know the nature and extent of any dangers that you face in the workplace, and all precautions that can be taken to reduce the risk of injury or illness. California's Occupational Safety and Health laws, commonly referred to as Cal/OSHA, seek to protect you as a worker by requiring employers to provide you with necessary information and notice about workplace hazards. Cal/OSHA requirements may be found in the California Labor Code²⁸ and Title 8 of the California Code of Regulations.²⁹ Cal/OSHA is administered by the California Department of Industrial Relations and enforced by its Division of Occupational Safety and Health.

II. EXPOSURE TO CHEMICAL SUBSTANCES

Many work-related illnesses are caused by over-exposure to chemical substances. You can be exposed to many chemical substances at work without realizing it. You can be exposed to chemical substances in the workplace through

²⁸ See Cal. Labor Code §§ 6300 *et seq.*

²⁹ See 8 C.C.R. §§ 330 *et seq.*

inhaling (breathing them in), ingesting (eating, drinking or swallowing them), or absorbing (through contact with the eyes or skin). Sometimes, workers expose their families by carrying home chemical substances on their clothes. For example, children of asbestos workers have developed cancer from asbestos fibers brought home on their father's clothing. Also, workers in lead-battery manufacturing facilities and radiator repair shops can expose their families to lead dust brought home on clothes.

III. DIFFICULTIES IN IDENTIFYING WORKPLACE ILLNESSES

Generally, the risk of illness from hazardous substances in the workplace is often not seen as a widespread problem because work-related illnesses are not reported to the California Division of Labor Statistics and Research, as often as work-related injuries. If a falling box injures a worker in the workplace, the injury is obviously work-related. Connecting an illness to environmental hazards at work is more difficult.

First, it is sometimes hard to isolate the cause of the work-related illness. If a worker gets lung disease, it can be difficult to show that the cotton fibers he or she routinely breathes in at work are the cause of the lung disease, rather than cigarette smoking or some other non-work factor.

Second, it is often difficult to prove that an illness that occurs when you are older is caused by work-related exposures which occurred when you were significantly younger. But some illnesses do have very long latency periods; for example, cancer caused by asbestos often takes at twenty years or longer to develop.

Third, over-exposure to one chemical substance can cause many different immediate reactions. One worker may get runny eyes, while another gets a headache. Because their symptoms are different, workers may not realize that the same chemical substance at work is causing both problems.

Fourth, over-exposure to one chemical substance can cause many different types of illnesses, making a pattern of reaction and illness more difficult to show. Again, because one worker gets liver damage, and another worker gets cancer, they may not realize that their over-exposure to the same chemical substance is causing both problems.

Fifth, it may be a combination of chemicals that causes problems, rather than just a single one. For example, janitors at one facility using a cleaner and a polish may not have any health problems, while janitors at another facility using the same cleaner but a different polish may become ill because the cleaner and second polish interact with each other to cause a health hazard.

Lawmakers are becoming aware of this problem of under-reporting illnesses because of the difficulty of showing that work caused the illness. Recent laws focus on informing workers about hazardous chemical substances and conditions that cause illness, and providing training to workers about how to protect themselves. The following sections provide a summary of certain Cal/OSHA requirements relating to workers' right to know about the presence and use of hazardous substances at the workplace.

IV. POSTING REQUIREMENTS

The Cal/OSHA poster, "Safety and Health Protection on the Job," must be posted at every worksite.³⁰ If there are more than eleven employees at your workplace, a "Log of Summary of Occupational Injuries and Illness" must also be posted. Encourage your employer to post emergency numbers, such as those for fire, police and ambulance services, in a visible location.

³⁰ 8 C.C.R. § 1509.

V. CALIFORNIA'S HAZARD COMMUNICATION PROGRAM

A. General Requirements

As we mentioned in Chapter 2 of this community guide (Part I), companies handling certain hazardous substances are required by federal and state right-to-know laws to maintain an information system for employees to learn about the hazardous substances and chemicals in the workplace. The California Hazardous Substance Information and Training Act ("HSITA"), found in the California Labor Code (starting at § 6360), requires employers to communicate information to employees regarding the potential risks of hazardous substances in the workplace.

