Handbook for
City Advisory Body Members

November 2019
TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW ................................................................................................. 3
  Public Records and Disclosure .................................................................................................. 3
  Types of Advisory Bodies ........................................................................................................ 3
  Ad-Hoc Committees ................................................................................................................ 3
  Standing Committees .............................................................................................................. 4
  Formation and Structure ......................................................................................................... 4
  El Cerrito Advisory Bodies ..................................................................................................... 4

GENERAL MEMBER PROVISIONS ............................................................................................... 8
  Term Length and Limits ........................................................................................................... 8
  Filling Vacancies ..................................................................................................................... 8
  Resignation ............................................................................................................................ 9
  Filing and Training Requirements ........................................................................................... 9
    Oath of Office ...................................................................................................................... 9
    Ethics Training ................................................................................................................... 10
    Statement of Economic Interests Filings (Form 700) ......................................................... 10

ROLES AND RESPONSIBILITIES ................................................................................................ 11
  Common Member Responsibilities .......................................................................................... 11
  Limitations ............................................................................................................................ 12
  Conflict of Interest .............................................................................................................. 12
    Political Reform Act ........................................................................................................... 12
    Financial Interest in Contracts ............................................................................................. 13
    Other Conflict of Interest Laws .......................................................................................... 13
  Chair and Vice Chair Roles .................................................................................................. 14
  Council Liaison ...................................................................................................................... 15
  Staff Liaison .......................................................................................................................... 15

MEETING ADMINISTRATION ..................................................................................................... 15
  The Ralph M. Brown Act ....................................................................................................... 15
    Regular Meetings ................................................................................................................ 16
    Special Meetings ................................................................................................................ 16
    Joint Meetings .................................................................................................................... 16
    Adjourned Meetings .......................................................................................................... 16
    Common Violations ............................................................................................................ 17
    Teleconferencing ................................................................................................................ 17
    Meeting Agenda and Discussion ......................................................................................... 17
    Meeting Materials ............................................................................................................. 18

Parliamentary Procedure .......................................................................................................... 18
  Quorum ................................................................................................................................. 18
  Motions ................................................................................................................................. 18
  Point of Order ........................................................................................................................ 20
  Adjournment ........................................................................................................................ 20
  Majority Vote ....................................................................................................................... 20
  Tie Vote .................................................................................................................................. 20
  Abstention .............................................................................................................................. 20
INTRODUCTION AND OVERVIEW

Congratulations! You have been selected to serve your community as a member of a City of El Cerrito Board, Commission or Committee (Advisory Bodies). The City Council and City staff believe that citizen participation is vital to the ongoing business and future progress of our community. We commend you on your commitment to the City and encourage you to become acquainted with all phases of your municipal government.

The primary purpose of this handbook is to provide general guidelines in the conduct of meetings to ensure compliance with laws and policies; inform members of the responsibilities and duties of the specific advisory bodies; and clarify relationships between appointed members and the City Council, City staff and the community.

City advisory bodies serve in various capacities and are managed by department assigned staff liaisons, in conjunction with the City Clerk’s Office.

Public Records and Disclosure

The California Public Records Act, Government Code Sections 6250 et seq. ("Public Records Act"), governs public access to most government records. As a member of a city advisory body, all documentation provided to or exchanged with the city, including email and written correspondence, may be subject to public disclosure unless otherwise exempt under the act. The California Supreme Court has ruled that emails from personal devices or personal email accounts that relate to the City's business are public records subject to disclosure.

Types of Advisory Bodies

The City has Boards, Commissions and Committees. For ease of reference, this manual categorizes all three as advisory bodies, however they each have different functions. Boards and Commissions are directly responsible to the City Council and fill advisory and/or quasi-judicial roles. Commissions are composed of lay citizens while members for boards are selected for their special expertise. Committees sponsored by the city do not formally represent the city, have no official responsibility and do not fill quasi-judicial roles. Pursuant to El Cerrito Municipal Code (ECMC) §2.04.220(B)(10), regardless of the type of advisory body, provisions of the Brown Act must be following unless otherwise noted in the advisory body enabling legislation.

The city prohibits individuals residing at the same address from serving on the City Council and an advisory body, on the same advisory body, or advisory bodies with overlapping subject matter jurisdiction (Resolution 2013-68).

Ad-Hoc Committees

An ad-hoc committee is a temporary committee established for a special purpose and for a limited duration and is comprised of less than a quorum of members. The advisory body chair together with city staff shall determine the scope and approximate length of time the ad-hoc committee shall be needed.
The advisory body chair shall formally announce the formation of the committee, state the scope, and make all appointments. Once the ad-hoc committee has completed its task, the issue shall be agendized and reported out before the full advisory body. Although not subject to the requirements of the Brown Act, ad-hoc committees may meet openly and post agendas if desired.

Standing Committees

A Standing Committee is an ongoing group formed for discussion or work on an ongoing topic or need within the subject matter jurisdiction of the advisory body and is comprised of less than a quorum of members. Although not subject to the requirements of the Brown Act, standing committees may meet openly and post agendas if desired. If there is any clarity needed on the appropriate type of committee for a given need, city staff shall consult with the City Clerk’s Office for direction.

Formation and Structure

Formation and/or enabling legislation for advisory bodies are typically in the form of a city ordinance or resolution. General requirements for all advisory bodies are contained in ECMC § 2.04.220. Formation documents outline topics such as the number of members, attendance rules, quorum, background and qualifications requirements, as well as powers and duties.

El Cerrito Advisory Bodies

The City of El Cerrito currently has 13 advisory bodies which are managed by various departments. Each advisory body has a dedicated webpage that provide information for members, as well as the public. This includes powers and duties, enabling legislation, membership information, meeting schedules, agendas and minutes.

The following descriptions, linked to the applicable advisory body website, provides a brief overview of the membership, roles and responsibilities and training or disclosure requirements of each advisory body and are arranged by responsible departments.

City Management

**Arts and Culture Commission** is comprised of seven members who demonstrate a commitment to various arts disciplines, including but not limited to fine arts, visual arts, performing arts, literary arts, art history, and arts education. The Commission is charged with oversight of the Arts in Public Places Program, which requires certain development projects to contribute 1% of construction costs to public art, and is responsible for acquisition, funding, and placement of public art in the City on public property. The Commission also juries the City Hall Gallery Space, located on the second floor of City Hall at 10890 San Pablo Avenue.

Members of this commission are required to complete ethics training and file a Statement of Economic Interests Form 700.
Community Development Department

**Design Review Board** is comprised of five members who review new Tier II developments and major Tier III renovations of existing properties in the San Pablo Specific Plan area. They serve as the appeal hearing body for administrative Tier I design review actions and make recommendations to the Planning Commission regarding Tier IV projects located in the Plan area. They also have final design authority for new residential developments, from duplexes to multi-family units outside of the Plan area. Their purview includes the consideration of the proposed architecture, site layout, landscaping as well as master sign programs for the purpose of encouraging quality design. In this role, they work collaboratively with applicants to refine their projects in terms of materials, finishes and landscaping. Finally, they are the approving authority for necessary environmental documentation required by the California Environmental Review Act (CEQA) related to projects under their review.

Members of this board are required to complete ethics training and file a Statement of Economic Interests Form 700.

**Economic Development Committee** is comprised of up to fifteen members who act in an advisory capacity to perform tasks and duties identified by the Economic Development Strategy and Action Plan. Advises the Council on economic development matters, makes recommendations on the annual economic development work plan, and oversees the work of subcommittees established to concentrate on creating plans for high-priority areas. Provides input to other City boards and commissions on economic development matters and reviews progress towards achieving the annual work plan goals and long-range economic development goals. Encourages community involvement in economic development.

**Planning Commission** is comprised of seven members whose primary functions is as an advisory body to the City Council in matters relating to current and advance planning and the development of the built environment. This includes the review and stewardship of the City’s long-range planning goals, policies and programs on a broad array of issues related to land use, including concessions under state density law. In addition, this body hears and takes action on Tier IV development projects located inside the San Pablo Avenue Plan area, after receiving the recommendation of the Design Review Board. They also hear appeals of administrative decisions of the Zoning Administrator as well as appeals of actions made by the Design Review Board. In addition, the Commission takes action on conditional use permits, variances, development agreements and serves as the approving authority for necessary environmental documentation required by the California Environmental Review Act (CEQA) for any project under their purview.

Members of this commission are required to complete ethics training and file a Statement of Economic Interests Form 700.
Finance Department

**Financial Advisory Board** is comprised of five members who conduct a review of the proposed annual budget and long-term financial plan for the City to assist the City Council in making decisions on major expenditures and revenue sources; develops a long-term financial plan for the City; conducts an annual review of the City’s investment policies and gives consideration to the managing of the City’s financial reserves to assure maximum returns on approved investments; reviews the annual audit and management letter and provides the City Council with recommended changes in financial practices; and reviews and makes recommendations on all proposed bonds or other debt instruments to be issued by the City.

Members of this board are required to complete ethics training and file a Statement of Economic Interests Form 700.

Human Resources

**Civil Service Commission** is comprised of five members who hear appeals submitted by any City of El Cerrito civil service employee relative to any disciplinary action, dismissal, demotion, or alleged violation of the municipal code or the personnel rules and certifies its findings and recommendations. The Commission holds hearings and makes recommendations on any matter of personnel administration requested by the Council or the City Manager.

**Human Relations Commission** is comprised of five member who develop positive human relations through education, encouragement of greater respect and understanding between people, their equal opportunity rights under the law and the recognition of the racial, ethnic, religious and cultural diversity of the El Cerrito community. The purpose of the Commission is to initiate educational and cultural programs, promote tolerance and mutual respect between all persons.

Police Department

**Crime Prevention Committee** is comprised of up to fifteen members who develop and promote crime prevention programs, promotes cooperation with local law enforcement and awareness of methods to prevent crime, as well as advises the City Council regarding crime prevention programs.

Public Works Department

**Citizens Street Oversight Committee** is comprised of five members who monitor the expenditures of revenue collected pursuant to ECMC Chapter 4.60 (the "Pothole Repair and Local Street Improvement and Maintenance Transactions and Use Tax") to determine whether such funds are expended for the purposes specified in the then-current Street Repair and Maintenance Expenditure Plan, and issues reports on their findings to the City Council and
public at least annually. The Committee may also review the annual financial or performance audits performed by an independent auditor.

**Environmental Quality Committee** is comprised of up to fifteen members who work to involve the community directly in understanding and reducing our impact on the environment. This includes acting as ambassadors for citywide environmental quality efforts; reviewing requests for policies pertaining to the environment; develop programs to reduce citywide environmental impacts; and educating and involving residents in City environmental programs and activities.

**Urban Forest Committee** is comprised of up to fifteen members who serve in an advisory capacity to the City Council, other commissions, and the citizens of the City with regard to the growth, maintenance, and location of trees within the City; recommends programs, policies, and ordinances to implement and promote the City’s Master Street Tree List and Urban Forest Management Plan; promotes and fosters public awareness, education, interest and support for urban forestry efforts; educates residents regarding selecting, planting and maintaining trees; and promotes public awareness and education concerning potential hazards about above ground and underground utilities and provides information about appropriate tree species and varieties.

**Recreation Department**

**Committee on Aging** is comprised of up to fifteen members whose primary duties are to identify El Cerrito’s older and/or disabled adults; establish regular communication and consultation among individual older and/or disabled adults; document needs and wants of individuals and available benefits from all agencies; develop comprehensive plans for programs and for utilizing the resource of talents among El Cerrito’s older and/or disabled adults for inclusion in the General Plan and other plans and programs as may be developed; review and evaluate existing and proposed programs within their responsibility and make recommendations to the Council on City action and funding; and establish liaisons with other interested and concerned groups.

**Park and Recreation Commission** is comprised of seven members who act in an advisory capacity to the City Council on all matters pertaining to public recreation, including parks, playgrounds, landscaping, childcare, the arts, educational courses and entertainment. The Commission considers the annual budget of the Recreation Department during its preparation and makes recommendations; assists in the planning of a recreation program for the City-promoting and stimulating public interest; and solicits to the fullest possible extent the cooperation of special authorities and other interested public and private agencies.

Members of this commission are required to complete ethics training.
GENERAL MEMBER PROVISIONS

General provisions for members of city advisory bodies, in large part, are contained in the city’s municipal code Section 2.04.220. This includes the appointment process, terms, vacancies, absences, removal of members, quorum, minutes, staff assistance, and meeting schedules. In the event that a resolution or separate ordinance is in place for a specific advisory body, the provisions in those documents would prevail. If the advisory body’s formation documents do not include an area covered by the municipal code, then the following general provisions would apply.

Term Length and Limits

Unless otherwise specified in the formation documents, term lengths are for a period of four years, commencing on March 1 (ECMC 2.04.220 (B)(3)). Members are limited to two consecutive full terms on each advisory body. At the end of the term, the incumbent shall reapply for their seat if they wish to continue serving on the advisory body. The term of the individual seat is fixed. Therefore, if a seat is vacated before the end of the term, the new member would serve the remainder of the current term. This is considered a “partial term” and does not count towards the two term limits.

All city advisory bodies have staggered terms so that an entire advisory body is not replaced at any given time. Generally, half of an advisory body’s membership expires on a set date, with the other half expiring several years later. This method keeps informed members on the advisory body and allows the advisory body to function with a continued level of continuity and institutional knowledge as members are replaced.

At this time only the Crime Prevention Committee is not restricted to two terms (Resolution 2001-105).

Filling Vacancies

The City Clerk’s Office manages the application process to fill expired and/or vacated advisory body seats. All applicants (including applicants for re-appointment) for boards, commissions, and the Citizens Street Oversight Committee will be invited to interview with the City Council at a noticed and open public meeting. After all candidates have been interviewed, the City Council will take action to make an appointment to fill the vacancies.

Applicants for committees will be directed to contact the staff liaison and begin attending meetings of the committee. After attending at least three meetings, the committee may take action to recommend that City Council appoint the individual. The staff liaison will work with the City Clerk’s Office to agendize the appointment of the individual at a subsequent City Council meeting. Incumbents interested in re-appointment shall submit a new application and the committee will be required to take action to recommend that City Council re-appoint the individual.
Attendance

Meeting attendance is essential as it establishes a quorum of the membership and permits the advisory body to conduct business. Regular and continued attendance also allows an advisory body to progress without having to continually bring absent advisory body members up to speed.

Unless otherwise specified in formation documents, the following attendance rules apply (ECMC § 2.04.220(4)).

1. If a member notifies the staff liaison of intended absence at least 24 hours prior to the scheduled meeting time, the absence is considered excused.
2. If a member is absent for an unforeseeable and unavoidable circumstance, and reports and explains such in writing to the staff liaison prior to the next meeting of the advisory body, the absence is considered excused.
3. If the member does not communicate their absence, it is considered unexcused.
4. Excused absences for medical reasons shall not exceed a period of 120 calendar days.

ECMC section 2.04.220 (B)(4)(a) provides presumption that failure of any member to attend three consecutive regular meetings without cause, or half of the regular meetings in a calendar year, or who no longer resides in the city, has resigned. If the member cannot regularly attend, the member is encouraged to respectfully resign. Annually in January, the City Clerk will review attendance reports for all advisory bodies to determine if any action is needed regarding removal of members.

Resignation

At any point, if a member wished to resign from their position on the advisory body, it shall be provided in writing. This is necessary as the seat cannot be filled until a resignation is on file with the City Clerk’s Office, the member is removed by act of the City Council, or the member’s term has expired. The member may send an email to the City Clerk’s Office or announce his/her resignation openly at a meeting of their advisory body. If the latter occurs, the staff liaison will record such announcement in the meeting minutes and provide a copy of the minutes to the City Clerk’s Office for verification. Confirmation, as well as notice of any required actions upon resignation, will be sent to the member by the City Clerk’s Office.

Filing and Training Requirements

When the appointment of a member is confirmed, the City Clerk’s Office will send formal notification as well as instructions for any applicable filing requirements.

Oath of Office

The City of El Cerrito considers all advisory body members to fall under the definition of a “public officer” and therefore all members are required to subscribe to the Oath of Office pursuant to Article XX of the California Constitution, and California Government Code
(GC) §36507. The Oath is required as a condition of entering into office and therefore shall be subscribed to prior to a member participating in their first advisory body meeting. The oath will also be required upon re-appointment of any additional terms, or subsequent appointment of an individual to a different advisory body. The signed oath shall be filed with the City Clerk, an original signature is required.

Ethics Training

Advisory bodies designated by Resolution 2013-67 are required to take two hours of local ethics training pursuant to GC §53235.1(b). Members are also required to take an additional two hours of training every two years thereafter for the duration of their term. A free on-line course available from the State Fair Political Practices Commission (FPPC) provides a course in compliance, and a completion certificate.

The City Clerk’s Office monitors this program and informs members of the requirement to take this training. Completion is requested within 30 days of appointment. Once complete, a signed copy of the certificate shall be filed with the City Clerk, an original signature is not required.

The following advisory body members are currently subject to this requirement:

1. Arts and Culture Commission
2. Design Review Board
3. Financial Advisory Board
4. Park and Recreation Commission
5. Planning Commission

Statement of Economic Interests Filings (Form 700)

Advisory bodies designated by the city’s Conflict of Interest Code (Resolution 2018-55) have a requirement to file the Statement of Economic Interests Form 700 (Form 700). Additionally, members of the Planning Commission are required to file with the State pursuant to Government Code section 87200. The Form 700 is required within 30 days of appointment (assuming), annually on April 1st (annual) and within 30 days of leaving the advisory body (leaving). The City Clerk’s Office is the official filing officer for this form and communicates directly with advisory body members regarding this requirement. The signed statements shall be filed with the City Clerk, an original signature is required.

The City Clerk’s Office is always available to assist members with filing resources but cannot provide legal advice. In the event a member is late or refuses to file, the City Clerk’s Office has an obligation to forward the case to the Fair Political Practices Commission (FPPC) for enforcement. All efforts will be taken to avoid enforcement referrals.

The following advisory body members are currently subject to this requirement:

1. Arts and Culture Commission
2. Design Review Board
3. Financial Advisory Board
4. Planning Commission
ROLES AND RESPONSIBILITIES

Most roles and responsibilities are common to all advisory body members. The following are guidelines to assist members in realizing their full potential as a member of a city advisory body. This section is also intended to provide a better understanding of specific roles played by some advisory body members, and certain city staff.

Common Member Responsibilities

Understand your role and the scope of your responsibility. Generally, the role of advisory body members is to advise the City Council on specific City program areas and related policies. Members should not become involved in the administrative or operational matters of City departments unless specifically provided in the statement of the powers and duties of the Board, Commission or Committee. Members should take every opportunity to learn about related City programs and be sure to read any and all material that City staff provides.

Follow rules and procedures. All advisory body members are governed by city rules and procedures that apply to their area of assignment. Members must also adhere to the Brown Act, which is discussed in a subsequent section, and follow any adopted procedural rules for the conduct of meetings.

Represent the community rather than any special interest. In making appointments to citizen advisory bodies, the City Council often seeks to ensure that there is a diversity of backgrounds and interests. All advisory body members should welcome citizen input and strive to serve the broader community. Members should be committed to promoting, listening and giving serious consideration to a full range of opinions. Decisions should be fair and impartial and be based on the greater public good.

Maintain good working relationships with all advisory body members. Although the members often represent divergent interests, they must work as one to accomplish the goals of the advisory body. Cooperation is crucial to the success or failure of the advisory group. In order to build consensus and reach common goals and objectives, members should demonstrate a willingness to give objective consideration to matters before them and an ability to work to reconcile contradictory viewpoints to the extent feasible.

Understand your relationship to the City Council and City staff. The ability of any advisory body to accomplish its goals depends in part upon establishing and maintaining good working relations with the City Council and City staff. Members should never portray themselves as responsible for a decision or recommendation that rightfully belongs to the advisory group as a whole. When a member of an advisory body addresses the City Council on a matter, the member must represent the viewpoint of the advisory group as a whole (not a personal opinion), unless a proper qualification is made. Advisory body members occasionally make recommendations or decisions that ultimately are reversed by the City Council. It is important to show respect for the authority of City Council members, who in their capacity as elected officials are charged with making decisions for the community.
City staff may have authority to make administrative decisions or recommendations, with which you may disagree. In this case, staff's authority should also be recognized. Advisory body members should be careful to avoid the appearance of influencing a staff member or placing a staff member in a compromising position. Staff has technical expertise that may be made available to the advisory body. It is especially important that members do not ask staff to commit to work that has not been budgeted or approved, or in any way try to direct the priority of work for the department providing technical advisory staff.

**Limitations**

If an advisory body wishes to request staff to pursue projects that will require an excessive amount of staff time, they must first request council permission. Staff liaisons are not employees of the advisory body but are directly responsible to the department director and/or the City Manager (Administrative Policy (AP) I A 6).

Unless specifically authorized by City Council, advisory bodies may **not** represent the policy of the city and may not directly communicate with outside agencies. They may not take any financial actions such as endorsing grant applications, receiving donations, fundraising, approving use of city property, or any other action which commits or indicates the intention to commit the city (AP I A 6).

Advisory body members may not ask for individual reports, favor or special consideration. Requests and communication shall be restricted to the framework of the advisory body’s assignment. Any citizen complaints should be referred back to the staff liaison and not personally acted upon (AP I A 6).

**Conflict of Interest**

Participation in any agency action by a member who has a conflict of interest may not only invalidate the agency’s action but may also expose the individual to penalties and sanctions.

The most common conflict of interest issues arise with respect to financial conflicts of interest (under the Political Reform Act, Government Code Section 87100 et seq.) and financial interests in contracts per Government Code Section 1090 et seq., which are briefly summarized below. In addition, the city attorney has provided a guide for [Conflict of Interest and Ethics for Local Government Officials: Political Reform Act and Common Law Conflicts of Interest](https://example.com).

**Political Reform Act**

The basic prohibition under the Political Reform Act ("PRA") is that public officials are disqualified from participating in government decisions in which they have a financial interest. Generally, a public official or employee has a disqualifying conflict of interest when all of the following occur:

1. The official makes, participates in, or uses his or her official position to influence a government decision;
2. It is foreseeable that the decision will affect the official's economic interest;
3. The effect of the decision on the official's economic interest will be material;
4. The effect of the decision on the official's economic interest will be distinguishable from its effect on the public generally.

If the answer to all of these questions is yes, a conflict of interest exists and disqualification is required. Disqualified public officials are also required to leave the meeting room during action on the item; however, the law also permits them to remain in the room if they intend to participate in the matter as a member of the public, once they have left the dais. Each matter must be determined on a case-by-case basis. Because of the complexity and potential consequences of conflicts issues, it is critical that if any member becomes aware of even a possibility of a conflict, they should immediately contact the City Clerk for guidance.

Financial Interest in Contracts

Government Code Section 1090, et seq., involves conflicts of interest in contracts. Section 1090 prohibits officers or employees from having financial interests in contracts made by them in their official capacity or by any board or body of which they are members. Section 1090 was enacted to codify the common law prohibition against self-dealing. Although the term "financial interest" is not specifically defined in the statute, an examination of case law and statutory exceptions to the basic prohibition indicates that the term is to be liberally interpreted and can include both direct and indirect interests in a contract.

Even if the public official only has a "remote interest" (as defined in Government Code Section 1091 and case law) in a contract, the public official must nonetheless disclose the interest, have it noted in the official record, and abstain from voting. Failure to do so makes the contract void. If the public official is found guilty of willfully violating any of the provisions of Section 1090 et seq., such willful violations are punishable by a fine of not more than $1,000 or imprisonment in state prison as well as the individual forever being disqualified from holding any office in the state.

If it is determined that the public official has a "non-interest" (as defined by Government Code Section 1091.5 et seq.), the public official is not required to abstain from voting and disclosure is generally not required (although in some instances disclosure is required). For example, a public official who is a non-salaried member of a non-profit corporation is not deemed interested in contracts of that corporation in accordance with Government Code Section 1091.5(a)(7). Nonetheless, that section requires disclosure of the public official's interest at the time the contract is first considered and noting of the interest in the official records.

Other Conflict of Interest Laws

Separate and apart from the Political Reform Act and Government Code Section 1090 et seq., other laws may require disqualification from decision making and even forfeiture of office in certain circumstances. Some of the other conflict of interest laws to consider are as follows:
1. **Bias.** Whenever a City official will participate in a quasi-judicial decision, the common law prohibition against biased decision-making must be considered. The official should disqualify themselves if the official is biased in favor of or against a party involved in a quasi-judicial decision. The City official must be prepared to apply the law to the particular fact situation presented during the hearing regardless of what pre-hearing opinions the official may hold.

2. **No Free Rides.** A person who holds a public office may not accept a free pass or discount from a transportation company. If this prohibition is violated, the person forfeits the office. (California Constitution Article XII, Section 7.)

3. **Incompatibility of Offices.** Whenever a person holding a public office intends to simultaneously hold a second public office, the doctrine of incompatible public offices should be considered. If the duties of two offices are incompatible, a public official assuming the second such office vacates the first office. (California Government Code Section 1099.)

4. **Incompatibility of Outside Activity.** Whenever a person holding a position as a local agency official or employee intends to engage in any other employment, activity, or enterprise for compensation, the provisions of Government Code Section 1126 should be considered where the agency has adopted rules related to this subject. Agency rules implementing this section impose a duty on every local agency official and employee not to engage in any outside activity for compensation that is inconsistent, incompatible, in conflict with, or inimical to his/her:
   
   a. Duties as a local agency officer or employee;
   b. The duties, functions, or responsibilities of his/her appointing power or the agency by which he/she is employed.

**Chair and Vice Chair Roles**

Each advisory body annually in April, elects a Chair and Vice Chair. The advisory body chair (or in their absence, the vice chair) is responsible for the following:

1. Presides over all meetings of the commission and ensures that the work of the commission is accomplished. To this end the chairperson must exert sufficient control of the meeting to eliminate irrelevant, repetitious or otherwise unproductive discussion. At the same time the chair must ensure that all viewpoints are heard and are considered in a fair and impartial manner.
2. Appoints members to temporary subcommittees subject to the approval of the advisory body.
3. Works with the staff liaison to determine the contents of the agenda prior to distribution.
4. Represents the commission before the City Council.
5. Signs correspondence and meeting minutes on behalf of the advisory body.
6. Performs other duties necessary or customary to the office.
Council Liaison

A member of the City Council is assigned to each advisory body with the responsibility of reporting on council actions and activities. The council liaison is required to attend and deliver this report to the advisory body quarterly. They shall remove themselves to the audience, or leave the room, and not participate in the meeting after said report is delivered, as outlined in Resolution 2013-68.

Staff Liaison

Staff liaisons are responsible for several areas including generating meeting materials, management of advisory body records, facilitating meetings, advising members, and ensuring compliance with the Brown Act and Parliamentary Procedure.

All contact from advisory body members to any staff (other than the liaison), and any communication with advisory body members shall exclusively be through the staff liaison (APIA 6). The staff liaison is responsible for ensuring adequate communication with advisory body members, as well as the City Council assigned liaison.

MEETING ADMINISTRATION

All members are responsible for understanding areas of meeting conduct required of city advisory bodies and are expected to understand the provision of the Ralph M. Brown Act and Parliamentary Procedure.

The Ralph M. Brown Act

All city advisory bodies are subject to the provisions of the Ralph M. Brown Act (Brown Act). The Brown Act provides statutory rules for how meetings are conducted, how advisory body members conduct themselves, as well as agenda and posting requirements.

The Brown Act defines a meeting as “any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location (as permitted by GC § 54953), to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body.” The Brown Act is clear that the body does not need to take action in order for the gathering to be defined as a meeting.

Definition of a meeting does not extend to individual contact by members, attendance at conferences and seminars, attending an open meeting of another public agency, community meetings, social or ceremonial events; even if a quorum of members are present, provided that they are not discussing or taking action on any item within the subject matter jurisdiction. There are several types of meetings defined under the Brown Act.
Regular Meetings

Regular meetings are defined as meetings held on the dates, times and in the location set by resolution, ordinance or other forma action by the legislative body. At least 72 hours prior to a regular meeting, all pages of the agenda must be physically posted at the meeting location. The agenda shall contain a brief general description of each item to be discussed or transacted at the meeting. The Brown Act makes it clear that discussed items must be placed on the agenda, as well as items which may be the subject of action.

The agenda shall specify the time, date and location of the regular meeting and shall be posted in a location that is freely accessible to the members of the public for the full 72 hours immediately preceding the meeting. No action or discussion shall be had on any item not appearing on the posted agenda, except that members or staff may briefly respond to statements made or questions posed by persons commenting under the Public Comment-Matters Not on the Agenda section of the agenda.

Special Meetings

Special meetings are those meetings that have not been pre-approved by the advisory body as a regular meeting. A meeting not held at the regular meeting location is also considered a special meeting and requires that the agenda be posted both at the regular location and the current location. A Public Comment-Matters Not on the Agenda section is not to be included on a special agenda. All other requirements with regard to the content of a special meeting agenda are the same as the requirements of a regular meeting.

At least 24 hours prior to a special meeting, the agenda must be posted, containing a brief general description of each item to be discussed or transacted at the meeting. The city’s general practice is, when possible, to post at least 72 hours in advance for all meetings, including special meetings.

Joint Meetings

Joint meetings fall under the category of special meetings. At a joint meeting, only those items that are of interest to both advisory bodies may be discussed. Meeting minutes of the individual advisory bodies may not be agendized at a joint meeting. All other requirements with regard to the content of a joint meeting agenda are the same as the requirements of a special meeting.

Adjourned Meetings

A notice of Adjournment shall suffice for the posting of an adjourned meeting. The items of unfinished business on the posted agenda of which the notice of adjournment was ordered shall suffice for the official notice of business to be conducted. The notice shall include a time, date and location specific for the holding of the Adjourned meeting and be posted on or near the door of place where meeting was held within 24 hours of adjournment.
Common Violations

It is important to understand what a serial meeting is in order to avoid inadvertently violating the Brown Act.

A serial meeting occurs when a majority of members of a legislative body “uses a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” This can happen when discussions and opinions are expressed with only a portion of a legislative body, but eventually involves a majority. There are two scenarios in which this commonly occurs.

1. **Daisy Chain** - Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated, or taken action on an item within the legislative body’s subject matter jurisdiction.

2. **Hub and Spoke** - Member A (the hub) sequentially contacts Members B, C, and D and so on (the spokes), until a quorum has been contacted.

   A second scenario is when a staff member (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members’ respective views is revealed.

Each of these scenarios violates the Brown Act. Legal action may be sought to nullify an agency decision because of any violation of the Brown Act.

Teleconferencing

The Brown Act specifically allows teleconferencing to meet, receive public comment and testimony, deliberate or conduct a closed session. A member may teleconference as long as the following requirements are met:

- Teleconference location must be identified on the agenda
- Agenda must be posted at all locations (physical and teleconference)
- Each teleconference location must be accessible to members of the public
- At least a quorum of members must participate from within the jurisdiction
- All votes must be done by roll call

If a member wants to participate in a meeting from a non-qualifying teleconferencing location, they are permitted to call in and listen, but cannot ask questions, comment or participate in the discussion, or vote.

Meeting Agenda and Discussion

Discussion at each meeting is limited to what is on the agenda. Brief responses to statements or questions, announcements, request for report back, or future agenda items is the limited acceptable dialogue for items not on the agenda.
Meeting Materials

Materials distributed to the advisory body less than 72 hours prior to the meeting must be simultaneously made available to the public. If materials are distributed by the agency during the meeting, copies for the public must be available during the meeting. If materials are provided by the public during the meeting, they must be made available after the meeting.

Parliamentary Procedure

Parliamentary procedure is a set of rules that govern the conduct of business at public meetings. City advisory bodies may choose to establish and adopt Rules of Procedure. In the absence of, the advisory body shall follow the Standard Code of Parliamentary Procedures (Standard) (formerly Sturgis) for conduct of business at meetings (ECMC 2.04.220(B)(7)). Standard procedural rules are an accepted and standard set of procedures for conducting public meetings and are outlined as follows.

Quorum

A quorum is the number of members required to be present in order to hold the meeting. For some advisory bodies, the quorum is established in the formation documents as a specific number of members. This number cannot change, even when there are vacant seats. For other advisory bodies, the quorum is a majority of members currently serving. In this instance, the quorum can change with the number of seats officially filled. For advisory bodies that establish a quorum on the number of seats filled, the staff liaison shall carefully monitor vacancies and resignations. This is important to ensure that the proper quorum is established before calling any meeting to order. A majority is established as more than half.

For city committees, while quorum is a majority of members currently serving, a meeting may be conducted with two members for purpose of doing the work of the committee, however formal action requires at least three members to be present to take action (ECMC 2.04.220(B)(5)(b)).

If a quorum is not established, the meeting must be cancelled. The advisory body chair or vice-chair shall call for a quorum and wait a reasonable length of time to determine if a quorum can be established. Each advisory body may establish a reasonable waiting time based on the logistics of the particular advisory body; generally, not more than 15-30 minutes. If a quorum cannot be established, the meeting is adjourned.

Motions

Motions are a way that advisory body members communicate their ideas and/or positions. Motions also allow the advisory body to progress through popular ideas and get past unpopular ideas without excessive discussion on ideas that are not supported by the majority.
Unless otherwise noted, when a member makes a motion, it requires a second member to verbally "second" the motion in order for the advisory body to vote on the proposed action. If a second is not obtained, no further action occurs. Although there are many types of motions, the most commonly used during the deliberative process are outlined below.

- **Main Motion** – This motion is the first idea introduced for consideration by the advisory body. A main motion cannot be made when another motion is before the advisory body. Main motions are introduced with “I move that....”

- **Substitute Motion** – This motion introduces a second idea for consideration that is different from the main motion. Substitute motions are introduced with “I move to adopt the following motion in lieu of the main motion. I move that...”

- **Amended** – This motion amends a main or substitute motion (that has received a second) but does not change the basic premise of the motion. This motion may also be referred to as a friendly amendment and may be handled informally. If the members who make and second a motion agree with the minor change (and state so verbally), then a motion may be amended without a vote. Amended motions can be introduced with “I move to amend that motion by adding/removing/modifying ....”

- **Continue** – This motion is to introduce the consideration that an issue be continued or postponed for consideration, to a certain time and date. This can be introduced with “I move to postpone the motion until...”

- **Table** – This motion is intended to terminate further consideration of an issue under discussion, as well as prevent any other motion from being made at that meeting. Tabling a motion does not prevent an issue from being agendized at a future meeting, rather postpones consideration. This motion is made with “I move to table the motion.” This motion requires 2/3 affirmative votes to pass, rather than a simple majority.

- **Reconsider** – This motion is to introduce the reconsideration of a motion already voted on. The member motioning for reconsideration shall have been in the majority of those voting on the original motion. If a motion for reconsideration is successful, the members may then open up the matter to further discussion and make new motions as appropriate. During discussion testimony shall be limited to new facts that were not known at the time of the original motion. A previously voted motion may only be reconsidered at the same or next meeting of the advisory body. If the reconsideration is not at the same meeting, the issue shall be included on the agenda of the next meeting. This motion is introduced with “I move to reconsider the motion that was adopted [when] to...”
• **Withdrawal of a Motion** - A motion may be withdrawn by the member who moved it and is introduced with "I move to withdraw my motion." This does not require the consent of the member who seconded and can only be done before the motion is voted on.

**Point of Order**

This action is to protest a breach in the rules or conduct of the advisory body. A point of order does not require a second. The motioning member may interrupt the speaker and take the floor.

**Adjournment**

This officially ends the agenda after all business has been heard. If there are no items of business left on the agenda, an official motion is not required. The chair simply calls the meeting to adjournment by stating "This meeting is now adjourned."

If items remain on the agenda, a motion and second is required and can be introduced with "I move to adjourn"

**Majority Vote**

An issue must receive a majority of affirmative votes to pass. A majority is more than half of the members present and voting. This is the same math that is used to establish a quorum but is not necessarily the same number. For example: A majority quorum of a nine-member advisory body is five (9 / 2 = 4.5 or 5 rounding up). A member cannot be split in half, so the majority is always rounded up to the next whole number. If five members are present a quorum is reached. With five members present and voting, a majority vote is three (5 / 2 = 2.5 or 3 rounded up). Some advisory bodies have a set number of votes that are required to affirmatively pass an issue. This number would be in the advisory body's formation documents. However, most advisory bodies calculate the affirmative vote threshold on the majority of members present once a quorum is established.

**Tie Vote**

A tie vote is not a vote in the affirmative. A tie is when an even number of members vote yes and no. Tie votes may also occur when there are an odd number of members voting, but one member abstains. Motions with tie votes fail.