Specifically, HSITA requires every employer with 10 or more employees, who knows that an employee is likely to be exposed to a chemical, to have a written hazard communication program, with an explanation of how the employer plans to inform and train affected employees about the hazard(s) present, how to detect releases and the protection available.³¹ An employer must provide employees with information and training about hazardous substances at the time of initial work assignment and whenever a new hazard is introduced into the work area.³² At a minimum, the information and training must include:

1. the work operations involving hazardous substances;

³¹ 8 C.C.R. § 5194(b)(6), (e)-(h).

³² 8 C.C.R. § 5194(g)(10).

2. the location and availability of the written hazard communication program;
3. methods to detect the release of a hazardous substance;
4. the physical and health hazards posed by such substances in the workplace and the protection, procedures, and devices that may be used for protection from such substances; and
5. detailed provisions of the hazard communication program, including how to read labels and material safety data sheets, and how to obtain and use such information.³³

The employer must inform employees of their right to personally receive information about hazardous substances to which they may be exposed, the right for their doctor or collective bargaining agent to receive such information, and that it is against the law for an employer to retaliate because the employee exercised rights under HSITA.³⁴

B. Chemicals Triggering Hazard Communication Requirements

Employers must comply with HSITA's requirements if a chemical at the workplace is either: (a) listed as "hazardous" by the director of the California Department of Industrial Relations; (b) presents a health hazard or physical hazard; or (c) listed as a chemical known to cause cancer or reproductive hazard,

³³ Cal. Lab. Code § 6399.

³⁴ 8 C.C.R. § 5194(h)(2)(G).

under a California state law called "Prop. 65." An explanation of these three categories of chemicals are provided in the following sections.

1. Listed Hazardous Chemicals

Not all chemical substances are dangerous. Some are dangerous only if mixed with other chemical substances. Others are dangerous only to some people and not others. For example, some workers may be more sensitive to the chemical substance than others. Some chemicals are so commonly recognized as dangerous that the director of the Department of Industrial Relations has listed them as "hazardous".³⁵ Employers are required to have a hazard communication program for chemicals listed as "hazardous" by the director of the Department of Industrial Relations.

2. Substances Which Present Health or Physical Hazards

A hazard communication program is also required for substances which are considered health hazards or physical hazards, as explained in Cal/OSHA's

³⁵ Pursuant to Cal. Labor Code § 6380, the director of the Department of Industrial Relations establishes a list of hazardous substances. Under Cal. Labor Code § 6382, a substance is deemed "hazardous" if it is listed by: (a) the International Agency for Research as causing cancer; (b) U.S. EPA as having known, adverse human health risk (33 U.S.C. §§ 1251, 1317, 1321; 42 U.S.C. § 7412); (c) Cal-OSHA as an airborne chemical contaminant (Cal. Lab. Code § 142.3); (d) the director of Food and Agriculture as having known adverse human health risks (Food & Agric. Code § 14004.5); or (e) the Hazard Evaluation System and Information Service as a possible hazardous substance (Cal. Lab. Code § 147.2). The director's list is reviewed and revised, as appropriate, every year.

General Industry Safety Order 5194.³⁶ Such substances include carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, and substances which damage the lungs, skin, eyes, or mucous membranes.³⁷

3. Chemicals Known to Cause Cancer or Reproductive Hazards

Certain chemicals which are known to cause cancer or reproductive hazardous are listed in state regulations, in accordance with the Safe Drinking Water and Toxic Enforcement Act of 1986, also known as "Prop. 65."³⁸ A hazard communication program is required if workers are exposed to a chemical listed in the Prop. 65 regulations.

C. Obtaining Information on Hazardous Substances

If you are exposed to a chemical or hazardous substance at work, and want to know if it is dangerous, there are several things that you can do.

³⁶ 8 C.C.R. § 5194(c).

³⁷ The hazardous substances covered by General Industry Safety Order 5194 are defined in detail in Appendix A and Appendix B of 8 C.C.R. § 5194, and include all the substances within the scope of the federal Hazard Communication regulations, 29 C.F.R. § 1910.1200.

³⁸ This law was passed by voter initiative in 1986 as "Proposition 65" and is consequently called "Prop. 65." It requires businesses with 10 or more employees to provide warnings to individuals who are exposed to a chemical known to cause cancer or a reproductive hazard. See Cal. Health & Safety Code §§ 25249.5 *et seq.*

1. Check the Product Label

A retail product label must list the chemical substances it contains, any handling precautions, any symptoms of over-exposure and any emergency treatment needed. Manufacturers must warn consumers if a product contains a "hazardous" chemical substance.³⁹ However, you may not find a label on a particular container because employers often use wholesale products and then transfer them into smaller containers.

2. Check with a Specialist

Some medical and legal consultants and agencies specialize in problems concerning hazardous substances. First, check Appendix A at the end of this chapter, or the telephone book, to see if there is an occupational safety and health clinic, legal clinic or a toxic specialist in your area. Alternatively, you may telephone the State Department of Health at (916) 445-0174 or your county medical society for a list of toxicologists in your area. Also, you may telephone your local Cal/OSHA office to ask their doctor to recommend a toxicologist or for help in filing a confidential complaint. You may ask any of these specialists to help you find out about a chemical substance to which you are exposed at work.

³⁹ 8 C.C.R. § 5194(f).

3. Check the Material Safety Data Sheet

If a wholesale product contains a listed hazardous substance, the manufacturer must prepare and supply on request a Material Safety Data Sheet ("MSDS"). As explained in Chapter 2 of this guide, an MSDS reveals important information on toxic chemicals.⁴⁰

D. How to Request a MSDS

You may ask your employer for an MSDS. Your employer must provide you, on a timely and reasonable basis, with an MSDS for any product containing a listed hazardous substance to which you reasonably believe that you are being exposed, or have been exposed, at work.⁴¹ (A sample letter requesting an MSDS is attached at end of this chapter.) If your employer does not know of an MSDS or have one available, you can ask him or her to request one for you from the manufacturer. (A sample letter for requesting an MSDS from the manufacturer is attached.) The law says that your employer should not retaliate against you for asking for an MSDS.⁴²

⁴⁰ See pp. 25-27 of this community guide (Part I).

⁴¹ 8 C.C.R. §§ 5194(h)(2)(G), 6398.

⁴² 8 C.C.R. § 6399.7.

Nonetheless, if you know the names of the chemical substances contained in the product, you can check your local public library for reference materials which describe chemical substances. For example, the *MERCK Index: Encyclopedia of Chemicals, Drugs and Biologicals*, is a reference manual which identifies chemicals by their names, identification numbers and provides a detailed description about each chemical.⁴³

Alternatively, if you know only the name of the product, you can contact Cal/OSHA to see if the product, or any one of the chemical substances in it, is listed as "hazardous."⁴⁴ Cal/OSHA may be able to help you get an MSDS if the product or chemical substance contained in the product is listed as hazardous. They may also be able to caution you about the dangers from chemical substances that are often considered risky, but not yet listed as hazardous by the director of the Department of Industrial Relations.

⁴³ *MERCK Index* provides a listing of chemicals by their Chemical Abstract Service ("CAS") names and CAS registry numbers, an identification system used nationwide for chemicals.

⁴⁴ You may reach the Division of Occupational Safety and Health's headquarters offices in San Francisco by calling (415) 972-8515, or its regional offices in Los Angeles by calling (213) 736-2187.

E. Problems with the MSDS

There are three major problems with an MSDS: (1) it may difficult to understand; (2) it may be confusing or misleading; and/or (3) it may not tell you everything you need to know.

1. MSDS May Be Difficult to Understand

MSDSs may be difficult to read at first, but they are understandable. Each MSDS looks a little different, but all offer similar information. Look for these sections, usually given in the following order:

a. Chemical identification:

The section helps you identify the chemical. It lists the chemical name, trade or common name, and an identification number⁴⁵ of each hazardous ingredient.⁴⁶ It also gives the manufacturer's name and address, and may give an emergency phone number. However, if a particular chemical is part of a formula

⁴⁵ All chemicals have been assigned an identification number by the Chemical Abstract Service (CAS). This CAS registry number should appear on the MSDS for each chemical in the product.