**Abstention**

A vote of abstention is counted as a no vote. For example: in the scenario above, 5 members present and voting receives 2 yes, 2 no, and one abstention, the vote is not a vote in the affirmative. It is the same as 2 yes and 3 no.
ACKNOWLEDGEMENTS

The League thanks the following individuals for their work on this publication:

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Contents

Chapter 1 – Introduction and Overview ................................................................. 5

ORIGINS OF THE PUBLIC RECORDS ACT .......................................................... 5

FUNDAMENTAL RIGHT OF ACCESS TO GOVERNMENT INFORMATION .......... 5

EXEMPTIONS FROM DISCLOSURE — PROTECTING THE PUBLIC’S FUNDAMENTAL
RIGHT OF PRIVACY AND NEED FOR EFFICIENT AND EFFECTIVE GOVERNMENT .. 6

Achieving Balance .................................................................................................. 7

INCORPORATION OF THE PRA INTO THE CALIFORNIA CONSTITUTION .......... 8

Proposition 59 ........................................................................................................ 8

Proposition 42 ......................................................................................................... 8

EXPANDED ACCESS TO LOCAL GOVERNMENT INFORMATION .................... 9

EQUAL ACCESS TO GOVERNMENT RECORDS .............................................. 9

ENFORCED ACCESS TO PUBLIC RECORDS .................................................... 10

THE PRA AT THE CRUX OF DEMOCRATIC GOVERNMENT IN CALIFORNIA ...... 10

Chapter 2 – The Basics ......................................................................................... 11

WHAT ARE PUBLIC RECORDS? ........................................................................ 11

Writings .................................................................................................................. 11

Information Relating to the Conduct of Public Business ....................................... 12

Prepared, Owned, Used, or Retained .................................................................... 12

Regardless of Physical Form or Characteristics .................................................... 13

Metadata ............................................................................................................... 14

Agency-Developed Software .................................................................................. 14

Computer Mapping (GIS) Systems ....................................................................... 14

SPECIFICALLY IDENTIFIED RECORDS .......................................................... 15

WHAT AGENCIES ARE COVERED? ................................................................. 15

WHO CAN REQUEST RECORDS? .................................................................... 16
Chapter 3 – Responding to a Public Records Request

LOCAL AGENCY’S DUTY TO RESPOND TO PUBLIC RECORD REQUESTS ................................................................. 17

TYPES OF REQUESTS — RIGHT TO INSPECT OR COPY PUBLIC RECORDS .................................................................................................................. 18

Right to Inspect Public Records .......................................................................................................................................................................................... 18
Right to Copy Public Records ...................................................................................................................................................................................... 18

FORM OF THE REQUEST ............................................................................................................................................................................................... 19

CONTENT OF THE REQUEST ......................................................................................................................................................................................... 20

TIMING OF THE RESPONSE ......................................................................................................................................................................................... 20

Inspection of Public Records ................................................................................................................................................................................... 20
Copies of Public Records ...................................................................................................................................................................................... 21
Extending the Response Times for Copies of Public Records .................................................................................................................. 21

TIMING OF DISCLOSURE ............................................................................................................................................................................................ 22

ASSISTING THE REQUESTER ..................................................................................................................................................................................... 22

LOCATING RECORDS ................................................................................................................................................................................................. 23

TYPES OF RESPONSES ....................................................................................................................................................................................... 24

REDACTING RECORDS .............................................................................................................................................................................................. 24

NO DUTY TO CREATE A RECORD OR A PRIVILEGE LOG ......................................................................................................................... 25

FEES ............................................................................................................................................................................................................................................. 25

WAIVER ............................................................................................................................................................................................................................... 26

Chapter 4 – Specific Document Types, Categories and Exemptions from Disclosure

OVERVIEW OF EXEMPTIONS ................................................................................................................................................................................... 27

TYPES OF RECORDS AND SPECIFIC EXEMPTIONS ................................................................................................................................. 28

Architectural and Official Building Plans ......................................................................................................................................................... 28
Attorney-Client Communications and Attorney Work Product .................................................................................................................................................. 29
Attorney-Client Privilege ......................................................................................................................................................................................... 29
Attorney Work Product .......................................................................................................................................................................................................... 30
Common Interest Doctrine ...................................................................................................................................................................................................... 30
Attorney Bills and Retainer Agreements ...................................................................................................................................................... 30
CEQA Proceedings ..................................................................................................................................................................................................... 31
Code Enforcement Records ........................................................................................................................................................................................................ 32
Deliberative Process Privilege .................................................................................................................................................................................................. 32
Drafts ........................................................................................................................................................................................................................................ 33
<table>
<thead>
<tr>
<th>Category</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elections</td>
<td>34</td>
</tr>
<tr>
<td>Voter Registration Information</td>
<td>34</td>
</tr>
<tr>
<td>Initiative, Recall, and Referendum Petitions</td>
<td>34</td>
</tr>
<tr>
<td>Identity of Informants</td>
<td>35</td>
</tr>
<tr>
<td>Information Technology Systems Security Records</td>
<td>35</td>
</tr>
<tr>
<td>Law Enforcement Records</td>
<td>35</td>
</tr>
<tr>
<td>Overview</td>
<td>35</td>
</tr>
<tr>
<td>Exempt Records</td>
<td>36</td>
</tr>
<tr>
<td>Information that Must be Disclosed</td>
<td>36</td>
</tr>
<tr>
<td>Disclosure to Victims, Authorized Representatives, Insurance Carriers</td>
<td>36</td>
</tr>
<tr>
<td>Information Regarding Arrestees</td>
<td>37</td>
</tr>
<tr>
<td>Complaints or Requests for Assistance</td>
<td>38</td>
</tr>
<tr>
<td>Requests for Journalistic or Scholarly Purposes</td>
<td>38</td>
</tr>
<tr>
<td>Coroner Photographs or Video</td>
<td>38</td>
</tr>
<tr>
<td>Mental Health Detention Information</td>
<td>39</td>
</tr>
<tr>
<td>Elder Abuse Records</td>
<td>39</td>
</tr>
<tr>
<td>Juvenile Records</td>
<td>39</td>
</tr>
<tr>
<td>Child Abuse Reports</td>
<td>40</td>
</tr>
<tr>
<td>Library Patron Use Records</td>
<td>40</td>
</tr>
<tr>
<td>Library Circulation Records</td>
<td>40</td>
</tr>
<tr>
<td>Licensee Financial Information</td>
<td>40</td>
</tr>
<tr>
<td>Medical Records</td>
<td>40</td>
</tr>
<tr>
<td>Health Data and Advisory Council Consolidation Act</td>
<td>41</td>
</tr>
<tr>
<td>Physician/Patient Privilege</td>
<td>41</td>
</tr>
<tr>
<td>Confidentiality of Medical Information Act</td>
<td>42</td>
</tr>
<tr>
<td>Health Insurance Portability and Accountability Act</td>
<td>42</td>
</tr>
<tr>
<td>Workers’ Compensation Benefits</td>
<td>42</td>
</tr>
<tr>
<td>Official Information Privilege</td>
<td>43</td>
</tr>
<tr>
<td>Pending Litigation or Claims</td>
<td>44</td>
</tr>
<tr>
<td>Personal Contact Information</td>
<td>45</td>
</tr>
<tr>
<td>Posting Personal Contact Information of Elected/Appointed Officials on the Internet</td>
<td>46</td>
</tr>
<tr>
<td>Personnel Records</td>
<td>46</td>
</tr>
<tr>
<td>Peace Officer Personnel Records</td>
<td>47</td>
</tr>
<tr>
<td>Employment Contracts, Employee Salaries, &amp; Pension Benefits</td>
<td>49</td>
</tr>
<tr>
<td>Contractor Payroll Records</td>
<td>49</td>
</tr>
<tr>
<td>Test Questions and Other Examination Data</td>
<td>50</td>
</tr>
<tr>
<td>Public Contracting Documents</td>
<td>50</td>
</tr>
<tr>
<td>Real Estate Appraisals and Engineering Evaluations</td>
<td>51</td>
</tr>
<tr>
<td>Recipients of Public Services</td>
<td>52</td>
</tr>
<tr>
<td>Taxpayer Information</td>
<td>52</td>
</tr>
</tbody>
</table>
Chapter 5 – Judicial Review and Remedies

OVERVIEW.......................................................................................................................... 57

THE TRIAL COURT PROCESS ............................................................................................... 57
Jurisdiction and Venue ........................................................................................................ 57
Procedural Considerations .................................................................................................. 58
  Timing................................................................................................................................. 58
  Discovery......................................................................................................................... 58
  Burden of Proof............................................................................................................... 58
  In Camera Review ......................................................................................................... 59
  Decision and Order....................................................................................................... 59

REVERSE PRA LITIGATION ............................................................................................... 59

APPELLATE REVIEW ............................................................................................................ 60
Petition for Review ........................................................................................................... 60
  Timing................................................................................................................................. 60
Requesting a Stay ............................................................................................................... 60
  Scope and Standard of Review ....................................................................................... 60
  Appeal of Other Decisions under the PRA ..................................................................... 61

ATTORNEYS’ FEES AND COSTS ......................................................................................... 61
Eligibility to Recover Attorneys’ Fees ............................................................................. 61

Chapter 6 – Records Management

PUBLIC MEETING RECORDS .............................................................................................. 63
MAINTAINING ELECTRONIC RECORDS ............................................................................ 63
Metadata ............................................................................................................................... 64
Computer Software ........................................................................................................... 65
Computer Mapping (GIS) Systems ....................................................................................... 65
Public Contracting Records ............................................................................................... 66

ELECTRONIC DISCOVERY .................................................................................................. 66

RECORD RETENTION AND DESTRUCTION LAWS ............................................................ 66
  Records Covered by the Records Retention Laws ............................................................ 67

Frequently Requested Information and Records................................................................... 68
Chapter 1

Introduction and Overview

Origins of the Public Records Act

The California Public Records Act (the PRA) was enacted in 1968 to: (1) safeguard the accountability of government to the public; (2) promote maximum disclosure of the conduct of governmental operations; and (3) explicitly acknowledge the principle that secrecy is antithetical to a democratic system of “government of the people, by the people and for the people.” The PRA was enacted against a background of legislative impatience with secrecy in government and was modeled on the federal Freedom of Information Act (FOIA) enacted a year earlier. When the PRA was enacted, the Legislature had been attempting to formulate a workable means of minimizing secrecy in government. The resulting legislation replaced a confusing mass of statutes and court decisions relating to disclosure of government records. The PRA was the culmination of a 15-year effort by the Legislature to create a comprehensive general public records law.

Fundamental Right of Access to Government Information

The PRA is an indispensable component of California’s commitment to open government. The PRA expressly provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” The purpose is to give the public access to information that enables them to monitor the functioning of their government. The concept that access to information is a fundamental right is not new to United States jurisprudence. Two hundred years ago James Madison observed “[k]nowledge will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both.”


3 San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 772; American Civil Liberties Union Federation v. Deukmejian, supra, 32 Cal.3d at p. 447.

4 Gov. Code, § 6250.

5 CBS, Inc. v. Block, supra, 42 Cal.3d at p. 651; Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1350.

The PRA provides for two different rights of access. One is a right to inspect public records: “Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided.”7 The other is a right to prompt availability of copies of public records:

 Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.8

Agency records policies and practices must satisfy both types of public records access that the PRA guarantees.

Exemptions from Disclosure — Protecting the Public’s Fundamental Right of Privacy and Need for Efficient and Effective Government

The PRA’s fundamental precept is that governmental records shall be disclosed to the public, upon request, unless there is a legal basis not to do so.9 The right of access to public records under the PRA is not unlimited; it does not extend to records that are exempt from disclosure. Express legal authority is required to justify denial of access to public records.

The PRA itself currently contains approximately 76 exemptions from disclosure.10 Despite the Legislature’s goal of accumulating all of the exemptions from disclosure in one place, there are numerous laws outside the PRA that create exemptions from disclosure. The PRA now lists other laws that exempt particular types of government records from disclosure.11

The exemptions from disclosure contained in the PRA and other laws reflect two recurring interests. Many exemptions are intended to protect privacy rights.12 Many other exemptions are based on the recognition that, in addition to the need for the public to know what its government is doing, there is a need for the government to perform its assigned functions in a reasonably efficient and effective manner, and to operate on a reasonably level playing field in dealing with private interests.13

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7 Gov. Code, § 6253, subd. (a).
8 Gov. Code, § 6253, subd. (b).
9 Gov. Code, § 6253, subd. (b).
11 Gov. Code, §§ 6275 et seq.
12 See, e.g., “Personnel Records,” p. 46.
Achieving Balance

The Legislature in enacting the PRA struck a balance among competing, yet fundamental interests: government transparency, privacy rights, and government effectiveness. The legislative findings declare access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in the state and the Legislature is “mindful of the right of individuals to privacy.” 14 “In the spirit of this declaration, judicial decisions interpreting the [PRA] seek to balance the public right to access to information, the government’s need, or lack of need, to preserve confidentiality, and the individual’s right to privacy.” 15

Of the approximately 76 current exemptions from disclosure contained in the PRA, 38 or half, appear intended primarily to protect privacy interests. 16 Another 35 appear intended primarily to support effective governmental operation in the public’s interest. 17 A few exemptions appear to focus equally on protecting privacy rights and effective government. Those include: an exemption for law enforcement records; an exemption that incorporates into the PRA exemptions from disclosure in other state and federal laws, including privileges contained in the Evidence Code; and the “public interest” or “catch-all” exemption, where, based on the particular facts, the public interest in not disclosing the record clearly outweighs the public interest in disclosure. 18 Additionally, the deliberative process privilege reflects both the public interests in privacy and government effectiveness by affording a measure of privacy to decision-makers that is intended to aid in the efficiency and effectiveness of government decision-making.19

The balance that the PRA strikes among the often-competing interests of government transparency and accountability, privacy rights, and government effectiveness intentionally favors transparency and accountability. The PRA is intended to reserve “islands of privacy upon the broad seas of enforced disclosure.” 20 For the past four decades, courts have balanced those competing interests in deciding whether to order disclosure of records. 21 The courts have consistently construed exemptions from disclosure narrowly and agencies’ disclosure obligations broadly. 22 Ambiguities in the PRA must be interpreted in a way that maximizes the public’s access to information unless the Legislature has expressly provided otherwise. 23

The PRA requires local agencies, as keepers of the public’s records, to balance the public interests in transparency, privacy, and effective government in response to records requests. Certain provisions in the PRA help maintain the balancing scheme established under the PRA and the cases interpreting it by prohibiting state and local agencies from delegating their balancing role and making arrangements with other entities that could limit access to public records. For example, state and local agencies may not allow another party to control the disclosure of information otherwise subject to disclosure under the PRA. 24 Also, state and local agencies may not provide public records subject to disclosure under the PRA to a private entity in a way that prevents a state or local agency from providing the records directly pursuant to the PRA. 25

14 Gov. Code, § 6250; Cal Const., art I, § 3(b)(3).
15 American Civil Liberties Union Foundation v. Deukmejian, supra, 32 Cal.3d at p. 447.
16 The following exemptions contained in the PRA appear primarily intended to protect privacy interests: Gov. Code, §§ 6253.2, 6253.5, 6253.6, 6254, subds. (c), (i), (j), (m), (o), (r), (u)(1), (u)(2), (u)(3), (x), (z), (ac), (ad), (ad)(1), (ad)(4), (ad)(5) & (ad)(6); 6254.1, subds. (a), (b) & (c); 6254.2; 6254.3; 6254.4; 6254.10; 6254.11; 6254.13; 6254.15; 6254.16; 6254.17; 6254.18; 6254.20; 6254.21; 6254.29; 6267; 6268.
17 The following exemptions contained in the PRA appear primarily intended to support effective government: Gov. Code, §§ 6254, subds. (a), (b), (c)(1), (c)(2), (c)(3), (c)(4), (c), (g), (h), (l), (m), (p), (q), (s), (t), (v)(1), (v)(1)(a), (v)(1)(b), (w), (y), (aa), (ab), (ad)(2) & (ad)(3); 6254.6; 6254.7; 6254.9; 6254.14; 6254.19; 6254.22; 6254.23; 6254.25; 6254.26; 6254.27; 6254.28.
18 Gov. Code, §§ 6254, subds. (f) & (k); Gov. Code, § 6255.
19 Gov. Code § 6255; Times Mirror Co. v. Superior Court, supra, 53 Cal.3d at pp. 1339–1344.
24 Gov. Code, § 6253.3.
25 Gov. Code, § 6270, subd. (a).
PRACTICE TIP:

Even though contracts or settlement agreements between agencies and private parties may require that the parties give each other notice of requests for the contract or settlement agreement, such agreements cannot purport to permit private parties to dictate whether the agreement is a public record subject to disclosure.

Incorporation of the PRA into the California Constitution

Proposition 59

In November 2004, the voters approved Proposition 59, which amended the California Constitution to include the public’s right to access public records: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”26 As amended, the California Constitution provides each statute, court rule, and other authority “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.”27 The Proposition 59 amendments expressly retained and did not supersede or modify other existing constitutional, statutory, or regulatory provisions, including the rights of privacy, due process and equal protection, as well as any constitutional, statutory, or common-law exception to the right of access to public records in effect on the amendments’ effective date. That includes any statute protecting the confidentiality of law enforcement and prosecution records.28

The courts and the California Attorney General have determined that the constitutional provisions added by Proposition 59 maintain the established principles that disclosure obligations under the PRA must be construed broadly, and exemptions construed narrowly.29 By approving Proposition 59, the voters have incorporated into the California Constitution the PRA policy prioritizing government transparency and accountability, as well as the PRA’s careful balancing of the public’s right of access to government information with protections for the public interests in privacy and effective government. No case has yet held Proposition 59 substantively altered the balance struck in the PRA between government transparency, privacy protection, and government effectiveness.

Proposition 42

In June 2014, the voters approved Proposition 42, which amended the California Constitution “to ensure public access to the meetings of public bodies and the writings of public officials and agencies.”30 As amended, the Constitution requires local agencies to comply with the PRA, the Ralph M. Brown Act (The Brown Act), any subsequent amendments to either act, any successor act, and any amendments to any successor act that contain findings that the legislation furthers the purposes of public access to public body meetings and public official and agency writings.31 As amended, the Constitution also no longer requires the state to reimburse local governments for the cost of complying with legislative mandates in the PRA, the Brown Act,

26 Cal. Const., art I, § 3, subd. (b)(1).
27 Cal. Const., art I, § 3, subd. (b)(2).
and successor statutes and amendments. Following the enactment of Proposition 42, the Legislature has enacted new local mandates related to public records, including requirements for agency data designated as "open data" that is kept on the Internet and requirements to create and maintain “enterprise system catalogs.”

**Expanded Access to Local Government Information**

The policy of government records transparency mandated by the PRA is a floor, not a ceiling. Most exemptions from disclosure that apply to the PRA are permissive, not mandatory. Local agencies may choose to disclose public records even though they are exempt, although they cannot be required to do so. The PRA provides that "except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter." A number of local agencies have gone beyond the minimum mandates of the PRA by adopting their own "sunshine ordinances" to afford greater public access to public records. Such "sunshine ordinances," however, do not purport to authorize a locality to enact an ordinance addressing records access that conflicts with the locality’s governing charter.

Local agency disclosure of exempt records can promote the government transparency and accountability purposes of the PRA. However, local agencies are also subject to mandatory duties to safeguard some particularly sensitive records. Unauthorized disclosure of such records can subject local agencies and their officials to civil and in some cases criminal liability.

**PRACTICE TIP:**

Local agencies that expand on the minimum transparency prescribed in the PRA, which is something that the PRA encourages, should ensure that they do not violate their duty to safeguard certain records, or undermine the public’s interest in effective government.

**Equal Access to Government Records**

The PRA affords the same right of access to government information to all types of requesters. Every person has a right to inspect any public record, except as otherwise provided in the PRA, including citizens of other states and countries, elected officials, and members of the press. With few exceptions, whenever a local agency discloses an exempt public record to any member of the public, unless the disclosure was inadvertent, all exemptions that apply to that particular record are waived and it becomes

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32 Cal. Const., art. XIIIB, §6, subd. (a)(4). Proposition 42 was a legislatively-referred constitutional amendment in response to public opposition to AB-1464 and SB-1006 approved June, 2012. The 2012 legislation suspended certain PRA and Brown Act provisions and was intended to eliminate the state’s obligation to reimburse local governments for the cost of complying with PRA and Brown Act mandates through the 2015 fiscal year. There is no record of local agencies ceasing to comply with the suspended provisions.

33 Gov. Code, §§ 6253.10, 6270.5.


35 See Gov. Code, § 6254.5 and “Waiver,” p. 26, regarding the effect of disclosing exempt records.

36 Gov. Code, § 6253, subd. (e).

37 St. Croix v. Superior Court (2014) 228 Cal.App.4th 434, 446. ("Because the charter incorporates the [attorney-client] privilege, an ordinance (whether enacted by the City’s board of supervisors or by the voters) cannot eliminate it, either by designating as not confidential a class of material that otherwise would be protected by the privilege, or by waiving the privilege as to that category of documents; only a charter amendment can achieve that result.").

38 E.g., individually-identifiable medical information protected under state and federal law (Civ. Code §§ 56.10(a), 56.05(g); 42 U.S.C. § 1320d-1-d-3); child abuse and neglect records (Pen. Code, § 11167.5); elder abuse and neglect records (Welf. & Inst. Code, §15633); mental health detention records (Welf. & Inst. Code, §§ 5150, 5328).

39 Gov. Code, §§ 6253, subd. (a); 6252, subd. (c); Connell v. Superior Court (1997) 56 Cal.App.4th 601, 610-612; Gov. Code § 6252.5; See "Who Can Request Records,” p. 16.
subject to disclosure to any and all requesters.40 Accordingly, the PRA ensures equal access to government information by preventing local agencies from releasing exempt records to some requesters but not to others.

**Enforced Access to Public Records**

To enforce local agencies’ compliance with the PRA’s open government mandate, the PRA provides for the mandatory award of court costs and attorneys’ fees to plaintiffs who successfully seek a court ruling ordering disclosure of withheld public records.41 The attorney’s fees policy enforcing records transparency is liberally applied.42

**The PRA at the Crux of Democratic Government in California**

Ongoing, important developments in PRA-related constitutional, statutory, and decisional law continue to reflect the central role government’s handling of information plays in balancing tensions inherent in democratic society: considerations of privacy and government transparency, accountability, and effectiveness. Controversial records law issues in California have included government’s use of social media and new law enforcement technologies, and treatment of related records; management and retention of public officials’ emails; open data standards for government information; disclosure of attorney bills; and new legal means for preserving or opposing access to government information.43 Regarding all those issues and others, the PRA has been, and continues to be an indispensable and dynamic arena for simultaneously preserving information transparency, privacy, and effective government, which the California Constitutional and statutory frameworks are intended to guarantee, and on which California citizens continue to insist.


41 Gov. Code, § 6259, subd. (d); see “Attorney Fees and Costs,” p. 61.

42 See “Attorneys Fees and Costs,” p. 61.

The Basics

The PRA "embodies a strong policy in favor of disclosure of public records." As with any interpretation or construction of legislation, the courts will "first look at the words themselves, giving them their usual and ordinary meaning." Definitions found in the PRA establish the statute’s structure and scope, and guide local agencies, the public, and the courts in achieving the legislative goal of disclosing local agency records while preserving equally legitimate concerns of privacy and government effectiveness. It is these definitions that form the "basics" of the PRA.

What are Public Records?

The PRA defines “public records” as "any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The term "public records" encompasses more than simply those documents that public officials are required by law to keep as official records. Courts have held that a public record is one that is “necessary or convenient to the discharge of [an] official duty[,]” such as a status memorandum provided to the city manager on a pending project.

Writings

A writing is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."
The statute unambiguously states that “[p]ublic records” include “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”

Unless the writing is related “to the conduct of the public’s business” and is “prepared, owned, used or retained by” a local agency, it is not a public record subject to disclosure under the PRA.

Information Relating to the Conduct of Public Business

Public records include “any writing containing information relating to the conduct of the public’s business.” However, “[c]ommunications that are primarily personal containing no more than incidental mentions of agency business generally will not constitute public records.” Therefore, courts have observed that although a writing is in the possession of the local agency, it is not automatically a public record if it does not also relate to the conduct of the public’s business. For example, records containing primarily personal information, such as an employee’s personal address list or grocery list, are considered outside the scope of the PRA.

Prepared, Owned, Used, or Retained

Writings containing information “related to the conduct of the public’s business” must also be “prepared, owned, used or retained by any state or local agency” to be public records subject to the PRA. What is meant by “prepared, owned, used or retained” has been the subject of several court decisions.

Writings need not always be in the physical custody of, or accessible to, a local agency to be considered public records subject to the PRA. The obligation to search for, collect, and disclose the material requested can apply to records in the possession of a local agency’s consultants, which are deemed “owned” by the public agency and in its “constructive possession” when the terms of an agreement between the city and the consultant provide for such ownership. Where a local agency has no contractual right to control the subconsultants or their files, the records are not considered to be within their “constructive possession.”

Likewise, documents that otherwise meet the definition of public records (including emails and text messages) are considered “retained” by the local agency even when they are actually “retained” on an employee or official’s personal device or account.

The California Supreme Court has provided some guidance on how a local agency can discover and manage public records located on their employees’ non-governmental devices or accounts. The Court did not endorse or mandate any particular search method, and reaffirmed that the PRA does not prescribe any specific method for searching, and that the scope of a local agency’s search for public records need only be “calculated to locate responsive documents.” When a local agency receives a request for records that may be held in an employee’s personal account, the local agency’s first step should be to communicate the request not only to the custodian of records but also to any employee or official who may have such information in personal devices or accounts. The Court states that a local agency may then “reasonably rely” on the employees to search their own personal files, accounts, and devices for responsive materials.

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51 Regents of the University of California v. Superior Court, supra, 222 Cal.App.4th at p. 399.

52 Gov. Code, § 6252, subd. (e).

53 City of San Jose v. Superior Court (2017) 2 Cal.5th 608, 618-619.

54 Gov. Code, § 6252, subd. (e); Regents of the University of California v. Superior Court, supra, 222 Cal.App.4th at pp. 403–405; Braun v. City of Taft, supra, 154 Cal.App.3d at p. 340; San Gabriel Tribune v. Superior Court, supra, 143 Cal.App.3d at p. 774.

55 Gov. Code § 6252,subd. (e).

56 Consolidated Irrigation District v. Superior Court (2013) 205 Cal.App.4th 697, 710; City of San Jose v. Superior Court, supra, 2 Cal.5th at p. 623.

57 Community Youth Athletic Center v. City of National City (2013) 220 Cal.App.4th 1385, 1428; City of San Jose v. Superior Court, supra, 2 Cal.5th at p. 623.

58 City of San Jose v. Superior Court, supra, 2 Cal.5th at p. 629; Community Youth Athletic Center v. City of National City (2013) 220 Cal.App.4th 1385, 1428.

59 City of San Jose v. Superior Court, supra, 2 Cal.5th at p. 628.
The Court’s guidance, which includes a caveat that they “do not hold that any particular search method is required or necessarily adequate[,]” includes examples of policies and practices in other state and federal courts and agencies, including:

- Reliance on employees to conduct their own searches and record segregation, so long as the employees have been properly trained on what are public records;
- Where an employee asserts to the local agency that he or she does not have any responsive records on his or her personal device(s) or account(s), he or she may be required by a court (as part of a later court action concerning a records request) to submit an affidavit providing the factual basis for determining whether the record is a public or personal record (e.g., personal notes of meetings and telephone calls protected by deliberative process privilege, versus meeting agendas circulated throughout entire department.)
- Adoption of policies that will reduce the likelihood of public records being held in an employee’s private account, including a requirement that employees only use government accounts, or that they copy or forward all email or text messages to the local agency’s official recordkeeping system.

Documents that a local agency previously possessed, but does not actually or constructively possess at the time of the request may not be public records subject to disclosure.

**Regardless of Physical Form or Characteristics**

A public record is subject to disclosure under the PRA “regardless of its physical form or characteristics.” The PRA is not limited by the traditional notion of a “writing.” As originally defined in 1968, the legislature did not specifically recognize advancing technology as we consider it today. Amendments beginning in 1970 have added references to “photographs,” “magnetic or punch cards,” “disks,” and “drums,” with the latest amendments in 2002 providing the current definition of “writing.” Records subject to the PRA include records in any media, including electronic media, in which government agencies may possess records. This is underscored by the definition of “writings” treated as public records under the PRA, which includes “transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” The legislative intent to incorporate future changes in the character of writings has long been recognized by the courts, which have held that the “definition of writing is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed.”

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60 Id. at pp. 627-629.
61 See Grand Cent. Partnership, Inc. v. Cuomo (2d. Cir. 1999) 166 F.3d 473, 481 for expanded discussion on the use of affidavit in FOIA litigation.
62 See 44 U.S.C. Sec. 2911(a).
64 Gov. Code, § 6252, subd. (e).
65 Gov. Code, § 6252, subd. (c); Stats. 1970, c. 575, p. 1151, § 2.
66 Gov. Code, § 6252, subd. (g); Stats. 2002, c. 1073
67 Gov. Code, § 6252, subd. (g).
Metadata
Electronic records may include “metadata,” or data about data contained in a record that is not visible in the text. For example, metadata may describe how, when, or by whom particular data was collected, and contain information about document authors, other documents, or commentary or notes. No provision of the PRA expressly addresses metadata, and there are no reported court opinions in California considering whether or the extent to which metadata is subject to disclosure. Evolving law in other jurisdictions has held that local agency metadata is a public record subject to disclosure unless an exemption applies. There are no reported California court opinions providing guidance on whether agencies have a duty to disclose metadata when an electronic record contains exempt information that cannot be reasonably segregated without compromising the record’s integrity.

**PRACTICE TIP:**
Agencies that receive requests for metadata or requests for records that include metadata should treat the requests the same way they treat all other requests for electronic information and disclose non-exempt metadata.

Agency-Developed Software
The PRA permits government agencies to develop and commercialize computer software and benefit from copyright protections so that such software is not a “public record” under the PRA. This includes computer mapping systems, computer programs, and computer graphics systems. As a result, public agencies are not required to provide copies of agency-developed software pursuant to the PRA. The PRA authorizes state and local agencies to sell, lease, or license agency-developed software for commercial or noncommercial use. The exception for agency-developed software does not affect the public record status of information merely because it is stored electronically.

Computer Mapping (GIS) Systems
While computer mapping systems developed by local agencies are not public records subject to disclosure, such systems generally include geographic information system (GIS) data. Many local agencies use GIS programs and databases for a broad range of purposes, including the creation and editing of maps depicting property and facilities of importance to the agency and the public. As with metadata, the PRA does not expressly address GIS information disclosure. However, the California Supreme Court has held that while GIS software is exempt under the PRA, the data in a GIS file format is a public record, and data in a GIS database must be produced.

70 Gov. Code, § 6254.9, subds. (a), (b).
71 Gov. Code, § 6254.9, subd. (a).
72 Gov. Code, § 6254.9, subd. (d).
Specifically Identified Records

The PRA also expressly makes particular types of records subject to the PRA, or subject to disclosure, or both. For example, the PRA provides that the following are public records:

- Contracts of state and local agencies that require a private entity to review, audit, or report on any aspect of the agency, to the extent the contract is otherwise subject to disclosure under the PRA;74
- Specified pollution information that state or local agencies require applicants to submit, pollution monitoring data from stationary sources, and records of notices and orders to building owners of housing or building law violations;75
- Employment contracts between state and local agencies and any public official or employee;76 and
- Itemized statements of the total expenditures and disbursements of judicial agencies provided for under the State Constitution.77

What Agencies are Covered?

The PRA applies to state and local agencies. A state agency is defined as “every state office, officer, department, division, bureau, board and commission or other state body or agency.”78 A local agency includes a county, city (whether general law or chartered), city and county, school district, municipal corporation, special district, community college district, or political subdivision.79 This encompasses any committees, boards, commissions, or departments of those entities as well. Private entities that are delegated legal authority to carry out public functions, and private entities (1) that receive funding from a local agency, and (2) whose governing board includes a member of the local agency’s legislative body who is appointed by that legislative body and who is a full voting member of the private entity’s governing board, are also subject to the PRA.80 Nonprofit entities that are legislative bodies under the Brown Act may be subject to the PRA.81

The PRA does not apply to the Legislature or the judicial branch.82 The Legislative Open Records Act covers the Legislature.83 Most court records are disclosable as the courts have historically recognized the public’s right of access to public records maintained by the courts under the common law and the First Amendment of the United States Constitution.84

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74 Gov. Code, § 6253.31.
75 Gov. Code, § 6254.7. But see Masonite Corp. v. County of Mendocino Air Quality Management District (1996) 42 Cal.App.4th 436, 450–453 (regarding trade secret information that may be exempt from disclosure).
76 Gov. Code, § 6254.8. But see Versaci v. Superior Court (2005) 127 Cal.App.4th 805, 817 (holding that reference in a public employee's contract to future personal performance goals, to be set and thereafter reviewed as a part of, and in conjunction with, a public employee's performance evaluation does not incorporate such documents into the employee's performance for the purposes of the Act).
77 Gov. Code, § 6261.
78 Gov. Code § 6252, subd. (f). Excluded from the definition of state agency are those agencies provided for in article IV (except section 20(k)) and article VI of the Cal. Constitution.
79 Gov. Code, § 6252, subd. (a).
81 See Open & Public V, Chapter 2.
83 Gov. Code, § 1070.
Who Can Request Records?

All “persons” have the right to inspect and copy non-exempt public records. A “person” need not be a resident of California or a citizen of the United States to make use of the PRA.85 “Persons” include corporations, partnerships, limited liability companies, firms, or associations.86 Often, requesters include persons who have filed claims or lawsuits against the government, or who are investigating the possibility of doing so, or who just want to know what their government officials are up to. With certain exceptions, neither the media nor a person who is the subject of a public record has any greater right of access to public records than any other person.87

Local agencies and their officials are entitled to access public records on the same basis as any other person.88 Further, local agency officials might be authorized to access public records of their own agency that are otherwise exempt if such access is permitted by law as part of their official duties.89 Under such circumstances, however, the local agency shall not discriminate between or among local agency officials as to which writing or portion thereof is to be made available or when it is made available.90

88 Gov. Code, § 6252.5.
90 Gov. Code, § 6252.7. See also Gov. Code, § 54957.2.
Responding to a Public Records Request

Local Agency’s Duty to Respond to Public Record Requests
The fundamental purpose of the PRA is to provide access to information about the conduct of the people’s business. This right of access to public information imposes a duty on local agencies to respond to PRA requests and does not “permit an agency to delay or obstruct the inspection or copying of public records.” Even if the request does not reasonably describe an identifiable record, the requested record does not exist, or the record is exempt from disclosure, the agency must respond.

Types of Requests — Right to Inspect or Copy Public Records
There are two ways to gain access under the PRA to a public record: (1) inspecting the record at the local agency’s offices or on the local agency’s website; or (2) obtaining a copy from the local agency. The local agency may not dictate to the requester which option must be used, that is the requester’s decision. Moreover, a requester does not have to choose between inspection and copying but instead can choose both options. For example, a requester may first inspect a set of records, and then, based on that review, decide which records should be copied.

► PRACTICE TIP:
If the public records request does not make clear whether the requester wants to inspect or obtain a copy of the record or records being sought, the local agency should seek clarification from the requester without delaying the process of searching for, collecting, and redacting or “whiting out” exempt information in the records.

91 Gov. Code, § 6250.
92 Gov. Code, § 6253, subd. (d).
93 Gov. Code, § 6253.
94 Gov. Code, § 6253, subds. (a), (b), & (f).
Right to Inspect Public Records

Public records are open to inspection at all times during the office hours of the local agency and every person has a right to inspect any public record. This right to inspect includes any reasonably segregable portion of a public record after deletion of the portions that are exempted by law. This does not mean that a requester has a right to demand to see a record and immediately gain access to it. The right to inspect is constrained by an implied rule of reason to protect records against theft, mutilation, or accidental damage; prevent interference with the orderly functioning of the office; and generally avoid chaos in record archives. Moreover, the agency’s time to respond to an inspection request is governed by the deadlines set forth below, which give the agency a reasonable opportunity to search for, collect, and, if necessary, redact exempt information prior to the records being disclosed in an inspection.

In addition, in lieu of providing inspection access at the local agency’s office, a local agency may post the requested public record on its website and direct a member of the public to the website. If a member of the public requests a copy of the record because of the inability to access or reproduce the record from the website, the local agency must provide a copy.

Right to Copy Public Records

Except with respect to public records exempt from disclosure by express provisions of law, a local agency, upon receipt of a request for a copy of records that reasonably describes an identifiable record or records, must make the records promptly available to any person upon payment of the appropriate fees. If a copy of a record has been requested, the local agency generally must provide an exact copy except where it is “impracticable” to do so. The term “impracticable” does not necessarily mean that compliance with the public records request would be inconvenient or time-consuming to the local agency. Rather, it means that the agency must provide the best or most complete copy of the requested record that is reasonably possible. As with the right to inspect public records, the same rule of reasonableness applies to the right to obtain copies of those records. Thus, the local agency may impose reasonable restrictions on general requests for copies of voluminous classes of documents.
The PRA does not provide for a standing or continuing request for documents that may be generated in the future.\textsuperscript{103} However, the Brown Act provides that a person may make a request to receive a mailed copy of the agenda, or all documents constituting the agenda packet for any meeting of the legislative body. This request shall be valid for the calendar year in which it is filed.\textsuperscript{104} A person may also make a request to receive local agency notices, such as public work contractor plan room documents,\textsuperscript{105} and development impact fee,\textsuperscript{106} public hearing,\textsuperscript{107} or California Environmental Quality Act notices.\textsuperscript{108} The local agency may impose a reasonable fee for these requests.

\begin{itemize}
  \item \textbf{PRACTICE TIP:}
  Agencies may consider the use of outside copy services for oversize records or a voluminous record request, provided that the requester consents to it and pays the appropriate fees in advance. Alternatively, local agencies may consider allowing the requester to use his or her own copy service.
\end{itemize}

\section*{Form of the Request}

A public records request may be made in writing or orally, in person or by phone.\textsuperscript{109} Further, a written request may be made in paper or electronic form and may be mailed, emailed, faxed, or personally delivered. A local agency may ask, but cannot require, that the requester put an oral request in writing. In general, a written request is preferable to an oral request because it provides a record of when the request was made and what was requested, and helps the agency respond in a more timely and thorough manner.

\begin{itemize}
  \item \textbf{PRACTICE TIP:}
  Though not legally required, a local agency may find it convenient to use a written form for public records requests, particularly for those instances when a requester “drops in” to an office and asks for one or more records. The local agency cannot require the requester to use a particular form, but having the form and even having agency staff assist with filling out the form may help agencies better identify the information sought, follow up with the requester using the contact information provided, and provide more effective assistance to the requester in compliance with the PRA.
\end{itemize}

\begin{flushleft}
\footnotesize
\textsuperscript{103} Gov. Code, §§ 6252, subds. (c) & (g); 6253, subds. (a) & (b).
\textsuperscript{104} Gov. Code, § 54954.1; see also Gov. Code § 65092 (standing request for notice of public hearing), Cal. Code Regs., tit. 14, §§ 15072, 15082 and 15087 (standing requests for notice related to environmental documents).
\textsuperscript{105} Pub. Contract Code, § 20103.7.
\textsuperscript{106} Gov. Code, § 66016.
\textsuperscript{107} Gov. Code, § 65092.
\textsuperscript{108} Pub. Resources Code, § 21092.2
\end{flushleft}
Content of the Request

A public records request must reasonably describe an identifiable record or records. It must be focused, specific, and reasonably clear, so that the local agency can decipher what record or records are being sought. A request that is so open-ended that it amounts to asking for all of a department’s files is not reasonable. If a request is not clear or is overly broad, the local agency has a duty to assist the requester in reformulating the request to make it clearer or less broad.

A request does not need to precisely identify the record or records being sought. For example, a requester may not know the exact date of a record or its title or author, but if the request is descriptive enough for the local agency to understand which records fall within its scope, the request is reasonable. Requests may identify writings somewhat generally by their content.

No magic words need be used to trigger the local agency’s obligation to respond to a request for records. The content of the request must simply indicate that a public record is being sought. Occasionally a requester may incorrectly refer to the federal Freedom of Information Act (FOIA) as the legal basis for the request. This does not excuse the agency from responding if the request seeks public records. A public records request need not state its purpose or the use to which the record will be put by the requester. A requester does not have to justify or explain the reason for exercising his or her fundamental right of access.

PRACTICE TIP:

A public records request is different than a question or series of questions posed to local agency officials or employees. The PRA creates no duty to answer written or oral questions submitted by members of the public. But if an existing and readily available record contains information that would directly answer a question, it is advisable to either answer the question or provide the record in response to the question.

A PRA request applies only to records existing at the time of the request. It does not require a local agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

Timing of the Response

Inspection of Public Records

Although the law precisely defines the time for responding to a public records request for copies of records, it is less precise in defining the deadline for disclosing records. Because the PRA does not state how soon a requester seeking to inspect records must be provided access to them, it is generally assumed that the standard of promptness set forth for copies of records applies to inspection. This assumption is bolstered by the provision in the PRA that states, “Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records,” which again signals the importance of promptly disclosing records to the requester.