⁴⁶ Chemical ingredients are identified on an MSDS if the ingredient is listed as "hazardous" by the director of the Department of Industrial Relations and is present at a concentration level above a certain amount (usually, the concentration must be over a base rate of either 1% or 0.1%).

covered by a company's "trade secret" claim,⁴⁷ the chemical may not be identified by the MSDS. If an MSDS has a trade secret claim preventing you from identifying a chemical, you should contact your regional Cal/OSHA office to see whether such trade secret claim is valid. Sometimes such trade secret claims are not valid and Cal/OSHA may be able to assist you in obtaining the information you want for a particular chemical or hazardous substance.

b. Hazardous ingredients:

This section tells you which chemical ingredient(s) can harm you. It lists the permissible exposure limit ("PEL"), or threshold limit value ("TLV"), which is the concentration of the chemical to which OSHA thinks you can be "safely" exposed during a normal work shift.

c. Physical data:

This section describes the chemical's physical appearance, smell, and its other characteristics, such as corrosiveness (when it "eats" some substances on contact) and volatility (evaporates at room temperature).

d. Fire and explosion data:

This section gives the temperature at which the chemical catches fire:

⁴⁷ According to Cal-OSHA, "trade secret" is defined as any confidential formula, pattern, process, device, or information that is used in an employer's business and that gives the business an opportunity to obtain an advantage over competitors." 8 C.C.R. § 3204(c)(14).

"Flammable" means it ignites at below 100 degrees Fahrenheit;

"Combustible" means it ignites at 100 degrees Fahrenheit or higher.

It tells you what types of materials to use to put out the fire safely, such as water or fire-suppression foam. These materials are called "extinguishing media" on the MSDS.

e. Health hazards:

This section lists the following types of information: (1) how exposure may occur, such as by inhaling (breathing it in), ingesting (eating or drinking it), or absorbing (eye or skin contact); (2) symptoms of over-exposure (e.g., eye or skin irritation, burns, headaches, dizziness, nausea, vomiting and loss of consciousness); (3) what first aid is necessary if over-exposure has occurred; (4) how to neutralize the effects (e.g., flush skin with water); (5) how to treat acute reactions (e.g., whether or not to induce vomiting); and (6) the health risks from over-exposure.

f. Reactivity data:

This section tells you whether the chemical "reacts" dangerously with materials or conditions. "Incompatibility" means that mixing this chemical with the material listed causes fire, explosion or release of dangerous gases.

"Instability" means that exposing this chemical to the environmental condition listed, such as heat or direct sunlight, etc., causes a dangerous reaction.

g. Spill or leak procedures:

This section tells you how to clean up an accidental spill or leak. Always check with your supervisor first, because you may also need special protective gear, such as gloves or a respirator. It should also tell you how to safely dispose of the chemical and the materials used to clean-up the spill or leak.

h. Special protection:

This section lists the personal protective gear (gloves, masks, etc.) that your employer must provide to help you work safely with this chemical.

i. Special precautions:

This section lists any other special precautions to follow when handling the chemical. This may include what to have nearby to clean up spills or put out a fire, and what safety signs to post near the chemical. It also tells you about other health and safety information not included elsewhere. It may also include a 1-800 number for further information.

2. MSDS May Be Confusing or Misleading

Following is a list of the some common statements provided on an MSDS and an explanation of what they mean.

a. ***"The permissible level of exposure for
(chemical name) has not been established"***

This does not mean that the substance is safe, but only that OSHA has not yet decided how much exposure to the substance is safe. Check any signs or symptoms of over-exposure to see if you have been or are being over-exposed.

b. ***"Signs of over-exposure"***

There are two types of effects of over-exposure: acute and chronic. Acute effects are immediate responses; chronic effects are long-term ones. Some manufacturers do not list the type of signs to look for to recognize these effects, or leave some signs off the list.

For example, acute effects of over-exposure to perchloroethylene (a hazardous substance used by many drycleaners) are listed as irritation of eyes and skin, breathing problems, dizziness, diarrhea, nausea and vomiting. What the MSDS does not tell you is that if you can smell the perchloroethylene, you have already been overexposed. Drycleaning workers may smell the perchloroethylene every day when they first arrive work, and not know that this means they are being over-exposed to it. Even customers picking up or unwrapping drycleaned clothes often smell the perchloroethylene.

The MSDS may also not disclose that you can become accustomed to the smell of perchloroethylene very quickly. So, even if drycleaning workers know

that smelling the perchloroethylene means they have been over-exposed to it, they may also falsely believe that because they no longer smell the perchloroethylene, they are no longer over-exposed to it. If such workers continue to be over-exposed to perchloroethylene, chronic effects, including cancer, or liver, kidney, spleen, lung and/or brain damage, can occur.

c. *"Use with adequate ventilation"*

Ventilation is only adequate if monitoring shows that the workplace exposure level is below the OSHA standard for safe exposure. Installing a fan that merely shifts the hazardous vapors from one place to another may be more harmful than no fan at all. Only regular, frequent monitoring can establish whether or not the ventilation is adequate.

d. *"Do not breathe vapors"*

Generally, this means that you should use an appropriate respirator when handling this substance. Turning your head away from the container as you open it does not keep you safe from vapors. Also, as discussed above, just because you can not smell the vapors does not necessarily mean that you are safe.

3. MSDSs May Omit Important Information

Not all manufacturers report all health risks on their MSDSs. Some manufacturers list the most common acute effects, but leave off more controversial chronic effects. Some think that they need not report health risks shown from tests done on animals, but only those shown from tests done on humans.

While an MSDS can help you learn the dangers you face in the workplace, you should not rely on it entirely. Once you know the name of the chemical substances you are exposed to at work, check with Cal/OSHA (in San Francisco, call (415) 972-8515; in Los Angeles, call (213) 736-2187) or with a toxic/occupational health specialist.

VI. MONITORING WORKERS' EXPOSURE TO CHEMICALS

Generally, exposure to chemicals is determined by both the length of time and the amount of hazardous substance involved. If an employer does monitor the workers' exposure to hazardous substances, he or she may do so only occasionally.

The more dangerous the hazardous substance involved, the more frequent the monitoring recommended.

Some Cal/OSHA standards of exposure set a schedule for monitoring.

Some require monitoring "when it is reasonable to expect that employees may be exposed to concentrations in excess of levels permitted," such as airborne contaminants.⁴⁸ Employers must monitor certain conditions to limit or prevent employees' exposure to potentially harmful situations.⁴⁹

If your employer monitors exposure levels, you or your union representative has the right to know when and how your employer is going to monitor exposure levels, and must be given a chance to watch the monitoring take place.⁵⁰ If the employer's monitoring shows that you are being, or have been over-exposed, your employer must tell you so. The employer must also tell you how he or she is correcting the problem.⁵¹

⁴⁸ 8 C.C.R. § 5155(c).

⁴⁹ See, for example, Cal-OSHA's monitoring requirements for workers' exposure to confined spaces, 8 C.C.R. § 5158(c); excessive noise, 8 C.C.R. § 5097; cotton dust, 8 C.C.R. § 5190(d); asbestos, 8 C.C.R. § 5208(g)(1); vinyl chloride, 8 C.C.R. § 5210(d); lead, 8 C.C.R. § 5216(d); and coke-oven emissions, 8 C.C.R. § 5211(e).

⁵⁰ 8 C.C.R. § 340.1(a).

⁵¹ Cal. Lab. Code § 6408(e); 8 Cal. Reg. § 340.2.

VII. ACCESS TO WORKERS' EX

A. General Requirements

Subject to certain exceptions, en
exposure to hazardous substances for 2
duration of the employment plus 30 ye
must transfer the workers' exposure an
who takes over the business.⁵³ If a busi
the National Institute for Occupational
that he or she plans to dispose of the re
Cal/OSHA regulation, transfer the recc

You have the right to see and co
within 15 days of requesting this inform
copy such records which are maintaine
employers.⁵⁶ Every year, employers m
entitled to view and copy their exposur

⁵² 8 C.C.R. § 3204(d)(1)(A), (B).

⁵³ 8 C.C.R. § 3204(h)(1).

⁵⁴ 8 C.C.R. § 3204(h)(3)(A), (B).

⁵⁵ 8 C.C.R. § 3204(e).