110 Gov. Code, § 6253, subd. (b).
113 See “Assisting the Requester,” p. 22.
115 See Gov. Code, § 6257.5.
117 Gov. Code § 6254, subd. (c).
118 Gov't Code, § 6253, subd. (b) (“…each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available…”); 88 Ops. Cal. Atty. Gen. 153 (2005); 89 Ops. Cal. Atty. Gen. 39 (2006).
119 Gov. Code, § 6253, subd. (d).
Neither the 10-day response period for responding to a request for a copy of records nor the additional 14-day extension may be used to delay or obstruct the inspection of public records.120 For example, requests for commonly disclosed records that are held in a manner that allows for prompt disclosure should not be withheld because of the statutory response period.

Copies of Public Records

Time is critical in responding to a request for copies of public records. A local agency must respond promptly, but no later than 10 calendar days from receipt of the request, to notify the requester whether records will be disclosed.121 If the request is received after business hours or on a weekend or holiday, the next business day may be considered the date of receipt. The 10-day response period starts with the first calendar day after the date of receipt.122 If the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request.123

▶ PRACTICE TIP:
To ensure compliance with the 10-day deadline, it is wise for local agencies to develop a system for identifying and tracking public records requests. For example, a local agency with large departments may find it useful to have a public records request coordinator within each department. It is also very helpful to develop and implement a policy for handling public records requests in order to ensure the agency’s compliance with the law.

▶ PRACTICE TIP:
Watch for shorter statutory time periods for disclosure of public records. For example, Statements of Economic Interest (FPPC Form 700) and other campaign statements and filings required by the Political Reform Act of 1974 (Govt Code §§ 81000 et seq) are required to be made available to the public as soon as practicable, and in no event later than the second business day following receipt of the request.124

Extending the Response Times for Copies of Public Records

A local agency may extend the 10-day response period for copies of public records for up to 14 additional calendar days because of the need:

- To search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
- To search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request;
- To consult with another agency having substantial interest in the request (such as a state agency), or among two or more components of the local agency (such as two city departments) with substantial interest in the request; or
- In the case of electronic records, to compile data, write programming language or a computer program, or to construct a computer report to extract data.125

No other reasons justify an extension of time to respond to a request for copies of public records. For example, a local agency

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121 Gov. Code, § 6253(c).
122 Civ. Code, § 10.
124 Gov. Code, § 81008.
125 Gov. Code, § 6253, subds. (c)(1)-(4).
may not extend the time on the basis that it has other pressing business or that the employee most knowledgeable about the records sought is on vacation or is otherwise unavailable.

If a local agency exercises its right to extend the response time beyond the ten-day period, it must do so in writing, stating the reason or reasons for the extension and the anticipated date of the response within the 14-day extension period. The agency does not need the consent of the requester to extend the time for response.

**PRACTICE TIP:**
If a local agency is having difficulty responding to a public records request within the 10-day response period and there does not appear to be grounds to extend the response period for an additional 14 days, the agency may obtain an extension by consent of the requester. Often a requester will cooperate with the agency on such matters as the timing of the response, particularly if the requester believes the agency is acting reasonably and conscientiously in processing the request. It is also advisable to document in writing any extension agreed to by the requester.

### Timing of Disclosure

The time limit for responding to a public records request is not necessarily the same as the time within which the records must be disclosed to the requester. As a practical matter, records often are disclosed at the same time the local agency responds to the request. But in some cases, that time frame for disclosure is not feasible because of the volume of records encompassed by the request.

**PRACTICE TIP:**
When faced with a voluminous public records request, a local agency has numerous options — for example, asking the requester to narrow the request, asking the requester to consent to a later deadline for responding to the request, and providing responsive records (whether redacted or not) on a “rolling” basis, rather than in one complete package. It is sometimes possible for the agency and requester to work cooperatively to streamline a public records request, with the result that the requester obtains the records or information the requester truly wants, while the burdens on the agency in complying with the request are reduced. If any of these options are used it is advisable that it is documented in writing.

### Assisting the Requester

Local agencies must provide assistance to requesters who are having difficulty making a focused and effective request. To the extent reasonable under the circumstances, a local agency must:

- Assist the requester in identifying records that are responsive to the request or the purpose of the request, if stated;
- Describe the information technology and physical location in which the record or records exist; and
- Provide suggestions for overcoming any practical basis for denying access to the record or records.

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126 Gov. Code, § 6253, subd. (c).
Alternatively, the local agency may satisfy its duty to assist the requester by giving the requester an index of records. Ordinarily an inquiry into a requester’s purpose in seeking access to a public record is inappropriate, but such an inquiry may be proper if it will help assist the requester in making a focused request that reasonably describes an identifiable record or records.

**Locating Records**

Local agencies must make a reasonable effort to search for and locate requested records, including by asking probing questions of city staff and consultants. No bright-line test exists to determine whether an effort is reasonable. That determination will depend on the facts and circumstances surrounding each request. In general, upon the local agency’s receipt of a public records request, those persons or offices that would most likely be in possession of responsive records should be consulted in an effort to locate the records. For a local agency to have a duty to locate records they must qualify as public records. “Thus, unless the writing is related ‘to the conduct of the public’s business’ and is ‘prepared, owned, used or retained by’ a public entity, it is not a public record under the PRA, and its disclosure would not be governed by the PRA. No words in the statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used or retained them.”

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**PRACTICE TIP:**

To ensure compliance with the PRA and in anticipation of court scrutiny of agency diligence in locating responsive records, agencies may want to consider adopting policies similar to those required by state and federal E-discovery statutes to prevent records destruction while a request is pending.

The right to access public records is not without limits. A local agency is not required to perform a “needle in a haystack” search to locate the record or records sought by the requester. Nor is it compelled to undergo a search that will produce a “huge volume” of material in response to the request. On the other hand, an agency typically will endure some burden — at times, a significant burden — in its records search. Usually that burden alone will be insufficient to justify noncompliance with the request. Nevertheless, if the request imposes a substantial enough burden, an agency may decide to withhold the requested records on the basis that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

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130 See Gov. Code, § 6257.5.
131 Gov. Code, § 6253.1, subd. (a).
133 See “What Are Public Records” p. 11.
136 Ibid.
137 Ibid.
Types of Responses
After conducting a reasonable search for requested records, a local agency has only a limited number of possible responses. If the search yielded no responsive records, the agency must so inform the requester. If the agency has located a responsive record, it must decide whether to: (1) disclose the record; (2) withhold the record; or (3) disclose the record in redacted form.

➤ PRACTICE TIP:
Care should be taken in deciding whether to disclose, withhold, or redact a record. It is advisable to consult with the local agency’s legal counsel before making this decision, particularly when a public records request presents novel or complicated issues or implicates policy concerns or third party rights.

If a written public records request is denied because the local agency does not have the record or has decided to withhold it, or if the requested record is disclosed in redacted form, the agency’s response must be in writing and must identify by name and title each person responsible for the decision. 139

➤ PRACTICE TIP:
A local agency should always document that it is supplying the record to the requester. The fact and sufficiency of the response may become points of dispute with the requester.

➤ PRACTICE TIP:
Although not required, any response that denies in whole or in part an oral public records request should be put in writing.

If the record is withheld in its entirety or provided to the requester in redacted form, the local agency must state the legal basis under the PRA for its decision not to comply fully with the request. 140 Statements like “we don’t give up those types of records” or “our policy is to keep such records confidential” will not suffice.

Redacting Records
Some records contain information that must be disclosed, along with information that is exempt from disclosure. A local agency has a duty to provide such a record to the requester in redacted form if the nonexempt information is “reasonably segregable” from that which is exempt, 141 unless the burden of redacting the record becomes too great. 142 What is reasonably segregable will depend on the circumstances. If exempt information is inextricably intertwined with nonexempt information, the record may be withheld in its entirety. 143

139 Gov. Code, §§ 6253, subd. (d), 6255, subd. (b).
140 Gov. Code, § 6255, subd. (a).
141 Gov. Code, § 6253, subd. (a); American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 458.
142 American Civil Liberties Union Foundation v. Deukmejian, supra, 32 Cal.3d , at p. 452–454.
143 Ibid.
No Duty to Create a Record or a Privilege Log

A local agency has no duty to create a record that does not exist at the time of the request.144 There is also no duty to reconstruct a record that was lawfully discarded prior to receipt of the request. However, an agency may be liable for attorney fees when a court determines the agency was not sufficiently diligent in locating requested records, even when the requested records no longer exist.145

The PRA does not require that a local agency create a "privilege log" or list that identifies the specific records being withheld.146 The response only needs to identify the legal grounds for nondisclosure. If the agency creates a privilege log for its own use, however, that document may be considered a public record and may be subject to disclosure in response to a later public records request.

► PRACTICE TIP:
To ensure compliance with the PRA or in anticipation of court scrutiny of the agency’s due diligence, the local agency may wish to maintain a separate file for copies of records that have been withheld and those produced (including redacted versions).

Fees

The public records process is in many respects cost-free to the requester. The local agency may only charge a fee for the direct cost of duplicating a record when the requester is seeking a copy,147 or it may charge a statutory fee, if applicable.148 A local agency may require payment in advance, before providing the requested copies;149 however, no payment can be required merely to look at a record where copies are not sought.

Direct cost of duplication is the cost of running the copy machine, and conceivably the expense of the person operating it. "Direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection, and handling of the file from which the copy is extracted. 150 For example, if concern for the security of records requires that an agency employee sit with the requester during the inspection, or if a record must be redacted before it can be inspected, the agency may not bill the requester for that expenditure of staff time.

► PRACTICE TIP:
The direct cost of duplication charged for a PRA request should be supported by a fee study adopted by a local agency resolution.

Although permitted to charge a fee for duplication costs, a local agency may choose to reduce or waive that fee.151 For example, the agency might waive the fee in a particular case because the requester is indigent; or it might generally choose to waive fees below a certain dollar threshold because the administrative costs of collecting the fee would exceed the revenue to be collected.

144 Gov. Code, § 6252, subd. (e); Haynie v. Superior Court (2001) 26 Cal.4th 1061, 1075; See Chapter 6 concerning duties and obligations with respect to electronic records.
146 Haynie v Superior Court, supra, 26 Cal.4th, at p. 1075.
147 Gov. Code, § 6253, subd. (b).
149 Gov. Code, § 6253, subd. (b).
An agency may also set a customary copying fee for all requests that is lower than the amount of actual duplication costs.

➤ PRACTICE TIP:
If a local agency selectively waives or reduces the duplication fee, it should apply standards for waiver or reduction with consistency to avoid charges of favoritism or discrimination toward particular requesters.

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy. However, requesters may be required to bear additional costs of producing a copy of an electronic record, such as programming and computer services costs, if the request requires the production of electronic records that are otherwise only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction, or programming. Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.

➤ PRACTICE TIP:
If there is a request for public records pursuant to Government Code section 6253.9 requiring “data compilation, extraction, or programming to produce the record” the local agency should ask the requester to pay the fees in advance, before the “data compilation, extraction, or programming” is actually done.

Waiver

Generally, whenever a local agency discloses an otherwise exempt public record to any member of the public, the disclosure constitutes a waiver of most of the exemptions contained in the PRA for all future requests for the same information. The waiver provision in Government Code section 6254.5 applies to an intentional disclosure of privileged documents, and a local agency’s inadvertent release of attorney-client documents does not waive such privilege.152 There are, however, a number of statutory exceptions to the waiver provisions, including, among others, disclosures made through discovery or other legal proceedings, and disclosures made to another governmental agency which agrees to treat the disclosed material as confidential.

Chapter 4

Specific Document Types, Categories and Exemptions from Disclosure

Overview of Exemptions

This chapter discusses how to address requests for certain specific types and categories of commonly requested records and many of the most frequently raised exemptions from disclosure that may, or in some cases, must be asserted by local agencies.

Transparent and accessible government is the foundational objective of the PRA. This recently constitutionalized right of access to the writings of local agencies and officials was declared by the Legislature in 1968 to be a “fundamental and necessary right.” While this right of access is not absolute, it must be construed broadly.153 The PRA contains approximately 76 express exemptions, many of which are discussed below, including one for records that are otherwise exempt from disclosure by state or federal statutes,154 and a balancing test, known as the “public interest” or “catchall” provision. This “catchall” provision allows local agencies to justify withholding any record by demonstrating that on the facts of a particular case the public interest in nondisclosure clearly outweighs the public interest in disclosure.155

When local agencies claim an exemption or prohibition to disclosure of all or a part of a record, they must identify the specific exemption to disclosure in the response.156 Where a record contains some information that is subject to an exemption and other information that is not, the local agency may redact the information that is exempt (identifying the exemption), but must otherwise still produce the record. Unless a statutory exemption applies, the public is entitled to access or a copy.157

156 Gov. Code, §6255, subd. (a); Long Beach Police Officers Assn. v. City of Long Beach, supra, 59 Cal.4th at p. 67.
Types of Records and Specific Exemptions

Architectural and Official Building Plans

The PRA recognizes exemptions to the disclosure of a record “which is exempted or prohibited [from disclosure] pursuant to federal or state law ...” 158 Under this rule, architectural and official building plans may be exempt from disclosure, because: (1) architectural plans submitted by third parties to local agencies may qualify for federal copyright protections; 159 (2) local agencies may claim a copyright in many of their own records; or (3) state laws address inspection and duplication of building plans by members of the public.

“Architectural work,” defined under federal law as the “design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings,” 160 is considered an “original work of authorship,” which has automatic federal copyright protection. 161 Architectural plans may be inspected, but cannot be copied without the permission of the owner. 162

PRACTICE TIP:
Some requesters will cite the “fair use of copyrighted materials” doctrine as giving them the right to copy architectural plans. The fair use rule is a defense to a copyright infringement action only and not a legal entitlement to obtain copyrighted materials.

The official copy of building plans maintained by a local agency’s building department may be inspected, but cannot be copied without the local agency first requesting the written permission of the licensed or registered professional who signed the document and the original or current property owner. 163 A request made by the building department via registered or certified mail for written permission from the professional must give the professional at least 30 days to respond and be accompanied by a statutorily prescribed affidavit signed by the person requesting copies, attesting that the copy of the plans shall only be used for the maintenance, operation, and use of the building, that the drawings are instruments of professional service and are incomplete without the interpretation of the certified, licensed, or registered professional of record, and that a licensed architect who signs and stamps plans, specifications, reports, or documents shall not be responsible for damage caused by subsequent unauthorized changes to or uses of those plans. 164 After receiving this required information, the professional cannot withhold

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158 Gov. Code, § 6254, subd. (k).
164 Ibid.
written permission to make copies of the plans. These statutory requirements do not prohibit duplication of reduced copies of plans that have been distributed to local agency decision-making bodies as part of the agenda materials for a public meeting.

The California Attorney General has determined that interim grading documents, including geology, compaction, and soils reports, are public records that are not exempt from disclosure.

**Attorney-Client Communications and Attorney Work Product**

The PRA specifically exempts from disclosure "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, the provisions of the Evidence Code relating to privilege." The PRA’s exemptions protect attorney-client privileged communications and attorney work product, as well as, more broadly, other work product prepared for use in pending litigation or claims.

**Attorney-Client Privilege**

The attorney-client privilege protects from disclosure the entirety of confidential communications between attorney and client, as well as among the attorneys within a firm or in-house legal department representing such client, including factual and other information not in itself privileged outside of attorney-client communications. The fundamental purpose of the attorney-client privilege is preservation of the confidential relationship between attorney and client. It is not necessary to demonstrate that prejudice would result from disclosure of attorney-client communications to prevent such disclosure. When the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney and client, the communication is protected by the privilege. Unlike the exemption for pending litigation, attorney-client privileged information is still protected from disclosure even after litigation is concluded. But note, the attorney-client privilege will likely not protect communication between a public employee and his or her personal attorney if that communication occurs using a public entity’s computer system and the public entity has a computer policy that indicates the computers are intended for the public entity’s business and are subject to monitoring by the employer.

The attorney plaintiff in a wrongful termination suit and the defendant insurer may reveal privileged third-party attorney-client communications to their own attorneys to the extent necessary for the litigation, but may not publicly disclose such communications.

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166 Gov. Code, § 54957.5.
168 Gov. Code, § 6254, subd. (k).
Attorney Work Product

Any writing that reflects an attorney’s impressions, conclusions, opinions, legal research, or theories is not discoverable under any circumstances and is thus exempt from disclosure under the PRA. There is also a qualified privilege against disclosure of materials (e.g., witness statements, other investigative materials) developed by an attorney in preparing a case for trial as thoroughly as possible with a degree of privacy necessary to uncover and investigate both favorable and unfavorable aspects of a case.\[176\]

Common Interest Doctrine

The common interest doctrine may also protect communications with third parties from disclosure where the communication is protected by the attorney-client privilege or attorney-work-product doctrine, and maintaining the confidentiality of the communication is necessary to accomplish the purpose for which legal advice was sought. The common interest doctrine is not an independent privilege; rather, it is a nonwaiver doctrine that may be used by plaintiffs or defendants alike.\[177\] For the common interest doctrine to attach, the parties to the shared communication must have a reasonable expectation that the information disclosed will remain confidential. Further, the parties must have a common interest in a matter of joint concern. In other words, they must have a common interest in securing legal advice related to the same matter and the communication must be made to advance their shared interest in securing legal advice on that common matter.\[178\]

Attorney Bills and Retainer Agreements

The courts have established a narrower rule governing disclosure of attorney bills. An attorney’s billing entries remain exempt from disclosure under the attorney-client privilege or attorney-work-product doctrine only insofar as they describe an attorney’s impressions, conclusions, opinions, legal research, or strategy. Neither the attorney-client privilege nor the attorney work product doctrine categorically shields everything in a billing invoice from disclosure, even if the bills concern pending litigation. The court will look at whether, in pending or active matters, the billing entries are so closely related to the attorney-client communications that they “implicate the heartland” of the privilege.\[179\] Only substantive attorney communications such as legal conclusions, research, or strategy are protected.\[180\]

Retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney-client privilege.\[181\] A local agency’s governing body may waive the privilege and elect to produce the agreements.\[182\]

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**PRACTICE TIP:**

Some agencies simplify redaction of attorney bills and production of non-exempt bill information in response to requests by requiring that non-exempt portions of attorney bills, such as the name of the matter, the invoice amount, and date, be contained in separate documents from privileged bill text.

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176 Code Civ. Proc., § 2018.030, subds. (a) & (b); Gov. Code, § 6254, subd. (k).
178 Compare Citizens for Ceres v. Superior Court (2012) 217 Cal.App.4th 889, 914–922 (common interest doctrine inapplicable to communications between developer and city prior to approval of application because, pre-project approval, parties lacked a common interest) with California Oak Foundation v. County of Tehama (2009) 174 Cal.App.4th 1217, 1222–1223 (sharing of privileged documents with project applicant prepared by county’s outside law firm regarding CEQA compliance was within common interest doctrine).
179 County of Los Angeles v. Superior Court (2016) 2 Cal.5th 282, 288.
181 Bus. & Prof. Code, § 6149 (a written fee contract shall be deemed to be a confidential communication within the meaning of section 6068(e) of the Business & Professions Code and section 952 of the Evidence Code); Evid. Code §952 (“Confidential communication between client and lawyer”); Evid. Code §954 (attorney-client privilege).
CEQA Proceedings

Increasingly, potential litigants have been submitting public records requests as a prelude to or during preparation of the administrative record for challenges to the adequacy of an agency’s California Environmental Quality Act (CEQA) process or certification of CEQA documents. While there are no specific PRA provisions directly addressing CEQA proceedings, these requests can present multiple challenges as they may seek voluminous amounts of records, such as email communications between staff and consultants, or confidential and privileged documents.

**PRACTICE TIP:**

A request to prepare an administrative record for a CEQA challenge does not excuse or justify ignoring or delaying responses to a CEQA-related PRA request. A failure to properly or fully respond to the PRA request can lead to claims of violations of the PRA and a demand for attorneys’ fees being included in a CEQA lawsuit. Local agencies should, therefore, exercise the same due diligence when responding to CEQA-related PRA requests as they do with any other type of PRA request. As with any litigation or potential litigation, local agencies should also consider invoking internal litigation holds and evidence preservation practices early on in a contentious CEQA process.

Two particularly challenging issues that arise with CEQA-related PRA requests are whether and to what extent a subcontractor’s files are public records subject to disclosure, and whether the deliberative process privilege or public interest exemption apply to the requested documents.

In determining whether a subcontractor’s files are public records in the actual or constructive possession of the local agency, the court will look to the consultant’s contract to determine the extent to which, if any, the local agency had control over the selection of subcontractors, and how they performed services required by the primary consultant.183

**PRACTICE TIP:**

Examine your contracts with consultants and clearly articulate who owns their work product, and that of their subcontractors.

Requests for materials that implicate the deliberative process privilege or public interest exemption are commonly made in CEQA-related PRA requests. While it may seem obvious that local agency staff and their consultants desire and in fact need to engage in candid dialogue about a project and the approaches to be taken, when invoking the deliberative process privilege to protect such communications from disclosure the local agency must clearly articulate why the privilege applies by more than a simple statement that it helps the process.184 Likewise, when invoking the public interest exemption to protect documents from disclosure, local agencies must do more than simply state the conclusion that the public’s interest in nondisclosure is clearly outweighed by the public interest in disclosure.185

**PRACTICE TIP:**

When evaluating whether the deliberative process privilege applies to documents covered by a PRA request during a pre-litigation CEQA process, keep in mind the close correlation between the drafts exemption, discussed below, and the deliberative process privilege.

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184 See Deliberative Process Privilege p. 32.

Code Enforcement Records

Local agencies may pursue code enforcement through administrative or criminal proceedings, or a combination of both. Records of code enforcement cases for which criminal sanctions are sought may be subject to the same disclosure rules as police and other law enforcement records, including the rules for investigatory records and files, as long as there is a concrete and definite prospect of criminal enforcement. 186 Records of code enforcement cases being prosecuted administratively do not qualify as law enforcement records. 187 However, some administrative code enforcement information, such as names and contact information of complainants, may be exempt from disclosure under the official information privilege, the identity of informant privilege, or the public interest exemption. 188

Deliberative Process Privilege

The deliberative process privilege is derived from the public interest exemption, which provides that a local agency may withhold a public record if it can demonstrate that “on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.” 189 The deliberative process privilege was intended to address concerns that frank discussion of legal or policy matters might be inhibited if subject to public scrutiny, and to support the concept that access to a broad array of opinions and the freedom to seek all points of view, to exchange ideas, and to discuss policies in confidence are essential to effective governance in a representative democracy. Therefore, California courts invoke the privilege to protect communications to decisionmakers before a decision is made. 190

In evaluating whether the deliberative process privilege applies, the court will still perform the balancing test prescribed by the public interest exemption. 191 In doing so, courts focus “less on the nature of the records sought and more on the effect of the records’ release.” 192 Therefore, the key question in every deliberative process privilege case is “whether the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” 193 Accordingly, the ... courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not.” 194 Protecting the predecisional deliberative process gives the decision-maker “the freedom ‘to think out loud,’ which enables him [or her] to test ideas and debate policy and personalities uninhibited by the danger that his [or her] tentative but rejected thoughts will become subjects of public discussion. Usually the information is sought with respect to past decisions; the need is even stronger if the demand comes while policy is still being developed.” 195

Courts acknowledge that even a purely factual document would be exempt from public scrutiny if it is ”actually ... related to the process by which policies are formulated” or “inextricably intertwined” with “policy-making processes.” 196 For example, the

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190 Ibid.; 5 USC § 552(b)(5).
192 Times Mirror Company v. Superior Court, supra, 53 Cal.3d at pp. 1338, 1342.
California Supreme Court applied the deliberative process privilege in determining that the Governor’s appointment calendars and schedules were exempt from disclosure under the PRA even though the information in the appointment calendars and schedules was based on fact. The Court reasoned that such disclosure could inhibit private meetings and chill the flow of information to the executive office.

**Drafts**

The PRA exempts from disclosure "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." The "drafts" exemption provides a measure of privacy for writings concerning pending local agency action. The exemption was adapted from the FOIA, which exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” The FOIA "memorandums" exemption is based on the policy of protecting the decision making processes of government agencies, and in particular the frank discussion of legal or policy matters that might be inhibited if subjected to public scrutiny.

The "drafts" exemption in the PRA has essentially the same purpose as the "memorandums" exemption in the FOIA. The key question under the FOIA test is whether the disclosure of materials would expose a local agency's decision-making process in such a way as to discourage candid discussion within the local agency and thereby undermine the local agency's ability to perform its functions. To qualify for the "drafts" exemption the record must be a preliminary draft, note, or memorandum; that is not retained by the local agency in the ordinary course of business; and the public interest in withholding the record must clearly outweigh the public interest in disclosure.

The courts have observed that preliminary materials that are not customarily discarded or that have not in fact been discarded pursuant to policy or custom must be disclosed. Records that are normally retained do not qualify for the exemption. This is in keeping with the purpose of the FOIA "memorandums" exemption of prohibiting the “secret law” that would result from confidential memos retained by local agencies to guide their decision-making.

**PRACTICE TIP:** By adopting written policies or developing consistent practices of discarding preliminary deliberative writings, local agencies may facilitate candid internal policy debate. Consider including in such policies when a document should be considered to be “discarded,” which might prevent the need to search through bins of documents segregated and approved for destruction under the policies, yet awaiting appropriate shredding and disposal. Such policies and practices may exempt from disclosure even preliminary drafts that have not yet been discarded, so long as the drafts are not maintained by the local agency in the ordinary course of business, and the public interest in nondisclosure clearly outweighs the public interest in disclosure.

197 Times Mirror Company v. Superior Court, supra, 53 Cal.3d at p. 1338.
198 Ibid.
199 Gov. Code, § 6254, subd. (a).
200 Gov. Code, § 6254, subd. (a); 5 U.S.C. § 552, subd. (b)(5).
201 Times Mirror Co. v. Superior Court, supra, 53 Cal.3d 1325, 1339–1340.
202 Id. at p. 1342.
204 Id. at p. 714.
Elections

Voter Registration Information

Voter registration information, including the home street address, telephone number, email address, precinct number or other number specified by the Secretary of State for voter registration purposes is confidential and cannot be disclosed except as specified in section 2194 of the Elections Code. Similarly, the signature of the voter shown on the voter registration card is confidential and may not be disclosed to any person, except as provided in the Elections Code. Voter registration information may be provided to any candidate for federal, state, or local office; to any committee for or against an initiative or referendum measure for which legal publication is made; and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State.

A California Driver’s License, California ID card, or other unique identifier used by the State of California for purposes of voter identification shown on the affidavit of voter registration of a registered voter, or added to voter registration records to comply with the requirements of the federal Help America Vote Act of 2002, is confidential and may not be disclosed to any person.

When a person’s vote is challenged, the voter’s home address or signature may be released to the challenger, elections officials, and other persons as necessary to make, defend against, or adjudicate a challenge.

A person may view the signature of a voter to determine whether the signature matches a signature on an affidavit of registration or a petition. The signature cannot be copied, reproduced, or photographed in any way.

Information or data compiled by local agency officers or employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets is not a disclosable public record and may not be provided to any person other than those local agency officers or employees who are responsible for receiving and processing those requests.

Initiative, Recall, and Referendum Petitions

Nomination documents and signatures filed in lieu of filing fee petitions may be inspected, but not copied or distributed. Similarly, any petition to which a voter has affixed his or her signature for a statewide, county, city, or district initiative, referendum, recall, or matters submitted under the Elections Code, is not a disclosable public record and is not open to inspection except by the local agency officers or employees whose duty it is to receive, examine, or preserve the petitions. This prohibition extends to all memoranda prepared by county and city elections officials in the examination of the petitions indicating which voters have signed particular petitions.

If a petition is found to be insufficient, the proponents and their representatives may inspect the memoranda of insufficiency to determine which signatures were disqualified and the reasons for the disqualification.
Identity of Informants

A local agency also has a privilege to refuse to disclose and to prevent another from disclosing the identity of a person who has furnished information in confidence to a law enforcement officer or representative of a local agency charged with administration or enforcement of the law alleged to be violated.\(^\text{216}\) This privilege applies where the information purports to disclose a violation of a federal, state, or another public entity’s law, and where the public’s interest in protecting an informant’s identity outweighs the necessity for disclosure.\(^\text{217}\) This privilege extends to disclosure of the contents of the informant’s communication if the disclosure would tend to disclose the identity of the informant.\(^\text{218}\)

Information Technology Systems Security Records

An information security record is exempt from disclosure if, on the facts of a particular case, disclosure would reveal vulnerabilities to attack, or would otherwise increase the potential for an attack on a local agency’s information technology system.\(^\text{219}\)

Disclosure of records stored within a local agency’s information technology system that are not otherwise exempt under the law do not fall within this exemption.\(^\text{220}\)

Law Enforcement Records

Overview

Law enforcement records are generally exempt from disclosure.\(^\text{221}\) That is, the actual investigation files and records are themselves exempt from disclosure, but the PRA does require local agencies to disclose certain information derived from those files and records.\(^\text{222}\) For example, the names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer’s safety (e.g., if there is a specific threat to an officer or an officer is working undercover).\(^\text{223}\)

The type of information that must be disclosed differs depending upon whether it relates to, for example, calls to the police department for assistance, the identity of an arrestee, information relating to a traffic accident, or certain types of crimes, including car theft, burglary, or arson. The identities of victims of certain types of crimes, including minors and victims of sexual assault, are required to be withheld if requested by the victim or the victim’s guardian, if the victim is a minor.\(^\text{224}\) Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.\(^\text{225}\) Certain information that may be required to be released may be withheld where the disclosure would endanger a witness or interfere with the successful completion of the investigation. These exemptions extend indefinitely, even after the investigation is closed.\(^\text{226}\)

\(^{216}\) Evid. Code, § 1041  
\(^{218}\) People v. Hobbs (1994) 7 Cal.4th 948, 961–962.  
\(^{219}\) Gov. Code, § 6254.19  
\(^{220}\) Gov. Code, § 6254.19; see also Gov. Code, § 6254, subd. (aa).  
\(^{221}\) Gov. Code, § 6254, subd. (f).  
\(^{223}\) Long Beach Police Officers Association v. City of Long Beach (2014) 59 Cal.4th 59, 63–68.  
\(^{224}\) Gov. Code, § 6254, subd. (f)(2).  
\(^{226}\) Rivero v. Superior Court (1997) 54 Cal.App.4th 1048, 1052; Williams v. Superior Court (1993) 5 Cal.4th 337, 361–362; Office of the Inspector General v. Superior Court (2010) 189 Cal.App.4th 695 (Office of the Attorney General has discretion to determine which investigatory records are subject to disclosure in connection with its investigations, and investigatory records in that context may include some documents that were not prepared as part of, but became subsequently relevant to, the investigation).
Release practices vary by local agencies. Some local agencies provide a written summary of information being disclosed, some release only specific information upon request, while others release reports with certain matters redacted. Other local agencies release reports upon request with no redactions except as mandated by statute. Some local agencies also release 911 tapes and booking photos, although this is not required under the PRA.\(^{227}\)

**Practice Tip:**
If it is your local agency’s policy to release police reports upon request, it is helpful to establish an internal process to control the release of the identity of minors or victims of certain types of crimes, or to ensure that releasing the report would not endanger the safety of a person involved in an investigation or endanger the completion of the investigation.

**Exempt Records**
The PRA generally exempts most law enforcement records from disclosure, including, among others:
- Complaints to or investigations conducted by a local or state police agency;
- Records of intelligence information or security procedures of a local or state police agency;
- Any investigatory or security files compiled by any other local or state police agency;
- Customer lists provided to a local police agency by an alarm or security company; and
- Any investigatory or security files compiled by any state or local agency for correctional, law enforcement, or licensing purposes.\(^{228}\)

**Practice Tip:**
Many departments that choose not to release entire reports develop a form that can be filled out with the requisite public information.

**Information that Must be Disclosed**
There are three general categories of information contained in law enforcement investigatory files that must be disclosed: information which must be disclosed to victims, their authorized representatives and insurance carriers, information relating to arrestees, and information relating to complaints or requests for assistance.

**Disclosure to Victims, Authorized Representatives, Insurance Carriers**
Except where disclosure would endanger the successful completion of an investigation or a related investigation, or endanger the safety of a witness, certain information relating to specific listed crimes must be disclosed upon request to:
- A victim;
- The victim’s authorized representative;
- An insurance carrier against which a claim has been or might be made; or
- Any person suffering bodily injury, or property damage or loss.

The type of crimes listed in this subsection to which this requirement applies include arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime defined by statute.\(^{229}\)

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\(^{228}\) Gov. Code, § 6254, subd. (f); Dixon v. Superior Court (2009) 170 Cal.App.4th 1271, 1276 (coroner and autopsy reports).

\(^{229}\) Gov. Code, § 6254, subd. (f).
The type of information that must be disclosed under this section (except where it endangers safety of witnesses or the investigation itself) includes:

- Name and address of persons involved in or witnesses to incident (other than confidential informants);
- Description of property involved;
- Date, time, and location of incident;
- All diagrams;
- Statements of parties to incident; and
- Statements of all witnesses (other than confidential informants).230

Local agencies may not require a victim or a victim’s authorized representative to show proof of the victim’s legal presence in the United States to obtain the information required to be disclosed to victims.231 However, if a local agency does require identification for a victim or authorized representative to obtain information disclosable to victims, the local agency must, at a minimum, accept a current driver’s license or identification card issued by any state in the United States, a current passport issued by the United States or a foreign government with which the United States has a diplomatic relationship, or a current Matricula Consular card.232

The Vehicle Code addresses the release of traffic accident information. A law enforcement agency to whom an accident was reported is required to disclose the entire contents of a traffic accident report to persons who have a “proper interest” in the information, including, but not limited to, the driver(s) involved in the accident, or the authorized representative, guardian, or conservator of the driver(s) involved; the parent of a minor driver; any named injured person; the owners of vehicles or property damaged by the accident; persons who may incur liability as a result of the accident; and any attorney who declares under penalty of perjury that he or she represents any of the persons described above.233 The local enforcement agency may recover the actual cost of providing the information.

### Information Regarding Arrestees

The PRA mandates that the following information be released pertaining to every individual arrested by the local law enforcement agency, except where releasing the information would endanger the safety of persons involved in an investigation or endanger the successful completion of the investigation or a related investigation:

- Full name and occupation of the arrestee;
- Physical description including date of birth, color of eyes and hair, sex, height and weight;
- Time, date, and location of arrest;
- Time and date of booking;
- Factual circumstances surrounding arrest;
- Amount of bail set;
- Time and manner of release or location where arrestee is being held; and
- All charges the arrestee is being held on, including outstanding warrants and parole or probation holds.234

As previously stated, a PRA request applies only to records existing at the time of the request.235 It does not require a local

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230 Gov. Code, § 6254, subd. (f); Buckheit v. Dennis (ND Cal. 2012) 2012 U.S. Dist. LEXIS 49062 (noting that Government Code section 6254, subd. (f) requires disclosure of certain information to a victim. Suspects are not entitled to that same information).


233 Veh. Code, § 20012.


235 Gov. Code, § 6254, subd. (c).
agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

**PRACTICE TIP:**

Most police departments have some form of a daily desk or press log that contains all or most of this information.

Complaints or Requests for Assistance

The Penal Code provides that except as otherwise required by the criminal discovery provisions, no law enforcement officer or employee of a law enforcement agency may disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim of or witness to the alleged offense.\(^{236}\)

Subject to the restrictions imposed by the Penal Code, the following information must be disclosed relative to complaints or requests for assistance received by the law enforcement agency:

- The time, substance, and location of all complaints or requests for assistance received by the agency, and the time and nature of the response thereto;
- To the extent the crime alleged or committed or any other incident is recorded, the time, date, and location of occurrence, and the time and date of the report;
- The factual circumstances surrounding crime/incident;
- A general description of injuries, property, or weapons involved; and
- The names and ages of victims, except the names of victims of certain listed crimes may be withheld upon request of victim or parent of minor victim. These listed crimes include various Penal Code sections which relate to topics such as sexual abuse, child abuse, hate crimes, and stalking.\(^{237}\)

Requests for Journalistic or Scholarly Purposes

Where a request states, under penalty of perjury, that (1) it is made for a scholarly, journalistic, political, or governmental purpose, or for an investigative purpose by a licensed private investigator, and (2) it will not be used directly or indirectly, or furnished to another, to sell a product or service, the PRA requires the disclosure of the name and address of every individual arrested by the local agency and the current address of the victim of a crime, except for specified crimes.\(^{238}\)

Coroner Photographs or Video

No copies, reproductions, or facsimiles of a photograph, negative, print, or video recording of a deceased person taken by or for the coroner (including by local law enforcement personnel) at the scene of death or in the course of a post mortem examination or autopsy may be disseminated except as provided by statute.\(^{239}\)

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\(^{236}\) Pen. Code, § 841.5, subd. (a).

\(^{237}\) Gov. Code, § 6254, subd. (f)(2).


\(^{239}\) Code Civ. Proc., § 129.
Mental Health Detention Information

All information and records obtained in the course of providing services to a mentally disordered individual who is gravely disabled or a danger to others or him or herself, and who is detained and taken into custody by a peace officer, are confidential and may only be disclosed to enumerated recipients and for the purposes specified in state law. Willful, knowing release of confidential mental health detention information can create liability for civil damages.

PRACTICE TIP:
All information obtained in the course of a mental health detention (often referred to as a “5150 detention”) is confidential, including information in complaint or incident reports that would otherwise be subject to disclosure under the PRA.

Elder Abuse Records

Reports of suspected abuse or neglect of an elder or dependent adult, and information contained in such reports, are confidential and may only be disclosed as permitted by state law. The prohibition against unauthorized disclosure applies regardless of whether a report of suspected elder abuse or neglect is from someone who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not for compensation (a mandated reporter), or from someone else. Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.

Juvenile Records

Records or information gathered by law enforcement agencies relating to the detention of, or taking of, a minor into custody or temporary custody are confidential and subject to release only in certain circumstances and by certain specified persons and entities. Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.

PRACTICE TIP:
Some local courts have their own rules regarding inspection and they may differ from county to county and may change from time to time. Care should be taken to periodically review the rules as the presiding judge of each juvenile court makes their own rules.

Different provisions apply to dissemination of information gathered by a law enforcement agency relating to the taking of a minor into custody where it is provided to another law enforcement agency, including a school district police or security department, or other agency or person who has a legitimate need for information for purposes of official disposition of a case. In addition, a law enforcement agency must release the name of and descriptive information relating to any juvenile who has escaped from a secure detention facility.

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241 Welf. & Ins. Code, § 5330.
244 Welf. & Inst. Code, §15633.
245 Welf. & Inst. Code, §§ 827, 828; see Welf & Inst. Code, § 827.9 (applies to Los Angeles County only); see also T.N.G. v. Superior Court (1971) 4 Cal.3d 767 (release of information regarding minor who has been temporarily detained and released without any further proceedings.)
247 Welf & Inst. Code, § 828, subd. (a); Cal. Rules of Court, rule 5.552(g).
248 Welf & Inst. Code, § 828, subd. (b).
Child Abuse Reports
Reports of suspected child abuse or neglect, including reports from those who are “mandated reporters,” such as teachers and public school employees and officials, physicians, children’s organizations, and community care facilities, and child abuse and neglect investigative reports that result in a summary report being filed with the Department of Justice, are confidential and may only be disclosed to the persons and agencies listed in state law. Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.

Library Patron Use Records
All patron use records of any library that is supported in whole or in part by public funds are confidential and may not be disclosed except to persons acting within the scope of their duties within library administration, upon written authorization from the person whose records are sought, or by court order. The term “patron use records” includes written or electronic records that identify the patron, the patron’s borrowing information, or use of library resources, including database search records and any other personally identifiable information requests or inquiries. This exemption does not extend to statistical reports of patron use or records of fines collected by the library.

Library Circulation Records
Library circulation records that are kept to identify the borrowers, and library and museum materials presented solely for reference or exhibition purposes, are exempt from disclosure. Further, all registration and circulation records of any library that is (in whole or in part) supported by public funds are confidential. The confidentiality of library circulation records does not extend to records of fines imposed on borrowers.

Licensee Financial Information
When a local agency requires that applicants for licenses, certificates, or permits submit personal financial data, that information is exempt from disclosure. One frequent example of this is the submittal of sales or income information under a business license tax requirement. However, this exemption does not apply to financial information filed by an existing licensee or franchisee to justify a rate increase, presumably because those affected by the increase have a right to know its basis.

Medical Records
California’s Constitution protects a person’s right to privacy in his or her medical records. Therefore, the PRA exempts from disclosure “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” In addition, the PRA exempts from disclosure “records, the disclosure of which is exempted or prohibited pursuant to a license, charter, or permit.”

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249 Pen. Code, §§ 11165.6, 11165.7, 11167.5, 11169.
250 Pen. Code, § 11167.5, subd. (a).
251 Gov. Code, § 6267.
252 Gov. Code, § 6267.
253 Gov. Code, § 6267.
254 Gov. Code, § 6254, subd. (j).
255 Gov. Code, § 6254, subd. (j).
256 Gov. Code, § 6254, subd. (n).
259 Gov. Code, § 6254, subd. (c).
to federal or state law,261 including, but not limited to, those described in the Confidentiality of Medical Information Act,262 physician/patient privilege,263 the Health Data and Advisory Council Consolidation Act,264 and the Health Insurance Portability and Accountability Act. 265

**PRACTICE TIP:**
Both subdivision (c) and subdivision (k) of Government Code section 6254 probably apply to most records protected under the physician/patient privilege, the Confidentiality of Medical Information Act, the Health Data and Advisory Council Consolidation Act, and the Health Insurance Portability and Accountability Act. In addition, individually identifiable health information is probably also exempt from disclosure under the “public interest” exemption in Government Code section 6255.

**Health Data and Advisory Council Consolidation Act**
Any organization that operates, conducts, owns, or maintains a health facility, hospital, or freestanding ambulatory surgery clinic must file reports with the state that include detailed patient health and financial information.266 Patient medical record numbers, and any other data elements of these reports that could be used to determine the identity of an individual patient are exempt from disclosure.267

**Physician/Patient Privilege**
Patients may refuse to disclose, and prevent others from disclosing, confidential communications between themselves and their physicians.268 The privilege extends to confidential patient/physician communication that is disclosed to third parties where reasonably necessary to accomplish the purpose for which the physician was consulted.269

**PRACTICE TIP:**
Patient medical information provided to local agency emergency medical personnel to assist in providing emergency medical care may be subject to the physician/patient privilege if providing the privileged information is reasonably necessary to accomplish the purpose for which the physician was, or will be, consulted, including emergency room physicians.

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261 Gov. Code, § 6254, subd. (k).
262 Civ. Code, § 56 et seq.
263 Evid. Code, § 990 et seq.
264 Health & Saf. Code, § 128675 et seq.
265 42 U.S.C. § 1320d.
266 Health & Saf. Code, §§ 128735, 128736, 128737.
267 Health & Saf. Code, § 128745, subd. (c)(6).
268 Evid. Code, § 994.
269 Evid. Code, § 992.
Confidentiality of Medical Information Act

Subject to certain exceptions, health care providers, health care service plan providers and contractors are prohibited from disclosing a patient’s individually identifiable medical information without first obtaining authorization. Employers must establish appropriate procedures to ensure the confidentiality and appropriate use of individually identifiable medical information. Local agencies that are not providers of health care, health care service plans, or contractors as defined in state law may possess individually identifiable medical information protected under state law that originated with providers of health care, health care service plans, or contractors.

Health Insurance Portability and Accountability Act

Congress enacted the Health Insurance Portability and Accountability Act in 1996 to improve portability and continuity of health insurance coverage and to combat waste, fraud, and abuse in health insurance and health care delivery through the development of a health information system and establishment of standards and requirements for the electronic transmission of certain health information. The U.S. Department of Health and Human Services Secretary has issued privacy regulations governing use and disclosure of individually identifiable health information. Persons who knowingly and in violation of federal law use or cause to be used a unique health identifier, obtain individually identifiable health information relating to an individual, or disclose individually identifiable health information to another person are subject to substantial fines and imprisonment of not more than one year, or both, and to increased fines and imprisonment for violations under false pretenses or with the intent to use individually identifiable health information for commercial advantage, personal gain, or malicious harm. Federal law also permits the Health and Human Services Secretary to impose civil penalties.

Workers’ Compensation Benefits

Records pertaining to the workers’ compensation benefits for an individually identified employee are exempt from disclosure as “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy.” The PRA further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law. State law prohibits a person or public or private entity who is not a party to a claim for workers’ compensation benefits from obtaining individually identifiable information obtained or maintained by the Division of Workers’ Compensation on that claim.

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270 Civ. Code, §§ 56.10, subd. (a), 56.05, subd. (g). “Provider of health care” as defined means persons licensed under Business & Professions Code section 500 et seq. or Health & Safety Code section 1797 and following, and clinics, health dispensaries, or health facilities licensed under Health and Safety Code section 1200 and following. “Health care service plan” as defined means entities regulated under Health & Safety Code section 1340 and following. “Contractor” as defined means medical groups, independent practice associations, pharmaceutical benefits managers, and medical service organizations that are not providers of health care or health care service plans.

271 Civ. Code, § 56.20.

272 Civ. Code, § 56.05, subd. (g).


275 42 U.S.C. § 1320d-6. Federal law defines “individually identifiable health information” as any information collected from an individual that is created or received by a health care provider, health plan, employer or health care clearing house, that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual, and that identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.


277 Gov. Code, § 6254, subd. (c).

278 Gov. Code, § 6254, subd. (k).

279 Lab. Code, § 138.7, subd. (a). This state statute defines “individually identifiable information” to mean “any data concerning an injury or claim that is linked to a uniquely identifiable employee, employer, claims administrator, or any other person or entity.”
Certain information may be subject to disclosure once an application for adjudication has been filed. If the request relates to pre-employment screening, the administrative director must notify the person about whom the information is requested and include a warning about discrimination against persons who have filed claims for workers’ compensation benefits. Further, a residential address cannot be disclosed, except to law enforcement agencies, the district attorney, other governmental agencies, or for journalistic purposes. Individually identifiable information is not subject to subpoena in a civil proceeding without notice and a hearing at which the court is required to balance the respective interests—privacy and public disclosure. Individually identifiable information may be used for certain types of statistical research by specifically listed persons and entities.

Official Information Privilege

A local agency may refuse to disclose official information. “Official information” is statutorily defined as “information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed to the public prior to the time the claim of privilege is made.” However, the courts have somewhat expanded on the statutory definition by determining that certain types of information, such as police investigative files and medical information, are “by [their] nature confidential and widely treated as such” and thus protected from disclosure by the privilege. Therefore, “official information” includes information that is protected by a state or federal statutory privilege or information, the disclosure of which is against the public interest, because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.

The local agency has the right to assert the official information privilege both to refuse to disclose and to prevent another from disclosing official information. Where the disclosure is prohibited by state or federal statute, the privilege is absolute. In all other respects, it is conditional and requires a judge to weigh the necessity for preserving the confidentiality of information against the necessity for disclosure in the interest of justice. This is similar to the weighing process provided for in the PRA — allowing nondisclosure when the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure. As part of the weighing process a court will look at the consequences to the public, including the effect of the disclosure on the integrity of public processes and procedures. This is typically done through in camera judicial review.

There are a number of cases interpreting this statute. While many of the cases interpreting this privilege involve law enforcement records, other cases arise out of licensing and accreditation-type activities. The courts address these types of cases on an individualized basis and further legal research should be done within the context of particular facts.

PRACTICE TIP:

Although there is no case law directly on point, this privilege, along with the informant privilege, may be asserted to protect the identities of code enforcement complainants and whistleblowers.

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281 Lab Code, §138.7.
282 Evid. Code, § 1040.
283 Evid. Code, § 1040, subd. (a).
286 Evid. Code, § 1040, subd. (b).
287 Gov. Code, § 6255.
288 Shepherd v. Superior Court (1976) 17 Cal.3d 107, 126.
289 The term “in camera” refers to a review of the document in the judge’s chambers outside the presence of the requesting party.
Pending Litigation or Claims

The PRA exempts from disclosure "(r)ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to [the California Government Claims Act] until the pending litigation or claim has been finally adjudicated or otherwise settled." 291 Although the phrase "pertaining to" pending litigation or claims might seem broad, the courts nevertheless have construed the exemption narrowly, consistent with the underlying policy of the PRA to promote access to public records. Therefore, the claim itself is not exempt from disclosure — the exemption applies only to documents specifically prepared by, or at the direction of, the local agency for use in existing or anticipated litigation. 292

It may sometimes be difficult to determine whether a particular record was prepared specifically for use in litigation or for other purposes related to the underlying incident. For example, an incident report may be prepared either in anticipation of defending a potential claim, or simply for risk management purposes. In order for the exemption to apply, the local agency would have to prove that the dominant purpose of the record was to be used in defense of litigation. 293 However, attorney payment and billing records related to ongoing litigation are not subject to the pending litigation exemption, because such records are not primarily prepared for use in litigation. 294

It is important to remember that even members of the public that have filed a claim against or sued a local agency are entitled to use the PRA to obtain documents that may be relevant to the claim or litigation. The mere fact that the person might also be able to obtain the documents in discovery is not a ground for rejecting the request under the PRA. 295

The pending litigation exemption does not prevent members of the public from obtaining records submitted to the local agency pertaining to existing or anticipated litigation, such as a claim for monetary damages filed prior to a lawsuit, because the records were not prepared by the local agency. 296 Moreover, while medical records are subject to a constitutional right of privacy, and generally exempt from production under the PRA and other statutes, 297 an individual may be deemed to have waived the right to confidentiality by submitting medical records to the public entity in order to obtain a settlement. 298

Once the claim or litigation is no longer “pending,” records previously shielded from disclosure by the exemption must be produced, unless covered by another exemption. For example, the public may obtain copies of depositions from closed cases, 299 and documents concerning the settlement of a claim that are not shielded from disclosure by other exemptions. 300 Exemptions that may be used to withhold documents from disclosure after the claim or litigation is no longer pending include the exemptions for law enforcement investigative reports, medical records, and attorney-client privileged records and attorney work product. 301 Particular records or information relevant to settlement of a closed claim or case may also be subject to nondisclosure under the public interest exemption to the extent the local agency can show that the public interest in nondisclosure clearly outweighs the public interest in disclosure. 302

291 Gov. Code, § 6254, subd. (b).
297 See Medical Privacy Laws, p. 40.
302 Gov. Code, § 6255.
**PRACTICE TIP:**
In responding to a request for documents concerning settlement of a particular matter, it is critical to pay close attention to potential application of other exemptions under the PRA. Additionally, if the settlement is approved by the legislative body during a closed session, release of the settlement documents are governed by the Brown Act. It is recommended that you seek the advice of your local agency counsel.

There is considerable overlap between the pending litigation exemption and both the attorney-client privilege and attorney-work-product doctrine. However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney-client privilege or work product protection. Moreover, while the exemption for pending litigation expires once the litigation is no longer pending, the attorney-client privilege and attorney-work-product doctrine continue indefinitely.

**Personal Contact Information**

Court decisions have ruled that individuals have a substantial privacy interest in their personal contact information. However, a fact-specific analysis must be conducted to determine whether the public interest exemption protects this information from disclosure, i.e., whether the public interest in nondisclosure clearly outweighs the public interest in disclosure. Application of this balancing test has yielded varying results, depending on the circumstances of the case.

For example, courts have allowed nondisclosure of the names, addresses, and telephone numbers of airport noise complainants. In that instance, the anticipated chilling effect on future citizen complaints weighed heavily in the court’s decision. On the other hand, the courts have ordered disclosure of information contained in applications for licenses to carry firearms, except for information that indicates when or where the applicant is vulnerable to attack or that concern the applicant’s medical or psychological history or that of members of his or her family. Courts have also ordered disclosure of the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance, and the names of donors to a university affiliated foundation, even though those donors had requested anonymity.

**PRACTICE TIP:**
In situations where personal contact information clearly cannot be kept confidential, inform the affected members of the public that their personal contact information is subject to disclosure under the PRA.

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305 City of Los Angeles v. Superior Court, supra, 41 Cal.App.4th 1083, 1087.
306 Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 373 (attorney-client privilege); Fellows v. Superior Court (1980) 108 Cal.App.3d 55, 61–63 (work-product doctrine); Costco Wholesale Corp. v. Superior Court, supra, 47 Cal.4th 725. But see Los Angeles County Board of Supervisors v. Superior Court (2016) 2 Cal.5th 282 (holding that the attorney-client privilege protects the confidentiality of invoices for work in pending and active legal matters, but that the privilege may not encompass invoices for legal matters that concluded long ago).
307 Gov. Code, § 6255, subd. (a).
309 Gov. Code, § 6254, subd. (u)(1).
Posting Personal Contact Information of Elected/Appointed Officials on the Internet

The PRA prohibits a state or local agency from posting on the Internet the home address or telephone number of any elected or appointed officials without first obtaining their written permission.\(^\text{312}\) The prohibition against posting home addresses and telephone numbers of elected or appointed officials on the Internet does not apply to a comprehensive database of property-related information maintained by a state or local agency that may incidentally contain such information, where the officials are not identifiable as such from the data, and the database is only transmitted over a limited-access network, such as an intranet, extranet, or virtual private network, but not the Internet.\(^\text{313}\)

The PRA also prohibits someone from knowingly posting on the Internet the home address or telephone number of any elected or appointed official, or the official’s “residing spouse” or child, and either threatening or intending to cause imminent great bodily harm.\(^\text{314}\) Similarly, the PRA prohibits soliciting, selling, or trading on the Internet the home address or telephone number of any elected or appointed official with the intent of causing imminent great bodily harm to the official or a person residing at the official’s home address.\(^\text{315}\)

In addition, the PRA prohibits a person, business, or association from publicly posting or displaying on the Internet the home address or telephone number of any elected or appointed official where the official has made a written demand to the person, business, or association to not to disclose his or her address or phone number.\(^\text{316}\)

Personnel Records

The PRA exempts from disclosure “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”\(^\text{317}\) In addition, the public interest exemption may protect certain personnel records from disclosure.\(^\text{318}\) In determining whether to allow access to personnel files, the courts have determined that the tests under each exemption are essentially the same: the extent of the local agency employee’s privacy interest in certain information and the harm from its unwarranted disclosure is weighed against the public interest in disclosure. The public interest in disclosure will be considered in the context of the extent to which the disclosure of the information will shed light on the local agency’s performance of its duties.\(^\text{319}\)

Decisions from the California Supreme Court have determined that local agency employees do not have a reasonable expectation of privacy in their name, salary information, and dates of employment. This interpretation also applies to police officers absent unique, individual circumstances.\(^\text{320}\)

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\(^{312}\) See Gov. Code, § 6254.21, subd. (f) (containing a non-exhaustive list of individuals who qualify as “elected or appointed official[s]”).


\(^{314}\) Gov. Code, § 6254.21, subd. (b).

\(^{315}\) Gov. Code, § 6254.21, subd. (d).

\(^{316}\) Gov. Code, § 6254.21, subd. (c).

\(^{317}\) Gov. Code, § 6254, subd. (c).


\(^{320}\) International Fed’n of Prof. & Tech. Eng’rs, Local 21, AFL-CIO v. Superior Court, supra, 42 Cal.4th 319, 327; Commission on Peace Officer Standards & Training v. Superior Court, supra, 42 Cal.4th 278, 289–293.
In situations involving allegations of non-law enforcement local agency employee misconduct, courts have considered the following factors in determining whether disclosure of employment investigation reports or related records would constitute an unwarranted invasion of personal privacy:

- Are the allegations of misconduct against a high-ranking public official or a local agency employee in a position of public trust and responsibility (e.g., teachers, public safety employees, employees who work with children)?
- Are the allegations of misconduct of a substantial nature or trivial?
- Were findings of misconduct sustained or was discipline imposed?

Courts have upheld the public interest against disclosure of “trivial or groundless” charges. In contrast, when “the charges are found true, or discipline is imposed,” the public interest likely favors disclosure. In addition, “where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists.” However, even if the local agency employee is exonerated of wrongdoing, disclosure may be warranted if the allegations of misconduct involve a high-ranking public official or local agency employee in a position of public trust and responsibility, given the public’s interest in understanding why the employee was exonerated and how the local agency employer treated the accusations.

With respect to personnel investigation reports, although the PRA’s personnel exemption may not exempt such a report from disclosure, the attorney-client privilege or attorney-work-product doctrine may apply. Further, discrete portions of the personnel report may still be exempt from disclosure and redacted, such as medical information contained in a report or the names of third party witnesses.

The courts have permitted persons who believe their rights may be infringed by a local agency decision to disclose records to bring a “reverse PRA action” to seek an order preventing disclosure of the records.

**Peace Officer Personnel Records**

Peace officer personnel records, including internal affairs investigation reports regarding alleged misconduct, are both confidential and privileged. They clearly fall within the category of records, “the disclosure of which is exempted or prohibited pursuant to federal or state law ...” The discovery and disclosure of the personnel records of peace officers are governed exclusively by statutory provisions contained in the Evidence Code and Penal Code. Peace officer personnel records and records of citizen complaints “…or information obtained from these records…” are confidential and “shall not” be disclosed in any criminal or civil proceeding except by discovery pursuant to statutorily prescribed procedures. The appropriate procedure for obtaining information in the

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321 AFSCME, Local 1650 v. Regents of Univ. of Cal. (1978) 80 Cal.App.3d 913, 918.
322 Ibid.
323 Ibid.
326 BRV, Inc. v Superior Court, supra, 143 Cal.App.4th 742, where on the facts of that case, an investigation report that arguably was privileged was ordered disclosed.
329 Pen. Code, § 832.7; Evid. Code, §§ 1043, 1046.
protected peace officer personnel files is to file a motion commonly known as a “Pitchess” motion, which by statute entails a two-part process involving first a determination by the court regarding good cause and materiality of the information sought and a subsequent confidential review by the court of the files, where warranted.330

Peace officer personnel files are not protected from disclosure, however, when the district attorney, attorney general, or grand jury are investigating the conduct of the officers, including when the district attorney conducts a Brady review of files for exculpatory evidence relevant to a criminal proceeding.331 The other notable exception arises where an officer publishes factual information concerning a disciplinary action that is known by the officer to be false. If the information is published in the media, the employing agency may disclose factual information about the discipline to refute the employee’s false statements.332

Peace officer “personnel records” include personal data, medical history, appraisals, and discipline; complaints and investigations relating to events perceived by the officer or relating to the manner in which his or her duties were performed; and any other information the disclosure of which would constitute an unwarranted invasion of privacy.333 The names, salary information, and employment dates and departments of peace officers have been determined to be disclosable records absent unique circumstances.334 Additionally, official service photographs of peace officers are subject to disclosure and are not exempt or privileged as personnel records unless disclosure would pose an unreasonable risk of harm to the peace officer.335 The names of officers involved in a police shooting are subject to disclosure, unless disclosure would endanger an officer’s safety (e.g., if there is a specific threat to an officer or an officer is working undercover).336 Video captured by a dashboard camera is not a personnel record protected from disclosure.337

While the Penal and Evidence Code privileges are not per se applicable in federal court, federal common law does recognize a qualified privilege for “official information” and considers government personnel files to be “official information.”338 Moreover, independent reports regarding officer-involved shootings are not exempt from disclosure, though portions of the report culled from personnel information or officers’ statements made in the course of an internal affairs investigation of the shooting are protected and may be redacted from the report.339 Such a qualified privilege in federal court results in a very similar weighing of the potential benefits of disclosure against potential disadvantages.340


331 Pen. Code, § 832.7, subd. (a); People v. Superior Court (2015) 61 Cal.4th 696.,

332 Pen. Code, § 832.7, subd. (d).


336 Long Beach Police Officers Ass’n v. City of Long Beach (2014) 59 Cal.4th 59, 75; 91 Ops.Cal.Atty.Gen. 11 (2008) (the names of peace officers involved in critical incidents, such as ones involving lethal force, are not categorically exempt from disclosure, however, the balancing test may be applied under the specific factual circumstances of each case to weigh the public interests at stake).


Employment Contracts, Employee Salaries, & Pension Benefits

Every employment contract between a local agency and any public official or local agency employee is a public record which is not subject to either the personnel exemption or the public interest exemption.\(^{341}\) Thus, for example, one court has held that two letters in a city firefighter’s personnel file were part of his employment contract and could not be withheld under either the local agency employee’s right to privacy in his personnel file or the public interest exemption.\(^{342}\)

With or without an employment contract, the names and salaries (including performance bonuses and overtime) of local agency employees, including peace officers, are subject to disclosure under the PRA.\(^{343}\) Public employees do not have a reasonable expectation that their salaries will remain a private matter. In addition, there is a strong public interest in knowing how the government spends its money. Therefore, absent unusual circumstances, the names and salaries of local agency employees are not subject to either the personnel exemption or the public interest exemption.\(^{344}\)

In addition, the courts have held that local agencies are required to disclose the identities of pensioners and the amount of pension benefits received by such pensioners, reasoning that the public interest in disclosure of the names of pensioners and data concerning the amounts of their pension benefits outweighs any privacy interests the pensioners may have in such information.\(^{345}\) On the other hand, the courts have found that personal information provided to a retirement system by a member or on a member’s behalf, such as a member’s personal email address, home address, telephone number, social security number, birthday, age at retirement, benefits election, and health reports concerning the member, to be exempt from disclosure under the PRA.\(^{346}\) With regard to the California Public Employees’ Retirement System (CalPERS), the identities of and amount of benefits received by CalPERS pensioners are subject to public disclosure.\(^{347}\)

**PRACTICE TIP:**

If a member of the public requests information regarding CalPERS from a local agency, make sure to check the terms of any agreement that may exist between the agency and CalPERS for confidentiality requirements.

Contractor Payroll Records

State law establishes requirements for maintaining and disclosing certified payroll records for workers employed on public works projects subject to payment of prevailing wages.\(^{348}\) State law requires contractors to make certified copies of payroll records available to employees and their representatives, representatives of the awarding body, the Department of Industrial Relations, and the public.\(^{349}\) Requests are to be made through the awarding agency or the Department of Industrial Relations, and the requesting party is required to reimburse the cost of preparation to the contractor, subcontractors, and the agency through

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341 Gov. Code, § 6254.8; Gov. Code, § 53262, subd. (b).
344 *Commission on Peace Officer Standards & Training v. Superior Court*, supra, 42 Cal.4th 278, 299, 303.
348 Lab. Code, § 1776.
349 Lab. Code, § 1776, subd. (b).
which the request is made prior to being provided the records.\textsuperscript{350} Contractors are required to file certified copies of the requested records with the requesting entity within ten days after receipt of a written request.\textsuperscript{351}

However, state law also limits access to contractor payroll records. Employee names, addresses, and social security numbers must be redacted from certified payroll records provided to the public or any local agency by the awarding body or the Department of Industrial Relations.\textsuperscript{352} Only the employee names and social security numbers are to be redacted from certified payroll records provided to joint labor-management committees established pursuant to the federal Labor Management Cooperation Act of 1978.\textsuperscript{353} The name and address of the contractor or subcontractor may not be redacted.\textsuperscript{354}

The Department of Industrial Relations Director has adopted regulations governing release of certified payroll records and applicable fees.\textsuperscript{355} The regulations: (1) require that requests for certified payroll records be in writing and contain certain specified information regarding the awarding body, the contract, and the contractor; (2) require awarding agency acknowledgement of requests; (3) specify required contents of awarding agency requests to contractors for payroll records; and (4) set fees to be paid in advance by persons seeking payroll records.\textsuperscript{356}

**Test Questions and Other Examination Data**

The PRA exempts from disclosure test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided in the portions of the Education Code that relate to standardized tests.\textsuperscript{357} Thus, for example, a local agency is not required to disclose the test questions it uses for its employment examinations. State law provides that standardized test subjects may, within 90 days after the release of test results to the test subject, have limited access to test questions and answers upon request to the test sponsor.\textsuperscript{358} This limited access may be either through an in-person examination or by release of certain information to the test subject.\textsuperscript{359} The Education Code also requires that test sponsors prepare and submit certain reports regarding standardized tests and test results to the California Postsecondary Education Commission.\textsuperscript{360} All such reports and information submitted to the Commission are public records subject to disclosure under the PRA.\textsuperscript{361}

**Public Contracting Documents**

Contracts with local agencies are generally disclosable public records due to the public’s right to determine whether public resources are being spent for the benefit of the community as a whole or the benefit of only a limited few.\textsuperscript{362} When the bids or proposals leading up to the contract become disclosable depends largely upon the type of contract.

\begin{itemize}
  \item \textsuperscript{350} Lab. Code, § 1776, subd. (c).
  \item \textsuperscript{351} Contractors and subcontractors that fail to do so may be subject to a penalty of $25 per worker for each calendar day until compliance is achieved. Lab. Code, §1776, subds. (d) & (g).
  \item \textsuperscript{352} Lab. Code, § 1776, subd. (c); Trustees of Southern Cal. IBEW-NECA Pension Plan v. Los Angeles Unified School District (2010) 187 Cal.App.4th 621.
  \item \textsuperscript{353} Lab. Code, § 1776, subd. (e).
  \item \textsuperscript{354} Lab. Code, § 1776, subd. (e).
  \item \textsuperscript{355} Lab. Code, § 1776, subd. (e); see Lab. Code, § 16400 et seq.
  \item \textsuperscript{356} 8 C.C.R. §§ 16400, 16402.
  \item \textsuperscript{357} Gov. Code, § 6254, subd. (g).
  \item \textsuperscript{358} Ed. Code, § 99157, subd. (a) Brutsch v. City of Los Angeles (1982) 3 Cal.App.4th 354.
  \item \textsuperscript{359} Ed. Code, §§ 99157, subds. (a) & (b).
  \item \textsuperscript{360} Ed. Code, §§ 99153, 99154.
  \item \textsuperscript{361} Ed. Code, § 99162.
  \item \textsuperscript{362} Cal. State Univ., Fresno Ass’n., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 833.
\end{itemize}
For example, local agency contracts for construction of public works and procurement of goods and non-professional services are typically awarded to the lowest responsive, responsible bidder through a competitive bidding process.\(^{363}\) Bids for these contracts are usually submitted to local agencies under seal and then publicly opened at a designated time and place. These bids are public records and disclosable as soon as they are opened.

Other local agency contracts for acquisition of professional services or disposition of property are awarded to the successful proposer through a competitive proposal process. As part of this process, interested parties submit proposals that are evaluated by the local agency and are used to negotiate with the winning proposer. While the public has a strong interest in scrutinizing the process leading to the selection of the winning proposer, a local agency’s interest in keeping these proposals confidential frequently outweighs the public’s interest in disclosure until negotiations with the winning proposer are complete.\(^{364}\) If a winning proposer has access to the specific details of other competing proposals, then the local agency is greatly impaired in its ability to secure the best possible deal on its constituents’ behalf.

Some local agencies pre-qualify prospective bidders through a request for qualifications process. The pre-qualification packages submitted, including questionnaire answers and financial statements, are exempt from disclosure.\(^{365}\) Nevertheless, documents containing the names of contractors applying for pre-qualification status are public records and must be disclosed.\(^{366}\) In addition, the contents of pre-qualification packages may be disclosed to third parties during the verification process, in an investigation of substantial allegations or at an appeal hearing.

**PRACTICE TIP:**
Local agencies should clearly advise bidders and proposers in their Requests for Bids and Requests for Proposals what bid and proposal documents will be disclosable public records and when they will be disclosable to the public.

### Real Estate Appraisals and Engineering Evaluations

The PRA requires the disclosure of the contents of real estate appraisals, or engineering or feasibility estimates, and evaluations made for or by a local agency relative to the acquisition of property, or to prospective public supply and construction contracts, but only when all of the property has been acquired or when agreement on all terms of the contract have been obtained.\(^{367}\) By its plain terms, this exemption only applies while the acquisition or prospective contract is pending. Once all the property is acquired or agreement on all terms of the contract have been obtained, the exemption will not apply. In addition, this exemption is not intended to supersede the law of eminent domain.\(^{368}\) Thus, for example, this exemption would not apply to appraisals of owner-occupied residential property of four units or less, where disclosure of such appraisals is required by the Eminent Domain Law or related laws such as the California Relocation Assistance Act.\(^{369}\)

**PRACTICE TIP:**
If the exemption for real estate appraisals and engineering evaluations does not clearly apply, consider whether the facts of the situation justify withholding the record under Government Code section 6255.

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367 Gov. Code, § 6254, subd. (h).
368 Gov. Code, § 6245, subd. (h).
369 Gov. Code, § 7267.2, subd. (c).
Recipients of Public Services

Disclosure of information regarding food stamp recipients is prohibited.370 Subject to certain exceptions, disclosure of confidential information pertaining to applicants for or recipients of public social services for any purpose unconnected with the administration of the welfare department also is prohibited.371 This latter prohibition does not create a privilege.372

Leases and lists or rosters of tenants of the Housing Authority are confidential and shall not be open to inspection by the public, but shall be supplied to the respective governing body on request.373 A Housing Authority has a duty to make available public documents and records of the Authority for inspection, except any applications for eligibility and occupancy which are submitted by prospective or current tenants of the Authority.374

The PRA exempts from disclosure records of the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information in accordance with section 18081 of the Health and Safety Code.375

Taxpayer Information

Where information that is required from any taxpayer in connection with the collection of local taxes is received in confidence and where the disclosure of that information would result in unfair competitive disadvantage to the person supplying the information, the information is exempt from disclosure.376 Sales and use tax records may be used only for administration of the tax laws. Unauthorized disclosure or use of confidential information contained in these records can give rise to criminal liability.377

PRACTICE TIP:

Make sure to check your local agency’s codes and ordinances with respect to local taxes when determining what information submitted by the taxpayer is confidential.

Trade Secrets and Other Proprietary Information

As part of the award and administration of public contracts, businesses will often give local agencies information that the businesses would normally consider to be proprietary. There are three exemptions that businesses often use to attempt to protect this proprietary information — the official information privilege, the trade secret privilege, and the public interest exemption.378

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371 Welf. & Inst. Code, § 10850.
373 Health & Saf. Code, § 34283.
374 Health & Saf. Code, § 34332, subd. (c).
376 Gov. Code, § 6254, subd. (i); see also Rev. & Tax. Code, § 7056.
377 Rev. & Tax. Code, §§ 7056, 7056.5
However, California’s strong public policy in favor of disclosure of public records precludes local agencies from protecting most business information. Both the official information privilege and the public interest exemption require that the public interest in nondisclosure outweigh the public interest in disclosure. While these provisions were designed to protect legitimate privacy interests, California courts have consistently held that when individuals or businesses voluntarily enter into the public sphere, they diminish their privacy interests. Courts have further found that the public interest in disclosure overrides alleged privacy interests. For example, a court ordered a university to release the names of anonymous contributors who received license agreements for luxury suites at the school’s sports arena. Another court ordered a local agency to release a waste disposal contractor’s private financial statements used by the local agency to approve a rate increase.

The trade secret privilege is for information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

However, even when records contain trade secrets, local agencies must determine whether disclosing the information is in the public interest. When businesses give local agencies proprietary information, courts will examine whether disclosure of that information serves the public interest.

The PRA contains several exemptions that address specific types of information that are in the nature of trade secrets, including pesticide safety and efficacy information, air pollution data, and corporate siting information (financial records or proprietary information provided to government agencies in connection with retaining, locating, or expanding a facility within California). Other exemptions cover types of information that could include but are not limited to trade secrets — for example, certain information on plant production, utility systems development data, and market or crop reports.

**PRACTICE TIP:**

Issues concerning trade secrets and proprietary information tend to be complex and fact specific. Consider seeking the advice of your local agency counsel in determining whether records requested are exempt from disclosure.

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381 Civ. Code, § 3426.1, subd. (d). This trade secret definition is set forth in the Uniform Trade Secrets Act ("UTSA"). However, Civil Code section 3426.7, subd. (c) states that any determination as to whether disclosure of a record under the Act constitutes a misappropriation of a trade secret shall be made pursuant to the law in effect before the operative date of the UTSA. At that time, California used the Restatement definition of a trade secret, which was lengthy. See *Uribe v. Howie* (1971) 19 Cal.App.3d 194. Accordingly, it is not clear that the trade secret definition that applies generally under the UTSA is the trade secret definition that applies in the context of a public records request.


383 Gov. Code, § 6254.2.

384 Gov. Code, § 6254.7.

385 Gov. Code, § 6254.15.

386 Gov. Code, § 6254, subd. (e).
Utility Customer Information

Personal information expressly protected from disclosure under the PRA includes names, credit histories, usage data, home addresses, and telephone numbers of local agencies’ utility customers. This exception is not absolute, and customers’ names, utility usage data, and home addresses may be disclosable under certain scenarios. For example, disclosure is required when requested by a customer’s agent or authorized family member, or an officer or employee of another governmental agency when necessary for performance of official duties by court order or request of a law enforcement agency relative to an ongoing investigation, when the local agency determines the customer used utility services in violation of utility policies, or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.

Utility customers who are local agency elected or appointed officials with authority to determine their agency’s utilities usage policies have lesser protection of their personal information because their names and usage data are disclosable upon request.

Public Interest Exemption

The PRA establishes a “public interest” or “catchall” exemption that permits local agencies to withhold a record if the agency can demonstrate that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test. The PRA does not specifically identify the public interests that might be served by not making the record public under the public interest exemption, but the nature of those interests may be inferred from specific exemptions contained in the PRA. The scope of the public interest exemption is not limited to specific categories of information or established exemptions or privileges. Each request for records must be considered on the facts of the particular case in light of the competing public interests.

The records and situations to which the public interest exemption may apply are open-ended and, when it applies, the public interest exemption alone is sufficient to justify nondisclosure of local agency records. The courts have relied exclusively on the public interest exemption to uphold nondisclosure of:

- Local agency records containing names, addresses, and phone numbers of airport noise complainants;
- Proposals to lease airport land prior to conclusion of lease negotiations;
- Information kept in a public defender’s database about police officers; and
- Individual teacher test scores, identified by name, designed to measure each teacher’s effect on student performance on standardized tests.

The public interest exemption is versatile and flexible, in keeping with its purpose of addressing circumstances not foreseen by the Legislature. For example, in one case, the court held local agencies could properly consider the burden of segregating exempt

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387 Gov. Code, § 6254.16.  
388 Gov. Code, § 6554.16, subd. (a).  
389 Gov. Code, § 6254.16, subd. (b).  
390 Gov. Code, § 6254.16, subd. (c).  
391 Gov. Code, § 6254.16, subd. (d).  
392 Gov. Code, § 6254.16, subd. (f).  
393 Gov. Code, § 6265.16, subd. (e).  
394 Gov. Code, § 6255.  
396 Times Mirror Co. v. Superior Court, supra, 53 Cal.3d 1325, 1338.  
from nonexempt records when applying the balancing test under the public interest exemption.\footnote{398} In that case, the court held that the substantial burden of redacting exempt information from law enforcement intelligence records outweighed the marginal and speculative benefit of disclosing the remaining nonexempt information. In another case, the court applied the balancing test to the time of disclosure to hold that public disclosure of competing proposals for leasing city airport property could properly await conclusion of the negotiation process.\footnote{399}

The requirement that the public interest in nondisclosure must “clearly outweigh” the public interest in disclosure for records to qualify as exempt under the public interest exemption is important and emphasized by the courts. Justifying nondisclosure under the public interest exemption demands a clear overbalance on the side of confidentiality.\footnote{400} Close calls usually do not qualify for an exemption. There are a number of examples of cases where a clear overbalance was not present to support nondisclosure under the public interest exemption. The courts have held that the following are all subject to disclosure under the public interest exemption balancing test:

- The identities of individuals granted criminal conviction exemptions to work in licensed day care facilities and the facilities employing them;
- Records relating to unpaid state warrants;
- Court records of a settlement between the insurer for a school district and a minor sexual assault victim;
- Applications for concealed weapons permits;
- Letters appointing then rescinding an appointment to a local agency position;
- The identities and license agreements of purchasers of luxury suites in a university arena; and
- GIS base map information.\footnote{401}

The public interest exemption balancing test weighs only public interests — the public interest in disclosure and the public interest in nondisclosure. Agency interests or requester interests that are not also public interests are not considered.\footnote{402} For example, the courts have held that the public’s interest in information regarding peace officers retained in a database by the public defender in the representation of its clients is slight, and the private interests of the requesters (the police officers listed in the database) were not to be considered in determining whether the database was exempt from disclosure.\footnote{403}

\footnote{398} American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440.
\footnote{399} Michaelis, Montanari & Johnson v. Superior Court, supra, 38 Cal.4th 1065.
\footnote{403} Id.
Judicial Review and Remedies

Overview
The PRA establishes a special, expedited judicial process to resolve disputes over the public’s right to inspect or receive copies of public records. In contrast to other governmental transparency laws such as the Brown Act, there are no criminal penalties for a local agency’s failure to comply with the PRA. Rather, the PRA is enforced primarily through an expedited civil judicial process in which any person may ask a judge to enforce their right to inspect or to receive a copy of any public record or class of public records. Whether the PRA provides the exclusive judicial remedy for resolving a claim that a local agency has unlawfully refused to disclose a particular record or class of records remains unresolved. This chapter discusses the special rules that apply to lawsuits brought to enforce the PRA.