⁵⁶ 8 C.C.R. § 3204(c)(7).

employees must also be informed that they are entitled to have access to such records before starting work.⁵⁷ Cal/OSHA gives you this right so you can make sure that the exposure level at work is safe.

If your employer does not have exposure records for you, you can also see and copy exposure records of other employees at your workplace with similar or related job duties or working conditions.⁵⁸ Cal/OSHA gives you this right so that you can check if other workers with similar exposures have similar health problems to you and each other. If they do, this may suggest that your health problems were caused by your work.

If you have a union at work, you can ask your union representative to check the exposure records for you.⁵⁹ Under certain conditions, Cal/OSHA gives unions the right to see and copy workers' exposure records without the specific consent of the individual employees involved, so that unions can identify workers with similar exposure records, and then ask those workers if they have any similar health problems.⁶⁰ Again, if workers do, this may suggest that a health problem may be work-related. Once a union knows that a health problem is work-related,

⁵⁷ 8 C.C.R. § 3204(g).

⁵⁸ 8 C.C.R. § 3204(e)(2)(A).

⁵⁹ 8 C.C.R. § 3204(e)(1)(A),(C); § 3204(e)(2).

⁶⁰ 8 C.C.R. § 3204(e)(2)(A).

it can attempt to pressure the employer to prevent the health risk, or to provide more protection for workers.

B. Reviewing and Copying Medical Records

As mentioned earlier, you have the right to see and copy your own medical records and your employer must give you access to your medical records within 15 days of your request to see it.⁶¹ (See attached sample letter requesting release of medical records.) However, your employer can refuse to let you see your own medical records if a doctor advises your employer that allowing you to have direct access to medical information about a specific diagnosis of a terminal illness or psychiatric condition could harm you.⁶² Under these circumstances, you can give an agent, such as your union representative or someone else, your specific written consent to see and copy your medical records, and they can then give the records to you.⁶³

If you believe that you have an illness that was caused by work, you may want to collect and maintain your own medical records. You should maintain records of medical examinations that your employer provides. You should also

⁶¹ 8 C.C.R. §§ 3204(a), (e)(1)(A).

⁶² 8 C.C.R. § 3204(e)(2)(B)4.

⁶³ 8 C.C.R. §§ 3204(c)(10), (e)(2)(B)5.

maintain records of other illnesses that you have reason to believe were caused by your work. Collecting and keeping these medical records may help you prove, if necessary, that your employer knew or should have known of health risks in the workplace. Your medical file may help reveal a definite pattern of illness in the workplace and so help establish whether or not a chemical substance is unsafe.⁶⁴

VIII. PROTECTING YOURSELF FROM CHEMICAL EXPOSURES

If you are able to identify the specific chemicals and hazardous substances which are being used or handled at your job site, and the exposure levels that are occurring at work for these chemicals, you will be able to protect yourself from chemical exposures. You can check an MSDS or ask Cal/OSHA to see if a "safe" level of exposure has been set for a particular chemical or hazardous substance, and if your workplace exposure level is within the "safe" exposure limits.

If an MSDS shows the level of exposure at work is within "safe" limits, don't assume that means you **ARE** safe. Some people are more sensitive to chemicals than others, so what is a "safe" exposure level for some may still be dangerous for others. Also, workplace exposure levels may change from day to

⁶⁴ Note that workers compensation claims for work-related injuries or illnesses must be filed within specified time periods. If you believe that you have such a claim, you should consult with a workers compensation expert about any time limits for filing the claim.

day. They are established by monitoring done on a specific day; monitoring may have occurred on a day when the level of exposure was low.

Further, what is considered a "safe" exposure level in the past may be considered unsafe by today's standards. Sheets of asbestos were once considered a safe building material, but we now know that even small quantities of asbestos released into the air can cause lung cancer. Remember, Cal/OSHA has made the "safe" exposure level of some chemical substances more lenient, but it has rarely made it more stringent. If you suffer any health problems that you think might be related to exposure to chemical substances at work, don't rely on the "safe" exposure level to keep you safe -- keep checking the effects of the chemicals that you are working with.