The Trial Court Process
Jurisdiction and Venue
Any person may file a civil action for injunctive or declaratory relief, or writ of mandate, to enforce their right to inspect or receive a copy of any public record or class of public records under the PRA. While the PRA clearly provides specific relief when a local agency denies access or copies of public records, it does not preclude a taxpayer lawsuit seeking declaratory or injunctive relief to challenge the legality of a local agency’s policies or practices for responding to public records requests generally. Conversely, a local agency may not commence an action for declaratory relief to determine its obligation to disclose records under the PRA. The rationale for this rule is that allowing a local agency to seek declaratory relief to determine whether it must disclose records would require the person requesting documents to defend civil actions they did not commence and discourage

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404 Gov. Code, §§ 6258, 6259.
405 Gov. Code, § 54950 et seq.
408 Gov. Code, § 6258.
them from requesting records. That would frustrate the purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of local agencies. However, a local agency is a “person” under the PRA and may maintain an action to compel the disclosure of records from another public entity subject to the PRA.

The action may be filed in any court of competent jurisdiction, which typically is the superior court in the county where the records or some part of them are maintained.

Procedural Considerations

Timing
The PRA does not contain a specific time period in which the action or responsive pleadings must be filed. Therefore, any action must be filed in a manner consistent with traditional actions for injunctive or declaratory relief, or writ of mandate, and is subject to any limitations periods or equitable concepts, such as laches, applicable to those actions. In a typical action under the PRA, the parties will file written arguments with the court to explain why the records should be disclosed or can be withheld. The court will also hold a hearing to give the parties an opportunity to argue the case. The judge in each case will establish the deadlines for briefing the issues and for hearings with the object of securing a decision at the earliest possible time.

Discovery
The PRA is considered a “special proceeding of a civil nature,” and as such, the Civil Discovery Act applies to actions brought under the PRA. Any discovery sought must still, however, be relevant to the subject matter of the pending action and the trial court has the discretion to restrict discovery only where it would be likely to aid in the resolution of the particular issues presented in the proceeding.

A local agency that receives a request for records that would traditionally be sought through a formal discovery mechanism must handle the request in a manner consistent with the PRA rather than pursuant to discovery statutes. A litigant using the PRA as an alternative to traditional discovery may not avoid California Environmental Quality Act’s statutory duty to pay for preparation of the administrative record by cloaking its discovery actions under the PRA.

Burden of Proof
In general, a plaintiff bears the burden of proving the plaintiff made a request for reasonably identifiable public records to a local agency and the agency improperly withheld or failed to conduct a reasonable search for the requested records. A local agency may assert, as affirmative defenses, and bears the burden of proving that: (i) a request was unclear and the agency provided adequate assistance to the requestor to identify records but was still unable to identify any records; (ii) the withholding was justified under the PRA; or (iii) the local agency undertook a reasonable search for records but was unable to locate the requested records.

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411 Id. at p. 423.
413 Gov. Code, § 6259, subd. (a).
414 Gov. Code, § 6258.
418 Fredericks v. Superior Court (2015) 233 Cal. App. 4th 209, 227 “[A] person who seeks public records must present a reasonably focused and specific request, so that the public agency will have an opportunity to promptly identify and locate such records and to determine whether any exemption to disclosure applies”; American Civil Liberties Union of N. Cal. v. Superior Court (2011) 202 Cal. App. 4th 55, 85 [“Government agencies are, of course, entitled to a presumption that they have reasonably and in good faith complied with the obligation to disclose responsive information.”]
In Camera Review

The judge must decide the case based on a review of the record or records (if such review is permitted by the rules of evidence),421 the papers filed by the parties, any oral argument, and additional evidence as the court may allow.422 If permitted, the judge may examine the record or records at issue in camera, that is, in the judge’s chambers and out of the presence and hearing of others, to help decide the case.423 However, a judge cannot compel in camera disclosure of records claimed to be protected from disclosure by the attorney-client privilege for the purpose of determining whether the privilege applies.424

Decision and Order

If the court determines, based upon a verified petition, that certain public records are being improperly withheld, the court will order the officer or person withholding the records to disclose the public record or show cause why he or she should not do so.425 If the court determines the local agency representative was justified in refusing to disclose the record, the court shall return the item to the local agency representative without disclosing its content with an order denying the motion and supporting the decision refusing disclosure.426 The court may also order some of the records to be disclosed while upholding the decision to withhold other records. In addition, the court may order portions of the records be redacted and compel the disclosure of the remaining portions of the records.

Reverse PRA Litigation

While there is no specific statutory authority for such an action, a person who believes their rights would be infringed by a local agency decision to disclose documents may bring a “reverse PRA action” to seek an order enjoining disclosure.427 The court has allowed a records requester to join in a reverse PRA action as a real party or an intervener.428

PRACTICE TIP:

A local agency that receives a request for records that are or could be statutorily exempt from disclosure (under the PRA or otherwise) might consider notifying affected parties prior to disclosing the records. For example, “affected parties” would be individuals or organizations for whom disclosure could constitute an unwarranted intrusion of privacy if the requested documents contain potentially confidential information, such as trade secrets or confidential information of employees, contractors, or other third-party stakeholders. The notification prior to disclosing the records would allow the third parties to file a reverse PRA action to enjoin the local agency from disclosing the records.

421 Evid. Code, § 915.
422 Gov. Code, § 6259, subd. (a).
423 Gov. Code, § 6259, subd. (a).
425 Gov. Code, § 6259, subd. (a).
426 Gov. Code, § 6259, subd. (b).
428 Id. at p. 1269.
Appellate Review

Petition for Review

The PRA establishes an expedited judicial review process. A trial court’s order is not considered to be a final judgment subject to the traditional and often lengthy appeal process. In place of a traditional appeal, such orders are subject to immediate review through the filing of a petition to the appellate court for the issuance of an extraordinary writ.429 Because the trial court’s decision is not a final judgment for which there is an absolute right of appeal, the appellate court may decline to review the case without a hearing or without issuance of a detailed written opinion.430 However, the intent of substituting writ review for the traditional appeal process is to provide for expedited appellate review, not an abbreviated review. Therefore, an appellate court may not deny an apparently meritorious writ petition that has been timely presented and is procedurally sufficient merely because the petition presents no important issue of law or because it considers the case less worthy of its attention.431 This manner of providing for appellate review through an extraordinary writ procedure rather than a traditional appeal has been held to be constitutional.432

Timing

A party seeking review of a trial court’s order must file a petition for review with the appellate court within 20 days after being served with a written notice of entry of the order, or within such further time, not exceeding an additional 20 days, as the trial court may for good cause allow.433 If the written notice of entry of the order is served by mail, the period within which to file the petition is increased by five days.434

Once a court of appeal accepts a petition for review the appellate process proceeds in much the same fashion as a traditional appeal. Unless the parties stipulate otherwise, the appellate court will establish a briefing schedule and may set the matter for oral arguments once briefing is complete.

Requesting a Stay

If a party wishes to prevent the disclosure of records pending appellate review of the trial court’s decision, then that party must seek a stay of the trial court’s order or judgment.435 In cases when the trial court’s order requires disclosure of records prior to the time when a petition for review must be filed, the party seeking a stay may apply to the trial court for a stay of the order or judgment. Where there is sufficient time for a party to file a petition for review prior to the date for disclosure, that party may seek a stay from the appellate court. The trial and appellate courts may only grant a stay when the party seeking the stay demonstrates that: (1) the party will sustain irreparable damage because of the disclosure; and (2) it is probable the party will succeed on the merits of the case on appeal.436

Scope and Standard of Review

On appeal, the appellate court will conduct an independent review of the trial court’s ruling, upholding the factual findings made by the trial court if they are based on substantial evidence.437 The decision of the appellate court, whether to deny review or on the merits of the case, is subject to discretionary review by the California Supreme Court through a petition for review.

429 Gov. Code, § 6259, subd. (c); but see Mincal Consumer Law Group v. Carlsbad Police Department (2013) 214 Cal.App.4th 259, 265 (under limited circumstances, an appellate court may exercise its discretion to treat an appeal from a non-appealable order as a petition for writ relief).

430 Gov. Code, § 6259, subd. (c).


432 Id. at p.115.

433 Gov. Code, § 6259, subd. (c).

434 Gov. Code, § 6259, subd. (c).

435 Gov. Code, § 6259, subd. (c).

436 Gov. Code, § 6259, subd. (c).

437 Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1336.
Appeal of Other Decisions under the PRA

While the trial court’s decision regarding disclosure of records is not subject to the traditional appeal process, other decisions of the trial court related to a lawsuit under the PRA are subject to appeal. Thus, a trial court’s decision to grant or deny a motion for attorneys’ fees and costs under the PRA is subject to appeal and is not subject to the extraordinary writ process.438 Similarly, an award of sanctions in a public records case is subject to appeal rather than a petition for an extraordinary writ.439

Attorneys’ Fees and Costs

Attorneys’ fees may be awarded to a prevailing party in an action under the PRA. If the plaintiff prevails in the litigation, the judge must award court costs and reasonable attorneys’ fees to the plaintiff.440 A member of the public may be entitled to an award of attorneys’ fees and costs even when he or she is not denominated as the “plaintiff” in a lawsuit under the PRA, if the party is the functional equivalent of a plaintiff.441 Records requesters that participate in a reverse-PRA lawsuit are not entitled to an award of attorneys’ fees for successfully opposing such litigation.442 Successful local agency defendants may obtain an award of attorneys’ fees and court costs against an unsuccessful plaintiff only when the court finds the plaintiff’s case was clearly frivolous.443 Unless a plaintiff’s case is “utterly devoid of merit or taken for improper motive,” a court is unlikely to find a plaintiff’s case frivolous and award attorneys’ fees to an agency.444 Only one reported case has upheld an award of attorneys’ fees to a local agency based on a frivolous request.445

Eligibility to Recover Attorneys’ Fees

In determining whether a plaintiff has prevailed, courts have applied several variations of analysis similar to that used under the private attorney general laws, i.e., whether the party has succeeded on any issue in the litigation and achieved some of the public benefits sought in the lawsuit. Some courts, however, have determined a plaintiff may still be a prevailing party entitled to attorneys’ fees under the PRA even without a favorable ruling or other court action.446

Generally, if a local agency makes a timely effort to respond to a vague document request, then a plaintiff will not be awarded attorneys’ fees as the prevailing party even in litigation resulting in issuance of a writ.447 However, where the court determines a local agency was not sufficiently diligent in locating all requested records and issues declaratory relief, stating there has in fact been a violation of the PRA, even if the records sought no longer exist and cannot be produced, the court may still award attorneys’ fees on the basis of the statutory policies underlying the PRA.448

The trial court has significant discretion when determining the appropriate amount of attorneys’ fees to award.449 Local agencies must pay any award of costs and fees, and not the individual local agency employees or officials who decide not to disclose requested records.450

443 Gov. Code, §6259, subd. (d).
445 Butt v. City of Richmond, supra, 44 Cal.App.4th at p. 932.
450 Gov. Code, § 6259, subd. (d).
Records Management

In addition to the PRA, other California laws support and complement California’s commitment to open government and the right of access to public records. These laws include, among others, open meeting laws under the Ralph M. Brown Act, records retention requirements, and California and federal laws prohibiting the spoliation of public records that might be relevant in litigation involving the local agency. Proper records management policies and practices facilitate efficient and effective compliance with these laws.

Public Meeting Records

Under the Brown Act,\(^451\) any person may request a copy of a local agency meeting agenda and agenda packet by mail.\(^452\) If requested, the agenda materials must be made available in appropriate alternative formats to persons with disabilities.\(^453\) If a local agency receives a written request to send agenda materials by mail, the materials must be mailed when the agenda is either posted or distributed to a majority of the agency’s legislative body, whichever occurs first.\(^454\) Requests for mailed copies of agenda materials are valid for the calendar year in which they are filed, but must be renewed after January 1 of each subsequent year.\(^455\) Local agency legislative bodies may establish a fee for mailing agenda materials.\(^456\) The fee may not exceed the cost of providing the service.\(^457\) Failure of a requester to receive agenda materials is not a basis for invalidating actions taken at the meeting for which agenda materials were not received.\(^458\)

Writings that are distributed to all or a majority of all members of a legislative body in connection with a matter subject to discussion or consideration at a public meeting of the local agency are public records subject to disclosure, unless specifically

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451 Gov. Code, § 54950.5.
454 Ibid.
455 Ibid.
456 Ibid.
457 Ibid.
458 Ibid.
exempted by the PRA, and must be made available upon request without delay. When non-exempt writings are distributed during a public meeting, in addition to making them available for public inspection at the meeting (if prepared by the local agency or a member of its legislative body) or after the meeting (if prepared by another person), they must be made available in appropriate alternative formats upon request by a person with a disability. The local agency may charge a fee for a copy of the records; however, no surcharge may be imposed on persons with disabilities. When records relating to agenda items are distributed to a majority of all members of a legislative body less than 72 hours prior to the meeting, the records must be made available for public inspection in a designated location at the same time they are distributed. The address of the designated location shall be listed in the meeting agenda. The local agency may also post the information on its website in a place and manner which makes it clear the records relate to an agenda item for an upcoming meeting.

**Maintaining Electronic Records**

“Public records,” as defined by the PRA, includes “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.” The PRA does not require a local agency to keep records in an electronic format. But, if a local agency has an existing, non-exempt public record in an electronic format, the PRA does require the agency make those records available in any electronic format in which it holds the records when requested. The PRA also requires the local agency to provide a copy of such records in any alternative electronic format requested, if the alternative format is one the agency uses for itself or for provision to other agencies. The PRA does not require a local agency to release a public record in the electronic form in which it is held if the release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained. Likewise, the PRA does not permit public access to records held electronically, if access is otherwise restricted by statute.

**PRACTICE TIP:**

Local agencies should consider adopting electronic records policies governing such issues as: what electronic records (e.g., emails, texts, and social media) and what attributes of the electronically stored information and communications are considered “retained in the ordinary course of business” for purposes of the PRA; whether personal electronic devices (such as computers, tablets, cell phones) and personal email accounts may be used to store or send electronic communications concerning the local agency, or whether the agency's devices must be used; and privacy expectations. Local agencies should consult with information technology officials to understand what information is being stored electronically and the technological limits of their systems for the retention and production of electronic records.

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459 Gov. Code, § 54957.5, subd. (a).
460 Gov. Code, § 54957.5, subd. (c).
462 Gov. Code, § 54957.5, subds. (b)(1), (b)(2).
463 Gov. Code, § 54957.5, subd. (b)(2).
464 Govt C §54957.5, subd. (b)(2).
465 Gov. Code, § 6252, subd. (e).
466 Gov. Code, § 6252, subd. (e).
467 Gov. Code, § 6253, subd. (a)(1).
468 Gov. Code, § 6253.9, subd. (a)(2).
469 Gov. Code, § 6253.9, subd. (f).
469 Gov. Code, § 6253.9, subd. (g).
Duplication costs of electronic records are limited to the direct cost of producing the electronic copy. However, requesters may be required to bear additional costs of producing a copy of an electronic record, such as programming and computer services costs, if the request requires the production of electronic records that are otherwise only produced at regularly scheduled intervals, or production of the record would require data compilation, extraction or programming. Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.

**Metadata**

Electronic records may include “metadata,” or data about data contained in a record that is not visible in the text. For example, metadata may describe how, when or by whom particular data was collected, and contain information about document authors, other documents, or commentary or notes. Although no provision of the PRA expressly addresses metadata, and there are no reported court opinions in California considering whether or to what extent metadata is subject to disclosure, other jurisdictions have held that metadata is a public record subject to disclosure, unless an exemption applies. There are no reported California court opinions providing guidance on whether agencies have a duty to disclose metadata when an electronic record contains exempt information that cannot be reasonably segregated without compromising the record’s integrity.

**Computer Software**

The PRA permits government agencies to develop and commercialize computer software and to benefit from copyright protections for agency-developed software. Computer software developed by state or local agencies, including computer mapping systems, computer programs, and computer graphics systems, is not a public record subject to disclosure. As a result, public agencies are not required to provide copies of agency-developed software pursuant to the PRA. The PRA authorizes state and local agencies to sell, lease, or license agency-developed software for commercial or noncommercial use. The exception for agency-developed software does not affect the exempt status of records merely because it is stored electronically.

**Computer Mapping (GIS) Systems**

While computer mapping systems developed by local agencies are not public records subject to disclosure, such systems generally include geographic information system (GIS) data. Many local agencies use GIS programs and databases for a broad range of purposes, including the creation and editing of maps depicting property and facilities of importance to the local agency and the public. As with metadata, the PRA does not expressly address GIS information disclosure. However, the California Supreme Court has held, that while GIS software is exempt under the PRA, the data in a GIS file format is a public record, and data in a GIS database must be produced.

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470 Gov. Code, § 6253.9, subd. (a)(2).
471 Gov. Code, § 6253.9, subd. (b).
472 Gov. Code, § 6253.9, subd. (c).
474 Gov. Code, § 6254.9, subds. (a), (b).
475 Gov. Code, § 6254.9, subd. (a).
476 Gov. Code, § 6254.9, subd. (d).
Public Contracting Records

State and local agencies subject to the Public Contract Code that receive bids for construction of a public work or improvement, must, upon request from a contractor plan room service, provide an electronic copy of a project’s contract documents at no charge to the contractor plan room. The Public Contract Code does not define the term “contractor plan room,” but the term commonly refers to a clearinghouse that contractors can use to identify potential bidding opportunities and obtain bid documents. The term may also refer to an on-line resource for a contractor to share plans and information with subcontractors.

Electronic Discovery

The importance of maintaining a written document retention policy is evident by revisions to the Federal Rules of Civil Procedure, and California’s Civil Discovery Act and procedures, relative to electronic discovery. Those provisions and discovery procedures require parties in litigation to address the production and preservation of electronic records. Those rule changes may require a local agency to alter its routine management or storage of electronic information, and illustrate the importance of having and following formal document retention policies.

Once a local agency knows or receives notice that information is relevant to litigation (e.g., a litigation hold notice or a document preservation notice), it has a duty to preserve that information for discovery. In some cases, the local agency may have to suspend the routine operation of its information systems (through a litigation hold) to preserve information relevant to the litigation and avoid the potential imposition of sanctions.

Record Retention and Destruction Laws

The PRA is not a records retention statute. The PRA does not prescribe what type of information a public agency may gather or keep, or provide a method for correcting records. Its sole function is to provide access to public records. Other provisions of state law govern retention of public records.

Local agencies generally must retain public records for a minimum of two years. However, some records may be destroyed sooner. For example, duplicate records that are less than two years old may be destroyed if no longer required. Similarly, the retention period for “recordings of telephone and radio communications” is 100 days and “routine video monitoring” need only be retained for one year, and may be destroyed or erased after 90 days if another record, such as written minutes, is kept of the recorded event. “Routine video monitoring” is defined as “video recording by a video or electronic imaging system designed to record the regular and ongoing operations of a [local agency] …, including mobile in-car video systems, jail observation and monitoring systems, and building security recording systems.” The Attorney General has opined that recordings by security cameras on public buses and other transit vehicles constitute “routine video monitoring.” Whether additional recording technology used for law and parking enforcement such as body cameras and Vehicle License Plate Recognition (“VLPR”) systems also constitute routine video monitoring is an open question and may depend upon its use. While the technology is very similar to in-car video systems, recordings targeting specific activity may not be “routine.” The retention statutes do not provide a specific retention period for e-mails, texts, or forms of social media.

481 Ibid.
482 Gov. Code, § 34090, subd. (d).
483 Gov. Code, § 34090.7.
485 Gov. Code, §§ 34090.6, 34090.7.
By contrast, state law does not permit destruction of records affecting title to or liens on real property, court records, records required to be kept by statute, and the minutes, ordinances, or resolutions of the legislative body or city board or commission.\footnote{Gov. Code, § 34090, subds. (a), (b), (c) & (e).}

In addition, employers are required to maintain personnel records for at least three years after an employee’s termination, subject to certain exceptions, including peace officer personnel records, pre-employment records, and where an applicable collective bargaining agreement provides otherwise.\footnote{Lab. Code, § 1198.5, subd. (c)(1).}

To ensure compliance with these laws, most local agencies adopt records retention schedules as a key element of a records management system.

**Records Covered by the Records Retention Laws**

There is no definition of “public records” or “records” in the records retention provisions governing local agencies.\footnote{64 Ops.Cal.Atty.Gen. 317, 323 (1981).} The Attorney General has opined that the definition of “public records” for purposes of the records retention statutes is “a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept; or (2) because it is necessary or convenient to the discharge of the public officer’s duties and was made or retained for the purpose of preserving its informational content for future reference.”\footnote{Id. at p. 324.}

Under that definition, local agency officials retain some discretion concerning what agency records must be kept pursuant to state records retention laws. Similarly, the PRA allows for local agency discretion concerning what preliminary drafts, notes, or interagency or intra-agency memoranda are retained in the ordinary course of business.\footnote{Gov. Code, § 6254, subd. (a). See “Drafts,” p. 33.}

### Practice Tip:

Though there is no definition of “records” for purposes of the retention requirements applicable to local agencies, the retention requirements and the disclosure requirements of the PRA should complement each other. Local agencies should exercise caution in deviating too far from the definition of “public records” in the PRA in interpreting what records should be retained under the records retention statutes.
Frequently Requested Information and Records

This table is intended as a general guide on the applicable law and is not intended to provide legal advice. The facts and circumstances of each request should be carefully considered in light of the applicable law. A local agency’s legal counsel should always be consulted when legal issues arise.

<table>
<thead>
<tr>
<th>INFORMATION/RECORDS REQUESTED</th>
<th>MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?</th>
<th>APPLICABLE AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>AGENDA MATERIALS DISTRIBUTED TO A LEGISLATIVE BODY RELATING TO AN OPEN SESSION ITEM</td>
<td>Yes</td>
<td>Gov. Code, § 54957.5. For additional information, see p. 63 of “The People’s Business: A Guide to the California Public Records Act,” “the Guide.”</td>
</tr>
<tr>
<td>AUDIT CONTRACTS</td>
<td>Yes</td>
<td>Gov. Code, § 6253.31.</td>
</tr>
<tr>
<td>AUDITOR RECORDS</td>
<td>Yes, with certain exceptions</td>
<td>Gov. Code, § 36525(b).</td>
</tr>
<tr>
<td>AUTOMATED TRAFFIC ENFORCEMENT SYSTEM (RED LIGHT CAMERA) RECORDS</td>
<td>No</td>
<td>Veh. Code, § 21455.5(f)(1).</td>
</tr>
<tr>
<td>CALENDARS OF ELECTED OFFICIALS</td>
<td>Perhaps not, but note that there is no published appellate court decision on this issue post- Prop. 59.¹</td>
<td>See Times Mirror Co. v. Superior Court (1991) 53 Cal.3d. 1325 and Rogers v. Superior Court (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. For additional information, see p. 32 of the Guide.</td>
</tr>
<tr>
<td>DOG LICENSE INFORMATION</td>
<td>Unclear</td>
<td>See conflict between Health &amp; Safety Code, § 121690(h) which states that license information is confidential, and Food and Agr. Code, § 30803(b) stating license tag applications shall remain open for public inspection.</td>
</tr>
<tr>
<td>ELECTION PETITIONS (INITIATIVE, REFERENDUM AND RECALL PETITIONS)</td>
<td>No, except to proponents if petition found to be insufficient</td>
<td>Gov. Code, § 6253.5; Elec. Code, §§ 17200, 17400, and 18650; Evid. Code, § 1050. For additional information, see p. 34 of the Guide.</td>
</tr>
<tr>
<td>EMAILS AND TEXT MESSAGES OF LOCAL AGENCY STAFF AND/OR OFFICIALS</td>
<td>Yes</td>
<td>Emails and text messages relating to local agency business on local agency and/or personal accounts and devices are public records. Gov. Code § 6252(e); City of San Jose v. Superior Court (2017) 2 Cal. 5th 608. For additional information, see p. 12 of the Guide.</td>
</tr>
<tr>
<td>EMPLOYMENT AGREEMENTS/CONTRACTS</td>
<td>Yes</td>
<td>Gov. Code, §§ 6254.8 and 53262(b). For additional information, see p. 49 of the Guide.</td>
</tr>
<tr>
<td>EXPENSE REIMBURSEMENT REPORT FORMS</td>
<td>Yes</td>
<td>Gov. Code, § 53232.3(e).</td>
</tr>
<tr>
<td>FORM 700 (STATEMENT OF ECONOMIC INTERESTS) AND CAMPAIGN STATEMENTS</td>
<td>Yes²</td>
<td>Gov. Code, § 81008.</td>
</tr>
<tr>
<td>INFORMATION/RECORDS REQUESTED</td>
<td>MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?</td>
<td>APPLICABLE AUTHORITY</td>
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<tr>
<td>GRADING DOCUMENTS INCLUDING GEOLOGY REPORTS, COMPACTION REPORTS, AND SOILS REPORTS SUBMITTED IN CONJUNCTION WITH AN APPLICATION FOR A BUILDING PERMIT</td>
<td>Yes</td>
<td>89 Ops.Cal.Atty.Gen. 39 (2006); but see Gov. Code, § 6254(e). For additional information, see p. 29 of the Guide.</td>
</tr>
<tr>
<td>JUVENILE COURT RECORDS</td>
<td>No</td>
<td>T.N.G. v. Superior Court (1971) 4 Cal.3d. 767; Welf. &amp; Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.</td>
</tr>
<tr>
<td>LEGAL BILLING STATEMENTS</td>
<td>Generally, yes, as to amount billed and/or after litigation has ended. No, if pending or active litigation and the billing entries are closely related to the attorney-client communication. For example, substantive billing detail which reflects an attorney’s impressions, conclusions, opinions or legal research or strategy.</td>
<td>Gov. Code, § 6254(k); Evid. Code, § 950, et seq.; County of Los Angeles Board of Supervisors v. Superior Court (2016) 2 Cal.5th 282; Smith v. Laguna Sun Villas Community Assoc. (2000) 79 Cal.App.4th 639; United States v. Amlani, 169 F.3d 1189 (9th Cir. 1999). But see Gov. Code, § 6254(b) as to the disclosure of billing amounts reflecting legal strategy in pending litigation. County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57 (Pending litigation exemption does not protect legal bills reflecting the hours worked, the identity of the person performing the work, and the amount charged from disclosure; only work product or privileged descriptions of work may be redacted). For additional information, see p. 30 of the Guide.</td>
</tr>
<tr>
<td>LIBRARY PATRON USE RECORDS</td>
<td>No</td>
<td>Gov. Code, §§ 6254(i) and 6267. For additional information, see p. 40 of the Guide.</td>
</tr>
<tr>
<td>MEDICAL RECORDS</td>
<td>No</td>
<td>Gov. Code, § 6254(c). For additional information, see p. 40 of the Guide.</td>
</tr>
<tr>
<td>MENTAL HEALTH DETENTIONS (5150 REPORTS)</td>
<td>No</td>
<td>Welf. &amp; Inst. Code, § 5328. For additional information, see p. 39 of the Guide.</td>
</tr>
<tr>
<td>NOTICES/ORDERS TO PROPERTY OWNER RE: HOUSING/BUILDING CODE VIOLATIONS</td>
<td>Yes</td>
<td>Gov. Code, § 6254.7(c). For additional information, see p. 1 of the Guide.</td>
</tr>
<tr>
<td>INFORMATION/RECORDS REQUESTED</td>
<td>MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?</td>
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<tr>
<td><strong>OFFICIAL BUILDING PLANS (ARCHITECTURAL DRAWINGS AND PLANS)</strong></td>
<td>Inspection only. Copies provided under certain circumstances.</td>
<td>Health &amp; Saf. Code, § 19851; see also 17 U.S.C. §§ 101 and 102. For additional information, see p. 28 of the Guide.</td>
</tr>
<tr>
<td><strong>PERSONAL FINANCIAL RECORDS</strong></td>
<td>No</td>
<td>Gov. Code, §§ 7470, 7471, 7473; see also Gov. Code, § 6254(n). For additional information, see p. 40 of the Guide.</td>
</tr>
<tr>
<td><strong>PERSONNEL</strong></td>
<td>For additional information, see p. 46 of the Guide.</td>
<td></td>
</tr>
<tr>
<td>• Employee inspection of own personnel file</td>
<td>Yes, with exceptions</td>
<td>For additional information, see pp. 29-31 of the Guide. Lab. Code, § 1198.5. This section applies to charter cities. See Gov. Code, § 31011. For peace officers, see Gov. Code, § 3306.5. For firefighters, see Gov. Code, § 3256.5.</td>
</tr>
<tr>
<td>• Name and pension amounts of public agency retirees</td>
<td>Yes. However, personal or individual records, including medical information, remain exempt from disclosure.</td>
<td>Sacramento County Employees Retirement System v. Superior Court (2011) 195 Cal.App.4th 440; San Diego County Employees Retirement Association v. Superior Court (2011) 196 Cal.App.4th 1228; Sonoma County Employees Retirement Assn. v. Superior Court (2011) 198 Cal.App.4th 196.</td>
</tr>
<tr>
<td>• Names and salaries (including performance bonuses and overtime) of public employees, including peace officers</td>
<td>Yes, absent unique, individual circumstances. However, other personal information such as social security numbers, home telephone numbers and home addresses are generally exempt from disclosure per Gov. Code, § 6254(c).</td>
<td>International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court (2007) 42 Cal.4th 319; Commission on Peace Officers Standards and Training v. Superior Court (2007) 42 Cal.4th 278.</td>
</tr>
<tr>
<td>• Officer’s personnel file, including internal affairs investigation reports</td>
<td>No</td>
<td>This information can only be disclosed through a Pitchess motion. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045; International Federation of Professional &amp; Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319; People v. Superior Court (2014) 228 Cal.App.4th 1046; City of Hemet v. Superior Court (1995) 37 Cal.App.4th 1411.</td>
</tr>
<tr>
<td>• Test Questions, scoring keys, and other examination data.</td>
<td>No</td>
<td>Gov. Code, § 6254(g).</td>
</tr>
<tr>
<td><strong>POLICE/LAW ENFORCEMENT</strong></td>
<td>For additional information, see p. 35 of the Guide.</td>
<td></td>
</tr>
<tr>
<td>• Arrest Information</td>
<td>Yes</td>
<td>Gov. Code, § 6254(f)(1); County of Los Angeles v. Superior Court (Kusar) (1993) 18 Cal.App.4th 588.</td>
</tr>
<tr>
<td>• Child abuse reports</td>
<td>No</td>
<td>Pen. Code, §11167.5.</td>
</tr>
<tr>
<td>INFORMATION/RECORDS REQUESTED</td>
<td>MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?</td>
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<tr>
<td>POLICE/LAW ENFORCEMENT, Continued</td>
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</tr>
<tr>
<td>• Citizen complaint policy</td>
<td>Yes</td>
<td>Pen. Code, § 832.5(a)(1).</td>
</tr>
<tr>
<td>• Citizen complaints</td>
<td>No</td>
<td>Pen. Code, § 832.7.</td>
</tr>
<tr>
<td>• Citizen complaints – annual summary report to the Attorney General</td>
<td>Yes</td>
<td>Pen. Code, § 832.5.</td>
</tr>
<tr>
<td>• Citizen complainant information – names addresses and telephone numbers</td>
<td>No</td>
<td>City of San Jose v. San Jose Mercury News (1999) 74 Cal. App.4th 1008. For additional information see p.38 of the Guide.</td>
</tr>
<tr>
<td>• Concealed weapon permits and applications</td>
<td>Yes, except for home/ business address and medical/ psychological history</td>
<td>Gov. Code, § 6254(u)(1); CBS, Inc. v. Block (1986) 42 Cal.3d 646.</td>
</tr>
<tr>
<td>• Contact information – names, addresses and phone numbers of crime victims or witnesses</td>
<td>No</td>
<td>Gov. Code § 6254(f)(2). For additional information, see p. 38 of the Guide.</td>
</tr>
<tr>
<td>• Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video</td>
<td>No</td>
<td>Gov. Code, § 6254(f); Haynie v. Superior Court (2001) 26 Cal.4th 1061.</td>
</tr>
<tr>
<td>• Crime reports</td>
<td>Yes</td>
<td>Gov. Code, §§ 6254(f), 6255.</td>
</tr>
<tr>
<td>• Crime reports, including witness statements</td>
<td>Yes, but only to crime victims and their representatives</td>
<td>Gov. Code, §§ 6254(f), 13951.</td>
</tr>
<tr>
<td>• Elder abuse reports</td>
<td>No</td>
<td>Welf. and Inst. Code, §15633</td>
</tr>
<tr>
<td>• In custody death reports to AG</td>
<td>Yes</td>
<td>Gov. Code, § 12525</td>
</tr>
<tr>
<td>• Juvenile court records</td>
<td>No</td>
<td>T.N.G. v. Superior Court (1971) 4 Cal.3d 767; Welf. &amp; Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.</td>
</tr>
<tr>
<td>• List of concealed weapon permit holders</td>
<td>Yes</td>
<td>Gov. Code, § 6254(u)(1); CBS, Inc. v. Block (1986) 42 Cal.3d 646.</td>
</tr>
<tr>
<td>• Mental health detention(5150) reports</td>
<td>No</td>
<td>Welf. &amp; Inst. Code, § 5328. For additional information, see p. 39 of the Guide.</td>
</tr>
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<tr>
<td><strong>POLICE/LAW ENFORCEMENT, Continued</strong></td>
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</tr>
<tr>
<td>• Official service photographs of peace officers</td>
<td>Yes, unless disclosure would pose an unreasonable risk of harm to the officer</td>
<td>Ibarra v. Superior Court (2013) 217 Cal.App.4th 695.</td>
</tr>
<tr>
<td>• Peace officer’s name, employing agency and employment dates</td>
<td>Yes, absent unique, individual circumstances</td>
<td>Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal.4th 278.</td>
</tr>
<tr>
<td>• Traffic accident reports</td>
<td>Yes, in their entirety, but only to certain parties</td>
<td>Veh. Code, §§ 16005, 20012 [only disclose to those needing the information, such as insurance companies, and the individuals involved].</td>
</tr>
<tr>
<td><strong>PUBLIC CONTRACTS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Bid Proposals, RFP proposals</td>
<td>Yes, except competitive proposals may be withheld until negotiations are complete to avoid prejudicing the public</td>
<td>Michaelis v. Superior Court (2006) 38 Cal. 4th 1065; but see Gov. Code, § 6255 and Evid. Code, § 1060. For additional information, see p. 50 of the Guide.</td>
</tr>
<tr>
<td>• Certified payroll records</td>
<td>Yes, but records must be redacted to protect employee names, addresses, and social security number from disclosure</td>
<td>Labor Code, § 1776.</td>
</tr>
<tr>
<td>• Financial information submitted for bids</td>
<td>Yes, except some corporate financial information may be protected</td>
<td>Gov. Code, §§ 6254(a),(h), and (k), 6254.15; and 6255; Schnabel v. Superior Court of Orange County (1993) 5 Cal. App.4th 704, 718. For additional information, see p. 51 of the Guide.</td>
</tr>
<tr>
<td>• Trade secrets</td>
<td>No</td>
<td>Evid. Code, § 1060; Civ. Code, § 3426, et seq. For additional information, see p. 52 of the Guide.</td>
</tr>
<tr>
<td><strong>PURCHASE PRICE OF REAL PROPERTY</strong></td>
<td>Yes, after the agency acquires the property</td>
<td>Gov. Code, § 7275.</td>
</tr>
<tr>
<td><strong>REAL ESTATE</strong></td>
<td></td>
<td>For additional information, see p. 51 of the Guide.</td>
</tr>
<tr>
<td>• Property information (such as selling assessed value, square footage, number of rooms)</td>
<td>Yes</td>
<td>88 Ops.Cal.Atty.Gen. 153 (2005).</td>
</tr>
<tr>
<td>• Appraisals and offers to purchase</td>
<td>Yes, but only after conclusion of the property acquisition</td>
<td>Gov. Code, § 6254(h). Note that Gov. Code, § 7267.2 requires release of more information to the property owner while the acquisition is pending.</td>
</tr>
<tr>
<td><strong>REPORT OF ARREST NOT RESULTING IN CONVICTION</strong></td>
<td>No, except as to peace officers or peace officer applicants</td>
<td>Lab. Code, § 432.7.</td>
</tr>
<tr>
<td><strong>SETTLEMENT AGREEMENTS</strong></td>
<td>Yes</td>
<td>Register Division of Freedom Newspapers v. County of Orange (1984) 158 Cal.App.3d 893. For additional information, see p. 44 of the Guide.</td>
</tr>
<tr>
<td><strong>SOCIAL SECURITY NUMBERS</strong></td>
<td>No</td>
<td>Gov. Code § 6254.29.</td>
</tr>
<tr>
<td>INFORMATION/RECORDS REQUESTED</td>
<td>MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?</td>
<td>APPLICABLE AUTHORITY</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------------------------------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>SPEAKER CARDS</td>
<td>Yes</td>
<td>Gov. Code, § 6255.</td>
</tr>
<tr>
<td>TAX RETURN INFORMATION</td>
<td>No</td>
<td>Gov. Code, § 6254(k); Internal Revenue Code, § 6103.</td>
</tr>
<tr>
<td>TAXPAYER INFORMATION RECEIVED IN CONNECTION WITH COLLECTION OF LOCAL TAXES</td>
<td>No</td>
<td>Gov. Code, § 6254(i). For additional information, see p. 52 of the Guide.</td>
</tr>
<tr>
<td>TELEPHONE RECORDS OF ELECTED OFFICIALS</td>
<td>Yes, as to expense totals. No, as to phone numbers called.</td>
<td>See Rogers v. Superior Court (1993) 19 Cal.App.4th 469.</td>
</tr>
<tr>
<td>UTILITY USAGE DATA</td>
<td>No, with certain exceptions.</td>
<td>Gov. Code, § 6254.16. For additional information, see p. 54 of the Guide.</td>
</tr>
<tr>
<td>VOTER INFORMATION</td>
<td>No</td>
<td>Gov. Code, § 6254.4. For additional information, see p. 34 of the Guide.</td>
</tr>
</tbody>
</table>

1 The analysis with respect to elected officials may not necessarily apply to executive officers such as City Managers or Chief Administrative Officers, and there is no case law directly addressing this issue.

2 It should be noted that these statements must be made available for inspection and copying not later than the second business day following the day on which the request was received.

Revised April 2017
RESOLUTION 2013–68

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL CERRITO REVISING A POLICY REGARDING COUNCIL AND STAFF RELATIONS WITH CITY COMMISSIONS, BOARDS, COMMITTEES AND TASK FORCES

WHEREAS, the City Council approved a policy on October 21, 1991 which provided guidelines for Council and staff relations with city commissions, boards, committees and task forces; and

WHEREAS, the City Council discussed the role and functions of the Council Liaison role at its October 15, 2013 meeting including ways to facilitate communication between the Council and the Boards, Commissions and Committees, due process concerns and the possibility of inadvertently influencing the decision making process; and

WHEREAS, the City Council deems it necessary to update the 1991 policy to include language regarding the individual rights of Councilmembers, Council Liaison assignments, and efficient communications.

NOW THEREFORE, BE IT RESOLVED that the City Council of the City of El Cerrito establishes the following policy regarding City Councilmember and staff relations with city commissions, boards, committees and task forces:

SECTION 1. CITY COUNCIL

A. A Councilmember will be assigned as liaison to each city commission, board, committee and task force (Advisory Body). Making liaison assignments is one of the first orders of business for the Mayor when a new City Council is organized each year. With the exception of the Committee on Aging, for which the Mayor may make a continuing appointment, Council Liaison (Liaison) assignments must rotate among all Councilmembers on an annual basis to ensure that Liaisons are not regarded as a regular member of any one Advisory Body, and allow each Councilmember an opportunity to experience a different Advisory Body.

B. The City Council recommends and expects each Councilmember assigned as a liaison to an Advisory Body to deliver a quarterly report to the Advisory Body at the beginning of the meeting and either leave or remove themselves to the audience and not participate in the meeting after the report. It is the policy of the City Council that a Liaison is expected to attend the meetings of the Advisory Body to which the Liaison is assigned at least once quarterly.

C. The Liaison will inform the Advisory Body about Council policies, priorities and significant actions taken by the Council. The Liaison represents the City Council as a whole when addressing the Advisory Body during the Liaison report.

D. Although Councilmembers do not give up their first amendment rights when they are elected and can speak on an issue as an individual, they need to understand that if they express a view on an item that they are interested in that is potentially appealable or will come to the entire Council for review, they may be precluded from participating in the issue when it comes before the Council for a decision. It is critically important to avoid both the substance and
the appearance of having pre-judged an issue which may later come before the Council for deliberation.

E. Due to the quasi-judicial or deliberative nature of the following Advisory Bodies, Liaisons to the Arts and Culture Commission, Design Review Board, Financial Advisory Board, Parks and Recreation Commission and Planning Commission are expected to leave the room after their report is delivered.

SECTION 2. CITY STAFF

A. A staff liaison is assigned to each Advisory Body. The staff role is:

1. Preparing agendas and noticing meetings and hearings in conjunction with the Advisory Body Chair and posting agendas to the City’s website;

2. Arrange for accommodations for disabled Advisory Body members and the public;

3. Taking and transcribing action minutes and posting approved minutes to the City’s website;

4. Providing information related to Advisory Body business to Advisory Body members and the public upon request;

5. Preparing reports, including reports for the Council’s consideration; and

6. Relaying reports and other information to the City Council at the request of the Advisory Body.

B. The City Council may also ask staff to relay information to an Advisory Body. The staff role is generally limited to these specific activities and any other activities defined by the City Manager as outlined in Administrative Policy and Procedure 1(A)(6).

SECTION 3. COMMISSIONERS

A. To avoid any possibility of the appearance of or actual conflict of interest, unfairness, bias, prejudice or influence, individuals residing at the same address cannot serve on the Council and an advisory body, the same advisory body, or advisory bodies with overlapping subject-matter jurisdiction.

I CERTIFY that at a regular meeting on November 19, 2013, the El Cerrito City Council passed this resolution by the following vote:

AYES: Councilmembers Benassini, Bridges, Friedman and Mayor Lyman
NOES: Mayor Pro Tem Abelson
ABSENT: None
IN WITNESS of this action, I sign this document and affix the corporate seal of the City of El Cerrito on November 26, 2013.

Cheryl Moise, City Clerk

APPROVED:

Gregory B. Lyman, Mayor
2.04.220 - Boards, commissions and committees.

A. Boards, commissions and committees are appointed by the council to advise and to perform any duties determined by the council in one or more aspects of city government. City boards, commissions and committees are intended to provide a valuable service to the community by providing in-depth advice to the city council on a variety of topics and assume some of the workload from council to research issues or gather public input. Except as otherwise provided in state law, boards and commissions are directly responsible to the council and fill quasi-judicial roles. Commissions are made up of lay citizens, while boards are residents with special expertise. Committees sponsored by the city are intended to be working groups, do not fill quasi-judicial roles, and are established by council resolution. Appointment to boards and commissions shall be made only after:

1. Advertisement of the open position in a local paper.
2. Public interviews of selected applicants for the positions.
3. Appointment by a majority of the council.

B. Unless determined elsewhere in law, the boards and commissions shall be governed by or meet the following criteria:

1. Membership. The boards and commissions shall consist of seven members each, who shall be residents of the city, unless otherwise provided in this chapter or otherwise prescribed by state law or the ordinance or resolution establishing the board or commission or committee to represent a specified organization, agency, group, category or profession. A "member" shall be defined as a voting member of any board, commission or committee established by the city council, notwithstanding the manner in which such voting member is appointed.

2. Appointments. The members shall be appointed by majority vote of the council. Members shall not be reappointed to the same board or commission for more than two consecutive full terms.

3. Term. Terms are four years, commencing on March 1st unless a member is removed from office pursuant to the provisions of subsection (B)(4) of this section. Members appointed prior to March 1, 2014 with terms that commenced on January 1 will conclude their terms on January 1. The membership shall be divided to achieve temporal distribution of terms. If a board member or commissioner fails to complete the term, the council appointment shall be for the remainder of the uncompleted term. Members are not eligible to serve on the same board or commission if they have served two consecutive full four-year terms.

4. Removal of Members.
   a. Members of boards and commissions serve at the pleasure of the council and may be removed by a majority vote of the entire council. It shall be presumed that any member who is absent for three consecutive regularly scheduled meetings without cause, or half the regular meetings in a calendar year, or who resides outside the city, has resigned. The staff liaison shall notify the city clerk of a vacancy within five days after the staff liaison has determined that the vacancy exists. Within one week after receiving such notice from the staff liaison, the city clerk shall notify any member whose appointment has automatically terminated and report to the council that a vacancy exists and that an appointment should be made to fill the vacancy.
   b. An absence shall be considered excused if either: (1) the member informs the staff liaison of his/her intended absence at least twenty-four hours prior to the scheduled time of the meeting; or (2) such absence is due to unforeseeable and unavoidable circumstances and reported and explained in writing to the staff liaison prior to the next meeting of the board or commission. Excused absences for medical reasons shall not exceed a period of one hundred twenty calendar days.
   c. Nothing contained in this section shall be deemed to limit the power of the city council to remove any member of any city board, commission or committee at any time, with or without cause.
Quorum.

a. For boards and commissions, a quorum for the purpose of holding a meeting shall consist of a simple majority of the members then serving. A board or commission may act by an affirmative vote of a simple majority of a quorum. Notwithstanding the foregoing, a quorum for the purposes of holding a meeting of the planning commission, design review board and arts and culture commission shall consist of a simple majority of the members then serving, but not fewer than three members. Further, the planning commission, design review board and arts and culture commission may act by an affirmative vote of a simple majority of a quorum, but not less than three affirmative votes shall be required for the planning commission.

b. For committees, a quorum for the purpose of holding a meeting shall consist of a simple majority of the members then serving. Two members may conduct a meeting for the purpose of doing the work of a committee and allowing persons interested in becoming members to attend. Formal action of a committee shall require at least three members to be present at a meeting and a simple majority of affirmative votes of a quorum.

6. Officers. The annual election of officers should occur during the month of April. Officers shall be selected by a majority of the commission for a one-year term and consist of a chairperson (chair) and a vice chairperson. No board member, commissioner or committee member shall serve as chairperson for more than two consecutive years.

7. Conduct of Business. The conduct of board or commission business shall be by Sturgis Standard Code of Parliamentary Procedure, or by rules of procedure adopted by the board or commission. Failure to follow the applicable rules of procedure shall not invalidate an otherwise valid action of a board or commission.

8. Minutes. The staff liaison of the board or commission shall cause minutes to be prepared for the membership and presented at the following meeting for approval by the board or commission. Minutes shall be posted on the city's website within ten days of the board or commission's approval.

9. Staff Assistance. The city staff shall provide appropriate notice to the members of the agenda for each meeting, and shall provide to the members the draft minutes of the previous meeting for their approval. Each board or commission shall have access to all information possessed by the city concerning its agenda items. The city manager will provide for staff assistance at the meetings of the various boards and commissions.

10. Meetings. Unless otherwise provided, the boards and commissions shall meet at least monthly, on a regularly scheduled basis, in a public meeting room and shall be subject to the Ralph M. Brown Act, Government Code Section 54950 et seq.

C. Committees shall be governed by the same criteria as boards and commissions unless otherwise prescribed by council resolution.

(Ord. 2007-11 § 1, 2007: Ord. 92-2 Div. 2 (part), 1992.)

(Ord. No. 2013-06, § 1, 12-3-2013)
RESOLUTION NO. 2001- 105

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL CERRITO REPEALING RESOLUTION NO. 3701 WHICH CREATED THE PRESENT EL CERRITO CITIZENS COMMITTEE ON CRIME PREVENTION AND CREATING A NEW CRIME PREVENTION COMMITTEE WHICH SHALL OPERATE IN THE MANNER DESIGNATED HEREIN

WHEREAS, on September 15, 1975, the El Cerrito City Council adopted Resolution No. 3701 creating the Committee on Crime Prevention. Since that date, the Committee on Crime Prevention has greatly benefitted the City of El Cerrito and its citizens; and

WHEREAS, the City Council has determined, that the present Committee on Crime Prevention should be disbanded and a new Committee should be formulated to deal with the issues of crime in the community.

NOW, THEREFORE BE IT RESOLVED:

1. Resolution No. 3701 is hereby repealed and the present El Cerrito Citizens Committee on Crime Prevention is abolished.

2. A new committee, designated as the El Cerrito Crime Prevention Committee is hereby established and is charged with:

   A. Developing and promoting crime prevention programs in the City of El Cerrito such as:

      1. Neighborhood Watch.
      2. Home security reviews when requested by City residents.
      4. Crime prevention programs in association with City schools and groups.

   B. Promoting cooperation with local law enforcement.

   C. Promoting citizen awareness of methods to prevent crime.

   D. Making recommendations to the City Council regarding crime prevention programs.

3. The Committee shall consist of a minimum of five members and a maximum of fifteen members.

4. Upon the adoption of this resolution, the present Chair of the Citizens Committee on Crime Prevention shall submit to the City Clerk the names of those present Committee members
who have regularly attended Committee meetings over the past six months and who wish to be appointed to the new Committee. The City Clerk shall submit these names to the City Council for appointment to the new Committee. The City Council shall not be required to interview these persons prior to appointing them to the new Committee.

5. Upon adoption of this resolution, the City Clerk shall place advertisements in a local newspaper concerning the creation of this new Committee and the fact that openings are available for membership on the Committee. City residents interested in serving on the Committee shall complete an application and forward it to the City Clerk.

6. After the application period has ended, the City Council shall appoint as many members as the Council desires from the list of applicants, up to a total of 15 members, including those present members who have sought appointment to the new Committee. The City Council shall not be required to interview applicants prior to making the initial appointments.

7. After the Committee is constituted, Committee members may solicit new members if less than 15 members have been appointed to the Committee. The names of any new members solicited by the Committee shall be forwarded to the City Council for appointment. The City Council shall not be required to interview members prior to appointing them to the Committee.

8. The Committee shall be governed by the criteria contained in Section 2.04.220(B) of the El Cerrito Municipal Code except as follows:

   A. Membership shall consist of a minimum of five members and a maximum of 15 members.

   B. Terms are four years unless a member is removed from office by the City Council pursuant to Section 2.04.220(B)(4). Terms shall commence on the date of appointment by the City Council. Members may serve on the Committee for more than two consecutive full terms.

   C. Any member who is absent for three consecutive meetings without the permission of the Chair, or any member who is absent for more than one-half of the meetings during a calendar year without the permission of the Chair, shall be treated as having resigned from the Committee. Such person shall no longer participate as a member of the Committee unless appointed by the City Council to a new term of office.

   D. A quorum of the Committee shall consist of a majority of the members then appointed by the City Council. For example, if the Committee consists of seven members, four members shall constitute a quorum. If the Committee consists of 12 members, seven members shall constitute a quorum.
I certify that at a regular meeting on December 17, 2001, the El Cerrito City Council passed this resolution by the following vote:

AYES: COUNCILMEMBERS: Brusatori, Friedman, Moore, Perka, Abelson
NOES: COUNCILMEMBERS: None
ABSTAIN: COUNCILMEMBERS: None
ABSENT: COUNCILMEMBERS: None

In witness of this action, I sign this document and affix the corporate seal of the City of El Cerrito on December 17, 2001.

Linda Giddings, City Clerk

APPROVED:

Janet Abelson, Mayor

Resolution 2001-105
RESOLUTION NO. 2013–67

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL CERRITO
ESTABLISHING A POLICY REGARDING APPROPRIATE POSITIONS TO RECEIVE
ETHICS TRAINING PURSUANT TO GOVERNMENT CODE SECTION 53235

WHEREAS, the California Legislature enacted Government Code Section 53234 et seq. requiring, in part, that certain local agency officials receive training in specified laws relating to local government; and

WHEREAS, the El Cerrito City Council receives the training and may designate other local agency officials to receive the training; and

WHEREAS, ethics training covers but is not limited to general ethics principles and ethics laws relevant to public service, conflict-of-interest gift and travel restrictions, prohibitions against the use of public resources for personal or political purposes, government transparency laws and laws relating to due process requirements; and

WHEREAS, the City Council finds that it will benefit the City of El Cerrito to require appointed Commissioners and Board Members to receive training in specified laws relating to local government and service as a local agency official.

NOW THEREFORE, BE IT RESOLVED that the City Council of the City of El Cerrito designates each member of the Arts and Culture Commission, Design Review Board, Financial Advisory Board, Parks and Recreation Commission, and Planning Commission to receive training pursuant to the requirements of Government Code section 53234 et seq. and provide the original proof of participation certificate to the City Clerk upon completion.

BE IT FURTHER RESOLVED that this resolution shall become effective January 1, 2014.

I CERTIFY that at a regular meeting on November 19, 2013, the El Cerrito City Council passed this resolution by the following vote:

AYES: Councilmembers Abelson, Benassini, Bridges, Friedman and Mayor Lyman
NOES: None
ABSENT: None

IN WITNESS of this action, I sign this document and affix the corporate seal of the City of El Cerrito on November 26, 2013.

Cheryl Morse, City Clerk

Approved:

Gregory B. Lyman, Mayor
RESOLUTION NO. 2018–55

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL CERRITO
ADOPTING A REVISED CONFLICT OF INTEREST CODE FOR THE CITY OF EL
CERRITO, INCLUDING THE FILING OF ANY RELATED AGENCY POSITIONS, SUCH AS
THE EMPLOYEE PENSION BOARD, THE SUCCESSOR AGENCY TO THE FORMER
REDEVELOPMENT AGENCY, AND THE PUBLIC FINANCING AUTHORITY (PFA) AND
RESCINDING RESOLUTION NO. 2016-77

WHEREAS, the Political Reform Act of 1974 ("Act"), Government Code Sections 8100 et seq. enacted as part of Proposition 9, requires every local agency to adopt and promulgate a conflict of interest code applicable to employees or consultants holding designated positions and public officials within the jurisdiction of the local agency; and

WHEREAS, in 1977, the El Cerrito City Council enacted Resolution No. 3843, adopting the City of El Cerrito ("City") Conflict of Interest Code, and

WHEREAS, subsequent to the enactment of Resolution No. 3843, the Fair Political Practices Commission enacted 2 Cal. Code of Regs. Section 18730 which contains the terms of a standard model conflict of interest code, which could be adopted by local agencies covering such matters as the manner of reporting financial interests, the procedures to be utilized in filing conflict of interest statements, the contents of such statements, the time within which such statements must be filed, etc; and which may be amended by the Fair Political Practices Commission after public notice and hearings to conform to amendments to the Political Reform Act; and

WHEREAS, in 1983, the City Council enacted Resolution No. 83-14 which adopted the model conflict of interest code drafted by the Fair Political Practices Commission, including any amendments duly adopted by the Commission to conform to amendments to the Political Reform Act, as the new City of El Cerrito Conflict of Interest Code; and

WHEREAS, Appendix A of Resolution No. 83-14 listed the designated employees subject to the model conflict of interest code (listed as "designated filers"); and Appendix B of Resolution No. 83-14 identified the specific financial interests that would be reportable; and

WHEREAS, state law as specified in the Act requires the City Council, as the City's code-reviewing body to direct the review of its Conflict of Interest Code; and

WHEREAS, the Act additionally requires the submission of a revised conflict of interest code for approval by the code-reviewing body or the notification of said body that no changes are necessary pursuant to Government Code Section 87306.5; and

WHEREAS, the City Council has regularly amended its Conflict of Interest Code to correspond to changes in the City resulting from reorganization of City departments and employees, changes in job classifications, and the addition and deletion of certain boards and commissions and to respond to any changes in State law; and

WHEREAS, the Conflict of Interest Code was last amended in 2016 through Resolution 2016-77 and the Code requires revision to reflect the changes in designated positions and the financial interests required to be reported; and
WHEREAS, this review has been completed and the City Council has determined that such changes are necessary due to changes in City organization and to comply with state law and that Appendices A and B, attached herein, accurately sets forth the designated positions, and their respective categories of financial interests which should be made reportable and those boards, commissions and committees which should be designated and the respective categories of financial interests which should be made reportable by their members; and

WHEREAS, the Conflict of Interest Code includes filing requirements for related agency positions, such as the Successor Agency to the former El Cerrito Redevelopment Agency, the Public Financing Authority (PFA), and the Employee Pension Board; and

WHEREAS, the City of El Cerrito Conflict of Interest Code, incorporated herein, requires revision so that it accurately sets forth the designated positions and categories of financial interests which should be made reportable.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of El Cerrito as follows, with additions indicated by underline and deletions indicated with strikethrough:

Section 1. Incorporation of Recitals. All Recitals above are true and correct and are incorporated herein.

Section 2. Adoption of Model Conflict of Interest Code. The terms of 2 Cal. Adm. Code Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission are hereby incorporated by reference and included as part of the Conflict of Interest Code of the City of El Cerrito.

Section 3. Statement of Economic Interest Requirement. Persons holding designated positions and persons required to do so by statute shall file Statements of Economic Interests with the City of El Cerrito on Fair Political Practices Commission forms, in conformance with the individual disclosure categories and State guidelines, when requested by the City Clerk. Persons holding designated positions and persons required by statute to file statements of economic interests shall also report interests for any other related agency positions, such as the Employee Pension Board, Successor Agency to the former Redevelopment Agency, and the Public Finance Authority (PFA). The City Clerk will retain custody of the statements and make the statements available for public inspection and reproduction.

Section 4. Form 700 Requirement. In accordance with FPPC Regulation 18734, any individual hired for a position not yet covered under this Conflict of Interest Code must file a Form 700 if the individual serves in a position that makes or participates in making governmental decisions. Individuals in this category must file under the broadest disclosure category until the code is amended to include the new position unless the City of El Cerrito provides, in writing, a limited disclosure requirement.

Section 5. Late Filings and Failure to File Statements. Any violation of any provision of this Code is subject to the administrative, criminal and civil sanctions provided in the Political Reform Act, Government Code Sections 81000 et seq. The following additional regulations shall apply to City of El Cerrito (a) designated employees, (b) designated members of boards and commissions appointed by the City Council, and (c) consultants:

(a) City Employees:
If a City employee fails to file an Initial, Assuming Office or Annual Statement of Economic Interests within thirty days after the City Clerk has given specific written notice of non-filing, he or she shall undergo steps resulting in a written reprimand in accordance with the provisions of the appropriate Memorandum of Understanding or City of El Cerrito Personnel Policies and Administrative Regulations. The employee's supervisor shall comply with the provisions of the appropriate Memorandum of Understanding or City of El Cerrito Personnel Rules and Administrative Regulations. In addition, the City Clerk shall impose late filing fees in accordance with Government Code Section 91013 and 91013.5. No person who has left City employment and failed to file the appropriate statement shall resume active employment with the City of El Cerrito if there are outstanding statements or fines.

(b) Members of Boards and Commissions:

If a member of any non-elected board, commission or committee specified in the Code fails to file an Assuming Office, Initial or Annual Statement of Economic Interests within thirty days after the City Clerk has given specific written notice of non-filing, the member's term on the commission shall expire. The City Clerk shall notify the commissioner that his/her term has expired and notify the City Council that a vacancy exists on the commission. In addition, the City Clerk shall impose late filing fees in accordance with Government Code Sections 91013 and 91013.5.

Prior to being eligible for reappointment to any board, commission, or committee all outstanding filings for all commission appointments must be filed and any outstanding fines, payable under Government Code Section 91013, shall be paid. No person shall be appointed to any commission if there are outstanding statements or fines, and no person shall be appointed to any commission for a period of one year if terminated from any commission more than once for failure to file statements.

(c) Consultants:

If a consultant, as defined in 2 Cal. Code Regs. Section 18701, fails to file any Statement of Economic Interests within thirty days after the City Clerk has given specific written notice of non-filing, he or she shall be advised by the City's project manager that no further payments shall be made by the City of El Cerrito under the contract until such statement has been received by the City Clerk. The City Clerk shall also impose late filing fees in accordance with Government Code Sections 91013 and 91013.5.

Section 6. Employees and Officials that Must Disclose Financial Interests. The City Conflict of Interest Code hereby includes Appendix A, which reflects changes in City organization and in the job titles of City management staff and reflects the inclusion of staff positions with decision making authority as authorized by the El Cerrito Municipal Code and in compliance with Title 2, Section 18701 of the California Code of Regulations. Designated Employees and Public Officials shall disclose financial interests as set forth in Appendix B.

Section 7. Adoption of Disclosure Categories. The City Conflict of Interest Code hereby includes Appendix B, to achieve consistency with State Law and reflect the required disclosure categories of this Conflict of Interest Code.

Section 8. Rescission of Previous Conflict of Interest Code. The City Council
hereby rescinds Resolution No. 2016-77.

I CERTIFY that at a regular meeting on October 16, 2018 the City Council of the City of El Cerrito passed this Resolution by the following vote:

AYES:        Councilmembers Abelson, Fadelli, Lyman, Pardue-Okimoto, and Mayor Quinto  
NOES:        None  
ABSTAIN:     None  
ABSENT:      None  

IN WITNESS of this action, I sign this document and affix the corporate seal of the City of El Cerrito on October 17, 2018.

Gabriel Quinto, Mayor
# APPENDIX A

## DESIGNATED FILITIES

<table>
<thead>
<tr>
<th>Job Classification</th>
<th>Disclosure Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assistant to the City Manager</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Assistant City Attorney</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Assistant City Manager</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Associate Engineer</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Associate Planner <em>(inactive)</em></td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Battalion Fire Chief</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>Building Official</td>
<td>1,2,3,4</td>
</tr>
<tr>
<td>City Clerk</td>
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<td>Human Resources Manager</td>
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<td>Special Counsel</td>
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<td>Commission and Board Members:</td>
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<td>Arts and Culture Commission Members</td>
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<td>Design Review Board Members</td>
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<td>Financial Advisory Board Members</td>
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*Consultants*

*With respect to consultants, the City Manager or designee may determine in writing that a particular consultant, has been hired to perform a range of duties that is sufficiently limited in scope so as not to require full compliance with the disclosure requirements described in this section. Such written determination shall include a description of the consultant’s duties and, based upon that description, a statement of the extent of disclosure requirements, if any. The City Manager's determination is a public record and shall be retained for public inspection in the same manner and location as the disclosure statements filed pursuant to this Resolution.*
APPENDIX B
DISCLOSURE CATEGORIES

Category 1: Personal Income

All sources of income, including investments, gifts, loans and travel payments as defined in Government Code Section 82030, as amended. Not included as income in this disclosure category is income received from any source outside the City of El Cerrito if that source is not presently doing business within the City of El Cerrito and has not done business within the City of El Cerrito during the two years prior to the time this disclosure statement is made.

Category 2: Interests in Real Property

All interests in real property in excess of $2,000 held by the designated employee, or commissioner, the employee or commissioner's spouse, domestic partner or dependent children located in whole or in part within the City of El Cerrito or within a two-mile radius of the boundaries of the City of El Cerrito. Included within this disclosure category is any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property. Included within this disclosure category is any pro rata share of interests in real property of any business entity or trust in which the designated employee, or commissioner, the employee or commissioner's spouse, domestic partner or dependent children, owns directly, indirectly or beneficially, a 10 percent interest or greater. An "interest in real property" does not include the principal residence of the employee or commissioner, making the disclosure unless all or part of that residence is used for business purposes and claimed as a business deduction on the designated employee or commissioner's income tax return.

Category 3: Investments

All financial interests in excess of $2,000 held by the designated employee or commissioner, the employee or commissioner's spouse, domestic partner or dependent children in security issued by a business entity, including but not limited to common stock, preferred stock, options, debt instruments and any partnership or other ownership interest if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the City of El Cerrito, or does business or plans to do business in the City of El Cerrito, or has done business within the City of El Cerrito at any time during the two years prior to the time this disclosure statement is made. The term "investments" does not include a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission or a common trust fund created pursuant to Section 1564 of the Finance Code, or any bond or other debt instrument issued by any government or government agency. The term "investments" does include a pro rata share of investments of any business entity, mutual fund, or trust in which the designated employee or commissioner, or the employee's or commissioner's spouse, domestic partner or dependent children own directly, indirectly or beneficially, a 10 percent interest or greater.
Category 4: Management Positions

Management positions held with any business entity located, doing business, planning to do business, or having done business in the past two years within the City of El Cerrito.

Category 5: Arts and Culture Commission

All members of the Commission shall disclose business entities in which they have an investment, or in which they are a director, officer, partner, employee, or hold any position of management; and income as defined in Government Code Section 82030, as amended, including gifts, loans, and travel payments; if the business entity or source of income: a) has applied for, is receiving, or within the previous two years has received, funds through the City to advance Arts in El Cerrito; b) has profited from the creation, production, sale, or display of any artistic endeavor; or c) has provided services, goods, or equipment to artistic endeavors in the City of El Cerrito.
Conflicts of Interest and Ethics For Local Government Officials: Political Reform Act & Common Law Conflicts of Interest

City of El Cerrito
September 2019
# TABLE OF CONTENTS

I. **POLITICAL REFORM ACT** .................................................................................................1  
   A. General Rule Regarding Conflicts of Interest .........................................................1  
   B. Conflicts of Interest under the POLITICAL REFORM ACT .....................................1  
   C. Components of a POLITICAL REFORM ACT Conflict of Interest ..........................2  
   D. DISQUALIFICATION IF CONFLICT EXISTS ..............................................................5  
   E. Penalties for Violation of the Political Reform Act .................................................6  
      1. Administrative Fine ..............................................................................................6  
      2. Civil Remedy ......................................................................................................6  
      3. Criminal Sanctions ..............................................................................................6  
   F. HOW TO OBTAIN ADVICE ........................................................................................6  
      1. Unofficial ............................................................................................................6  
      2. FPPC Advice Letter ............................................................................................6  

II. **CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS** .........................6  
   A. DISCLOSURE – REPORTING OF CONTRIBUTIONS ...............................................7  
   B. PERSONS COVERED ................................................................................................7  
   C. PROCEEDINGS COVERED .....................................................................................7  
   D. DISQUALIFICATION REQUIRED ............................................................................7  

III. **CONFLICTS OF INTEREST WHEN LEAVING OFFICE** ...........................................7  

IV. **PROHIBITION AGAINST BRIBERY** .........................................................................8  

V. **COMMON LAW BIAS PROHIBITIONS** ....................................................................8
INTRODUCTION

There are various laws in place to prevent councilmembers from participating in decision in which they have a disqualifying conflict of interest. The purpose of such laws and regulations is to ensure that all actions are taken in the public interest. This handout discuss some of the major rules governing conflicts of interest. If at any time a Councilmember believes a potential for conflict of interest exists, he/she is encouraged to consult with the City Attorney as soon as possible. Violations of these rules may result in significant penalties including fines or criminal prosecution.

I. POLITICAL REFORM ACT

The Political Reform Act of 1974 was adopted by initiative as a response to the "Watergate" scandals and is contained in Government Code Sections 81000 et seq. It is the primary source of statutory law in California regarding conflicts. The Political Reform Act regulates disqualification of government officials due to conflicts of interest. In addition, it also regulates reporting and disclosure of economic interests; gift and honoraria limits; and, to a limited extent, campaign contributions. The Political Reform Act establishes the Fair Political Practices Commission ("the FPPC") as the State agency charged with its enforcement. FPPC regulations implementing the Political Reform Act are found at 2 Cal. Code of Regulations ("CCR") §18110 et seq.

A. GENERAL RULE REGARDING CONFLICTS OF INTEREST

No public official at any level of government shall make, participate in making or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, he or she has a financial interest. (Gov. Code § 87100.) The purpose of the Political Reform Act is to ensure officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the interests of persons who have supported them.

B. CONFLICTS OF INTEREST UNDER THE POLITICAL REFORM ACT

An official has a conflict of interest under the Political Reform Act when it is reasonably foreseeable that the decision will have a material financial effect on an economic interest of the official or a member of his or her immediate family. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any financial interest of the official or his or her immediately family. (2. Cal. Code Regs. § 18700(a).) A public official's immediate family includes his or her spouse and dependent children.

A public official has a financial interest in anything or anyone listed below, including if such interest is held by a member of the official’s immediate family:

Business Investments: A public official has an economic interest in a business entity, operated for profit, in which he or she has a direct or indirect investment of $2,000 or more.
**Business Management Positions:** A public official has an economic interest in any business entity, operated for profit, in which he or she holds a position as a director, official, partner, trustee or any position of management.

**Real Property:** A public official has an interest in real property when the official, spouse or dependent children have a direct or indirect equity, option or leasehold interest of $2,000 or more in a parcel of property located in, or within two miles of, the geographical jurisdiction of the official’s agency.

**Sources of Income:** A public official has an economic interest in any person or entity from whom he/she has received income aggregating $500 within 12 months prior to the time when the relevant governmental decision is made. Income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income. (Gov. Code § 87103).

**PRACTICE TIP:** The Political Reform Act does not include income received from government entities as “income”. As a consequence, a public official usually has no conflict of interest under the Political Reform Act even when the decision affects his or her government employer, unless another economic interest is also involved. WARNING: Government Code Section 1090 does not exclude government salaries from its definition of “financial interest”.

**Sources of Gifts:** A public official has an economic interest in any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating $500 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

**PRACTICE TIP:** The gift limitation amount is adjusted by the FPPC every two years.

**Personal Financial Effects:** A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, and those of his or her immediate family.

**C. COMPONENTS OF A POLITICAL REFORM ACT CONFLICT OF INTEREST**

FPPC regulations establish a 4-step process for determining whether or not a conflict of interest exists in any given case. (2 Cal. Code Regs. § 18700 et seq.) A public official seeking to determine whether or not he or she has a conflict of interest should make the following determinations:

**Step One:** Is the financial effect on the public official’s financial interest “reasonably foreseeable” with the meaning of the PRA?

FPPC regulations require that it be "reasonably foreseeable" that a decision will have a financial effect on a financial interest of the public official in order for a conflict of
A financial effect is presumed to be reasonably foreseeable if the financial interest is a named party in, the subject of, or otherwise explicitly involved in a governmental decision before the official or the official’s agency. (2. Cal. Code Regs. § 18701(a).)

If a financial interest is not explicitly involved in a governmental decision, a financial effect is reasonably foreseeable if the financial effect is a realistic possibility and more than hypothetical or theoretical. Various factors may be considered in determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest not explicitly involved in a governmental decision. Factors include, but are not limited to, the extent to which the occurrence of the financial effect is contingent upon intervening events, outside the control of the public official or the public official’s agency and whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome of the governmental decision under normal circumstances. (2. Cal. Code Regs. § 18701(b).)

**Step Two: Is the financial effect material?**

A public official may not participate in a governmental decision if the reasonably foreseeable financial effect on the official’s financial interest is material. The rules for determining whether the financial effect is material differ depending on the type of financial interest involved.

- If the decision involves a financial interest in a business entity:

  The financial effect is material if, among other reasons, the business entity bids on or enters into a contract with the official’s agency or applies for a permit, license, grant or other entitlement from the official’s agency. (2. Cal. Code Regs. § 18702.1.)

- If the decision involves a financial interest in real property:

  The financial effect is material if, among other reasons, the governmental decision would determine the property’s zoning, or would affect the property value of any parcel located within 500 feet of the official’s property. (2 Cal. Code Regs. § 18702.2.)

- If the decision involves a financial interest in a source of income:

  The financial effect is material if, among other reasons, the source of income is the applicant, respondent, contracting party or otherwise named or identified as the subject of the proceeding before the official’s agency. (2 Cal. Code Regs. § 18702.3.)

- If the decision involves a financial interest in a source of gifts:
The financial effect is material if, among other reasons, the source of the gift is the applicant, respondent, contracting party or otherwise named or identified as the subject of the proceeding before the official’s agency. (2 Cal. Code Regs. § 18702.4.)

- If the decision involves a financial interest in the public official’s personal finances or those of his or her immediate family:

The financial effect is material if, among other reasons, the official or the official’s immediate family member will receive a measurable financial benefit or loss from the decision. (2 Cal. Code Regs. § 18702.5.)

The factors listed under each type of financial interest above are not exhaustive, and are only examples. Please review the applicable regulation or contact legal counsel for complete information.

Step Three: Is the effect on the official the same as on the “public generally”?  

A public official does not have a conflict of interest if the material financial effect on the official’s interest is indistinguishable from the decisions effect on the public generally. A governmental decision’s financial effect on a public official’s financial interest is indistinguishable from its effect on the public generally if a significant segment of the public is affected. (2 Cal. Code Regs. § 18703.)

A significant segment of the public is at least 25 percent of:

(1) All businesses or non-profit entities within the official’s jurisdiction;
(2) All real property, commercial real property, or residential real property within the official’s jurisdiction; or
(3) All individuals within the official’s jurisdiction.

Even if a significant segment of the public is affected, the decision is not indistinguishable if the decision’s effect on the official’s financial interest is not unique compared to the effect on the significant segment. A unique effect includes, among other things, a disproportionate effect on the development potential or use of the official’s real property or on the income producing potential of the official’s real property or business entity.

Step Four: Is the official “making, participating in the making, or using his or her position to influence” the governmental decision from which the financial effects result?

A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (2 Cal. Code Regs. § 18704(a).) A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without
significant intervening substantive review. (2 Cal. Code Regs. § 18704(b).) A public official uses his or her official position to influence a governmental decision if he or she contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision or any other government agency and acts or on behalf of his or her agency in making the contact. (2 Cal. Code Regs. § 18704(c).) There are limited exceptions to these rules. (2 Cal. Code Regs. § 18704(d).)

**PRACTICE TIP:** Because "participation" is broader than merely the final vote on a matter, it is important for public officials to not become involved in the preliminary stages of a decision on which their board or commission may ultimately have the final vote.

If the public official is not "making a decision" as defined in the Political Reform Act, then he or she does not have a conflict of interest.

**D. DISQUALIFICATION IF CONFLICT EXISTS**

If, after following the process outlined above, a conflict is found to exist, the public official is disqualified from participating in making the decision. An official who is disqualified from an item on the agenda for a closed session may not attend the closed session or obtain the materials distributed for the closed session.

If a conflict exists and the disqualified member is not required to participate by the rule of necessity, then the member must:

1. Publicly identify the financial interest that gives rise to the conflict in detail sufficient for a layperson to understand the conflict.

2. Recuse himself/herself from attempting to influence, participating in, discussing or voting on the matter.

3. Leave the room where the discussion or consideration of the matter is occurring, unless the matter is listed on the consent calendar of the public agency.

Notwithstanding the conflict, however, an official may appear in the same manner as a member of the general public before his or her agency solely to represent himself in a matter related to his or her own personal interests. This includes where decisions would affect real property or a business entity that is solely owned by the official or the official's immediate family. In such cases, the official must still identify the conflict and leave the dais, but he or she may address the agency from the same position as the public and may listen to the public discussion of the item. (2 CCR § 18704(d).)

The public agency may also be able to "segment" the decision under consideration, so that the official may participate in portions, but not all, of the decision. This may occur provided that: (2) the decision can be broken down into separate decisions that are not "inextricably interrelated" to the decision in which the official has a conflict; (2) the decision in which the official has a financial interest is segmented from the other decisions; (3) the decision in which the official has a financial interest is considered first and a final decision on that segment is reached by the agency without any participation by the official; and (4)
participation by the official in the remaining segments does not result in a reopening of, or otherwise financially affect, the segment from which the official was disqualified. (2 CCR § 18706.)

E. PENALTIES FOR VIOLATION OF THE POLITICAL REFORM ACT

1. Administrative Fine

The administrative fine is $5,000 fine per violation imposed by FPPC.

2. Civil Remedy

If official derived economic benefit from decision, fine could amount to 3 times the benefit received.

3. Criminal Sanctions

If the official knowingly or willingly violated the law: misdemeanor conviction, fine of $10,000 or 3 times value of benefit conferred (whichever is greater and the official may not be a candidate for public office for 4 years).

F. HOW TO OBTAIN ADVICE

If you think you may have a conflict, contact your agency's attorney who may be able to provide general guidance. The FPPC will also provide free advice.

1. Unofficial

You may request unofficial advice from the FPPC by calling 1-866-ASK-FPPC (1-866-275-3772), or you can get general guidance and information from the FPPC website at "www.fppc.ca.org.”

2. FPPC Advice Letter

Only a public official or his or her authorized representative can seek advice concerning his/her duties. The FPPC does not provide third party advice. However, written FPPC advice conveys immunity even if the advice is incorrect as long as the advice is followed. The FPPC does not provide advice for past conduct. Importantly, receiving written advice from the FPPC can take up to a month, so requests should be made far in advance of the relevant decision.

PRACTICE TIP: If uncertain regarding the existence of a conflict, always ask for advice first in order to obtain the immunity. Advice may take several months, therefore ask early. If the FPPC is unclear on the facts as described in your request, it may respond with a letter that generally describes the applicable standards, but does not answer the specific question and does not provide immunity.

II. CONFLICTS OF INTEREST AND CAMPAIGN CONTRIBUTIONS

The Political Reform Act regulates campaign contributions to certain classes of public officials as a potential conflict of interest requiring disqualification of the official.
A. DISCLOSURE — REPORTING OF CONTRIBUTIONS

In general, ethics rules concerning campaign contributions focus on disclosure rather than disqualification. Rules pertaining to disclosure are set forth in both State statute (see Gov. Code §§ 84100 et seq.) and the regulations of the FPPC (see 2 California Code of Regulations §§18401 et seq.). Candidates are required to file semi-annual campaign statements. (Gov. Code §84200.) Campaign statements must, among other things, list the name, address and occupation of individuals donating or loaning $100 or more. (Gov. Code §84211.)