Also, the California Division of Occupational Safety and Health offers free Cal/OSHA consultation services and provides information and advice on workplace safety and health issues. Employers may request Cal/OSHA consultation to be provided at the job site and invite workers to participate, or workers may request a free consultation away from the job site.⁶⁵

Besides the Cal/OSHA requirements described in this chapter, there are additional federal and state employment and workers' safety laws which provide

⁶⁵ Cal/OSHA consultation services may be obtained by calling the San Francisco headquarters office at (415) 972-8515.

protection to workers. For example, workers have certain legal rights to complain about unsafe work conditions, to refuse hazardous work, to protection against hazardous exposures and to report unsafe working conditions to Cal/OSHA. These workers' rights and other employment laws will be described in Part III of this community guide.

* * *

**SAMPLE LETTER FROM EMPLOYEE TO EMPLOYER
REQUESTING COPY OF MSDS**

Date

Name and Address of
Employer

RE: Request for MSDS

Dear Sir/Madam:

I am requesting a copy of the Material Safety Data Sheet for the following substances which I understand are used (or were being used) at [insert the employer's name] during my employment and to which I am being (or was) exposed:

[Insert the list of chemicals or products]

I am making this request to discover the nature and extent of my exposure to toxic chemicals at [insert the employer's name].

The Cal/OSHA legal unit has explained to me that you should be maintaining an MSDS file of all toxic chemical used at [insert the employer's name], and must provide me with this material as soon as possible.

If no MSDS is currently on file, please request one from the manufacturer. I have attached a sample request letter to a manufacturer for your convenience.

Yours truly,

[Insert your name]

**SAMPLE LETTER FROM EMPLOYER TO MANUFACTURER
REQUESTING COPY OF MSDS**

Date

Name and Address of
Chemical Company or Distributor

Re: MSDS for **[Insert name of product(s)]**

Dear Sir/Madam:

Please send a copy of your Material Safety Data Sheet (MSDS) for the above product. The MSDS is needed for compliance with the State of California Hazard Communication Regulation, Section 5194 of Title 8 of the California Code of Regulations.

Please send the MSDS to:

[Insert your company's name and address]

If this product does not require an MSDS, please notify us in writing. If you have any questions regarding our request, please contact **[insert the name of the appropriate person in your company]**.

Yours truly,

Firm Representative

**SAMPLE AUTHORIZATION LETTER FOR RELEASE OF MEDICAL
RECORD INFORMATION TO DESIGNATED REPRESENTATIVE**

I, [insert your full name], hereby authorize [insert the name of individual or organization holding the medical records] to release to [insert the name of the individual or organization authorized to receive the medical information on your behalf], the following medical information from my personal medical records:

[Describe generally the information you want to be released].

I give my permission for this medical information to be used for the following purpose: _____, but I do not give permission for any other use or re-disclosure of this information.

[Note: You may also want to place additional restrictions on this authorization letter. For example, you may want to:

1. specify an expiration date for this authorization letter. If no date is specified, it will automatically expire in one year.
2. describe medical information which you expect will be collected and maintained by the employer in the future that you want covered by this authorization letter.
3. describe any portions of the medical information in your records which you do not want to be released.]

Yours Truly,

[Insert your signature or that of your legal representative]

[Insert your full name, address and telephone number or that of your legal representative]

[Insert the date of signature]

APPENDIX A
Occupational Safety & Health Groups, Labor Occupational Health Centers
and Other Job Safety Advocacy Groups

Santa Clara Center for Occupational Health (SCCOSH)
760 N. First Street
San Jose, CA 95112
Phone (408) 998-4050; Fax (408) 998-4051

Golden Gate University School of Law
Environmental Law & Justice Clinic
Women's Employment Rights Clinics
536 Mission Street
San Francisco, CA 94105-2968
Phone (415) 442-6647; Fax (415) 442-6609

California Rural Legal Assistance (CRLA)
631 Howard Street, Suite 300
San Francisco, CA 94105-3907
Phone (415) 777-2752

Labor Occupational Health Program (LOHP)
2515 Channing Way
Berkeley, CA 94720
Phone (510) 642-5507

Hazard Evaluation System and Information Service (HESIS)
2151 Berkeley Way
Berkeley, CA 94704
Phone (510) 540-2115

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