B. PERSONS COVERED

The Political Reform Act's prohibition on conflicts of interest with regard to campaign contributions applies to state and local agency heads and members of boards and commissions. However, the prohibition does not extend to members of local governmental agencies whose members are directly elected by the voters. (Gov. Code § 84308.) Therefore, members of city councils, county boards of supervisors and boards of directors for special districts are exempt from conflicts of interest regarding campaign contributions. However, these officials are not exempt from coverage when they sit as appointed members of other boards or bodies such as joint powers agencies or regional governments.

C. PROCEEDINGS COVERED

The prohibition extends to all proceedings that involve a license, permit, or other entitlement for use. (Gov. Code § 84308.) These terms include all business, professional, trade, and land use licenses and permits, and all other entitlements for use, including entitlements for land use, contracts and franchises. However, the Political Reform Act expressly exempts contracts that are competitively bid, relate to labor matters, or relate to personal employment from the campaign contribution requirements.

D. DISQUALIFICATION REQUIRED

Covered officials may not receive more than $250 in contributions from a party to a covered proceeding within the 12 months preceding the decision. (Gov. Code § 84308, 2 CCR § 18438.8.) Parties to covered proceedings are required to list all contributions more than $250 to covered officials involved in the proceedings. If a covered official has received more than $250 within the prior year, he or she must disqualify himself or herself from participating in the proceeding. However, if an official returns the part of the contribution that exceeds $250 within 30 days of discovering the contribution and the proceeding, then disqualification is not required.

Covered officials are also prohibited from soliciting or receiving contributions of more than $250 from parties who they know are financially interested in the outcome of a proceeding. Interested parties may not make contributions of more than $250 to covered officials while proceedings are pending and for a period of time of three months thereafter.

III. CONFLICTS OF INTEREST WHEN LEAVING OFFICE

Prior to leaving government office or employment, the Political Reform Act prohibits all public officials from making, participating in the making or using their official position to influence the making of government decisions directly relating to any person with whom they are negotiating, or have any
arrangement, concerning prospective employment. (Gov. Code § 87407.) This requirement was amended in 2003 to include local government officials as well as State officials.

A local elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district who held a position with a local government agency shall not, for a period of one year after leaving that office or employment, act as agent or attorney for any other person by making any formal or informal appearance before or by making any oral or written communication to that local government agency, or any committee, subcommittee, or present member, officer, or employee of that local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Gov. Code § 87406.3(a).) This prohibition will not apply if the former official is an officer or employee of, and appearing on behalf of, another public agency. (Gov. Code § 87406.3(b).)

IV. PROHIBITION AGAINST BRIBERY

Penal Code Section 165 provides that a member of any city or town council, board of supervisors, or board of trustees of any local public agency who receives, or offers or agrees to receive any bribe upon any understanding that his or her official vote, opinion, judgment, or action shall be influenced thereby, may be imprisoned for up to four years and forever disqualified from holding any public office or trust.

Penal Code Section 7 defines a “bribe” for the purposes of the Penal Code as “anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.”

As far as the bribe-taker is concerned, the crime of bribery consists of three elements: (1) the person charged must be a member of one of the bodies specified in section 165, which basically consists of all cities, counties, and other local public agencies; (2) that person must ask for, receive, or agree to receive something of “value or advantage,” present or prospective; and (3) the request, receipt or agreement to receive must be upon an understanding that his or her opinion, judgment or action upon any official matter on which he or she may be required to act will be influenced.

PRACTICE TIP: While the common perception of a bribe is a large sum of money passed under the table, the fact is that a bribe can take virtually any form. A public official should be careful not to accept anything of value that might influence his or her official decision.

V. COMMON LAW BIAS PROHIBITIONS

A. COMMON LAW CONFLICT OF INTEREST CASES

While there are now statutory provisions prohibiting a financial conflict of interest, there are still cases that invoke the old common law doctrine against conflicts of interest. The common law doctrine against conflicts of interest is the judicial expression of the public policy against public officials using their official positions for private benefit. This doctrine has been primarily applied to require a public official to abstain from participation in cases where the public official's private financial interest may conflict with his or her official duties. But it can also apply to non-financial conflicts as well.
By virtue of holding public office, an elected official is impliedly bound to exercise the powers conferred on him or her with disinterested skill, zeal, and diligence and primarily for the benefit of the public. An elected official bears a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interest. (See Noble v. City of Palo Alto, 89 Cal.App. 47, 51 (1928).) Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office. Generally, such conflicts are found only when there is an identifiable financial interest that is affected; however, any potential common law conflict of interest issue should be discussed with your agency's attorney.
AGENDA ITEM

1. PUBLIC COMMENT: The City Council values your comments; however, pursuant to the Brown Act, Council cannot take action on items not listed on the posted agenda. The public comment period is limited to 20 minutes, with 2 minutes allotted for each speaker. This public comment period is to address the City Council on Consent Calendar items, other agenda items (if the member of the public cannot be present at the time the item is considered) or items of genera...
ACKNOWLEDGEMENTS

The League thanks the following individuals for their work on this publication:

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CHAPTER 1: IT IS THE PEOPLE’S BUSINESS ....................................................5
CHAPTER 2: LEGISLATIVE BODIES .................................................................11
CHAPTER 3: MEETINGS .................................................................................17
CHAPTER 4: AGENDAS, NOTICES, AND PUBLIC PARTICIPATION .................29
CHAPTER 5: CLOSED SESSIONS ..................................................................41
CHAPTER 6: REMEDIES .................................................................................55
# TABLE OF CONTENTS

## CHAPTER 1: IT IS THE PEOPLE’S BUSINESS .......................................... 5

- The right of access.............................................................................................................. 6
- Broad coverage .................................................................................................................... 6
- Narrow exemptions .............................................................................................................. 7
- Public participation in meetings .......................................................................................... 7
- Controversy .......................................................................................................................... 8
- Beyond the law — good business practices......................................................................... 8
- Achieving balance ............................................................................................................... 9
- Historical note ..................................................................................................................... 9

## CHAPTER 2: LEGISLATIVE BODIES ....................................................... 11

- What is a “legislative body” of a local agency? .................................................................... 12
- What is not a “legislative body” for purposes of the Brown Act? ........................................ 14

## CHAPTER 3: MEETINGS ...................................................................... 17

- Brown Act meetings.......................................................................................................... 18
- Six exceptions to the meeting definition............................................................................ 18
- Collective briefings.............................................................................................................. 21
- Retreats or workshops of legislative bodies......................................................................... 21
- Serial meetings.................................................................................................................... 21
- Informal gatherings............................................................................................................. 24
- Technological conferencing ............................................................................................... 24
- Location of meetings.......................................................................................................... 25

## CHAPTER 4: AGENDAS, NOTICES, AND PUBLIC PARTICIPATION ...... 29

- Agendas for regular meetings............................................................................................ 30
- Mailed agenda upon written request.................................................................................. 31
- Notice requirements for special meetings ........................................................................... 32
- Notices and agendas for adjourned and continued meetings and hearings........................ 32
- Notice requirements for emergency meetings ..................................................................... 32
- Notice of compensation for simultaneous or serial meetings............................................ 33
- Educational agency meetings............................................................................................. 33
- Notice requirements for tax or assessment meetings and hearings..................................... 33
Non-agenda items .................................................................................................................. 34
Responding to the public ....................................................................................................... 34
The right to attend and observe meetings ............................................................................ 35
Records and recordings ......................................................................................................... 36
The public’s place on the agenda ........................................................................................ 37

CHAPTER 5: CLOSED SESSIONS .................................................................................... 41
Agendas and reports .............................................................................................................. 42
Litigation ................................................................................................................................. 43
Real estate negotiations ........................................................................................................ 45
Public employment ................................................................................................................ 46
Labor negotiations ................................................................................................................ 47
Labor negotiations — school and community college districts ............................................ 48
Other Education Code exceptions ....................................................................................... 48
Joint Powers Authorities ...................................................................................................... 48
License applicants with criminal records ............................................................................ 49
Public security ..................................................................................................................... 49
Multijurisdictional law enforcement agency ....................................................................... 49
Hospital peer review and trade secrets ............................................................................... 49
Other legislative bases for closed session ........................................................................... 50
Who may attend closed sessions ....................................................................................... 50
The confidentiality of closed session discussions .............................................................. 50

CHAPTER 6: REMEDIES ............................................................................................... 55
Invalidation ............................................................................................................................ 56
Applicability to Past Actions ............................................................................................... 57
Civil action to prevent future violations ............................................................................ 57
Costs and attorney’s fees .................................................................................................... 58
Criminal complaints ............................................................................................................ 58
Voluntary resolution ............................................................................................................ 59
Chapter 1

IT IS THE PEOPLE’S BUSINESS

The right of access.............................................................................................................. 6

Broad coverage ................................................................................................................... 6

Narrow exemptions ............................................................................................................ 7

Public participation in meetings ......................................................................................... 7

Controversy ......................................................................................................................... 8

Beyond the law — good business practices ................................................................. 8

Achieving balance ............................................................................................................. 9

Historical note ..................................................................................................................... 9
CHAPTER 1: IT IS THE PEOPLE’S BUSINESS

Chapter 1

IT IS THE PEOPLE’S BUSINESS

The right of access

Two key parts of the Brown Act have not changed since its adoption in 1953. One is the Brown Act’s initial section, declaring the Legislature’s intent:

“In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”

“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The people reconfirmed that intent 50 years later in the November 2004 election by adopting Proposition 59, amending the California Constitution to include a public right of access to government information:

“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

The Brown Act’s other unchanged provision is a single sentence:

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.”

That one sentence is by far the most important of the entire Brown Act. If the opening is the soul, that sentence is the heart of the Brown Act.

Broad coverage

The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly-elected members of a legislative body, even before they take office.

Similarly, meetings subject to the Brown Act are not limited to face-to-face gatherings. They also include any communication medium or device through which a majority of a legislative body
discusses, deliberates or takes action on an item of business outside of a noticed meeting. They include meetings held from remote locations by teleconference.

New communication technologies present new Brown Act challenges. For example, common email practices of forwarding or replying to messages can easily lead to a serial meeting prohibited by the Brown Act, as can participation by members of a legislative body in an internet chatroom or blog dialogue. Communicating during meetings using electronic technology (such as laptop computers, tablets, or smart phones) may create the perception that private communications are influencing the outcome of decisions; some state legislatures have banned the practice. On the other hand, widespread cablecasting and web streaming of meetings has greatly expanded public access to the decision-making process.

Narrow exemptions
The express purpose of the Brown Act is to assure that local government agencies conduct the public’s business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules.4

Generally, public officials should think of themselves as living in glass houses, and that they may only draw the curtains when it is in the public interest to preserve confidentiality. Closed sessions may be held only as specifically authorized by the provisions of the Brown Act itself.

The Brown Act, however, is limited to meetings among a majority of the members of multi-member government bodies when the subject relates to local agency business. It does not apply to independent conduct of individual decision-makers. It does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the members of a body do not discuss issues related to their local agency’s business. Meetings of temporary advisory committees — as distinguished from standing committees — made up solely of less than a quorum of a legislative body are not subject to the Brown Act.

The law does not apply to local agency staff or employees, but they may facilitate a violation by acting as a conduit for discussion, deliberation, or action by the legislative body.5

The law, on the one hand, recognizes the need of individual local officials to meet and discuss matters with their constituents. On the other hand, it requires — with certain specific exceptions to protect the community and preserve individual rights — that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

Public participation in meetings
In addition to requiring the public’s business to be conducted in open, noticed meetings, the Brown Act also extends to the public the right to participate in meetings. Individuals, lobbyists, and members of the news media possess the right to attend, record, broadcast, and participate in public meetings. The public’s participation is further enhanced by the Brown Act’s requirement that a meaningful agenda be posted in advance of meetings, by limiting discussion and action to matters listed on the agenda, and by requiring that meeting materials be made available.

Legislative bodies may, however, adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and irrelevant speech.
Controversy

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media and government watchdogs often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.

Public officials complain that the Brown Act makes it difficult to respond to constituents and requires public discussions of items better discussed privately — such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act inconsistent with their private business experiences. Closed meetings can be more efficient; they eliminate grandstanding and promote candor. The techniques that serve well in business — the working lunch, the sharing of information through a series of phone calls or emails, the backroom conversations and compromises — are often not possible under the Brown Act.

As a matter of public policy, California (along with many other states) has concluded that there is more to be gained than lost by conducting public business in the open. Government behind closed doors may well be efficient and business-like, but it may be perceived as unresponsive and untrustworthy.

Beyond the law — good business practices

Violations of the Brown Act can lead to invalidation of an agency’s action, payment of a challenger’s attorney fees, public embarrassment, even criminal prosecution. But the Brown Act is a floor, not a ceiling for conduct of public officials. This guide is focused not only on the Brown Act as a minimum standard, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, when an agency conducts too much of its business in closed session or discusses matters in closed session that are beyond the authorized scope, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices and requirements for greater access to meetings for itself and its subordinate committees and bodies that are more stringent than the law itself requires. Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act does not provide full guidance. As with the adoption of any other significant policy, public comment should be solicited.

A local policy could build on these basic Brown Act goals:

- A legislative body’s need to get its business done smoothly;
- The public’s right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time;
- A local agency’s right to confidentially address certain negotiations, personnel matters, claims and litigation; and
- The right of the press to fully understand and communicate public agency decision-making.
An explicit and comprehensive public meeting and information policy, especially if reviewed periodically, can be an important element in maintaining or improving public relations. Such a policy exceeds the absolute requirements of the law — but if the law were enough, this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. An agency should consider going beyond the law, and look at its unique circumstances and determine if there is a better way to prevent potential problems and promote public trust. At the very least, local agencies need to think about how their agendas are structured in order to make Brown Act compliance easier. They need to plan carefully to make sure public participation fits smoothly into the process.

**Achieving balance**

The Brown Act should be neither an excuse for hiding the ball nor a mechanism for hindering efficient and orderly meetings. The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for openness in local government, yet should allow government to function responsively and productively.

There must be both adequate notice of what discussion and action is to occur during a meeting as well as a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

**Historical note**

In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on “Your Secret Government” that ran in May and June 1952.

Out of the series came a decision to push for a new state open meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted such a bill and Assembly Member Ralph M. Brown agreed to carry it. The Legislature passed the bill and Governor Earl Warren signed it into law in 1953.

The Ralph M. Brown Act, known as the Brown Act, has evolved under a series of amendments and court decisions, and has been the model for other open meeting laws — such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Assembly Member Brown is best known for the open meeting law that carries his name. He was elected to the Assembly in 1942 and served 19 years, including the last three years as Speaker. He then became an appellate court justice.

**PRACTICE TIP:** The Brown Act should be viewed as a tool to facilitate the business of local government agencies. Local policies that go beyond the minimum requirements of law may help instill public confidence and avoid problems.
ENDNOTES:

1 California Government Code section 54950
2 California Constitution, Art. 1, section 3(b)(1)
3 California Government Code section 54953(a)
4 This principle of broad construction when it furthers public access and narrow construction if a provision limits public access is also stated in the amendment to the State’s Constitution adopted by Proposition 59 in 2004. California Constitution, Art. 1, section 3(b)(2).
5 California Government Code section 54952.2(b)(2) and (c)(1); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533
6 California Government Code section 54953.7

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Chapter 2

LEGISLATIVE BODIES

What is a “legislative body” of a local agency? ................................................................. 12

What is not a “legislative body” for purposes of the Brown Act? ................................. 14
What is a “legislative body” of a local agency?

A “legislative body” includes:

- **The “governing body”** of a local agency and certain of its subsidiary bodies; “or any other local body created by state or federal statute.” This includes city councils, boards of supervisors, school boards and boards of trustees of special districts. A “local agency” is any city, county, city and county, school district, municipal corporation, successor agency to a redevelopment agency, district, political subdivision or other local public agency. A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state. The California Attorney General has opined that air pollution control districts and regional open space districts are also covered. Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.

- **Newly-elected members** of a legislative body who have not yet assumed office must conform to the requirements of the Brown Act as if already in office. Thus, meetings between incumbents and newly-elected members of a legislative body, such as a meeting between two outgoing members and a member-elect of a five-member body, could violate the Brown Act.

Q. On the morning following the election to a five-member legislative body of a local agency, two successful candidates, neither an incumbent, meet with an incumbent member of the legislative body for a celebratory breakfast. Does this violate the Brown Act?

A. **It might, and absolutely would if the conversation turns to agency business.** Even though the candidates-elect have not officially been sworn in, the Brown Act applies. If purely a social event, there is no violation but it would be preferable if others were invited to attend to avoid the appearance of impropriety.

- **Appointed bodies** — whether permanent or temporary, decision-making or advisory — including planning commissions, civil service commissions and other subsidiary committees, boards, and bodies. Volunteer groups, executive search committees, task forces, and blue ribbon committees created by formal action of the governing body are legislative bodies. When the members of two or more legislative bodies are appointed to serve on an entirely separate advisory group, the resulting body may be subject to the
Brown Act. In one reported case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a legislative body subject to the Brown Act. Had the two committees remained separate; and met only to exchange information and report back to their respective boards, they would have been exempt from the Brown Act.

- **Standing committees** of a legislative body, irrespective of their composition, which have either: (1) a continuing subject matter jurisdiction; or (2) a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body. Even if it comprises less than a quorum of the governing body, a standing committee is subject to the Brown Act. For example, if a governing body creates long-term committees on budget and finance or on public safety, those are standing committees subject to the Brown Act. Further, according to the California Attorney General, function over form controls. For example, a statement by the legislative body that the advisory committee “shall not exercise continuing subject matter jurisdiction” or the fact that the committee does not have a fixed meeting schedule is not determinative. “Formal action” by a legislative body includes authorization given to the agency’s executive officer to appoint an advisory committee pursuant to agency-adopted policy.

- The governing body of any **private organization** either: (1) created by the legislative body in order to exercise authority that may lawfully be delegated by such body to a private corporation, limited liability company or other entity; or (2) that receives agency funding and whose governing board includes a member of the legislative body of the local agency appointed by the legislative body as a full voting member of the private entity’s governing board. These include some nonprofit corporations created by local agencies. If a local agency contracts with a private firm for a service (for example, payroll, janitorial, or food services), the private firm is not covered by the Brown Act. When a member of a legislative body sits on a board of a private organization as a private person and is not appointed by the legislative body, the board will not be subject to the Brown Act. Similarly, when the legislative body appoints someone other than one of its own members to such boards, the Brown Act does not apply. Nor does it apply when a private organization merely receives agency funding.

**PRACTICE TIP:** It can be difficult to determine whether a subcommittee of a body falls into the category of a standing committee or an exempt temporary committee. Suppose a committee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration. Is it an exempt temporary committee or a non-exempt standing committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee’s charge, or whether the committee exists long enough to have “continuing jurisdiction.”

**Q:** The local chamber of commerce is funded in part by the city. The mayor sits on the chamber’s board of directors. Is the chamber board a legislative body subject to the Brown Act?

**A:** **Maybe. If the chamber’s governing documents require the mayor to be on the board and the city council appoints the mayor to that position, the board is a legislative body. If, however, the chamber board independently appoints the mayor to its board, or the mayor attends chamber board meetings in a purely advisory capacity, it is not.**

**Q:** If a community college district board creates an auxiliary organization to operate a campus bookstore or cafeteria, is the board of the organization a legislative body?

**A:** **Yes. But, if the district instead contracts with a private firm to operate the bookstore or cafeteria, the Brown Act would not apply to the private firm.**

- **Certain types of hospital operators.** A lessee of a hospital (or portion of a hospital)
first leased under Health and Safety Code subsection 32121(p) after January 1, 1994, which exercises “material authority” delegated to it by a local agency, whether or not such lessee is organized and operated by the agency or by a delegated authority.16

What is not a “legislative body” for purposes of the Brown Act?

- A temporary advisory committee composed solely of less than a quorum of the legislative body that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed is not subject to the Brown Act.17 Temporary committees are sometimes called ad hoc committees, a term not used in the Brown Act. Examples include an advisory committee composed of less than a quorum created to interview candidates for a vacant position or to meet with representatives of other entities to exchange information on a matter of concern to the agency, such as traffic congestion.18

- Groups advisory to a single decision-maker or appointed by staff are not covered. The Brown Act applies only to committees created by formal action of the legislative body and not to committees created by others. A committee advising a superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the school board, would be covered.19

Q. A member of the legislative body of a local agency informally establishes an advisory committee of five residents to advise her on issues as they arise. Does the Brown Act apply to this committee?

A. No, because the committee has not been established by formal action of the legislative body.

Q. During a meeting of the city council, the council directs the city manager to form an advisory committee of residents to develop recommendations for a new ordinance. The city manager forms the committee and appoints its members; the committee is instructed to direct its recommendations to the city manager. Does the Brown Act apply to this committee?

A. Possibly, because the direction from the city council might be regarded as a formal action of the body notwithstanding that the city manager controls the committee.

- Individual decision makers who are not elected or appointed members of a legislative body are not covered by the Brown Act. For example, a disciplinary hearing presided over by a department head or a meeting of agency department heads are not subject to the Brown Act since such assemblies are not those of a legislative body.20

- Public employees, each acting individually and not engaging in collective deliberation on a specific issue, such as the drafting and review of an agreement, do not constitute a legislative body under the Brown Act, even if the drafting and review process was established by a legislative body.21

- County central committees of political parties are also not Brown Act bodies.22

ENDNOTES:

1 Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal.App.4th 1123, 1127
2 California Government Code section 54952(a) and (b)
3 California Government Code section 54951; Health and Safety Code section 34173(g) (successor agencies to former redevelopment agencies subject to the Brown Act). But see Education Code section 35147, which exempts certain school councils and school site advisory committees from the Brown Act and imposes upon them a separate set of rules.
4 Torres v. Board of Commissioners of Housing Authority of Tulare County (1979) 89 Cal.App.3d 545, 549-550
7 California Government Code section 54952.1
9 California Government Code section 54952(b)
12 California Government Code section 54952(c)(1). Regarding private organizations that receive local agency funding, the same rule applies to a full voting member appointed prior to February 9, 1996 who, after that date, is made a non-voting board member by the legislative body. California Government Code section 54952(c)(2)
16 California Government Code section 54952(d)
17 California Government Code section 54952(b); see also Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors (1993) 6 Cal.4th 821, 832.

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Chapter 3

MEETINGS

Brown Act meetings ......................................................................................................... 18

Six exceptions to the meeting definition.......................................................................... 18

Collective briefings............................................................................................................ 21

Retreats or workshops of legislative bodies..................................................................... 21

Serial meetings ................................................................................................................. 21

Informal gatherings.......................................................................................................... 24

Technological conferencing .............................................................................................. 24

Location of meetings ........................................................................................................ 25
The Brown Act only applies to meetings of local legislative bodies. The Brown Act defines a meeting as: “… and any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body.” The term “meeting” is not limited to gatherings at which action is taken but includes deliberative gatherings as well. A hearing before an individual hearing officer is not a meeting under the Brown Act because it is not a hearing before a legislative body.

**Brown Act meetings**

Brown Act meetings include a legislative body’s regular meetings, special meetings, emergency meetings, and adjourned meetings.

- **“Regular meetings”** are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.
- **“Special meetings”** are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act’s notice requirements for special meetings and are subject to 24-hour posting requirements.
- **“Emergency meetings”** are a limited class of meetings held when prompt action is needed due to actual or threatened disruption of public facilities and are held on little notice.
- **“Adjourned meetings”** are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.

**Six exceptions to the meeting definition**

The Brown Act creates six exceptions to the meeting definition:

- **Individual Contacts**
  - The first exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff, or a colleague.
  - Individual contacts, however, cannot be used to do in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation, or action among a majority of the members of a legislative body is prohibited. Such serial meetings are discussed below.
Conferences

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, so long as those meetings are open to the public. However, a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency’s subject matter jurisdiction.

Community Meetings

The third exception allows a legislative body majority to attend an open and publicized meeting held by another organization to address a topic of local community concern. A majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the legislative body’s subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates’ night if the meetings are open to the public.

“I see we have four distinguished members of the city council at our meeting tonight,” said the chair of the Environmental Action Coalition. “I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?"

The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if a majority discusses, deliberates, or takes action on an item during the meeting of the other organization. There is a fine line between what is permitted and what is not; hence, members should exercise caution when participating in these types of events.

Q. The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for re-election and all three participate. All of the candidates are asked their views of a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question?

A. Yes, because the Brown Act does not constrain the incumbents from expressing their views regarding important matters facing the local agency as part of the political process the same as any other candidates.
Other Legislative Bodies
The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of: (1) another body of the local agency; and (2) a legislative body of another local agency. Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. This exception allows, for example, a city council or a majority of a board of supervisors to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation. Further, aside from the Brown Act, there may be other reasons, such as due process considerations, why the members should avoid giving public testimony or trying to influence the outcome of proceedings before a subordinate body.

Q. The entire legislative body intends to testify against a bill before the Senate Local Government Committee in Sacramento. Must this activity be noticed as a meeting of the body?
A. No, because the members are attending and participating in an open meeting of another governmental body which the public may attend.

Q. The members then proceed upstairs to the office of their local Assembly member to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public?
A. Yes, because the entire body may not meet behind closed doors except for proper closed sessions. The same answer applies to a private lunch or dinner with the Assembly member.

Standing Committees
The fifth exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body, provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting).

Q. The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?
A. She may attend, but only as an observer; she may not participate.
Social or Ceremonial Events
The final exception permits a majority of a legislative body to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the legislative body.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception, or farewell. The test is not whether a majority of a legislative body attends the function, but whether business of a specific nature within the subject matter jurisdiction of the body is discussed. So long as no such business is discussed, there is no violation of the Brown Act.

Grand Jury Testimony
In addition, members of a legislative body, either individually or collectively, may give testimony in private before a grand jury. This is the equivalent of a seventh exception to the Brown Act’s definition of a “meeting.”

Collective briefings
None of these exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements.

Retreats or workshops of legislative bodies
Gatherings by a majority of legislative body members at the legislative body’s retreats, study sessions, or workshops are covered under the Brown Act. This is the case whether the retreat, study session, or workshop focuses on long-range agency planning, discussion of critical local issues, or team building and group dynamics.

Q. The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors?
A. No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.

Serial meetings
One of the most frequently asked questions about the Brown Act involves serial meetings. At any one time, such meetings involve only a portion of a legislative body, but eventually involve a majority. The Brown Act provides that “[a] majority of the members of a legislative body shall not, outside a meeting ... use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” The problem with serial meetings is the process, which deprives the public of an opportunity for meaningful observation of and participation in legislative body decision-making.
The serial meeting may occur by either a “daisy chain” or a “hub and spoke” sequence. In the daisy chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated, or taken action on an item within the legislative body’s subject matter jurisdiction. The hub and spoke process involves at least two scenarios. In the first scenario, Member A (the hub) sequentially contacts Members B, C, and D and so on (the spokes), until a quorum has been contacted. In the second scenario, a staff member (the hub), functioning as an intermediary for the legislative body or one of its members, communicates with a majority of members (the spokes) one-by-one for discussion, deliberation, or a decision on a proposed action. Another example of a serial meeting is when a chief executive officer (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members’ respective views is revealed. Each of these scenarios violates the Brown Act.

A legislative body member has the right, if not the duty, to meet with constituents to address their concerns. That member also has the right to confer with a colleague (but not with a majority of the body, counting the member) or appropriate staff about local agency business. An employee or official of a local agency may engage in separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”

The Brown Act has been violated, however, if several one-on-one meetings or conferences leads to a discussion, deliberation, or action by a majority. In one case, a violation occurred when a quorum of a city council, by a letter that had been circulated among members outside of a formal meeting, directed staff to take action in an eminent domain proceeding.

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act. Such a memo, however, may be a public record.

The phone call was from a lobbyist. “Say, I need your vote for that project in the south area. How about it?”

“Well, I don’t know,” replied Board Member Aletto. “That’s kind of a sticky proposition. You sure you need my vote?”

“Well, I’ve got Bradley and Cohen lined up and another vote leaning. With you I’d be over the top.”

Moments later, the phone rings again. “Hey, I’ve been hearing some rumbles on that south area project,” said the newspaper reporter. “I’m counting noses. How are you voting on it?”

Neither the lobbyist nor the reporter has violated the Brown Act, but they are facilitating
a violation. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members’ positions by asking “You sure you need my vote?” The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of others.

The mayor sat down across from the city manager. “From now on,” he declared, “I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don’t want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting.”

Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.” Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation or action taken among the majority of the legislative body.

“Thanks for the information,” said Council Member Kim. “These zoning changes can be tricky, and now I think I’m better equipped to make the right decision.”

“Glad to be of assistance,” replied the planning director. “I’m sure Council Member Jones is OK with these changes. How are you leaning?”

“Well,” said Council Member Kim, “I’m leaning toward approval. I know that two of my colleagues definitely favor approval.”

The planning director should not disclose Jones’ prospective vote, and Kim should not disclose the prospective votes of two of her colleagues. Under these facts, there likely has been a serial meeting in violation of the Brown Act.

**Q.** The agency’s website includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?

**A.** Yes, because it is a technological device that may serve to allow for a majority of members to discuss, deliberate, or take action on matters of agency business.

**Q.** A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?

**A.** No, the Brown Act expressly allows a majority of a body to call a special meeting, though the members should avoid discussing the merits of what is to be taken up at the meeting.
Particular care should be exercised when staff briefings of legislative body members occur by email because of the ease of using the “reply to all” button that may inadvertently result in a Brown Act violation.

**Informal gatherings**

Often members are tempted to mix business with pleasure — for example, by holding a post-meeting gathering. Informal gatherings at which local agency business is discussed or transacted violate the law if they are not conducted in conformance with the Brown Act. A luncheon gathering in a crowded dining room violates the Brown Act if the public does not have an opportunity to attend, hear, or participate in the deliberations of members.

Thursday at 11:30 a.m., as they did every week, the board of directors of the Dry Gulch Irrigation District trooped into Pop’s Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board.

A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues — which might be difficult. This kind of situation should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive’s presence in no way lessens the potential for a violation of the Brown Act.

**Q.** The agency has won a major victory in the Supreme Court on an issue of importance. The presiding officer decides to hold an impromptu press conference in order to make a statement to the print and broadcast media. All the other members show up in order to make statements of their own and be seen by the media. Is this gathering illegal?

**A.** Technically there is no exception for this sort of gathering, but as long as members do not state their intentions as to future action to be taken and the press conference is open to the public, it seems harmless.

**Technological conferencing**

Except for certain nonsubstantive purposes, such as scheduling a special meeting, a conference call including a majority of the members of a legislative body is an unlawful meeting. But, in an effort to keep up with information age technologies, the Brown Act specifically allows a legislative body to use any type of teleconferencing to meet, receive public comment and testimony, deliberate, or conduct a closed session. While the Brown Act contains specific requirements for conducting a teleconference, the decision to use teleconferencing is entirely discretionary with the body. No person has a right under the Brown Act to have a meeting by teleconference.

“Teleconference” is defined as “a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either
In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following teleconferencing requirements:

- Teleconferencing may be used for all purposes during any meeting;
- At least a quorum of the legislative body must participate from locations within the local agency’s jurisdiction;
- Additional teleconference locations may be made available for the public;
- Each teleconference location must be specifically identified in the notice and agenda of the meeting, including a full address and room number, as may be applicable;
- Agendas must be posted at each teleconference location, even if a hotel room or a residence;
- Each teleconference location, including a hotel room or residence, must be accessible to the public and have technology, such as a speakerphone, to enable the public to participate;
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location; and
- All votes must be by roll call.

Q. A member on vacation wants to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C. to New York. May she?

A. She may not participate or vote because she is not in a noticed and posted teleconference location.

The use of teleconferencing to conduct a legislative body meeting presents a variety of issues beyond the scope of this guide to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

**Location of meetings**

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is one of the following:

- Comply with state or federal law or a court order, or attend a judicial conference or administrative proceeding in which the local agency is a party;
- Inspect real or personal property that cannot be conveniently brought into the local agency’s territory, provided the meeting is limited to items relating to that real or personal property;

Q. The agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

A. Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be allowed to attend.
Participate in multiagency meetings or discussions; however, such meetings must be held within the boundaries of one of the participating agencies, and all of those agencies must give proper notice;

Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries, or meet at its principal office if that office is located outside the territory over which the agency has jurisdiction;

Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction;

Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility; or

Visit the office of its legal counsel for a closed session on pending litigation, when to do so would reduce legal fees or costs.25

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential employee from another district.26 A school board may also interview members of the public residing in another district if the board is considering employing that district’s superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.27

Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.28
Endnotes:
1 California Government Code section 54952.2(a)
3 California Government Code section 54954(a)
4 California Government Code section 54956
5 California Government Code section 54956.5
6 California Government Code section 54955
7 California Government Code section 54952.2(c)
8 California Government Code section 54952.2(c)(4)
9 California Government Code section 54952.2(c)(6)
10 California Government Code section 54953.1
12 California Government Code section 54952.2(b)(1)
13 Stockton Newspaper Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95
14 California Government Code section 54952.2(b)(2)
16 Roberts v. City of Palmdale (1993) 5 Cal.4th 363
17 California Government Code section 54957.5(a)
18 California Government Code section 54952.2(b)(2)
20 California Government Code section 54953(b)(1)
21 California Government Code section 54953(b)(4)
22 California Government Code section 54953
23 California Government Code section 54954(b)
24 California Government Code section 54954(b)(1)-(7)
26 California Government Code section 54954(c)
27 California Government Code section 54954(d)
28 California Government Code section 54954(e)

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment. A current version of the Brown Act may be found at www.leginfo.ca.gov.
Chapter 4

AGENDAS, NOTICES, AND PUBLIC PARTICIPATION

Agendas for regular meetings ................................................................. 30
Mailed agenda upon written request .................................................. 31
Notice requirements for special meetings .......................................... 32
Notices and agendas for adjourned and continued meetings and hearings .......... 32
Notice requirements for emergency meetings ..................................... 32
Notice of compensation for simultaneous or serial meetings ............. 33
Educational agency meetings ............................................................... 33
Notice requirements for tax or assessment meetings and hearings ........ 33
Non-agenda items ............................................................................. 34
Responding to the public ................................................................. 34
The right to attend and observe meetings ....................................... 35
Records and recordings ................................................................. 36
The public’s place on the agenda ................................................ 37
Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if nobody knows about the meeting.

**Agendas for regular meetings**

Every regular meeting of a legislative body of a local agency — including advisory committees, commissions, or boards, as well as standing committees of legislative bodies — must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

The agenda must be posted at least 72 hours before the regular meeting in a location “freely accessible to members of the public.” The courts have not definitively interpreted the “freely accessible” requirement. The California Attorney General has interpreted this provision to require posting in a location accessible to the public 24 hours a day during the 72-hour period, but any of the 72 hours may fall on a weekend. This provision may be satisfied by posting on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period. While posting an agenda on an agency’s Internet website will not, by itself, satisfy the “freely accessible” requirement since there is no universal access to the internet, an agency has a supplemental obligation to post the agenda on its website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.

**Q.** May the meeting of a governing body go forward if its agenda was either inadvertently not posted on the city’s website or if the website was not operational during part or all of the 72-hour period preceding the meeting?

**A.** At a minimum, the Brown Act calls for “substantial compliance” with all agenda posting requirements, including posting to the agency website. Should website technical difficulties arise, seek a legal opinion from your agency attorney. The California Attorney General has opined that technical difficulties which cause the website agenda to become inaccessible for a portion of the 72 hours preceding a meeting do not automatically or inevitably lead to a Brown Act violation, provided the agency can demonstrate substantial compliance. This inquiry requires a fact-specific examination of whether the agency or its legislative body made “reasonably effective efforts to notify interested persons of a public meeting” through online posting and other available means. The Attorney General’s opinion suggests that this examination would include an evaluation of how long a technical problem persisted, the efforts made to correct the problem or otherwise ensure that the public was informed, and the actual effect the problem had on public
The agenda must state the meeting time and place and must contain “a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.” Special care should be taken to describe on the agenda each distinct action to be taken by the legislative body, and avoid overbroad descriptions of a “project” if the “project” is actually a set of distinct actions that must each be separately listed on the agenda.

Q. The agenda for a regular meeting contains the following items of business:
   • Consideration of a report regarding traffic on Eighth Street; and
   • Consideration of contract with ABC Consulting.

   Are these descriptions adequate?

A. If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read “consideration of a contract with ABC Consulting in the amount of $50,000 for traffic engineering services regarding traffic on Eighth Street.”

Q. The agenda includes an item entitled City Manager’s Report, during which time the city manager provides a brief report on notable topics of interest, none of which are listed on the agenda.

   Is this permissible?

A. Yes, so long as it does not result in extended discussion or action by the body.

A brief general description may not be sufficient for closed session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions. Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.

Mailed agenda upon written request

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted. If requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

A request for notice is valid for one calendar year and renewal requests must be filed following January 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.
Notice requirements for special meetings

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed. Written notice must be sent to each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation, and radio or television station that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting.

The notice must state the time and place of the meeting, as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda — with a brief general description. As noted above, closed session items should be described in accordance with the Brown Act’s safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements.

The special meeting notice must also be posted at least 24 hours prior to the special meeting using the same methods as posting an agenda for a regular meeting: (1) at a site that is freely accessible to the public, and (2) on the agency’s website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.12

Notices and agendas for adjourned and continued meetings and hearings

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.13 If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.14 A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.15

Notice requirements for emergency meetings

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.16 News media that have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However, the news media must be notified as soon as possible of the meeting and any action taken.
News media may make a practice of having written requests on file for notification of special or emergency meetings. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings — although notification may be advisable in any event to avoid controversy.

**Notice of compensation for simultaneous or serial meetings**

A legislative body that has convened a meeting and whose membership constitutes a quorum of another legislative body, may convene a simultaneous or serial meeting of the other legislative body only after a clerk or member of the convened legislative body orally announces: (1) the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the meeting of the other legislative body; and (2) that the compensation or stipend is provided as a result of convening the meeting of that body.\(^\text{17}\)

No oral disclosure of the amount of the compensation is required if the entire amount of such compensation is prescribed by statute and no additional compensation has been authorized by the local agency. Further, no disclosure is required with respect to reimbursements for actual and necessary expenses incurred in the performance of the member’s official duties, such as for travel, meals, and lodging.

**Educational agency meetings**

The Education Code contains some special agenda and special meeting provisions.\(^\text{18}\) However, they are generally consistent with the Brown Act. An item is probably void if not posted.\(^\text{19}\) A school district board must also adopt regulations to make sure the public can place matters affecting the district’s business on meeting agendas and to address the board on those items.\(^\text{20}\)

**Notice requirements for tax or assessment meetings and hearings**

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased tax or assessment imposed on businesses.\(^\text{21}\) Though written broadly, these Brown Act provisions do not apply to new or increased real property taxes or assessments as those are governed by the California Constitution, Article XIIIC or XIIID, enacted by Proposition 218. At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days notice of a public hearing at which the legislative body proposes to enact or increase the tax or assessment. Notice of the public meeting and public hearing must be provided at the same time and in the same document. The public notice relating to general taxes must be provided by newspaper publication. The public notice relating to new or increased business assessments must be provided through a mailing to all business owners proposed to be subject to the new or increased assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.

The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of the Constitution.\(^\text{22}\) As a practical matter, the Constitution’s notice requirements have preempted this section of the Brown Act.
Non-agenda items

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda:23

- When a majority decides there is an “emergency situation” (as defined for emergency meetings);
- When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action and the need to take action “came to the attention of the local agency subsequent to the agenda being posted.” This exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A new need does not arise because staff forgot to put an item on the agenda or because an applicant missed a deadline; or
- When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

The exceptions are narrow, as indicated by this list. The first two require a specific determination by the legislative body. That determination can be challenged in court and, if unsubstantiated, can lead to invalidation of an action.

“I’d like a two-thirds vote of the board, so we can go ahead and authorize commencement of phase two of the East Area Project,” said Chair Lopez.

“It’s not on the agenda. But we learned two days ago that we finished phase one ahead of schedule — believe it or not — and I’d like to keep it that way. Do I hear a motion?”

The desire to stay ahead of schedule generally would not satisfy “a need for immediate action.” Too casual an action could invite a court challenge by a disgruntled resident. The prudent course is to place an item on the agenda for the next meeting and not risk invalidation.

“We learned this morning of an opportunity for a state grant,” said the chief engineer at the regular board meeting, “but our application has to be submitted in two days. We’d like the board to give us the go ahead tonight, even though it’s not on the agenda.”

A legitimate immediate need can be acted upon even though not on the posted agenda by following a two-step process:

- First, make two determinations: 1) that there is an immediate need to take action, and 2) that the need arose after the posting of the agenda. The matter is then placed on the agenda.
- Second, discuss and act on the added agenda item.

Responding to the public

The public can talk about anything within the jurisdiction of the legislative body, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?
While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to “briefly respond” to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back, request to place a matter on the agenda for a subsequent meeting (subject to the body’s rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on his or her own activities. However, caution should be used to avoid any discussion or action on such items.

Council Member Jefferson: I would like staff to respond to Resident Joe’s complaints during public comment about the repaving project on Elm Street — are there problems with this project?

City Manager Frank: The public works director has prepared a 45-minute power point presentation for you on the status of this project and will give it right now.

Council Member Brown: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.

It is clear from this dialogue that the Elm Street project was not on the council’s agenda, but was raised during the public comment period for items not on the agenda. Council Member A properly asked staff to respond; the city manager should have given at most a brief response. If a lengthy report from the public works director was warranted, the city manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the council in a matter that is not listed on the agenda.

The right to attend and observe meetings

A number of Brown Act provisions protect the public’s right to attend, observe, and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise “fulfill any condition precedent” to attending a meeting. Any attendance list, questionnaire, or similar document posted at or near the entrance to the meeting room or circulated at a meeting must clearly state that its completion is voluntary and that all persons may attend whether or not they fill it out.

No meeting can be held in a facility that prohibits attendance based on race, religion, color, national origin, ethnic group identification, age, sex, sexual orientation, or disability, or that is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present. This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.
Action by secret ballot, whether preliminary or final, is flatly prohibited.29

All actions taken by the legislative body in open session, and the vote of each member thereon, must be disclosed to the public at the time the action is taken.30

Q: The agenda calls for election of the legislative body’s officers. Members of the legislative body want to cast unsigned written ballots that would be tallied by the clerk, who would announce the results. Is this voting process permissible?

A: No. The possibility that a public vote might cause hurt feelings among members of the legislative body or might be awkward — or even counterproductive — does not justify a secret ballot.

The legislative body may remove persons from a meeting who willfully interrupt proceedings.31

Ejection is justified only when audience members actually disrupt the proceedings. If order cannot be restored after ejecting disruptive persons, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to re-admit an individual or individuals not responsible for the disturbance.33

Records and recordings

The public has the right to review agendas and other writings distributed by any person to a majority of the legislative body in connection with a matter subject to discussion or consideration at a meeting. Except for privileged documents, those materials are public records and must be made available upon request without delay.34 A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.35

Q: In connection with an upcoming hearing on a discretionary use permit, counsel for the legislative body transmits a memorandum to all members of the body outlining the litigation risks in granting or denying the permit. Must this memorandum be included in the packet of agenda materials available to the public?

A: No. The memorandum is a privileged attorney-client communication.

Q: In connection with an agenda item calling for the legislative body to approve a contract, staff submits to all members of the body a financial analysis explaining why the terms of the contract favor the local agency. Must this memorandum be included in the packet of agenda materials available to the public?

A: Yes. The memorandum has been distributed to the majority of the legislative body, relates to the subject matter of a meeting, and is not a privileged communication.
A legislative body may discuss or act on some matters without considering written materials. But if writings are distributed to a majority of a legislative body in connection with an agenda item, they must also be available to the public. A non-exempt or otherwise privileged writing distributed to a majority of the legislative body less than 72 hours before the meeting must be made available for inspection at the time of distribution at a public office or location designated for that purpose; and the agendas for all meetings of the legislative body must include the address of this office or location. A writing distributed during a meeting must be made public:

- At the meeting if prepared by the local agency or a member of its legislative body; or
- After the meeting if prepared by some other person.

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is subject to the California Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency. The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting to record the proceedings, absent a reasonable finding by the legislative body that noise, illumination, or obstruction of view caused by recorders or cameras would persistently disrupt the proceedings.

Similarly, a legislative body cannot prohibit or restrict the public broadcast of its open and public meetings without making a reasonable finding that the noise, illumination, or obstruction of view would persistently disrupt the proceedings.

**The public’s place on the agenda**

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body’s consideration of it.

**Q.** Must the legislative body allow members of the public to show videos or make a power point presentation during the public comment part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?

**A.** Probably, although the agency is under no obligation to provide equipment.

Moreover, the legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself. But the Brown Act provides no immunity for defamatory statements.
Q. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

A. No, as long as the criticism pertains to job performance.

Q. During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

A. There is no case law on this subject. Some would argue that campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section because it is relevant to the governing of the agency and an implicit criticism of the incumbents.

The legislative body may adopt reasonable regulations, including time limits, on public comments. Such regulations should be enforced fairly and without regard to speakers’ viewpoints. The legislative body has discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or lengthened to allow additional time for discussion on a complicated matter.

The public does not need to be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a public meeting, if all interested members of the public had the opportunity to speak on the item before or during its consideration, and if the item has not been substantially changed.

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.

Endnotes:
1 California Government Code section 54954.2(a)(1)
4 California Government Code sections 54954.2(a)(1) and 54954.2(d)
5 California Government Code section 54960.1(d)(1)
9 California Government Code section 54954.2(a)(1)
10 San Joaquin Raptor Rescue v. County of Merced (2013) 216 Cal.App.4th 1167 (legislative body’s approval of CEQA action (mitigated negative declaration) without specifically listing it on the agenda violates Brown Act, even if the agenda generally describes the development project that is the subject of the CEQA analysis.)
11 California Government Code section 54954.1
12 California Government Code sections 54956(a) and (c)
13 California Government Code section 54955
14 California Government Code section 54954.2(b)(3)
15 California Government Code section 54955.1
16 California Government Code section 54956.5
17 California Government Code section 54952.3
18 Education Code sections 35144, 35145 and 72129
20 California Education Code section 35145.5
21 California Government Code section 54954.6
22 See Cal.Const.Art.XIIIIC, XIID and California Government Code section 54954.6(h)
23 California Government Code section 54954.2(b)
24 California Government Code section 54954.2(a)(2)
25 California Government Code section 54953.3
26 California Government Code section 54961(a); California Government Code section 11135(a)
27 California Government Code section 54952.2(c)(2)
28 California Government Code section 54953(b)
29 California Government Code section 54953(c)
30 California Government Code section 54953(c)(2)
31 California Government Code section 54957.9.
32 Norse v. City of Santa Cruz (9th Cir. 2010) 629 F.3d 966 (silent and momentary Nazi salute directed towards mayor is not a disruption); Acosta v. City of Costa Mesa (9th Cir. 2013) 718 F.3d 800 (city council may not prohibit “insolent” remarks by members of the public absent actual disruption).
33 California Government Code section 54957.9
34 California Government Code section 54957.5
35 California Government Code section 54957.5(d)
36 California Government Code section 54957.5(b)
37 California Government Code section 54957.5(c)
38 California Government Code section 54953.5(b)
39 California Government Code section 54953.5(d)
40 California Government Code section 54953.5(a)
41 California Government Code section 54956.6
42 California Government Code section 54954.3(a)
43 California Government Code section 54954.3(c)
45 California Government Code section 54954.3(a)
46 California Government Code section 54954.3(a)

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Chapter 5

CLOSED SESSIONS

Agendas and reports......................................................................................................... 42
Litigation............................................................................................................................ 43
Real estate negotiations ................................................................................................... 45
Public employment ........................................................................................................... 46
Labor negotiations ............................................................................................................ 47
Labor negotiations — school and community college districts....................................... 48
Other Education Code exceptions .................................................................................... 48
Joint Powers Authorities ................................................................................................... 48
License applicants with criminal records ......................................................................... 49
Public security................................................................................................................... 49
Multijurisdictional law enforcement agency ..................................................................... 49
Hospital peer review and trade secrets ............................................................................ 49
Other legislative bases for closed session ........................................................................ 50
Who may attend closed sessions ..................................................................................... 50
The confidentiality of closed session discussions............................................................ 50
Chapter 5
CLOSED SESSIONS

A closed session is a meeting of a legislative body conducted in private without the attendance of the public or press. A legislative body is authorized to meet in closed session only to the extent expressly authorized by the Brown Act.¹

As summarized in Chapter 1 of this Guide, it is clear that the Brown Act must be interpreted liberally in favor of open meetings, and exceptions that limit public access (including the exceptions for closed session meetings) must be narrowly construed.² The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city’s position in litigation or compromising the privacy interests of employees). Closed sessions should be conducted keeping those narrow purposes in mind. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter to be considered by a legislative body must be discussed in public. As an example, a board of police commissioners cannot meet in closed session to provide general policy guidance to a police chief, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.³

In this chapter, the grounds for convening a closed session are called “exceptions” because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, although the Brown Act does authorize closed sessions related to specified types of contracts (e.g., specified provisions of real property agreements, employee labor agreements, and litigation settlement agreements),⁴ the Brown Act does not authorize closed sessions for other contract negotiations.

Agendas and reports
Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption.⁵ An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly agendized as a closed session item or unless it is properly added as a closed session item by a two-thirds vote of the body after making the appropriate urgency findings.⁶

The Brown Act supplies a series of fill in the blank sample agenda descriptions for various types of authorized closed sessions, which provide a “safe harbor” from legal attacks. These sample
agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multi-jurisdictional law enforcement cases, hospital boards of directors, medical quality assurance committees, joint powers agencies, and audits by the California State Auditor’s Office.\textsuperscript{7}

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.\textsuperscript{8}

Following a closed session, the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report varies according to the reason for the closed session and the action taken.\textsuperscript{9} The announcements may be made at the site of the closed session, so long as the public is allowed to be present to hear them.

If there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session, if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.\textsuperscript{10}

The Brown Act does not require minutes, including minutes of closed sessions. However, a legislative body may adopt an ordinance or resolution to authorize a confidential “minute book” be kept to record actions taken at closed sessions.\textsuperscript{11} If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict of interest.\textsuperscript{12} A court may order the disclosure of minute books for the court’s review if a lawsuit makes sufficient claims of an open meeting violation.

**Litigation**

There is an attorney/client relationship, and legal counsel may use it to protect the confidentiality of privileged written and oral communications to members of the legislative body — outside of meetings. But protection of the attorney/client privilege cannot by itself be the reason for a closed session.\textsuperscript{13}

The Brown Act expressly authorizes closed sessions to discuss what is considered pending litigation. The rules that apply to holding a litigation closed session involve complex, technical definitions and procedures. The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is, or could become, a party.\textsuperscript{14} The litigation exception under the Brown Act is narrowly construed and does not permit activities beyond a legislative body’s conferring with its own legal counsel and required support staff.\textsuperscript{15} For example, it is not permissible to hold a closed session in which settlement negotiations take place between a legislative body, a representative of an adverse party, and a mediator.\textsuperscript{16}
The California Attorney General has opined that if the agency’s attorney is not a participant, a litigation closed session cannot be held. In any event, local agency officials should always consult the agency’s attorney before placing this type of closed session on the agenda in order to be certain that it is being done properly.

Before holding a closed session under the pending litigation exception, the legislative body must publicly state the basis for the closed session by identifying one of the following three types of matters: existing litigation, anticipated exposure to litigation, or anticipated initiation of litigation.

**Existing litigation**

Q. May the legislative body agree to settle a lawsuit in a properly-noticed closed session, without placing the settlement agreement on an open session agenda for public approval?

A. Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.

Existing litigation includes any adjudicatory proceedings before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops, or consider alternatives for resolution of the case. Generally, an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation cannot be approved in closed session if it commits the city to take an action that is required to have a public hearing.

**Anticipated exposure to litigation against the local agency**

Closed sessions are authorized for legal counsel to inform the legislative body of a significant exposure to litigation against the local agency, but only if based on “existing facts and circumstances” as defined by the Brown Act. The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff. In general, the “existing facts and circumstances” must be publicly disclosed unless they are privileged written communications or not yet known to a potential plaintiff.

**Anticipated initiation of litigation by the local agency**

A closed session may be held under the exception for the anticipated initiation of litigation when the legislative body seeks legal advice on whether to protect the agency’s rights and interests by initiating litigation.

Certain actions must be reported in open session at the same meeting following the closed
session. Other actions, as where final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person. Each agency attorney should be aware of and make the disclosures that are required by the particular circumstances.

**Real estate negotiations**

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange, or lease of real property by or for the local agency. A "lease" includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body’s negotiator on price and terms of payment. Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues such as site design, architecture, or other aspects of the project for which the transaction is contemplated.

**Q.** May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

**A.** No. However, there are differing opinions over the scope of the phrase “price and terms of payment” in connection with real estate closed sessions. Many agency attorneys argue that any term that directly affects the economic value of the transaction falls within the ambit of “price and terms of payment.” Others take a narrower, more literal view of the phrase.

The agency’s negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiators, the real property that the negotiations may concern and the names of the parties with whom its negotiator may negotiate.

After real estate negotiations are concluded, the approval and substance of the agreement must be publicly reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval and the substance of the agreement upon inquiry by any person, as soon as the agency is informed of it.

“Our population is exploding, and we have to think about new school sites,” said Board Member Jefferson.

“Not only that,” interjected Board Member Tanaka, “we need to get rid of a couple of our older facilities.”

“Well, obviously the place to do that is in a closed session,” said Board Member O’Reilly. “Otherwise we’re going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar.”

A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites — which must be identified at an open and public meeting.
Public employment

The Brown Act authorizes a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.” The purpose of this exception — commonly referred to as the “personnel exception” — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies. The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception. That authority may be delegated to a subsidiary appointed body.

An employee must be given at least 24 hours notice of any closed session convened to hear specific complaints or charges against him or her. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. A legislative body may examine (or exclude) witnesses, and the California Attorney General has opined that, when an affected employee and advocate have an official or essential role to play, they may be permitted to participate in the closed session. The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session. If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. The Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.

Q. Must 24 hours notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?
A. No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee. An incorrect agenda description can result in invalidation of an action and much embarrassment.

For purposes of the personnel exception, “employee” specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, district general manager or superintendent. Examples of the latter include a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception. Action on individuals who are not “employees” must also be public — including discussing and voting on appointees to committees, or debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.
The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter), yet another example of the importance of using correct agenda descriptions.

Reclassification of a job must be public, but an employee’s ability to fill that job may be considered in closed session.

Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position. However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.

“I have some important news to announce,” said Mayor Garcia. “We’ve decided to terminate the contract of the city manager, effective immediately. The council has met in closed session and we’ve negotiated six months severance pay.”

“Unfortunately, that has some serious budget consequences, so we’ve had to delay phase two of the East Area Project.”

This may be an improper use of the personnel closed session if the council agenda described the item as the city manager’s evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution should be exercised to not discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.

**Labor negotiations**

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members, on employee salaries and fringe benefits for both represented (“union”) and non-represented employees. For represented employees, it may also consider working conditions that by law require negotiation. For the purpose of labor negotiation closed sessions, an “employee” includes an officer or an independent contractor who functions as an officer or employee, but independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.

These closed sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.
During its discussions with representatives on salaries and fringe benefits, the legislative body may also discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.\(^{42}\)

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.\(^{43}\) The labor closed sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees.

**Labor negotiations — school and community college districts**

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Rodda Act:

1. A negotiating session with a recognized or certified employee organization;
2. A meeting of a mediator with either side;
3. A hearing or meeting held by a fact finder or arbitrator; and
4. A session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.\(^{44}\)

Public participation under the Rodda Act also takes another form.\(^{45}\) All initial proposals of both sides must be presented at public meetings and are public records. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.\(^{46}\) The final vote must be in public.

**Other Education Code exceptions**

The Education Code governs student disciplinary meetings by boards of school districts and community college districts. District boards may hold a closed session to consider the suspension or discipline of a student, if a public hearing would reveal personal, disciplinary, or academic information about the student contrary to state and federal pupil privacy law. The student’s parent or guardian may request an open meeting.\(^{47}\)

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.\(^{48}\) Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.\(^{49}\)

**Joint Powers Authorities**

The legislative body of a joint powers authority may adopt a policy regarding limitations on disclosure of confidential information obtained in closed session, and may meet in closed session to discuss information that is subject to the policy.\(^{50}\)
License applicants with criminal records
A closed session is permitted when an applicant, who has a criminal record, applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license. The applicant and the applicant’s attorney are authorized to attend the closed session meeting. If the body decides to deny the license, the applicant may withdraw the application. If the applicant does not withdraw, the body must deny the license in public, immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.51

Public security
Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings, essential public services, including water, sewer, gas, or electric service, or to the public’s right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with designated security or law enforcement officials including the Governor, Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.52 Action taken in closed session with respect to such public security issues is not reportable action.

Multijurisdictional law enforcement agency
A joint powers agency formed to provide law enforcement services (involving drugs; gangs; sex crimes; firearms trafficking; felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft) to multiple jurisdictions may hold closed sessions to discuss case records of an on-going criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.53 The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.54

Hospital peer review and trade secrets
Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals, under other provisions of law.55

1. A meeting to hear reports of hospital medical audit or quality assurance committees, or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.

2. A meeting to discuss “reports involving trade secrets” — provided no action is taken.

A “trade secret” is defined as information which is not generally known to the public or competitors and which: 1) “derives independent economic value, actual or potential” by virtue of its restricted knowledge; 2) is necessary to initiate a new hospital service or program or facility; and 3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district’s dissolution.56
Other legislative bases for closed session

Since any closed session meeting of a legislative body must be authorized by the Legislature, it is important to carefully review the Brown Act to determine if there is a provision that authorizes a closed session for a particular subject matter. There are some less frequently encountered topics that are authorized to be discussed by a legislative body in closed session under the Brown Act, including: a response to a confidential final draft audit report from the Bureau of State Audits,\(^57\) consideration of the purchase or sale of particular pension fund investments by a legislative body of a local agency that invests pension funds,\(^58\) hearing a charge or complaint from a member enrolled in a health plan by a legislative body of a local agency that provides Medi-Cal services,\(^59\) discussions by a county board of supervisors that governs a health plan licensed pursuant to the Knox-Keene Health Care Services Plan Act related to trade secrets or contract negotiations concerning rates of payment,\(^60\) and discussions by an insurance pooling joint powers agency related to a claim filed against, or liability of, the agency or a member of the agency.\(^61\)

Who may attend closed sessions

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Therefore, local agency officials and employees must pay particular attention to the authorized attendees for the particular type of closed session. As summarized above, the authorized attendees may differ based on the topic of the closed session. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session, with very limited exceptions for adversaries or witnesses with official roles in particular types of hearings (e.g., personnel disciplinary hearings and license hearings). In any case, individuals who do not have an official role in the closed session subject matters must be excluded from closed sessions.\(^63\)

Q. May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer?

A. No, attendance in closed sessions is reserved exclusively for the agency’s advisors.

The confidentiality of closed session discussions

The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.\(^64\) It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.\(^65\) Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.\(^66\)
Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long opined that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is “improper” for officials to disclose information received during a closed session regarding pending litigation, though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions. In any event, in 2002, the Brown Act was amended to prescribe particular remedies for breaches of confidentiality. These remedies include injunctive relief; and, if the breach is willful disclosure of confidential information, the remedies include disciplinary action against an employee, and referral of a member of the legislative body to the grand jury.

The duty of maintaining confidentiality, of course, must give way to the responsibility to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, under the Brown Act, a local agency may not penalize a disclosure of information learned during a closed session if the disclosure: 1) is made in confidence to the district attorney or the grand jury due to a perceived violation of law; 2) is an expression of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action; or 3) is information that is not confidential.

The interplay between these possible sanctions and an official’s first amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

“I want the press to know that I voted in closed session against filing the eminent domain action,” said Council Member Chang.

“Don’t settle too soon,” reveals Council Member Watson to the property owner, over coffee. “The city’s offer coming your way is not our bottom line.”

The first comment to the press may be appropriate if it is a part of an action taken by the City Council in closed session that must be reported publicly. The second comment to the property owner is not — disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.

PRACTICE TIP: There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.
ENDNOTES:

1 California Government Code section 54962
2 California Constitution, Art. 1, section 3
3 61 Ops.Cal.Atty.Gen. 220 (1978); but see California Government Code section 54957.8 (multijurisdictional law enforcement agencies are authorized to meet in closed session to discuss the case records of ongoing criminal investigations, and other related matters).
4 California Government Code section 54957.1
5 California Government Code section 54954.5
6 California Government Code section 54954.2
7 California Government Code section 54954.5
8 California Government Code sections 54956.9 and 54957.7
9 California Government Code section 54957.1(a)
10 California Government Code section 54957.1(b)
11 California Government Code section 54957.2
13 Roberts v. City of Palmdale (1993) 5 Cal.4th 363
14 California Government Code section 54956.9; Shapiro v. Board of Directors of Center City Development Corp. (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).
18 California Government Code section 54956.9(g)
20 Government Code section 54956.9(e)
21 California Government Code section 54957.1
22 California Government Code section 54956.8
23 Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904; see also 93 Ops.Cal. Atty.Gen. 51 (2010) (redevelopment agency may not convene a closed session to discuss rehabilitation loan for a property already subleased to a loan recipient, even if the loan incorporates some of the sublease terms and includes an operating covenant governing the property); 94 Ops.Cal. Atty.Gen. 82 (2011) (real estate closed session may address form, manner and timing of consideration and other items that cannot be disclosed without revealing price and terms).
25 California Government Code sections 54956.8 and 54954.5(b)
26 California Government Code section 54957.1(a)(1)
27 California Government Code section 54957(b)
31 California Government Code section 54957(b)(3)
34 California Government Code section 54957(b); but see *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568 (notice not required for closed session deliberations regarding complaints or charges, when there was a public evidentiary hearing prior to closed session).
36 *Moreno v. City of King* (2005) 127 Cal.App.4th 17
37 California Government Code section 54957
39 California Government Code section 54957.1(a)(5)
40 California Government Code section 54957.6
41 California Government Code section 54957.6(b); see also 98 Ops.Cal. Atty.Gen. 41 (2015) (a project labor agreement between a community college district and workers hired by contractors or subcontractors is not a proper subject of closed session for labor negotiations because the workers are not “employees” of the district).
43 California Government Code section 54957.1(a)(6)
44 California Government Code section 3549.1
45 California Government Code section 3540
46 California Government Code section 3547
48 California Education Code section 72122
49 California Education Code section 60617
50 California Government Code section 54956.96
51 California Government Code section 54956.7
52 California Government Code section 54957
54 California Government Code section 54957.8
55 California Government Code section 54962
56 California Health and Safety Code section 32106
57 California Government Code section 54956.75
58 California Government Code section 54956.81
59 California Government Code section 54956.86
60 California Government Code section 54956.87
61 California Government Code section 54956.95
64 Government Code section 54963


66 Roberts v. City of Palmdale (1993) 5 Cal.4th 363


69 California Government Code section 54963

70 California Government Code section 54963

71 California Government Code section 54957.1

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Chapter 6

REMEDIES

Invalidation ........................................................................................................................................56

Applicability to Past Actions ...........................................................................................................57

Civil action to prevent future violations ........................................................................................57

Costs and attorney’s fees ................................................................................................................58

Criminal complaints .......................................................................................................................58

Voluntary resolution .......................................................................................................................59
Chapter 6

REMEDIES

Certain violations of the Brown Act are designated as misdemeanors, although by far the most commonly used enforcement provisions are those that authorize civil actions to invalidate specified actions taken in violation of the Brown Act and to stop or prevent future violations. Still, despite all the safeguards and remedies to enforce them, it is ultimately impossible for the public to monitor every aspect of public officials’ interactions. Compliance ultimately results from regular training and a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

Invalidation

Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Brown Act. Violations of the Brown Act, however, cannot be invalidated if they involve the following types of actions:

- Those taken in substantial compliance with the law. No Brown Act violation is found when the given notice substantially complies with the Brown Act, even when the notice erroneously cites to the wrong Brown Act section, but adequately advises the public that the Board will meet with legal counsel to discuss potential litigation in closed session;
- Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
- Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
- Those connected with the collection of any tax; or
- Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.

Before filing a court action seeking invalidation, a person who believes that a violation has occurred must send a written “cure or correct” demand to the legislative body. This demand must clearly describe the challenged action and the nature of the claimed violation. This demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session but in violation of Section 54954.2, which requires (subject to specific exceptions) that only properly agendized items are acted on by the governing body during a meeting. The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days. The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and to weigh its options before litigation is filed.
Although just about anyone has standing to bring an action for invalidation, the challenger must show prejudice as a result of the alleged violation. An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.

Applicability to Past Actions

Any interested person, including the district attorney, may file a civil action to determine whether past actions of a legislative body occurring on or after January 1, 2013 constitute violations of the Brown Act and are subject to a mandamus, injunction, or declaratory relief action. Before filing an action, the interested person must, within nine months of the alleged violation of the Brown Act, submit a “cease and desist” letter to the legislative body, clearly describing the past action and the nature of the alleged violation. The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action. If the body fails to take any action within the 30-day period or takes an action other than an unconditional commitment, a lawsuit may be filed within 60 days.

The legislative body’s unconditional commitment must be approved at a regular or special meeting as a separate item of business and not on the consent calendar. The unconditional commitment must be substantially in the form set forth in the Brown Act. No legal action may thereafter be commenced regarding the past action. However, an action of the legislative body in violation of its unconditional commitment constitutes an independent violation of the Brown Act and a legal action consequently may be commenced without following the procedural requirements for challenging past actions.

The legislative body may rescind its prior unconditional commitment by a majority vote of its membership at a regular meeting as a separate item of business not on the consent calendar. At least 30 days written notice of the intended rescission must be given to each person to whom the unconditional commitment was made and to the district attorney. Upon rescission, any interested person may commence a legal action regarding the past actions without following the procedural requirements for challenging past actions.

Civil action to prevent future violations

The district attorney or any interested person can file a civil action asking the court to:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body of a local agency;
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body;
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law; or
- Compel the legislative body to tape record its closed sessions.

PRACTICE TIP: A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options. The Brown Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and start over, or reaffirm the action if the local agency relied on the action and rescinding the action would prejudice the local agency.
It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future where the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.\(^16\) Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.\(^17\)

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to tape record its future closed sessions. In a subsequent lawsuit to enforce the Brown Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant portion of the closed session recording.

**Costs and attorney’s fees**

Someone who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act’s civil remedies may seek court costs and reasonable attorney’s fees. Courts have held that attorney’s fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.\(^18\) When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorney’s fees will be awarded against the agency if a violation of the Act is proven.

An attorney’s fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney’s fees if the court finds the lawsuit was clearly frivolous and lacking in merit.\(^19\)

**Criminal complaints**

A violation of the Brown Act by a member of the legislative body who acts with the improper intent described below is punishable as a misdemeanor.\(^20\)

A criminal violation has two components. The first is that there must be an overt act — a member of a legislative body must attend a meeting at which action is taken in violation of the Brown Act.\(^21\)

“Action taken” is not only an actual vote, but also a collective decision, commitment or promise by a majority of the legislative body to make a positive or negative decision.\(^22\) If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.\(^23\) In fact, criminal liability is triggered by a member’s participation in a meeting in violation of the Brown Act — not whether that member has voted with the majority or minority, or has voted at all.

The second component of a criminal violation is that action is taken with the intent of a member “to deprive the public of information to which the member knows or has reason to know the public is entitled” by the Brown Act.\(^24\)
As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies’ adherence to the requirements of the law.

Some attorneys and district attorneys take the position that a Brown Act violation may be pursued criminally under Government Code section 1222.25 There is no case law to support this view; if anything, the existence of an express criminal remedy within the Brown Act would suggest otherwise.26

Voluntary resolution

Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy residents fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down. The district attorney or even the grand jury occasionally becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body. There are times when it may be preferable to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

At bottom, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.

ENDNOTES:

1 California Government Code section 54960.1. Invalidation is limited to actions that violate the following sections of the Brown Act: section 54953 (the basic open meeting provision); sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); 54956 (special meetings); and 54956.5 (emergency situations). Violations of sections not listed above cannot give rise to invalidation actions, but are subject to the other remedies listed in section 54960.1.


3 California Government Code section 54960.1 (b) and (c)(1)


6 Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116-17, 1118

7 Government Code Section 54960.2(a); Senate Bill No. 1003, Section 4 (2011-2012 Session)

8 Government Code Sections 54960.2(a)(1), (2)

9 Government Code Section 54960.2(b)


Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors (2003) 112 Cal. App.4th 1313, 1327-29 and cases cited therein

California Government Code section 54960.5

California Government Code section 54959. A misdemeanor is punishable by a fine of up to $1,000 or up to six months in county jail, or both. California Penal Code section 19. Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.

California Government Code section 54959


California Government Code section 54952.6

California Government Code section 54959

California Government Code section 1222 provides that “[e]very wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”

The principle of statutory construction known as expressio unius est exclusio alterius supports the view that section 54959 is the exclusive basis for criminal liability under the Brown Act.

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengovernment. A current version of the Brown Act may be found at www.leginfo.ca.gov.
American Institute of Parliamentarians
Standard Code of Parliamentary Procedure
A quick reference
Guide to Parliamentary Motions

*Motions* are listed in order of precedence. New motions can be introduced only if they are higher on the chart than any pending motions.

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>PRIVILEGED MOTIONS</td>
<td>End the meeting (78)</td>
<td>I move that we adjourn.</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted¹</td>
<td>Yes – Restricted¹</td>
</tr>
<tr>
<td></td>
<td>Take a break (76)</td>
<td>I move to recess for...</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted²</td>
<td>Yes – Restricted³</td>
</tr>
<tr>
<td></td>
<td>Make a request affecting the health, safety, security, comfort or integrity of members (73)</td>
<td>I rise to a question of privilege</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>SUBSIDIARY MOTIONS</td>
<td>Postpone consideration of a pending motion until an indefinite time (70)</td>
<td>I move to table the motion.</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Close debate on a pending motion and vote (67)</td>
<td>I move to close debate.</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Limit or extend time for debate on a pending motion (65)</td>
<td>I move to limit debate to... OR I move to extend debate by...</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted⁴</td>
<td>Yes – Restricted³</td>
</tr>
<tr>
<td></td>
<td>Postpone consideration of a pending motion until a specific future time or meeting (61)</td>
<td>I move to postpone the motion until...</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted²</td>
<td>Yes – Restricted³</td>
</tr>
<tr>
<td></td>
<td>Transfer a motion to a subordinate committee for consideration (58)</td>
<td>I move to refer the motion to [Standing Cte] with instructions to...</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted⁵</td>
<td>Yes – Restricted⁶</td>
</tr>
<tr>
<td></td>
<td>Modify the language or content of a pending motion (50)</td>
<td>I move to amend the motion by...</td>
<td>No</td>
<td>Yes</td>
<td>If original motion is debatable</td>
<td>Yes</td>
</tr>
<tr>
<td>MAIN MOTIONS</td>
<td>Bring business (a new main motion) before the assembly (35)</td>
<td>I move that...</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Introduce a motion as a specific alternative to a motion known to be coming before the assembly (39)</td>
<td>I move to adopt the following motion in lieu of [scheduled motion(s)]: ...</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Modify or amend a motion that has already been adopted (36)</td>
<td>I move to amend the motion that was approved on [date] to... , by...</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Validate an emergency action taken without quorum or affirm the action of another body (41)</td>
<td>I move to ratify an action taken by... to... on [date of action being ratified].</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Remove a referred subject or motion from a subordinate committee for reconsideration by the assembly (43)</td>
<td>I move to recall [motion to/matter of] from [Standing Cte].</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted⁸</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Reconsider a motion after a vote has been taken (44)</td>
<td>I move to reconsider the vote on the motion that was adopted [when] to...</td>
<td>No</td>
<td>Yes</td>
<td>Yes – Restricted⁸</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Repeal or nullify a main motion that has already been approved (48)</td>
<td>I move to rescind the motion that was adopted [when] to...</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

¹ Motion to adjourn: Debate restricted to advisability of amendment stipulating continuation of meeting at a later time. Amendments restricted to changing the time of adjournment and setting a time for continuation of meeting.

² Debate restricted to brief discussion of time and advisability of recess or postponement.
3 Motion may be amended with regard to time.
4 Debate restricted to need for limitation/extension and the type and time of limitation/extension.
5 Motion to refer. Debate restricted to advisability of amendment stipulating continuation of meeting at a later time. Amendments restricted to changing the time of adjournment and setting a time for continuation of meeting.

**Incidental Motions** have no order of precedence and can be introduced at any time.

<table>
<thead>
<tr>
<th>IF YOU WANT TO:</th>
<th>SAY:</th>
<th>Can interrupt speaker?</th>
<th>Second required?</th>
<th>Is the motion debatable?</th>
<th>Is the motion amendable?</th>
<th>Vote required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Have the committee review and then vote upon sustaining or overruling an action taken by its chair (82)</td>
<td>I appeal from the decision of the chair. <em>(Stated immediately after the chair announces a decision that a member believe is mistaken or unfair)</em></td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Majority</td>
</tr>
<tr>
<td>Take an action that would otherwise be prevented by a procedural rule or another action already taken (84)*</td>
<td>I move to suspend the rule requiring …</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>2/3</td>
</tr>
<tr>
<td>To talk informally so that agreement may be reached on the type and wording of the motion that is needed (128)</td>
<td>I move we consider informally…</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Majority</td>
</tr>
<tr>
<td>To call attention to a violation of the rules or an error in procedure (87)</td>
<td>Point of order!</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>To ask a question related to parliamentary procedure or to ask a question about the motion (90)</td>
<td>Parliamentary inquiry.</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>Withdraw a motion (94)</td>
<td>I wish to withdraw my motion</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>To divide a motion into two or more individual motions to be considered and voted on (96)</td>
<td>I request that the motion be divided into [x] motions: …</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>To verify an indecisive vote or hand count by having members rise to be counted (99)</td>
<td>I call for a standing vote. <em>(State immediately after vote has been taken)</em></td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
</tbody>
</table>

* Rule suspensions cannot deprive members of any fundamental right. For example, rules stated in bylaws or charges and basic rules of common parliamentary procedure, such as those governing notice, quorum, vote requirements, and voting methods, cannot be suspended.
<table>
<thead>
<tr>
<th>IF YOU WANT TO:</th>
<th>USE THIS MOTION</th>
</tr>
</thead>
</table>
| Present an idea to the committee or board for discussion and/or action | ° Main motion  
° Resolution  
° Consider informally |
| Modify a pending motion                    | ° Amend  
° Division of question |
| End or regulate debate                     | ° Close debate  
° Limit debate  
° Extend debate |
| Delay a decision                           | ° Refer to a committee  
° Postpone to a certain time  
° Postpone temporarily  
° Recess  
° Adjourn |
| Remove a motion from consideration         | ° Table  
° Withdraw a motion |
| Address an emergency situation             | ° Question of privilege  
° Suspend rules |
| Get more information about a pending motion| ° Parliamentary inquiry  
° Request for information  
° Request to ask member a question  
° Question of privilege |

<table>
<thead>
<tr>
<th>IF YOU WANT TO:</th>
<th>USE THIS MOTION</th>
</tr>
</thead>
</table>
| Question the decision of the chair         | ° Point of order  
° Appeal from decision of chair |
| Enforce meeting rights and privileges      | ° Division of assembly  
° Division of question  
° Parliamentary inquiry  
° Point of order  
° Appeal from decision of chair |
| Bring a motion back on the table for consideration | ° Resume consideration  
° Reconsider  
° Renew a motion  
° Amend a previous action |
| Validate an action taken without quorum    | ° Ratify |
| Change an action already taken             | ° Reconsider  
° Rescind  
° Amend a previous action |
| End a meeting                              | ° Adjourn  
° Recess |
<table>
<thead>
<tr>
<th><strong>Parliamentary Strategy</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IF YOU WANT TO SUPPORT A MOTION:</strong></td>
<td><strong>IF YOU WANT TO OPPOSE A MOTION</strong></td>
</tr>
<tr>
<td>Second it.</td>
<td>Speak against it and raise questions.</td>
</tr>
<tr>
<td>Speak in favor as soon as possible.</td>
<td>Move to amend the motion to make it less objectionable.</td>
</tr>
<tr>
<td>Know your facts and provide reference materials as necessary.</td>
<td>Draft a more acceptable version and offer an amendment as a substitution.</td>
</tr>
<tr>
<td>If necessary, amend the motion to make it more acceptable to other members.</td>
<td>To delay the motion you may move to table it, move to postpone it or refer it to a committee.</td>
</tr>
<tr>
<td>Vote against motions to table or delay your motion.</td>
<td>Move to recess if you need time to gather more facts.</td>
</tr>
<tr>
<td>Move to recess or postpone if you need more time to strengthen your proposal or get additional information.</td>
<td>Move to adjourn</td>
</tr>
<tr>
<td>If you fear your motion will be rejected, you can move to divide the question for a partial victory or you may refer it to a committee.</td>
<td>If the motion is adopted, move to reconsider it.</td>
</tr>
<tr>
<td>If a motion is defeated, you may move to reconsider it or you can reintroduce it at a future meeting.</td>
<td>If the motion is adopted, consider trying to rescind it at the next meeting.</td>
</tr>
</tbody>
</table>

In the event of a procedural dispute, have the Standard Code of Parliamentary Procedure and committees standing rules and bylaws handy.